



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/09070/2017**

Appeal Number:

THE IMMIGRATION ACTS

Heard at Field House

On 16 January 2018

**Decision & Reasons
Promulgated
On 05 February 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MSH

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer
For the Respondent: Mr M Hussain, Raiyad Solicitors

DECISION AND REASONS

1. The appellant in this appeal is the Secretary of State and the respondent is Mr MSH. However for the purposes of this decision and reasons I refer to the parties as they were before the First-tier Tribunal where Mr MSH was the appellant and the Secretary of State was the respondent.
2. Mr MSH, who was born on 1 June 1989 and is a citizen of Bangladesh, first arrived in the UK in 2010 on a student visa, as a minor, and his leave was extended until 2015. In April 2015 his application for further leave to remain was refused. He applied for asylum in November 2015. The Secretary of State refused that application on 1 September 2016. In a decision and reasons, promulgated on 30 October 2017, Judge of the First-

tier Tribunal Hawden-Beal allowed Mr MSH's appeal on asylum and human rights grounds.

3. The Secretary of State appealed on the following grounds:

Ground 1

That the First-tier Tribunal, having found that the appellant would not live an openly gay life on return to Bangladesh, erred in law in its approach to **HJ Iran [2010] UKSC 31**, given that the appellant does not live an openly gay life in the UK.

4. It was submitted that the findings of the First-tier Tribunal Judge at [43] that there was a risk from the state was inconsistent with her considerations at [39]. It was [39] that the Bangladeshi state does not enforce action against the LGBT community.

Ground 2

The Secretary of State further submitted that the judge had erred at [43] in finding that following the case of **HJ/HT Iran** those in Bangladesh were liable for persecution if they live openly as or are perceived to be gay, and it was submitted that **HJ/HT** dealt with Iranian and Cameroonian nationals and that this did not support that someone from Bangladesh is at risk.

Error of Law Discussion

5. Mr Avery made no submissions in relation to the second ground. That was the proper approach in my view, as the grounds contain a complete misreading of the judge's findings at [43] where the judge said as follows:

"In the circumstances following **HJ/HT**, I am satisfied that those who are gay or perceived to be gay are liable to persecution in Bangladesh. I am satisfied that the appellant will live discreetly as he has done so here but would do so for the same reasons as he has done so here, for fear of what his family would do if they found out and in Bangladesh for fear of what the state would do. ..."

6. In my view it is difficult to argue that the judge was doing anything other than applying the test which he was required to do in **HJ Iran** in stating that she was satisfied that those who are gay are liable to persecution in Bangladesh. It is not properly arguable, in the context of all her findings, including that she clearly recognised that this appellant was from Bangladesh and considered in some detail, including at [39], [40] and [41], the country evidence background information in relation to the treatment of homosexuals in Bangladesh in her decision and reasons, that she was relying on **HJ Iran** as evidence that those who are gay face persecution in Bangladesh. Rather the Tribunal was properly applying the rationale of **HJ Iran** to the facts as she had found them, including, at [40] that:

'I am satisfied that those from the LGBTI community who live openly in Bangladesh are liable to persecution there...'

The second ground of appeal is not made out

7. The relevant paragraph of **HJ Iran** that the judge had in mind, at [43], sets out the now familiar test as follows at paragraph 82:

“The approach to be followed by Tribunals

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 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 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 the 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 in fear of the persecution which would follow if he were to live openly as a gay man, 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 grounds he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to right-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.”

8. Mr Avery submitted that the judge, at [38], had made findings which were not entirely clear; although the judge had accepted that Mr MSH had had sexual relations with at least three men in the UK, the judge went on to state that the fact that he had had sexual relationships with three men did not automatically mean that he is gay. However the judge was “satisfied that it is highly likely that if that information was common knowledge then the appellant would be considered to be gay and thus would be at risk.”
9. These findings must be read in the context of the Tribunal’s findings as a whole, including that the subsequent findings proceeded on the basis that the judge accepted that Mr MSH was gay, including that the judge found at [43] that the appellant would live discreetly as he has done in the UK but “for the same reasons as he has done so here, for fear of what his family would do if they found out and in Bangladesh for fear of what the state would do”. That necessitates an acceptance that the appellant has been living discreetly in the UK as a gay man rather than openly as a gay man.
10. I also take into account that the Secretary of State had not disputed in her grounds the Tribunal’s findings in relation to whether or not the appellant was a gay man and I am not satisfied that this is a “**Robinson**” obvious point. Even if I am wrong, the Tribunal’s quite properly, at 43, applied the rationale of **HJ Iran** which applies to both those who are gay ‘or perceived to be gay’ and it is clear that the Tribunal at [38] found the appellant, at the very least, as someone who would be considered or perceived to be gay.
11. The main thrust of the Secretary of State’s arguments in ground 1, which is the only ground with any realistic prospects of success, given that I am satisfied that ground 2 was predicated on a significant misreading of the judge’s findings, was that it was inconsistent of the judge to find that the appellant would live discreetly because of risk of persecution given that he lived discreetly in the UK and that the findings were inconsistent as to risk from the Bangladeshi state.
12. I am satisfied that the Secretary of State’s grounds disclose no more than a disagreement with the careful and cogent reasonings of the Judge of the First-tier Tribunal. The fact that the appellant does not live openly as a gay man in the UK is not a barrier to him succeeding under the **HJ Iran** principles. The judge accepted in her findings that he lived discreetly in the UK because of his fear of his family and that “his sister would swear at him, his brother would kill him, his father would disown him and then kill him, and the community would beat him, drive him from the village and may kill him.” The judge also properly directed herself as to the test in **HJ Iran** including asking herself, at [41], whether the appellant would live discreetly because he wanted to to avoid embarrassing friends and family or if he would live discreetly because he feared persecution.

13. The judge placed these findings in the context of her findings that she was satisfied, at [41], that those from the LGBT community who live openly in Bangladesh were liable to persecution. It is no more than a quarrel with those findings for the Secretary of State to state that the Tribunal's reasons are inconsistent, on the basis that the judge had found at [39] that although consensual same sexual activities are illegal, the law is not enforced. The judge went on to find however, significant difficulties with the treatment of homosexual individuals in Bangladesh, which is supported by the background country information before her and which the Secretary of State did not substantively challenge.
14. For example, at [40], the judge found that the evidence confirmed that LGBTI individuals "cannot be open about their sexuality regardless of their socio-economic status or the geographical location" and that "LGBTI individuals, especially gay men faced a high risk of societal discrimination because of the widespread traditionally held views about sexuality and gender and visibly gay men faced a high risk of violence, including being killed." The judge also found that attacks on victims were not reported.
15. The judge gave adequate reasons for those findings and it cannot properly be said that they were irrational on the basis of the wealth of information before the judge in relation to the treatment of homosexuals in Bangladesh. In that context, it is somewhat mischievous of the Secretary of State to suggest that a finding, that the Bangladeshi state do not enforce their law criminalising same sex activity means, in itself, that a finding that an openly gay man would be at risk of persecution is inconsistent.
16. I do not share Mr Avery's submission that the judge's findings as to whether the appellant is gay, were unclear and indeed as I have already noted this was not challenged in the Secretary of State's grounds. A proper reading of Judge Howden-Beal's decision reveals that she assessed the evidence before her both from the appellant and the background country information and reached careful findings on the basis of that evidence and then applied the law to those findings of fact.
17. The fact that the appellant's fear includes a fear of persecution from his family as well as a fear of the wider community in Bangladesh, which is the reason why he would live discretely, is a different issue from the appellant living discretely because of fear of embarrassment.
18. It was the judge's reasoned findings, which cannot be said to be irrational, that the appellant's fear of persecution arose from the combined elements of his family and the wider community finding out about his sexuality which would put him at an objectively well-founded fear of persecution on the basis of his sexuality or perceived homosexuality. No error of law is disclosed in the respondent's first ground.

Notice of Decision

The appeal of the Secretary of State is dismissed. The decision of the First-tier Tribunal does not disclose an error of law and shall stand.

I continue the anonymity order that was made in the First-tier Tribunal

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

Date: 1 February 2018

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

No application was made and I make no fee award.

Signed

Date: 1 February 2018

Deputy Upper Tribunal Judge Hutchinson