IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

First-tier Tribunal No:
PA/07958/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 29 March 2023

Before

UPPER TRIBUNAL JUDGE OWENS
DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

AH
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Symes, Counsel instructed by Waterstone Solicitors
For the Respondent: Mr Clarke, Senior Presenting Officer

Heard at Field House on 31 March 2022

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

History of the Appeal

1. This appeal comes before us for re-making. Upper Tribunal Judge Owens set aside the decision of First-tier Tribunal Judge Shaerf promulgated on 28 January 2021 dismissing the appellant's appeal against the decision to refuse his protection and human rights claims on the basis that there had been a material error of law for the reasons given in the decision dated 7 February 2022 appended to this decision at Annex A. However, that decision preserved the factual findings made by the First-tier Tribunal in relation to the appellant's activities in the UK.

Delay

2. There has been a substantial delay in promulgating this decision because of long term illness of one of the panel members. The decision and our reasons for that decision were however discussed shortly after the hearing and what follows reflects that. However, in order to ensure fairness this Tribunal issued directions on 8 February 2023 inviting both parties to indicate if they would like to have a resumed hearing in order to admit any further evidence or make any up-to-date submissions on any recent authorities. Neither party had responded by 24 February 2023. On 1 March 2023 both parties were requested to put their position in writing. The appellant responded that he did not want to have a further hearing to make any submissions. The respondent also confirmed that she did not want an updated hearing and confirmed that the County Policy and Information Note on Bangladesh Political Parties and affiliation v 3.0 of September 2020 ("2020 CPIN") has not been updated.

3. We are satisfied that the appellant has had an opportunity to adduce any further evidence of political activities undertaken, his political beliefs, and his family's political activities since the re-making hearing on 31 March 2023 and declined to do so. In these circumstances we are satisfied that the delay in promulgation has caused no unfairness to either party and that any further findings of fact can properly be made on the basis of the evidence before us in the re-making hearing.

Appellant's Asylum Chronology

4. This is set out in detail at [3] to [5] of the error of law decision. In summary, the appellant originally entered the UK on 11 September 2009 as a student. A further application for leave to remain outside of the rules was refused on 28 August 2015. The appellant then claimed asylum on 16 May 2018 and his application was refused on 6 August 2019. This is the decision to which this re-making decision relates.

The issues in this appeal

5. First-tier Tribunal Judge Shaerf found that the appellant was not at risk in Bangladesh as a result of any "sur place" political activities in the UK. His decision in relation to the claim for protection was set aside on the sole basis that the judge made a material error of law in failing to consider what the appellant would do if returned to Bangladesh in accordance with the principles in HJ (Iran) v SSHD [2010] UKSC 31.

6. The HJ (Iran) principles are summarised at paragraphs 539 to 540 of KK and RS (Sur place activities: risk) Sri Lanka CG [2021] UKUT 130 (IAC) as set out below:

> 539. The HJ (Iran) principle establishes that it is no answer to a claim for asylum that an individual would conceal their sexual identity in order to avoid persecution that would follow if they did not do so. At paragraph 82 of HJ (Iran), Lord Roger, JSC, set out the correct approach to be adopted by decision-makers in the context of an individual claiming to be at risk in their country of origin by virtue of wishing to live openly as a gay man:
>
> > "82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.
> >
> > If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.
> >
> > If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.
> >
> > If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".
> >
> > If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.
> >
> > If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which

means that he is not in fact liable to be persecuted because he is gay.

If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

540. That the HJ (Iran) principle applies to cases concerning political opinions was confirmed by Lord Dyson, JSC, at paragraphs 26 and 27 of RT (Zimbabwe):

"26. The HJ (Iran) principle applies to any person who has political beliefs and is obliged to conceal them in order to avoid the persecution that he would suffer if he were to reveal them. Mr Swift accepted that such a person would have a "strong" case for Convention protection, but he stopped short of an unqualified acceptance of the point. In my view, there is no basis for such reticence. The joint judgment of Gummow and Hayne JJ in Appellant S395/2002 contains a passage under the heading "'Discretion' and 'being discreet'" which includes the following at para 80:

> "If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be 'discreet' about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences."

27. I made much the same point in HJ (Iran) at para 110:

> "If the price that a person must pay in order to avoid persecution is that he must conceal his race, religion,

> nationality, membership of a social group or political opinion, then he is being required to surrender the very protection that the Convention is intended to secure for him. The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he would conceal the fact that he is a gay man in order to avoid persecution on return to his home country."”

7. The question we must therefore ask are as follows:

   a) If the appellant behaves in the manner he claims he will, will he have a well-founded fear of persecution?

   b) What will the appellant actually do if he is returned to Bangladesh?

   c) If he does not behave in this manner, is this to avoid persecution?

Preserved Findings

8. In the error of law decision, the judge’s factual findings were preserved. They are as follows:

   a) The appellant was involved in student politics for the Chattra Shibir which is the student wing of the Jamaat -e-Islami prior to coming to the UK in 2009, he was President of the Chattra Shibir in his college,

   b) On 27 February 2009 following a violent clash between the local college branches of the Chattra Shibir and the Chattra League (the student branch of the Awami League) the appellant was arrested and briefly detained (for two hours) before being released on payment of a bribe. He did not claim to have been expressly targeted,

   c) His family were involved in politics at a local level but his father died in 2014,

   d) His political activity in the UK has been limited and sporadic,

   e) He has attended some demonstrations in London in 2018,

   f) There is no claim that the appellant has been photographed for the purposes of social media and no evidence of any press coverage that included any photographs of him or reference to him,

   g) He has posted and re-posted anti-government material on-line but has failed to demonstrate that the operation of his Facebook page means that the material posted will come to attention of the authorities,

h) There was no evidence that the appellant had joined any anti-government or similar organisations in the UK,

i) There was insufficient evidence that the appellant's sister and brother-in-law were actively involved in politics or had come to the attention of the authorities. His father, even if he were to be politically active, died in 2014,

j) The appellant does not have a real risk of serious harm on account of any previous activities he carried out in Bangladesh or because of his family associations or because of his Facebook posts.

9. In addition, the judge's findings and decision in respect of Article 8 ECHR were not challenged and were preserved.

10. Importantly, in our view, the judge made sustainable findings that the appellant had not demonstrated how his Facebook posts would have come to the attention of the authorities given the limitations on the evidence provided. The appellant's Facebook evidence had been found to be deficient in a previous hearing of his appeal (which in turn had been set aside) and in a previous Upper Tribunal decision. The hearing before First-tier Tribunal Judge Shaerf provided him with an opportunity to remedy these defects. He failed to do so. In particular he failed to tender in evidence an email link to his account, provide an edit history, provide evidence about his account being "open" or the numbers of views on his account.

Directions

11. Having set aside the decision in respect of whether the appellant has a well-founded fear of persecution, Upper Tribunal Judge Owens issued directions on 7 February 2022 to both parties to assist us with the re-making.

12. Both parties were directed to file skeleton arguments and the appellant was directed to file and serve any further evidence accompanied by the relevant notices.

New evidence/ relevant notices

13. The appellant filed a skeleton argument. The skeleton appeared to attempt to reopen factual findings but after a discussion Mr Symes confirmed that he was confined to those findings preserved by the Upper Tribunal. The submissions are set out below.

14. The appellant did not submit any further documentary evidence. There was no new bundle and no new witness statement. Consequently, there was no rule 15(2A) Notice. We indicated that if Mr Symes wished to take oral evidence from the appellant as to his intentions on returning to Bangladesh, he would need to prepare a written statement to adopt as evidence in chief. We adjourned the

appeal briefly to allow Mr Symes to take instructions. Mr Symes then returned with a written statement from the appellant and a rule 15(2A) notice.

15. We admitted this further evidence because we found that it was in the interests of justice to do so to fully determine whether the appellant has a well-founded fear of persecution in Bangladesh and the appellant was specifically asked to address this issue in directions. We took into account the delay in producing the evidence (as we are required by rule 15(2A)(b) to do), but we were not persuaded that it outweighed the appellant's interests in being permitted to rely on it, particularly in light of the lack of substantive objection from the respondent.

16. The respondent did not produce a skeleton argument.

Appellant's evidence

17. The appellant's evidence in his brief written statement was that he would continue to be politically active if he were returned to Bangladesh by supporting the senior branch of the Jamaat–e-Islami. He would continue his involvement in politics by attending demonstrations and encouraging his community to support the Jamaat- e-Islami. His evidence was not that he would refrain from carrying out political activities because of a fear of being persecuted.

18. His written statement dated 31 March 2022 did not assert that he had carried out any further political activity in the UK since the hearing on 25 November 2020.

19. The appellant then gave oral evidence in Bengali. He confirmed that he understood the court appointed interpreter. He adopted his witness statement and was cross examined by Mr Clarke.

20. He was asked various questions about the Jamaat- e-Islami with reference to the 2020 CPIN on Bangladesh. He said that if he returned, he would continue to support the Jamaat-e-Islami. It was put to him that the party had been deregistered in 2013 on the basis of its anti-secular views. Its aim is to create an Islamic state with a sharia legal system and to remove un-Islamic laws and practices. The party was banned from participating as a party in the 2014 and 2018 elections. The appellant stated that the party was not banned but now contests seats under a different name which is the Jatiya Party. This is supported by the background material. The appellant was asked why if there are other parties that are affiliated to the Jamaat- e-Islami who are permitted to sit in elections, he would not support them. He responded that they are not following the original ideology and policies of the Jamaat- e-Islami and are not really the Jamaat- e-Islami. They are supported by the government.

21. The appellant's attention was drawn to him standing in front of a BNP flag at a demonstration in 2018. It was put to him that in the lead up to the 2018 elections the BNP distanced themselves from the Islamic Jamaat- e-Islami. He was asked why he would join a BNP protest when the BNP does not support the Jamaat- e-Islami. The appellant asked for the question to be repeated and gave a rather garbled general response referring to Khaleda Zia being placed illegally in jail and that the BNP is under pressure to keep a distance. He then stated that whenever there was a protest against the illegitimate government he would go and protest. He confirmed that the photographs showed him demonstrating at two demonstrations in April 2018 and one in September 2018 which was about the time he claimed asylum. His evidence is that he did not have photographic evidence of previous demonstrations he had attended.

22. The appellant was asked why he had not provided a complete Facebook download given the criticism in the previous decision and the criticisms in the most recent decision. He had had an opportunity to provide further evidence. He stated that he did not understand the question and did not understand what a complete download was. When this was explained to him, he expressed surprise and indicated that he did was not aware that he had to admit this evidence. He denied that his "sur place" claim was a sham and stated wherever in the world he was, he would support his party. He then stated that he had attended a demonstration in Hastings in 2019 but that in 2019, 2020, 2021 and 2022 there had been no demonstrations because of Covid. He stated that he had continued to post on Facebook.

Submissions

23. Mr Clarke submitted that based on the preserved findings and in particular the credibility findings by the First-tier Tribunal, that it is not possible to characterise the appellant as a die-hard political activist who is immersed in politics in the UK. He submitted that the "sur place" activities were a sham and pointed to the timing of the activities which took place in 2018 around the time of his asylum claim. He pointed to credibility issues which should be considered in the round with his actions and intentions. He submitted that the appellant had never claimed to be specifically targeted. He did not look for a further college in the UK after his student leave was curtailed in 2015. There was no asylum claim until 2018. The First-tier Tribunal noted that there was a discrepancy because he said he had left Bangladesh due to his fear in 2009 but gave no explanation for the delay in the claim. He pointed to the fact that the Facebook posts were re-posts and that there was no evidence that the appellant had joined any organisations in the UK. The preserved finding was that his father was not as prominent in politics as alleged. He is a supporter rather than a member of the Jamaat- e-Islami. He last carried out activities in 2009. There had been no attempt to remedy the omission of the lack of evidence in respect of his brother-in-law. He submitted that the

appellant's profile in the UK is an indication of what he would do on return. His activities are limited and historic. One would expect to see more evidence of active political protest. There was insufficient evidence to demonstrate that the authorities would monitor Facebook posts in Bangladesh particularly the limited ability of government to hack Facebook.

24. He asked us to find that the appellant deliberately attended some demonstrations to support his asylum claim. He also pointed to the fact that politics in Bangladesh had moved on and the Jamaat-e-Islami has been deregistered because of its religious position and was not allowed to take part in elections. Not all supporters of the Jamaat- e-Islami are targeted in any event and there are a large number of Jamaat- e-Islami supporters. It is those high-level members of the Jamaat-e -Islami who are at risk.

25. Mr Symes relied on his skeleton argument. He submitted that the appellant was politically active in the past. He has attended demonstrations and posted material critical of the Bangladeshi government in the UK. He does not have photographs prior to the claim for asylum because he did not take photographs. His history in Bangladesh is of active involvement, going beyond tacit support for the Jamaat- e-Islami. He was president of a local branch of the Chattra Shibir. His family have been and remain politically active.

26. He submitted that on return the appellant would feel compelled to be active in opposition to the Awami League as he was previously. He will carry on the same activities as he carried out in the past which would lead him to having a well-founded fear of persecution in Bangladesh. In this respect he had previously been attacked, and opposition members are routinely arrested, detained and subject to ill-treatment. The situation is worse than in 2018. There is an increased risk at election time. The Jamaat- e-Islami are still active, and this is the party with which the appellant has always been associated.

Findings on the HJ issue

27. We answer the first question in the affirmative. We do not underplay the considerable political unrest which continues to characterise Bangladeshi politics. There is ample evidence that the authorities are intolerant to opposition views and that thousands of arrests of members and supporters take place particularly in the context of political demonstrations and during election times and that activists, journalists, prominent leaders are particularly at risk.

28. We take into account the evidence at 10.2.22 to 10.2.25 of the 2020 CPIN which states (omitting footnotes) as follows:

> 10.2.22 The DFAT report noted in respect of the Jamaat-e-Islami (JI):

> ‘Authorities have particularly targeted for arrest the JI’s senior leadership, few of whom remain free and active. Other targets have included prominent leaders, ICS [Islami Chhatra Shibir – student wing] members and, in some cases, family members. Lower-level JI members have reportedly been able to avoid the attention of authorities either through the paying of bribes to AL leaders or by physically relocating. DFAT assesses as credible reports that the situation is better for JI members in villages than in cities.’
>
> 10.2.23 The same source added, ‘People who are perceived as being supporters of JI have reported being followed or intimidated, including when abroad [see Sur place activities]. Some government critics with no affiliation with JI have reported that they have been accused of having such links as a means of attacking their credibility.’
>
> 10.2.24 The Freedom House Freedom in the World 2020 report noted ‘A JI spokesman said more than 1,850 party members were arrested ahead of the2018 elections, and some party members claimed they had been subject to torture while in custody.’
>
> 10.2.25 Odhikar reported that ‘In 2019, attacks and suppression on the opposition political parties and dissidents by the government became alarming. During this period, there were reports of fictitious cases filed against leaders and activists of the opposition political parties (especially BNP leaders and activists) arrests and re-arrests from the jail gate after a person had been released on bail. Women leaders and activists of the opposition were also arrested during internal meetings.’

29. On this basis we have no hesitation in finding that were the appellant to return to Bangladesh and work for the Jamaat-e-Islami as an activist by attending demonstrations and prominently encouraging the local community to join the party that he would be at risk of persecution.

30. We turn to the second question of what the appellant will actually do on his return to Bangladesh.

31. We firstly take into account and give weight to the lack of any further evidence supplied by the appellant to demonstrate his political commitment and activities in the UK. Mr Symes stated that the appellant was bound by the preserved findings from the hearing in November 2020. However, the appellant was directed to serve any further evidence on which he intended to rely. It was open to him to serve evidence of any political activities he had undertaken which post-dated the appeal hearing. He did not adduce any further evidence at all of any attendance at demonstrations, of any involvement with political activities in the UK including with Jamaat-e-Islami supporters in the diaspora or indeed with any of the other well organised and numerous supporters from other opposition parties in the diaspora. He did not adduce any supporting evidence of further Facebook posts despite asserting that he was still posting and he did not produce any further evidence about the difficulties that his family were having in Bangladesh and in particular his brother-in-law. This

lack of evidence was referred to by the judge in the original decision. The appellant is represented by experienced practitioners, and it is not plausible that he would not have been advised to obtain any further evidence of political activities.

32. We were of the view that the reason that there was no such further evidence was because it did not exist. We further note that another year has passed since the re-making hearing and the appellant was given a second opportunity to submit any further evidence but has not done so.

33. On this basis we find that there is no additional evidence to demonstrate any further political activity by the appellant. We have had regard to the scant political activities undertaken by the appellant in the UK. He has now been living in the UK for over 13 years. Around the time of his claim for asylum in 2018 he attended three or four demonstrations which is the preserved finding. The judge did not accept that he had attended demonstrations prior to that. We accept that during 2019, 2020 and potentially 2021 that it is less likely that demonstrations were taking place because of the pandemic but additionally there was no further evidence of attendance at demonstrations in late 2021, 2022 or early 2023 and we do not accept that the pandemic would have prevented political activities taking place in this period. The background evidence suggests that there is a large and well organised Bangladeshi diaspora in the UK particularly for the BNP and the appellant's evidence was that he would attend any anti-government organisations. Had the appellant attended demonstrations we find that this evidence would have been adduced.

34. The appellant does not assert that he is currently a member of the Jamaat-e-Islami. He does not assert that he has carried out any other political activity in the UK such as attending meetings, conferences, corresponding with other activists, encouraging people to join the party or participating in political activities or campaigning. He does not assert that he has been followed or threatened in the UK. Even on the lower standard of proof, we find that he is not currently politically active in the UK for the Jamaat-e-Islami or any other party and we do not find that he is an activist.

35. Similarly, despite his assertion that he continues to post material critical of the government he did not adduce any supporting evidence of Facebook posts postdating his appeal in November 2020, nor of detailed Facebook logs to demonstrate that such material is open to the public and has not been edited and would be available to the Bangladeshi authorities. We do not accept his explanation that he was not aware that he needed to supply this evidence. As we have already noted the appellant is represented by experienced and specialist solicitors as well as having counsel present at several of his appeals. It is inconceivable that his representatives did not explain to him that one of the reasons his appeal was dismissed previously was because

of his failure to supply more evidence in respect of his Facebook posts including the complete download, the editing history etc. It is not plausible that the appellant did not seek to have the decisions explained to him when they are a matter of such importance to him. We find that this evidence has not been adduced because there are no further posts.

36. Further, the judge rejected the appellant's account that his brother-in-law has been detained on several occasions because of his prominent position in the Jamaat-e-Islami. The judge referred to the lack of supporting evidence. The appellant has had ample time to adduce further evidence of any risk to him due to his brother in law's asserted political but has failed to do so.

37. We also give weight to the fact that the appellant's written statement is very brief consisting of a mere assertion of his commitment. There was little evidence of what activities he would undertake on return to Bangladesh, with whom he is in contact and how he would go about his political activities. We note in this respect that his oral evidence was similarly general referring vaguely to the illegal government and arrest of the opposition leader Zia. We found his oral evidence to be vague and evasive. On occasions he did not answer questions directly.

38. We take into account and give weight to the fact that the appellant was committed to the youth wing of the Jamaat-e -Islami in the past, prior to coming to the UK in 2009. However, this was now 14 years ago. The evidence before us from the 2020 CPIN is that youth branches of the various parties were and are particularly active. The appellant was detained very briefly in a demonstration when he was a student. He was not individually targeted. He was released after two hours and his evidence has never been that the authorities were hunting him down or that there was a warrant out for his arrest. At the time he was in college there was a caretaker government in place following the BNP administration coming to an end in 2006 and considerable political unrest. Since 2009 the Awami League have been in power.

39. The appellant is a much older man now. Our findings on how the appellant would act and what he would actually do in Bangladesh are informed partly by the activities he has carried out in the UK during the many years he has lived here. There is nothing to have prevented him from carrying out political activities in the UK. There is evidence in the CPIN of well-organised anti-government diaspora activities not only in the UK but elsewhere in the world. We find that were he a committed political activist he would have done more in the UK. His activities here consist of attendance at a very few demonstrations as well as critical posts on Facebook which he has not demonstrated are open to the public. He is not immersed in politics in his community in the UK and those activities he did undertake we find were undertaken to bolster his asylum claim in order to remain in the UK. His failure to

be active in a safe country where the appellant has had ample opportunity to be active is in our view indicative that despite his previous support for the Chattra Shibir that he will not now be politically active in Bangladesh. We find, to the lower standard that the appellant would not be politically active on his return to Bangladesh. We have had particular regard in this respect to the preserved negative credibility findings and limited political activity in which the appellant has engaged while in the UK. We also find to the lower standard that he will not openly post material critical to the regime in Bangladesh which will come to the attention of the Bangladeshi authorities because he has not demonstrated that he has done this in the UK. We also find that his family do not have a profile as prominent opponents or party members of Jamaat-e- Islami.

40. We have no doubt that the appellant has negative views in relation to the current government in Bangladesh like many millions of other individuals in Bangladesh. However, we find that his claim that he will be politically active on return is not credible for the reasons given above.

41. We find that he is not a member of the party, he will not be an active supporter and he will not carry out any political activities. We find that the majority of those individuals targeted in Bangladesh have some kind of profile in that they are members, activists, senior or prominent leaders, journalists or have taken part in demonstrations or who are supporters who have carried out activities or individuals who have been openly critical of the government on social media or who are family members of the above. The appellant does not fall into any of these categories. We do not find that he will be targeted for the sole reason that he does not support the government and that politically he passively supports the Jamaat- e- Islami

42. In answer to the third question, we find that his failure to undertake any political activities in Bangladesh will not be out of a fear of being persecuted but out of apathy and a lack of sufficiently strong political motivation and conviction.

43. We find on this basis that the appellant does not have a well-founded fear of persecution in Bangladesh. We also find that he is not at risk of treatment amounting to a breach of Articles 2 or 3 ECHR.

Notice of Decision

44. We re-make the decision. The appeal is dismissed under the Refugee Convention and Article 3 ECHR.

45. The appeal was previously dismissed under Article 8 ECHR and that decision was not challenged. The appeal continues to be dismissed under Article 8 ECHR.

R J Owens

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 March 2022

ANNEX A

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: PA/07958/2019

THE IMMIGRATION ACTS

Heard at Field House
Via Microsoft Teams
On 9 July 2021

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE OWENS

Between

AH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Symes, Counsel instructed by Waterstone Solicitors
For the Respondent: Mr Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh born on 1 July 1984. He appeals with permission against the decision of First-tier Tribunal Judge Shaerf dismissing his appeal against a decision dated 6 August 2019 refusing his protection claim.

2. Both parties attended remotely via Microsoft Teams. Neither party objected to the hearing being held in this manner. The representatives confirmed that they could see and hear the proceedings and there were no connectivity issues. There was no complaint of any unfairness.

Appellant's Background

3. The appellant entered the United Kingdom as a Tier 4 General Migrant on 11 September 2009. His leave was extended until 29 March 2015 when his leave was curtailed because his sponsoring college had lost its sponsor licence. A further application for leave outside the rules was refused on 28 August 2015. On 16 May 2018 he claimed asylum. The asylum claim was refused on 6 August 2019.

4. The appellant's case is that he was actively involved in politics in Bangladesh as a student for the student branch of the Jammaat- e-Islami ("JI") and was on one occasion attacked by the Awami League. The appellant claims to be actively involved in politics in the UK which puts him at risk of persecution if he is returned to Bangladesh. The appellant submits that the Bangladeshi government considers him sufficiently significant as an opposition activist to be of adverse interest and at risk of persecution.

5. The position of the Secretary of State is that there is no evidence that the Bangladeshi authorities would be aware of the appellant's attendance at protests nor of his Facebook posts, nor that the Bangladeshi government would be interested in him. Further, the respondent relies on Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 because the appellant's claim for asylum was made 9 years after his arrival in the UK.

First-tier Tribunal Decision

6. The judge heard evidence from the appellant. He accepted the appellant's evidence that following a violent clash between the local college branches of the Chattra Shibir ("BICS") and the Chattra League, the appellant had been arrested and briefly detained before being released on payment of a bribe. The judge did not consider that the appellant had been individually targeted.

7. The judge found that the appellant came to the UK to pursue his studies in chartered accountancy. His father died on 16 November 2014. After the appellant was notified that his leave would be curtailed, he did not enrol himself on another course. Instead, he applied to remain in the UK outside the rules. The judge took into account the timing of the appellant's claim for asylum in 2018, and the discrepancy between his assertion that the was frightened to remain in Bangladesh when he left in 2009 because of his activities for BICS and the late claim for asylum. The judge noted that there was a lack of supporting evidence regarding the appellant's assertion that his brother-in-law had a senior position in the JI, had numerous cases against him and that he had been arrested.

8. The judge found that most of the appellant's Facebook posts were "re-posts" and that the appellant's own words were "timid and ill-expressed". The judge considered the background evidence in relation to individuals

being arrested for posting material on Facebook and the country background materials on Bangladesh including the Home Office Country Policy and Information Note dated April 2020. The judge took into account that the appellant had failed to provide evidence in relation to the operation of his Facebook account despite the fact that the First-tier Tribunal and Upper Tribunal had previously raised concerns about the Facebook evidence, commenting on the lack of evidence of the Facebook edit history, the lack of an email link to the Facebook page, and lack of evidence that the account was public and the number of followers.

9. The judge found that the appellant was previously involved in student politics for the BICS, the student wing of the JI in Bangladesh but that his political involvement since his arrival in the UK in 2009 has been very limited and sporadic. He has attended some demonstrations in London but does not claim to have been photographed by the Bangladeshi authorities nor that there was any press coverage relating specifically to him. There was no evidence beyond the appellant's assertions that Bangladeshi authorities use computer programmes for facial recognition or for scanning Facebook posts. There was no evidence that the appellant has joined any anti-government or similar organisation in the UK.

10. The judge found that the appellant's family was involved with politics at a local level but found that because this was some time ago, there would be no material impact on the perception of the appellant by the Awami League. The judge did not accept the appellant's claims about his brother-in-law because of the lack of supporting evidence.

11. The judge then went on to consider BA (Demonstrators in Britain- risk on return) Iran CG [2011] UKUT 36 (IAC) and decided that the appellant has failed to discharge the burden of proof that he will be at risk on return.

12. The judge dismissed the asylum, humanitarian protection and human rights appeals.

Grounds of Appeal

Ground 1. Failure to take into account material evidence

13. It is asserted that the judge erred by overlooking substantial evidence before the judge of the government arresting and detaining individuals for "re-posting", "sharing" and "liking" posts on-line. The judge's conclusion that re-posting on Facebook would not warrant attention and that there is no evidence that the authorities do not scan social media is not in line with the background evidence. The judge disregarded evidence in a "Human Rights Watch" report that a British citizen member of the Jammaat was arrested in 2018, beaten and injured having been identified as someone who had participated in anti-regime demonstration in London. He had been required to give access to his social media accounts.

14. Alternatively, when finding that only overt political criticism at a certain level would attract persecution, the judge had failed to take into account what the authorities would make of those political acts and what opinion they would impute to him.

Ground 2. Wrongful search of overt evidence of surveillance by a repressive regime

15. The judge finds that there is no overt evidence that the appellant's activities in protesting had been photographed by the Bangladeshi authorities. This is contrary to the guidance in KS(Burma)[2013] EWCA 67 and YB(Eritrea) [2008] Civ 360 that no positive evidence is necessarily required to demonstrate the likelihood of persecution where a regime is a repressive one which does not tolerate political dissent. On the country evidence, Bangladesh is a repressive regime and the appellant's Facebook posts are in the public domain.

Ground 3. Future expression of political dissent

16. Having found that the appellant was politically active and that he had come from a political family it was incumbent on the judge to consider the appellant's future conduct on his return to Bangladesh by analogy with HJ(Iran) [2010] UKSC 31.

Rule 24 Response

17. The respondent submitted a skeleton argument opposing all three grounds.

Submissions

18. Mr Symes took me to the evidence of the appellant's Facebook posts. There were references to the Prime Minister of Bangladesh being a "killer", "abusing power" and being "an illegal idiot" as well as satirical cartoons. He drew my attention to the evidence in the Human Rights Watch report with regard to the government's treatment of those who are critical of the government on social media. He also pointed to evidence of the legislative framework being tightened. Numerous people have been arrested for writing, sharing and posting material. He drew my attention to the fact that the hearing had lasted three and a half hours and that the judge had been taken through all of the background evidence. He submitted that the judge had noted that the appellant's posts were mainly "re-posts" and his own posts were "timid and ill-expressed". The judge had disregarded the evidence that individuals have been arrested for re-posting. The judge said he had regard to the report but in light of that evidence the judge's finding that re-posting would not be sufficient to attract the attention of the authorities meant that he had not taken into account the contents of the report or was alternatively irrational. The judge also failed to look at what the authorities would have made of this

material. At [48] and [56] the judge has made “value judgements” and his approach is incorrect.

19. As far as ground 2 is concerned there is little doubt that Bangladesh is a repressive regime. The judge’s statement at [56] that the appellant had not claimed to be photographed is erroneous. The Court of Appeal has repeatedly emphasised that that positive evidence is not required in this respect if a regime is repressive and does not tolerate political dissent. In fact, there was some evidence in the Human Rights Watch report that the Bangladeshi authorities do monitor social media. Further, because of the very secretive nature of such monitoring, it is difficult to obtain expert evidence in this respect. This was the basis on which the case was put in the skeleton argument.

20. Mr Symes’s submission was that the judge has misapplied the law in this respect by requiring the appellant to produce evidence that he was not capable of producing.

21. Finally in respect of Ground 3, Mr Symes argued that the skeleton raised the issue about how the appellant would behave on return to Bangladesh. The judge should have considered this aspect of the claim when evaluating the risk to the appellant. It has been accepted that he was politically active in the past in Bangladesh as was his family at a local level, that he has been posting on Facebook and that he has attended demonstrations in the UK. The judge should have made findings as to whether he would continue these activities but failed to do so.

22. Mr Melvin urged me to consider the decision in a holistic way against the background evidence and the failure of the appellant to produce evidence about his family in Bangladesh.

23. In respect of Ground 1, the appellant has never really been a member of the JI. He was active in his student branch in his student days. There has been a lack of engagement with political organisations or parties in the UK. He suggested that the appellant received advice that if he posted cartoons on his Facebook, he would be able to claim asylum in the UK. The judge looked at the cartoons and the posts. He attached weight to them, and his conclusions were open to him on the evidence before him. Mr Melvin’s submission that Ground 1 amounts to an attack on the weight that the judge gave to the evidence.

24. The judge did look at the Human Rights Watch Report and came to the conclusion that there was insufficient evidence that postings of this nature would be of interest to the Bangladeshi authorities. The judge found that the appellant’s political activities were sporadic. It is not the case that every political activist in Bangladesh will be targeted. The judge finds that the appellant has no profile. There is no evidence of the brother in law’s activities from anyone in Bangladesh. His activities were purely historical and include speculative posts on Facebook. There is nothing to suggest that the appellant would return to Bangladesh other than as a normal

citizen or that the authorities would demand to see evidence of his Facebook posts. Further the appellant did not address any of those issues in relation to his Facebook posts which were addressed in previous hearings. In the view of Mr Melvin, the judge's findings are adequately reasoned and rationally made.

25. Regarding Ground 2 the appellant did not produce evidence that any photographs of him demonstrating had been posted online or were in the public domain. There was no evidence that the Bangladeshi authorities have any interest in monitoring demonstrations in the UK nor that they have facial recognition technology or monitor Facebook posts.

26. As far as Ground 3 is concerned the appellant did not give evidence that he would continue to be politically active on his return to Bangladesh. It was not possible for the judge to make a finding in light of the lack of evidence. He is now 37 years old and has not been significantly active in the UK. When considered as a whole, the decision is sustainable

Analysis and Discussion

27. I note firstly that the grounds do not challenge any of the judge's factual findings about the scope of the appellant's political activities, rather they relate to the risk to him as a result of those activities.

Ground 1

28. The judge undertook a thorough evaluation of the background evidence in relation to the Bangladeshi authorities' attitude to Facebook posts from [49] to [54], carefully analysing the material produced by the appellant including newspaper reports and information about the Digital Security Act. I am satisfied that the judge was properly able to conclude from the evidence in the newspaper reports that;

> "the items which appear most likely to cause offence which the Appellant has posted on Facebook are the press cartoons. The newspaper articles in his objective bundle referring to arrest or prosecutions indicate something more serious than re-posting cartoons critical of the Bangladeshi government, the Awami League or Prime Minister Hasina" (My emphasis).

29. This was clearly part of the judge's overall analysis of that part of the evidence which consisted of newspaper reports.

30. The judge went on to consider the contents of Human Rights Watch report "Creating Panic". He specifically referred to the report at [54] where he stated:

> "Page 7 of the Human Rights Watch report "Creating Panic" notes that s57 Information and Communication Technology Act 2006 has been replaced by the Digital Security Act 2018 (DSA) which provides more broadly drawn restrictions on freedom of expression. The report states that:

> The DSA also targets online expression by ordinary citizens on platforms such as Facebook. Numerous people have been detained or harassed for writing, sharing or merely liking material on Facebook".

31. The judge was manifestly aware and took into account that individuals in Bangladesh can be targeted for merely "sharing" and "liking" critical material rather than making direct comments.

32. It was further properly open to the judge to state at [54] that:

> "The report does not state when the DSA came into effect, so it is not possible to assess whether the detention and harassment of numerous people for Facebook activities referred to is a reflection of the more broadly drawn restrictions of the DSA or simply the continuation of the application of s57 ICT Act. Further, no details of the nature of the persons targeted or the Facebook material are given by the report and the appellant tendered no evidence about the DSA other than the reference in the report".

33. This is an evaluation of the quality of the evidence and the weight he can give to this evidence, and I am in agreement with Mr Melvin in this respect.

34. However, given the contents of the Human Rights Watch report it was manifestly not open to the judge on the evidence before him to state at [56];

> "There was no evidence beyond the appellant's assertions that the Bangladeshi authorities had or often used computer programmes for facial recognition or for scanning Facebook posts".

35. The material in the Human Rights Watch report was wide ranging and referred to a schoolteacher being arrested and detained in 2018 because she had shared a Facebook post appealing for peace in an ongoing student protest. The report stated "numerous people have been detained or harassed for writing sharing or merely liking posts" as well as evidence from a journalist who reported that "the government announced that it had formed a nine member monitoring cell to detect rumours on social media" and that "the rapid action battalion (RAB), a paramilitary force implicated in serious human rights violations including extra-judicial killings and enforced disappearances has been tasked with monitoring social media of anti-state propaganda rumours fake news and provocations".

36. I am satisfied that the judge's conclusion at [56] in the light of this evidence was not sustainable. It may be that the judge was stating that there was no evidence of computer programmes per se. However, there was evidence of monitoring of digital material by the authorities and of an increase in legislative powers in relation the prosecution of anti-regime digital material and on a common-sense view this must involve some element of computerisation by virtue of the nature of the material being monitored. I am satisfied that in the light of this evidence it was not open to the judge to conclude that re-posting a satirical political cartoon

depicting the Prime Minister as “Lady Hitler” would not attract adverse attention from the authorities.

37. I note that a more recent CPIN which is dated January 2021 in relation to journalists bloggers and internet bloggers does not appear to have been taken into account by the judge presumably because the appeal was heard in November 2020 but not drafted until 21, 25 or 26 January 2021 and not promulgated until 28 January 2021 and therefore the judge was not aware of its existence. The CPIN addresses the increased use of digital surveillance and the associated legislation and refers to hundreds being arrested under the new DSA. Since this material was not before the judge, he cannot be criticised for failing to address it.

38. However, the question is whether these errors are material given the judge’s finding on the limitations of the evidence put forward by the appellant about how he operated his Facebook account. The judge noted that apart from an assertion that his Facebook account was “open”, the appellant had failed to address the gaps in his evidence about the operation of his Facebook account which had previously been raised by Judge Cockburn and Upper Tribunal Judge Frances in previous decisions. It was not submitted by Mr Symes that the appellant had tendered in evidence an email link to his account, nor that he had provided an edit history nor more evidence about his posts being “open” or the number of views. From reading the decision holistically, the judge’s reasoning is that the appellant has failed to demonstrate that these critical posts are in the public domain as he asserts and that they would therefore come to the attention of the authorities.

39. On this basis I am satisfied that although the judge has erred in his evaluation of the interest of the Bangladeshi authorities in critical Facebook posts, I do not find that this error is material because the judge has not erred in finding that the appellant has not demonstrated that the Bangladeshi authorities could access this material.

Ground 2

40. Although I am in agreement that KS (Burma) and YB (Eritrea) are authority for the proposition that no positive evidence is necessarily required to demonstrate the likelihood of persecution if a regime is a repressive one, I am satisfied from reading the decision as a whole that the judge was well aware that Bangladesh is a repressive regime. At [52] the judge refers to the April 2020 CPIN and comments that during 2018 there was a significant increase in arrests of opposition party activists. Secondly this error is immaterial for the same reasons as Ground 1 in that the judge was not satisfied that the appellant had demonstrated that his critical Facebook posts were capable of coming to the attention of the authorities and that his attendance at protests in 2018 was limited and sporadic. At [35] the judge noted the appellant’s submissions on the above authorities. The judge correctly had regard to BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36(IAC) and neither KS (Burma) nor YB

(Eritrea) are authority for the contention that every individual who participates in an anti-regime protest will be at risk merely by virtue of their attendance. It is important to note that the background material on Bangladesh does not suggest that there is a "pinch point" on arrival where returnees are routinely questioned about their activities in the UK.

Ground 3 – HJ(Iran)

41. The respondent's position was that it was not incumbent on the judge to consider whether the appellant would carry out activities in Bangladesh because the case was not put this way.

42. I am not in agreement. The skeleton argument clearly referred to HJ(Iran) and although the appellant did not give evidence about what he would do if returned to Bangladesh, it was incumbent on the Tribunal to consider this point for itself, particularly where the judge found that appellant had previously been politically active in student politics for the BICS, the student wing of the Jaamaat-e-Islami in Bangladesh, had been detained on one occasion, that his family were involved with politics at a local level and that he had carried out some political activities in the UK including attending demonstrations and posting on-line (albeit not publicly). The evidence before the judge was that the appellant had been active in BICS from 2000 until 2009 and had been President of his local college branch. The judge importantly did not find that the appellant's political activities were completely fabricated for the purpose of engineering an asylum claim but accepted that appellant had in the past expressed his opposition to the now ruling party. It is also apparent from the respondent's CPIN that the government routinely arrests, detains and tortures opposition party activists.

43. I have had regard to the authority of KK & RS (sur place activities, risk) (Sri Lanka) [2021] UKUT 130 (IAC) at [537] and [538] which states:

> "Beyond the application of the country guidance set out above, it is of critical
> importance for tribunals to have regard to wider principles of refugee law. The
> ultimate decision in any case is, after all, not whether an individual falls within
> the parameters of the guidance, but whether they have a well-founded fear of
> persecution for a Convention reason".
>
> "It is therefore essential, where appropriate, that a tribunal does not end its considerations with an application of the country guidance to the facts, but proceeds to engage with the HJ (Iran) principle, albeit that such an analysis will
> involve interaction with that guidance".

44. I am satisfied on this basis that it was a material error of law for the judge not to have gone on to consider what, if any activities the appellant would carry out on his return to Bangladesh and what the risk to him would be of

those activities. Mr Melvin's submission is that from reading the decision, it is clear that the judge would have found that the appellant would not have been politically active, but that is to second guess findings that have not been made in circumstances where the appellant is accepted to have a past political profile, and I reject it.

45. I am satisfied that this is a material error of law which warrants the decision being set aside with the findings below preserved so that the Tribunal can consider this important question.

46. I preserve the following findings

    a) The appellant was involved in student politics for the BICS prior to coming to the UK.

    b) His family are involved in politics at a local level.

    c) In the UK his political activity has been limited and sporadic

    d) The appellant has attended some demonstrations in London in 2018.

    e) The appellant has posted and re-posted anti-government material on-line but has failed to demonstrate that the operation of his Facebook page means that the material posted will come to the attention of the authorities.

Disposal

47. This is the second time that this appeal has come before the First-tier Tribunal. The appellant did not challenge the judge's findings on the extent of the appellant's political activities. Although in his oral submissions, Mr Symes stated that he did not agree with the judge's view that the posts were "timid and ill expressed", it is pertinent to note that the grounds did not assert that the judge's findings in respect of these posts were inadequately reasoned, nor that the judge had made factual findings in respect of the appellant's individual activities that were not open to him. On that basis, the extent of fact finding necessary to determine the appeal is limited because the issue to be addressed by the Tribunal is one of potential risk on return because of any future activities. I am satisfied that this issue is discrete and can be addressed by the Upper Tribunal and does not warrant the appeal being heard de novo. Both representatives were of the view that the appeal could be re-made at the Upper Tribunal.

Notice of Decision

48. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

49. The decision of the First-tier Tribunal is set aside with the findings at [46] above preserved.

50. The appeal is adjourned for re-making at the Upper Tribunal.

Anonymity Direction

51. I maintain the anonymity order of the First-tier Tribunal pursuant to Rule 14 of the 2008 Procedure rules.

> "Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Directions

52. The appellant is to file and serve a skeleton argument on the Tribunal and the respondent addressing the HJ(Iran) issue no later than 14 days prior to the resumed hearing. Any further evidence must be accompanied by the relevant notices.

53. The respondent is to file and serve a skeleton argument/position statement on the Tribunal and the appellant addressing the same issue in the same timeframe.

Signed R J Owens Date 7 February 2022

Upper Tribunal Judge Owens