Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11081/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18 June 2019	**On 27 June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE A M BLACK

Between

A N
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Dr T Mahmood, counsel
For the Respondent: Mr L Tarlow, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Bangladesh born on 4 November 1987. She appealed against the decision of the respondent on 23 August 2018 to refuse her protection claim. Her appeal was dismissed by Judge of the First-tier Tribunal Boylan-Kemp MBE ("the FTTJ") in a decision promulgated on 10 April 2019.

2. Permission to appeal was granted by First-tier Tribunal Judge O'Garro in the following terms:

> "…
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> 2. The grounds assert that the judge did not assess the evidence properly, in particular that the judge failed to apply the guidance given in **HJ Iran** and failed to give adequate consideration to the country evidence.

> 3. It is arguable that the judge fell into error in finding that the appellant who has been accepted to be a lesbian can relocate to the [sic] Bangladesh without giving adequate consideration to the respondent's country policy note which states that society exerts immense pressure on lesbian [sic] to get married and on resisting, some experienced violence from their family members. Permission is granted."

The Hearing

3. The grounds of appeal to this tribunal are two: a failure to apply the principles in **HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31** and a failure to consider the respondent's Country Policy and Information Notes on Bangladesh.

4. Dr Mahmood, for the appellant, submitted the absence of reference to **HJ (Iran)** in the FTTJ's decision, demonstrated she had not applied her mind to the four stage assessment required pursuant to that judgment. It had been accepted by the respondent that the appellant was a lesbian; the issue to be decided was the impact of her sexuality on return. The FTTJ had not, he submitted, considered adequately the respondent's Country Policy and Information Note, Bangladesh: Sexual orientation and gender identity, Version 3.0, published November 2017, particularly paragraph 4.2.1. It was accepted by the appellant that there was no specific law prohibiting lesbian activities but it could be inferred from the background material relating to gay men that Section 377 of the Bangladesh Penal Code was also applicable to lesbians.

5. Dr Mahmood submitted that the conclusion at [16] of the FTTJ's decision that Section 377 of the Bangladeshi Penal Code could not apply to females was wrong and arose from an improper analysis. He relied on the conclusion of Professor Yasmin, in her expert report which had been before the FTTJ, that members of the LGBT community "often fall victims of persecution". He submitted that, had the FTTJ taken Professor Yasmin's opinion in her second paragraph into account, she would have come to a different conclusion as regards the risk on return.

6. In response, Mr Tarlow, for the respondent, submitted there was no material error of law. He noted the FTTJ found at [18] a lack of criminalisation and that there was no risk to the appellant from state actors. He noted the FTTJ observed at [19] that the appellant's previous problems had stopped when she had changed her contact details. He took the appellant's point about paragraph 4.2.1 of the CPIN regarding unnatural offences but also referred to paragraphs 4.6.3 and 5.1.1. He noted the lack of enforcement of Section 377 by the authorities. In summary he submitted that the findings of the FTTJ were open to her. The respondent had accepted the appellant would be subjected to discrimination (paragraph 61 of the reasons for refusal letter referred) but this was not sufficient to amount to persecution. In effect, the FTTJ did not reach the second stage of the **HJ (Iran)** test. There had been no need for the FTTJ to consider the matter further having found that lesbians were not at risk.

7. In reply, Dr Mahmood reiterated his earlier submissions. He submitted that 90% of the population in Bangladesh were Muslim and that Sharia law applied. He submitted that the expert report, irrespective of the legal position, demonstrated that the **HJ (Iran)** threshold was crossed. The FTTJ should have considered whether there would be state protection for the appellant.

Discussion

8. The respondent accepted the appellant was a lesbian. The appellant's evidence, before the FTTJ, was that she had had a lesbian relationship in Bangladesh but that she had ended that

relationship when she had received rape and death threats in 2010 from people who had found out about it. The appellant did not seek the protection of the police. At that time the appellant denied her sexuality to her family but, while she was in the UK, they discovered it. Her family told her she had brought shame on them. The appellant has not been in touch with her family since about 2016. The sole issue to be decided by the FTTJ was risk on return.

9. Lord Hope identified in **HJ (Iran)** at [35] the test to be adopted by fact-finding tribunals. He said it was necessary to proceed in stages:

> "(a) The first stage, of course, is to consider whether the applicant is indeed gay. Unless he can establish that he is of that orientation he will not be entitled to be treated as a member of the particular social group. But I would regard this part of the test as having been satisfied if the applicant's case is that he is at risk of persecution because he is suspected of being gay, if his past history shows that this is in fact the case.
>
> (b) The next stage is to examine a group of questions which are directed to what his situation will be on return. This part of the inquiry is directed to what will happen in the future. The Home Office's Country of Origin report will provide the background. There will 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. 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. The way he conducts himself may vary from one situation to another, with varying degrees of risk. But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result and that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this inquiry.
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> (c) On the other hand, the fact that the applicant will not be able to do in the country of his nationality everything that he can do openly in the country whose protection he seeks is not the test. As I said earlier (see para 15), the Convention was not directed to reforming the level of rights in the country of origin. So it would be 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 as openly as a gay person as he would be able to do if he were not returned. It does not guarantee to everyone the human rights standards that are applied by the receiving country within its own territory. The focus throughout must be on what will happen in the country of origin.
>
> (d) The next stage, if it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well founded.
>
> (e) This is the final and conclusive question: does he have a well-founded fear that he will be persecuted? If he has, the causative condition that Lord Bingham

> referred to in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, para 5 will have been established. The applicant will be entitled to asylum."

10. The FTTJ makes no reference to **HJ (Iran)** specifically. However, I bear in mind the guidance of the Court of Appeal. In **EA v SSHD [2017] EWCA Civ 10** Burnett LJ made the following observations at [27]:

> "Decisions of tribunals should not become formulaic and rarely benefit from copious citation of authority. Arguments that reduce to the proposition that the F-tT has failed to mention dicta from a series of cases in the Court of Appeal or elsewhere will rarely prosper. Similarly, as Lord Hoffmann said in Piglowska v Piglowski [1999] 1 WLR 1360, 1372, "reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account". He added that an "appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself". Moreover, some principles are so firmly embedded in judicial thinking that they do not need to be recited. For example, it would be surprising to see in every civil judgment a paragraph dealing with the burden and standard of proof; or in every running down action a treatise, however short, on the law of negligence. That said, the reader of any judicial decision must be reassured from its content that the court or tribunal has applied the correct legal test to any question it is deciding."

11. In the present case the respondent had referred in the reasons for refusal letter, at [55] onwards under the heading "Assessment of Future Fear", to the guidance in **HJ (Iran).** The application of this guidance was not disputed by the appellant who referred to it in her grounds of appeal to the First-tier Tribunal [7]. The appellant noted that it was conceded by the respondent, in the reasons for refusal, that the appellant met stage (a) of the test but that the respondent, relying on his CPIN on sexual orientation in Bangladesh, had concluded the appellant did not meet stage (b).

12. Thus the first area of dispute between the parties was whether the appellant met the threshold at stage (b) of **HJ (Iran).** Since this was plain from the reasons for refusal and the grounds of appeal, it can reasonably be inferred that the FTTJ had this in mind when assessing the risk on return. Indeed, the FTTJ identifies at [14] that the "decision in this appeal comes down primarily to the risk arising to the appellant as a result of her sexual orientation. It has been accepted by the respondent that she is a lesbian and so this matter is not in dispute". While the FTTJ could have referred here to following the guidance in **HJ (Iran)** it is axiomatic that she did so because she then analyses the objective material to which she was referred by the appellant's representative, namely the respondent's CPIN, Bangladesh: Sexual Orientation and Gender Identity, November 2017. She rightly notes the content of paragraph 4.2.1 which refers to sexual activity between men, being under the heading "Gay and Bisexual Men". The FTTJ does not accept the submission for the appellant that this provision could be applied to a lesbian relationship. Given the terms of the following paragraph in the CPIN (albeit not cited specifically by the FTTJ), this is a sustainable finding:

> "Lesbians and bisexual women
>
> 4.3.1. In 2017 ILGA indicated that female-female sexual activity was not a criminal offence under existing penal law. The Human Dignity Trust, in a May 2016 report, did not include Bangladesh on a list of countries where 'lesbians and bisexual women are criminalised'.

13. The FTTJ acknowledges at [15] the appellant's position, before her, namely that "the appellant could be prosecuted under the laws referring to male-male sexual relationships and that the discrimination a lesbian would face in Bangladesh was sufficient to amount to persecution." The FTTJ did not accept that submission [16]; her finding is sustainable in the light of paragraph 4.2.1 of the CPIN which is in the following terms:

> "Sexual activity between men, whether consensual or not, is illegal. Section 377 of the Bangladesh Penal Code, originally enacted by the colonial government in India in the 1860s, provides:
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> 'Section 377: Unnatural offences: Whoever voluntary has carnal intercourse against the order of nature with man, woman, or animal, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to 10 years, and shall also be liable to fine.
>
> 'Explanation: penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

14. The FTTJ also rejected the submission for the appellant that Article 86 was applicable to lesbians. Paragraph 4.6.1 of that CPIN (albeit not cited in full by the FTTJ) is instructive:

> "The report of an April 2015 fact finding mission by the French Office for Protection of Refugees and Stateless Persons ('the 2015 OFPRA FFM Report') noted: 'Article 86 of the [Dhaka Metropolitan Police Ordinance], entitled "Penalty for being found under suspicious circumstances between sunset and sunrise", can be used against LGBT individuals, in particular its subparagraph (b): "Having without any satisfactory excuse his face covered or otherwise disguised", as men wearing makeup and women's clothes or meeting in small groups during the hours stipulated in the ordinance may be arrested on the basis of the Article.
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> 4.6.2 Article 54 of the Code of Penal Procedure of 1898, which allows the police to arrest a person (against whom a complaint has been made) without a warrant, has also been used against LGBT individuals, according to the OFPRA Report 2015.
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> 4.6.3. The Global Human Rights Development (GHRD) reported in 2015: 'Section 377 of the Penal Code is used in conjunction with sections 54 and 55 of the Code of Criminal Procedure (CCP), which allow law enforcement agencies to arrest without a warrant, to harass the LGBT community. Sections 54 and 55 of CCP are enforced as a so-called "preventative measure": any police officer in charge can arrest individuals whom he/she has a probable cause or reasonable suspicion that the individual will commit a "cognisable offence". 'The High Court Division of the Supreme Court of Bangladesh has issued detailed guidelines on the enforcement of section 54 of CCP. These guidelines were issued to limit the abuse of section 54...by law enforcement agencies."

15. The FTTJ found "the article [86] makes no specific reference to women and there is no logical rationale provided by Dr Ilahi [the appellant's representative] as to why this provision could or might be applied to females". Before me, no submission has been made to suggest that the FTTJ misunderstood or failed to take into account the submissions of Dr Ilahi (who did not represent the appellant before me). The FTTJ's finding is sustainable in the light of the background material to which she was referred. She has given adequate reasoning for rejecting the appellant's submission as regards the application of Article 86 and Section 377.

16. It is submitted in the grounds of appeal to this tribunal that the FTTJ had failed to consider "the relevant provisions of other CPINS, which deals [sic] with circumstances where sexuality based on being Lesbian is not a criminal offence, but based on objective evidence, whether

the Appellant nevertheless would face persecution or would be subject to persecution, if she openly discloses her sexuality and what would be the consequences and repercussions of such disclosure". The grounds refer to the respondent's "Report of a Home Office Fact-Finding Mission Bangladesh Conducted 14-16 May 2017 published September 2017, sections 7.2, 7.3, 7.9 and 7.10.

17. This Fact-Finding Mission report refers to LGB people being unable to be open about their sexuality and there being differences in treatment between men and women. It refers to particular pressure on women to marry by about 30 and lesbians being forced into marriage. However, this appellant has no contact with her family and has not had contact since 2016. Thus the potential threat of being forced into marriage does not arise here. The report refers at paragraph 7.3.2 to the arrest of men which, again, is of no relevance here. Paragraph 7.9.1 refers to societal treatment and, particularly discrimination, an issue which is not in dispute but which does not assist the appellant. At paragraph 7.10.1 it is stated that "several sources suggested that LGBT people would not feel that they could approach the police for protection … However, members of the press noted that the police are obliged to take on a case, irrespective of the sexuality of the reporter of the crime; and BLAST noted that there is 'very little research on these issues'". Again this does not assist the appellant. While it is her evidence that she had not sought police protection in the past and that she believed such protection would not be available to her, this report demonstrates that police protection is available to lesbians who seek it.

18. The grounds of appeal to this tribunal also refer to the impact of Sharia Law as identified in the CPIN, Bangladesh, Sexual orientation and gender identity, cited above. This states at 4.7.1:

> "Nearly 90 per cent of Bangladesh's population is Muslim, and sexual activity of any nature outside of a (heterosexual) marriage is prohibited under Sharia."

Irrespective of whether or not that is the case, this does not address the issue of whether protection is available from the state. Mere statement of the position under Sharia law is not sufficient to demonstrate the appellant would be at risk of persecution as a result of being in breach of Sharia law. The grounds of appeal to this tribunal are as follows:

> "One would not need Judicial guidance or country guidance to establish that punishment under Sharia Law for any sexual activity outside marriage and any activity that is not heterosexual, is simply the death penalty".

It is for the appellant, upon whom the burden of proof lies, albeit to the lower standard, to demonstrate that she will be, on return, a Muslim subject to Sharia law in Bangladesh and that, as a result, she is at real risk of being persecuted as a result of her sexuality. Her witness statement makes no reference to her religion, albeit she refers to being from a religious family (with whom she is no longer in contact).

19. Dr Mahmood submitted that the FTTJ had failed to have regard to the respondent's CPIN, Bangladesh: Women fearing gender-based violence, version 2.0, published in January 2018. He did not refer to any particular part of the CPIN as being relevant to the FTTJ's decision-making. Nor did he identify how the absence of consideration of this CPIN was material to the outcome. There is no specific reference to this CPIN in the decision of the FTTJ, only to the CPIN relating to sexual orientation and gender identity. I do not criticise the FTTJ for this: lesbians are not identified at paragraph 4.3 as being a disadvantaged group of women in Bangladesh. This CPIN has no bearing on the assessment of risk on return.

20. While the grounds of appeal to this tribunal do not challenge the FTTJ's findings on Professor Yasmin's report, Dr Mahmood made oral submissions on that issue and, for the sake of completeness, I address them. The FTTJ considered the report at [17].

21. The FTTJ found at [17] that there was "little" in Professor Yasmin's report

> "that relates to any persecution of women involved in a female-female relationship except for the one reference to a lesbian couple being arrested for attempting a same-sex marriage. However, upon consideration of the source (as provided in footnote 6) it appears that the case concerned the alleged abduction of a minor teenage girl by an older woman and that the older woman had been charged with kidnapping as opposed to any offence relating to their sexual orientation. Further, the case occurred in 2013 and there is no further independent evidence to support the contention that the matter ended in prosecution or conviction for either of the women involved. Consequently, I do not find the expert report to assist in persuading me that the objective evidence is incorrect and that a lesbian living in Bangladesh would be at risk of persecution."

22. Dr Mahmood referred me to the second paragraph of Professor Yasmin's report, submitting that this was sufficient to demonstrate the risk of persecution of those who were openly lesbian in Bangladesh. I cite this paragraph in full:

> "Although there is no official data on the number of people belonging to the LGBT community in Bangladesh, it is commonly estimated that the number ranges from 1.6 to 4.8 million. In an overtly religious socio-cultural environment such as that of Bangladesh, for people belonging to the LGBT community there is no legal recognition or social acceptance of their personal status, gender identity or sexual orientation and as such they often fall victims of persecution. There is also lack of attention on part of the government to ensure protection and fundamental rights of people of LGBT community. The deliberate negligence towards LGBT citizens again stems from the conservative religious notions and the unwillingness on part of the governments of all regimes to contradict those for obvious political gains and stability."

No citations or references are provided for the opinion that "people belonging to the LGBT community … often fall victims of persecution". This statement is not corroborated or supported by any research material, articles or other documentary evidence. I reject the submission of Dr Mahmood that this paragraph, without more, is sufficient to support the claim that lesbians are at risk of persecution in Bangladesh. It amount to little more than mere assertion by the author and, in any event, refers generally to members of the LGBT community (which includes gay and bisexual men whose sexual activities are criminalised) rather than lesbians, whose situation is the issue here. Furthermore, Professor Yasmin makes a misleading statement in the following paragraph where she states "The Penal Code criminalises consensual sexual intercourse between adults of the same sex". It does not: it criminalises "carnal intercourse against the order of nature with man, woman, or animal" where carnal intercourse is defined as "penetration". She goes on to refer to that Section but then refers to "a colonial approach of criminalising same sex relationship …". Section 377 does not criminalise same-sex relationships; it criminalises certain sexual acts. In any event, Professor Yasmin accepts that "cases under s 377 is very rare". She goes on to cite the case to which the FTTJ refers and the arrest of two gay men in a relationship for several years who were attempting to marry. Neither of these cases suggest lesbians are at risk on return merely as a result of being open about their sexuality.

23. The principal difficulty with Professor Yasmin's report is that she refers largely to the LGBT community, rather than to lesbians specifically. This is the issue of concern for the FTTJ and

it is a valid one. Professor Yasmin refers, for example, on the third page of her report to "violent attacks against secular bloggers, academics, gay rights activist, foreigners, and members of religious minorities in recent years". This is of no relevance to the appellant who does not claim to be any of these. On the same page Professor Yasmin states "throughout 2016 the levels of violence and threat from religious radicals that LGBT people have been exposed to have exponentially risen and the State has not offered protection". This does not relate specifically to lesbians. The citation for this statement is the International Lesbian, Gay, Bisexual, Trans and Intersex Association: Carroll, A. and Mendos, L.R., State Sponsored Homophobia 2017: A world survey of sexual orientation laws: criminalisation, protection and recognition (Geneva; ILGA, May 2017). This report does not cite a source for this statement. In any event, this latter report refers on page 37 to the application of Section 377 being to males only, contrary to the appellant's claim.

24. The main thrust of Professor Yasmin's report is that some of those who have been active as regards LGBT rights, including lesbian rights, have been subjected to mistreatment. This opinion is not applicable to the appellant or to lesbians generally in Bangladesh. There are also references to the arrest in May 2017 of "27 youths in a community centre near Dhaka on suspicion of being gay". These arrests do not assist in the assessment of risk to lesbians. Professor Yasmin refers to "these incidents" as exacerbating "the negative social and religious notions criminalising homosexuality in Bangladesh" but lesbian sex is not criminalised and this statement has no relevance here.

25. Of some relevance is Professor Yasmin's comment that "members of Bangladesh's LGBT community [are] regularly receiving <u>threatening messages</u> via telephone, text, and social media from various radical Islamist groups" (Professor Yasmin's emphasis). This accords with the appellant's own evidence of threats made to her in Bangladesh as a result of a lesbian relationship. However, this does not, without more, amount to persecution, merely discrimination and harassment which is accepted by the respondent as being an issue for lesbians in Bangladesh.

26. Professor Yasmin comments that "the situation for people who identify as LGBT in Bangladesh has taken a turn for the worst [sic] over the last two years. Repeated threats, killings, arrests and continuous harassment by the police have shattered Dhaka's fledgling LGBT community. Some of them are in hiding, living double lives to avoid reprisals. Others chose to flee abroad, either on their own or by seeking asylum." This statement does not relate specifically to lesbians albeit they are included in the general term "LGBT". Given that sexual acts between gay men are criminalised, this general opinion is insufficient to demonstrate, even on the lower standard of proof applicable here, that lesbians are subjected to persecution.

27. While Professor Yasmin summarises her report by stating "for a gay or a lesbian person living in Bangladesh, there is a high risk of persecution" that is not a statement which is grounded in the content of her report. Indeed her report, insofar as she refers to articles and other sources, is remarkably similar to the content of the respondent's CPIN. She merely draws a different conclusion to the respondent on the basis of similar material. Her opinion as to the risk on return is unsustainable on the basis of the limited material she cites relating to the circumstances for lesbians in Bangladesh.

28. In summary, the FTTJ's finding at [17] that the expert report "did not assist in persuading [her] that the objective evidence was incorrect and that a lesbian living in Bangladesh would be at risk of persecution" is sustainable on the evidence before her: she preferred the submission for the respondent that the "lack of criminalisation of the act of female-female sexual relations means that there is no risk to the appellant of persecution from any state actor

upon her return as a result of her sexual orientation". Furthermore, the background material makes it clear that there is sufficiency of protection as regards the activities of non-state actors.

29. In summary, the FTTJ found, on sustainable grounds, that the appellant had not demonstrated she met the **HJ (Iran**) test at stage (b). This is a finding which is grounded in the background material before her. That background material does not demonstrate that lesbians who are not active in LGBT rights are at real risk of persecution on the grounds of their sexuality. As the respondent concedes, they are at risk of discrimination and harassment but this is not sufficient to amount to persecution. There was no need for the FTTJ to go on to the assessment at stage (c). In any event, even if she had done so, the appellant's evidence about her behaviour as a lesbian on return is very limited: she gave no oral evidence, the hearing being on submissions only, and her witness statement contains no specific evidence as to whether she would wish to live openly as a lesbian on return. She says only this: "It gives me a great sense of security to live freely regardless of my sexuality in UK. In Bangladesh, a gay blogger was hacked to death in broad daylight and neither the society nor my family has any tolerance for homosexuality. All I want is a normal life without fear of death." While it could be inferred that the appellant would wish to live openly in Bangladesh as a lesbian, as she has done in the UK, this is not specifically stated. As Lord Hope says at paragraph 35(c) of **HJ (Iran),** "the fact that the applicant will not be able to do in the country of his nationality everything that he can do openly in the country whose protection he seeks is not the test."

30. For these reasons, I am satisfied the FTTJ's decision does not contain a material error of law. The FTTJ's findings are grounded in the evidence and background material. They are sustainable and open to her.

Decision

31. The making of the decision of the First-tier Tribunal involved no material error of law.

32. The decision of the FTTJ stands. This appeal is dismissed.

33. Given my references to the appellant's sexuality, she is entitled to anonymity in these proceedings.

A M Black

Deputy Upper Tribunal Judge Dated: 24 June 2019

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.

A M Black

Deputy Upper Tribunal Judge Dated: 24 June 2019