



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

Appeal Number: PA/00431/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 16 January 2019**

**Decision and  
Promulgated  
On 15 February 2019**

**Reasons**

**Before**

**UPPER TRIBUNAL JUDGE CONWAY**

**Between**

**HMAA  
(Anonymity Order Made)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr Swain of Counsel

For the Respondent: Ms Cunha, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Bangladesh born in 1983. He appealed against a decision of the respondent made on 22 December 2017 to refuse him asylum.

2. The basis of his claim is that he is a member of a particular social group, a gay man who would face a real risk of persecution for that reason if returned.
3. The respondent did not accept that the appellant's sexuality was as claimed. He had not provided a reliable account of his discovering his sexual identity in Bangladesh. His account was vague and implausible. His claim to have been disowned by his father to whom he had disclosed his sexuality was not believed nor that his father's membership of a fundamentalist party would put him at further risk.
4. He appealed.

### **First-tier Hearing**

5. Following a hearing at Taylor House on 12 July 2018 Judge of the First-tier Tribunal Traynor, who heard evidence from the appellant and two male witnesses, ND and AH, dismissed the appeal.
6. He found for the reasons he gave at paragraphs [60-69] that the appellant is gay.
7. He found that the appellant, who first came to the UK with leave as a student in 2009 and subsequently gained leave as a Tier 1 Highly Skilled Migrant, has been in a committed gay relationship with ND since 2015. He accepted the evidence of the appellant and ND about how their relationship had developed. The evidence of AH was also accepted. He had given evidence of his knowledge of the appellant's developing sexuality in Bangladesh and of the appellant's relationship with ND here.
8. Whilst accepting that he may have been disowned by his father when he disclosed his sexuality to his family in 2015, the judge did not believe that his father would make the matter public thereby putting him at risk. His claim to have received threats from unidentified persons was considered to be an attempt, falsely, to bolster his claim.
9. Despite finding that the appellant is a gay man, the judge determined that the appellant would not be at risk of persecution in Bangladesh for the reasons set out at [70 to 83].
10. In summary, it was a relevant factor when determining the risk of persecution on return that the appellant's first and only gay relationship before he left Bangladesh for the UK and which lasted for several years, had, because Bangladesh prohibits same sex relationships, been conducted [70] "*in a very discreet manner to the extent that no one, apart from them, knew of its existence*" which did not cause the appellant any difficulty. That was a relevant factor to be taken into account when applying the guidance in **HJ (Iran)** and **HT (Cameroon) v SSHD [2010] UKSC 31**.

11. There was no evidence to suggest that the appellant is an LGBT activist. He and ND [72] *“do not socialise a great deal, rarely go to nightclubs due to lack of funds and otherwise continue their relationship discreetly.”* They are *“living a relatively quiet life.”*
12. The question posited by **HJ (Iran)** is whether it would be possible for the appellant to return to live in Bangladesh and live a discreet life as a gay man. He stated he would not be able to do so as he wishes to live an openly gay lifestyle as in the UK [76].
13. The judge, repeating that the appellant *“has, to a large extent, led a relatively discreet gay existence”* in the UK, had no doubt that there are places in Bangladesh where the appellant could do so and the background information supported that proposition [79].
14. The judge had to be *“satisfied that if the appellant is to return to Bangladesh he would be able to conduct himself as a discreet gay man in that country.”* No evidence had been provided to show why the appellant and ND would not be able to conduct their same *“quiet and discreet lifestyle in Dhaka, a large city which has a growing LGBT community,”* despite the killing of LGBT activists by Islamic extremists in 2016 [80].
15. Moreover, the background evidence indicated that the police in Dhaka are likely to take action when a threatened gay person sought protection. There was no evidence to suggest that the law relating to same sex relationships is being enforced to suppress all LGBT activity in Bangladesh, and in particular, in Dhaka [80].
16. No evidence had been provided, therefore, to establish why the appellant and ND could not live in Bangladesh [81].

### **Error of law hearing**

17. The appellant sought permission to appeal which was granted on 26 November 2018.
18. At the error of law hearing Mr Swain’s main submission was that the judge misapplied the guidance in **HJ (Iran)** when determining whether the appellant should be expected to live discreetly in Bangladesh as a gay man. He should not be expected to live discreetly if the reasons for doing so would be to avoid persecution. His evidence was that he would not wish to live discreetly there but feared that if he lived openly he would be persecuted. Also, contrary to the judge’s conclusion, the background material, which was before the judge, indicates that the appellant would be at likely risk of persecution as an openly gay man and that state protection and internal relocation would be neither adequate nor viable. He invited me to set the decision aside and remake it by allowing it.

19. Ms Cunha's response was not wholly clear. She said that the judge's decision showed material error (at [72]) by apparently suggesting that the appellant not being an LGBT activist was relevant in finding he would not be at risk. She said the case should be remitted for rehearing.
20. I pointed out that there was no challenge to the judge's findings that the appellant is gay and that the appropriate course was for me to remake the decision in light of the findings as to how he would seek to lead his life and the background material. She agreed. Her final comment was that she "was not strongly opposing" Mr Swain's position which I took to be a lack of opposition to the decision being remade as allowed.

## Consideration

21. I agree with Mr Swain. **HJ (Iran)** paragraphs 78 to 83 made clear that an appellant should not be expected to live discreetly in Bangladesh if the reasons for doing so would be to avoid persecution.
22. Lord Rodger said this: (at [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 would be treated as gay by potential persecutors in his country of nationality. If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who live openly would be liable to persecution in the appellant'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 ..."*
23. As indicated it is clear that the judge accepted the evidence of the appellant and the witnesses as to his sexuality and his wish to live an openly gay lifestyle in Bangladesh as he does here, albeit somewhat restricted by a lack of funds. Such includes going to gay clubs [35,45] and being a member of an LGBT support group called Imaan for whom he undertakes voluntary work [27]. By concluding that the appellant could live discreetly in Bangladesh and not taking account of his desire to live openly, the judge erred in his construction of **HJ (Iran)** such that the decision must be set aside.
24. I proceed to remake the decision.

25. I note the Country Policy and Information Note Bangladesh: sexual orientation and gender identity (November 2017) and in particular the following: At [2.3.7] *"[Legal provisions] ... have reportedly sometimes been used by police as a pretext to arrest, harass, intimidate and extort LGBT persons, primarily gay men ... There have also been reports of physical and sexual assaults against LGBT persons."*
26. At [2.3.8] *"Whilst 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 men ..."*
27. At [2.3.12] *"There have been some reports of violent behaviour towards LGBT persons, who are open about their sexual orientation...by non-state actors. Among the perpetrators are 'mastans' (local thugs), family members and Islamist groups."*
28. At [2.3.14 and 2.3.15] *"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. There is evidence that the LGBT 'community' is closed and private .... Bangladesh's first Rainbow ('gay pride') rally took place in Dhaka in April 2014 and was repeated in April 2015. The event planned for 2016 had to be cancelled due to threats and opposition from Islamist groups."*
29. At [2.3.16] *"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 or gender identity are likely to be socially excluded, receive threats of violence and, in some cases, (particularly gay men), may be attacked by non-state actors ..."*
30. And at [2.3.17] *"Therefore, 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."*
31. I note further (under "Protection") at [2.4.5] *"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."*
32. As for internal relocation [2.5.3] *"... internal relocation will not be an option if it depends on the person concealing their sexual orientation ... in the proposed new location for fear of persecution."*
33. Finally, (under "Public opinion") at [7.3.3] *"The gay rights publication LGBT Weekly noted in April 2014 that 'any discussion around sex and sexuality is taboo'. In December 2014 the Dhaka Telegraph observed that*

*'homosexuality is still considered taboo in Bangladesh ... More than 50 per cent [of people surveyed] said they lived in constant fear of their sexual orientation being out.'*" And at [8.1.5] (under "Societal violence and discrimination") Human Rights Watch in April 2016, having interviewed LGBT people in Bangladesh noted they *"...faced threats of violence, particularly after homophobic public comments by Islamic leaders...In recent years, LGBT people have also been targeted with extremist rhetoric..."*

34. I find the appellant's situation, in summary, to be as follows. The appellant is gay, he has lived openly as a gay man in the UK with his partner, going to gay clubs and being involved in a LGBT support group, and if returned to Bangladesh would wish to live openly as a gay man there. He does not wish and is not required to conceal his sexual identity or otherwise live discreetly for fear of persecution. The background material indicates that were he to live openly as a gay man in Bangladesh he would be at real risk of persecution as a member of a particular social group and that there is no sufficiency of protection and no internal relocation option.
35. The appeal, thus, succeeds.

### **Notice of Decision**

36. The decision of the First-tier Tribunal shows material error of law. It is set aside and remade as follows:-

The appeal is allowed on asylum grounds.

Signed

Date 11 February 2019

Upper Tribunal Judge Conway

An anonymity order is made. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. Failure to comply with this order could lead to contempt of court proceedings.