



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/07096/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 22 November 2018**

**Decision & Reasons
Promulgated
On 8 February 2019**

Before

**THE HONOURABLE LORD MATTHEWS
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE JACKSON**

Between

**MSA
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Reza, solicitor, JKR Solicitors

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant was born on 3 April 1993 and is a national of Bangladesh. He entered the United Kingdom on 25 February 2010 with leave as a visitor valid for six months. On 12 January 2017 he claimed asylum on the basis that as a gay man he feared persecution if he ever returned to Bangladesh. He had a screening interview on 28 January 2017 and a

substantive asylum interview on 5 July 2017. The claim was refused by the respondent on 13 July 2017. It was accepted by the respondent that he was a gay man and that he had demonstrated a genuine subjective fear on return to Bangladesh. However, it was not accepted that his fear was objectively well-founded. It was accepted that sexual activity between men, whether consensual or not, was illegal under Section 377 of the Bangladesh Penal Code but it was maintained that the authorities did not enforce that legislation fully. It was accepted that the LGBT community might face harassment by the authorities but for various reasons set out in the refusal letter it was not accepted that the treatment of gay men amounted to persecution under the Refugee Convention or that there was a real risk of serious harm in terms of paragraph 339C of the Immigration Rules or Article 3 of the ECHR. Neither was there any breach of Article 8.

2. The appellant appealed under Section 82(1) of the Nationality, Immigration and Asylum Act 2002.
3. The appeal was heard on 25 August 2017 by FtTJ P-J S White, whose decision, refusing the appeal, was promulgated on 20 October 2017. The FtTJ set out the legal framework in paragraphs 3 and 4 of the determination and no issue is taken with that. On the asylum claim it is for the appellant to prove that there is a real risk that he will suffer persecution for one of the five reasons identified in the Refugee Convention, now incorporated into the EU Qualification Directive, which in turn has been implemented by appropriate changes to the Immigration Rules, HC 395 (as amended), which came into force on 9 October 2006. This makes provision for protection in qualifying cases: The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 S.I. No. 2525. The FtTJ pointed out that consideration had to be given to the question whether, if not entitled to asylum, he was entitled to humanitarian protection, under paragraph 339C of HC 395, by virtue of a real risk of suffering serious harm, as therein defined. Insofar as the appellant relied on rights under Article 3 of the Human Rights Convention, he had to show a real risk that he would suffer inhuman and degrading treatment. In the claim under Article 8, he had to show that the decision interfered with his protected family or private life. Article 8 being a qualified right, it was open to the respondent to show that any interference was justified.
4. The burden of proof rests on the appellant. The standard of proof in all the claims advanced is the lower standard of a real risk, save for the claim under Article 8, where it is the balance of probabilities. The evidence had to be considered in the round and the relevant date was the date of the hearing. The FtTJ reminded himself of the need for anxious scrutiny of the evidence and of the advice of UNHCR that asylum claimants be given the benefit of the doubt where their claim was otherwise plausible. Even if the judge were dubious of some aspects of the evidence, the core of the account might still be true.

5. Having considered the evidence and submissions, the judge made a number of findings of fact both in relation to the appellant himself and in relation to the situation in Bangladesh. Following that, the judge dismissed the appeal on asylum grounds, humanitarian protection grounds and human rights grounds.
6. The appellant appealed to the Upper Tribunal and in a determination promulgated on 15 May 2018, Upper Tribunal Judge King TD found that there was an error of law in the FtTJ's analysis of the background material. The determination was set aside but only in that respect. The findings of fact in relation to the appellant himself were not set aside. He determined that the background material should be considered by the Upper Tribunal in a hearing convened for that purpose and to consider the question as to whether there existed within Bangladesh as a whole or Bangladesh in particular areas where an openly gay man could pursue his homosexual lifestyle without undue risk to himself. Various passages from reports had been cited both in the refusal letter and before the FtTJ but not in any detail. Judge King indicated that it was for both parties to present the reports and in the skeleton arguments to highlight with particular care those passages which were relied upon either to establish that there were safe areas or to establish the contrary, as the case might be.
7. With that background, the case ultimately came before us on 22 November 2018.
8. Mr Reza submitted a bundle of reports and a skeleton argument highlighting those parts which he said were relevant. Unfortunately, the respondent submitted no skeleton argument. Mr Wilding, whom we do not blame for this situation, said that this was due to a lack of resources. Furthermore, the appellant's evidence only came in two days before the hearing. We found this situation unfortunate, to say the least. A lack of resources seems to us to be a poor excuse for not complying with the directions issued on 18 October 2018. A skeleton argument, in terms of those directions, was to be submitted no later than Friday, 2 November 2018. While the appellant had not produced a skeleton until very late in the day, that did not seem to us to absolve the respondent from the duty to comply with the directions and our consideration of this case was hampered, albeit Mr Wilding's submissions were of considerable assistance.
9. We asked Mr Wilding at the outset what the respondent's position was. He told us that in accordance with the latest Home Office Country Policy and Information Note (version 3.0 - November 2017) the assessment was on a case by case basis. Societal discrimination per se did not amount to persecution. There was a lack of consistent evidence as to how gay men were treated. Mr Wilding said that he could not readily identify whether the appellant had a well-founded fear of persecution in his home area but perhaps the Tribunal did not think it mattered. He was not sure if his case was that he was at risk from his family or not. His skeleton argument appeared to suggest that the conditions generally amounted to

persecution and that the State was not able or willing to offer protection. There was no finding that he was at risk from his family.

10. We did not hear any evidence about the appellant's particular situation, that not being the focus of the appeal before us. In these circumstances, the FtTJ's findings as to the appellant's personal circumstances still stand. The relevant circumstances seem to us to be as follows.
11. There was no dispute about the appellant's identity and nationality. While there is no finding of fact about this, the evidence demonstrated that he came from Sylhet, where his family still live. That not having been disputed, we proceeded on the basis that it is true. At the age of 14 he realised that he was homosexual. Nothing particularly turns on this, it being accepted that he is gay. There was evidence that he went to gay clubs and bars but the FtTJ found that insofar as he had been open about his sexuality, this was a recent development, beginning two to three months before he made his asylum claim and that he remained guarded with at least some people, including his own relatives. There were letters from friends, and one from a cousin, to the effect that they knew him to be homosexual and in some cases that they had seen him at gay clubs and/or events, which suggested at least a degree of openness on his part. The FtTJ found that that was of limited assistance in deciding whether he would live openly on return to Bangladesh. However, under reference to HJ (Iran) and Another v SSHD [2010] UKSC 31, the FtTJ noted that the reason for discretion in Bangladesh will be important.
12. The respondent submitted that the appellant would not live openly in Bangladesh but that would not be the end of the matter even if that were the case. If even part of the reason for discretion was a fear of persecution he would be entitled to refugee status. The FtTJ noted that it was not put to the appellant that he would live discreetly and would do so for reasons other than persecution and that so far as he admitted not telling everyone of his sexuality, the reason assigned was fear of harm, rather than stigma. The judge noted that the refusal letter accepted that he had a genuine subjective fear, which further suggested that if he were to live discreetly, at least part of the reason would be fear of persecution. In the light of that, while the judge thought it far from clear how openly he presently lived, or how openly he would live in Bangladesh, as a gay man, he was satisfied that a suggestion that he would be discreet was no answer to his claim because such discretion would be in part from fear of persecution. It is not entirely clear whether the FtTJ found that he was in fear of his family. The finding that he remained guarded with at least some people, including his own relatives, is of limited assistance in that regard.
13. Nonetheless, we proceeded on the basis that he is gay and that he would either wish to live openly or would refrain to do so at least in part because of his fear of persecution. As the FtTJ noted, the real issue is whether that fear of persecution is objectively well-founded.

The Submissions

14. Mr Reza submitted that the respondent and the First-tier Tribunal for that matter had relied on the Country Policy and Information Note of December 2016, which had indicated that there was a considerable degree of social stigma for LGBT people in Bangladesh. However, there was evidence to suggest that tolerance may be improving and there was in general no risk of persecution. In any event, the appellant could relocate. However, in assessing the extent of his ability to live freely and openly gay in Bangladesh, the expert evidence had to be considered. Things had moved on since December 2016. Two other Country Policy and Information Notes had been produced, one in September and one in November 2017. The previous two reports had indicated that gay people were at risk of discrimination but not persecution but the latest report represented a significant change. The latest policy summary could be found at paragraph 3.1.1 to 3.1.8 in the following terms:

- “3.1.1 Male same-sex sexual acts are criminalised in Bangladesh under Section 377 of the Penal Code and punishable by life imprisonment. However there have only ever been two arrests under the provision and no convictions. Sex between women is not criminalised and transgender persons (hijras) are legally recognised. There are, however, reports that Section 377, together with other legal instruments, have sometimes been used by the police to arbitrarily arrest, harass and intimidate LGBT persons. There have also been reports police use physical and sexual violence against LGBT persons.
- 3.1.2 However, in general, the available evidence does not establish that LGBT persons are systematically targeted and subject to treatment amounting to persecution or serious harm by the state.
- 3.1.3 Reports indicate that LGBT persons are reluctant to be open about their sexual identity due to social stigma, pressures and norms, and to avoid a level of discrimination and violence by non-state actors, including family members and Islamic extremists, arising from this. Similarly, the LGBT ‘community’ is closed and private.
- 3.1.4 Women are less able than men to withstand family pressure to marry and, for example, may be more restricted in their movements. Decision makers must consider all of the person’s circumstances.
- 3.1.5 In general, an LGBT person who does not conceal their sexual orientation or gender identity may be at risk of treatment, which by its nature and repetition amounts to persecution or serious harm. The nature and degree of treatment may vary according to geography and socio-economic status. Gay rights activists and bloggers may be at greater risk due to their profile. Each case must be considered on its facts and merits.

- 3.1.6 In general, the state appears able but unwilling to offer effective protection. However, each will need to be considered on its facts.
- 3.1.7 Internal relocation may be reasonable depending on the person's individual circumstances, for example: where they have chosen to live discreetly due to social or religious pressures. However, internal relocation will not be an option if it depends on the person concealing their sexual orientation and/or gender identity in the proposed new location for fear of persecution.
- 3.1.8 Where a claim is refused, it is unlikely to be certifiable as 'clearly unfounded'."
15. This was not the same as the conclusion in the previous reports. Mr Reza submitted, however, that even in those reports the sources contradicted the conclusions. We do not need to decide whether that particular submission was well founded.
16. As far as the December 2016 report was concerned, paragraph 4.4.2 was to the effect that there were no laws in Bangladesh prohibiting discrimination on the basis of sexual orientation or identity. There was no legal recognition of same sex civil unions or marriages and same sex couples could not adopt children.
17. At 4.4.3 it was indicated that nearly 90% of the population was Muslim and sexual activity of any nature outside of a heterosexual marriage was prohibited under Sharia law.
18. At 4.5.1 reference was made to a Fact-Finding Mission undertaken in April 2015 by the French Office for Protection of Refugees and Stateless Persons which noted that Article 86 of the Dhaka Metropolitan Police Ordinance 18, entitled "Penalty for being found under suspicious circumstances between sunset and sunrise", could be used against LGBT individuals, in particular its subparagraph (b): "Having without any satisfactory excuse his face covered or otherwise disguised". Men wearing makeup and women's clothes or meeting in small groups during the hours stipulated in the ordinance may be arrested.
19. Article 54 of the Code of Penal Procedure of 1898, which allows the police to arrest a person against whom a complaint has been made without a warrant, had been used against LGBT individuals.
20. At paragraph 4.5.3 it was noted that the Global Human Rights Development reported in 2015 that Section 377 of the Penal Code was used in conjunction with Sections 54 and 55 of the Code of Criminal Procedure, which allowed law enforcement agencies to arrest without a warrant, to harass the LGBT community. Sections 54 and 55 were enforced as a so-called "preventative measure". Any police officer in

charge could arrest individuals whom he or she had a probable cause or reasonable suspicion would commit a “cognisable offence”.

21. At paragraph 5.2.2 it was noted that the BSW (Bandhu Social Welfare Society) had reported that the law was used by social institutions including families to harass LGBT persons and compel them into heterosexual marriages. At paragraph 5.2.3 the late gay rights activist Xulhaz Mannan was quoted by the Kaleidoscope Trust as commenting that even in some more conservative regions homosexual acts between teenage boys were seen as the safer way of exploring sexuality and that as long as they got married in their adulthood no one cared much. However, it was a closet and the moment someone decided to leave that they would be ostracised by family, friends and society. Other material was quoted to the effect that homosexuality deviated from the cultural norm in Bangladesh and that coming out could have a wide range of consequences. Some parents in Bangladesh considered homosexuality to be a mental illness and as a morally depraved Western phenomenon that needed to be fended off. However, mainly due to new media, times were changing. The gay rights publication LGBT Weekly noted in April 2014 that “any discussion around sex and sexuality is taboo”. A similar comment was made by the Dhaka Tribune in December 2014.
22. At paragraph 5.3.4 the Refugee Coordinator of Amnesty International in Toronto indicated in March 2010 that it was generally unsafe for gay men in Bangladesh to publicly reveal their sexual orientation and they frequently married persons of the opposite gender to give the appearance of heterosexuality. At paragraph 6.1.1 it was noted that in September 2014 the Bangladesh Permanent Representative to the UN told the Dhaka Tribune that the government opposed the International Conference on Population and Development’s recommendations for LGBT rights. The government of Bangladesh (paragraph 6.1.2) rejected a recommendation to abolish Section 377 of the Penal Code at the 24th Regular Session of the UN Human Rights Council’s Universal Periodic Review.
23. At paragraph 6.1.6 it was noted that following the murders of two gay rights activists (Xulhaz Mannan and Mahbub Tonoy) in Dhaka on 25 April 2016, a representative of Bangladesh's first LGBT magazine told The Telegraph that “LGBT activists did not trust the police” and that most LGBT activists had now gone into hiding. The Telegraph also reported (paragraph 6.1.7) that the murdered activists were too scared to report the death threats they had received to the police for fear of retribution.
24. At paragraph 6.1.8 Reuters reported that the Home Minister, Asaduzzaman Khan, said no one involved in the killings would be spared but also urged people to respect religious sensitivities and indicated that Xulhaz used to work to protect the rights of gay people, which was not in line with their society.
25. In paragraph 6.2.2 it was noted that the U.S. Department of State 2015 Report indicated that police used the law as a pretext to bully LGBT

individuals, particularly those seen as effeminate men. Some groups also reported harassment under a suspicious behaviour provision of the police code. According to “views adopted” by the UN Human Rights Committee in 2013:

“Although the law that criminalises homosexual relationships is not systematically applied it reinforces a general climate of homophobia and impunity for those who persecute LGBT individuals. Moreover, the law is applied in an unofficial manner without recorded prosecutions by state and non-state agents.”

26. Mr Reza then referred to the September 2017 report, which concluded that some LGBT persons had reportedly faced harassment by law enforcement officers but these were not sufficiently serious by their nature and repetition as to amount to persecution or serious harm. It went on that in general LGBT persons were not open due to social pressures and norms, and to avoid a level of discrimination arising from this. But, even when taken cumulatively, it was not sufficiently serious by its nature and repetition as to reach the high threshold of persecution or serious harm.
27. However, he submitted that the contents of the report challenged that conclusion. Reference was made to paragraphs 2.3.8, 2.3.10, 2.3.11, 2.3.12, 2.4.3, 2.5.6 and 4.1.2. These were to the effect that Bangladesh was a conservative society in which homophobic attitudes persisted. LGBT persons faced discrimination as well as family and societal pressure to conform to Bangladeshi and Muslim social and heterosexual norms, including marriage. There had been some reports of violent behaviour towards LGBT persons and rights activists by non-state actors. Among the main perpetrators were “mastans” (local thugs) and Islamist groups, although harassment and discrimination were more likely experiences than violence. Various sources maintained that LGBT persons were, in general, reluctant to be open about their sexuality, although persons from a higher socio-economic background might “come out” to their family or friends. Reasons for not being open might include conforming to societal norms and fear of discrimination and/or violence. There was an indication that the rise in social media had led to an increase in hate speech against LGBT people. Whilst there were support groups for them, some had reduced their activities following the murder of the two gay rights activists in 2016. Some sources indicated that many LGBT persons who experienced societal ill-treatment did not report the incidents to the police due to a fear of having to reveal their sexual orientation. LGBT persons from influential families might be able to access protection, although we note that there is no suggestion that the appellant in this case came from an influential family. Internal relocation would not be an option if it depended on the person concealing their sexual orientation and/or gender identity in the proposed new location for fear of persecution. There were no laws in Bangladesh prohibiting discrimination on the basis of sexual orientation or gender identity. There was no legal recognition of same sex civil unions or marriages and same sex couples could not adopt children.

28. Mr Reza went on to submit that LGBT people were more likely to be charged with other offences, and not necessarily under 377 of the Penal Code. In this regard he quoted from paragraphs 4.6.1, 4.6.3, 5.1.2 and 5.1.3 of the September 2017 report.
29. This referred again to the use of Article 86 of the Dhaka Metropolitan Police Ordinance regarding the penalty for being found under suspicious circumstances between sunset and sunrise. It referred again to the Global Human Rights Development report in 2015 of the use of Sections 54 and 55 of the Code of Criminal Procedure, along with Section 377 of the Penal Code. At 5.1.2 (which is in similar terms to paragraph 6.2.2 of the latest Country Policy and Information Note from November 2017) it was noted that according to views adopted by the UN Human Rights Committee in 2013:

“Although the law that criminalises homosexual relationships is not systematically applied it reinforces a general climate of homophobia and impunity for those who persecute LGBT individuals. Moreover, the law is applied in an unofficial manner without recorded prosecutions by state and non-state agents. According to a U.S. State Department 2016 Report, lesbian, gay, bisexual, transgender and intersex (LGBTI) groups reported that police used the law as a pretext to bully LGBTI individuals, including those considered effeminate regardless of their sexual orientation, as well as to limit registration of LGBTI organisations. Some groups also reported harassment under a suspicious behaviour provision of the police code. During a Home Office Fact-Finding Mission (“FFM”) to Bangladesh in May 2017, two sources noted that people were unlikely to be charged under Section 377 but that other laws, such as drug laws, were used against LGBT people.”
30. Police brutality and torture was noted in the report at paragraph 6.1.1. Human Rights Watch stated in a press release of 26 April 2016 that in 2013 the country’s National Human Rights Commission called on the government to protect sexual and gender minorities from discrimination. In a 2015 manual on sexual and gender minorities the commission acknowledged that police physically and sexually assaulted LGBT people and also arbitrarily arrested them based on their appearance. At paragraph 6.4.3 it was noted that according to Western officials consulted during the Home Office Fact-Finding Mission in May 2017, the murders of the two activists had not yet been solved and no arrests had been made. The New York Times reported in June 2017 that one arrest had been made but there was no further progress in the case, a year after the murders.
31. At paragraph 6.4.4 it was noted that the Australian government's Department of Foreign Affairs and Trade Country Information Report noted in July 2016 that many gay men, including LGBTI activists and non-activists, had reportedly received threats of violence and had been unwilling or unable to approach police for support. During the Fact-Finding Mission in May 2017, several sources suggested that LGBT people would

not feel that they could approach the police for protection. The Boys of Bangladesh said that there might be some exceptions to this, for instance someone from an influential family. However, members of the press noted that the police were obliged to take on a case, irrespective of the sexuality of the reporter of the crime and the Bangladesh Legal Aid and Services Trust (BLAST) noted that there was “very little research on these issues”.

32. We have already considered certain statements by government officials but the following reference was made to this at paragraph 6.5.3 of the report, referring to a report by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) in 2017 which stated the following:

“While referencing family values at its second cycle UPR in April 2013, the Bangladeshi Minister for Foreign Affairs concurred with the newly found position of the National Human Rights Commission that LGBT people should be protected from violence and discrimination in law. However, throughout 2016 the levels of violence and threat from religious radicals that LGBT people have been exposed to have exponentially risen, and the state has not offered protection. As such, many have been forced to leave their homes and flee the country for fear of their lives.”

33. At paragraph 6.5.4 that report is noted as pointing out that Bangladesh accepted a recommendation to carry out sensitisation training with public officials but this issue was not picked up and there was no evidence that such sensitisation had significantly occurred.
34. Mr Reza, in his skeleton, drew attention to paragraph 7.2.2 of the September 2017 report, which points to the effect that the BSWS (Bandhu Social Welfare Society) reported that the law was used by social institutions including families to harass LGBT persons and compel them into heterosexual marriages.
35. At paragraph 7.3.4 the Refugee Coordinator of Amnesty International in Toronto was noted in 2010 as indicating that it was generally unsafe for gay men in Bangladesh to publicly reveal their sexual orientation, and they frequently married persons of the opposite gender to give the appearance of heterosexuality. At paragraph 7.3.5 it was noted that DFAT noted in its July 2016 report that “the level and frequency of harassment (of LGBT persons) depends largely on an individual’s socio-economic status and their geographic location”, while adding “... credible sources have told DFAT that lesbian, gay, bisexual, transgender ... and intersex (LGBTI) persons are not able to be open about their sexual orientation or gender identity, regardless of their socio-economic status or geographic location.” Several sources consulted during the Home Office FFM to Bangladesh in May 2017 maintained that LGB people were unable to be open about their sexuality. An official at the National Human Rights Commission (NHRC) said that some people may be able to “come out” to close family and friends, particularly in upper middle class families ...

Boys of Bangladesh noted that the rise in social media, and an unfriendly media, had led to an increase in hatred against LGBT people.

36. Reference was made to paragraphs 8.1.1, 8.1.4 and 8.2.1 of the September 2017 report. That recorded that the USSD 2015 Report stated that attacks on LGBTI persons occurred occasionally, but these offenses were difficult to document because the victims desired confidentiality. It noted that LGBT persons regularly received threatening messages via telephone, text, and social media. Freedom House, in its 2017 report, noted that societal discrimination against LGBT persons remained the norm.
37. It was noted at paragraph 8.1.4 that according to the USSD 2015 Report, strong social stigma based on sexual orientation was common and prevented open discussion of the subject but said that some public events, such as a Rainbow-themed march during the capital's main Bengali New Year's celebration, elicited little reaction from mainstream society. At paragraph 8.2.1 it was noted that the Immigration and Refugee Board of Canada, in a research response of 2010, referred to the records of the Bandhu Social Welfare Society as showing that "physical assault or beating was the primary form of violence experienced by MSM (men who have sex with men). The main perpetrators of violence were local thugs or 'mastans'".
38. The report also noted at 8.5.1 that ILGA noted in its 2017 report that in February 2015 Avijit Roy, the author of Bangladesh's first scientific book on same sex sexual identity, was savagely murdered on the streets of Dhaka, seemingly by religious fundamentalists.
39. Reference was made again to the murder of the two gay rights activists on 25 April 2016. They were killed in a machete attack by a gang of assailants posing as delivery men. Al-Qaeda claimed responsibility. It was claimed that they were killed for being pioneers of practising and promoting homosexuality in Bangladesh.
40. Paragraph 8.5.4 noted that following the murders, Reuters interviewed eight members of Bangladesh's LGBT community and found that out of fear of further attacks some people had scrubbed Facebook pictures that hinted at same sex relationships or de-activated profiles altogether. Several had gone into hiding in safe houses in Dhaka arranged by local and foreign friends, while others fled to the countryside, considering it safer than the teeming capital.
41. The USSD Report of 2016 observes that following the murder of the two activists, many members of LGBTI communities reduced their activities and sought refuge both inside and outside of the country, resulting in severely weakened advocacy and support networks for LGBTI persons. It was noted at 8.7.3 that the OFPRA FFM Report of 2015 observed that there were no purely social meeting places such as "gay friendly" or specifically LGBTI restaurants or bars in the capital. They usually met at private

parties. The National Human Rights Commission and an official at the British High Commission in Dhaka, who were consulted during the Home Office FFM to Bangladesh in May 2017, noted that the LGBT community was closed and private. Paragraph 8.7.4 noted that several sources consulted during the FFM agreed that gay rights activists and bloggers were more at risk than “ordinary” LGBT people. Members of the press judged that Sylhet was riskier than Dhaka. The Boys of Bangladesh claimed that within the last year more LGBT people had left Bangladesh because of the attack against gay activists in 2016.

42. Mr Reza submitted that the new policy note, published in November 2017, in effect was not new but merely recognised the existing situation. He submitted that it was in recognition of the Fact-Finding Mission in May but that was referred to, as we understand it, in the September report, so that part of his submission cannot be right. Nonetheless, Mr Wilding very kindly was able to find the report of the Fact-Finding Mission and provided a copy of it to us.
43. Mr Reza quoted extensively from the latest report in his skeleton argument. We have already referred to parts of this. Mr Reza submitted that this policy note for the first time accepted that gay people were at risk of persecution in Bangladesh and it was an admission for the first time that the State was able but not willing to offer effective protection. We will not repeat quotes from the report which echo material in previous reports, such as the prohibition against same sex unions, same sex adoption, the use of Article 86 of the Dhaka Metropolitan Police Ordinance, and the use of Articles 54 and 55 of the Code of Criminal Procedure in conjunction with Section 377 of the Penal Code.
44. The views of the UN Human Rights Committee in 2013 were repeated as were the references in the USSD 2016 Report to LGBT groups reporting bullying tactics by the police. The FFM noted that people were unlikely to be charged under Section 377 but that drug laws were likely to be used against them.
45. At paragraph 6.1.1 it was noted in the report that Human Rights Watch stated in a press release of 26 April 2016 that in 2013 the country’s National Human Rights Commission called on the government to protect sexual and gender minorities from discrimination. In a 2015 manual on sexual and gender minorities, the commission acknowledged that police physically and sexually assaulted LGBT people and also arbitrarily arrested them based on their appearance.
46. Paragraph 6.3.2 noted that in July 2016 Australia’s Department for Foreign Affairs and Trade (DFAT) gave its assessment on LGBT persons in Bangladesh, stating that:

“... LGBTI individuals - particularly gay men - face a high risk of official discrimination because of their sexual orientation or gender identity, which may include being harassed, extorted, or denied police

protection. Even if legal punishments and prosecutions are rare, the illegality of homosexual acts under the Criminal Code can be used as a means of harassment.”

47. At 6.3.3 it was noted that during the Home Office FFM to Bangladesh in May 2017, Boys of Bangladesh referred to “extreme cases” of hijras being beaten by the police. When asked how a gay man or lesbian would be treated by the police, an official at the National Human Rights Commission (NHRC) stated that if an LGBT person had to report a crime, they would not identify themselves as LGBT to the police. However, if they were identified, the NHRC official thought they might face custodial torture. An official from the British High Commission in Dhaka felt that it was difficult to know if LGBT people were treated worse than anyone else because “everyone has a rough time with the police”.
48. At paragraph 6.3.4 it was noted that Amnesty International stated in August 2017 that harassment of LGBTI people by security forces was common in Bangladesh and many LGBTI people had told Amnesty International that they were extremely hesitant to approach the police. Far from being offered protection, those who had reported abuses said that they were often harassed by police, told to be “less provocative” and even threatened with arrests and criminal charges for “unnatural offences” under Section 377 of the Penal Code.
49. Reference was made, again, at 6.4.1 about the LGBT community's reaction to the murders of two activists in April 2016. Most LGBT activists had gone into hiding, had stopped chatting on social media, had switched off their phones and changed the places where they stayed. They were just doing this to survive.
50. Mr Reza referred to a number of other passages which faithfully repeated what had been said in earlier reports and went on to consider paragraph 8.1.2. This reflects information in the same paragraph in the earlier reports and is to the following effect:

“Participants in a study based on 50 interviews with individuals from the LGBT community, jointly conducted by GHRD and Boys of Bangladesh (a support group for the gay community) between November 2013 and May 2014, said that when they were subjected to violence based on their sexual orientation they did not report the incidents to the police due to a fear of having to reveal their sexual orientation. ... According to the survey of 751 self-identified LGB persons in 2014, of the 25.8% who stated they faced discrimination, 'a higher percentage' said they either had no knowledge of or no access to legal support.”
51. Mr Reza did not quote the immediately succeeding paragraph, 8.1.3, which appears to be the same as in the September 2017 report, to the following effect:

“In December 2014 the Dhaka Tribune reported on a survey conducted by Boys of Bangladesh and Roopban (a gay community magazine) among 751 self-identified LGB persons, as part of a Needs Assessment survey. The survey showed that 59% of respondents never faced discrimination but 25.8% did face discrimination, while more than 50% said they lived in constant fear of their sexual orientation being discovered. According to the Tribune there was speculation that respondents were largely from the middle class. Polled individuals came from eight major cities across the country, including 250 from Dhaka. The average age of those surveyed was 25.”

52. This latter paragraph is referred to in the determination of the First-tier Tribunal at paragraph 23. Upper Tribunal Judge King specifically referred to this in his determination of 15 May 2018. The FtT's determination did not refer to the percentage (25.8%, not 28%, as UT Judge King indicated) who said that they did experience discrimination. It was not entirely clear, according to UT Judge King, how many of those who did experience discrimination were openly gay and what proportion of those who had not experienced discrimination were living discreetly. Unfortunately, the Home Office report does not provide any further breakdown of the figures and the interaction between them is not entirely clear.
53. Mr Reza referred to paragraph 8.1.5, which indicated that in April 2016 Human Rights Watch reported having interviewed LGBT people in Bangladesh “in recent months” and found that they faced threats of violence, particularly after homophobic public comments by Islamic leaders. Activists working on gender and sexuality said that, to ensure their personal safety, they concealed their identities and constrained their work. Those who were exposed in the media and public spaces felt particularly vulnerable. In recent years, LGBT people in Bangladesh had been targeted with extremist rhetoric. For example, in November 2015, when activists began publishing a cartoon series featuring a lesbian character, religious groups issued hateful anti-LGBT statements, calling on the government to prosecute LGBT people under Section 377 and Sharia law.
54. At paragraph 8.1.6 it was noted that a source consulted during the Home Office FFM opined that journalists who published information on LGBT or secular issues received threats from Islamist groups and added that the government did not recognise LGBT issues.
55. At paragraph 8.2.1 it was noted that the Immigration and Refugee Board of Canada, in a research response of 2010, referred to the records of the Bandhu Social Welfare Society as showing that “physical assault or beating was the primary form of violence experienced by MSM [men who have sex with men]. The main perpetrators of violence were local thugs or 'mastans'.”

56. Mr Reza went on to quote from paragraphs 8.2.2 to 8.2.4. The BSWs, in its 2010 annual report, claimed that social attitudes towards feminised males left them as prior victims of abuse and harassment leading to physical, psychological, social, economical and emotional problems which further increased vulnerability and social exclusion. Their 2013 report observed that the:
- “... non-recognition of full civil and political rights of LGBT in Bangladesh is worsened by this homophobia, stigma and social discrimination. These things, together with illegality (Section 377) further result in social exclusion and create psychical, social, psychological, legal harassment and mental disorders”.
57. In July 2016 Australia’s Department for Foreign Affairs and Trade stated that LGBTI individuals, particularly gay men, faced a high risk of societal discrimination in Bangladesh because widespread traditional views about sexuality and gender continued to restrict their participation in the community and workforce. Visible gay men faced a high risk of violence, including being killed.
58. Reference was made again to the murder of Avijit Roy in February 2015 and the two gay rights activists Xulhaz Mannan and Mahbub Tonoy on 25 April 2016, as well as the consequences thereof.
59. Mr Reza submitted that the respondent's guidance supported the appellant's case that as a practising homosexual he was likely to face treatment amounting to persecution and harassment.
60. The report of the FFM refers to Section 377 of the Penal Code. It also refers to the recent arrest of 27 or 28 men after a raid on a private gathering of gay men in Dhaka. The men were charged with narcotics offences. The Boys of Bangladesh referred to the arrests of four people prior to a Gay Pride rally but they were later released. Two sources noted that men who had sex with men were tolerated if they married and bore children. They were seen as more acceptable than men and women who committed adultery. Sources noted that the LGBT community was closed and private. There was no Gay Pride but there was online activism, particularly in the last five to six years, and there were LGBT groups, mostly based in Dhaka, such as Bandhu. Several sources agreed that gay rights activists and bloggers were “more at risk” than “ordinary” LGBT people. Members of the press judged that Sylhet was riskier than Dhaka. BLAST noted that there were instances of known LGBT activists being murdered in their own homes by extremists, such as Xulhaz Mannan. His murder was thought to be atypical because he was a prominent activist. However, Boys of Bangladesh claimed that within the last year more LGBT people had left Bangladesh because of the attack against gay activists in 2016. It was difficult to know if LGBT people were being treated worse than anyone else because everyone has a rough time with the police. The rise in social media and an unfriendly media had led to an increase in hatred against LGBT people, according to the Boys of Bangladesh. There

was also discrimination against LGBT people, such as in healthcare, which was worse in urban areas. It was claimed that it was a common experience for families to suggest psychiatric treatment to those who came out. Several sources suggested that LGBT people would not feel they could approach the police for protection. There might be some exceptions to this according to BOB such as someone from an influential family.

61. Mr Reza referred to a recent report from the Australian Department of Foreign Affairs and Trade, dated 2 February 2018. Paragraphs 3.92 to 3.99 are in the following terms:

“3.92 Sexual Orientation and Gender Identity Article 377 of the Penal Code (‘Of Unnatural Offences’) criminalises homosexual acts, defined as ‘carnal intercourse against the order of nature’, and provides for a maximum penalty of life imprisonment. While actual prosecutions are rare, human rights groups report that police have used Article 377 to harass LGBTI individuals, including men considered effeminate regardless of their sexual orientation. This harassment includes using the Article as leverage to extort bribes from individuals under threat of arrest, and as a means to limit registration of LGBTI organisations. The level and frequency of harassment depends largely on an individual’s socio-economic status and geographic location.

3.93 Male homosexuality remains a strong social taboo, while there is a general lack of societal awareness of lesbians. The overwhelming majority of gay and lesbian people in Bangladesh prefer to keep their sexual orientation a private matter. There is considerable familial and societal pressure on both gay men and lesbians to enter into heterosexual marriages. DFAT assesses it would be extremely difficult in practice to live in a publicly acknowledged homosexual relationship.

3.94 Until recently, there had been some evidence to suggest that official and societal attitudes towards LGBTI rights and issues were improving. Local NGOS reported they had been able to campaign for LGBTI rights through cultural activities in an increasingly open manner since 2007. The government acknowledged the existence of the LGB population in its April 2013 Universal Periodic Review, having stated in its 2009 review that there were no LGB individuals in the country. A ‘Rainbow Rally’ LGBTI rights parade held during the Bengali New Year in April 2015 was both high profile and well attended.

3.95 Events since 2016 have suggested that this trend is reversing. Organisers planning a follow-up event to the ‘Rainbow Rally in April 2016 received a number of death threats, and cancelled the event after police refused to guarantee protection and instead arrested four of their number. In the same month, Islamist militants murdered LGBTI activist Xulhaz Munnan, the founder of Bangladesh’s only LGBTI magazine, in his apartment, along with

a friend. Officials commenting on the murders of the two men blamed the murders on Munnán's activism: the Minister for Home Affairs declared that Munnán was 'writing in favour of unnatural sex, which is tantamount to a criminal offence'. The murders remain unsolved. Following the two murders, several gay men – both activists and non-activists – reported receiving threats of violence. LGBTI activists subsequently cancelled a number of advocacy events and constrained their work, some in the LGBTI community removed Facebook pictures hinting at same-sex relationships or deactivated their profiles altogether, and many went into hiding. This has resulted in considerably weakened advocacy and support networks for LGBTI persons.

- 3.96 While DFAT is unaware of any further murders or violent crimes committed against LGBTI individuals, rights activists have reported that the government has generally remained unsympathetic on the issue. Although the murders of Munnán and his friend were two of the most high-profile murder cases in Bangladesh, only two newspapers mentioned the issue on the first anniversary of their deaths. One republished an Amnesty International Report, while the other reported that no government agencies, law enforcement or investigation officers had contacted Munnán's family in the year since his murder. An editor of a leading English language newspaper reportedly told activists that they had received official instruction not to publish articles on homosexuality.
- 3.97 In May 2017, the Rapid Action Battalion arrested 27 LGBTI youths at a party in Keranganj on the outskirts of Dhaka – Bangladesh's largest coordinated arrest of LGBTI individuals in recent history. While a RAB representative confirmed that those arrested included 'homosexuals from 20 districts' and images of the arrestees appeared on television and in newspapers identifying them as gay men, those arrested were charged with narcotics offences rather than under Article 377. Activists have suggested that arresting and charging the group on the grounds of drug possession rather than homosexuality – and using the RAB rather than regular police to do so – was an attempt by authorities to send a message to the LGBTI community that their activities were being monitored, while avoiding international pressure.
- 3.98 DFAT is aware of proposals to establish a position for an LGBTI representative in the National Human Rights Commission, which may provide greater opportunities for advocacy of LGBTI rights and provide a clearer avenue for effective recourse against those responsible for violating them. It is unclear how far the proposal has progressed or the timeline for when such a position might be established.
- 3.99 DFAT assesses that LGBTI individuals face a moderate risk of official discrimination in that they are unlikely to be able to access state protection in the event of threats or attacks against

them. Although prosecutions or legal prosecutions are rare, the existence of Article 377 can be used as a means of harassment or extortion. DFAT assesses that people perceived to be LGBTI individuals face a high risk of physical violence.”

62. Mr Reza submitted that until recently it was thought that the situation of the LGBT community was improving but recent incidents showed that the trend was reversing. He referred to a detailed research report on the LGBTI community in Bangladesh by Global Human Rights Defence. It was known as *The Invisible Minority: The Situation of LGBT Community in Bangladesh*. In the executive summary the following was stated:

“The situation of the LGBT community in Bangladesh is of paramount concern. Bangladesh still criminalises same-sex relations under Section 377 of the Penal Code, a particular provision that the government refuses to repeal. The government’s negative stance on LGBT rights, combined with Bangladeshi society’s cultural and religious beliefs contribute to the strictly binary conceptualisation of sexual orientation and gender identity. The LGBT community is currently severely disenfranchised, facing discrimination, violence, and social exclusion.”

63. Reference was made by Mr Reza to concerns expressed by the UK government, as reported in the *Pink News* on 30 May 2017. This referred to the murder of the journalist, to which reference has already been made. The FCO Minister Hugo Swire is reported as having raised concerns about human rights and violence against LGBT people with the Bangladeshi High Commissioner, adding that it had been raised with the Prime Minister of Bangladesh on a previous occasion.

64. Mr Reza referred again to the murder of the two gay activists in Dhaka. No prosecution had followed, yet the respondent suggested the appellant could relocate to Dhaka. Most incidents had taken place in Dhaka. Many gay people had fled the country and some had committed suicide. He quoted from an article entitled “Bangladeshi repression leaves LGBT community reeling” dated 21 May 2017, which referred to the multiple arrests of gay individuals, who were charged with drugs offences. That report in turn quoted a gay rights activist, the founder of a small LGBT rights group called *Vivid Rainbow*. He said that the motivation behind the arrests was that the politicians wanted to please the majority Muslim fundamentalists to get more votes. He also went on to say that the government was applying Section 377, Section 57 and the blasphemy law of the Bangladesh Penal Code to silence free thinkers and LGBT people. He was also quoted as saying:

“Many LGBT people already fled to abroad as refugees and many of them have already committed suicide. But nobody is caring about human rights. I am also thinking [about whether to keep living] as nobody is saving us from this homophobic living hell.”

65. He added that the same person had been quoted as saying that in the past year at least fourteen LGBT Bangladeshis that he knew had committed suicide. Many others had tried to commit suicide but failed. Many others had cut off their genitalia and joined the hijra community, a group of “third gender” trans people who were widely recognised in Bengali society.
66. On 25 May 2017 the Dhaka Tribune published a report on the arrests. In the course of that report a Bangladeshi LGBT rights organisation was quoted as saying in 2015 that “visibility can be life-threatening”. It was said that even discreet activism can attract unwanted attention, which was made even riskier as the authorities have repeatedly failed to stand up for freedom of expression. The arrests were also criticised in the Washington Post.
67. The Bangladesh government's position on homosexuality was clearly stated by their Home Minister, Mr Khan Kamal, during a visit by the US Assistant Secretary of State on 5 May 2016. The minister explained that homosexuality was a criminal offence and that Bangladeshi society, law and religion did not support homosexuality in any way. The government had consistently rejected UNHCR's recommendations to abolish Section 377.
68. Such was the hatred of homosexuals among the Bengali community that even in London there was an incident of Bengalis attacking a gay couple, as reported in the Gay Star News on 24 June 2014.
69. Reference was made to two articles, one entitled “Nowhere to turn for Bangladeshi's LGBT” and the other entitled “Raped and abused, this 23 year old gay refugee from Bangladesh on the run in Nepal shares his story”. The first of these contained harrowing details about a 22 year old gay activist who had recently fled Bangladesh for Germany after repeated attacks. After his father found out that he was gay he took him to a doctor for medicine, which produced severe side effects. He was later taken to India for hormone replacement therapy. Along with some friends he formed a counselling group for homosexuals in 2008 and they used to meet once a week in a secret place. They organised a 'Rainbow Rally in the city in 2009 (the city being Comilla) but the rally was attacked and some of his fellow activists were injured. He was later attacked himself and a group of Islamists tried to cut off his fingers. He was abducted and raped in 2010. Police officers rescued him after a few days but did not file any case. They suggested instead that he leave the country. His college stripped him of his rights to study there, citing his activism. He said that he had been sued 25 times in the past few years for being gay. Even some parents of his close friends went to court saying that he was teaching their children homosexuality. He was attacked in 2014, leaving him with severe damage in his right ear. He had been imprisoned on a couple of occasions.

70. The other article related to a 23 year old who came from South-Central Bangladesh. He was rejected by his parents and left home at 18 for Dhaka. He got involved with a local LGBT organisation but fled when he began to receive threats from Muslim extremists over social media. He said that he was assaulted by police officers in a park in 2013. They put cigarettes out on him. This was on the basis that they said he was gay or from the transgender community. They explained that the park at night was a cruising site for sex selling. The police officers raped him.
71. Mr Reza referred to a report by Dr Inge Amundsen, who he said was a recognised country expert on Bangladesh. This report is referred to in the determination of the FtTJ. The FtTJ approached the report with some caution but accepted that Dr Amundsen was entitled to be regarded as an expert on Bangladesh. Dr Amundsen's credentials are set out at paragraph 154 of the appellant's bundle (page 10 of the report). We need not repeat what is said there. Mr Wilding also challenged his expertise, as we shall show in due course, but we are satisfied with what appears from his credentials that he is entitled to be regarded as an expert on human rights in Bangladesh, albeit with no specific expertise or background in LGBT issues.
72. Dr Amundsen pointed out that homosexual activity is illegal. Social stigma, communal rejection, shame and assaults by religious groups made it impossible to live as an openly gay person in Bangladesh. He indicated that gay people were harassed and persecuted by law enforcement agencies, even when the law was not directly enforced. There were only two court convictions for breaking the specific law. He referred to the arrests of 27 men, the arrests of four activists taking part in a traditional procession to celebrate the Bengali New Year, the arrests of three young gay men in Sylhet in August 2012 and the arrests of a lesbian couple who were arrested in Dhaka for marrying each other and threatened with life imprisonment. This appears to be in 2013. He referred to a researcher, Kyle Knight, of Human Rights Watch LGBT Rights Programme, who said that the police and the Rapid Action Battalion had raided meetings, arrested men and paraded them in front of the public and media while saying they were gay, thus abusing their authority to humiliate gay men. He indicated that it had been argued that state protection for homosexuals who were victims of violence or subject to threats was unlikely and that in fact such a request could be seen as a confession to a criminal offence. He referred to the murder of Mannan and Tonoy and a claim by their friends that they never sought police protection because they feared the backlash. Homosexuals were regularly receiving threats to their life by mobile phone and social media. One source claimed that at least fourteen human rights defenders, secular writers and activists were murdered in Bangladesh between February 2013 and June 2016. Local media reported at least 34 attacks of this type in 2015 and early 2016 which took 35 lives and injured 129 people. It is not clear, though, how many of these were "ordinary" gay people.

73. With more particular relevance to the appellant, he said that Sylhet was known to be a socially and religiously conservative part of Bangladesh, noted for its piety and conservative attitudes towards family life. It was likely that the appellant as an openly gay person would not be accepted by his family and it was possible that he would be harassed and assaulted if he returned to his family there. However, there were few cases reported in Bangladesh and Sylhet on the murder of a returned gay man by family members. In fact, no directly comparable cases were found. Most murders committed by family members were of women, based on the suspicion of adultery and/or indecent behaviour. The expert considered that the risk of him being harassed and injured by his father and/or other family members if he returned to Sylhet was real. It was also opined that his fear of the public, the police and Islamic organisations was well-founded. Strong social stigma based on sexual orientation was common in Bangladesh, where society largely saw it as a sin. The police were harassing and the Islamist organisations were harassing and even murdering gay people. The expert considered that the risk of his being harassed and persecuted by the police and harassed, persecuted, injured and even killed by Islamist organisations or their supporters was real. This was said to amount to persecution within the meaning of the Refugee Convention and to be well above the minimum level of severity to engage Article 3 of the ECHR. These conclusions are, of course, a matter for us.
74. As far as relocation was concerned, Dr Amundsen said that it was correct that in Dhaka the appellant should not fear his family. The distance from Sylhet to Dhaka was about five and a half hours' drive and Dhaka was a chaotic city of almost 9,000,000 people with ample opportunity to hide. However, his fear of persecution by the police and Islamist organisations in Dhaka was well-founded. Most of the reported cases of police harassment as well as most of the reported cases of murder of gay people by Islamists had taken place in Dhaka. He could not live in Dhaka as an openly gay person and he could not expect any support from his family or from the gay community in Dhaka. It had collapsed. The situation had turned for the worse over the last few months (looked at from the perspective of 20 August 2017). There were no longer a few associations supporting or advocating for LGBT persons. An increased number of gay Bangladeshis had retreated into the closet and fled abroad.
75. Dr Amundsen referred to the Country Policy and Information Note of December 2016. He said that the situation on the ground had changed noticeably since that was researched and written. State protection of human rights in Bangladesh was faulty. The authorities continued to criminalise the LGBTI community and they did not trust either the formal court system or traditional mediation mechanisms. The 'Rainbow Rally which took place in Dhaka in April 2014 and was repeated in April 2015 could not be held in 2016 or 2017 due to threats and opposition from Islamist groups. It was not correct to say that tolerance of LGBT persons was improving. The Islamist groups had successfully created an environment of fear in the country, silencing people and leading to an

increasing number of gay Bangladeshis to retreat into the closet and flee abroad. It was not correct to say that there were non-governmental organisations in Bangladesh who advocated for LGBT rights and the LGBT community and which might be able to assist. The LGBTI/gay community in Dhaka had collapsed.

76. The cited two arrests had now increased to at least 30. Although the law which criminalised homosexual relationships was not systematically applied it reinforced a general climate of homophobia and impunity for those who persecuted LGBT individuals. Moreover, the law was applied in an unofficial manner without recorded prosecutions by State and non-State agents. Reportedly, the level of violence had increased, the hacking to death of LGBT activists was “serious harm” and police arrests had recently been made.
77. In a recent article (23 March 2018) entitled “The ruins of Bangladesh's LGBT community” Dr Amundsen wrote that:
- “... what was once a fledgling lesbian, gay, bisexual and transgender community in the Bangladeshi capital of Dhaka is now destroyed. In 2014 and 2015 the Bangladeshi gay scene was cautiously becoming more open. 'Rainbow Rally' pride parades were held and a gay magazine called Roopbaan was in print. But the LGBT community has since been scared back from the streets, and to be openly gay in Bangladesh is now life threatening.”
78. Reference was also made to an article entitled “Homosexuality in Bangladesh” by a human rights and immigration lawyer, Daniel Cohn, dated 10 July 2018. It does not really add anything and, unlike Dr Amundsen's report, does not quote any sources. We do not consider that any weight can be attached to it.
79. Mr Reza submitted that despite calls from various international agencies Bangladesh did not repeal Section 377 of the Penal Code. It created a climate of homophobia and the authorities made use of other laws to persecute and harass members of the LGBT community. The prospect of recognition of LGBT rights in Bangladesh was a far cry. There had been a significant rise in Islamic militancy in the country. Dr Amundsen's article referred to that. No progress had been made in the investigation of the murder of the two gay rights activists. Many frontline LGBT leaders, volunteers or people associated with the gay magazine Roopban or the Boys of Bangladesh had been forced to leave the country. In light of the objective evidence and the country situation it was submitted that the appellant, as a practising gay person, was very likely to face treatment amounting to persecution and ill-treatment. If he had to live discreetly in order to avoid persecution his situation would be covered by HJ (Iran) and the case of LC (Albania) v SSHD [2017] EWCA Civ 351.
80. In conclusion, it was submitted that the appeal should be allowed both under the Refugee Convention and the Human Rights Convention. The

respondent's position had changed. The expert evidence was to the effect that he would have a problem in his own area of Sylhet. He would also have a problem in Dhaka. He came from a very conservative and religious part of the country and would not have the support of his family. The background evidence supported his subjective fear of persecution.

81. Mr Wilding submitted that the only legal issue was whether the societal discrimination went beyond that into persecution. The test of persecution was set out in Article 9 of the Qualification Directive. It was in the following terms:

- “1. In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:
 - (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the [ECHR]; or
 - (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).
2. Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of:
 - (a) acts of physical or mental violence, including acts of sexual violence;
 - (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
 - (c) prosecution or punishment, which is disproportionate or discriminatory;
 - (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
 - (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);
 - (f) acts of a gender-specific or child-specific nature.”

82. Mr Wilding submitted that the respondent's policy position had not particularly changed. Paragraph 3.1.5 of the Country Policy and Information Note was clear. The background material was patchy about actual incidents of undoubted persecution. All of the reports discussed the same key events, which were best summarised at page 247 of the appellant's bundle. It boiled down to the murders of Avijit Roy, Xulhaz Mannan and Mahbub Tonoy in the first place. In the second place, there was the cancellation of the Gay Pride event in April 2016. Mr Reza had submitted that it was cancelled because the police said it could not protect

those who would take part but there was no evidence that the cancellation was due to the authorities' intolerance or ambivalence. They did not want a security threat from an Islamist group. See paragraph 8.6.1 of the Country Policy and Information Note. Four people were arrested but only because they had attempted to hold the rally after permission for it had been denied. The only other specific incident was the arrest in 2016 of 27 or so gay men on drugs charges.

83. Applying the test in the Qualification Directive, the societal discrimination referred to did not generally amount to persecution. Nothing on the facts gave the appellant a particular profile. He was not a gay rights or human rights activist or, for example, a high profile gay sportsman.
84. Dr Amundsen's report was particularly unimpressive. His credentials were set out at page 154 but it was not clear why he was an expert in this. He did not add anything to the background material. Nothing on pages 145 to 147 (Dr Amundsen's pages 1 to 3) told us anything we did not already know. There was no argument that the existence of Section 377 was of itself persecution. He referred to two matters in 2012 and 2013. Three young gay men were arrested in Sylhet in August 2012 but we did not know if they were arrested for being gay or if it was for something else. The lesbian couple were said to have been threatened with life imprisonment in 2013 but there was no information about what actually happened. The reference on page 5 of the report to the long list of secularists, free thinkers and atheists who had been terrorised and killed by fundamentalists was irrelevant. The expert then dealt with this particular case and equated the appellant to an activist.
85. On page 9 the expert said that there were reasons to doubt the overall conclusion in the Country Information and Policy Note that "evidence of violence by non-state actors against LGBT people is limited, with harassment and discrimination more likely experiences" and that "the treatment of LGBT persons in Bangladesh does not amount to serious harm or persecution, even when taken cumulatively". The expert's own conclusion was only vaguely justified. The country information report referred to the police arrests and the deaths of activists. Murder was undoubtedly serious harm but it did not mean that there was any persecution. The expert really endorsed the Secretary of State's position that violence was limited. There were sporadic outbursts of violence by particular individuals and no more than that.
86. As paragraph 8.7.4 of the Country Policy and Information Note noted, several sources consulted during the FFM agreed that gay rights activists and bloggers were more at risk than "ordinary" LGBT people.
87. There was nothing in the previous reports in 2016 and 2017 which warranted separate consideration. The September document was almost the same as the November one.

88. In reply, Mr Reza submitted that Dr Amundsen was a well-known expert on Bangladesh and anyone could check his details. Although the death penalty was not in force in Bangladesh, the government had voted to retain it at the UN, in order to help countries like Iran. The government was trying to appease Islamists. There was a difference between the September and November reports in that the conclusions were completely different. The conclusion that the State was able but unwilling to help was an important change. While Section 377 was rarely used, the respondent's own guidance was that other laws were used. Paragraph 5.1.2 referred to the USSD 2016 Report to the effect that the police used the law as a pretext to bully LGBTI individuals. Paragraph 8.7.4 showed that members of the press judged that Sylhet was riskier than Dhaka.
89. There was evidence that violence had increased. Reference was made to paragraph 6.5.3, which noted the ILGA report of 2017 as stating the following:
- “While referencing family values at its second cycle UPR in April 2013, the Bangladeshi Minister for Foreign Affairs concurred with the newly found position of the National Human Rights Commission that LGBT people should be protected from violence and discrimination in law. However, throughout 2016 the levels of violence and threat from religious radicals that LGBT people have been exposed to have exponentially risen, and the state has not offered protection. As such, many have been forced to leave their homes and flee the country for fear if their lives.”
90. It was clear that members of the LGBT community, whether or not activists, faced a risk of conduct which would amount to persecution and ill-treatment.
91. Following these submissions, we reserved our decision, which we now give.

Findings and Reasons

92. We have taken account of all of the background material, even though it is not specifically mentioned in this determination.
93. The appellant is undoubtedly a gay man who comes from Sylhet, a conservative part of Bangladesh. The attitude towards homosexuality in Bangladesh has been amply demonstrated. It deems it a criminal offence and the government has shown no willingness to repeal Section 377 of the Penal Code. For many of the Islamic community it is regarded as a sin. It is obvious that homosexuals face discrimination and there is no anti-discrimination law covering them. The murders of three prominent activists have been well-documented as is the fact that no prosecutions have followed. It is fair to say that the public announcements of government representatives have been ambivalent in addressing the murders and the nature of the activities of the victims.

94. We proceed upon the view that homophobic attitudes persist in Bangladesh. As is set out at paragraph 2.3.10 of the November 2017 report, Bangladesh is a conservative society in which homophobic attitudes persist. LGBT persons face societal discrimination as well as family and societal pressure to conform to cultural and religious norms, including marriage. Strong social stigma about sexual orientation prevent discussion of LGBT rights. As is said at paragraph 2.3.12, there have been some reports of violent behaviour towards LGBT persons who are open about their sexual orientation or gender identity by non-state actors. As is said at 2.3.14, there is an indication that the rise in social media has led to an increase in hate speech against LGBT people.
95. Paragraph 2.3.16 notes that in general, LGBT persons are not open due to social stigma, pressures and norms, and to avoid a level of discrimination and violence arising from this. LGBT persons who openly express their sexual orientation or gender identity are likely to be socially excluded, receive threats of violence and, in some cases (particularly gay men), may be attacked by non-State actors. Widespread stigma and discrimination is also likely to restrict their participation in the community and the workforce and access to healthcare. The nature and degree of treatment may vary according to geography and socio-economic status.
96. Paragraph 2.3.17 says the following:
- “Therefore, in general, an LGBT person who does not conceal their sexual orientation or gender identity may be at risk of treatment, which by its nature and repetition amounts to persecution or serious harm ... LGBT rights activists and bloggers may be at greater risk due to their profile ... However, each case must be considered on its facts with the onus on the person to demonstrate why their particular circumstances would put them at real risk from non-state actors.”
97. Paragraph 2.4.3 and 2.4.4 are in the following terms:
- “2.4.3 Some sources indicate that many LGBT persons who experience societal ill-treatment do not report the incidents to the police due to a fear of having to reveal their sexual orientation. LGBT persons from influential families may be able to access protection ...
- 2.4.4 State authorities have been responsible for arbitrary arrests, detentions, harassment and discrimination towards LGBT persons with reports of the police physically and sexually assaulting them. There is some evidence of the authorities taking appropriate action. For example, the police are reported to have investigated the murder of two gay rights activists in 2016, and one arrest was made.”
98. 2.4.5 says the following:
- “In general, the state appears able but unwilling to offer effective protection and the person will not be able to avail themselves of the

protection of the authorities. However, each will need to be considered on its facts.”

99. In relation to internal relocation, the report at paragraph 2.5.3 says the following:

“It would not, in general, be unreasonable for a gay man, who has chosen to live discreetly due to social or religious pressures, to relocate internally within Bangladesh. However, internal relocation will not be an option if it depends on the person concealing their sexual orientation and/or gender identity in the proposed new location for fear of persecution.”

100. What is the particular situation of the appellant? The First-tier Tribunal, in an assessment which is not challenged, while not finding specifically that the appellant would live openly as a gay man in Bangladesh, finds nonetheless that if he did not do so it would be due at least partly to a fear of persecution. He is part of a relevant social group which exists in Bangladesh. He has a subjective fear of persecution. The issue for us is whether that subjective fear is objectively well-founded, in other words, has he shown that there is a risk of persecution.

101. He comes from Sylhet. A number of references in the background reports are to the effect that Sylhet is riskier than Dhaka. The extent to which the appellant is afraid of his family is not clear. Dr Amundsen opines that the risk of the appellant being harassed and injured by his father and/or other family members if he returns to Sylhet is real. This conclusion does not seem to us to be fully justified by the material which preceded it. That was to the effect that Sylhet was known to be a socially and religiously conservative part of Bangladesh, noted for its piety and conservative attitudes towards family life. It has many madrasas (Qur'anic schools) and a custom for arranged and sometimes forced marriages. The report goes on: “Thus, it is very likely that Mr A, as an openly gay person, will not be accepted by his family. It is also possible that he will be harassed and assaulted if he returns to his family in Sylhet.”

102. Given the nature of Sylhet, we consider however that there is force in the reference to its being possible that he will be harassed and assaulted if he returns to his family in Sylhet but it is not clear to us why his family should be involved in this. Nonetheless, given the preponderance of the information with which we are provided, it does seem to us that there is a risk of the appellant being subjected to violence in Sylhet, whether or not by his family, and whether or not he is an activist. We consider Article 9 of the Qualification Directive. We consider that there is a real risk of repeated physical violence which would amount to persecution. It can never be guaranteed that such violence will occur but in our judgment, there is a real risk of it in his home territory, such that his subjective fear of persecution is, we determine, well-founded.

103. We find that that risk of persecution would be from non-State actors, rather than from the State itself, primarily because of the lack of direct evidence before us of the actions of the State in Syhlet and only general evidence before us from the latest Country Policy and Information Note that there is no evidence of LGBT persons being systematically targeted and subject to treatment amounting to persecution or serious harm by the State itself. The appellant has made no specific case before us on the evidence of being specifically at risk from the State in his home area.
104. Having concluded that the appellant would be at risk in his home area from non-State actors, the next questions are whether there would be a sufficiency of protection for him and/or an option of internal relocation. The latest Country Policy and Information Note concludes that the State appears able but unwilling to offer effective protection to a person at risk from non-State actors on the basis of their sexuality and Mr Wilding did not seek to persuade us that there would be any effective State protection for the appellant, or anyone else in his position.
105. As to internal relocation, we reach the same conclusion that there is a real risk of persecution in relation to Dhaka (no other possible locations for internal relocation have been proposed by the respondent and we have not therefore considered any other locations). We agree with Mr Wilding that certain specific acts of violence have been repeatedly referred to in the background material and we are conscious of the danger of placing too much emphasis on them because they appear time and again and because most of those instances relate to high profile victims who were bloggers and/or activists, which this appellant is not.
106. We agree with Mr Wilding that the references in Dr Amundsen's report to incidents in 2012 and 2013 are of no assistance. There was some further information about the 2013 matter in the appellant's bundle but it was inspecific. We also agree that the murders of the three activists cannot be regarded as typical. We bear in mind that there is no suggestion that the appellant will be an activist. Nonetheless, there is no suggestion that he is from an influential family. We find the recent article by Dr Amundsen to be persuasive in relation to the current situation in Dhaka. The preponderance of evidence is that LGBT activists have been dissuaded from advocacy and indeed from using social media. This is indicative of the relevant circumstances in Dhaka. The information suggests that although Section 377 is not used, other laws have been employed to arrest members of the LGBT community and, on occasions, violence, including sexual violence, has been used against them.
107. We note that paragraph 399 of the Australian DFAT Report of 2 February 2018 assesses that people perceived to be LGBTI individuals face a high risk of physical violence. That report indicated that the trend of improving societal attitudes towards LGBTI ways and issues, which had been improving, was reversing.

108. We note the article by Colin Stewart on page 157 of the bundle. We have already referred to the quotations of the LGBT activist about people he knew committing suicide. We cannot place a great deal of weight on this document but it is at least consistent with the general tenor of the other background information.
109. Our impression from the background material is that not only is there significant and widespread societal discrimination, but that the level of violence towards homosexual men, even known activists, has increased and that the risk of persecution and serious harm is made out.
110. In addition to the above, we find the greatest support for our conclusions from the evidence submitted by the respondent himself contained in the latest Country Policy Information Note, which on a plain reading, concludes to the lower standard applicable in asylum claims, that there is a real risk of persecution. In paragraph 3.1.5, as already quoted above, it states "In general, an LGBT person who does not conceal their sexual orientation or gender identity may be at risk of treatment, which by its nature and repetition amounts to persecution or serious harm." Although it goes on to say that the nature and degree of treatment may vary according to geography and socio-economic status, with gay-rights activists and bloggers potentially at greater risk due to their profile and that each case must be considered on the facts and merits, there is nothing in the evidence before us to detract from the general position of risk. There is for example no indication, save as recorded above the limited evidence that the position in Syhlet is worse than in Dhaka, of any particular difference based on geography, nor that there would not for example be any real risk in Dhaka. There was limited evidence before us that the position may be better for those who come from a wealthy and/or into influential family, but otherwise nothing to detract from the general position.
111. Although the Appellant is not an activist and blogger, nor is there any indication that he would commence such activities on return to Bangladesh, he also does not have a high socio/economic status nor does he come from a wealthy or influential family such that may assist him or reduce the risk of persecution or serious harm. We find nothing about his circumstances that would place him in anything other than the general category of the person who does not conceal his sexual orientation and may be at risk of treatment, which by its nature and repetition amounts to persecution or serious harm, both in his home area and in Dhaka.
112. Even if we are wrong that it would not be safe for the appellant to internally relocate to Dhaka, we are quite satisfied that it would be unreasonable to require that the appellant relocate to Dhaka. This is for the reasons already set out above and because if he moves to Dhaka he will not have any family at all. He will be a lone individual with no support network. As a single gay man with no family and no support network it seems to us that there is a risk that the appellant would be vulnerable and face very significant difficulties in being able to integrate and sustain

himself given the high levels of societal discrimination against LGBT persons and the general position in Dhaka.

113. In conclusion and for the reasons set out above, the appellant's appeal is allowed on asylum grounds as he has established to the lower standard that he is at real risk of persecution on return to Bangladesh because of his sexual orientation, that there is no sufficiency of protection from the authorities for him and it would be unsafe and/or unreasonable for him to internally relocate to Dhaka. For the same reasons we would also allow the appeal on humanitarian protection grounds and on human rights grounds.

Notice of Decision

The appeal is allowed on asylum grounds.

The appeal is allowed on humanitarian protection grounds.

The appeal is allowed on human rights 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 4th January 2019

On behalf of:
LORD MATTHEWS
Sitting as an Upper Tribunal Judge
(Immigration and Asylum Chamber)