



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/12962/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 31 January 2019

Decision & Reasons Promulgated  
On 26 February 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

I H  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr A Swain, Counsel instructed by City Heights Solicitors

For the Respondent: Mr N Bramble, Home Office Presenting Officer

**DECISION AND REASONS**

1. The Appellant is a national of Bangladesh born on 15 October 1987. He arrived in the UK on 6 April 2010 as a Tier 4 Student. He made an application to extend this leave which was refused and an appeal against this decision was dismissed. He was served with papers as an overstayer on 23 February 2017 and claimed asylum that day. This application was refused in a decision dated 24 November 2017 against which he appealed. The basis of this claim is that he is a gay man and he feared persecution on the grounds of his sexual orientation if returned to Bangladesh.

2. The Appellant's appeal hearing came before Judge of the First-tier Tribunal Hussain on 25 September 2018 when the Appellant and a number of witnesses gave evidence. In a decision and reasons promulgated on 15 November 2018, the judge accepted the Appellant's sexual orientation but found that he would not be at risk of persecution if returned to Bangladesh.
3. Permission to appeal was sought in time on the basis that the judge erred materially in law: (i) in failing to take proper account of the background evidence, particularly that contained in the Home Office Country Policy Information Note (CPIN) "*Bangladesh Sexual Orientation and Gender Identity November 2017*" which makes clear that if one is an LGBT advocate or activist that could give rise to a risk on return. The judge failed to take into account the fact that the Appellant is an active member of Imaan, a UK based LGBT support group for Muslims, that he regularly participates in London Pride and was at the forefront of a nationwide publicity campaign promoting Imaan's involvement with London Pride. It was argued in the alternative that Dhaka was not in any event safe for openly gay men and the judge failed to properly address this; (ii) the judge failed to take proper account of medical evidence in the form of a psychological report of Dr Sreenan dated 1 August 2018 as to the Appellant's suicidal ideation, the fact he suffered from PTSD with symptoms consistent with attacks on him in February 2010.
4. Permission to appeal was granted by First-tier Tribunal Judge Doyle in a decision dated 11 December 2018.

#### *Hearing*

5. At the hearing before the Upper Tribunal, Mr Bramble at the outset accepted that the judge had made material errors of law for the reasons set out in the first ground of appeal. He accepted that the Home Office CPIN does refer to potential risks to LGBT activists and it might be that the Appellant falls within that category, yet the judge had failed to take this into consideration.
6. Mr Swain submitted that rather than remit the appeal for a further hearing that the decision could be remade in light of the background evidence. Mr Bramble had no objection to that course of action. Consequently, I found material errors of law in the decision of First-tier Tribunal Judge Hussain for the reasons set out in the first ground of appeal and I now proceed to remake the decision.
7. I heard submissions from Mr Bramble who was content to rely on the refusal decision by the Respondent and the evidence in the main bundle submitted by the Appellant. Mr Swain sought to rely on his skeleton argument, which at page 5 sets out the background evidence which is pertinent to the issue of the risks to openly gay men in Bangladesh. He also sought to rely on the supporting letter from Imaan at page 115 and the evidence in the Appellant's additional bundle in the run up to London Pride 2018. In relation to the evidence, Mr Swain submitted that openly gay men in Bangladesh are at risk and it was accepted by the judge that the Appellant is an openly gay man: C 28.

8. Mr Swain submitted that, contrary to the contention in the refusal decision, Dhaka does not represent a safe haven for gay men: C 14 of his grounds of appeal. In the alternative, Mr Swain submitted that the Appellant was a poster boy for the LGBT community less than a year ago: C 30 to 33 of the Appellant's bundle and 2.3.8 of the CPIN. Whilst there is no evidence that the Bangladesh authorities monitor activities in the UK by LGBT activities and advocates, notably the Appellant has been subjected to online abuse, he is living openly as a gay man and is publicly active, see e.g. the poster campaign. He would not be able to live openly in Bangladesh because of the constraints on openly gay men there.
9. He submitted in light of HJ (Iran) [2010] UKSC 31, that the reason the Appellant would live discretely would be simply because of a fear of persecution. Whilst the Appellant claimed to have been ostracised and disowned by his family, which had been rejected by the judge, the finding that he has been beaten has not been challenged and therefore stands.

*Findings and Reasons*

10. The preserved, unchallenged, findings of fact of the First-tier Tribunal are that the Appellant is a gay man, albeit without a history of persecution or being disowned by his family. The judge apparently accepted that the Appellant had been involved with Imaan in the UK, noting that evidence at [20] albeit he did not make any specific findings in respect of it.
11. I will now set out the evidence upon which the Appellant relies in support of his claim. As stated above there is evidence that he has been an active member of Imaan at page 115 of the Appellant's bundle. That is dated 29 June 2017 and states *inter alia*:

*"He is open about his homosexuality, which means his situation in Bangladesh would be a dangerous one considering their sexuality. If he is forced to return, he would be in danger of being imprisoned and face very real threats of death and violence. These threats and dangers exist in most, if not all, Muslim-majority countries."*
12. There are also receipts for attendance at gay clubs, some documents in relation to attending Lancaster Pride, some documents in relation to volunteering at London Pride and a number of photographs at pages 133 to 150 of the Appellant with friends in clubs and social settings.
13. In addition to the evidence contained in the Appellant's additional bundle there are photographs of the Appellant in front of a poster entitled Pride in London sponsored by Barclays. The poster specifically relates to Imaan which has five individuals in it, a mixture of men and women including the Appellant. Under the photograph the poster states *"Going to Pride so that no LGBT plus Muslim feels excluded from their faith or their community"*. There are variations of this poster also at page 31 and a photograph of the photoshoot at 32 and further examples of the poster and a copy printout from Facebook at page 34.

14. In respect of the background evidence as to the situation in Bangladesh both parties were content to rely on the Respondent's CPIN, see above November 2017, which is specifically concerned with sexual orientation and gender identity in Bangladesh. This report states at 2.3.5 that:

*"Section 377 of the Penal Code does not explicitly refer to homosexuality, but to carnal intercourse against the order of nature which includes sex between men and is punishable by life imprisonment or a shorter period. Sources report there have only ever been two reported arrests under Section 377 (and both were later charged under other provisions of the Penal Code) and that there have been no cases of punishment under Section 377."*

At 2.3.7-2.3.9:

*"2.3.7. Section 377 and certain other legal provisions ... have reportedly sometimes been used by police as a pretext to arrest, harass, intimidate and extort LGBT persons, primarily gay men and hijra. There have also been reports of physical and sexual assaults by police against LGBT persons."*

*2.3.8 While same-sex sexual activity between men is illegal, the state rarely arrests and prosecutes gay and bisexual men. However other laws are sometimes used as a pretext to arrest, harass, intimidate and ill-treat gay (and bi-) men and hijra, particularly those who are sex workers. Sources do not indicate that the state harasses or arrests and prosecutes lesbian or bisexual women, trans persons who are not hijra, or LGBT activists or advocates.*

*2.3.9. 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."*

The policy summary provides:

*"3.1.3 Reports indicate that LGBT persons are reluctant to be open about their sexual identity due to social stigma, pressures and norms, and to avoid a level of discrimination and violence by non-state actors, including family members and Islamic extremists, arising from this. Similarly, the LGBT 'community' is closed and private..."*

*3.1.5 In general, an LGBT person who does not conceal their sexual orientation or gender identity may be at risk of treatment, which by its nature and repetition amounts to persecution or serious harm. The nature and degree of treatment may vary according to geography and socio-economic status. Gay rights activists and bloggers may be at greater risk due to their profile. Each case must be considered on its facts and merits.*

*3.1.6 In general, the state appears able but unwilling to offer effective protection. However, each will need to be considered on its facts.*

*3.1.7 Internal relocation may be reasonable depending on the person's individual circumstances, for example: where they have chosen to live discreetly due to social or religious pressures. However, internal relocation will not be an option if it depends on the person concealing their sexual orientation and/or gender identity in the proposed new location for fear of persecution."*

*Findings and reasons*

15. I proceed on the basis that the Appellant is a gay man, who is “out” in the UK and who has some profile as a gay activist, having taken part in an LGBT poster campaign organised by Imaan in respect of gay Muslims. He has resided in the UK since April 2010 and I find that he has lived openly as a gay man during this time. There is no country guidance in respect of gay men and Bangladesh so I proceed to apply the guidance set out in HJ (Iran) [2010] UKSC 31. Notably, Lord Rodger placed substantial weight on the judgment and reasoning of the Australian High Court in a gay Bangladeshi case *viz Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473, concluding at [69]:

*“69. The decision of the High Court is accordingly powerful authority, which I would respectfully follow, for the proposition that, if a person has a well-founded fear that he would suffer persecution on being returned to his country of nationality if he were to live openly as a gay man, then he is to be regarded as a refugee for purposes of the Convention, even though, because of the fear of persecution, he would in fact live discreetly and so avoid suffering any actual harm. The High Court has followed the same line of reasoning in subsequent cases.”*

16. The test is set out at [82] and provides, on the basis that it is accepted that the Appellant is gay:

*“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."*

17. In light of the background evidence, which is essentially that contained in the Respondent's CPIN November 2017, I find that section 377 of the Penal Code criminalises same sex relations. I further find that, in practice, it is rarely utilised either to arrest or prosecute gay men, but it is "*used by police as a pretext to arrest, harass, intimidate and extort LGBT persons, primarily gay men.*" I have also taken into consideration the background evidence submitted to the Respondent and contained in his bundle, including: an article from Mail Online dated 19.5.17 which refers to the raid of a party by the Bangladeshi police and the arrest of 27 young men in a rare crackdown and that while they were arrested for homosexuality, they were later charged with drug offences instead. The article also refers to the fact that in the previous year two prominent LGBT activists including an editor of the country's only magazine for gay people were hacked to death by Islamist extremists linked to Al-Qaeda and that "*many prominent homosexual activists have since fled the country after several of them received death threats*" [M1-2]; further articles about the murder of the two LGBT activists, Xulhaz Mannan and his friend and an interview with a gay activist from Bangladesh who fled to claim asylum in Germany [M24-25].
18. I find that to return the Appellant to Bangladesh would expose him to a serious risk of persecution. In this respect I do not only refer to the risk of physical attack or arrest and prosecution, but also an accumulation of various discriminatory measures and the impact on the Appellant's mental health, in light of the medical evidence that he meets the diagnostic criteria for generalised anxiety disorder, reactive depression and some post traumatic stress disorder. It was also the Appellant's evidence that he attempted suicide in 2016 and in May/June 2017. I find that these matters properly fall for consideration under Article 9 of the QD.
19. I find in light of the Appellant's profile in the UK, in particular the fact that he has partaken in a public poster campaign for Imaan to encourage gay Muslims to attend Pride demonstrations, the Appellant would wish to continue to live openly as a gay man in Bangladesh but that the likely reality is that he would be forced to conceal his sexual orientation in order to avoid persecution. In light of the background evidence, set out in CPIN summarised at [14] above, I do not find that the Appellant would be able to access effective protection from the Bangladeshi authorities and it would be unduly harsh to expect him to internally relocate, given that he would be obliged to conceal his sexual orientation throughout the country.

#### *Decision*

20. In light of the judgment in *HJ (Iran)* the appeal falls to be allowed on the basis that the Appellant has a well-founded fear of persecution in Bangladesh on the basis that he is a member of a particular social group *viz* gay men.

**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 *Rebecca Chapman*

Date 20 February 2019

Deputy Upper Tribunal Judge Chapman