IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003077
UI-2024-004524
First-tier Tribunal No: IA/09012/2022
HU/56298/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 21 January 2025

Before

UPPER TRIBUNAL JUDGE LANDES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R J
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms McCarthy, Counsel instructed by Shahid Rahman Solicitors

Heard at Field House on 29 November 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant before the First-Tier Tribunal ("RJ") is granted anonymity.

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

DECISION AND REASONS

1. Although the Secretary of State has brought this appeal, for ease of reference when I refer to the appellant and respondent, I refer to them (other than in the heading) as they were before the First-Tier Tribunal.

Background

2. The appellant RJ is a national of Bangladesh. I set out only her relevant immigration history. She came to the UK on a student visa issued on 3 October 2010. On 23 August 2017 she claimed international protection. Her claim was refused by decision of 4 January 2021. The appellant did not receive this decision. Meanwhile, the appellant claimed indefinite leave to remain on the basis of long residence by application of 21 March 2022. Her claim and the associated human rights claim were refused by decision of 31 August 2022. At the same time, the decision refusing her international protection claims was sent to her then representatives.

3. The appellant appealed the refusal of her human rights claim under reference HU/56298/2022. The skeleton argument originally filed on her behalf, dated 19 December 2022 only challenged the refusal of her human rights' claim. The hearing of her appeal, on 24 March 2023, was adjourned because the appellant had sought to rely on the subject matter of her asylum claim of 23 August 2017, but the respondent had not been put on notice of the same. The appellant was directed to provide an amended skeleton argument setting out the full nature of her appeal, and the respondent was to provide an amended review as it considered appropriate. The appellant and respondent did provide an amended skeleton argument and review. The appellant's amended skeleton argument raised international protection grounds, and the respondent in the amended review of 8 June 2023 asserted that they continued to rely on the decision letter of 4 January 2021 and set out a "counter schedule" of issues with the issues being whether it was reasonably likely that the appellant would face a threat of harm for a Refugee Convention reason on return, whether if so she could obviate the risk by availing herself of a sufficiency of protection in her home area or an internal relocation alternative and whether the appellant could succeed by reliance on her human rights under Article 8 ECHR.

4. The adjourned appeal came before Judge Aldridge on 26 June 2023, and he dismissed it on both protection and human rights grounds. In granting the appellant permission to appeal Judge Aldridge's decision on 6 September 2023, Judge Mills observed that *"the appeal has also encompassed protection issues, with the consent of the respondent."*

5. The error of law hearing came before Deputy Upper Tribunal Judge Haria on 30 October 2023. By a decision promulgated on 9 November 2023 the judge found that there were material errors of law and remitted the appeal to the First-Tier Tribunal with no findings of fact preserved. She referred to the respondent's rule 24 response not opposing the application, and agreeing that there was force in the second ground of appeal (relating to failure to engage with risk on return from the appellant's uncles) and the third ground (relating to the assessment of family life) and the respondent conceding at the hearing that the decision contained material errors of law.

6. The appeal was remitted to the First-Tier Tribunal for rehearing. It was remitted under reference IA/09012/2022 which is not a myHMCTS reference. This is because remitted appeals could not be continued on the myHMCTS database.

7. In a decision promulgated on 5 June 2024, Judge Murdoch allowed the appeal on asylum grounds on the basis that the appellant had a genuine fear of her uncles who were affiliated with her immediate family's political opponents, that sufficient protection would not be available and that internal relocation would be unduly

harsh. She also allowed the appeal on Article 8 grounds on the basis that there would be very significant obstacles to the appellant's reintegration into Bangladesh and that the appellant's removal would give rise to unjustifiably harsh consequences for the appellant, her sister and brother-in-law and their children and that the interference with family life outweighed the public interest.

The appeal to the Upper Tribunal

8. The Home Office sought permission to appeal. Their first ground was that the judge had misdirected herself by allowing the appeal on asylum grounds as she did not have jurisdiction so to do as the asylum decision was not appealed by the appellant. The second ground was that the judge had failed to provide adequate reasons why the appellant was found to be credible and that it was unclear how the respondent's case against the appellant had been resolved in the appellant's favour. It was further said that the judge had failed to provide adequate reasons why it would be unjustifiably harsh on the appellant's sister's children if the appellant were to be removed as the children would be remaining in the UK with both their parents.

9. By decision of 26 June 2024 Judge Singer granted permission on the second ground only. He concluded that ground 1 was not *"remotely arguable"* and that the judge *"unarguably had jurisdiction to determine the protection claim."* He observed that the respondent had expressly accepted in the review that the issue of persecution under the Refugee Convention was before the tribunal and specifically stated that the review considered the asylum claim. He granted permission on the second ground, concluding that the judge's consideration at [22] that the respondent had not identified any significant credibility issues with the appellant's account was arguably not adequate and explaining that the judge did appear to have the 4 January 2021 refusal letter, and would have had available to her (by accessing the myHMCTS bundle under the former appeal reference) the asylum and screening interview records.

10. Judge Singer continued – "*Regardless of the interview, issues under s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 were raised in the refusal letter of 4 January 2021 (at paragraphs 24, and 86-90) which arguably required proper consideration: (see for example KG (Turkey) v SSHD [2022] EWCA Civ 1578). There were also a number of other specific credibility points taken, at paragraphs 48-79 of the refusal letter, which arguably were not addressed, and should have been, before a final decision was made on credibility.*

11. *It is arguable that the positive credibility findings in relation to the protection claim impacted on the Article 8 ECHR assessment both within and without the Rules*."

12. The error of law hearing came before Deputy Upper Tribunal Judge Zucker on 25 September 2024. He adjourned the appeal on the Secretary of State's application on the basis that the Secretary of State had lodged the wrong bundle (the bundle relating to the appeal before Judge Aldridge) and that the appeal would be adjourned on the basis that the Secretary of State through her representative had agreed to an order for costs being made subject to a schedule being lodged for assessment. He gave further directions.

13. By application submitted on 30 September 2024 the Secretary of State applied to renew ground 1 in an amended form and to amend ground 2. A witness

statement from the presenting officer who appeared before Judge Murdoch accompanied the grounds. Section 5 on the form "late appeals" was not completed and the grounds contained no explanation of why the renewal of ground 1 was out of time.

14. The appellant through her solicitors served a response to the application for permission.

15. The Principal Resident Judge decided that given the procedural history, the renewed application for permission to appeal (UI-2024-004524) would be determined as a preliminary issue at the start of the hearing of appeal (UI-2024-003077) and the judge hearing the linked appeals would also make a decision in respect of the costs to be awarded to the appellant. Unfortunately his directions did not make their way to the parties; I read out his directions at the beginning of the hearing and the representatives decided that this was a sensible way to proceed.

The renewed application for permission to appeal and application to amend (UI-2024-004524)

16. After discussion Mr Tufan said that there was no need for him to amend ground 2 and he would not be applying to do so. Ms McCarthy agreed that the original ground 2 encompassed the respondent's credibility concerns in the refusal letter of 4 January 2021.

17. I said that it was only right that I shared with the representatives my thoughts about jurisdiction. I said I was aware that in the refusal decision of August 2022 in which the respondent refused the appellant's human rights' claim, the respondent had, under the heading "exceptional circumstances" referred to the appellant having provided a social work report explaining her fears of her safety if she returned to Bangladesh due to amongst other things, her political views, and that the respondent had concluded that although the report post-dated the January 2021 decision letter most of the issues had been covered and addressed in that letter. The respondent therefore referred the appellant to that letter for relevant responses to the matters raised in the current application. Nevertheless, the only decision made in that letter appeared to be the refusal of a human rights claim. However, the decision letter of August 2022 contained a section 120 notice. The amended skeleton argument, was in my preliminary view, a response to the section 120 notice and the tribunal was therefore required to determine the protection issue, subject to any "new matter" questions – see Hydar (s 120 response; s 85 "new matter": Birch) [2021] UKUT 176. The respondent's application to amend the grounds referred to case law indicating jurisdiction could not be waived by agreement, but a matter is only a "new matter" if the respondent has not previously considered the matter not just in the decision but in the context of a section 120 statement (see section 85 (6) (b) (ii) of the 2002 Act). By the time the appeal came for decision before the tribunal, the respondent had, in their review of June 2023, fully considered protection issues, relied on the RFRL of 4 January 2021 and specifically said, as Judge Singer noted when refusing permission, that the review considered the asylum claim. The asylum matters were therefore not "new matters" but bearing in mind the history, the respondent must have given the tribunal consent to consider them, as she had considered them and actively raised them as issues before the tribunal in review.

18. Mr Tufan said that he would still be seeking to rely on ground 1 as varied. He agreed that there was a significant delay in that as permission was refused on ground 1 on 26 June 2024, the time limit for renewal expired on 10 July and so the application was lodged more than 9 weeks' late. He acknowledged that no reason was given for the delay in the application and he could not give me any reason. He submitted that the presenting officer had clearly raised the question of jurisdiction and the judge had not dealt with it. There was merit, he said, in the argument because the only appeal before the tribunal was the human rights appeal.

19. Ms McCarthy said that the respondent's application was very out of time and there was no explanation for it. She said her contention was that the references to the asylum claim in the human rights refusal of 31 August 2022 effectively maintained the original asylum refusal. She said her understanding was that the judge in March 2023 had considered that the appellant was effectively amending the grounds to appeal on asylum grounds because of that incorporation. All parties including the respondent agreed that was the best way to deal with it and the respondent, having agreed, had never taken issue with such agreement until the hearing before Judge Murdoch. If the respondent had thought there was a difficulty they should have acted long ago.

20. I explained that my decision on the renewed application for permission to appeal was not to admit it. Following the principles set out in R (on the application of Hysaj) [2014] EWCA Civ 1633, the first stage was to identify and assess the seriousness and significance of the delay. It was a delay of 9 weeks, thus significantly out of time. As to the second stage, why the default occurred, there was no explanation at all. Considering all the circumstances of the case, the third stage, there was no prejudice to the respondent if the application was not admitted because whilst the judge did not consider the jurisdiction argument there was nothing in that argument whether for the reasons submitted by Ms McCarthy or the preliminary view I had indicated, whilst there would be great prejudice to the appellant in the argument being raised at this very late stage. Taking everything together, the significant delay with no explanation coupled with the lack of merit in the jurisdiction argument which was raised at a very late stage after the appeal had already been before the Upper Tribunal, meant I was not admitting the renewed application.

Ground 2

Submissions

21. Mr Tufan submitted that the judge simply did not refer to the respondent's position on credibility. The respondent had explained in detail in the decision letter with reference to the interview why there were inconsistencies such that the appellant's claim that she and her family had experienced problems in Bangladesh as a result of her father's political involvement were not accepted and it was also not accepted that the appellant had experienced problems from her uncles following the death of her father. None of this was referred to, and it was not clear from the decision what the respondent's case was. He referred me to the case of Malaba v Secretary of State for the Home Department [2006] EWCA Civ 820 at [20]. He noted Judge Singer's points when granting permission referred to above. He submitted that the judge seemed to have considered that the relationship between the appellant and her nieces and nephews was a parental relationship, and that was something which could be challenged.

22. Ms McCarthy acknowledged that the judge did not expressly refer to section 8 of the 2004 Act, but said that the judge had fully considered the Home Office's position. The Secretary of State did not point to any aspect with which it was suggested the judge had not dealt nor had the presenting officer complained that he had not been able to raise specific points whether in cross-examination or submissions (the judge had placed time limits on the hearing). If the Home Office were saying the basis on which findings of credibility were made was not adequately supported by the evidence, then it was for the Home Office to submit evidence to that effect. The judge did not accept all the claims made by the appellant; indeed she had rejected some with reasoning and accepted the Home Office case that the appellant was only a lower-level political supporter. She had explained why she considered that she accepted the Home Office case that the risk arising from the authorities was not made out. The Home Office case in relation to risk from the uncles was a small part of the overall reasoning and really amounted to questions of plausibility. The judge had not specifically mentioned section 8 of the 2004 Act but overall, she submitted the judge had dealt appropriately and adequately with credibility.

Analysis and conclusions

23. As Judge Singer pointed out, the refusal letter of January 2021 raises issues under section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

24. Section 8 (1) of that Act provides "In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the appellant's credibility, of any behaviour to which this section applies."

25. The respondent's case was that the appellant's behaviour had engaged section 8 (5) (failure to make an asylum claim or human rights claim before being notified of an immigration decision) because the appellant had not claimed asylum until August 2017 despite her student visa having been curtailed with no right of appeal in January 2014. The respondent explained why the appellant's explanation that she expected that things would cool down was not considered to be reasonable and it was noted that the problems she claimed in Bangladesh existed before she arrived in the UK.

26. The respondent also considered that the appellant's behaviour had engaged sections 8 (2) (a) (behaviour designed or likely to conceal information), (b) (behaviour designed or likely to mislead) and 8 (3) (the subsection includes a range of behaviour which is treated as designed or likely to conceal information or mislead – the particular type is not specified by the respondent). This was because it was said when the appellant was encountered by immigration officials at a residential property (in August 2017) she said she had no identification, did not give the correct name or date of birth, said she was a British citizen and made excuses about why she could not provide a photograph of her British passport. It was said that she did provide her correct details but only after she had been informed she would face arrest if she continued to provide false information.

27. Judge Murdoch makes no reference at any point in her decision to these matters which the respondent pointed to as damaging the appellant's credibility under the provisions of section 8. The case of KG (Turkey) v Secretary of State for the Home Department [2022] EWCA Civ 1578 held at [33]: "the s.8 factors are to be taken into account as part of a holistic assessment of credibility .....So long as it is clear

that the decision maker has specifically considered the potentially adverse impact of the relevant period of delay upon credibility, and has given a sufficient explanation for finding that the delay is (or is not) damaging, there is no need for specific mention of the statute or its requirement".

28. The judge did not consider the section 8 factors as part of a holistic assessment of credibility. Nowhere does the decision specifically refer to the appellant's delay in claiming asylum or to the contention that she tried to hide her identity by providing false information when she was encountered by immigration officers. The judge says at [22] "*Having considered the evidence in the round, I do not consider that the respondent has identified any significant credibility issues with the appellant's account".* She continued to say that the account was internally consistent, that the account of political activities was broadly consistent with country evidence, and it was not implausible. That is simply not adequate as there is no consideration of the section 8 factors. If the judge did not overlook the section 8 factors, but either accepted the appellant's explanation or considered that the factors pointed to by the respondent did not come within the provisions of section 8 of the 2004 Act then she should have made specific findings with at least brief reasoning. The absence of such consideration means that the decision is inadequately reasoned.

29. Even aside from the judge's lack of consideration of the section 8 factors, whilst I do not consider that there was a need for the decision to set out what the respondent's case against the appellant was (c f para 2 b) grounds) as that was set out sufficiently in the decision letter, I consider that the judge did fail to provide her reasons for concluding that the respondent had not identified any significant credibility issues with the appellant's account and such failure does amount to an error of law. The Home Office had pointed to what they said were a number of inconsistent and implausible features of the appellant's account which damaged the appellant's credibility; whilst I do not consider the judge needed to go in detail through every single issue, she should still have explained at least in a few sentences why it was she concluded that no significant credibility issues or implausible features were identified, so that the respondent could understand why their contentions were not accepted (as the case of Budhatoki (reasons for decisions) [2014] UKUT 00341 quoted in the grounds explains). Whilst the risk from the uncles was a relatively small part of the overall reasoning, the credibility of the risk from the uncles could not be separated from the overall credibility of the family having experienced problems in Bangladesh as a result of the father's political involvement.

30. The decision must therefore be set aside for error of law. Clearly an error going to the credibility of the appellant's account/evidence is a material one.

31. I asked Ms McCarthy what she said about whether, if I was against her on the credibility point, she would argue that the Article 8 findings and reasoning could be separated out; she said that if the judge was wrong in her assessment of credibility then everything including the Article 8 assessment needed to be looked at again. That is a reasonable conclusion bearing in mind the extent to which credibility inevitably permeates all findings.

32. Accordingly given the extent of the necessary findings, the decision will be remitted to the First-Tier Tribunal, with no findings preserved.

Costs

33. A schedule of costs was served on behalf of RJ relating to her wasted costs incurred by the adjournment of the hearing in September 2024 which the Secretary of State had been directed to pay.

34. The costs amounted to a total of £3,397. The costs were broken down as to £1,000 for counsel's fees for the hearing, £1,833 for work done on documents and £564 for attendance on RJ.

35. I told the representatives that I considered counsel's fee of £1,000 for the adjourned hearing was clearly a wasted cost, as was £141 claimed for the preparation of the schedule of costs but I could not see the other costs claimed for work done on the documents were wasted costs, as they would have been incurred anyway. The grounds and FTPA would have been perused, a rule 24 response prepared, and the amended grounds considered even if the hearing had not been adjourned. Ms McCarthy did not demur. I said that whilst I considered some attendance on RJ was reasonable in order to explain what was happening/had happened and what the future steps were, I did not consider 2 hours was reasonable. Some attendance costs would have been incurred anyway and I had to consider the likely additional costs incurred because of the adjournment. Doing the best I could, I considered that half an hour (at £141) was a reasonable sum. The total costs awarded to RJ would therefore be £1,282.

Notice of Decision

The Secretary of State's renewed application for permission to appeal on ground 1 is not admitted.

The Judge's decision contains errors of law and is set aside with no findings preserved. The appeal is remitted to the First-Tier Tribunal at Hatton Cross to be heard by a Judge other than Judges Murdoch and Aldridge.

RJ's costs incurred by the adjournment on 25 September 2024 are assessed at £1,282 and are to be paid by the Secretary of State for the Home Department.

A-R Landes

Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 January 2025