IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001923
First-tier Tribunal No:
PA/50877/2020
IA/01776/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 19 April 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

MH (Bangladesh)
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr J. Martin, Counsel instructed by Indra Sebastian Solicitors
For the Respondent: Mr T. Melvin, Senior Home Office Presenting Officer

Heard at Field House on 17 February 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Lloyd-Lawrie ("the judge") promulgated on 17 June 2021 dismissing an appeal brought by the appellant, a citizen of Bangladesh born in 1977, against a decision of the Secretary of State to refuse his fresh claim for asylum.

© CROWN COPYRIGHT 2023

Factual background

2. The appellant claims to have arrived in the United Kingdom in 2003. He was encountered by the police in January 2013 and claimed asylum shortly afterwards, on the basis of his political opinion as a former youth activist for the BNP in Bangladesh. The claim was refused, and the appellant appealed to the First-tier Tribunal. His appeal was heard by First-tier Tribunal Judge Cox ("Judge Cox"), who, in a decision promulgated on 3 April 2013, accepted that he had been the subject of political violence in Bangladesh, but found that he would not be at risk upon his return. By the time of the first appeal in 2013, the appellant had been outside Bangladesh for approximately ten years. Judge Cox found that there was no reason to conclude that the appellant was at real risk of being persecuted by the authorities in Bangladesh, nor that any opposition parties would have any interest in him, upon his return.

3. The appellant absconded. On 2 May 2019, he was encountered by the police working illegally. He was arrested and detained, and on 25 January 2021 made further submissions to the Secretary of State, which were refused as a fresh claim, thereby attracting a right of appeal.

4. In the fresh claim, the appellant claimed that he would be at risk of being persecuted as a gay man in Bangladesh. He relied on a psychological report of Georgia Costa dated 24 January 2021 ("the Costa Report"), concerning the trauma he previously experienced on account of past mistreatment in Bangladesh due to his sexuality, and the impact that that had had on his mental health. The report concluded that the appellant "may end up killing himself".

5. The claim was refused because the Secretary of State did not accept that the appellant would be at risk of being persecuted on account of his political opinion in Bangladesh and did not accept that the appellant was a gay man.

6. The judge heard the appellant's appeal in Newport on 11 June 2021. In her decision, she found that there was nothing to suggest that the appellant was anything more than a low level member of the BNP, and that whatever minimal profile he had at the time of the proceedings before Judge Cox could only have diminished in the intervening 10 years. The appellant's claim to be a gay man lacked credibility. On his case, he knew that he was a gay man while growing up in Bangladesh, and had always identified in that way, yet had not raised his claimed sexuality at the time of his initial claim for asylum and the previous appeal. His explanation as to why he had not done so was inconsistent and lacked credibility. On the one hand, he claimed that his former immigration solicitor, a Muslim woman, had said that he could not pursue the claim on that basis because she was too scared to advance it on his behalf. On the other, he claimed that he had been uncomfortable in discussing that aspect of his claim with his solicitor, because she was a woman. The evidence of only witness proffered by the appellant concerning his claimed sexuality, Mr Ali, lacked weight. Pursuant to *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* * [2002] UKIAT 00702, the judge treated the appellant's claim to be a gay man with the greatest of circumspection.

7. As to the appellant's claimed mental health conditions, the judge accepted that the Costa Report recognised that the appellant had been diagnosed with a depressive illness in 2019 and found that the appellant's memory was poor and

that he was forgetful. He displayed three of the key elements of complex PTSD, and his depression level was said to be high. At para. 36, the judge found that there was no evidence that the appellant would suffer a rapid and irreversible decline in his health, nor that he would be unable to access appropriate treatment in Bangladesh.

8. The judge found that the appellant would not face "insurmountable obstacles" for the purposes of paragraph 276 ADE of the Immigration Rules but accepted that his removal to Bangladesh would nevertheless engage his private life under Article 8 of the European Convention on Human Rights ("the ECHR"), concerning the right to respect for private and family life. The resourcefulness of the appellant in securing work for nearly two decades as an illegal resident in the UK would stand him in good stead to re-establish himself in Bangladesh, she found. He would be able to enlist the support of family and would not be destitute. His private life attracted little weight since it had been established during the currency of an unlawful stay. The appellant's removal would be proportionate. The judge dismissed the appeal.

Grounds of appeal and submissions

9. The grounds of appeal are fourteen paragraphs long and have not been distilled into individual, succinct propositions. On a fair reading of the grounds of appeal in light of the focus of Mr Martin's submissions, there are essentially four main avenues of criticism:

   a. First, the judge's analysis of the appellant's political risk profile in Bangladesh failed to contextualise the appellant's return by reference to the contemporary background materials concerning the political and security situation in Bangladesh. There was simply no consideration, submitted Mr Martin, of the respondent's 2020 *Country Policy and Information Note* concerning political parties and affiliation in Bangladesh.

   b. Secondly, the judge's analysis of the appellant's claimed homosexuality was flawed, particularly in relation to the reasons given by the judge concerning Mr Ali's evidence, and her reasons for rejecting it. Moreover, the judge failed to address the background materials she had been provided with concerning the risk faced by gay men in Bangladesh. While there were some inconsistencies in the appellant's account concerning his solicitor, Mr Ali's evidence was "sufficient" to overcome any discrepancies in the appellant's evidence.

   c. Thirdly, the judge failed properly to analyse the appellant's claimed risk of suicide upon his return, in light of the Costa Report, and her Article 3 ECHR (prohibition of torture) analysis was cursory. The appellant said in his witness statement that he would commit suicide were he to be returned to Bangladesh, which the judge failed to address. The background materials suggest that it was fanciful to conclude that the appellant would be able to access mental health support in Bangladesh, as the mental health provision in the country is plainly inadequate.

   d. Fourthly, the judge erred in her consideration of Article 8 ECHR outside the rules. Pursuant to *Bensaid*, an individual's health forms part of their private life. The appellant's work as a chef was valuable to the community, and the judge gave it insufficient weight.

10. Permission to appeal was granted by First-tier Tribunal Judge O'Brien, primarily in relation to the judge's Article 3 analysis.

11. For the respondent, Mr Melvin relied on the Secretary of State's rule 24 notice dated 7 September 2021, which resisted all grounds of appeal.

12. I will expand upon the submissions of both parties where relevant in my analysis, below.

The law

13. In *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, the Court of Appeal summarised the different facets of an error of law in the following terms, at para. 9:

> "i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");
>
> ii) Failing to give reasons or any adequate reasons for findings on material matters;
>
> iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
>
> iv) Giving weight to immaterial matters;
>
> v) Making a material misdirection of law on any material matter;
>
> vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
>
> vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

14. Appellate courts and tribunals are to exercise restraint when reviewing the findings of first instance judges, for it is trial judges who have had regard to "the whole sea of evidence", whereas an appellate judge will merely be "island hopping" (see *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]). As Lady Hale PSC said in *Perry v Raleys Solicitors* [2019] UKSC 5 at [52], the constraints to which appellate judges are subject in relation to reviewing first instance judges' findings of fact may be summarised as:

> "… requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached."

15. In relation to claims under Article 3 ECHR, see the headnote to *AM (Art 3; health cases) Zimbabwe* [2022] UKUT 131 (IAC), at para. 1:

> "In Article 3 health cases two questions in relation to the initial threshold test emerge from the recent authorities of *AM*

(Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17 and *Savran v Denmark* (application no. 57467/15):

> (1) Has the person (P) discharged the burden of establishing that he or she is 'a seriously ill person'?
>
> (2) Has P adduced evidence 'capable of demonstrating' that 'substantial grounds have been shown for believing' that as 'a seriously ill person', he or she 'would face a real risk':
>
> > [i] 'on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment,
> >
> > [ii] of being exposed
> >
> > > [a] to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering, or
> > >
> > > [b] to a significant reduction in life expectancy'?"

Discussion

No error in relation to the appellant's BNP activity

16. In my judgment, nothing turns on the judge's approach to the appellant's claimed BNP risk profile in the context of the political and security situation in Bangladesh. Judge Cox found in 2013 that there was nothing to suggest that the appellant would be of any interest to the authorities or opposition parties ten years after his departure from the country. There was precious little material before the judge to demonstrate that, a further eight years later, that had changed. Mr Martin did not take me to any materials that were before the judge that demonstrated that, eighteen years after his departure from Bangladesh, the appellant's personal risk profile was such that the judge's findings of fact on this issue involved an error of law.

No error of law in the judge's analysis of the appellant's claimed homosexuality

17. Mr Martin's main criticism of the judge's analysis of this issue has several components, none of which have any merit.

18. At para. 32, the judge rejected the appellant's explanation for having not revealed his sexuality to his former immigration solicitor. The judge found that it was not plausible that a solicitor would have refused to represent a gay client. Mr Martin submitted that there are many examples of solicitors failing to comply with their professional obligations; it was not open to the judge to reject the appellant's evidence on this basis.

19. There are difficulties with this submission. First, the appellant has not made a formal complaint about his former solicitor. It would be incumbent upon him to do so if the basis of the case he now advances is based on her alleged flagrant refusal to discharge her professional duties. Secondly, it fails to engage with the remaining reasons given by the judge on this issue, namely the appellant's

changing and inconsistent explanations for having not raised the point with his former solicitor, which I have summarised at para. 6, above.

20. Mr Martin submitted that the treatment of the evidence of Mr Ali was flawed. At para. 34, the judge said this in relation to Mr Ali's evidence:

> "I find that the evidence of Mr Ali does not assist as at best, he can only say that the appellant told him that he was gay, not that he had seen the appellant live as an openly gay man."

21. In Mr Martin's submission, this analysis is inadequate. The judge expected a counsel of perfection from the appellant and Mr Ali. It was not rationally open to the judge to reject Mr Ali's evidence simply because he had relied on what the appellant had told him.

22. In my judgment, it is important to read the judge's analysis as a whole, without extracting individual sentences in isolation. The sentence quoted above features towards the end of a lengthy paragraph in which the judge addressed the guidance given in *Devaseelan* in the context of the findings of fact reached by Judge Cox, which had been based on the appellant's narrative as advanced at the time. Before Judge Cox, the appellant claimed that he had risen to a role of some prominence in the local youth wing of the BNP, and that he encountered some political violence as a result. By contrast, before the judge in the latest appeal, the appellant's case had been that he experienced violence and torture from the community on account of his sexuality which, he said, was well known. Against that background, it was rationally open to the judge to conclude that the appellant could not have both enjoyed the political prominence upon which his case before Judge Cox was based, while simultaneously facing violence, persecution and torture from the very same local community on account of his claimed sexuality. Further, the way in which the appellant had advanced his case concerning his claimed sexuality meant that, taken at its highest, he knew of his homosexuality while in Bangladesh. He should have raised it at the time, as the judge found, but did not.

23. It was against that background that the judge approached the evidence of Mr Ali. Despite Mr Martin's insistence that the judge's analysis of Mr Ali's evidence did not form part of her broader *Devaseelan* analysis, it plainly did. Mr Ali's evidence went to an issue which, as the judge legitimately found, should have been raised before Judge Cox and fell, therefore, to be treated with the "greatest of circumspection" pursuant to *Devaseelan*. The judge had the benefit of hearing live evidence from the appellant and from Mr Ali. It would be "island hopping" for this tribunal to hold that the reasons given by the judge, on the basis of the materials before her, were not rationally open to her.

Judge's Article 3 analysis sufficient

24. As identified by the judge, much of the Costa Report's analysis was in the form of general commentary on the impact of sexual trauma on men, rather than specifically in relation to this appellant (see para. 31). She went on to find that the Costa Report made a number of medical findings about the appellant, which she listed at para. 31, including quoting an extract from page 10 of the report. The judge had clearly considered the full report.

25. Looking at the Costa Report, where there is analysis relating to the appellant, it is in relatively brief terms. See, for example, page 18 of the report:

> "If [the appellant] were removed from his current context, his mental health will deteriorate further. He would break down and his anger would be turned against himself and he will continue to self-harm and may even end up killing himself. I am very concerned about his level of instability and vulnerability as he may need to be sectioned under the mental health act [sic] if his mental health deteriorates further."

26. The judge was plainly unimpressed by the above conclusions in light of what she said at para. 36:

> "In considering the Article 3 claim, in following the case of *AM (Zimbabwe)*… I find that the Appellant's mental health, when considering the evidence of Ms. Costa and the fact that the Appellant is still managing to maintain employment, is not severe enough to reach the threshold. There is no evidence that he would suffer rapid and irreversible decline nor that he would be unable to access treatment in Bangladesh. Ms. Costa does consider that his mental health will decline but she does not state that this would be rapid and irreversible."

27. On one view, there is a conflict between the judge's conclusion at para. 36, and the conclusions of the Costa Report at page 18, quoted above. Ms Costa *did* say that the appellant "may even end up killing himself…", whereas the judge said that Ms Costa "does not state that this would be rapid and irreversible…"

28. Properly understood, the judge must have meant that she did not find that the Costa Report's conclusions demonstrated that the serious, rapid and irreversible threshold would be met. Looking to the substance of the report, its findings were conclusions which, in any event, were not expressed in terms that could properly have led to the outcome now sought by the appellant. The reference to "self-harm" in the extract quoted above was to the appellant scratching himself violently when he felt angry: see page 9 of the Costa Report. There was no evidence before the judge that such scratching could amount to "serious, rapid and irreversible decline in his or her state of health resulting in intense suffering…", and nor was there any medical evidence of previous wounds or injuries the appellant had caused himself in this way. The Costa Report simply stated that the appellant would "continue to self harm", without explaining any possible augmentation of the nature and impact of such self-harm, nor its timing.

29. As to the report's conclusion that the appellant "may even end up killing himself", I consider that this risk is expressed in terms that are overly speculative (and possibly even flippant), that do not demonstrate that the "real risk" test is met. For the appellant to succeed in relation to this ground of appeal, he must demonstrate that the judge reached findings that no reasonable judge could have reached, or that she fell into one of the other errors identified in *R (Iran)*. Mr Martin's case fails to meet that threshold.

30. The "real risk" test was expounded in the context of suicide and Article 3 in *J v Secretary of State for the Home Department* [2005] EWCA Civ 629 at para. 25 and following by Dyson LJ, as he then was. The term "real risk" imposes a more stringent test than merely that the risk must be more than "not fanciful". There must be a causal link between removal and the suffering or suicide risk, and the threshold is particularly high because, in removal cases, the alleged inhuman treatment occurs outside the UK's jurisdiction under the ECHR. Where the risk

occurs because of some naturally occurring illness, rather than the direct or indirect responsibility of the public authorities of the receiving state, it is higher still. Further, where, as here, the health-based fears are not well founded, that will tend to weigh against there being a real risk that removal will be in breach of article 3.

31. I also observe that the judge found that the appellant's ability to work as a chef, as he had been doing at the time of the appeal, demonstrated that his mental health conditions were not as severe as he claimed. That analysis was plainly open to her.

32. When viewed against those stringent requirements, the judge was plainly entitled to conclude that the Costa Report, and the remaining evidence before her, could not merit an Article 3 finding in favour of the appellant. The report does not address the magnitude of the risk, nor the likely timescale, but uses imprecise and overly speculative language ("may even", "end up"). The report makes no references to prior suicidal ideation on the part of the appellant and contains no analysis of whether there could be any protective factors to minimise the risk. Further, while Mr Martin submitted that the background materials demonstrated that there would be minimal health provision for the appellant in Bangladesh, the judge was, I find, entitled to conclude on the basis of the materials before her that sufficient health provision would be available, especially with the possibility of continued financial support from Mr Ali (see para. 37).

33. The judge was entitled to conclude that the Costa Report did not merit a conclusion that any future intense health-based suffering faced by the appellant would be rapid or irreversible, or otherwise attributable to the UK's obligations under the ECHR.

Article 8 analysis sufficient

34. I consider Mr Martin's criticisms of the judge's Article 8 findings to be disagreements of fact and weight. The judge was entitled to find that the appellant would have family to return to in Bangladesh, and that he could not satisfy paragraph 276ADE of the Immigration Rules, concerning "very significant obstacles" to his integration in Bangladesh. The judge used the term "insurmountable obstacles", but nothing turns on that, as it is clear that she meant "very significant obstacles", since she referred to the correct provision of the rules.

35. The thrust of Mr Martin's criticism of the judge's decision on Article 8 grounds is that she failed expressly to refer to his submissions concerning the length of the appellant's residence, and his work in a shortage occupation area. It is trite law that it is not necessary for a judge expressly to refer to every submission that was made. In any event, it is difficult to see how the fact that the appellant had worked in a shortage occupation would be capable of outweighing the public interest in the maintenance of effective immigration controls. I have not been taken to any evidence demonstrating that the appellant enjoyed permission to work in the UK, meaning the weight to his work would have been diminished significantly. In any event, the judge *did* refer to the appellant's claimed residence since 2003, albeit in the context of underlining the length of his claimed work experience, and its impact on his ability to work in Bangladesh. That the judge didn't ascribe the significance to it in his favour that the appellant had hoped simply underlines that this is a disagreement of weight.

36. While Mr Martin is correct to submit that the European Court of Human Rights accepted in *Bensaid v UK* [2001] INLR 325 that a person's health conditions were capable of being regarded as a facet of their private life, as the judge correctly noted Article 8 cannot be used as a means to advance an Article 3 health case, albeit to a lower threshold. This submission is without merit.

37. In conclusion, this is an appeal that challenged a number of findings of fact reached by the judge. The judge was entitled to reach the findings she reached, on the evidence before her, for the reasons she gave.

Anonymity

38. The First-tier Tribunal made an order for the appellant's anonymity. I maintain that order so as to ensure that the publication of this decision could not lead to the appellant facing a risk that he does not currently face.

Notice of Decision

The appeal is dismissed.

The decision of Judge Lloyd-Lawrie did not involve the making of an error of law such that it must be set aside.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 February 2023