IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004278
First-tier Tribunal No: PA/54680/2021
IA/14155/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 March 2023

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

M N M
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Coyte, Seren Legal Practice
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 2 March 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

Introduction

1. The appellant is a citizen of Bangladesh who was born on 1 January 1972.

2. The appellant arrived in the United Kingdom sometime in 2003. Following an encounter with the police on 9 April 2019, the appellant was detained. On 10 May 2019 the appellant claimed asylum. He completed a screening interview on 23 May 2019 and an asylum interview took place on 13 June 2019. A rule 35 torture report was received on 1 July 2019.

3. The basis of the appellant's claim was that he had been involved in three incidents in Bangladesh in 1999 on behalf of the BNP and had distributed leaflets on their behalf. At the first - a demonstration - he had been attacked and injured by the Awami League and the police who had arrested and detained him for two to three days before he was released on bail. During his detention he was injured on his leg and face and, following his release, he went to hospital. He went into hiding. The second incident was a BNP meeting which was attacked by the Awami league and he sustained bruises to his leg and was struck on the head. The third incident was a demonstration which was attacked by the Awami League and he suffered minor injuries whilst escaping. He claimed that he was wanted by the police and left Bangladesh in 1999. In 2016, the appellant became a member of the BNP in the UK

4. On 10 September 2021, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR.

The First-tier Tribunal's Decision

5. The appellant appealed to the First-tier Tribunal. In a decision sent on 7 June 2022, Judge Lester dismissed the appellant's appeal on all grounds. First, the judge made an adverse credibility finding and rejected the appellant's account that he had been involved with the BNP in Bangladesh as he claimed. Secondly, the judge found that, in any event, the appellant would not be at risk on return given the incidents took place 23 years ago and his involvement was at a "very low level". Thirdly, the appellant had not established his claim under Art 3 of the ECHR based upon his health, namely he suffered from type 2 diabetes, PTSD and generalised anxiety disorder. Fourthly, the appellant's return to Bangladesh would not breach Art 8 of the ECHR.

The Appeal to the Upper Tribunal

6. The appellant sought permission to appeal to the Upper Tribunal. On 11 June 2022, the First-tier Tribunal (Judge Singer) granted the appellant permission to appeal.

7. The appeal was listed for hearing at the Cardiff Civil Justice Centre on 2 March 2023. The appellant was represented by Mr Coyte and the respondent was represented by Ms Rushforth.

8. I heard oral submissions from both representatives.

The Grounds

9. Mr Coyte relied upon the four grounds of appeal upon which permission was granted. They may be summarised as follows.

10. Grounds 1 and 2 challenge the judge's adverse credibility finding.

11. Ground 1 contends that the judge reached an adverse credibility finding without considering the background evidence or medical evidence supporting the appellant's claim. At para 62-63, the judge found the appellant's account not to be credible. However, at para 30 the judge made clear that, in doing so, he would not consider the background evidence and he said this:

> "30. I have seen objective evidence about Bangladesh and the BNP party. If the appellant is found credible then this evidence becomes relevant."

12. Further, having reached his adverse credibility finding at paras 62-63, the judge only considered the expert medical evidence which was supportive of the appellant's claim at paras 67-68 and he stated at para 69:

> "69. I find that these conclusions would only be supportive of the appellant if he were found credible and I have found him not credible."

13. Mr Coyte submitted this was an error of law. The judge's adverse credibility finding could only be made holistically taking into account all the evidence, including the background evidence and expert medical evidence.

14. In effect, this is the so-called Mibanga point (Mibanga v SSHD [2005] EWCA Civ 367).

15. Ground 2 contends that the judge failed to give adequate reasons why he did not accept the appellant's evidence when rejecting the appellant's explanation why he did not claim asylum earlier.

16. Ground 3 challenges the rejection of the Art 3 claim based upon the appellant's health. In particular, it contends that the judge failed to apply the test set out in the Supreme Court in AM (Zimbabwe) v SSHD [2020] UKSC 17. Whilst the judge considered whether the appellant would suffer a "significant reduction in life expectancy", he did not consider the alternative, namely whether as a result of a "serious, rapid and irreversible decline" in his health he would endure "intense suffering".

17. Ground 4 challenges the rejection of the appellant's Art 8 claim and contends that the judge failed to consider the totality of the appellant's circumstances in Bangladesh, including the stigma associated with his health problems and that he would not have support from his family there.

Discussion

Ground 1

18. Having heard Mr Coyte's submissions, Ms Rushforth conceded Ground 1, namely that the judge had erred in law in reaching his adverse credibility finding without regard to the totality of the evidence, in particular the supporting expert medical evidence. However, Ms Rushforth submitted the error was not material as the judge had found (at para 65) that, in any event, the appellant would not be at risk even if his account was true. She submitted this was consistent with the *CPIN*, "Bangladesh: Political Parties and Affiliation" (September 2020) at para 2.4.7 concerning those with "low level" involvement in BNP activities which were "unlikely to be of any ongoing interest" to the authorities and "unlikely" to be subject to treatment sufficiently serious or in repetition to amount to persecution. The appellant had said in his evidence that his involvement was 'low level'

19. Mr Coyte submitted the appellant had only said that he was not an "upper level member" (see para 54 of the judge's decision). Mr Coyte relied upon the material set out in his skeleton argument before the FtT at paras 28-31, pointing out that "low level" was not defined and contrasted in the *CPIN* at para 2.4.7 with "activists" which, he submitted, could include the appellant given his history (if accepted).

20. Given Ms Rushforth's concession, I can deal briefly with the Mibanga point raised in Ground 1. It suffices to say that I agree with Ms Rushforth's concession. In Mibanga, and the subsequent case law, the Courts have recognised that a credibility assessment requires a judge to make a holistic assessment of all the evidence including relevant country information and expert reports including medical evidence. There is no doubt that evidence, in particular the medical evidence summarised by the judge at para 68, was supportive of the appellant's account and his credibility. The background evidence in the *CPINs* caste some light on the plausibility of the appellant's account (see, e.g. paras 2.4.7-2.4.8 (September 2020) and paras 2.3.4-2.3.6 of *CPIN*, "Bangladesh: Actors of Protection" (April 2020) set out at paras 29-30 of Mr Coyte's FtT skeleton argument). In both paras 30 and 69, the judge wrongly denied the relevance of the background and medical evidence to his credibility assessment. In that regard, he fell into the error identified by Wilson J (as he then was) in Mibanga at [24]- [25]:

> "24. It seems to me to be axiomatic that a fact-finder must not reach his or her conclusion before surveying all the evidence relevant thereto. Just as, if I may take a banal if alliterative example, one cannot make a cake with only one ingredient, so also frequently one cannot make a case, in the sense of establishing its truth, otherwise than by combination of a number of pieces of evidence. Mr Tam, on behalf of the Secretary of State, argues that decisions as to the credibility of an account are to be taken by the judicial fact-finder and that, in their reports, experts, whether in relation to medical matters or in relation to in-country circumstances, cannot usurp the fact-finder's function in assessing credibility. I agree. What, however, they can offer, is a factual context in which it may be necessary for the fact-finder to survey the allegations placed before him; and such context may prove a crucial aid to the decision whether or not to accept the truth of them. What the fact-finder does at his peril is to reach a conclusion by reference only to the appellant's evidence and then, if it be negative, to ask whether the conclusion should be shifted by the expert evidence. Mr Tam has drawn the court's attention to a decision of the tribunal dated 5 November 2004, namely HE (DRC - Credibility and Psychiatric Reports) [2004] UKIAT 00321 in which, in paragraph 22, it said:
>
> > "Where the report is specifically relied on as a factor relevant to credibility, the Adjudicator should deal with it as an integral part of the findings on credibility rather than just as an add-on, which does not undermine the conclusions to which he would otherwise come."
>
> 25. In my view such was the first error of law into which the adjudicator fell. She addressed the medical evidence only after articulating conclusions that the central allegations made by the appellant were, in her extremely forceful if rather unusual phraseology, 'wholly not credible'."

21. The error identified in [25] of Mibanga was precisely the error that the judge fell into in this appeal in relation to the expert medical evidence, but also the background country evidence in the *CPIN*.

22. The issue is, therefore, whether that error of law was material to the judge's decision. The judge reached a finding – in the alternative – in paras 65-66:

> "65. With regards to the incidents in Bangladesh even on the appellant case his involvement was at a very low level and only brought him into contact with the police/authorities on one occasion and he was released within a day or so. On his case these incidents took place 23 years ago. I find that there was nothing in the evidence of the appellant even if he had been credible to suggest that the authorities would retain an interest in such a low level BNP member for matters almost a quarter of a century ago. However in any event I find the appellant not to be credible on this aspect of his case either.
>
> 66. Accordingly I find that there would be no risk on return."

23. The reasoning is brief and the judge does not engage directly with the background evidence which Mr Coyte relied upon at the FtT hearing and which he set out in his skeleton argument at paras 28-31 relying on the *CPIN* although the skeleton argument is set out in full earlier in the decision running to almost 9 pages of the judge's decision.

24. Paragraphs 2.4.7-2.4.8 are as follows:

> "2.4.7 In general, low-level members of opposition groups are unlikely to be of ongoing interest to the authorities and are unlikely to be subject to treatment that is sufficiently serious, by its nature or repetition, to amount to persecution. Opposition party activists, particularly those whose position and activities challenge and threaten the government and raises their profile, may be subject to treatment, including harassment, arrest and politically motivated criminal charges by the police or non-state actors, which amounts to persecution.
>
> 2.4.8 Decision makers must consider whether there are particular factors specific to the person which would place them at real risk. Each case must be considered on its facts with the onus on the person to show that they would be at real risk of serious harm or persecution on account of their actual or perceived political affiliation."

25. The guidance distinguishes "low level members" of opposition groups (such as the BNP) from "activists" (para 2.4.7). The former are unlikely to be of interest or at risk from the authorities. By contrast, the latter may be. But, in all cases the "particular factors specific to the person" must be considered. I do not accept Mr Rushforth's submission that the appellant conceded in his evidence he was a "low level" activist. According to the judge's statement of his evidence he only accepted he was not an "upper level member" (see para 54). In one sense, he might be seen as an "activist" as he took part in demonstrations and meetings of the BNP in Bangladesh and was, if his account is accepted as it must be for this purpose, on one occasion detained for 2-3 days by the police after a demonstration and ill-treated physically. As Mr Coyte submitted, the *CPIN* does not define who is a "low level" supporter and the judge does not engage with that issue and, as para 2.4.8 should have alerted him to, all the circumstances of the appellant's history - not just what he did but also what happened to him. If believed, he had been subject to ill-treatment (arguably amounting to

persecution) as a result of his level of involvement with the BNP. That was a relevant factor in determining what might happen to him on return in the light of the *CPIN* and para 339K of the Immigration Rules. In my judgment, the judge's finding at [65]-[66] is insufficiently reasoned to sustain, in itself, a decision where the judge wrongly found the appellant not to be credible.

26. As a consequence, I am satisfied that the judge erred in law in dismissing the appellant's asylum claim. That decision cannot stand. I set it aside and it must be re-made.

Ground 2

27. In the light of my conclusion on Ground 1, it is unnecessary to consider Ground 2.

Ground 3

28. The judge dealt with the appellant's Art 3 claim based upon his health at para 72 in these terms:

> "72. In respect of the medical claim under Article 3 the appellant case is that he suffers from type 2 diabetes, PTSD and a generalised anxiety disorder. I remind myself of the case law relevant in this area of Popashvilli (*sic*) and AM Zimbabwe. in this case there is clearly not a serious or rapid and irreversible decline in the health of the appellant leading to a reduction in life expectancy due to a lack of access to medical treatment in his country of origin. On any reading of the medical evidence this is not the situation of the appellant. There is a high threshold and the appellant does not meet it. the case fails under this point."

29. In AM(Zimbabwe), the Supreme Court explained the test to be applied in health cases under Art 3 based upon the Strasburg decision in Paposhvili at [183] of the latter's decision. It is clear that there are, as Mr Coyte submitted, two limbs to the test – one based upon a significant reduction in life expectancy and the other on a "serious, rapid and irreversible" decline in health resulting in "intense suffering". The UT helpful summarised the position on remittal of the appeal from the Supreme Court in AM (Art 3; health case) Zimbabwe [2022] UKUT 131 (IAC) (Foster J and Plimmer and Smith UTJs) as set out in the judicial headnote as follows:

> "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"?
>
> 2. The first question is relatively straightforward issue and will generally require clear and cogent medical evidence from treating physicians in the UK.
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> 3. The second question is multi-layered. In relation to (2)[ii][a] above, it is insufficient for P to merely establish that his or her condition will worsen upon removal or that there would be serious and detrimental effects. What is required is "intense suffering". The nature and extent of the evidence that is necessary will depend on the particular facts of the case. Generally speaking, whilst medical experts based in the UK may be able to assist in this assessment, many cases are likely to turn on the availability of and access to treatment in the receiving state. Such evidence is more likely to be found in reports by reputable organisations and/or clinicians and/or country experts with contemporary knowledge of or expertise in medical treatment and related country conditions in the receiving state. Clinicians directly involved in providing relevant treatment and services in the country of return and with knowledge of treatment options in the public and private sectors, are likely to be particularly helpful.
>
> 4. It is only after the threshold test has been met and thus Article 3 is applicable, that the returning state's obligations summarised at [130] of Savran become of relevance - see [135] of Savran."

30. The judge in the present appeal (at para 72) only engaged with the limb of the test in para 2(ii)(b) and not para 2(ii)(a). To that extent, I accept Mr Coyte's submission. However, when I pressed Mr Coyte as to what medical evidence there was before the judge that could have engaged the "intense suffering" limb of the test, he directed me to two paragraphs in the expert report of Dr Kareem dated 10 May 2021 at paras 15.21 and 15.22 as follows:

> "15.21 The above information suggests that, should [the appellant] be removed to Bangladesh, it is unlikely that he would be able to access mental health support in relation to his PTSD and Mixed Anxiety & Depressive Disorder, be robustly managed for any deterioration in his mental health, that the therapeutic interventions and support I have recommended in respect of required support....would be available in Bangladesh or that the standards of such professionals with the required expertise of working with individuals with PTSD available in the UK would be comparable to the resources (or lack thereof) in Bangladesh. The absence of such supported services would, in my professional opinion, have a negative impact upon [the appellant's] mental health in the shorter - longer - term. I respectfully reiterate my concern regarding the mention of access to medications and treatment being closely linked in many cases with the patients ability to pay.
>
> 12.22 It is my professional opinion that it is very important for [the appellant] to be afforded mental health support to prevent further deterioration as well as enhancing his recovery and functioning. Should there be a "gap" or cessation of the current healthcare receives, if his medication withdrawn, or is not afforded the addition of user support

> referred to in... this report, it is my professional opinion this would be deleterious to his mental health. Further, abrupt withdrawal medication is not recommended. The additional burden of the prospect of being returned to Bangladesh serves as a "psychological threat" that is perpetuating these anxiety, depression and PTSD symptoms, which are likely to further escalate should he be removed to Bangladesh. [The appellant's] complex mental health conditions require coordinated, evidenced-based interventions and it is unclear from the information available to me (as cited previously) whether these would be available to him in Bangladesh."

31. Whilst Dr Kareem predicates a potential deterioration in the appellant's mental health if returned to Bangladesh without available treatment, her evidence offers no reasonable basis for finding that its impact would reach the high threshold of either limb of the test in AM(Zimbabwe), in particular in the light of Ground 3, "a serious, rapid and irreversible decline" in his "state of health resulting in intense suffering". As a consequence, had the judge considered the alternative limb of the test under Art 3 he would, in my judgment, have inevitable made a finding against the appellant that the test was not met. Any error was, therefore, immaterial to the decision to dismiss the appeal under Art 3.

32. I reject, therefore, Ground 3.

Ground 4

33. The judge's decision in relation to Art 8 was, of course, made in the light of his adverse credibility findings. Ms Rushforth has accepted those findings cannot stand. It seems to me that, as the decision is set aside and has to be re-made in relation to the appellant's credibility and sustainable findings made, it would be appropriate for the decision in respect of Art 8 also to be re-made in the light of those findings and, indeed, any up to date evidence which may be relevant.

Conclusion

34. For the above reasons, the judge erred in law in dismissing the appeal.

Decision

35. The decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. The decision cannot stand and is set aside.

36. The decision must be remade in relation to the appellant's asylum, humanitarian protection and Art 8 claims. None of the findings in respect of those decisions are preserved.

37. However, the decision and findings in respect of the appellant's claim on health grounds under Art 3 stand and are preserved.

38. Having regard to the nature and extent of fact-finding required, and to para 7.2 of the Senior President's Practice Statement, the proper disposal of the appeal is to remit it to the First-tier Tribunal for a rehearing on the basis set out above before a judge other than Judge Lester.

Andrew Grubb

Judge of the Upper Tribunal

Immigration and Asylum Chamber

7 March 2023