



**Upper Tribunal**

**(Immigration and Asylum  
Chamber)**

**Appeal Number: UI-2022-  
002731**

**On appeal from PA/51742/2021  
[IA/06970/2021]**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On the 11 October 2022**

**Decision & Reasons  
Promulgated  
On the 02 November 2022**

**Before**

**Upper Tribunal Judge KEBEDE  
Deputy Upper Tribunal Judge MANUELL**

**Between**

**Mr MM  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Mr M Murphy, Counsel  
(instructed by City Heights Solicitors)

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

## **DECISION AND REASONS**

### *Introduction*

1. The Appellant appealed with permission granted by First-tier Tribunal Judge Mills on 10 June 2022, against the decision and reasons of First-tier Tribunal Judge Peer who had dismissed the appeal of the Appellant against the refusal of his international protection claim. The claim was based on the Appellant's sexual orientation. The decision and reasons was promulgated on or about 7 April 2022.
2. The Appellant is a national of Bangladesh, born on 11 December 1998. He claimed in summary that he was at risk on return to Bangladesh because he was gay and was known to be gay. It was accepted by the Respondent in the light of HJ (Iran) [2010] UKSC 31 that the Appellant would be at risk if he wished to lead an openly gay life in Bangladesh (see the CPIN for Bangladesh: Sexual orientation and gender identity and expression, Version 4.0, April 2020). The Appellant entered the United Kingdom in 2017 as a spouse, following an arranged marriage, which soon failed. He claimed asylum on 20 March 2022. Judge Peer found that the Appellant was not credible and that "much of the evidence was recent and self-serving". The judge found that the Appellant was able to return to Bangladesh safely.
3. Judge Mills considered that it was arguable that Judge Peer had erred by finding that the Appellant was not a gay man, despite seeming to accept that he engaged in sexual relationships with other men. The witness who attended the hearing to give evidence that he was currently in a sexual relationship with the Appellant was not challenged by way of cross examination on that point and was accepted to be a credible witness by the judge. There appeared to be contradictory findings.

### *Submissions*

4. The submissions took the form of dialogue with the Tribunal. Mr Murphy for the Appellant relied on his skeleton argument, the grounds of onwards appeal and the grant of permission to appeal in the First-tier Tribunal. In summary, counsel submitted that the judge had reached irrational findings. The judge had found as fact that the Appellant had sexual relations with men, yet had not accepted that it

logically followed he was likely to be gay. The decision and reasons was unsafe and should be set aside. There were sufficient findings for the appeal to be redetermined in the Appellant's favour, given the undisputed country background information.

5. Mr Melvin for the Respondent submitted in summary that the adverse credibility findings reached had been open to the judge, and that the appeal had been correctly decided. Casual sexual relations were not enough to prove orientation. The Appellant's relationship had been described as "open". The judge had found in effect that it was one of convenience, and had also taken into account the delay in making the claim, the section 8, Asylum and Immigration (Treatment of Claimants) Act 2004 point. The appeal to the Upper Tribunal should be dismissed.
6. Mr Murphy for the Appellant in reply submitted that everything before the judge pointed to the Appellant's same sex orientation. The judge had accepted that same sex relations took place. The judge had accepted that the Appellant's witness "may well offer emotional and sexual support to the Appellant, hugging and getting horny with him" [53 of the decision]. The judge went on "I have no doubt that [the witness] considers himself able and willing to support the Appellant where that is wanted" [54 of the decision]. At [70] the judge found "The evidence before me was that such relationships he has had in the United Kingdom have been with men of Bangladeshi origin and background and to that extent I find that he would have no real difficulty in readjusting to life in Bangladesh". The judge's decision was flawed and difficult to understand. It could however be remade without a further hearing.

*Material error of law finding*

7. At the conclusion of submissions, the Tribunal indicated that it found that there was a material error of law, with a written decision to follow. We invited submissions as to the next steps. Mr Melvin submitted that the appeal should be remitted to the First-tier Tribunal with no preserved findings, before another judge. Mr Murphy reiterated his submission that the appeal could be redetermined immediately without the necessity of another hearing, since (in his submission) there could only be a conclusion in the Appellant's favour. The Tribunal reserved its decision, which now follows.

8. It is well known that proving sexual orientation, like proving religious faith or conversion, presents difficulties for claimants and for fact finders and can be elusive. In the recent decision of PS (Christianity - risk) Iran CG [2020] UKUT 46 (IAC) the Upper Tribunal gave country guidance relating to Christians in Iran. Its relevance to the present sexual orientation appeal is by way of the general points made:

"10. That leads to our second point: what we mean by 'Christian convert'. It is not possible to make windows into men's souls. Whether someone is, or is not, a Christian is a matter of fact that is impossible to objectively verify. For example, an individual may pay very little attention to scripture or sermon but might fervently believe that Jesus Christ is the son of God; Christians with a long-held and deep belief can still face a crisis of faith at any given moment. It is no doubt for that reason that the Tribunal in Ali Dorodian v Secretary of State for the Home Department (01/TH/1537) preferred to focus on the externally observable: 'as we have said, it is church membership rather than mere belief, which may lead to risk'. This difficulty means that in this jurisdiction decision makers must rely largely on the observations of others to determine whether someone is, or is not, a 'genuine' Christian."
9. The judge in the present appeal complained that there was "limited documentary evidence presented in support of the Appellant's assertions that he is gay (see [52])". It seems to us that this was either a mistaken approach and/or poorly expressed, since there could never be documentary proof of sexual orientation because it is innate. Nevertheless the Appellant produced evidence of his social life and associations since his arrival in the United Kingdom, none of which could be considered normative for a Bengali Muslim man. The Appellant also produced a witness to his sexual orientation whose evidence, as Mr Murphy submitted, it seems was not challenged and was accepted by the judge.
10. We regret to say that we had considerable difficulty understanding the judge's conclusion that the Appellant was not gay in the light of some of the findings reached, indeed we regret to say that we are of the view that the reasoning was irrational if not also perverse, as we shall explain. We are of course aware that there have been instances of fabricated sexual orientation claims in the First-tier Tribunal and it was right for the judge to examine

the evidence with care. Among other matters, the Appellant had not claimed asylum at the first opportunity despite saying that he had come to the United Kingdom for his safety. Section 8 considerations had been raised by the Respondent.

11. In the present appeal, however, the judge found as a fact that the Appellant had left the British settled wife who had sponsored his spouse visa for the United Kingdom and had engaged in sexual relations with other men. It is known that in certain confined situations heterosexual men may seek relief from one another, but the judge made no clear finding that the Appellant fell into that category, despite the criticism of much of the Appellant's evidence. Significant findings were made that the Appellant received "emotional support" from the witness who declared himself as gay, and could resume male friendships in Bangladesh. Yet it was not accepted that the Appellant was gay. We find the reasoning defective and cannot follow it.
12. The confusion as to the findings, and the probable failure to adopt the proper approach to appeals of this nature which has been repeatedly recommended by the Upper Tribunal (see the line of cases commencing with Dorodian (above)) means that we cannot remake the decision in the way Mr Murphy has requested, attractive and convenient as that might seem. The whole of the evidence needs to be examined in the light of the cultural background. In our view the findings were too unclear and incomplete to permit what would have been a rewriting of the decision. The appeal will therefore have to be reheard unless the Respondent decides to revisit the refusal.

## **DECISION**

The appeal to the Upper Tribunal is allowed\_

The making of the previous decision involved the making of a material error on a point of law. The decision is set aside in its entirety.

The appeal shall be reheard in the First-tier Tribunal, before any judge except Judge Peer.

**Signed**  
2022

**Dated** 12 October

**R J Manuell**  
**Deputy Upper Tribunal Judge Manuell**