Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/04590/2021
UI-2021-001382 (PA/51819/2021)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 31 March 2022	**On 7 June 2022**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Shah, Taj Solicitors
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

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Introduction

2. The appellant was born on 1 January 1985. His nationality is in dispute. He claims to be Rohingya (and from Myanmar) whilst the respondent contends that he is not Rohingya and is a citizen of Bangladesh.

3. The appellant entered the United Kingdom in January or February 2008. He claimed asylum on 29 May 2014. His claim was that he is of Rohingya ethnicity and had been born in Myanmar. He claimed that he fled Myanmar when he was 7 years old because his village was burnt by the military and he went to Bangladesh where he lived as a refugee spending eight years in the Moyoshkom Camp and then travelling, via Chittagong, to Dhaka where he lived until 2008. He claimed to be at risk of persecution as a person of Rohingya ethnicity if returned to Myanmar.

4. The Secretary of State refused his claim for asylum on 4 July 2014.

5. The appellant appealed to the First-tier Tribunal and, in a decision promulgated on 8 October 2014, Judge Maciel dismissed the appellant's appeal. She made an adverse credibility finding against the appellant. She did not accept his account of what he claimed had happened to him in Bangladesh. She found that he was a citizen of Bangladesh and not of a person of Rohingya ethnicity from Myanmar. Permission to appeal that decision was refused by both the First-tier Tribunal and the Upper Tribunal on 4 November 2014 and 16 February 2015 respectively. The appellant became appeal rights exhausted on 18 February 2015.

6. On 1 June 2015, the appellant made an application to be declared stateless but this was refused on 28 January 2017.

7. On 8 November 2017, the appellant made further submissions in relation to his asylum claim. These were refused on 6 October 2020 by reference to para 353 of the Immigration Rules (HC 395 as amended). The appellant sought to judicially review that decision and, in a compromise reached in his judicial review claim, the respondent made a further decision refusing his international protection and human rights claims on 1 April 2021. That decision attracted a right of appeal.

8. The appellant again appealed to the First-tier Tribunal. In a decision dated 5 October 2021, Judge Solly dismissed the appellant's appeal on all grounds. She also made an adverse credibility finding. She did not accept that the appellant was of Rohingya ethnicity from Myanmar. She found that he was a citizen of Bangladesh and would not be at real risk of persecution on return to that country.

9. The appellant sought permission to appeal to the Upper Tribunal on a number of diverse grounds. On 23 December 2021, the First-tier Tribunal granted the appellant permission to appeal essentially on the ground that the judge had erred in reaching her adverse credibility finding and in

applying Devaseelan [2002] UKIAT 000702 in the light of new evidence relied upon by the appellant.

10. On 18 January 2022, the Secretary of State filed a rule 24 notice seeking to uphold the judge's decision.

11. The appeal was listed for hearing on 31 March 2022 at the Cardiff Civil Justice Centre. The appellant was represented by Mr Shah and the respondent by Ms Rushforth. I heard oral submissions from both representatives.

The Appellant's Submissions

12. In his oral submissions, Mr Shah helpfully collated and focused the diverse grounds.

13. First, the judge made a number of errors in her decision which demonstrated that she had not properly considered the appellant's claim. Mr Shah relied upon three points. First, at para 42 the judge made reference to "Judge Phillips" and his findings in relation to the appellant's earlier appeal when, in fact, the previous judge was Judge Maciel. Secondly, at para 50 the judge commented that the appellant's skeleton argument made no reference to Devaseelan which was incorrect because paras 5 – 10 of Mr Shah's skeleton argument dealt with the Devaseelan issue. Thirdly, at para 94 of her decision, the judge had said that she found the appellant was "a national of Pakistan" which was plainly an error.

14. Secondly, the judge had wrongly applied Devaseelan. Mr Shah did not rely upon para 10 of the grounds which stated that the judge should have applied Devaseelan so that the earlier appeal determination did "not exist". Instead, Mr Shah submitted that the evidence undermined the previous reason of Judge Maciel. Thus, at para 29 he submitted that Judge Maciel had found that the appellant was Bangladeshi on the basis that he "lived in Bangladesh and speaks Bengali". Mr Shah submitted that was contrary to the background evidence which demonstrated that those of Rohingya ethnicity spoke Bangladeshi or a dialect close to it which Judge Solly, herself, accepted at para 79 of her decision (*CPIN,* Burma – Rohingya (including Rohingya in Bangladesh) (Version 2.0 March 2019) at paras 3.2.1 and 3.3.1). Secondly, the background evidence set out in the *CPIN (*March 2019) supported the appellant's account, including that the vast majority of Rohingya are undocumented due to lack of citizenship rights in Bangladesh or Myanmar (e.g. paras 2.4.2, 2.4.3 and 2.4.10). Mr Shah also relied on the *CPIN*, "Bangladesh: Documentation" (version 2.0 March 2020) at 5.3.2 and 5.3.3 that fraudulent passports were often used by Rohingya refugees.

15. Thirdly, Mr Shah submitted that the judge had been wrong to conclude that the inconsistencies in the appellant's evidence, which assisted Judge Maciel in reaching her adverse credibility finding, had not been adequately

explained by the appellant in the present appeal. He relied upon the appellant's witness statement at page 14 of the appellant's bundle which he submitted the judge had not properly considered.

16. Fourthly, Mr Shah raised, albeit for the first time, the contention that the judge had been wrong to count against the appellant the fact that he had been unable to obtain supporting evidence either from the Myanmar Embassy or the Bangladeshi High Commission. He submitted that it was not unexpected that the appellant, if he were Rohingya, would not obtain responses from them.

17. Finally, Mr Shah indicated that he was not pursuing the challenge, set out in para 22 of the grounds, to the judge's decision in respect of Art 8 and in particular para 276ADE(1).

The Respondent's Submissions

18. On behalf of the respondent, Ms Rushforth relied upon the rule 24 response and made a number of submissions in reply to Mr Shah's submissions.

19. First, she submitted that the three errors in the judge's determination identified in para 11 of the grounds were no more than typographical errors and were not material errors which undermined the judge's determination.

20. As regards the judge's reference to "Judge Phillips", it was clear from reading the totality of Judge Solly's decision that she was well-aware that the previous judge was Judge Maciel and it was her earlier determination which Judge Solly was considering. Further, as regards the judge's reference to the appellant being a "national of Pakistan" in para 94, it was clear that the judge was concerned throughout her determination with the issue of whether the appellant had established he was a Rohingya from Myanmar or whether he was, in fact, a Bangladeshi national and it was in relation to that issue that the judge made specific findings in para 95. Finally, as regards the point that the judge failed to notice that Mr Shah's skeleton argument referred to Devaseelan, that was not material as the judge dealt at length with the Devaseelan issue, correctly noting that it was the "starting point" in para 42 of her decision and then going on to consider whether the new evidence justified her making findings contrary to those reached previously by Judge Maciel.

21. Secondly, in relation to the remaining points made by Mr Shah, Ms Rushforth submitted that Judge Solly had properly considered the new evidence. First, the new background evidence did not make a material difference so at to undermine the basis of Judge Maciel's decision. In particular, Ms Rushforth submitted that Judge Maciel had not decided that the appellant was not of Rohingya ethnicity and from Myanmar because he lived in Bangladesh and spoke Bengali. The latter, she submitted, would be inconsistent with Judge Solly's own finding and the background

evidence, and had merely led Judge Maciel to decide that the appellant was Bangladeshi after she had made adverse credibility findings in relation to his account. She accepted that speaking Bengali was consistent with being either Rohingya or Bangladeshi. Further, the judge had considered the appellant's new evidence and was entitled to conclude that it did not result in the inconsistencies which Judge Maciel had identified being resolved in the appellant's favour, in particular in relation to the circumstances surrounding the Refugee Book and Pink slip; in not accepting the appellant's account about his contact with the restaurant owner in Bangladesh before coming to the UK; and in finding implausible that he did not pay the agent, who arranged his travel to the UK, the whole amount in advance.

22. Ms Rushforth submitted that the judge had been correct to take Judge Maciel's findings as a 'starting point' following Devaseelan and was justified in concluding that the new evidence should not lead her to reach findings different from those made by Judge Maciel.

Discussion

23. Given Judge Maciel's adverse credibility finding and her conclusions that the appellant was a citizen of Bangladesh rather than someone of Rohingya ethnicity from Myanmar, Judge Solly was required to approach the appellant's claim in this appeal on the basis of the guidance in Devaseelan concerning a 'second appeal' by an individual and the relevance of the first appeal judge's findings and decision.

24. Before I turn to the Devaseelan issue, which in essence captures all of the grounds apart from the errors of detail relied upon by Mr Shah in para 11 of the grounds, I will first deal with the latter.

25. It is undoubtedly the case that Judge Solly's decision contains three mistakes. First, at para 42 she wrongly refers to the earlier judge as being "Judge Phillips" when it was, in fact, Judge Maciel. Secondly, at para 50 she wrongly notes that Mr Shah had not referred to Devaseelan in his skeleton argument when, in fact, he had. Thirdly, the judge found in para 94, that the appellant was a "national of Pakistan" which was never part of the appeal at all.

26. It is unfortunate that these three mistakes are expressed in Judge Solly's decision. But, it is plain to me that they are not material errors of law which undermine the integrity of Judge's Solly reasoning and her conclusions.

27. The first and third mistakes are plainly typographical errors. Judge Solly was well aware that Judge Maciel was the judge who heard the previous appeal. A reference to Judge Phillips in para 42 was simply a mistake affected by misdictation, mistranscription or mistyping when preparing the decision. Likewise, the reference to the appellant being a national of Pakistan in para 94, had no impact upon Judge Solly's reasoning or

findings. Throughout her determination she was grappling with the central issue in the appeal, namely is the appellant a Rohingya from Myanmar or a Bangladeshi citizen from Bangladesh. All her reasoning is directed towards that issue and it is on that issue that she made her finding in paras 93 and 95 that she did not accept that the appellant is a person of Rohingya ethnicity from Myanmar but rather that, on the basis of a "reasonable likelihood", he is a citizen of Bangladesh. Finally, as regards the remaining mistake, although the judge overlooked Mr Shah's reference to Devaseelan and argument in relation to it at paras 5 – 10 of his skeleton argument, Judge Solly did not overlook the Devaseelan issue and the arguments made on behalf of the appellant in relation to it in her decision. She set out, in effect, the guidance in Devaseelan at para 42 and, at para 51, she stated that she was taking Judge Maciel's determination as the "starting point." For these reasons, relying on para 11 of the grounds, I reject Mr Shah's submission that the judge materially erred in law.

28. I now turn to consider the Devaseelan issues.

29. The guidance in Devaseelan is set out at [37] – [42] of the IAT's decision in that case. The case, and indeed, the guidance is well-known. It has been approved on a number of occasions by the Court of Appeal both in cases concerned with a second appeal by an individual (see e.g. Djebbar v SSHD [2004] EWCA Civ 804) and where a 'second appeal' arises in relation to a person who is a relative of an appellant in a previous appeal or was a witness in a previous appeal (see Ocampo v SSHD [2006] EWCA Civ 1276; and AL (Albania) v SSHD [2019] EWCA Civ 950).

30. In the recent decision of SSHD v BK (Afghanistan) [2019] EWCA Civ 1358, Rose LJ (as she then was) summarised the Devaseelan guidance at [32] of her judgment:

> "32. The Tribunal in *Devaseelan* then gave guidance that can be summarised as follows:
>
> > (1) The first adjudicator's determination should always be the starting-point. It is the authoritative assessment of the appellant's status at the time it was made. In principle issues such as whether the appellant was properly represented, or whether he gave evidence, are irrelevant to this.
> > (2) Facts happening since the first adjudicator's determination can always be taken into account by the second adjudicator.
> > (3) Facts happening before the first adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second adjudicator.
> > (4) Facts personal to the appellant that were not brought to the attention of the first adjudicator, although they were relevant to the issues before him, should be treated by the second adjudicator with the greatest circumspection.
> > (5) Evidence of other facts, for example country evidence, may not suffer from the same concerns as to credibility, but should be treated with caution.
> > (6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's

> determination and make his findings in line with that determination rather than allowing the matter to be re-litigated.
> (7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the appellant's failure to adduce relevant evidence before the first adjudicator should not be, as it were, held against him. Such reasons will be rare.
> (8) The foregoing does not cover every possibility. By covering the major categories into which second appeals fall, the guidance is intended to indicate the principles for dealing with such appeals. It will be for the second adjudicator to decide which of them is or are appropriate in any given case."

31. In Djebbar, Judge LJ (as he then was), noted the guidance, nevertheless, required each judge to independently reach a decision on its own merits. At [30] he said this:

> "Perhaps the most important feature of the guidance is that the fundamental obligation of every [Immigration Judge] independently decide each new application on its own individual merits was preserved."

32. Then, at [40] Judge LJ commented:

> "40. … The great value of the guidance is that it invests the decision-making process in each individual fresh application with the necessary degree of sensible flexibility and desirable consistency of approach, without imposing any unacceptable restrictions on the second [Immigration Judge's] ability to make the findings which he conscientiously believes to be right. It therefore admirably fulfils its intended purpose."

33. In this appeal, the grounds contain potentially contradictory claims. First, they claim that the judge erred by not approaching the appeal "as if the previous determination does not exist" but then go on to contend that the judge erred in law by failing properly to apply Devaseelan on the basis of 'new' evidence. Mr Shah did not pursue the first of those grounds. He was, in my judgment, in the circumstance of this case entirely right to do so.

34. In Devaseelan, the IAT did recognise that there might be cases (albeit highly unusual and exceptional), where a judge should determine an appeal as if the earlier decision had not been made. In Guideline (7) at [42], the IAT recognised that taking the earlier decision as the "starting point" and not departing from it where the appellant, in effect, adduced either the same evidence or on matters not brought to the attention of the first judge, might be inappropriate where there was "some very good reason". The IAT rejected the arguments that this might arise where reliance was placed on the previous representatives' claimed inadequacies. Noting that a judge should be: "very slow to conclude that an appeal before another [Immigration Judge] has been materially affected by a representative's error or incompetence; …" Nevertheless, the IAT went on to recognise that:

> "… we do accept that there will be occasional cases where the circumstances of the first appeal were such that it would be right for the second [Immigration Judge] to look at the matter as if the first determination had never been made.

> (We think it unlikely that the second [Immigration Judge] would, in such a case, be able to build very meaningfully on the first [Immigration Judge's] determination, but we emphasise that, even in such a case, the first determination stands as the determination of the first appeal.)".

35. Clearly, the IAT contemplated a case where, as the grounds in this appeal originally stated, a judge should approach an appeal as if the "previous determination does not exist". That, however, will be unusual and likely be rare indeed. Mr Shah accepted it was not applicable in this case. A possible situation might be where it can be established that, in effect, the earlier decision was procedurally flawed or reached unfairly on some basis such that the earlier judge's findings cannot be relied upon. But even that situation has to take into account that if that was indeed the case, and it could have been known at the time of the appeal, the earlier decision should have been subject to an appeal to the Upper Tribunal (or its earlier equivalent). Even in this situation, caution should be exercised in permitting retrospective challenges to earlier appeal decisions which were not subject to any successful appeal at the time. But, as I have said, Mr Shah does not suggest the present appeal is such a case. It is not suggested that Judge Maciel's decision should, in effect, have been ignored by Judge Solly. Mr Shah's arguments were that, given the current evidence made available to Judge Solly, Judge Maciel's findings should have been departed from.

36. Turning now to that issue, I do not accept Mr Shah's submission that the background evidence was such that it undermined the basis upon which Judge Maciel had reached her adverse finding. Mr Shah's submission was that, at para 29 of her decision, Judge Maciel had, as one of her main reasons (he said one of her two reasons) for finding against the appellant, relied on the fact that he had lived in Bangladesh and spoke Bengali. Paragraph 29 of Judge Maciel's decision was as follows:

> "I find that the appellant is Bangladeshi on the basis that he had lived in Bangladesh and speaks Bengali. I find that the appellant is not from Myanmar as claimed. I find that the appellant has fabricated his account to establish a right to live in the UK. …."

37. Mr Shah pointed out that the fact that the appellant spoke Bengali did not mean that he was not Rohingya and came from Bangladesh. He relied on para 3.3.1 of the *CPIN* (March 2019) where it is said:

> "… Their Rohingya language is very similar to Chittagonian dialect of Bangla spoken in the area. There are few words which may differ in the two languages depending on how close to the Bangladesh border the Rohingya were residing in. Given that many Rohingya have been residing in Bangladesh for many years, it becomes difficult to distinguish a Rohingya from a Bangladeshi at times …"

38. Further, Mr Shah relied on the fact that Judge Solly had, herself, accepted (at para 79) that: "The people from Myanmar of Rohingya ethnicity speak Bengali."

39. In my judgment, Mr Shan's submission misunderstands what Judge Maciel was saying in para 29. She did not find that the appellant was not Rohingya (but, therefore, Bangladeshi) because he had lived in Bangladesh and spoke Bengali. Rather, the structure of Maciel's decision is that she identified at paras 19 – 28 aspects of the appellant's evidence which led her to conclude, as she had presaged in para 18, that his account was "not credible". Only then did she go on in para 29 to find that the appellant was in fact a Bangladesh citizen.

40. It is helpful to set out her reasoning in full, not least because it is relevant to Judge Solly's assessment of the new evidence in relation to those matters. So, at [19] – [28] Judge Maciel said this:

> "19. The Appellant relies on the Refugee Book and Pink slip as evidence that he is from Myanmar as his family were refugees in Bangladesh. I reject the Appellant's account as to how he came to be in possession of the book. Crucially, I do not accept that the Appellant kept this book with him whilst he was living on the streets of Dhaka for up to three years. As his own evidence provided, it would have been a dangerous thing to do as if caught by the police with it, his identity would be revealed and there was a risk that he would be removed to Myanmar or returned to the refugee camp. I find that if the Appellant's claim were true, he would have put as much distance between himself and the Refugee Book as he could. He stated that when he lived in the restaurant, he did not go out as he feared that the police would catch him. Yet, he lived on the streets of Dhaka for years with the book in his possession. This claim is internally inconsistent.
>
> 20. In any event, I note that the book is the one that the family used in 1994. There is the year noted in the medical records section of the book. Further, the head of the family's age is given as 36 years which would be consistent with his date of birth. I find that the book evidences an addition of Hafez Ahamed – the uncle. However, as on the Appellant's evidence, he would have been added to the family's book in 1992 or early 1993, whereas he appears to have been added to the 1994 book. This is not consistent with the Appellant's evidence that the uncle joined the family 7 – 8 months after their arrival. Their arrival was in April 1992. I find that in the 1994 book, he would already have been part of the family and would not have required the addition entry as is evidenced on page 4 of the book.
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> 21. I note that the book is issued annually and therefore the fact that there are no entries after 25 December is not relevant in assessing the reliability of the document. However, it is the case that the entries start in July and then only go up to December of that year. Given the date entries with their years quote the year 1994, I find that this book was used in 1994. I find it curious that the Appellant found the book and the pink slip in the bag that he took when he left the refugee camp. It is called the Master Card for the Registration of Refugees from Myanmar. I do not find it credible that he would have just left it at the bottom of a bag for it to be picked up inadvertently as the Appellant claims. Accordingly, I do not give any weight to the documents. I do not find that they are reliable documents to support the Appellant's claim.
>
> 22. In relation to the Appellant's account, I find that had he been a refugee from Myanmar, he would have been very sure of who was aware of this

fact and when they became aware of this fact. At question 102 of the interview, the Appellant stated:

After I stayed in Dhaka by myself for a while I found myself a job in a Restaurant. They did keep on asking me where I as from and my origins. I never told them.

23. At question 108 of the interview, the Appellant stated:

I was the youngest out of all the workers there. The owner knew this and knew I had no parents of any other family, so he was good with me.'

24. In his statement at paragraph 15, the Appellant stated :

Only people I find good with me as the restaurant owner. He knew about my true identity, he used to favour me because of my vulnerable situation, he knew that I do not have any parents with me, I have no place to go back. I was like an orphan and homeless.

25. In oral evidence, the Appellant stated that he told the owner about his true identity before coming to the UK. When challenged that this is inconsistent with his statement, he sought to explain that the owner knew that he was an orphan and vulnerable. He confirmed that nobody knew his true identity in Dhaka. I find that the passage in the witness statement is inconsistent with what the Appellant stated in interview and at the oral hearing. I find that the Appellant would be sure to know who knew about his true identity in Dhaka where he feared being returned to the refugee camp. There is inconsistency in whether the owner knew. In his witness statement, the owner must have known for some time as he 'favoured' the Appellant. Also, he stated in his witness statement that he was 'like an orphan'. The fact is that the Appellant's claim is that he was not an orphan but did not have contact with his parents. His explanation that the owner knew his situation that he was an orphan does not explain this inconsistency.

26. Further, I reject his account that he did not have to pay the agent the whole amount to travel to the UK. I find that the appellant had a source of funds which is not consistent with the claim that he has made. Given that the agent did not have family to threaten in Bangladesh, he would have not agreed to take the Appellant to the UK without payment of the full amount up front. There was nothing preventing the Appellant from not working as required to pay his debt off other than to threatened. I do not accept that the agent would have risked being out of pocket once the Appellant came to the UK.

27. Further, I reject his account that he fled from the initial restaurant and then got a train to Cardiff. He would have had to purchase a ticket to Cardiff – and accordingly, would have had to know where he was going before he boarded the train. I find that the Appellant travelled to Cardiff as he was offered alternative employment in Cardiff. I reject the Appellant's account that he was not aware if he was legal or illegal whilst working in London. I find that he would have been provided with instructions in the event that Immigration officials attended on the property to inspect the legality of workers at the restaurant. I find that he was fully aware that he was working there illegally. He was amongst persons who could speak his language and he would have been made aware of claiming asylum. I find that if he did have the Refugee Book with him at the time, he would have been keen to offer it as evidence of his claim.

> 28. I accept that the Appellant has provided a consistent account of a journey from Myanmar. However, I find that he has learnt this and repeated it. However, I find that this does not overcome what I regard as he significant inconsistencies in his account – who was aware of who he was in Dhaka and the preserving of the Refugee Book while he lived on the streets."

41. Then, Judge Maciel said what is now relied up by Mr Shah that the appellant is a Bangladeshi, on the basis that he has lived in Bangladesh and speaks Bengali.

42. Therefore, looked at overall, Judge Maciel's reasoning in paras 19 – 28 led her to reject the appellant's account that was central to his claim that he is of Rohingya ethnicity and from Myanmar. In those paragraphs, she finds that he has not proved that to be the case. Of course, the only other possibility presented in the appeal was that the appellant is, in fact, a citizen of Bangladesh and that is precisely what Judge Maciel finds in para 29, having rejected the appellant's claimed origins, on the basis that he has lived in Bangladesh and, of course, he speaks a language consistent with being Bangladeshi, namely Bengali. In other words, Judge Maciel did not find that the appellant was not credible and reject his account to be a Rohingya from Myanmar because he lived in Bangladesh and spoke Bengali. She found, having concluded that he had not established his claimed origins, that the only evidence before her led her to find that he was in fact from Bangladesh.

43. Consequently, Judge Solly, when she found in para 29 that those of Rohingya ethnicity from Myanmar speak Bengali was not reaching a finding which undermined a principal reason why Judge Maciel had found that the appellant was not a Rohingya from Myanmar. Indeed, Judge Solly's finding at para 93 is entirely consistent with that where she said:

> "Given my view on his credibility I do not accept that he is Rohingya ethnicity. I consider him to be a national of Bangladesh. This is what he told the people he lived with in Cardiff and is consistent with his language."

44. Like Judge Maciel, Judge Solly did not accept the appellant's account that he was of Rohingya ethnicity from Myanmar based upon his account not being credible but went on to find, given that this was consistent with his language, that he was a national of Bangladesh.

45. For these reasons, I reject Mr Shah's submissions that Judge Solly erred in law on this basis.

46. Judge Solly also noted that that is what he had told people with whom he lived in Cardiff. In the initial grounds of appeal, objection to that reasoning was taken on the basis that Judge Solly did not set out where that evidence had come from. As I pointed out to Mr Shah at the hearing, and he acknowledged, Judge Solly did, in fact, set this out at para 55 of her decision as being part of the appellant's oral evidence where she records that he said that:

> “He was questioned why the people he was staying with for 4 years didn’t ask anything about his identity during that period and he said that he still lived with these people and that *he had originally told them he was from Bangladesh*.” (my emphasis)

47. Mr Shah also submitted that the judge had failed properly to deal with the new evidence, both background country evidence and the appellant’s evidence, by failing to recognise that the inconsistencies that Judge Maciel relied upon were sufficiently answered so as to merit departing from her findings applying Devaseelan.

48. As regards the background evidence, Mr Shah, and the grounds, relied upon a number of passages in the *CPIN* Report (March 2019) at paras 2.4.2, 2.4.3, 2.4.10, 3.1.4, 3.2.1, 3.2.2 and 3.3.1.

49. Some of those paragraphs (3.3.1 and 3.3.2), as I have already noted, deal with the issue of whether Rohingya speak a language indistinguishable from Bengali. The other paragraphs, which are set out in brief extracts in the grounds, I will not set out in full. They, in effect, describe the position of Rohingya including that they are not recognised as Burmese citizens, they remain undocumented and effectively stateless and relate to them, their appearance and that their ID cards usually, through official insistence, list them as Bengali.

50. I accept Ms Rushforth’s submission that none of this evidence undermines the essence of Judge Maciel’s decision or provided any really material assistance to the appellant before Judge Solly. In fact, Judge Solly did refer to a significant part of the *CPIN* (March 2019) at paras 73 – 74, including para 4.2.2 dealing with lack of documentation and difficulties in identification. In my judgment, Mr Shah offered no sustainable basis upon which this material could have led Judge Solly to consider that Judge Maciel’s findings were undermined in relation to the circumstances surrounding the appellant’s possession of the Refugee Book and pink slip and that it was not credible how he had found the book and pink slip (see paras 19-21 set out above).

51. Further, the background material does not undermine Judge Maciel’s reasoning concerning the appellant’s evidence and which was inconsistent, in relation to what he had told the owner of the restaurant before he came to the UK and also that he had not paid the agent in full prior to travelling to the UK (paras 22-25 and 27 set out above).

52. Nor, in my judgment, did Judge Solly fail properly to take into account the appellant’s evidence in relation to what he claimed had occurred to him. Assessing that evidence, Judge Solly was entitled to have regard to the fact that this was evidence from the appellant about his account which, he had chosen to raise now, following the unsuccessful appeal heard by Judge Maciel. It was, in effect, evidence that could always have been given (and had not before Judge Maciel) but which, in any event, was given seeking to directly undermine Judge Maciel’s reasons based on the evidence she had heard. Mr Shah did not take me to specific parts of the appellant’s witness

statement but, Judge Solly deals with his oral evidence and refers to his witness statement when she set out his evidence at paras 52 – 56 of her decision as follows:

> "52. In evidence in chief the appellant confirmed that he had approved his witness statement 23 August 2021, it had been explained to him in a language he understood and said it was true and accurate.
>
> 53. He said that when he arrived in the UK in 2008 he had not had much education and was working in a restaurant where he was not paid a salary, he was unaware of the law and had hardly got out up to 2014 so this is why he had not applied for asylum earlier. It was 2014 when he was told he was illegal and he had not known this before. He discussed it was someone who was very helpful and gave him the phone number to contact at Croydon. They gave him an appointment.
>
> 54. Mr Shah asked the appellant why I should accept the Refugee Book and Pink slips as being genuine when the previous Immigration Judge in 2014 had not. The appellant said that when he left Bangladesh documents were in his bag and they were genuine. He said it was hard to make the judge understand. He was asked why things had changed in Myanmar since 2014 and he said many Rohingya had fled since then and could not return. He said there was 8 Appeal Number: PA/51819/2021 nowhere for him to return to and he was unaware of whether the Home Office had made any arrangements to obtain travel documents to Bangladesh.
>
> 55. In response to cross examination, he was asked whether he had escaped the restaurant in 2014 and he said he had been in the 1st restaurant for 3 years, then he came out and he went to Cardiff where he found someone who allowed him to stay and gave him information about his status. He was asked what year this was and he said this was in 2011 and it was when he came to Cardiff. He was asked to confirm that he knew he was illegal in the UK in 2011 to which he said he realised this in 2014. He was asked why he hadn't claimed asylum in 2011 when he knew he was illegal and he said he didn't know anyone then so could not claim. On being asked further questions he said that in 2011 when he 1st came to Cardiff, he did not tell them about his identity and it was only when he told them his background that they told him he was illegal. He was questioned why the people he was staying with for 3 years didn't ask anything about his identity during that period and he said that he still lived with these people and that he had originally told them he was from Bangladesh.
>
> 56. The appellant said he has not had any response from the authorities in Bangladesh or Myanmar since writing the letters in 2015, he has not chased either authority and has not attended their embassies in person. When asked why he said that he hoped they would reply. He said he was told by a solicitor not to attend in person. He was asked whether he was concerned that if he contacted the Bangladeshi authorities, they would say he was from Bangladesh and he said he was not afraid this."

53. Having then set out the submissions and referred to a number of cases, including Tanveer Ahmed [2002] UKIAT 00439, Judge Solly said this at paras 69 – 72 in the context of Judge Maciel's decision and the new evidence:

> "69. Judge Maciel in 2014 did not consider these documents to have any weight. The appellant says his witness statement in the bundle is a

consolidated witness statement. In particular he says that the previous immigration judge did not question the genuineness of the family 10 Appeal Number: PA/51819/2021 book in paragraph 11, however it is clear that Judge Maciel in giving no weight does question the genuineness of the documents. The appellant says that he preserved the documents whilst in Dhaka and living on the streets because he knew they were important to obtain food and medical services in camp and to confirm his date of birth and ethnicity. He said that no papers had been issued by the authorities in Myanmar. Because the documents were valuable it was reasonable for him to keep them safe. He also said it was possible to keep documents safe whilst he lived on the streets and it was not right that he would want to distance himself from these documents given their risk of associating him with Rohingya nationality.

70. On this evidence in the new witness statement I find to the low standard this is not new evidence given his evidence before the previous judge. Alternatively given they are a further explanation from the appellant such could have been placed before the previous Judge and there is no explanation for its absence.

71. If my above conclusions are incorrect then I look at the whole of the evidence including the Refugee Book and Pink slips in the light of the appellant's credibility and given background evidence.

72. The appellant speaks the language of Bangladesh and gave his evidence to me with assistance from a Bengali interpreter. In Dakhar he worked in a restaurant which I find as a fact as it does not appear to be disputed. On the basis of Mr Shah submissions, he has worked in a restaurant in the UK and I consider this to be likely to be in restaurants in Newcastle and Cardiff."

54. Following that the judge cited the *CPIN* (March 2019) document and then continued at 82 – 86 as follows:

"82. I had the benefit of seeing and listening most carefully to the Appellant as he gave his evidence. I have compared his oral evidence with his written accounts given in statement and interview form. In oral evidence before me the appellant gave 3 different explanations about the delay in applying for asylum until 2014 having arrived in 2008. Firstly, he said he 13 Appeal Number: PA/51819/2021 had claimed in 2011 on arrival in Cardiff, secondly, he said between 2011 and 2014 he didn't know anyone who could give him the information to claim and thirdly he said in 2011 he didn't tell anyone he was illegal and in fact said he was from Bangladesh.

83. The appellant has not dealt with the many inconsistencies in the Refugee Book and Pink documents identified by Judge Maciel or other aspects of his then claim, such as working, the ability to save money whilst in Dhaka and the arrangement with the agent.

84. The appellant has repeated evidence about what he told the restaurant owner he worked for in Dakhar about being an orphan (in paragraph 16 of his witness statement). I note the appellant's account that the restaurant owner considered him to be an orphan as he was severed from his family. This was considered to be one of a number of inconsistencies however were I to accept him as being credible this would deal with this inconsistency.

> 85. In looking at the appellant’s account of his time in Bangladesh I bear in mind that although he was around 23 years of age when he came to the UK, that he was very young when he fled on his own account of being aged 7 and when he later moved to Dhaka when aged 15. In considering this evidence I have considered the Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance. I accept that his age and pressures of his circumstances, should I accept them, may be a reason for inconsistencies however I must also consider my view concerning his credibility.
>
> 86. The appellant’s failure to follow up his enquiries about nationality with the authorities in Bangladesh and Myanmar are not adequately explained by saying this was on the advice of his solicitor. His current solicitor produces no evidence on this issue and there is no suggestion of him having made any complaint about the conduct of the previous solicitor acting at the time the letters were written in 2015. His current solicitors started acting for him in 2016. It is implausible that this correspondence would not have been followed up in some way either writing telephone calls or in person.”

55. Then at paras 88-89, Judge Solly reached the following conclusions in relation to the new evidence:

> “88. Having had the opportunity, I find the Appellant’s claim for asylum to not be credible as he has inadequately explained inconsistencies before me or they remain. He was not previously found credible by Judge Maciel. I have nevertheless looked at credibility afresh but on the information before me.
>
> 89. To the extent that his evidence is consistent with background information, it is general information available publicly in the UK and in Bangladesh. However there remain material inconsistencies in his account. His witness statement was not detailed and I find that his oral evidence was inconsistent and implausible.”

56. At paras 90 – 92, the judge referred to s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and, in relation to the documentation, at para 92 she again referred to Tanveer Ahmed and the need to consider the evidence in the round.

57. At para 93, the judge expressed her conclusions as follows:

> “93. Given my view on his credibility I do not accept that he is Rohingya ethnicity. I consider him to be a national of Bangladesh. This is what he told the people he lived with in Cardiff and is consistent with his language.”

58. At para 94, the judge referred to the lack of supporting evidence about his nationality:

> “94. I have considered MA (disputed nationality) Ethiopia [2008] UKIAT 00032. I have considered whether the appellant is de jure a national of the relevant country and I have then considered the factual question of whether it is reasonably likely that the authorities of that country will accept person if returned as one of its own national. I have rejected the documents that the appellant relies on and his evidence to be from

> Myanmar. I note that he speaks Bengali. The appellant's evidence about establishing his nationality by writing letters I consider to be inadequate particularly as he has been represented by solicitors from 2014 onwards. The appellant has not established de jure that he is a national of Myanmar and I find that he is a national of Pakistan."

59. Then the judge concluded as follows at para 95:

> "95. I do not accept that the appellant has established to the low standard of proof that he is of Rohingya ethnicity. Neither do I accept there is a reasonable likelihood of him being persecuted on return to Bangladesh."

60. It is plain that the judge did consider the appellant's evidence given before her both orally and in writing. She set it out in some detail in her decision. However, she did not accept that this evidence, which sought to explain inconsistencies in the appellant's earlier evidence relied upon by Judge Maciel, was sufficient for her to conclude, contrary to Judge Maciel's findings, that the appellant was both credible in his claimed origins and was, therefore, of Rohingya ethnicity from Myanmar. I accept that the judge in para 89 referred to the appellant's witness statement as one which was "not detailed". By contrast, at para 64 she said she had considered all of the appellant's evidence including "the detailed written statement" that he had given. I do not consider that difference of phraseology affects the underlying reasoning of Judge Solly. The point is that the judge did consider the appellant's evidence, which he now put forward to explain aspects of his evidence in the earlier appeal which, on an unchallenged basis at the time, had led Judge Maciel not to believe his account and, therefore, no to accept that he was a Rohingya from Myanmar. Judge Solly was, in my judgment, entitled to treat this evidence with some circumspection since it amounted to the appellant giving evidence, on a second occasion, to enhance his evidence which he had had a full opportunity to give before Judge Maciel and which, on an unsuccessfully challenged basis at the time, led to adverse credibility findings.

61. Mr Shah placed some reliance upon Judge Solly's reference to an absence of supporting documentation from the Myanmar Embassy or the Bangladeshi High Commission. As Judge Solly noted in para 67, the appellant had not provided independent evidence that letters had been sent or that he had telephoned or made visits to the embassies other than to say that he had been told by his solicitors that he should not make any visits. It is, of course, recognised that the absence of approach and supporting evidence from relevant embassies as to an individual's nationality can be of evidential relevance (see <u>MA (Ethiopia) v SSHD</u> [2009] EWCA Civ 289). Although, of course, care should be taken in giving weight to the absence of such evidence if the individual would, by approaching a particular embassy, potentially expose themselves to identification and risk.

62. In this case, although Judge Solly did take that into account, including that she did not accept as plausible that any follow up to his enquiries was

taken on the advice of his solicitor (see para 86), the absence of this evidence was not a central reason for the judge's adverse findings in relation to the appellant's claimed origins.

63. For all these reasons, I reject the appellants' grounds and Mr Shah's more focussed submissions that the judge materially erred in law in reaching her adverse credibility finding and in concluding that the appellant had not established, as he claimed, that he was of Rohingya ethnicity from Myanmar and would, as a result, on return to that country, be at real risk of persecution or serious harm.

Decision

64. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant's appeal did not involve the making of an error of law. That decision, therefore, stands.

65. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
6 April 2022

TO THE RESPONDENT
FEE AWARD

Judge Solly's decision not to make a fee award as the appeal was dismissed has not been challenged and, in all the circumstances, stands.

Signed

Andrew Grubb

Judge of the Upper Tribunal
6 April 2022