



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/13539/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 8 August 2018

Decision & Reasons Promulgated  
On 4 September 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR H R  
(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Mr Tarlow, Home Office Presenting Officer

For the Respondent: Mr Franco, Counsel instructed by Schneider Goldstein

**DECISION AND REASONS**

1. This is an appeal brought by the Secretary of State. For convenience I will refer to the parties as they were referred to in the First-tier Tribunal.
2. The appellant is a citizen of Bangladesh born on 20 June 1980. On 11 May 2016 he applied for asylum on the basis that he is gay and would be at risk on return to Bangladesh. His application was refused by the respondent who did not accept the appellant is gay or that he had faced problems in Bangladesh because of his sexuality. The appellant appealed to the First-tier Tribunal where his appeal was

heard by Judge of the First-tier Tribunal Nicholls. In a decision promulgated on 22 May 2018 the judge allowed the appeal. The respondent is now appealing against that decision.

3. The appellant claims that in June 2003 he was arrested whilst at a partner's flat because he is gay and severely tortured before being released without charge. He claims that his family and the local community became aware he was gay and stopped talking to him after his release. He left Bangladesh in 2004 and travelled to the UK on a work permit. His application for asylum was not made until he had been in the UK for another twelve years.
4. He claims to be in a relationship and live with a British citizen whom he met in a gay club. It is also the appellant's case that he suffers from post-traumatic stress disorder and a major depressive disorder. Medical evidence was adduced to support this.

#### Decision of the First-tier Tribunal

5. The judge accepted that the appellant is gay and that he has been in a relationship akin to marriage with his partner since March 2014. The judge also accepted the appellant's account of having been arrested and beaten by police and that his sexuality is known to his family in Bangladesh.
6. The judge stated at paragraph 20 of the decision that the appellant's "inclination would be to live discreetly."
7. The judge did not hear evidence from the appellant because of his mental health condition. At paragraph 18 the judge stated:-

*"The evidence I did hear from [the appellant's partner] is entirely consistent and I find that taken altogether it shows to the required standard of likelihood that the Appellant is homosexual, that he is in a gay relationship akin to marriage in the UK and that this is known to his family in Bangladesh. I further find that the Bangladesh police use the criminal law in Bangladesh as a means to harass and intimidate members of the LGBT community. Given the Appellant's mental state, I find that it is unlikely that he would be able to cope with and resist such harassment and intimidation."*
8. At paragraph 20 the judge stated:-

*"I find that this particular Appellant, with his mental health and psychological problems, could not safely be returned to Bangladesh. I find that his inclination would be to live discreetly, as [his partner] testified, although I accept that the Appellant has had homosexual encounters from time to time. I accept his evidence that on one occasion he was arrested and beaten by police, which is consistent with the background information."*
9. The judge allowed the appeal on the basis that the appellant had demonstrated a well-founded fear of persecution arising from his sexual orientation.

### Grounds of appeal and submissions

10. The grounds of appeal argue that the judge misdirected himself as to the relevant law by failing to consider and apply *HJ (Iran)* [2010] UKSC 00081. In particular the argument is made that the judge failed to deal with the issue of whether the appellant would live discreetly in Bangladesh and if so his reasons for so doing. The grounds contend that the evidence indicates that the reason he would live discreetly is social pressure rather than fear of persecution.
11. The second argument made in the grounds is that although the background information concerning Bangladesh indicates that gay men are subject to harassment and discrimination, it does not establish that this amounts to persecution given the limited evidence of violence from non-state actors and the lack of evidence in the appellant's account to show he has been systematically targeted.
12. The third ground of appeal submits that the judge erred by finding that the appellant could not return to Bangladesh because of his mental health issues without considering the availability of healthcare provision in Bangladesh and whether this would be accessible to the appellant.
13. Before me, Mr Tarlow submitted that the decision was flawed because of a failure to follow the framework in *HJ (Iran)*. He argued that the judge was required to consider the reasons the appellant would choose to live discreetly in Bangladesh but had not done so.
14. Mr Franco, in response, argued that the decision adequately addressed the issues in *HJ (Iran)* and that read as a whole it is apparent from the decision that the judge considered that one of the reasons the appellant would live discreetly in Bangladesh is a fear of persecution. He noted that the judge accepted that the appellant had been the victim in the past of violence.
15. Mr Franco highlighted that the appellant is highly vulnerable, with medical evidence showing he suffers from PTSD and major depressive disorder, and submitted that the appellant's mental health increased his risk as a gay man as it makes him less resilient and able to withstand harassment and the challenges he would receive if his gay orientation came to light. He also argued that there is a likelihood that there would be a police record of the appellant's sexual orientation given his previous arrest.

### Analysis

16. *HJ (Iran)* sets out a framework for assessing the risk faced by a person seeking asylum who claims to be at risk because he is gay.
17. The framework provides that the Tribunal must first ask itself whether the evidence shows that the appellant is gay or would be treated by potential persecutors as gay. In this appeal, the judge's finding that the appellant is gay has not been challenged.

18. The second step is for the Tribunal to ask itself whether the evidence shows that gay people who live openly would be liable to persecution in the country of nationality. The grounds argue that the background evidence does not support the judge's conclusion that openly gay men are persecuted in Bangladesh. I disagree. The judge referred to evidence of the police in Bangladesh using criminal law to harass and intimidate members of the gay community and accepted (in a finding that has not been challenged) that the appellant has been tortured by the police because he is gay. Having reviewed the objective evidence about Bangladesh that was before the judge I am satisfied that it was open to him, taking this evidence together with the factual finding that the appellant was tortured by the police because of his sexuality, to conclude that the appellant, if open about his sexuality, would be at risk of persecution.
19. The third step is for the Tribunal to consider whether the appellant would live openly and thereby expose himself to risk of persecution or whether he would avoid the risk by living discreetly. The decision does not address this clearly. At paragraph 20 of the decision the judge found that the appellant's "inclination would be to live discreetly" but that is not the same as making a finding as to whether the appellant "would in fact live discreetly and so avoid persecution", which is the test at paragraph 82 of *HJ (Iran)*. Reading the decision as a whole, it is apparent that the judge has taken the view that although the appellant would wish to be discreet, it is likely that his sexuality would become known to others given his fragile mental health, family's knowledge of his sexuality, and previous arrest for being gay. He would not, therefore, in fact live discreetly and thereby avoid persecution. In my view, the conclusion that the appellant would not in practice (or "in fact") live discreetly so as to avoid persecution notwithstanding that he would wish to do so is consistent with the evidence and therefore is a conclusion that was open to the judge.
20. The fourth step under *HJ(Iran)* is to consider, if the appellant would live discreetly, whether his reason for so doing is because that is how he would wish to live (for example, because of social pressure or religious reasons) or whether a material reason for living discreetly would be fear of persecution. However, it was not necessary for the judge to address the issue of the appellant's motivation for living discreetly as this is only relevant in circumstances where an appellant would in fact live discreetly to avoid persecution whereas in this appeal, for the reasons set out in paragraph 19 above, it was found that the appellant would not in fact live discreetly.
21. In conclusion, I find that the judge has not made a material error of law. He was entitled to find that the appellant is gay; that the appellant would be at risk on return to Bangladesh if his sexuality became known to the authorities; and that the appellant, because of his mental health and particular circumstances, would not be able to avoid persecution by living discreetly. It was therefore open to the judge to find that the appellant has a well founded fear of persecution.

### Notice of Decision

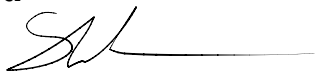
- A. The appeal is dismissed.

- B. The decision of the First-tier Tribunal does not contain a material error of law and stands.

**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



Deputy Upper Tribunal Judge Sheridan

Dated: 25 August 2018