



2. The Appellant arrived in the UK in September 2009 as a Tier 4 Student. His student leave was curtailed to expire on 23<sup>rd</sup> July 2012. He remained in the UK without leave. On 30<sup>th</sup> July 2015 he applied for leave to remain in the UK based upon his same-sex relationship with his partner. That application was refused on 16<sup>th</sup> February 2016.
3. On 28<sup>th</sup> December 2016 the Appellant claimed asylum based upon his sexuality. He claimed that he is gay and would be at risk if returned to Bangladesh. His application was refused on 23<sup>rd</sup> June 2017.
4. The Appellant appealed against both refusal decisions. Directions were made by the FtT that the two appeals should be linked together. The appeals were heard by the FtT on 15<sup>th</sup> August 2017.
5. The judge heard evidence from the Appellant and his partner, to whom I shall refer as C. The judge found that the Appellant is gay but did not accept that he was in a relationship akin to marriage with C. The judge described the Appellant as using C “as a useful assistant in gaining asylum and/or proving he has some sort of family or private life in this country”. The judge considered background and objective evidence in relation to LGBT persons in Bangladesh, noting that male same-sex sexual acts are criminalised in Bangladesh and punishable by life imprisonment. The judge however noted that there had only ever been two arrests and no convictions. The judge found that although in theory gay relationships in Bangladesh are against the law, they exist online and there are physical meeting places. The judge found it was appropriate to follow the Respondent’s policy guidance contained in the Country Policy and Information Note (the CPIN) on sexual orientation and gender identity in Bangladesh published December 2016, and found that “there is not a risk on return in this case”. The appeal was dismissed on all grounds.
6. The Appellant applied for permission to appeal to the Upper Tribunal. It was contended that the judge had erred in assessing credibility, had failed to take into account relevant country background material, and had failed to apply the principles in HJ (Iran) [2010] UKSC 31.
7. Upper Tribunal Judge Reeds granted permission, finding no arguable error of law in relation to the credibility findings, but finding it arguable that the judge had failed to take into account the country evidence relating to the nature of risk on return for LGBT persons “in Bangladesh and in the light of the necessary enquiry and questions identified in the decision of HJ (Iran) and reach findings on those issues.”

## **Error of Law**

8. On 10<sup>th</sup> December 2018 I heard submissions from both parties in relation to error of law, and concluded that the judge’s decision must be set aside. Full details of the application for permission, the submissions made by the parties, and my conclusions and reasons are contained in my error of law decision dated 11<sup>th</sup> December 2018, promulgated on 18<sup>th</sup> December 2018.

9. In summary, I found no error of law in relation to the credibility findings made by the judge and those findings were preserved. The judge had made a finding that the Appellant is gay, and that finding had not been challenged and was preserved. The error of law was that the judge had not demonstrated that having found the Appellant to be gay, he thereafter followed the approach set out in paragraph 82 of HJ (Iran).

### **Re-making the Decision**

10. At the resumed hearing the Appellant and C attended. They were called to give oral evidence. There was no cross-examination. In very brief summary, the Appellant confirmed that he had had a number of gay relationships while in the UK with men he met in Manchester Gay Village.
11. In giving oral evidence C confirmed that if the Appellant had to return to Bangladesh he would not accompany him, pointing out that it is illegal to be gay in Bangladesh and he would fear for his safety. In addition his health is not good, and he did not think he would receive the same medical care in Bangladesh as he receives in the UK.
12. I then heard oral submissions from the representatives. I have recorded the submissions in my Record of Proceedings and will not reiterate them here.
13. In very brief summary, Mr Tan referred to the most recent CPIN on sexual orientation and gender identity in Bangladesh published in November 2017. I was asked to conclude that the background evidence contained therein demonstrated that the Appellant would not be at risk as a gay man in Bangladesh.
14. Mr Karnik also relied upon the CPIN of November 2017, submitting that the evidence contained therein demonstrated that the Appellant would be at risk if he lived openly in Bangladesh. I was asked to find that the background evidence indicated that there would be no sufficiency of protection and no reasonable internal relocation option. Mr Karnik submitted that background evidence contained in the UK Foreign and Commonwealth Office Report dated 16<sup>th</sup> July 2018 on human rights and democracy in Bangladesh supported his submission that the Appellant would be at risk because of his sexuality if he returned to Bangladesh.
15. At the conclusion of oral submissions I reserved my decision.

### **My Conclusions and Reasons**

16. I have taken into account all the evidence, both oral and documentary that has been supplied, and considered that evidence in the round. In relation to risk on return the burden of proof is on the Appellant, to the lower standard, that being a reasonable degree of likelihood.
17. The finding made by the FtT that the Appellant is gay is preserved. I have to decide whether the Appellant would be at risk on account of his

sexuality if returned to Bangladesh. The CPIN of November 2017 provides up-to-date background evidence. It is accepted that LGBT persons in Bangladesh form a particular social group within the meaning of the Refugee Convention. The policy summary at 3.1.1 confirms that male same-sex sexual acts are criminalised in Bangladesh under section 377 of the Penal Code and punishable by life imprisonment. There have however only ever been two arrests under this provision and no convictions. There are reports that section 377, together with other legal instruments, have sometimes been used by the police in Bangladesh to arbitrarily arrest, harass and intimidate LGBT persons. There have also been reports that police use physical and sexual violence against LGBT persons.

18. The guidance indicates at 2.3.9 that 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. However, each case must be considered on its merits with the onus on the person to demonstrate that they would be at risk.
19. Further guidance is contained at 2.3.10–2.3.17 which I summarise below. LGBT persons face societal discrimination as well as family and societal pressure to conform to cultural and religious norms, including marriage. Strong social stigma about sexual orientation prevents discussion of LGBT rights
20. There have been some reports of violent behaviour towards LGBT persons who are open about their sexual orientation. Among the perpetrators are “mastans” (local thugs), family members and Islamist groups.
21. Various sources maintain that LGBT persons are in general reluctant to be open about their sexuality. Reasons for this may include conforming to societal norms and fear of discrimination and/or violence.
22. There is an indication that the rise in social media has led to an increase in hate speech against LGBT people. Whilst there are support groups for LGBT persons, some have reduced their activities following the murder of two gay rights activists in 2016.
23. There is evidence that the LGBT community is closed and private. Informal networking takes place at private parties and other venues and on the internet. A Gay Pride rally took place in Dhaka in April 2014 and another in April 2015. The event planned for 2016 had to be cancelled due to threats and opposition from Islamist groups.
24. In general LGBT persons are not open due to social stigma, pressures and norms, and to avoid a level of discrimination and violence arising from this. LGBT persons who openly express their sexual orientation are likely to be socially excluded, receive threats of violence, and in some cases (particularly gay men) may be attacked by non-state actors. The nature and degree of treatment may vary according to geography and socioeconomic status. Widespread stigma and discrimination is likely to

restrict their participation in the community and the workforce and access to healthcare.

25. In general, an LGBT person who does not conceal their sexual orientation may be at risk of treatment which by its nature and repetition amounts to persecution or serious harm. LGBT rights activists and bloggers may be at greater risk due to their profile. However, each case must be considered on its facts with the onus on the person to demonstrate why their particular circumstances would put them at real risk from non-state actors.
26. Protection from the state is dealt with in the guidance at 2.4.1–2.4.7. Where a person’s fear is of persecution and/or serious harm by the state they will not be able to obtain protection. LGBT persons from influential families may be able to access protection. State authorities have been responsible for arbitrary arrests, detentions, harassment and discrimination towards LGBT persons with reports of the police physically and sexually assaulting them. There is some evidence of the authorities taking appropriate action. For example, the police are reported to have investigated the murder of two gay rights activists in 2016 and one arrest was made.
27. In general, the state appears able but unwilling to offer effective protection and the person will not be able to avail themselves of the protection of the authorities. However, each case needs to be considered on its facts.
28. There is reference in the background evidence to activists. I do not find the Appellant to be an LGBT activist. There is also a reference to individuals coming from influential families. I do not find that the Appellant comes from an influential family.
29. Having summarised the background evidence above, I now turn to consider the approach that should be followed when considering an application for asylum from an individual who is gay. This is contained in paragraph 82 of HJ (Iran).
30. The first question to be answered is whether it has been established that the Appellant is gay. In this case that has been established.
31. I must then consider whether I am satisfied on the available evidence that gay people who live openly in Bangladesh will be liable to persecution. Having considered the Respondent’s own guidance set out above, I am satisfied to a reasonable degree of likelihood, that the background evidence indicates that a gay man who lived openly in Bangladesh would be liable to persecution. There is no reasonable internal relocation option in Bangladesh. I find the situation would be very much the same throughout the country. The background evidence indicates that there is not a sufficiency of protection as stated at 2.4.5 of the Respondent’s guidance.

32. I must then consider whether the Appellant would live openly or discreetly if he returned to Bangladesh. I find that he would live discreetly and I therefore I must consider why he would do this.
33. I do not find that the Appellant would choose to live discreetly because of social pressures such as not wanting to distress his parents or embarrass his friends, but would live discreetly because he has a fear of persecution if he lived openly.
34. The guidance in HJ (Iran) states that if:

“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”.
35. I therefore conclude that the Appellant is entitled to a grant of asylum based upon his sexuality. I also find, that if he returned to Bangladesh, there would be a real risk that he would be subjected to inhuman or degrading treatment or punishment which would breach Article 3 of the 1950 European Convention.
36. I move on to consider Article 8. I do not find that the Appellant has established family life in the UK but he has established a private life. Paragraph 276ADE(1)(vi) involves the Appellant proving on a balance of probabilities that there would be very significant obstacles to his integration in Bangladesh. I find that would be the case. My reasons for reaching this conclusion are that the Appellant would be at risk because of his sexuality if he returned to Bangladesh, and there is a risk that he would be subjected to treatment that would breach Article 3. I find that this is sufficient to amount to very significant obstacles to integration.
37. In considering Article 8 I have had regard to the considerations in section 117B of the Nationality, Immigration and Asylum Act 2002. This provides that the maintenance of effective immigration controls is in the public interest. In this regard I find it relevant that I have found the Appellant is entitled to asylum, and he satisfies the requirements of paragraph 276ADE(1)(vi).
38. Section 117B also provides that it is in the public interest that a person seeking leave to remain can speak English and is financially independent. The Appellant can speak English, and is not dependent upon the state. These are neutral factors in the balancing exercise.
39. It is further provided that little weight should be attached to a private life established by a person while in the UK with a precarious immigration status, or in the UK without leave. This applies to the Appellant. Initially he had a precarious immigration status as he had limited leave to remain, and thereafter he has remained without leave. Therefore little weight must be attached to his private life.

40. However, notwithstanding that conclusion, I find that the Appellant's removal would breach Article 8, because he satisfies the provisions of the Immigration Rules, and he would be at risk if returned.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error on a point of law and is set aside. I substitute a fresh decision.

I allow the Appellant's appeal on asylum grounds. Therefore, the Appellant is not entitled to humanitarian protection.

I allow the Appellant's appeal on human rights grounds with reference to Articles 3 and 8.

An anonymity direction is made.

### **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  
2019

Date                      11<sup>th</sup>                      February

Deputy Upper Tribunal Judge M A Hall

### **TO THE RESPONDENT FEE AWARD**

I make no fee award. The appeal has been allowed because of evidence considered by the Tribunal that was not before the initial decision maker.

Signed  
2019

Date                      11<sup>th</sup>                      February

Deputy Upper Tribunal Judge M A Hall

