



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00444/2017

THE IMMIGRATION ACTS

Heard at Field House
On 29 May and 24 September 2018
Dictated: 1 October 2018

Decision & Reasons Promulgated
On 6 November 2018

Before

UPPER TRIBUNAL JUDGE O'CONNOR

Between

MS
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity Direction

I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings. Liberty to apply.

Representation:

For the Appellant: Mr G Franco (29/5) and Mr D Mold (24/9), instructed by
Schneider Goldstein Immigration Law

For the Respondent: Mr T Wilding (29/5) and Ms K Pal (24/9), Senior Presenting
Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Bangladesh, born in August 1983. He appealed to the First-tier Tribunal (“FtT”) against a decision of the Secretary of State for the Home Department (“SSH”) dated 28 November 2016, refusing his application for leave to remain on protection and human rights grounds.
2. That appeal came before FtT Judge Steer and was dismissed in a decision promulgated on 07 July 2017. Permission to appeal to the Upper Tribunal was thereafter granted, on 12 September 2017, by Upper Tribunal Judge Rintoul. Thus, the matter comes before me.

FtT’s decision

3. The gravamen of the appellant’s case is that he is gay and that upon return to Bangladesh he will be persecuted by either his family members, the state, the mullahs or the general populace, or indeed all four.
4. The FtT found *“the appellant and his witness”* credible in the evidence they gave and made a specific finding that *“the Appellant is gay”* [24]. The Tribunal then went on to consider the risk to the appellant upon return, its core findings on this issue being found in paragraphs 36 and 37 of its decision:

“36. In relation to non-state actors, the Respondent maintained that, even when taken cumulatively, the societal treatment of LGBT persons in Bangladesh did not reach the level of being persecutory or otherwise inhuman or degrading treatment. Again, the country evidence cited in the Policy Note, as referenced by Mr Franco, was limited to *“some reports of violence ... Harassment and discrimination are more likely than violence. There is a range of reactions to “coming out” which may include serious harm (most likely from family members)”*. There were no specific examples, details or statistics provided, in support of assertions in relation to non-state actors, which would lend support to the Appellant’s claim that the actions were persecutory in nature. Further the assertions were somewhat contradictory, stating on the one hand that harassment and discrimination were more likely reactions than violence, but that the range of reactions may include serious harm (most likely from family members). The Appellant did not provide any plausible evidence that his family members in Bangladesh would actively seek him out, in order to persecute him, or cause him serious harm, should he return there now.

37. In the absence of any specific examples, details or statistics of persecutory treatment by state or non-state actors, and no plausible evidence that the Appellant’s family members would actively seek him out and cause him harm, should he return there now, I find that the Appellant is not at risk of suffering ill-treatment amounting to persecution or serious harm upon return to Bangladesh now.”

Setting aside of FtT's decision

5. At the hearing before the Upper Tribunal on 29 May, Mr Wilding accepted that the FtT had erred in law in failing to make an explicit finding as to *"how the appellant would live upon return to Bangladesh"*, by which he was referring to whether the appellant would 'live openly as a gay person upon return or would attempt in some way to conceal his sexual orientation'. Mr Wilding further accepted that consideration of this issue was integral to the proper assessment of whether the appellant would be at risk upon return, following the decision of the Supreme Court in HJ (Iran)[2010] UKSC 31. To use Mr Wilding's words, *"the consequence of [the FtT's] failure is that the consideration of the background material by the FtT was linear"* and, therefore, the FtT's decision should be set aside.
6. I concurred with Mr Wilding's view and for those reasons I set aside the FtT's decision.
7. I further observed, in my written decision promulgated on 12 June 2018, that the FtT's consideration of the risk from the appellant's family was also entirely inadequate. The only references in the decision relating to this issue focused on whether the appellant's family members would be likely to actively seek out the appellant in order to persecute him. However, the appellant grew up in a village in Bangladesh and on the available evidence his family still live in that village. There was no explanation by the FtT as to why, in such circumstances, the appellant's family would have to 'seek him out'. The question the FtT ought to have asked itself is whether, if the appellant were to return to his home village it would be reasonably likely that his family would come to know that he is gay. If this is answered in the affirmative, then an assessment of the consequences should have followed. The Tribunal failed to evaluate this scenario.
8. I adjourned the re-making of the decision for the reasons set out in my decision of 12 June, preserving the FtT's finding that the appellant is gay.

Re-making of the decision

Legal Framework

9. Article 9 of Council Directive 2004/83/EC defines acts of persecution in the following terms:
 - "1. Acts of persecution within the meaning of Article 1A of the Geneva Convention must
 - (a) be sufficiently serious by their 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 European Convention for the Protection of Human Rights and Fundamental Freedoms; 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 measure;
 - (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 gender-specific or child-specific nature.
 3. In accordance with Article 2(c) there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1."
10. Article 10 of the Directive identifies the reasons for persecutory treatment capable of engaging the Directive. These include the following:
- "1(d) a group shall be considered to form an innate social group where in particular:
- (1) members of that group share an innate characteristic or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
 - (2) that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society;
- depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation..."
11. Paragraph 65 of HJ and HT [2010] UKSC 31 summarises the basis of protection provided in cases such as the instant one:
- "... so far as the social group of gay people is concerned the underlying rationale of the Convention is that they should be able to live freely and openly as gay men and lesbian women, without fearing that they may suffer harm of the requisite intensity or duration because they are gay or lesbian. Their home state should protect them and so enable them to live in that way. If it does not and they will be threatened with serious harm if they live openly, then most people threatened with persecution will be forced to take what steps they can to avoid it."
12. Lord Rodger at [82] sets out the nature of the assessment to be carried out by a decision-maker:
- i. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

- ii. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who live openly would be liable to persecution in the applicant's country of nationality.
- iii. If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.
- iv. If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".
- v. If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.
- vi. If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g. not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.
- vii. If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect - his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.

13. In X, Y and Z (Cases C-199/12 to C-201/12) the CJEU considered a reference relating to three asylum applicants, respectively from Sierra Leone, Uganda and Senegal. In each country homosexuality is a criminal offence punishable by a term of imprisonment. The Raad van State requested a preliminary ruling from the CJEU on the following matters:

- "(1) Do foreign nationals with a homosexual orientation form a particular social group as referred to in Article 10(1)(d) [of the Directive]?"
- (2) If the first question is to be answered in the affirmative: which homosexual activities fall within the scope of the Directive and, in the case of acts of persecution in respect of those activities and if the other requirements are met, can that lead to the granting of refugee status? That question encompasses the following sub-questions:
 - (a) Can foreign nationals with a homosexual orientation be expected to conceal their orientation from everyone in their [respective] country of origin in order to avoid persecution?

- (b) If the previous question is to be answered in the negative, can foreign nationals with a homosexual orientation be expected to exercise restraint, and if so, to what extent, when giving expression to that orientation in their country of origin, in order to avoid persecution? Moreover, can greater restraint be expected of homosexuals than of heterosexuals?
 - (c) If, in that regard, a distinction can be made between forms of expression which relate to the core area of the orientation and forms of expression which do not, what should be understood to constitute the core area of the orientation and in what way can it be determined?
- (3) Do the criminalisation of homosexual activities and the threat of imprisonment in relation thereto, as set out in the Offences against the Person Act 1861 of Sierra Leone (Case C-199/12), the Penal Code Act 1950 of Uganda (Case C-200/12) or the Senegalese Penal Code (Case C-201/12) constitute an act of persecution within the meaning of Article 9(1)(a), read in conjunction with Article 9(2)(c) of the Directive? If not, under what circumstances would that be the case?"

14. The CJEU ruled as follows:

- "1. Article 10(1)(d) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or Stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group.
- 2. Article 9(1) of Directive 2004/83, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts per se does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.
- 3. Article 10(1)(d) of Directive 2004/83, read together with Article 2(c) thereof, must be interpreted as meaning that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope. When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation."

Decision and Discussion

15. It is prudent to consider sequentially the questions posed by Lord Rodger in HJ & HT.

Is the Appellant gay?

16. The FtT found in the appellant's favour on this issue and the SSHD has not sought to undermine that finding, either at the initial hearing before the Upper Tribunal or after having heard further evidence from the appellant at the hearing on 24 September. I, therefore, find that the appellant is gay.

Are gay people who live openly liable to persecution in Bangladesh?

17. The respondent's "*Country Policy and Information Note, Bangladesh: Sexual Orientation and Gender Identity*" of November 2017, states as follows:

"3 Policy Summary

- 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 social-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'."

(emphasis added)

18. At the hearing before the Upper Tribunal Ms Pal conceded, in line with the evidence of the respondent set out above, that if the Tribunal were to find that the appellant would live openly upon return to Bangladesh there would be a real risk that he would be persecuted there as a consequence of being gay, and there would be no viable internal relocation alternative. She accepted that there was nothing on the facts of the appellant's case, if he were to be found to be truthful, that would take him outwith the generality of openly gay persons in Bangladesh, of whom it is said may be at risk of suffering persecutory treatment.

Would the appellant live openly upon return to Bangladesh?

19. The parties did not assist the Tribunal as to the meaning of the phrase 'live openly', nor is it immediately obvious how the assessment of whether the appellant would 'live openly' in Bangladesh should be undertaken.
20. Given that the underlying task for the Tribunal is to determine whether there is a real risk of the appellant suffering persecutory treatment in Bangladesh, it seems to me that the question that requires answering at this stage is "*Whether the appellant's actions upon return to Bangladesh would be such as to lead to a real risk that potential persecutors would perceive him to be gay?*"
21. The following evidence is relevant to this issue:
- (i) Home Office record of interview with the appellant dated 15 November 2016. I need not set out a summary of the contents of this record herein but observe that it is entirely consistent with evidence provided by the appellant in his witness statement of 8 February 2017 and in oral evidence before the Tribunal.
 - (ii) Witness Statement dated 8 February 2017:
 - "6. At the age of 15 I started to enjoy the company of other boys in my area. I knew that this feeling was not normal because I enjoyed touching them, hugging them and I started to fantasise other things. I used to imagine which boy had the best lips and body and I was very fond of macho and masculine boys.
 - 7. Some of the boys used to laugh at me and call me names and taunted me. I had no other choice but to stay quiet and keep my feelings discreet. ...
 - 10. My father regularly ridiculed me that I was good for nothing and just a waste of space. He used to tell me that I sometimes behaved like a 5 year old and there was something wrong with me. However, he never took me to a specialist to see if I had any learning disabilities or not.
 - 11. My feelings for boys increased and over time and I used to touch boys but I did not have the courage to ask anyone if they were also

gay as I feared if they were not gay they would go and tell everyone and I would be in trouble.

12. I was sometimes told off by my close friends not to touch them or hug them as it was not normal but they usually laughed it off and thought I was a bit strange. I sometimes took the risk in touching them as I could not control my feeling but I used to pretend it was a friendly touch or hug but I actually knew it was probably a crush. Although I was still in denial to myself, however, I was becoming clearer over time that I am a homosexual. ...
20. I began a life of sadness, fear and frustration. I could not talk to anybody that I was gay and I was always scared that no matter how much I try and keep my homosexuality discreet, fearing the religious people and police, eventually it would all come out and my life would be at risk. The constant fear and frustration was nothing less than mental torture.
21. I started to realise that living in Bangladesh meant one day either the police or religious people would kill me if they found out that I am gay. I floated the idea of going abroad with my father and he was eventually happy with it. My brother was settled in the UK and I thought I should come to the UK.
22. I then applied for a working holidaymaker visa to the UK and this was approved and I entered the UK on 05 September 2007. I still kept my sexual orientation discreet as I had language barriers and did not know where to seek help and advice. For 2 years I worked in restaurants and visited different places in the UK. After 2 years my leave to remain expired but I did not return to Bangladesh. As I was in the UK I knew nobody could harm me here. I did sometimes wonder that I don't have any leave to remain in the UK and one day I would probably be forced to return to Bangladesh and this used to terrify me. ...
24. In 2010 I began to come out openly as a gay. I was always worried who to tell fearing their reactions. Unfortunately, people did not take my sexuality too sympathetically and most people shunned me. Eventually my brother also found out and asked me if the rumours he was hearing about my homosexuality was true or not. As I was living in his house there was no point hiding this matter from him any longer so I admitted that I was gay.
25. My brother told me that he was not happy but was fine with it as long as I kept my homosexual activities outside his home as he felt I was not a good example to his children. My parents also found out in Bangladesh that I was living openly in the UK as a gay. They were devastated and said they did not want me back in Bangladesh and even threatened me, however, over time their anger gradually cooled down and they agreed to send me money as long as I remain outside Bangladesh.
26. I continued to visit a gay bar in Leicester Square where I sometimes had casual gay relationships mainly with Asian guys as I could not

speak English. The longest gay relationship I had was with a guy called Jay which lasted for about 3 months. I used to spend a few hours or a night with a man and that would be the end. I have never had a proper relationship with another man. ...

30. I am a homosexual and I am aware that due to religious beliefs and cultural stigma in homosexuals are constantly persecuted in Bangladesh. The government authorities and the people of Bangladesh do not consider homosexuals as normal human beings and homosexuals all over Bangladesh are treated inhumanely. ...
32. After entering the UK I felt so much at peace. I did not have to worry about any risks due to my sexual orientation any longer. I was experiencing freedom and I wanted to seize this time. Unfortunately, my brother threw me out of his house in June 2016 due to pressure from his wife as she is a very religious woman. I am now living with a friend in Stratford, London who is kindly providing me with food and accommodation.
33. My only fear of returning to Bangladesh is my sexual orientation. I dread even thinking of ever returning to Bangladesh in the current circumstances as I am certain that I will be beaten to death due to my homosexuality. Moreover, it would be difficult to hide my homosexuality after openly being a gay in the UK."

(iii) Oral evidence before the Tribunal

- The appellant confirmed that he lives as an openly gay person in the United Kingdom;
- The way he would conduct himself in Bangladesh would necessarily expose his homosexuality if he were to return there;
- He would want to engage in relationships with men in Bangladesh and he would not be able to hide the fact he is gay;
- His family would beat or kill him upon return, they currently live in Sylhet, in the same place that they have always lived. This is a village of about 150-200 people. He has no contact with his parents, or with friends in Bangladesh;
- He does not have a long term or permanent relationship in the United Kingdom, but does associate with friends who are gay;
- He goes clubbing in a gay club in Leicester Square two to three times per month and plays sport in the local park with his gay friends. He attended Gay Pride in London, although he cannot recall the route he took, neither can he remember the name of the club he attends.

22. Ms Pal invited the Tribunal to find there was very little evidence that the appellant would live openly in Bangladesh and reminded the Tribunal that the appellant was unable to name the club that he claimed to attend 2-3 times per month, nor could he remember the route which he took when he allegedly attended Gay Pride. She submitted that the appellant's evidence that he intended to live openly in Bangladesh

should not be believed and further observed that the appellant had done little in the United Kingdom to openly explore his sexuality. She submitted that the appellant would live discreetly upon return to Bangladesh, not through fear of being persecuted but because this is how he generally conducts himself.

23. Mr Mold directed the Tribunal's attention to the evidence given by the appellant as to his lifestyle in the United Kingdom and reminded the Tribunal that the appellant would not marry in Bangladesh nor would he have a girlfriend, which of itself would eventually arouse suspicions. The appellant had not had to conceal his homosexuality in the United Kingdom and would not be able to hide it if he returned to Bangladesh. A casual slip of the tongue or his behaviour would bring to the attention to others the fact that he is gay. Mr Mold invited the Tribunal to accept the appellant's evidence as to his activities in the United Kingdom and, as a consequence, conclude that the appellant would be at risk of suffering persecutory treatment in Bangladesh.
24. Having considered the totality of the evidence before me I accept, to the lower standard, that the appellant is a witness of truth. As alluded to above, the FtT found the appellant to be credible in the evidence he gave and there is nothing in the evidence before me which leads me to conclude otherwise. In particular, I reject Ms Pal's assertion that the appellant's inability to recall the route he took during Gay Pride or the name of the night club he attends in Leicester Square should lead me to reject the appellant's assertions that he undertakes either of these activities. In doing so I observe that the appellant has consistently stated throughout the entirety of the asylum application process that he attends gay bars in the UK, giving details of one bar that he attends – see for example the answers to questions 76, 78, 87, 91, 97 to 100 and 130 to 136 of the asylum interview record. I further observe that in the decision letter the respondent accepted the existence of the bar referred to by the appellant, and that this bar was both situated and decorated as the appellant had asserted. Looked at as a whole, I find the appellant's evidence to be generally consistent and entirely plausible.
25. The appellant's evidence is that when previously living in Bangladesh he touched, hugged and kissed his male friends on the lips and face because he was gay; actions which his friends thought were 'not right' but which the appellant explained away as a joke between friends. It was not until approximately 3 years after he came to the UK that the appellant started to live a more openly gay life. He visits gay bars and clubs in the UK and has had a number of casual relationships with men and one longer relationship which lasted 3 months. I accept the appellant's evidence that he wishes to live openly in Bangladesh, although this intention does not sit easily with his fear of being killed should he do so. Nevertheless, given the evidence I have accepted as to how the appellant conducted himself when previously living in Bangladesh and that since that time he has the opportunity in the United Kingdom to fully participate in society as an openly gay person I accept that there is a real risk of the appellant's actions and behaviour in Bangladesh revealing to those around him that he is gay, particularly in the appellant's home village which has a population of only 150-200 people. Of course, his parents already know that the appellant is gay.

26. As indicated above, Ms Pal accepts that if the appellant is known in Bangladesh to be gay he would face a real risk of suffering persecutory treatment there – there being nothing in the facts of this case which takes the appellant outside the category of the generality of openly gay persons who would suffer such treatment. It has also been accepted, in line with the respondent’s guidance, that persons who have a well-founded fear of persecution in their home area cannot generally turn to the state for protection nor is there a reasonable internal flight alternative if it depends on a person concealing their sexual orientation in the proposed alternative location for fear of persecution – as would be the case for the instant appellant.
27. For these reasons the appellant has demonstrated to the required standard that his removal would lead to a breach of the Refugee Convention. I also conclude, for the same reasons, that there is a real risk of the appellant suffering treatment in Bangladesh that would be contrary to Article 3 ECHR.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law capable of affecting the outcome of the appeal and is set aside.

The appellant’s appeal is allowed on the basis that his removal to Bangladesh would lead to a breach of the Refugee Convention and Article 3 ECHR

Signed:

Date: 26 October 2018

Mark O’Connor

Upper Tribunal Judge O’Connor