



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004315
First-tier Tribunal No: HU-56633-2021
IA/15662/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 19 September 2023

Before:

UPPER TRIBUNAL JUDGE GILL

Between

N.I.
(ANONYMITY ORDER MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr P Georget, of Counsel, instructed M & K Solicitors.
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Heard at Field House on 7 August 2023

Anonymity

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the original appellant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings. I make this order on account of the evidence concerning the appellant's mental health. The parties at liberty to apply to discharge this order, with reasons.

Decision

1. The appellant, a national of Bangladesh born on 29 September 1982, appeals against a decision of Judge of the First-tier Tribunal A. Codd (hereafter the "judge") who, in a decision promulgated on 14 July 2022 following a hearing on 1 July 2022, dismissed his appeal on asylum, humanitarian protection and human rights grounds against a decision of the respondent of 17 August 2021 to refuse his further submissions of 11 April 2020 on asylum, humanitarian protection and human rights grounds.
2. The appellant first claimed asylum on 17 March 2016 when he was arrested having been encountered working illegally. His asylum claim was refused and he appealed.

His appeal against the refusal was dismissed by Judge of the First-tier Tribunal Lodge in a decision promulgated on 10 January 2017. He exhausted his appeal rights on 9 June 2017. He made an application for leave to remain outside the Immigration Rules on compassionate grounds on 27 June 2017. This was refused on 14 March 2018. He made further submissions on three occasions, beginning on 6 June 2018, all of which were refused. He made further submissions on the fourth occasion on 11 April 2020. These were the subject of the decision that was appealed before the judge.

3. In relation to the appellant's appeal on asylum grounds, humanitarian protection and the related Article 3 claim (hereafter the "protection claim" or the "protection grounds", as the context requires), the judge said that his starting point was the decision of Judge Lodge (para 34). He noted the findings of Judge Lodge and proceeded to consider the new evidence that was before him. Having done so, he found that he could not "*attach any weight to their credibility*" (para 44). He did not accept that the appellant was actively involved with the BNP in Bangladesh (para 47). He did not consider that there was any likelihood of the appellant's membership of the Luton branch of the BNP or his attendance at demonstrations in the United Kingdom coming to the attention of the Bangladeshi authorities or creating a serious risk upon return and that there was little risk of the appellant having to suppress his political beliefs and right to protest, if he is returned to Bangladesh.
4. The judge therefore dismissed the appellant's appeal on protection grounds.
5. The grounds of appeal do not challenge the judge's decision to dismiss the appellant's appeal on protection grounds nor do they challenge his adverse credibility assessment.
6. The sole challenge in the grounds of appeal concerns the judge's finding that "*there were no insurmountable obstacles to the appellant's return to Bangladesh*". This was raised in the grounds solely in connection with the criteria in para 276ADE(1)(vi) of the Immigration Rules.
7. I therefore observed at the commencement of the hearing that the grounds only challenged the judge's decision in relation to the appellant's Article 8 claim based on the criteria in para 276ADE(1)(vi), i.e. that there were very significant obstacles to his reintegration in Bangladesh, and that they did not raise the appellant's wider Article 8 claim. Mr Georget agreed.
8. In a nutshell, the appellant's case in his appeal to the Upper Tribunal is that the judge failed to apply the correct test in relation to para 276ADE(1)(vi). The correct test is whether there were very significant obstacles to the appellant's reintegration in Bangladesh. This would have required consideration of the appellant's mental health as well as other matters in order to conduct the evaluative assessment of whether there would be very significant obstacles to his reintegration in line with the guidance of the Court of Appeal in SSH D v Kamara [2016] EWCA Civ 813. However, the judge considered a different issue, i.e. whether there would be insurmountable obstacles to the appellant's return. The term "*insurmountable obstacles*" had a special meaning in the context of family life claims.
9. I heard detailed submissions from the parties, by the end of which Ms Everett conceded that the judge had applied the wrong test; that he did not cite the correct test; and that he did not consider the question of reintegration. Accordingly,

notwithstanding the contents of the respondent's Rule 24 Reply, she conceded that the judge had materially erred in law by considering whether there were insurmountable obstacles to the appellant's return to Bangladesh as opposed to whether there were very significant obstacles to his reintegration in Bangladesh.

10. I agree. My reasons are as follows: The mere fact that the judge did not cite the correct test is not determinative. However, not only did he not cite the correct test, he repeatedly referred to "*insurmountable obstacles to the appellant's return*" (paras 19.c, 54, 57 and 61). It is also important that he restricted himself to consideration of the appellant's mental health. There was no wider evaluative assessment as required pursuant to the judgment in Kamara. This omission is key to my decision on the question whether the judge had applied the wrong test.
11. In all of the circumstances, I am satisfied that the judge did materially err in law by applying the wrong test in relation to para 276ADE(1)(vi) of the Immigration Rules.
12. Accordingly, I set aside the judge's decision to dismiss the appellant's Article 8 claim insofar as that claim was based upon the criteria in para 276ADE(1)(vi) of the Immigration Rules. I therefore set aside paras 54-61 of the judge's decision.
13. The judge's decision to dismiss the appellant's appeal on protection grounds stands.
14. The next question is whether the decision on the appellant's appeal should be re-made in the Upper Tribunal or remitted to the First-tier Tribunal.
15. Ms Everett was content to leave this matter in my hands.
16. Mr Georget informed me that there would be a number of witnesses and more factual evidence on the appellant's mental health and family connections such that this would be a "*fact-heavy hearing*". In addition, the appellant has a girlfriend who has no immigration status and who is pregnant. This would be a new matter requiring the respondent's consent pursuant to s.85(5) of the Nationality, Immigration and Asylum Act 2002.
17. Ordinarily, if the issues on re-making are reduced (as is the case in the instant case), the Upper Tribunal would re-make the decision on the appeal. However, in this particular case, in reliance upon the matters raised by Mr Georget as described in the preceding paragraph, I am satisfied that this case does fall within para 7.2(b) of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal.
18. I am therefore of the view that a remittal to the First-tier Tribunal is the right course of action.
19. **The appellant must make his application to the respondent for her consent to raise the new matter described by Mr Georget forthwith upon receipt of this decision, if he has not already done so.**
20. Unless the respondent gives such consent, the re-making is limited to the appellant's Article 8 claim insofar as it is based upon the criteria in para 276ADE(1)(vi) being satisfied.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision to dismiss the appeal under Article 8 of the ECHR is set aside. The decision to dismiss the appeal on asylum grounds, humanitarian protection grounds and in relation to Article 3 of the ECHR stands.

This case is remitted to the First-tier Tribunal for a hearing of the Article 8 claim by a judge other than Judge of the First-tier Tribunal Codd.

Signed: Upper Tribunal Judge Gill

Date: 1 September 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email