



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

Appeal Number: PA/05105/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 24 January 2019**

**Decision & Reasons Promulgated
On 29th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHAERF

Between

**MR
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Hussain of Raiyad Solicitors

For the Respondent: Ms S Cunha of the Specialist Appeals Team

**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 his 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.

DECISION AND REASONS

The Appellant

1. The Appellant is a Bangladeshi born in 1987. On 26 March 2011 he entered with leave as a student which leave was extended on one occasion. Subsequently on 6 March 2015 the Appellant applied for leave to remain on the basis of his private life. This was refused and a similar application made on 9 July 2015 was refused on 27 August 2015.
2. On 20 January 2016 the Appellant made a claim for subsidiary protection on the basis of his sexual orientation.

The SSHD's Decision

3. On 3 April 2018 the Respondent (the SSHD) refused the Appellant subsidiary protection and also rejected his claim based on his private life. The SSHD accepted the Appellant's claimed sexual orientation as a gay man. The SSHD accepted that LGBT people in Bangladesh face discrimination but concluded there was no evidence suggested by the country information that the treatment of the general LGBT population in Bangladesh was so adverse as to amount to persecution. Further, the Appellant was not involved in activities which would raise his visibility as a gay man and so he would not face any increased risk from society at large: see foot of page 7 of the reasons for refusal.
4. On 17 April 2018 the Appellant appealed against the decision asserting that the reasons given for the SSHD's rejection of his claim were not supported by the background evidence and that the SSHD had failed correctly to apply the learning in *HJ (Iran) v SSHD [2010] UKSC 31*.

The Proceedings in the First-tier Tribunal

5. By a decision promulgated on 4 June 2018 Judge of the First-tier Tribunal Obhi dismissed the appeal finding at paragraph 37 of her decision:-

“... the fact that the Appellant will live in a more closed environment in Bangladesh does not mean that he will be persecuted. I am not satisfied that the mere fact of the Appellant being a gay person will place him at risk. Further there is no evidence to support the suggestion that he will be open about his sexuality and the only thing preventing him from being open is a fear of persecution.”
6. She also dismissed his claim based on his private life because he did not meet any of the time critical requirements of paragraph 276ADE of the Immigration Rules and there were no very significant obstacles to his re-integration in Bangladesh.
7. On 21 September 2018 Judge of the First-tier Tribunal Froom refused permission to appeal on the basis that the application for permission was nearly three months' late for which there was no satisfactory explanation. His decision was made with reference to an application of 8 September 2018 lodged by Syed Shaheen & Partners. He referred to the Appellant having concerns about his former solicitors who in the refusal of

permission were identified as Raiyad Solicitors. The relevance of the identity of the solicitors lodging the permission application is of note as mentioned below in paragraph 10.

Proceedings in the Upper Tribunal

8. On 18 October 2018 Syed Shaheen & Partners renewed the application to the Upper Tribunal, explaining the delay in making the original application to the First-tier Tribunal.
9. On 17 December 2018 Upper Tribunal Judge Canavan granted permission to appeal because the background evidence showed that same sex activity between men is illegal in Bangladesh and that there is societal disapproval, discrimination and a rise in hate crime. Further, Judge Obhi had noted evidence to show that an individual was unlikely to obtain effective protection from the state. She had arguably also erred in finding the only reason why the Appellant might be discreet about his sexuality on return was fear of disapproval by his family because he had given additional reasons at his interview by an Immigration Officer and in his witness statement.
10. In the Tribunal file, separate from the correspondence and pleadings, is a fax of 15 June 2018 from Raiyad Solicitors to the First-tier Tribunal enclosing an application to the First-tier Tribunal for permission to appeal together with a Transmission Verification Report showing it had been sent on 15 June at 6:44 p.m. There is also a copy of a letter of 20 October 2018 from Raiyad Solicitors to Syed Shaheen & Partners endeavouring to explain the position.
11. Ms Cunha for the Respondent raised a preliminary point that the grant of permission by the Upper Tribunal had not addressed the issue of timeliness as required by Rule 21(7) of the Tribunal Procedure (Upper Tribunal) Rules 2008. She referred to the reasons upon for which Judge Froom had refused permission.
12. I am prepared to accept that the letter of 15 June 2018 was sent by fax and for some unknown reason not placed in the Tribunal file by the Tribunal administration. Regrettably, in my experience over the past eighteen months or more this sort of thing appears to have happened with an increased frequency. Given the current pressures on the Tribunal's administrative staff, no criticism of any particular individual member of staff is intended.
13. There was no evidence before me what may have transpired between the Appellant, Raiyad Solicitors and Syed Shaheen & Partners. Consequently, I am not in a position to make any comment on it. Nevertheless, I do find that the application for permission to appeal by Raiyad Solicitors was made in time, and in any event, taking account of the subject matter of the appeal, I find it appropriate, if the permission application was out of time that it would be unjust not to extend time.

Submissions for the Appellant

14. Mr Hussain referred me to paragraph 36 of Judge Obhi's decision where she found:-

"He said in his evidence that he came out once he was in the UK and he noted a more open society. Despite that there is no evidence that the Appellant has been open about his sexuality even in the UK."

15. However, the Judge had also noted evidence that the Appellant has attended gay clubs in the United Kingdom and that he would be unlikely so to do in Bangladesh. She also noted the Appellant was not leading a celibate life in the United Kingdom.

16. Mr Hussain referred me to the Judge's findings at paragraphs 33 and 34 of her decision that the Appellant had been discreet in Bangladesh because of his parents' likely non-acceptance of his sexuality and that he had concealed it because of fear of his own family's reaction and not as a result of any persecution suffered by him. Mr Hussain argued that this did not fairly reflect the evidence before the Judge. At interview (pages B20, 23 and 35 of the Respondent's bundle) the Appellant had said in reply to questions 38, 50 and 108:-

"I am a homosexual person. If I go back to Bangladesh and if they come to know what I am I will be beaten up. If police come to know they will arrest me. They will take me to the lock-up and they will torture me and they will extract money from me, and if the fundamentalist religious extremists know, they will kill me.

Anybody in the society comes to know I am a gay, I will be beaten up. I was very scared of other people. Whenever I looked at attractive boys I used to look around myself whenever I was staring at them. Because in our society people hate gay people. They used to swear at them, used to say they are the dirtiest in society.

If I go back, I would hide away. If somebody came to know that I am a homosexual they will definitely attack me. If people know I am homosexual my parents may face problems because of me. I just came to (learn?) on 17 April 2017 297 people have been arrested by police on suspicion of being homosexual. In 2016 one gay person, Qulhas Manman was killed. He posted his gay photos on the internet, he wanted to be open."

At paragraphs 6 and 7 of his witness statement, the Appellant had said he had not told anyone in Bangladesh because he feared if his friends found out they would not be his friends anymore, his parents would disown him and throw him out and the general public would hate and attack him. He added that he had acted like a heterosexual to avoid people finding out about his sexuality.

17. Mr Hussain submitted that at paragraph 36 of her decision the Judge had appreciated the issues in the appeal were the threat from non-state actors

and whether there would be a sufficiency of protection for the Appellant on return.

18. He referred to paragraph 2.3.17 of the SSHD's Country Policy and Information Note – Bangladesh: Sexual orientation and gender identity of November 2017 which was before the Judge. This states that in general an LGBT person who does not conceal their sexual orientation or gender identity may be at risk of adverse treatment, which by its nature and repetition amounts to persecution or serious harm. Paragraph 4.2.1 it notes that in Bangladesh sexual activity between men is illegal and at paragraph 2.4.5 that in general, the Bangladeshi authorities appear able but unwilling to offer effective protection to members of the LGBT community. Further, in the previous paragraph the Note finds that the authorities have been responsible for arbitrary arrests, detentions, harassment and discrimination towards LGBT persons with reports of the police physically and sexually assaulting them.
19. He continued that the Judge's assessment of there being little likelihood the Appellant would be persecuted on return to Bangladesh was contrary to the background evidence. The absence of any systematic persecution by the state indirectly referred to at paragraph 36 of her decision did not mean that there was no risk on return. The evidence is that there is discrimination against members of the LGBT community which may amount to persecution and that the authorities are able to but unwilling to supply a sufficiency of protection.
20. Mr Hussain continued that the fact is the Appellant has declared his sexual orientation in the United Kingdom and had explained the reasons why he had been discreet in Bangladesh included his fear of violence at the hands of non-state actors and the lack of protection by the state. This was in addition to his fear of parental disapproval.
21. The Appellant had given ample reasons why he feared persecution on return to Bangladesh at interview and in his witness statement and having regard to *Hj (Iran)* the Judge had made a material error of law in dismissing his appeal.

Submissions for the SSHD

22. Ms Cunha submitted that a reading of the Appellant's interview reply 108 did not disclose that on return to Bangladesh he would be open about his sexual orientation. The Judge at paragraph 34 of her decision had found the Appellant would be discreet and consequently he was not likely to be persecuted on return. The Judge had noted that even in the United Kingdom the Appellant had provided limited evidence of his sexual orientation being a public matter. Consequently, his fear on return was not well-founded. There may be societal discrimination in Bangladesh against members of the LGBT community but the Appellant would lead a very private life and therefore not be at real risk of persecution. There was no material error of law in the Judge's decision.

Response for the Appellant

23. Mr Hussain referred again to the background evidence and the replies the Appellant had given at interview. The reason he had been discreet in Bangladesh was precisely because he feared persecution by non-state actors and rightly believed that the state authorities would not protect him. The Judge's decision had failed to take account of the background evidence and what the Appellant had said at interview and in his witness statement and should be set aside.

Consideration and Conclusion

24. I reserved my decision and obtained the agreement of both parties that in the event I found a material error of law I should proceed in this decision to deal with the substantive appeal.
25. I find there is a material error of law because the Judge did not take adequate or any account of the reasons given by the Appellant at interview and in his witness statement why he had been discreet about his sexual orientation while in Bangladesh. The Supreme Court in *HJ (Iran)* at paragraphs 77-80 set out the approach to be followed:-

“At the most basic level, if a male applicant were to live discreetly, he would in practice have to avoid any open expression of affection for another man which went beyond what would be acceptable behaviour on the part of a straight man. He would have to be cautious about the friendships he formed, the circle of friends in which he moved, the places where he socialised. He would have constantly to restrain himself in an area of life where powerful emotions and physical attraction are involved and a straight man could be spontaneous, impulsive even. Not only would he not be able to indulge openly in the mild flirtations which are an enjoyable part of heterosexual life, but he would have to think twice before revealing that he was attracted to another man. Similarly, the small tokens and gestures of affection which are taken for granted between men and women could well be dangerous. In short, his potential for finding happiness in some sexual relationship would be profoundly affected. It is objectionable to assume that any gay man can be supposed to find even these restrictions on his life and happiness reasonably tolerable.

It would be wrong, however, to limit the areas of behaviour that must be protected to the kinds of matters which I have just described – essentially, those which will enable the applicant to attract sexual partners and establish and maintain relationships with them in the same way as happens between persons who are straight. ...

In short, what is protected is the applicant's right to live freely and openly as a gay man. That involves a wide spectrum of conduct, going well beyond conduct designed to attract sexual partners and maintain relationships with them. To illustrate the point with trivial stereotypical examples from British society: ... In other words, gay men are to be as free as their straight equivalents in the society concerned to live their

lives in the way that is natural to them as gay men, without the fear of persecution.

This is not to give any false or undue prominence to the applicant's sexuality or to say that an individual is defined by his sexuality ... an applicant for asylum does not need to show that his homosexuality plays a particularly prominent part in his life. All that matters is that he has a well-founded fear that he will be persecuted because of that particular characteristic which he either cannot change or cannot be required to change.

... a tribunal has no legitimate way of deciding whether an applicant could reasonably be expected to tolerate living discreetly and concealing his homosexuality indefinitely for fear of persecution. Where would the tribunal find the yardstick to measure the level of suffering which a gay man - far less, the particular applicant - would find reasonably tolerable? How would the tribunal measure the equivalent level for a straight man asked to suppress his sexual identity indefinitely? The answer surely is that there is no relevant standard since it is something which no one should have to endure. In practice, of course, where the evidence showed that an applicant had avoided persecutory harm by living discreetly for a number of years before leaving his home country, the tribunal would be tempted to fall into error. The tribunal would be liable to hold that the evidence showed that this applicant, at least, must have found his predicament reasonably tolerable in the past - and so would find it reasonably tolerable if he were returned to his country of nationality. But, in truth, that evidence would merely show that the applicant had put up with living discreetly for fear of the potentially dire consequences of living openly."

At paragraph 82 the Judge did not adequately address the Appellant's testimony and background evidence which was before her. This will have materially infected her finding that the Appellant could safely return to Bangladesh.

26. The Appellant acknowledged the difficulties his parents would face if his sexual orientation became known on his return to Bangladesh. However, it is clear from his evidence that the reasons for his discretion in Bangladesh included fear of violence from non-state actors and an insufficiency of protection. The background evidence is clear that such fears are justified and having regard to the jurisprudence in *HJ (Iran)* and given the Appellant has chosen not to lead a celibate life, I find he would be at real risk on return to Bangladesh and the appeal is allowed on asylum grounds.

Anonymity

27. An anonymity direction has previously been made. It should continue.

SUMMARY OF DECISION

The decision of the First-tier Tribunal contained a material error of law and is set aside. The following decision is substituted:

The appeal is allowed on asylum grounds.

Signed/Official Crest

Date 26. iii. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal

TO THE RESPONDENT: FEE AWARD

The appeal has been allowed but in all the circumstances I do not consider it appropriate to make a fee award.

Signed/Official Crest

Date 26. iii. 2019

Designated Judge Shaerf
A Deputy Judge of the Upper Tribunal