



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/11021/2017

THE IMMIGRATION ACTS

Heard at Field House  
On 23 May 2018

Decision & Reasons Promulgated  
On 20 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

M F A  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Hussain, Raiyad Solicitors  
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant has been granted permission to appeal the decision of First-tier Tribunal Judge Telford dismissing his appeal against the decision of the respondent to refuse him asylum in the UK and leave to remain on humanitarian protection grounds.
2. The appellant is a citizen of Bangladesh born on 2 January 1976. He entered the UK in 2007 as a visitor for a short holiday. He failed to return to Bangladesh. He did not claim asylum until 24 May 2017.
3. He claimed that he could not return to Bangladesh due to membership of a particular social group. He claimed that as a homosexual he would not be able to behave or act as a homosexual freely in Bangladesh. He was therefore a member of a particular

social group subject to state persecution. This was because the state has laws prohibiting sexual intercourse between same sex couples. He also feared non-state actors. The state would not afford him sufficient protection. He could not safely relocate.

4. He claimed that the respondent's decision to refuse to grant him asylum and humanitarian protection was also unlawful under the provisions of Articles 2, 3 and 8 of the ECHR. Both parties agreed that Articles 2 and 3 stood or fell with the asylum claim. His Article 8 claim in his grounds of appeal was limited to a private life only.
5. The judge accepted that the appellant was a homosexual. Relying on **HJ (Iran) UKSC 00031**, the judge found that the appellant had made the initial step of establishing a valid Convention reason for his claim for asylum, namely membership of a particular social group.
6. The judge found that the appellant did not, however, show that he had made the second step of being homosexual in his particular set of circumstances which would lead him into a reasonable likelihood of a real risk of harm. In his matrix of circumstances, the judge found that the appellant would not be at risk. The judge said he was bolstered in his decision by the fact that the appellant stated that he would act privately as a homosexual and that he does so for a reason (as set out in **HJ**) that does not bring him within the "at risk" category of persons. This is because, as the appellant stated, he was private about all matters including his sexual emotions and feelings due to social conventions, religious conventions, family reasons and cultural factors.
7. The judge found that the appellant's explanation that he feared his family would harm him physically was not made out. This was because it had to be both suggested and then extracted out of him. His earlier oral statements about that rang true when he said they may feel socially ostracised, effectively at his strata of society, which was toward the upper end, by social snobs out to make some advantage for themselves at the expense of his family.
8. The judge said that the appellant was unusually private in nature and would not explain his sexual emotions or feelings for example when he was younger to anyone around him. He was not being private due to fear of persecution by the state or non-state actors, it was simply "him" and the way he would operate in society not just about sexuality but about a number of other features in his life.
9. The judge found that even as a homosexual and living a life as a homosexual in the UK, he could return as a privately active gay person as the evidence pointed to a degree of harassment only and not persecution in Bangladesh. The criminal laws on homosexuality which could lead to a real risk of harm were not enforced in Bangladesh. Those laws which led to harassment by the police would in his case be avoided as he would be a private person and not one who would come to the attention of the public, the police or others.

10. The judge went on to give reasons for his findings. He said it was difficult to look into the heart and mind of someone just from what they said. A factor he thought to bear on what was said by the appellant at the hearing about his sexuality was the circumstantial evidence surrounding the appellant and his actions. He included in that not only what he had done, what his family had done and what he had to say about events and documents, photographs and items but the background material and guidance issued by various interested parties.
11. He said that the appellant “rowed back” from a number of key issues, including whether his family would harm him (albeit by leading questions he was invited to reinstate it). The judge said that the position of the respondent that everyone who is gay can calmly return to Bangladesh and live quite openly was not one he found wholly supported by the background material.
12. On the plus side, the judge said the appellant not only said he was gay but he was being gay. On the minus side was his immigration history, which was awful. He was persuaded to say things which he found were not true just in order to maintain himself in the UK. Ten years’ delay in claiming asylum was not properly or rationally explained. The judge did not accept that he was either ignorant or not well-advised.
13. Finally, and very tellingly, the judge said when the appellant was asked about the real reasons why he wished to remain in the UK, he said it was for a better life here and by that he meant economically in order to make a real gain in his life here, socially in terms of meeting people in a much easier way, religiously as the society in Bangladesh was much more closed and narrow-minded on that and culturally in terms of involving himself in activities in public. The judge said these elements were wrapped up with his plea that he be allowed to remain in the UK so that he could maintain as open a gay life on the gay scene as possible, the appellant not having a long-term partner in his life.
14. Balancing all factors including the background evidence, the judge concluded that the appellant could and would live a discreet gay life in Bangladesh and as this was the key issue in terms of social group and Convention reason, he found that the appellant had not shown that he was here for reasons other than economic betterment and lifestyle choices rather than fear of harm for a Convention reason.
15. The judge said there was nothing to indicate that he had ever felt persecuted or under threat when he was in Bangladesh due to his sexuality. There was no evidence of anyone as a member of the public or the authorities perceiving him as homosexual or prosecuting him as homosexual.
16. The judge then considered the respondent’s guidance on sexual orientation and gender identity issued in September 2017. The judge found that persons such as the appellant, who originates from a slightly higher socio-economic background than the average Bangladeshi, may be able to “come out” to family and friends although he found the appellant would not wish to put his parents in a cleft stick by doing so. He found that the appellant would choose socially not to come out publicly. Part of this

was his restraint personally and partly because it could cause them problems in defending him from bullying. The appellant rightly did not feel that he could approach police for support from harassment or threats but the judge found that he would not wish to put himself in that situation in any event. The judge said that the fact that the 2010 Toronto Report (much of which he noted was not followed in the updated 2017 COI Report due to changes in Bangladeshi society in the past seven years) was still relied upon rightly indicates the general lack of safety for gay men but that safety issue was not the same thing as claiming that it is unsafe at the level required for Articles 2 or 3 for Convention purposes in all cases and certainly not in some particular cases of privacy by choice such as the appellant. He noted the conclusion in the 2017 COI Report that families were safe as long as one did not come out openly and he found that this was the situation here with this appellant.

17. The judge said it was accepted by the appellant that the background material indicated that penal code 377 was not used in practice. This was by far the most serious sanction involving the most serious penalties for homosexuality. However, the arrest without warrant provisions of Section 54 and Section 86 of the Dhaka Ordinance were used to harass openly gay and public facing gay people in Bangladesh. The judge found that the appellant even if gay would not be one of those at risk due to his claimed privacy preferences.
18. The judge deprecated the scatter gun approach in submissions to references overall and generalised incidents of homophobic abuse that occurs in Bangladesh. Firstly, he said, the most respected report by the UK agencies is at pains to indicate that it is not in any way a full picture. Second, much of the evidence in the background material is related as anecdotal. The Toronto Report, which lists and includes a whole series of horrific incidents during the killing of a blogger about homosexual activities is not useful for its deliberations because the references were simply not focused so as to be comparable to the particular circumstances of the appellant. The judge therefore rejected the submission that private people like the appellant who live a homosexual life in secret are bound to be more at risk than other high profile and openly gay people because there are hidden dangers lurking for them which we just do not know about.
19. The judge considered Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, which was relied on by the respondent in terms of deception in remaining beyond the period of visa for the appellant, thereafter from time to time working illegally and delay in making an asylum claim both when he first entered the UK and after he remained illegally in the UK. The judge found that these are hardly the actions of someone deliberately targeted by persecutors or fearful of the Bangladesh authorities for the crime of homosexual activity.
20. With regard to Article 8 outside the Rules the judge found that there was no exceptional reason for departing from the Rules in the light of the appellant's poor immigration history.
21. The judge concluded that the appellant's claim does not engage the Geneva Convention because it is not based on the appellant's public promotion of his sexuality

or the appellant “coming out” as homosexual in public or the appellant being forced due to fear of persecution into remaining only as a private homosexual. He has not shown that he is at risk for an **HJ** stage 2 reason or any other reason to do with his sexuality not covered by **HJ**.

22. Permission was granted to the appellant on the basis that the judge may have thought that a background report relied upon by the appellant was several years out of date and, as a result, may have underestimated the risk on return for the appellant.
23. Mr Hussain relied on the five grounds of appeal.
24. Mr Hussain challenged the judge’s finding at paragraph 21, which said:

*“... unusually private in nature and would not explain his sexual emotions or feelings for example when he was younger to anyone around him. He was not being private due to fear of persecution by the state or non-state actors, it was simply ‘him’ and the way he would operate in society not just about sexuality but about a number of other features in his life.”*

Mr Hussain said there was absolutely no evidence to support this finding. He relied on the appellant’s answer to question 26 of the interview where the appellant said that after he came to realise that he was homosexual, he kept it from people. He was always in fear in case somebody found out. This was when he was 16 years old when he realised he was homosexual. In answer to question 29, the appellant said he was never able to tell S, a boy he liked in his village, about the way he felt about him. This was because there was a chance that S might tell someone else and that may cause a problem for him. From one person everyone will come to know and he would get attacked. If his parents came to know about it they would beat him and because they would be so ashamed of him they would kick him out. His parents would lose face. Mr Hussain said that the judge did not refer to any of this evidence when he reached his decision at paragraph 21. He said the appellant was talking about a time when he was 16 years old in Bangladesh. He came to the UK when he was 32 years old. Mr Hussain said the interview record showed the reason why the appellant was being discreet when he was in Bangladesh and this was because he was afraid of being attacked by the public and his parents. These are reasons of persecution and not “simply him” as stated by the judge.

25. The second ground challenged the judge’s finding at paragraph 22 that the appellant could return as a privately active homosexual “as the objective evidence pointed to a degree of harassment only and not persecution in Bangladesh”. Mr Hussain submitted that the judge seems to have simply taken the opinion of the respondent in the 2017 SOGI Bangladesh Report and failed to apply any sort of judicial scrutiny to it. He said the opinion of the respondent was not supported by or based on any objective information.
26. In regard to ground 3, Mr Hussain argued that the judge was mistaken about the objective evidence in the 2016 Australian DFAT Report on Bangladesh. The judge said the report was out of date as it was published in 2010 and was no longer relevant as

Bangladeshi society has changed. The judge also suggested that much of this report was no longer in the 2017 report. Mr Hussain said the judge was mistaken as the Toronto Report was published in 2017 and not 2010. He said the part of the report dealing with sexuality can be found in almost in its entirety in different places of the 2017 COI Report. Paragraph 3.79 of the DFAT Report confirms that LGBT persons “are not able to be open about their sexual orientation or gender identity, regardless of their socio-economic status or geographic location”. Paragraph 3.82 of the DFAT Report states “visible gay men face a high risk of violence, including being killed”. Mr Hussain submitted that the judge’s finding that the evidence pointed to a degree of harassment only for gay people living in Bangladesh was based on a mistake as to the date of the publication of the DFAT Report. The judge’s finding that homosexuals in Bangladesh are “at high risk of violence, including being killed, does not amount to persecution” was simply irrational.

27. In regard to the fourth ground - Mr Hussain argued that the judge’s finding at paragraph 34 that families were safe as long as one did not come out, as was the situation with this appellant, was a finding that went against one of the main precedents set by **HJ (Iran)**. **HJ (Iran)** held:

*“To reject his application on the ground that he could avoid persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution.”*

28. Mr Hussain relied on the appellant’s answer to question 14 where he said:

*“I’m gay, if I were to return to Bangladesh, first of all my own family won’t want anything to do with me. They will beat me and kick me out of the house. If the community came to know they will kick me out of the community. If the police come to know then they will arrest me, torture me and they will want money from me. And if my religion comes to know about it, that is the religious leaders then they will kill me. So no place is safe for me in Bangladesh. There is no security for my life.”*

29. In the light of this evidence Mr Hussain submitted that the judge’s finding that the appellant would be able to avoid persecution in Bangladesh by being discreet goes against **HJ (Iran)**.
30. In regard to ground 5, Mr Hussain argued that the appellant did not mention any economic reasons for wanting to remain in the UK. The judge’s suggestion that this is what the appellant meant as opposed to what he said was contradicted by his own assertion that the appellant is from a higher level society position. He submitted that a person from a higher level society position does not need to come to the UK for a better lifestyle. The appellant stated he feared being killed by religious extremists. His reference to religion was always to do with being killed. He said this at the asylum interview and at the hearing.
31. Ms Everett submitted that there were no errors of law in the judge’s decision. She submitted that some of the arguments were an attempt to re-argue the appellant’s case. She said the judge weighed the evidence carefully, directed himself properly at

paragraph 23 and at 24 said it was difficult to look into the heart and mind of someone just from what they said.

32. She submitted that in other answers in his interview the appellant said that he had been living discreetly in Bangladesh. In answer to question 22 he said he had told his cousin that he was gay but had told the cousin not to tell his parents because they were elderly and were unwell and if they heard about this their health might deteriorate further. His answers to questions 69 and 70 indicated that he conducted his homosexual relationship with F, who he met in the UK, secretly. She said the judge looked at how the appellant would behave and the judge found that he would behave secretly, which was a fair assessment of his behaviour in the ten years he has been in the United Kingdom.
33. Ms Everett said the judge correctly applied **HJ (Iran)**. The appellant said in evidence that he would conceal his homosexuality, not because he was afraid of being persecuted. She submitted that nothing disclosed by Mr Hussain could properly amount to an error of law.
34. In reply Mr Hussain said that in answer to question 20 the appellant said that in July 2016 he opened up and told everybody including his cousin, Mr D A, who was in the UK, that he was gay. By everybody he meant his friends. Further, in answer to question 110, he said when he told his cousin that he was gay, his cousin said it was a good thing. This was because his cousin knew he was being put under pressure to get married. He had rejected two proposals previously. He came to realise the fears he had when he was in Bangladesh. He no longer has those fears. He has accepted himself and this is a very big part of his life and questioned why he should hide it. Some of his friends started suspecting him and that was why he opened up. He thought to himself that there was no reason why he should keep this a secret any longer and he opened up to everybody in this country.

### **Findings on Error of Law**

35. I find, in the light of the arguments put forward by Mr Hussain, that the judge erred in law. I find that throughout his interview the appellant named those he has a fear of if he were to return to Bangladesh. He was in fear that when his parents found out that he was a homosexual they would kick him out of the house for bringing shame on them. He was also afraid of the religious leaders and members of the community who he said would kill him. He kept quiet about his homosexuality in Bangladesh because of his fears. I find that the judge erred in not fully considering the answers the appellant gave in his interview and at the hearing about his fears.
36. I also accept the argument that the judge's finding at paragraph 22 that the evidence pointed to a degree of harassment only for gay people in Bangladesh did not fit with the objective evidence contained in the Respondent's Country Policy and Information Note Bangladesh: SOGI dated September 2017 which relied on the objective evidence contained in the Australian DFAT Country Information Report dated 5 July 2016. This

was because the judge erroneously relied on a background report which he said was several years out of date.

37. For these reasons I find that the judge's decision cannot stand. Rather than remitting the appeal, I took the view that there was no further evidence that the appellant was required to give and that the objective evidence was sufficient to enable me to determine the appeal.

### Decision

38. The respondent accepted that the appellant is gay. The respondent also identified the appellant's reasons for claiming asylum which were set out in his answer to question 14 of the interview. He claimed that on return to Bangladesh he feared his family will beat him and kick him out of the house if they found out he was gay. He feared that he would be kicked out by the community and the police would torture and arrest him. He also feared religious would kill him if they found out.
39. I find that it was in the light of these fears that the appellant remained private and discreet about his homosexuality when he was in Bangladesh.
40. He said in answer to question 66 that three months after arriving in the UK he began going to gay bars and clubs after searching for them on the internet. In England he has lived openly as a gay man. He also said in his interview that he has been open to friends about his sexuality. Indeed, the judge found that the position of the respondent that everyone who is gay can calmly return to Bangladesh and live quite openly was not one that he found was supported by the background material.
41. Mr Hussain relied on the 2016 Australian DFAT Report on Bangladesh. Paragraph 3.79 of the report confirms that LGBT persons are not able to be open about their sexual orientation or gender identity, regardless of their socio-economic status or geographic location. Paragraph 3.82 of the same report states that visible gay men face a high risk of violence, including being killed. Added to this is the precedent set in **HJ (Iran)** that to reject an application on the ground that the applicant could avoid persecution by living discreetly would be to defeat the very right which the Convention exists to protect - his right to live freely and openly as a gay man without fear of persecution.
42. I find that having lived openly as a gay man in the United Kingdom, it would be difficult for the appellant to return to Bangladesh and be discreet about his homosexuality.
43. In the light of the objective evidence and **HJ**, and the appellant's own evidence about his fears, I find that on return to Bangladesh the appellant will not be able to seek protection from the police, who seem to have a hostile attitude to homosexuals.
44. I find that the appellant's fear of persecution if he were returned to Bangladesh is well-founded. It was supported by the objective evidence.



45. I allow the appellant's appeal.

**Notice of Decision**

The appeal is allowed on asylum and humanitarian protection grounds.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

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

Signed

Date: 15 June 2018

Deputy Upper Tribunal Judge Eshun