



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

Appeal Number: PA/04940/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 15 November 2018**

**Decision & Reasons
Promulgated
On 30 November 2018**

Before

UPPER TRIBUNAL JUDGE LANE

Between

**AR
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Hussain, Raiyad Solicitors

For the Respondent: Mr Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, AR, is a citizen of Bangladesh. By a decision which was promulgated on 12 June 2018, I found that the First-tier Tribunal had erred in law such that the decision fell to be set aside. My reasons were as follows:

“1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant, AR, was born in 1984 and is a male citizen of Bangladesh. The Secretary of State accepts that the appellant is a homosexual. He applied for protection in the United

Kingdom but his application was refused by a decision dated 11 May 2017. He appealed to the First-tier Tribunal (Judge Jessica Pacey) which, in a decision promulgated on 30 June 2017, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. I find that the appeal should be allowed. I have reached that decision for the following reasons. First, I accept the Secretary of State's submission that at [39] the judge in effect reversed the burden of proof:

"The fact remains, however, that homosexual acts are illegal in Bangladesh and were the appellant to go back and under HJ Iran principles live openly as a homosexual he would be breaking the law. The respondent has not identified any evidence indicating that the lack of prosecutions could be attributed to tolerance of homosexuals rather than and to any other reason, such as incompetence."

3. There was no burden on the Secretary of State to identify such evidence. The burden of proof in the appeal rested on the appellant subject to the required standard of proof. Secondly, it is difficult to see what evidence the respondent may have been able to adduce which might show that the reason for the low number of prosecutions of homosexuals in Bangladesh originated not from tolerance of homosexual activities but to police incompetence. Whatever the reason for the low incidents of prosecutions, the judge has had no regard to the fact that the infrequency (two recorded arrests under the Penal Code of Bangladesh, paragraph 377) is plainly a factor which has to be considered as part of the assessment of risk on return. It was not open to the judge simply to reject that evidence or to refrain from including it in the assessment simply because she believed that the respondent had failed to show the cause for the low number of prosecutions.

4. There will need to be a proper examination of the risks possibly facing this individual as a homosexual man on return to Bangladesh. The remaining part of the appellant's protection claim which relates to problems with money lenders will not be revisited and the findings made by Judge Pacey in regard to that part of the claim shall stand. The sole issue remaining before the Upper Tribunal is that of the appellant's sexuality.

Notice of Decision

5. The decision of the First-tier Tribunal which was promulgated on 30 June 2017 is set aside. The findings of fact are set aside save for those relating to the appellant's claimed problems with money lenders (see above). The Upper Tribunal (Upper Tribunal Judge Lane) will remake the decision at or following a resumed hearing. The parties shall send to the Upper Tribunal and to each other any documentary evidence upon which they may respectively seek to rely at the resumed hearing no later than 10 days prior to that hearing."

2. Before the Upper Tribunal at the resumed hearing on 15 November 2018, Mr Avery, a Senior Home Office Presenting Officer, appeared for the respondent. Mr Hussain appeared for the appellant. The appellant

attended court but no interpreter had been booked by his solicitors and I was told by Mr Hussain that it was not intended that he should give evidence. The hearing proceeded by way of submissions only.

3. The Tribunal reserved its decision.
4. Mr Hussain relied upon the Country Policy and Information Note Bangladesh: Sexual Orientation and Gender Identity (Version 3.0: November 2017). He cited a number of passages from that document which make it clear that those men who not only live openly as homosexual men but also who may be described as “pioneers of practising and promoting homosexuality in Bangladesh” are at real risk of persecution and ill-treatment on account of their sexuality. The document refers variously to those who “*publicly* reveal their sexual orientation” and [7.3.4] and who are “*visible* gay men...” at [8.2.4]. Mr Avery did not disagree with the proposition that those who live openly as gay men in Bangladesh are also at risk.
5. It is against that background (with which both parties appear to agree) that I have to assess the risk to this individual appellant. Difficulties arise in that assessment because, as Mr Avery submitted, there is very little evidence to show (i) whether the appellant would behave openly as a gay man in Bangladesh or whether he would not act in such a way as to conceal his sexuality and (ii) if he did act so as to hide his sexuality whether he would do so as a result of societal or family pressure or out of a fear of persecution. I accept, as Mr Hussain submitted, that fear of persecution may constitute only one of several possible reasons for acting discreetly in order for the appellant to be recognised as a refugee.
6. In the absence of any oral evidence by the appellant, I was referred by Mr Hussain to the appellant’s statement in support of his application for asylum. In that statement at [26] the appellant states:

‘I want to [live] my life openly as a gay man and for everyone to accept me. I cannot do this should I be forced to return to Bangladesh as my family will not accept [it] and [I] will remain vulnerable to attack and persecution by others.’
7. In his asylum interview [question 42], the appellant was asked, “You fear getting arrested, imprisoned by the police and attacked by people in Bangladeshi society, is that correct?” to which the appellant replied “yes.” In the same interview [question 84], the appellant had stated that, “when I was in my own country, I could not share [my homosexuality] with others. I had to hide. After coming here I opened up and could share that with others...”
8. The proper approach for Tribunals in cases such as these is set out in *HJ (Iran)* [2010] UKSC 31 at [82]:

“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.

If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.

If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.

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".

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.

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.

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."

9. It would have been helpful had the appellant been tendered for cross-examination. Had his evidence been tested by cross-examination, then not only is it likely that I would have had a more detailed account than that pieced together from an interview record and a statement but the weight attaching to the appellant's evidence would potentially have been increased. Some of the passages from the written evidence which I have set out above do not unambiguously support the appellant's case; it seems likely from the very limited evidence available that the appellant's fear of the reaction of his family is at least part of the reason why he would behave discreetly and hide his sexuality if in Bangladesh. However, I do consider there is enough in the written evidence upon which the appellant relies to show that at least one of the reasons why he would behave discreetly is a fear of ill-treatment should the fact of his sexuality

become known more widely in his community beyond the confines of the family. I find that the appellant has shown that he has a real fear of physical injury should his sexuality become known more widely and that such fear would influence his behaviour. I find that the respondent's guidance note from which I quoted above does establish that, whilst prosecutions for homosexuality are not the norm, there is a general climate of homophobia and impunity for those who persecute homosexual men such that it has been objectively established, on the facts of this case, that there exists a real risk of ill-treatment. I am satisfied also, on the basis of the evidence before me, that, whilst they may be reluctant to bring prosecutions of gay men, the Bangladesh authorities would be unwilling to offer this appellant adequate protection. In the circumstances, I allow the appellant's appeal.

Notice of Decision

The appellant's appeal against the decision of the Secretary of State dated 11 May 2017 is allowed on asylum and Article 3 ECHR 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 their 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 26 November 2018

Upper Tribunal Judge Lane

No fee is paid or payable and therefore there can be no fee award.

Signed

Date 26 November 2018

Upper Tribunal Judge Lane