



IAC-AH-SAR-V1

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

Appeal Number: AA/06166/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 12 January 2016**

**Decision & Reasons Promulgated  
On 26 January 2016**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**AAS (BANGLADESH)  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Ms Claire Physsas, Counsel instructed by Irving & Co  
For the Respondent: Ms E Savage, Specialist Appeals Team

**DECISION AND REASONS**

1. The appellant appeals from the decision of the First-tier Tribunal (Judge J Macdonald sitting at Taylor House on 23 September 2015) dismissing his appeal against the decision of the Secretary of State to refuse to grant him international or human rights protection on the grounds of his sexual orientation. The First-tier Tribunal made an anonymity direction, and I consider it is appropriate that the appellant continues to be accorded anonymity for these proceedings in the Upper Tribunal.

**The Reasons for the Grant of Permission to Appeal**

2. On 5 November 2015 First-tier Tribunal Judge Baker granted permission to appeal as she considered the grounds of appeal had merit:

“It is arguable that in the light of the FTTJ’s findings that the appellant is homosexual and he wanted to act openly in Bangladesh; that he had largely hidden his sexual orientation when in Bangladesh, and in not applying **HJ (Iran)** the FTTJ may have erred materially in law in his assessment of risk on return.”

### **Relevant Background**

3. The appellant is a national of Bangladesh, whose date of birth is 3 September 1985. He entered the United Kingdom as a student on 11 July 2009. On 28 July 2014 a decision was made to curtail his remaining student leave because his sponsoring organisation had had its Tier 4 Student licence revoked. His leave was curtailed to expire on 11 October 2014. On 10 October 2014 the appellant attended the Croydon Asylum Screening Unit where he claimed asylum on the ground that he had a well-founded fear of persecution in Bangladesh as a gay man.
4. In the subsequent refusal letter, the Secretary of State did not accept that the appellant was a gay man. But on the assumption that he was, consideration had been given as to whether there was a risk of persecution for gay men on return to Bangladesh. Whilst same sex activity was illegal under Section 377 of the Bangladesh Penal Code, it was noted that the law was rarely enforced. The Secretary of State went on to cite various passages from recent reports. The government acknowledged the existence of a LGBT population during its April Universal Periodic Review, contrary to its stance in the 2009 review, during which the foreign minister stated there were no LGBT individuals in the country. Additionally, the government (now) allocated funds for the transgender and Hijra population in the national budget. There were several informal support networks for gays. These included Boys Only Bangladesh, which acted as a meeting place for homosexuals and provided advocacy for sexual rights and equality. It was working for Section 377 to be repealed. An LGBT magazine was now publicly available in Bangladesh: a group of volunteers had launched Bangladesh’s first magazine named “Lesbian, Gay, Bisexual and Transgender Issues” hoping to promote greater acceptance of the LGBT community, which faced widespread discrimination in the Muslim majority country.
5. The respondent at paragraph [47] cited Section 5 of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 which defined persecution as:
  - “(a) sufficiently serious by its nature or repetition as to constitute a serious violation of a basic human right, in particular a right from which derogation cannot be made under Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms; or

- (b) an accumulation of various measures, including a violation of a human right which is sufficiently severe as to affect an individual in a similar manner as specified in (a)”.
6. The above had been considered in line with the case law of **HJ (Iran) [2010] UKSC 31**, which set out the test that should be adopted by fact-finding Tribunals in the UK. Accordingly, it is not considered there was a real risk of persecution if he returned to Bangladesh. Although consensual same sex activity was illegal in Bangladesh, the legislation was not in force, and there had been no tried cases. There was also a substantial network of support for gay men, and the government’s attitude towards homosexuals was considered to be changing.
7. On the issue of internal relocation, he claimed that his family disowned him and that they wanted to kill him. However, by his own admission, his parents had asked him to return to Bangladesh when they became aware that he had travelled to the UK. In any event, he would be returned to an international airport in Bangladesh, where he could then use freedom of movement to travel away from Munshigong where his family resided. It was considered reasonable for him to return to live in a city such as Dhaka, where he claimed to have lived before without encountering any problems.

### **The Decision of the First-tier Tribunal**

8. The judge’s findings were set out at paragraphs [69] onwards. He found that the appellant was a gay man, and he accepted that the appellant started having gay sex at the age of 8 with a 10 year old cousin, and that at the age of 13 he had raped another male cousin who was only 10 years old.
9. He found that the appellant had come to the UK in order to study, and not because of an immediate fear of persecution in Bangladesh. He found that, aside from his older brother’s behaviour when he was living under the same roof as his older brother, he had not identified any occasion in Bangladesh when he had experienced any event that could have led him to have a well-founded fear of persecution. He could not identify any difficulty with his family apart from his older brother. He said he telephoned his family in or after October 2014 to say he was claiming asylum because he was gay. He had remained in touch with his family and his paternal uncle who was supporting him.
10. The judge concluded that the only basis on which the appellant could demonstrate a well-founded fear of persecution was by reference to the objective information. The judge took into account what had been said in the refusal letter on this topic, and also the entirety of the Country of Origin Information Report dated 31 August 2013. He found that this report accurately summarised the position in relation to gay men in Bangladesh.

11. Section 21 made it clear that Hijra and Kothi persons and male sex workers were subject to bullying and routine intimidation. However, the appellant was not a Hijra or a Kothi. He was not transgender and he was not a sex worker.
12. Paragraph 21.04 suggested effeminate boys faced serious bullying and intimidation in educational and other settings. The appellant was not effeminate and he was not a boy. He was now 30 years old. Although the appellant had produced some photographs of himself in women's clothes, these were worn to a party at a gay club. The appellant had not said in evidence that he normally wore such clothing in public or in private. The pictures and the appellant's evidence suggested that it was a one-off event (paragraph 99).
13. Paragraph 21.05 indicated that overt acts of discrimination against LGBT individuals were fairly rare. It went on to say that there was significant societal discrimination. Openly gay individuals found that their families and local communities ostracised them. The appellant had made it clear that he and his family had parted, and so this would not be a significant issue for him.
14. The police used the laws as a pretext to bully individuals. However, read in context, those bullied were effeminate men, Hijra, Kothi and sex workers in particular.
15. Based upon the COIR Report and other objective evidence submitted, and taking into account the appellant's lifestyle, he did not find that he was at specific risk of ill-treatment by police officers nor by "mastans".
16. He noted from paragraph 21.17 of the report that male homosexuality was tolerated despite religious sanction. He noted from paragraph 21.18 that male friendships were traditionally very intimate. "Sam" gave a description of his ability to go on trips with a male boyfriend, to hold hands on the streets of Dhaka and to share a bed. In this context it was stated "as long as you don't come out open to your family you are safe".
17. The judge said he considered all the above in the light of **HJ (Iran)** and in particular in the light of the following extract of paragraph 35(b):

"The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does. Those others will include everyone with whom he will come in contact, in private as well as in public."
18. He found the appellant was likely to conduct himself in public and in private as a gay man and to behave in the same way as the description given by "Sam" in paragraph 21.18 of the report. However, the appellant had already broken with his family and come out to them. He was unlikely to have any further contact with them. He found that his friends were likely to be gay men and in relation to him there would be no difficulty in being open about his sexuality.

19. The judge concluded at paragraph [109] that the appellant did not have a well-founded fear of persecution at the hands of the state or non-state aggressors.
20. At paragraphs [110] to [114], the judge gave his reasons for finding that the threat by the appellant's older brother to kill him was not to be taken literally. But even if it was, the appellant would be able to relocate to another part of Bangladesh, in particular Dhaka, where the appellant had lived before coming to the United Kingdom as a student.

### **The Hearing in the Upper Tribunal**

21. At the hearing before me, Ms Physsas developed the arguments raised in the grounds of appeal. In reply, Ms Savage adhered to the Rule 24 response settled by a colleague opposing the appeal. The grounds of appeal were essentially a disagreement with the judge's findings. The judge was clearly aware of **HJ (Iran)**, which he cited at paragraph [107], and he accepted the appellant would act openly in Bangladesh (see paragraph 108). The judge had had regard to all the background evidence and he had given adequately reasoned conclusions that the appellant was not at risk from either state or non-state actors.

### **Discussion**

22. In **HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31**, the Supreme Court gave the following guidance at paragraph [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 will be treated as gay by potential persecutors in his country of nationality. If so, that a 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 concluded that a material reason for the applicant living discreetly on his return would be a fear of 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.”

23. Lord Hope cited this formulation of the test by Lord Rodger with approval in his own speech at paragraph [35], but went on to express the test in his own words. The First-tier Tribunal Judge set out Lord Hope's formulation in full at paragraph [85] of his decision. It cannot reasonably be maintained that the judge did not seek to apply the test. The issue in controversy is whether he applied it correctly.

24. Looking at the matter through the prism of Lord Rodger's formulation, I find that the judge gave adequate reasons for finding, by reference to the objective information, that, with the arguable exception of certain high risk categories, gay people who lived openly in Bangladesh were not per se liable to persecution. Lord Hope observed in paragraph [35] that there would be little difficulty in holding that in countries such as Iran and Cameroon gays or persons who are believed to be gay are persecuted and that persecution is something that may reasonably be feared in those countries. There is no country guidance authority to the effect that gays or persons who are believed to be gay are persecuted in Bangladesh, and so the judge rightly sought to answer this question by reference to the Home Office's COIR Report.
25. As far as back as 1996, an article in Himal magazine stated that male prostitutes were available in most towns; in rural areas, homosexuality was considered something that young people did for fun and some elders might do in secret; and male homosexuality was tolerated despite religious sanction.
26. Ms Physsas submitted that the judge was unduly selective in the passages from the report which he cited, and that there were other passages which supported the proposition that gay men generally, and not just male prostitutes, were liable to abduction, rape, physical assault, and of being subjected to extortion by police and mastans (defined broadly as criminal thugs, sometimes with local political connections).
27. I find the judge has given adequate reasons for discerning in the background evidence a crucial difference between the experience of "ordinary" gay men and those with an inherently riskier profile, such as male prostitutes. I consider that the judge's reading of the background evidence is fair, and that Ms Physsas' interpretation of the background evidence is in reality no more than expression of disagreement with a finding that was reasonably open to the judge.
28. Another line of attack pursued by Ms Physsas was in respect of the judge's finding that the appellant would conduct himself in public and private in the same way as described by "Sam" in paragraph 21.18 of the report. She submits that on analysis the lifestyle described by "Sam" is one where he is living discreetly out of fear of persecution, and so in comparing the appellant to "Sam", the judge is tacitly acknowledging that the appellant would have to live discreetly as a gay person in Bangladesh in order to avoid persecution.
29. However, the life described by "Sam" is an openly gay lifestyle in that, for example, he feels able to walk hand in hand with his male partner in the streets of Dhaka. Also, on his own account, he does not have to take any steps to conceal the fact that he shares a bed with his male partner. The one respect in which "Sam" said he did not feel he would be safe was if he informed his family of his sexual orientation. But it is apparent from the context that the apprehended adverse consequences of coming out to

family members does not meet the threshold of persecution or serious harm.

30. Ms Physsas pointed out that “Sam” had not given his real name, but had asked to be referred to by a pseudonym, as he was concerned about the social and legal implications of his real name being publicised. But “Sam’s” understandable desire for anonymity in a country where there is significant societal discrimination against gay people, and where he has not come out to his own family, is not to be equated with a well-founded fear of persecution.
31. It was open to the judge to find, as he did, that the appellant would pursue a lifestyle in Bangladesh that was not materially different from the gay lifestyle which he was leading in the UK. He would not need to conceal aspects of his sexual orientation which he would otherwise be unwilling to conceal.
32. It is argued in the alternative that the judge’s assessment of whether the appellant met the requirements of Rule 276ADE(1)(iv) was flawed. But the error of law challenge to the judge’s findings on the appellant’s private life claim is based on the same proposition which underlies the error of law challenge to the judge’s finding on the asylum claim, namely that if the appellant is returned to Bangladesh, this would involve the suppression of his sexual identity. For the reasons given earlier in this discussion, this error of law challenge is not made out. The society to which the appellant would be returning is not a liberal one, but, as stated by Lord Hope, it is wrong to approach the issue on the basis that the purpose of the Convention is to guarantee to an applicant who is gay that he can live as freely and openly as a gay person as he would be able to do if he were not returned. As held by the judge, the appellant would be able to live an openly gay lifestyle like “Sam” in a place such as Dhaka, and thus there are not significant obstacles to his reintegration into Bangladesh.

### **New Evidence that was not before the First-tier Tribunal**

33. In advance of the error of law hearing, the appellant’s solicitors served a supplementary bundle of evidence upon which the appellant wished to rely at the hearing in the Upper Tribunal on 12 January 2016. At the outset of the hearing, I obtained Ms Physsas’ confirmation that the evidence was only going to be sought to be relied on if an error of law was made out.
34. For the avoidance of doubt, I accept the explanation that have been given as to why this evidence was not submitted to the First-tier Tribunal, which was that it was generated in response to the decision of the First-tier Tribunal.
35. The explanation is that the appellant contacted a friend in Bangladesh to inform him of the First-tier Tribunal decision, and this set off a chain of

events with the friend writing back to the appellant as well as informing the appellant's mother about what had happened.

36. The other development relied upon is that the appellant is now living with Mr S. Whilst the judge accepted that the appellant and Mr S were friends, he was not persuaded they were in a relationship which would amount to family life under Article 8.
37. Ms Physsas confirmed that it was not the appellant's case, even now, that Mr S meets the definition of a partner under Appendix FM, and so I do not consider that the new evidence on this issue takes matters any further.
38. The evidence emanating from Bangladesh is not admissible for the purpose of supporting an argument that the decision of the First-tier Tribunal is vitiated by a material error of law. This is because the evidence does not have the characteristics which are required by **R (Iran)**.

### **Notice of Decision**

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

### **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

Deputy Upper Tribunal Judge Monson