



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

Appeal Number: AA/02581/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 3 November 2015**

**Decision & Reasons Promulgated  
On 9 November 2015**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE SAFFER**

**Between**

**MR  
~~(NO ANONYMITY ORDER MADE)~~**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Sesay of Counsel

For the Respondent: Mr Bramble a Home Office Presenting Officer

**DECISION AND REASONS**

**Background**

1. The respondent refused the appellant's application for asylum or ancillary protection on 30 January 2015. His appeal against that decision was dismissed by First-tier Tribunal Judge Twydell ("the Judge") following a hearing on 19 June 2015. This is an appeal against that decision.

### The grounds of the application

2. It was argued that the Judge;
  - (1) did not refer to the Appellant's evidence regarding sufficiency of protection for gay men in Bangladesh,
  - (2) did not give adequate reasons for finding that there is sufficiency of protection, and
  - (3) applied the wrong standard of proof regarding the likelihood of harm.

### The grant of permission

3. Upper Tribunal Judge Martin granted permission to appeal (18 August 2015) on the ground that;

"It is arguable that the Judge ... does not give reasons for preferring the evidence adduced by the Secretary of State over that of the Appellant."

### Respondent's position

4. The Respondent asserted in her reply (2 September 2015) in essence that the Judge took into account all evidence and was entitled to find that;
  - (1) homosexuality is part of the Bangladeshi culture,
  - (2) participation in that culture will not necessarily result in prosecution,
  - (3) any discrimination suffered would not amount to persecution, and
  - (4) internal relocation to an active gay community where he can integrate is a viable option.
5. Mr Bramble submitted additionally that the fact that there are some unsympathetic policemen does not mean that there is a lack of willingness by the state to provide protection. The Judge looked at all the evidence. The fact that the gay scene is not as available does not mean he cannot act openly within the more constricted life available in Bangladesh.

### The Judges findings

6. The Judge found as follows;

[42] "...the appellant's sexuality is fundamental to his identity. He is homosexual and belongs to that particular social group."

[43] "When the appellant was living in Bangladesh he was subjected to intolerance/discrimination in relation to his sexuality from the local community ... his parents no longer had contact with the appellant because of his sexuality. Same sex activity is illegal in Bangladesh ... However ... prosecution does not often occur."

[44] "I find the appellant would have sufficient protection from the police or relevant authorities living as a homosexual in Bangladesh."

[45] "Homosexuality is part of the Bangladeshi culture and that participation in that culture will not necessarily result in prosecution...the appellant will not be able to do in Bangladesh everything he can openly do in the UK as that is not the test. It is possible the appellant might suffer some discrimination if he returned to Bangladesh, but based on the evidence it would not equate to persecution."

[46] "... his father was no longer an active police officer, and even if he was, it is unlikely he would be able to influence those sections of a community to which the appellant has relocated ... the threats ... are unlikely to be so far reaching they could be carried out if the appellant relocated. The appellant is fit, healthy and educated. Bangladesh is a large country with a population of approximately 166 million. I find that the appellant would be able to relocate, not only physically away from members of his family, but also to an area of Bangladesh where there is an active gay community to enable him to integrate."

[48] "He suffered discrimination in the form of teasing, bullying and physical assaults when in Bangladesh."

[51] "... he has lived most of his life in Bangladesh, spoke Bengali and went to school in Bangladesh. He is fit, healthy and educated and able to relocate ... and will have the protection of the police and relevant authorities upon his return."

### Relevant case law

7. Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC) guides me to the view that it is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. It is, however, necessary for Judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost.
8. HL (Malaysia) v SSHD [2012] EWCA Civ 834 states that even if in a particular country a gay person might not live freely and openly as such, an applicant would not be entitled to refugee status if he would behave discreetly for reasons quite other than a fear of persecution. In such a case there was no nexus between the possible persecution of overt gays and the claimant's conduct.
9. HJ (Iran) v SSHD; HT (Cameroon) v SSHD [2010] UKSC 31 states that attention must be focussed on what the applicant would actually do if he was returned to his country of nationality. The fact that he could take action to avoid persecution did not disentitle him from asylum if in fact he would not act in such a way as to avoid it.
10. R v SSHD (ex p Bagdanavicius) [2005] UKHL 38 states that there has to be substantial grounds for believing that there will be a real risk of harm and a failure by the state to provide reasonable protection.

11. AW (sufficiency of protection) Pakistan [2011] UKUT 31 (IAC) guides me to the view that the test set out in Horvath [2001] 1 AC 489 was intended to deal with the ability of a state to afford protection to the generality of its citizens. Notwithstanding systemic sufficiency of state protection, a claimant may still have a well founded fear of persecution if authorities know or ought to know of circumstances particular to his/her case giving rise to the fear, but are unlikely to provide the additional protection the particular circumstances reasonably require. Particular account must be taken of past persecution (if any) so as to ensure the question posed is whether there are good reasons to consider that such persecution (and past lack of sufficient protection) will not be repeated.

### Discussion

12. In my judgement the Judge did not engage with the Appellant's evidence regarding sufficiency of protection or the ability to internally relocate. She does not explain why she prefers the evidence of the Respondent to that produced by the Appellant. She does not explain how being teased, bullied and physically assaulted amounts to discrimination and not persecution. She does not explain how, if he had to cease being open regarding his sexuality to avoid the ill-treatment she accepted had occurred and which was linked to his sexuality, he fell foul of the guidance set out in HL (Malaysia) and HJ (Iran).
13. In addition, in stating that (my emphasis) "participation in that culture will not necessarily result in prosecution", the Judge erred, as the correct test is whether "it is reasonably likely" rather than "not necessarily". The former is a much lower threshold.
14. There was therefore a material error of law in the manner in which the Judge dealt with the Appellant's evidence as she failed to give reasons for preferring the evidence adduced by the Respondent over that of the Appellant, and applied the wrong test.
15. I therefore set the decision aside.

### Rehearing

16. Mr Sesay submitted that I should remit the matter to the First-tier Tribunal to enable the internal flight option to be considered. Mr Bartle submitted that all the information was available and I should determine the matter myself. I agreed with Mr Bartle. All the evidence was before me and delaying the matter when I was cognisant of all relevant facts did not accord with the principle of resolving disputes without undue delay.
17. On rehearing the matter Mr Bramble referred me to the Respondent's Country of Origin Information Report issued on 31 August 2013. Mr

Sesay submitted that there was a deeply homophobic society in Bangladesh. The authorities were complicit in the persecution and lack of adequate protection. There was a systematic brutality of the community towards homosexuals. Internal relocation would be unduly harsh and unreasonable.

18. The Respondent's Country of Origin Information Report notes;  
(21.01) - the jail and financial penalties for homosexuality within the penal code,  
(21.04 - December 2010) - the systematic persecution by state agents for "suspicious" behaviour of sexually marginalised populations,  
the gross infringements of the rights of sexual minorities,  
the harassment, physical and sexual abuse and extortion, as well as arbitrary arrest and detention of those not conforming to heterosexual norms,  
an emerging self-identified gay and lesbian culture, and that  
self-identified gay teenagers are often forced into psychiatric and medical regimes in order to be "cured",  
(21.07 - 2012) - the law against consensual same sex sexual activity was not enforced but there were reports that the police used the law as a pretext to bully especially effeminate men, and  
there were several informal support networks for gay men, and  
(21.08 - September 2011) that due to legal issues and societal norms and pressures, gay men rarely disclose their status.
19. I note the launching of an LGTB magazine in Dhaka (20 January 2014), and the article from Globalgayz (1 January 2012) which noted the lack of a publicly identifiable Bangladesh gay community.
20. It was accepted that the Appellant has been teased, bullied and physically assaulted and ostracised by his family due to his sexuality. The background evidence makes it clear that the authorities do not actively prosecute homosexuals under one piece of legislation but do so under another and used it as a pretext to bullying. Accordingly the homosexual community is marginalised and underground.
21. The Appellant would not be able to live openly as a homosexual in Bangladesh wherever he is. The only reason he cannot do that is to avoid a repeat of the ill-treatment he has suffered in the past. Being beaten goes beyond discrimination as it is a physical act as opposed to a denial of rights.
22. Given the background evidence, I am satisfied that there are substantial grounds for believing that there will be a real risk of harm and a failure by the state to provide reasonable protection to the

Appellant should he return to Bangladesh and seek to live openly as a homosexual. Internal relocation is not an option as there is no evidence any one part of Bangladesh is less homophobic than any other, and as the background evidence indicates that the police are part of the problem not part of the solution.

Decision:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

I set aside the decision.

I remake the decision and allow the appeal under the 1951 Geneva Convention relating to the Status of Refugees, and Article 3 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms.

Signed:

Deputy Upper Tribunal Judge Saffer  
4 November 2015