IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos.: UI-2023-004643

First-tier Tribunal Nos:
PA/52375/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 19th of June 2024

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE FARRELLY

Between

M H
[ANONYMITY DIRECTION MADE]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Saifolahi, Counsel instructed by Morgan Hill Solicitors
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard at Field House on Monday 3 June 2024

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

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Cary dated 25 September 2023 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 21 July 2022 refusing his protection claim for a second time. The Appellant had an earlier appeal dismissed on 24 January 2018 which decision was upheld by the Upper Tribunal when refusing permission to appeal on 25 June 2019. The earlier decision of First-tier Tribunal Judge Bulpitt ("the First Appeal Decision") and the refusals of permission to appeal appear at pages 2074-2089 of the composite hearing bundle.

2. The Appellant thereafter made further submissions on 18 January 2021, continuing to rely on his profile as a supporter of the BNP in Bangladesh and the UK and also relying on a risk to him from his sur place activities in the UK.

3. Judge Cary rejected the Appellant's claims, concluding that the Appellant was only a low-level supporter of the BNP, and that his sur place activities would not come to the attention of the authorities in Bangladesh. He therefore dismissed the appeal.

4. The Appellant appealed the Decision on ten grounds summarised as follows:

   Ground 1: the Judge failed to consider evidence of online threats made against the Appellant.
   Ground 2: the Judge failed to consider newspaper articles reporting on the Appellant's sur place activities.
   Ground 3: the Judge failed to consider evidence of the Appellant's sur place activities broadcast on news channels.
   Ground 4: the Judge failed to take into account that the Appellant's online posts would constitute an offence under the Digital Security Act 2018 (DSA) as detailed in the Respondent's Country Information and Policy Note entitled "Journalists, Publishers and Internet Bloggers: Bangladesh" dated January 2021 ("the Media CPIN").
   Ground 5(1): the Judge failed to consider evidence of State digital and human surveillance, in particular failing to apply what was said by the Court of Appeal in YB (Eritrea) v Secretary of State for the Home Department [2008] EWCA Civ 360 ("YB (Eritrea)").
   Ground 5(2): the Judge failed to take into account the evidence of the Appellant's witness, Mr Mahidur Rahman, who is said to be a prominent member of the BNP in the UK.
   Ground 6: the Judge incorrectly applied the Upper Tribunal's guidance in BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36 ("BA (Iran)").

Ground 7: the Judge gave inadequate reasons for finding that the Appellant would close his Facebook account on return to Bangladesh. The Judge failed to consider whether the Appellant would continue his opposition to the authorities on return to Bangladesh.
Ground 8: the Judge failed properly to consider the risk occasioned by the viewing of the Appellant's Facebook posts.
Ground 9: the Judge failed to consider the impact of the Appellant's removal on his wife who is currently receiving kidney dialysis treatment in the UK.

5. Permission to appeal was refused by First-tier Tribunal Judge Gumsley on 15 October 2023 in the following terms:

> "1. The application appears to have been made in time.
> 2. The majority of the Grounds of Appeal (1-8) might be categorised as being various criticisms of the way that FtT Judge Cary dealt with the whole issue of sur place activity.
> 3. However, what is not referred to in the Ground of Appeal is the fact that the FtT Judge was obliged to consider matters in the context of a previous determination which had been comprehensive and adverse to the Applicant.
> 4. In his consideration of the case the FtT Judge is plainly aware of the principles set out in Devaseelan, and sets out the 'fresh evidence relied upon'. It is also clear from the Decision and Reasons document itself that the FtT Judge considered matters with considerable care. In fact, and contrary to the Grounds advanced, the FtT Judge makes reference to the evidence advanced as to threats and the evidence in relation to newspaper articles. The FtT Judge also spent time specifically considering the video evidence, including of interviews on broadcast channels. However, the FtT Judge had concerns about the fresh evidence and adequately explains why. The FtT Judge referenced various aspects of the objective evidence, and carried out a thorough analysis of the matters before him. The FtT Judge was well aware of the relevant case law on the issue of sur place activity and properly applied it to the facts as he found them to be. The findings made were ones properly open to the FtT Judge on the evidence and he provided detailed reasons for doing so. The FtT Judge is not obliged to refer to all the evidence (which was substantial in this case) before him.
> 5. A further Ground relates to the position of the Appellant's wife. However, although the FtT Judge was well aware of the wife's medical issue, it does not appear that any argument was advanced as to medical matters at the hearing. It is not advanced in the ASA.
> 6. In all the circumstances I am not satisfied that it is arguable that the FtT Judge made a material error of law. Permission to appeal is therefore refused on all Grounds as pleaded."

6. The Appellant renewed his application to this Tribunal on the same grounds. In a lengthy decision dated 15 January 2024, Upper Tribunal Judge Gill refused permission on the majority of the grounds but granted permission on ground 5(1) on the basis that it was arguable. She gave a direction under rule 22(2)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules") in accordance with the guidance given in EH (PTA: limited grounds; Cart JR) Bangladesh [2021] UKUT 0117 (IAC) ("EH") limiting the grant of permission.

7. Also in accordance with the guidance in EH, the Appellant applied under rule 5(2) of the Rules to vary the direction in order to pursue the other grounds pleaded. That application was initially made dated 6 February 2024 but later amended by a document dated 22 February 2024 ("the Amended Rule 5(2) Application").

8. As set out in the Amended Rule 5(2) Application and confirmed by Ms Saifolahi at the outset of the hearing before us, the Appellant no longer pursues grounds 6, 8 and 9 and we therefore need say no more about those.

9. The appeal therefore comes before us to determine whether there is an error of law established by ground 5(1) and to consider whether we should grant permission to appeal on the remaining grounds which are still pursued and if we do so whether those grounds disclose an error of law in the Decision. If we conclude that the Decision does contain an error of law, we have to consider whether to set it aside in whole or in part. If we set it aside, we have to go on either to re-make the decision ourselves or to remit the appeal to the First-tier Tribunal for re-making.

10. We had before us a voluminous composite hearing bundle running to 2113 pages (2115 pages pdf) to which we refer below as [AB/xx]. As Mr Terrell submitted, and Ms Saifolahi very fairly accepted, the evidence in that bundle (and in the Appellant's bundle before Judge Cary) is poorly organised. Evidence in various categories is scattered among the documents making the issues very difficult to discern. Ms Saifolahi submitted that the existence of so much evidence might suggest that the Appellant has a stronger case. However, Judge Cary's task of identifying the relevant issues and evidence was made the more difficult by the poor presentation of the evidence by those instructed by the Appellant.

11. We have referred above to the Amended Rule 5(2) Application. The application which appears in the composite hearing bundle was not the amended version and therefore that appears separately. We also had a reply to the Amended Rule 5(2) Application from the Respondent which also stood as his Rule 24 Reply and skeleton argument ("the RSA").

12. Notwithstanding what we say about the poor organisation of the documentary evidence, we express our gratitude to Ms Saifolahi and Mr Terrell for their excellent submissions guiding us through the relevant issues and evidence.

13. At the conclusion of the hearing, we indicated that we would reserve our decision and provide that in writing which we now turn to do.

DISCUSSION

Ground 5(1): Misapplication of YB (Eritrea)

14. We begin with the ground on which the Appellant has been granted permission (ground 5(1)). The Appellant relies on the following passage from the judgment in YB (Eritrea):

> "18. As has been seen (§7 above), the tribunal, while accepting that the appellant's political activity in this country was genuine, were not prepared to accept in the absence of positive evidence that the Eritrean authorities had 'the means and the inclination' to monitor such activities as a demonstration outside their embassy, or that they would be able to identify the appellant from photographs of the demonstration. In my judgment, and without disrespect to what is a specialist tribunal, this is a finding which risks losing contact with reality. Where, as here, the tribunal has objective evidence which 'paints a bleak picture of the suppression of political opponents' by a named government, it requires little or no evidence or speculation to arrive at a strong possibility – and perhaps more – that its foreign legations not only film or photograph their nationals who demonstrate in public against the regime but have informers among expatriate oppositionist organisations who can name the people who are filmed or photographed. Similarly it does not require affirmative evidence to establish a probability that the intelligence services of such states monitor the internet for information about oppositionist groups. The real question in most cases will be what follows for the individual claimant. If, for example, any information reaching the embassy is likely to be that the claimant identified in a photograph is a hanger-on with no real commitment to the oppositionist cause, that will go directly to the issue flagged up by art 4(3)(d) of the Directive."

15. The Respondent for his part in the RSA makes the point that YB (Eritrea) is now quite dated. It has been considered in other cases since. The Respondent makes reference to the Court of Appeal's judgment in WAS (Pakistan) v Secretary of State for the Home Department [2023] EWCA Civ 894 as follows:

> "84. I paraphrase a question which Phillips LJ asked Mr Holborn in argument, 'What evidence did the UT expect?' It is very improbable that there would be any direct evidence of covert activity by the Pakistani authorities, whether it consisted of monitoring demonstrations, meetings and other activities, monitoring social media, or the use of spies or informers. I do not consider that Sedley LJ was suggesting, in paragraph 18 of *YB (Eritrea)*, that a tribunal must infer successful covert activity by a foreign state in the circumstances which he described. He was, nevertheless, making a common-sense point, which is that a tribunal cannot be criticised if it is prepared to infer successful covert activity on the basis of limited direct evidence. Those observations have even more force in the light of the great changes since 2008 in the sophistication of such methods, in the availability of electronic evidence of all sorts, and in the ease of their transmission. To give one obvious example, which requires no insight into the covert methods which might be available to states, it is very easy for an apparently casual observer of any scene to collect a mass of photographs and/or recordings on his phone, without drawing any adverse attention to himself, and then to send them anywhere in the world."

16. It is worth noting that this passage appears in a section which sets out the evidence which there was in that case before the Tribunal both as expert evidence and background evidence to the effect that the Pakistani authorities had the means and motivation to carry out monitoring and surveillance of opposition members in the position of the appellant in that case. That underlines what is there said and the submission made by Mr Terrell that the ability to demonstrate State surveillance has also moved on since YB (Eritrea). Whilst we accept what we understand to be Sedley LJ's proposition in YB (Eritrea) that a State is unlikely to openly advertise the extent of its surveillance and monitoring of opponents' activities abroad such that an appellant cannot be expected to provide specific evidence about this, it is likely in the current global environment and with advances in online technology that more evidence is likely to be available than was the case in 2008.

17. In any event, returning to YB (Eritrea), the effect of what is there said is that an appellant bears no burden of showing that his activities will have come to the attention of the authorities but rather that he can be expected to demonstrate a risk based on background and other evidence about the extent of interest which the State in question has in its opponents. There is of course also an issue about whether the State in question would be aware of the individual appellant based on what are or are not accepted to be that appellant's past activities and profile.

18. We turn then to what was said about YB (Eritrea) in the Decision as follows:

> "51. It is still the Appellants case that his activities in the United Kingdom are reasonably likely to put him at risk on return. Even opportunistic activity sur place is not an automatic bar to asylum under the immigration rules. It is evident that activities other than bona fide political protest can create refugee status sur place if a fear of persecution arising from such activities is objectively well founded - **YB (Eritrea) v SSHD [2008] EWCA Civ 360**. It follows that an applicant who has participated in political protests or other activities in the United Kingdom simply to bolster his or her asylum claim may still succeed with a claim to international protection unless the authorities in the home state are likely to treat the activities as insincere and opportunistic or are unlikely to know about them.
>
> 52. The Appellant must first establish that it is reasonably likely that the authorities in Bangladesh or others who would wish to cause him harm will become aware of his sur place activities. Where an individual relies upon activities in the UK, typically the issue of whether the authorities of the individual's own country will be aware of those activities raises questions of, for example, surveillance and intelligence gathering at demonstrations or monitoring of internet activity (see, for example, **YB (above)** and **AB & others (internet activity – state of evidence) Iran [2015] UKUT 00257**.) Even if the Appellant can establish that he attended one or more protests, demonstrations, meetings and political debate and has engaged in other political activities including posting on Facebook that does not mean that he is reasonably likely to be at risk on return. It is not enough for the Appellant simply to establish that he was involved in such activities without

producing any evidence that the authorities would be concerned about them or even that they were or would be aware of them.

53. General guidance on sur place activities can be found in **BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36**. I need to make a judgment about the risk on return for the Appellant having regard to his sur place activities. In this type of case the factors that bear on that judgment can be conveniently placed under four main heads: (i) the type of sur place activity involved; (ii) the risk that a person will be identified as engaging in it; (iii) the factors triggering inquiry on return of the person and; (iv) in the absence of a universal check on all entering the country, the factors that would lead to identification at the airport on return or after entry. For each factor there is a spectrum of risk. The factors are not exhaustive and may overlap."

19. This passage readily identifies the points we have already made about YB (Eritrea) placed in the current context. Judge Cary recognises that even a cynical involvement in sur place activities would place an appellant at risk if the State in question was concerned about opponents at that level and had the means and motivation to monitor and conduct surveillance abroad. The issue is whether the State in question would have the means and more importantly the motivation to do so. Judge Cary points to more recent cases where the Tribunal has been in the position to issue guidance about a State's interest in its opponents albeit in the rather more obvious case of Iran. More importantly, as the Judge says at [52] of the Decision, the Appellant has to show that the Bangladeshi State would be concerned about the activities in which he has been involved.

20. It is also important to note that the foregoing passage from the Decision is set against the background in this case of the First Appeal Decision (as Judge Gumsley pointed out when refusing permission on all grounds). At [39] of the Decision, Judge Cary refers to the evidence about the Appellant's issues with the authorities in Bangladesh being "broadly the same as that produced to and rejected by FTTJ Bulpitt". Judge Cary's reference to YB (Eritrea) also follows his consideration of the background evidence about the extent of interest by the Bangladeshi authorities in their opponents at [34] to [38] of the Decision leading to his conclusion that the evidence about the Appellant's previous issues was largely as had already been rejected in the First Appeal Decision. In that context, at [45] of the Decision, Judge Cary refers to and adopts Judge Bulpitt's findings that the Bangladeshi authorities had no adverse interest in the Appellant based on what the Appellant claimed were his activities in Bangladesh. Judge Cary went on to consider the further evidence about events in Bangladesh at [46] to [49] of the Decision but concluded that it did not alter the previous findings. Those findings are not the subject of challenge.

21. As we understood Ms Saifolahi to accept, therefore, the focus of the challenge to the Decision is firmly on the findings in relation to sur place activities. The starting point however is that the Appellant is not someone in whom the Bangladeshi authorities have any prior interest. As we also understood Ms Saifolahi to accept, therefore, the crux of the case is

whether the nature and extent of the Appellant's activities and profile in the UK would bring him to the attention of the Bangladeshi authorities and put him at risk as a result of that attention.

22. Judge Cary, having identified the four relevant factors at [53] of the Decision, considered those thereafter. At [54] to [59] of the Decision, he considered the extent of the Appellant's support for and roles within the BNP both in Bangladesh and the UK, taking into account the findings in the First Appeal Decision. He took into account at [60] of the Decision background evidence about the interest of the Bangladeshi authorities in expatriates opposed to the State. He then went on to look at background evidence relating to State opposition voiced in the media.

23. At [62] of the Decision, the Judge considered the evidence about the Appellant's political activities in the UK. The Judge thereafter reviewed the evidence of Facebook posts provided by the Appellant taking into account the guidance given by this Tribunal in XX (PJAK – sur place activities – Facebook) Iran [2022] UKUT 0023 ("XX (Iran)").

24. Having reached findings in that regard and concluded that there was no evidence that the Bangladeshi authorities hack Facebook or "scrape" data from that source, Judge Cary continued to the following conclusions:

> "66. Simply because someone's Facebook post may have been shared or viewed by others does not mean that that author is reasonably likely to be at risk. The original Facebook posts and any copy shared by other users cannot be viewed after being deleted. Upon deletion of a Facebook account all comments likes and shared content is removed. The Appellant will no doubt close his Facebook account and not volunteer the fact of a previously closed Facebook account prior to his removal. The deletion of a Facebook account does not equate to persecution, because there is no fundamental right protected by the Refugee Convention to have access to a particular social media platform. The deletion of the Appellant's account will not breach the **HJ (Iran)** principle in view of my analysis of the reasons for his sur place activities.
> 67. No doubt that the Appellant has negative views in relation to the current government in Bangladesh like many millions of other individuals in Bangladesh and elsewhere but that does not mean it is reasonably likely that he will be at risk on return. The evidence is that criticism of the government is commonplace in Bangladesh and the concerns expressed by the Appellant about the authorities are no different in substance to those that are regularly expressed by citizens of Bangladesh in their own country without repercussions. No doubt the Appellant has gone to considerable efforts to bolster his case. That was certainly the view of FTTJ Bulpitt who when specifically considering the Facebook extracts and newspaper articles produced at the hearing concluded that they 'indicate a person who is seeking to construct an asylum claim'. I agree with that assessment. There is no reason why he should not be removed and returned to Bangladesh. I reject his claim to international protection."

25. What is said in YB (Eritrea) cannot be read in isolation. Even in that case, the Court of Appeal made the comments in the context of the evidence (or

lack of it) in the case before it. The point there made is that risk is dependent upon interest by the authorities in that individual. That was the point which Judge Cary was considering. He was also doing so with the benefit of general guidance following YB (Eritrea) about the extent of monitoring and surveillance which is possible (in particular of Facebook - (XX (Iran)), background evidence in relation to the means and motivation of the Bangladeshi authorities in that regard ([60] to [64] of the Decision) and in the context of more detailed guidance produced since YB (Eritrea) about the factors which are relevant to consider when looking at risk arising from sur place activities (BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36)).

26. The approach of Judge Cary contains no error of law provided that the findings which underpin his analysis which follows the reference to YB (Eritrea) withstand scrutiny.

27. As discussed at the hearing, therefore, the error is less concerned with the application of YB (Eritrea) than with whether Judge Cary's findings about the Appellant's activities and profile and risks arising therefrom were open to him.

28. For the foregoing reasons, we conclude that there is no error established by ground 5(1) taken in isolation. However, we have to go on to consider the other grounds which the Appellant seeks to pursue.

29. As we have already explained and Ms Saifolahi accepted, in order for the Appellant to be able to pursue those grounds, he needs permission to appeal. He has to show therefore that the errors are arguable, and that Judge Gill was wrong to refuse permission on those grounds.

30. We begin with those grounds which we consider to be unarguable.

Ground 4: Failure to take into account that the Facebook posts would constitute a criminal offence under the DSA as set out in the Media CPIN

31. Judge Cary dealt with this issue at [60] and [61] of the Decision as follows:

> "60. I have considered what is said about sur place activities in section 10 of the Political CPIN. It is said there in reliance on the DFAT report that 'the BNP has a large diaspora network and engages strongly with expatriate Bangladeshi citizens and people of Bangladeshi descent living in other countries …DFAT does not know whether diaspora organisations report back to the domestic party on activities of their local BNP branch.' (10.6.4). According to a Freedom House report, Freedom on the Net 2019, 'The government is said to have targeted expatriate Bangladeshis for criticizing the government online. According to a senior officer of the Criminal Investigation Department (CID) of the Bangladesh Police, cases were filed against at least 12 expatriates in the United Kingdom, Malaysia, Saudi Arabia, Qatar, Australia, and Oman for allegedly spreading anti state rumours on social media.' (10.6.13).

> 61. The Media CPIN indicates that the authorities in Bangladesh are sensitive to criticism of the state, particularly where the official narrative as to the country's origins are challenged. The authorities sometimes use legal provisions, such as the Information and Communication Technology (ICT) Act or Digital Security Act (DSA), to harass, arrest, detain or prosecute persons who have published material that is deemed to be critical of the state, the Constitution or the ruling party, and thus considered seditious or defamatory (2.4.2). The Respondents view as expressed in the CPIN is 'Whether a person is at risk of persecution or serious harm from the state will depend on particular factors specific to them, for example: the subject matter and legality of the material published and the publicity attracted of said material. 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 opinion or religion (2.4.7)"

32. The point made in the grounds and repeated by Ms Saifolahi in her submissions is that the Judge failed to note in particular the extra-territorial scope of the DSA. She drew our attention in particular to section 4.3 of the Media CPIN dealing with the DSA at [AB/1564] and section 7 entitled "Sur Place Activity" at [AB/1585-6]. We accept that the latter section in particular does provide evidence that the DSA would permit the Bangladeshi authorities to prosecute for offences committed outside Bangladesh where those would constitute an offence inside Bangladesh.

33. However, there is nothing to suggest that Judge Cary did not take that into account. He took into account at [60] background evidence showing that criminal cases had been brought against expatriates (albeit not specifically under the DSA). As Mr Terrell submitted, and we accept, the Judge's rejection of risk arising from the Appellant's Facebook posts was not based on the territorial scope of legislation which might enable the Bangladeshi authorities to prosecute but on the fact that those posts would not be of interest to the authorities because of the Appellant's low-level opposition.

34. There is therefore no arguable error established by ground 4. Judge Gill was right to point out that this ground ignores that "the judge was plainly aware of the possibility of criminal cases being filed by the Bangladeshi authorities".

Ground 5(2): Failure to consider the evidence of Mr Mahidur Rahman

35. The evidence of Mr Rahman is dealt with at [58] and [59] of the Decision as follows:

> "58. I also note that Mr Mahidur Rahman gave evidence before FTTJ Bulpitt. He found that evidence to be unreliable. He did not find Mr Rahman to be a credible witness and considered that his primary motivation was to bolster the Appellant's claim and to support his friend.
> 59. It is now said that the Appellant is chief advisor to the JSD in the United Kingdom. However, Mr Hussain does not say in his letter of November 15 2020 when the Appellant was appointed, why he was appointed or what his

> role as chief advisor is. He makes no mention in his letter of the Appellant's involvement with the Zia Parishad. Mr Moshiur Rahman made no reference to the Appellant's appointment as chief advisor or his involvement with Zia Parishad in his statement of November 7 2022 although he claims to have known the Appellant for more than 25 years. Although Mr Mahidur Rahman said in his statement of the same date that the Appellant is general secretary of Zia Parishad he made no mention of his role as chief advisor to the JSD. He did not explain what the role of general secretary involved. I have nothing from Dr Imtiaz who was said to have appointed the Appellant general secretary of Zia Parishad to confirm that appointment or to explain the aims and activities of Zia Parishad. I also have nothing from the Appellant's wife or his sons to support the Appellant's claimed activities in the United Kingdom. [S] is now aged 20 and [S2] is 23 so they are of an age when they could give evidence to support what the Appellant has to say about his activities. Indeed no one of any importance from the BNP in the United Kingdom appeared at the hearing to give evidence on the Appellants behalf which is surprising in view of his claimed involvement with the BNP both in the United Kingdom and Bangladesh. The only logical conclusion is that the Appellant is not as politically active in the UK as he claims to be."

36. The challenge to the Judge's findings is only in relation to the remark that no-one of importance from the BNP had attended to give evidence for the Appellant. It is said that Mr Mahidur Rahman is the International Affairs Secretary of the BNP National Executive Committee and therefore "an individual of very considerable importance within the BNP in the United Kingdom".

37. The difficulty for the Appellant in this regard is two-fold. First, as Judge Gill pointed out, the evidence of Mr Rahman, whatever his status, was considered but Judge Cary did not find his evidence credible because it was inconsistent with evidence from others in the party. Second, Mr Rahman had also given evidence before Judge Bulpitt who had also found him not to be credible ([§29] of the First Appeal Decision at [AB/2084]). Even though Mr Rahman may hold the role he says he does (and I do not understand that to have been disputed), Judge Cary was entitled not to accept his evidence on the basis that it was inconsistent with evidence from other more senior BNP figures who had not provided evidence.

38. Ground 5(2) is for those reasons not arguable. Judge Gill was right so to conclude.

Ground 7: Inadequacy of reasons for finding that Appellant would delete his Facebook account on return

39. We have already set out [66] of the Decision above. That follows on from what is said at [51] of the Decision (also cited above) regarding the possibility of risk including to an individual who fabricates a claim based on sur place activities and is not genuinely politically motivated.

40. It is evident that Judge Cary did not accept that the Appellant is politically motivated or at least not to the extent he claims. The Appellant's activities in Bangladesh were not accepted. The events which the

Appellant claimed had occurred in Bangladesh were rejected as not credible by Judge Bulpitt (see [§20-34] at [AB/2081-2086]). Those formed the starting point for Judge Cary. As Judge Cary found at [67] of the Decision, whilst the Appellant may hold negative views about the current government in Bangladesh, he is no different to many millions of others. In other words, as a low- level supporter of the BNP, his views would not place him at risk. Judge Cary also there adopted Judge Bulpitt's finding that the Facebook posts and newspaper articles indicated someone who was seeking to fabricate an asylum claim. It was a logical inference therefore that the Appellant would delete that Facebook account on return.

41. Mr Terrell also pointed out, based on the finding that the Appellant would not have come to the attention of the Bangladeshi authorities because of his sur place activities, that there would be no reason for those authorities to question the Appellant about any Facebook account on return (see [64] and [65] of the Decision). As Judge Cary found, the Appellant would not be likely to volunteer the existence of the account.

42. Judge Gill rejected this ground for the following reasons:

> "This ignores the fact that the determination, when considered as a whole, shows that the judge did not find the appellant at all credible. It also ignores the judge's finding at para 67, that the appellant had gone to considerable lengths to bolster his case and that he agreed with the view of FtTJ Bulpitt who had said, when specifically considering the Facebook extracts and the newspaper articles produced at the hearing before Judge Bulpitt, that they '*indicate a person who is seeking to construct an asylum claim'.* In view of the judge's adverse credibility assessment and, in particular, the finding at para 67, he was unarguably entitled to find, at para 66, that the appellant can be expected to close his Facebook account and not volunteer the fact of a previously closed Facebook account prior to his removal."

43. We cannot improve on that reasoning for finding this ground to be unarguable.

Grounds 1-3:

44. That leaves us then with the first to third grounds which taken together assert that the Judge failed to take into account evidence about online threats made to the Appellant, and newspaper articles and news broadcasts about his sur place activities.

45. As the issues developed in the course of the hearing before us, these grounds assumed a greater importance for the Appellant. As we have already pointed out, what is said in YB (Eritrea) and the Judge's application of that judgment are irrelevant if the Judge was entitled to find that the Appellant is only a low-level supporter of the BNP and would not therefore be of interest to the Bangladeshi authorities.

46. Judge Gill rejected those grounds for the following reasons:

> "Ground 1: The fresh evidence as was explained to the judge (para 7 of the judge's decision) did not include evidence of the threats. This is relevant, given that the appellant's bundle before the judge ran to 1555 pages and the respondent's bundle to 516 pages. In any event, I have looked at the evidence at pages 104-114, 233-238, 262-265 and 590-596. Even if they were genuine threats, it is unarguably plain that they are from individuals. It was not the appellant's case that he was at real risk of persecution at the hands of non-state actors in Bangladesh. None of the evidence at pages 104-114, 233-238, 262-265 and 590-596 arguably undermines the judge's conclusion that the appellant had not produced evidence to show that it was reasonably likely that his activities had come to the adverse attention of the Bangladeshi authorities (para 64).
> Ground 2: I accept that the judge did not mention in terms the newspaper articles from 2022 and 2023. However, this evidence was (again) not specifically identified to the judge as being part of the fresh evidence relied upon in the appeal, as is clear from para 7 of the judge's decision. This is relevant in the context of the fact that there was substantial evidence before the judge. Furthermore, there is nothing that indicates that this evidence was arguably material to the outcome.
> Ground 3: This ground simply ignores para 8 of the judge's decision, where he set out the video evidence that he was shown, and para 62 where he specifically referred to the video evidence."

47. We have decided that, given the prominence of these three grounds in the Appellant's case before us, and because Judge Gill (and we) accept that, to some extent at least, Judge Cary did not deal expressly with some of the evidence on these issues, it would be appropriate to grant permission to appeal on all three grounds. We turn then to consider whether any of them disclose an error of law.

Ground 1: Failure to consider evidence about online threats

48. Ms Saifolahi took us to [§34-35] of the Appellant's witness statement at [AB/57-58] where he says the following:

> "34. In the refusal letter (RL) paragraph [62]-[68], I have already explained that I hold various positions at different levels due to my prominent leadership and activities in my long-standing political career. I did provide substantial evidence of my social media activities which is accepted by the case owner that were critical of the Bangladesh government [paragraph 83, RL]. I am content that my social media activities were widely circulated on various platforms. **I have received threats for my activities. The case owner has failed to understand that my Facebook is open to the public and threats from different parts of the world are not inconsistent as they are all linked with the Bangladesh government and its agencies. My facebook posts were viewed by 181K, 53.7K [CAB/56-115, 148-163, 233-238, 241-246, 760-819].**
> 35. 'Street-level informers working for the security agencies, such as the police and RAB [Rapid Action Batallion], closely monitor BNP leaders and activists. In Bangla, informers are known as source, former or, in student circles, tiktiki (lizards). BNP leaders and activists all portrayed informers as critical for the state to keep tabs on the movements and plans of the

> opposition. In some cases, particularly for elected representatives and high-profile leaders, informers literally followed them, while for others it was more a matter of informers monitoring their activities when they attended to their businesses or met with other BNP members. This monitoring represents a significant burden, meaning that opposition party members are often unable to continue their political or business activities, or even go home, fearing arrest or worse'. [CAB/440-509, CPIN 10.5.1]"
> [our emphasis]

49. The online threats on which reliance is placed are at [AB/142-153], [AB/271-276], [AB/300-303], and [AB/1051-1056]. Ms Saifolahi referred us to the Respondent's decision under appeal and the acceptance that some of these messages could be seen as threatening. Ms Saifolahi submitted that those messages had to be seen in the context of what is said at [§34] and [§35] of the Appellant's statement set out above. The inference to be drawn is that the individuals posting those threats are associated with the State.

50. There are a number of difficulties with the Appellant's case. The first is that the Appellant's profile as set out at [§34] of his statement was not accepted by Judge Cary for the reasons given at [54] to [59] of the Decision, based in part on the previous findings in the First Appeal Decision. Further, as Mr Terrell pointed out, the Appellant's assertion that his Facebook posts have been widely circulated and would therefore have come to the attention of the Bangladeshi authorities is also rejected for the reasons given at [63] to [65] of the Decision. The inference that the Appellant seeks to draw therefore from the threats that they are made by individuals linked with the Bangladeshi State is at odds with Judge Cary's findings.

51. The passage at [§35] of the Appellant's statement is lifted directly from the Respondent's Country Policy and Information Note entitled "Bangladesh: Political parties and affiliation" dated September 2020 ("the Political CPIN") which appears at [AB/478-547]. Judge Cary cites directly from the Political CPIN at [60] of the Decision (cited above) when considering the risk from the Bangladeshi State to opponents outside Bangladesh. The section cited by the Appellant in his statement is entitled "Surveillance" and it is clear from the context of that section that the paragraph relied upon by the Appellant relates to surveillance within Bangladesh and not outside it.

52. We also observe that the threats on which the Appellant relies all appear to come from named individuals and there is no evidence to suggest that they are linked to the Bangladeshi State. We also observe that it is difficult to ascertain from the posts in the bundle whether they actually appear on the Appellant's phone (although we are prepared to accept for current purposes that they do). This is relevant in light of what Judge Cary said about Facebook evidence (relying on XX (Iran)) at [63] of the Decision as follows:

> "I have also considered the evidence of Facebook posting to be found in the Appellant's bundles. Mr Plowright emphasised that many of these posts had been viewed many times. In assessing the relevance of the Facebook account I have considered the general guidance given in **XX (PJAK – sur place activities – Facebook) Iran (2022) UKUT 0023.** Production of a small part of a Facebook or social media account, for example, photocopied photographs, may be of very limited evidential value in a protection claim, when such a wealth of wider information, including a person's locations of access to Facebook and full timeline of social media activities, readily available on the 'Download your Information' function of Facebook in a matter of moments, has not been disclosed (which is the case here). It is easy for an apparent printout or electronic excerpt of an internet page to be manipulated by changing the page source data. For the same reason, where a decision maker does not have access to an actual account, purported printouts from such an account may also have very limited evidential value. The Appellant has produced nothing other than a series of posts and accordingly they have to be considered in light of what is said in **XX**."

53. Although we accept that Judge Cary did not refer specifically to the online threats on which the Appellant relies, no error arises when that material is considered in the context of the Judge's other findings about the Appellant's profile and the guidance regarding the production of online evidence. As Mr Terrell pointed out, there is no reference to the evidence of threats either in the summary of the further submissions at [4] of the Decision, or the summary of the Appellant's case at [7] of the Decision (although we accept that there is a brief mention of them at [13] of the Appellant's skeleton argument at [AB/41]).

54. The Appellant's case is not that he would be at risk from non-State agents. There is nothing in the evidence to suggest that, even if threats have been made as the evidence purports to show, those individuals have any links to the Bangladeshi authorities. Any failure to have express regard to this evidence is not material in the context of the other findings.

Ground 2: Failure to have regard to newspaper articles of the Appellant's sur place activities

55. Ms Saifolahi drew our attention to what is said in the Appellant's witness statement about newspaper reports which he says refer to him and demonstrate the risk he would face on return. Those are dealt with at [§20-26] of the statement at [AB/54-55]. We do not need to set out what is there said as that relates to newspaper articles in 2019 which are dealt with at [46-49] of the Decision. Judge Cary there provided cogent reasons for rejecting those articles. Those paragraphs are not expressly challenged in the pleaded grounds.

56. The pleaded challenge is to a failure to consider "numerous newspaper articles from 2022 and 2023" which are said to detail the Appellant's sur place activities including his role in Zia Parishad. As Judge Gill remarked when refusing permission on this ground, none of this evidence was specifically mentioned by the Appellant's advocate when summarising the

new evidence said to be of importance ([7] of the Decision). We also observe that none of it is mentioned in the Appellant's witness statement which post-dates the newspaper articles. The Appellant's skeleton argument ([AB/39-49] refers to the Appellant being "identified by name and image in Bangladeshi newspapers, online publications as well as Bangladeshi TV" but does not condescend to any detail in that regard.

57. We accept that there may be a few more than two articles which Mr Terrell referred to in his submissions. Nevertheless, the pleaded grounds mention only the following documents:

(a) Evidence regarding the circulation of the newspapers ([AB/263-264]. We do not consider that to take matters any further.
(b) The content of articles at [AB/198-199] (dated 5 May 2023), [AB/210-211] (dated 6 May 2023), [AB/214-215] (dated 5 May 2023), [AB/240-244] (dated 25 May 2023) and [AB/291-293] (dated 7 October 2023).

58. We accept that those articles appear to name the Appellant as the General Secretary of Zia Parishad. However, we also observe that the name appears in each instance with an additional name (initialised here as "P") in each instance which is unexplained (the Appellant does not say that he has three given names).

59. This then leads us on to Mr Terrell's submission that none of this evidence can be material, first, because of what is said by Judge Cary about the extent of media criticism and freedom of speech in Bangladesh as well as the level of monitoring (which goes to the issue whether the Bangladeshi authorities would have any interest in such criticism) and second, insofar as those are online newspapers, what is said by the Judge about the ability to manipulate online material at [63] of the Decision.

60. At [47] to [49] of the Decision, the Judge says this:

> "47. Bangladesh is a parliamentary democracy. Article 39(1) of the Constitution guarantees freedom of thought and conscience. Article 39(2) guarantees the right of every citizen to freedom of speech and expression as well as freedom of the press, although that is said to be 'Subject to any reasonable restrictions imposed by law in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. (4.1.1).
> 48. In commenting on print media the Media CPIN reported that many newspapers are outspoken (3.2.1). It is said that various sources indicated that media tends to be polarised and aligned to one or other of the main political parties, although allegiances shifted depending who is in power at the time (3.4.1). There are also a large number of newspapers. According to information provided by the Information Minister at the National Parliament in January 2018, there are 3,025 registered print media in Bangladesh and 1,191 of them are daily newspapers. Of the dailies, 470 are based in the capital city, Dhaka (3.2.2). The Respondent's report of a Fact-Finding Mission Bangladesh Conducted 14-26 May 2017 states that several sources commented it was hard to fake news, such as posting an arrest

> warrant or court summons in a paper, in the mainstream media. It would be easier to publish online (Documents CPIN) (5.3.8).
> 49. I do not see that any of these news articles assists the Appellant in establishing what happened to him in Bangladesh. I am concerned that the articles in the Daily Nayadiganta did not appear until 2019 well over 2 years after the Appellant's departure. It is difficult to accept that any newspaper would have still be [sic] interested in the Appellants case some years after his departure from Bangladesh. The remaining articles relied on by the Appellant as referred to in the refusal letter and the Appellant's evidence were also published some years after his departure. The Respondent noted that the articles were not consistent with each other or a supporting letter provided by [MB] which dealt in particular with the arrest of her son (the Appellants nephew). The Appellant has also failed to give a clear explanation as to how he was able to access those newspaper articles published from April to September 2019. The Respondent noted that some of the articles were very similar in composition. When I look at all the evidence I see no reason to depart from the findings made in 2019 that it is not reasonably likely that the Appellant ever experienced any problems in Bangladesh. The 'fresh evidence' he has produced is not sufficient to establish that he was targeted by the authorities during his time in Bangladesh and was forced to flee with his family. I do not even have a statement from his wife dealing with the events that at [sic] said to have occurred including the raids on the Appellant's homes."

61. At [64] of the Decision, the Judge said this:

> "There is nothing to suggest it is reasonably likely that the intelligence services of Bangladesh monitor the internet for information about oppositionist groups. The evidence fails to show it is reasonably likely that the Bangladeshi authorities are able to monitor, on a large scale, Facebook accounts or other internet activity (such as TV broadcasts). It is not reasonably likely that the Bangladeshi state, or its proxies, are able to conduct, through bulk extraction or peer surveillance, mass surveillance of the Bangladeshi diaspora's Facebook accounts. More focussed, ad hoc searches will necessarily be more labour-intensive and are presumably reasonably likely to be confined to individuals who are of significant adverse interest. No evidence has been produced to show it is reasonably likely that the Appellant Facebook account or internet presence has been monitored by the Bangladesh authorities to date. His activities as I have found them to be are not sufficiently high profile to have raised his social graph to prompt a targeted search of Facebook or the internet generally."

62. We have already set out [63] of the Decision regarding the weight to be given to online material in light of the ability to manipulate such sources.

63. We appreciate that the point which is made in the pleaded grounds is that the Judge failed to have regard to the newspapers articles particularly in 2023 which are said to name the Appellant as the General Secretary of Zia Parishad. However, we do not consider any failure to refer to this evidence to be material.

64. We have already cited the Judge's consideration of the witness evidence about the Appellant's position within that organisation at [59] of the

Decision. That points to omissions in the witness evidence and inconsistencies between what is said or not said about the Appellant's roles. Those inconsistences alone are sufficient reason to reject the Appellant's evidence about his roles. In any event, as the Judge there points out, there was no evidence explaining "the aims and activities of Zia Parishad" which would be relevant to the level of interest which the Bangladeshi authorities might show in that organisation.

65. The Judge's findings therefore about the Appellant's role in opposition to the Bangladeshi authorities coupled with his findings about the weight to be given to newspaper articles particularly where published online is sufficient for us to conclude that any failure to refer specifically to the 2023 articles (which were not mentioned in the Appellant's statement post-dating those articles or the submissions made about relevant evidence) is not material. That evidence could make no difference to the outcome in light of the other findings.

66. For those reasons, the second ground does not disclose a material error of law.

Ground 3: Failure to consider news broadcasts about the Appellant's sur place activities

67. The pleaded grounds recognise that the Judge has set out the content of the video evidence which he was shown at [8] of the Decision. The Judge has there summarised the content. For the most part this consists of the Appellant being shown at meetings or demonstrations. The only item which refers to the Appellant being interviewed is a Facebook interview apparently showing the Appellant in a broadcast on Channel Bangla. A transcript of this is at [AB/304-307]. We appreciate that the video at [AB/308-309] (referred to as Video 007 at [8(g)] of the Decision) also apparently shows the Appellant giving a speech.

68. Leaving aside the point we have already made about the difference in the Appellant's given names, we accept that those appear to show the Appellant criticising the Bangladeshi authorities and calling for new elections. As the Judge pointed out at [52] of the Decision cited above, "[e]ven if the Appellant can establish that he attended one or more protests, demonstrations, meetings and political debate and has engaged in other political activities including posting on Facebook that does not mean that he is reasonably likely to be at risk on return".

69. The Judge dealt expressly with the video evidence at [62] of the Decision as follows:

> "The Appellant clearly has been involved in some political activity in the United Kingdom as evidenced by the videos but I do not consider that his activities are at such a level that it is reasonably likely that he will be at risk on return. The Appellant has not produced anything to suggest that it is reasonably likely that the Bangladeshi High Commission (or political opponents of the BNP) in the UK film, photograph or monitor those who

> demonstrate or speak out in public against the regime or have informers among expatriate oppositionist organisations who can name and pass on intelligence about such people. For reasons explained below any social media/internet presence that Appellant currently has is also not reasonably likely to put him at risk on return."

70. We have already set out the Judge's findings in relation to print media and interest arising therefrom. We have also set out the Judge's findings about the level of interest which the Bangladeshi authorities are likely to show in an individual of the Appellant's profile based on his sur place activities, particularly given the unchallenged findings that the Appellant was not of interest before leaving Bangladesh.

71. In light of the overall findings and taking into account the background evidence on which the Judge relied, the Judge was entitled to reach the conclusion he did about the level of the Appellant's activities and to find that this level of activity would not place him at risk.

72. For those reasons, the third ground does not disclose any error of law.

CONCLUSION

73. For the reasons set out above, we conclude that the ground on which permission was granted does not disclose an error of law in the Decision. We have concluded that grounds 4, 5(2) and 7 do not arguably disclose any error of law and have maintained the refusal of permission on those grounds. Although we have granted permission on the first to third grounds, we have concluded that none of those grounds disclose a material error of law. We therefore conclude that there is no error of law in the Decision. Accordingly, we uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

NOTICE OF DECISION

The Decision of Judge Cary dated 25 September 2023 did not involve the making of an error of law. We therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

L K Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
11 June 2024