Upper Tribunal
(Immigration and Asylum Chamber)

Haque (s 86(2) – adjournment not required) Bangladesh [2011] UKUT 00481(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 th June 2011	.....

Before

MR JUSTICE KING

UPPER TRIBUNAL JUDGE GILL

Between

SHAMSUL HAQUE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Miss C Hulse, of Counsel, instructed by Duncan Moghal Solicitors & Advocates.

For the Respondent: Mr R Tarlow, Senior Home Office Presenting Officer.

An Immigration Judge is obliged to determine a ground of appeal brought under section 84(1)(g) of the Nationality, Immigration and Asylum Act 2002, even if the appellant raises for the first time in his grounds of appeal that he is a refugee. There is no obligation to adjourn any hearing before the First-tier Tribunal in order to allow the appellant to be interviewed by the Secretary of State.

DETERMINATION AND REASONS

1.
The Appellant is a citizen of Bangladesh born on the 22 April 1970 who claims to have first entered the United Kingdom in 2001. This is an appeal against the decision of the First-tier Tribunal promulgated on the 26 th of November 2010 dismissing his appeal against the decision of the Respondent of 13 September 2010 to give directions for his removal from the United Kingdom as an illegal entrant. These removal directions had been made consequent upon the decision of the Respondent to refuse the Appellant’s application for leave to remain on human rights grounds.

2.

The sole ground of appeal for which permission to appeal has been granted concerns the refusal of the Immigration Judge at the outset of the hearing to adjourn the hearing upon the application of the Appellant's legal representative so that the Appellant could be interviewed – presumably by the Secretary of State – in relation to " the asylum element of his claim" (to use the phraseology of paragraph 3 of the determination) which then formed part of his grounds of appeal. The critical context in which this application had been made was that prior to the lodging of his grounds of appeal against the removal decision, the Appellant had made no asylum claim. It was only in his grounds of the appeal that he raised the ground allowed for in section 84(1)(g) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') " that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention" .

The background facts

3.
The Appellant first came to the attention of the immigration authorities on the 23 rd of March 2010 when he was arrested on suspicion of illegal entry. He was served with form IS151A notifying him of his immigration status and liability to detention and removal. He was granted temporary admission subject to reporting and residence restrictions. He failed to comply with these restrictions but was subsequently encountered by immigration officials on the 26 th of August 2010 during an enforcement visit to premises in Newport where he was working illegally. On the 31st of August 2010 the Appellant lodged an application for leave to remain using form FLR(O). That sought leave to remain on compassionate grounds set out in an accompanying letter from his solicitors, Duncan Moghal. These grounds were in terms confined to a claim under Article 8 of the European Convention on Human Rights based upon the strong connections to the United Kingdom which the Appellant said he had established since his entry into the UK in 2001. There was no claim made for asylum.

4.
On the 1 st of September 2010 the Appellant was served with a "One Stop Warning" Notice under section 120 of the 2002 Act. This Notice told the Appellant in terms that he " must now make a formal statement about any reasons why you think you should be allowed to stay in the United Kingdom " and to do so on the attached form – " IS 76 - Statement of Additional Grounds ". This Notice had been served upon the Appellant at the request of his solicitors, made in a letter dated the 27 th of August, in which they said they would be grateful for such notification "in order for our client to lodge his human rights allegations ".

5.
A "Statement of Additional Grounds" in response to that section 120 Notice was duly made by the Appellant on the 2 nd of September 2010. It was sent through and drawn up on his behalf by his solicitors. This statement again made reference to Article 8, but in addition raised in very general terms a claim under Article 3 of the ECHR. Article 3 confers an absolute right not to be subjected to torture or to inhuman or degrading treatment or punishment. In paragraph 3.1 of the Statement of Additional Grounds it was stated that "the Applicant further maintains that if he is removed from the United Kingdom there would be a breach of his right under Article 3 ECHR ". What then followed was a discursive exposition of the legal principles said to be applicable to any consideration of a claim under Article 3, but nothing was said of the factual basis for the claim until the very last sentence in the statement which simply stated " 3.4 The Appellants (sic) contend that if he is returned to Bangladesh he will face an immediate risk of ill treatment ". No further particularity was given of the Article 3 claim.

6.
Again no asylum claim was made to the Secretary of State at this stage.

7.
By decisions dated the 13 th of September 2010 the Respondent refused the Appellant's application for leave to remain on human rights grounds, and decided to give directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 for the removal of the Appellant from the United Kingdom as an illegal entrant. In the "reasons for refusal" letter of like date in respect of the Article 3 claim, the Respondent stated at paragraph 9 that "we observe that your client provides no evidence or argument to explain why his removal to Bangladesh would be in breach of Article 3. We contend that the mere suggestion of a breach of the ECHR will not in itself postpone your client's removal ".

8.
That decision to remove was an immigration decision amenable to appeal to the First-tier Tribunal under section 82 of the 2002 Act and further gave rise to an in country right of appeal by virtue of the Appellant having made a human rights claim while in the UK (see section 92(4) of the Act). It is to be noted however that the Appellant had still not made any asylum claim at this stage.

9.
The Appellant duly exercised his right of appeal to the First-tier Tribunal by a Notice of Appeal lodged on the 16 th of September 2010. By virtue of section 84(1) of the 2002 Act, that appeal had to be brought on one or more of the grounds (a) to (g) set out in that subsection. Those grounds include under (g) "that removal of the Appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention… ".

10.
The grounds of appeal lodged by the Appellant included – amongst other grounds – a ground of appeal referable to section 84(1)(g) in these terms:

"2.4 That the removal of the Appellant would be in breach of United Kingdom's obligations under the 1951 Refugee convention".

11.
This was the first time the Appellant had ever raised the Refugee Convention. As already explained, at no time prior to his lodging of his appeal had he made any asylum claim to the Secretary of State. No such claim had been made in the Statement of Additional Grounds lodged under section 120 although there had been the claim under Article 3 of the ECHR.

12.
Moreover no particulars of the factual basis of this ground of appeal were given in the grounds of appeal. These came for the first time in the witness statement of the Appellant dated the 12 th October 2010, lodged for the purposes of the appeal, in the following paragraphs:

"4. I fled Bangladesh because my life was in danger due to my involvement in the BNP party (Bangladeshi National Party). I was heavily involved with the party and held quite high positions such as General Secretary of Sylhet district as well as other secretarial positions over the years. I would give talks at meetings and conferences, distribute literature, arrange meetings and invite people to join the party. When I started getting a good response from the public I was targeted by the Bangladeshi Awami League. Initially members of the Awami League would argue with me and then they started beating me whenever they saw me. I was beaten about 5 or 6 times in total and on the

final occasion I was told that if I was ever seen again I would be killed. I had no choice but to leave the country.

5. When I entered the United Kingdom I was advised by my friends not to claim asylum because I would be deported back to Bangladesh. I took their advice because I did not want to risk being sent back. I believe I would be killed if I am sent back.

6. I decided to settle down in the United Kingdom and started building my life…

9. I have spent nearly a decade in this country and I cannot just throw that away only to start all over again. Especially not at my age. In any event if I am returned I fear I will be killed because of my involvement with the BNP party.

10. I can confirm my involvement with the BNP party has continued whilst I have lived in the United Kingdom. I have attended many meetings in London and Newport and have spoken at conferences in Newport. The organisation I have been involved with is called Amra Tajpur Bashee."

The determination of the First-tier Tribunal

13.
The appeal hearing was on the 1 st November 2010. By a decision promulgated on the 26 th of November 2010 Immigration Judge Baker dismissed the Appellant's appeal on all grounds including that referred to as his asylum appeal.

14.
In relation to the asylum ground, the Immigration Judge considered the Appellant's oral evidence and the content of a number of letters produced by him purportedly from persons in Bangladesh attesting to the date (variously given as 1996/9) of and the reasons for his leaving Bangladesh together with the bio data information taken from him when arrested stating that his last employment in his country of origin was as a businessman selling clothes under the name of a shop from 1985 to 2001. The Immigration Judge considered the contradictions contained within all this evidence as to when, and the circumstances in which, the Appellant had left Bangladesh, and made a number of adverse findings relating to the credibility of the Appellant's claims. At paragraph 37 the Immigration Judge expressly found that:

"… he (the Appellant) has not demonstrated that he is in fear of return to Bangladesh. I find that he has not established there is a real risk of adverse interest in him because he has not demonstrated even to the lower standard applicable in asylum appeals that he had any political activity."

15.
At paragraph 45 the findings of the Immigration Judge are recorded in these terms:

"45. For these reasons the asylum claim is dismissed on my finding that he was not a political person, he was not involved in any political activity, he was an economic migrant who has come to the United Kingdom and who was apprehended after an unknown period in the United Kingdom."

The appeal to the Upper Tribunal

16.
An appeal to the Upper Tribunal lies only on an error of law. The appeal to this Tribunal for which permission has been granted, is on one ground only. There is no appeal seeking to challenge the Immigration Judge's findings on the ground of appeal under section 84(1)(g) on the evidence before

her, or on the ground that the Appellant was unable to give the full facts of his claim to the Immigration Judge. The sole ground relates to the refusal of the Immigration Judge at the beginning of the hearing to grant an adjournment.

17.
Moreover the basis of the appeal is not that the adjournment was required because the Appellant needed time in order to gather more evidence in support of his appeal although such an application was, it seems, also made to the Immigration Judge and rejected by her on the grounds that " the material sought, the basis of the adjournment, was unknown to the Appellant and he had ample time to obtain it" and that the Appellant's appeal could be justly determined without the necessity of an adjournment (see paragraphs 7 to 10 of the determination) .

18.
The sole ground advanced in the Appellant's renewed application for permission to appeal, lodged with the Upper Tribunal, is that the adjournment was required so that the Appellant could be interviewed by the Home Office on what is described as his asylum claim. To quote paragraph 3 of the determination:

"At the outset of the hearing Mr Ghani stated that his client wished to be interviewed in relation to the asylum element of his claim, having made his claim for asylum in his statement of 12 th of October 2010".

19.
This aspect of the application was rejected by the Immigration Judge on the ground that there had been no application for asylum made to the Home Office notwithstanding that the Appellant on the basis of an attendance note of his solicitors of May 2010 – produced by his representatives to the First-tier Tribunal – had following on his arrest on suspicion of illegal entry in March 2010, been given advice that this was an available option and had made subsequent application for leave to remain which had made no mention of any asylum ground. The Immigration Judge expressly found (at paragraph 4 of the determination) that:

"there is no requirement that an applicant who raised an asylum ground of appeal in the grounds of appeal should be interviewed prior to the determination of the appeal".

but then exercised a discretion on whether nonetheless to grant an adjournment on this ground. She declined to do so on the grounds that the application had been made late, and concluded that the appeal " could be justly and fairly determined by hearing evidence from the Appellant who had set out his claim in paragraph 4 of his witness statement and relied upon some documentary evidence in support with reference to paragraphs 4 and 10 of that statement". (See again paragraph 4 of the determination).

20.
At paragraph 6 of the determination this passage also appears in relation to the submission that in effect the Immigration Judge should arrange for the Appellant to be interviewed:

"This attendance note plainly followed the date of arrest on suspicion of illegal entry when he first came to the attention of the immigration authorities on 23 March 2010. There had been no subsequent application for asylum made to the Home Office. The application for leave to remain on compassionate grounds only was made on 31 August 2010 and refused on 13 September 2010. The attendance note does not record the appellant's claim that his asylum claim should be considered at

interview rather than at the appeal hearing. It is at the appeal hearing because he has failed to make any application for asylum notwithstanding the advice plainly received by him as to its availability in May of 2010 even when he made the later application for further leave to remain in August."

The alleged errors of law

21.
As we have indicated, this Tribunal can interfere with the First-tier Tribunal's decision not to grant an adjournment only if it can be demonstrated that the Immigration Judge made an error of law. In the grounds of appeal upon which permission has been granted, this error of law is put in two ways.

22.
First it said that in stating that there was no requirement that an applicant who raised an asylum ground of appeal in his grounds of appeal should be interviewed prior to the determination of the appeal, the Immigration Judge erred in law in that she (to quote the grounds of appeal but with the emphasis being that of this Court):

"failed to follow the correct asylum procedure which in turn has resulted in the Appellant's claim being unjustly and unfairly determined. Had the Appellant been given an opportunity to be interviewed by the Home Office then at any subsequent appeal further documents could have been produced that confirm the genuineness of the original documents relied upon. The Appellant has clearly lost this opportunity."

23.
Secondly, exception is taken to the Immigration Judge's findings at paragraph 37 of his determination which we have already out (" I find he has not established there is a real risk of adverse interest in him because I find he has not demonstrated even to the lower standard applicable in asylum appeals that he had any political activity "). It is said that the Immigration Judge here erred in law " in failing to recognise that this was not an asylum appeal because no asylum appeal decision of the Secretary of State was being appealed against". It is further in effect contended that the Immigration Judge in her reasoning rejecting the ground of appeal under s.84(1)(g) erred in law in " usurping " " the initial function of the Secretary of State " in asylum claims. Thus the second aspect of the ground being pursued reads as follows:

"The Immigration Judge failed to recognise that this was not an asylum appeal because no asylum appeal decision of the Secretary of State was being appealed against. The Immigration Judge should not have carried out the initial function of the Secretary of State and should have afforded the Appellant an opportunity to be interviewed in relation to his asylum claim especially given that the same was requested."

Our conclusions

24.
We find both aspects of this ground of appeal misconceived. They each operate on the false premise that the Immigration Judge could only hear and determine an appeal against a decision to give removal directions on the ground expressly allowed for under section 84(1)(g) if there had first been an initial "asylum decision" by the Secretary of State. But this simply ignores section 86(2), pursuant to which the Immigration Judge was obliged to determine " any matter raised as a ground of appeal", that is, she was obliged to determine the ground raised under section 84(1)(g) and to determine for herself whether the removal of the Appellant would be in breach of the UK's obligations under the

Refugee Convention. The fact that the Secretary of State had made a decision to give removal directions consequent upon a decision rejecting an application for leave to remain on non asylum grounds, and had not herself considered any protection issue under the Refugee Convention, must be to nothing. In determining the appeal brought under the ground in section 84(1)(g) without first referring the case back to the Secretary of State for an interview, the Immigration Judge was not usurping any function of the Secretary of State, for the simple reason that the Immigration Judge was not determining any asylum claim as such, since none had ever been made to the Secretary of State. Nor was she determining whether to grant the Appellant refugee status which indeed she had no power to do.

25.
The Immigration Judge was not acting as if she were herself the Secretary of State but rather was exercising the appellate functions conferred and provided for by the 2002 Act which obliged her to consider the appeal against the decision to give removal directions on the grounds on which the appeal before her had been brought under section 84(1).

26.
We consider our approach to this matter is entirely consistent with the decision of the Court of Appeal in AS (Afghanistan) [2009] EWCA Civ 1076 concerning the effect of section 85(2) of the 2002 Act in the context of a statement made under section 120. This subsection provides that ‘ if an appellant under section 82(1) makes a statement under section 120, the Tribunal shall consider any matter raised in the statement which constitutes a ground of appeal of a kind listed in section 84(1) against the decision appealed against .’ The majority (Moore-Bick and Sullivan LJJ) held that the Tribunal was obliged on an appeal under section 82(1) to consider any matter raised in a section 120 statement which would constitute a ground of appeal of a kind listed in section 84(1). The duty was not restricted to considering only the grounds for the original decision of the Secretary of State or the original grounds of appeal. [1]

27.
Contrary to what is asserted in the grounds of appeal, there can be no requirement as a matter of law that before any appeal brought under section 84(1)(g) can be determined in a case in which a claim for protection under the Refugee Convention is raised for the first time in the grounds of appeal, there has to be a Home Office interview prior to the determination of the appeal. Indeed we do not understand where lay the power of the Immigration Judge to arrange such an interview. As we endeavoured to point out to Miss Hulse who was at understandable pains to stress the purpose of the Home Office interview process in asylum claims and the undoubted benefit to any claimant of such process – by reference to the Respondent’s published guidance on asylum interviews – the provenance of any requirement in law for such interview must lie in the requirements of paragraph 339NA of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the Immigration Rules). This provides that “ before any decision is taken on the application for asylum, the applicant shall be given the opportunity of a personal interview on his application for asylum with a representative of the Secretary of State who is legally competent to conduct such an interview ”. As the terms of paragraph 339NA make clear, however, the interview provided for by this Rule is part only of the decision-making process of the Secretary of State herself when considering an asylum claim made to her, but there is nothing which provides for such an interview to take place before an asylum ground is determined by an Immigration Judge.

28.

The interview the Appellant was seeking in this case must thus have been an interview conducted by the Secretary of State through her representative under paragraph 339NA, but in our judgment it did not and could not lie in the power of the Immigration Judge seised of an appeal, to direct such an interview. In our judgment the Immigration Judge had no power, let alone legal duty, to remit the case to the Secretary of State for the purposes of such interview. The Immigration Judge could only deal with the appeal as it had been presented to her by the Appellant and this she duly did. She was right to proceed as she did.

29.
Certainly we accept the potential benefits to an applicant for refugee status, of going through the asylum claim process including the particular benefits of the interview process for the eliciting of relevant facts but, in any event, there is still the opportunity to give oral evidence before the Immigration Judge hearing the appeal. However, the Appellant chose to raise the issue whether his removal would breach the UK's obligations under the Refugee Convention as a ground of appeal and for the reasons we have given the Immigration Judge was bound to hear the appeal on this basis without more.

30.
For all these reasons we dismiss this appeal on the ground upon which permission has been given.

31.
Our conclusion is further supported by the fact that under paragraph 339NA, the personal interview may be omitted where (amongst other circumstances):

"(iii) The applicant, in submitting his application and presenting the facts, has only raised issues that are not relevant or of minimal relevance to the examination of whether he is a refugee as defined in regulation 2 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006."

32.
We have already identified the paucity of the particulars in the representations made in the Notice of Appeal in support of the claim under Article 3. Accordingly, in our judgment, the duty of the Secretary of State to interview the Appellant under paragraph 339NA was not triggered, in any event. This is especially so, bearing in mind that the Appellant only provided some detail of the basis of his asylum claim in his witness statement dated 12 October 2010, lodged a mere two weeks or so before his hearing on 1 November 2010 before the Immigration Judge, with no indication even at that late stage, that he wished to be interviewed by the Secretary of State.

Alternative ground of appeal

33.
We should record that Miss Hulse did seek to raise a new ground of appeal not otherwise pleaded, namely that the Secretary of State had erred in law in not treating the Statement of Additional Grounds served upon her on the 2 nd of September 2010, which included a claim to humanitarian protection and the unparticularised claim under Article 3 (unparticularised save for the contention that the Appellant would face an immediate risk of ill treatment if returned to Bangladesh), as amounting to an asylum claim, and further erred in law in not then proceeding to carry out a paragraph 339NA "Personal Interview".

34.

We can dispose of this matter in short form. The matter Miss Hulse now seeks to raise was never part of any ground of appeal to the Immigration Judge. As already explained, any appeal to the Upper Tribunal from the determination of the First-tier Tribunal has to be based upon an error of law on the part of the First-tier Tribunal in making that determination. No such error can be shown by reference to an alleged error of law on the part of the Secretary of State which was never raised as a ground of appeal before the First-tier Tribunal.

35.
It follows we find no merit in this alternative ground sought to be pursued and reject the application to pursue an appeal on this ground.

36.
To summarise, an Immigration Judge is obliged to determine a ground of appeal brought under section 84(1)(g) of the 2002 Act, even if the appellant raises for the first time in his grounds of appeal that he is a refugee. There is no obligation to adjourn any hearing before the First-tier Tribunal in order to allow the individual to be interviewed by the Secretary of State, nor is there any power to direct the Secretary of State to conduct an asylum interview.

37.
For all these reasons this appeal is dismissed.

Signed

Mr Justice King

(sitting as) Judge of the Upper Tribunal

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[1] This principle in AS (Afghanistan) is not affected by the recent judgment in Sapkota and KA (Pakistan) v the Secretary of State for the Home Department [2011] EWCA Civ 1320.