



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

Appeal Number: AA/00030/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 15 February 2016**

**Decision &  
Promulgated  
On 25 April 2016**

**Reasons**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE FROMM**

**Between**

**MNH**  
(ANONYMITY DIRECTION MADE)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Sesay, Solicitor

For the Respondent: Ms J Isherwood, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Bangladesh, aged 33. He has appealed with the permission of the Upper Tribunal against a decision of Judge of the First-tier Tribunal G Jones QC, promulgated on 13 August 2015, dismissing his appeal against a decision of the respondent to refuse his protection claim. The appellant claimed to be at risk on return to Bangladesh because he is an openly gay man.

2. The First-tier Tribunal did not make an anonymity direction but I make one in order to protect the identity of the appellant.
3. The appellant arrived in the UK in November 2010 to pursue studies. His leave was extended until August 2014 as a Highly Skilled Migrant. He visited his family in Bangladesh in February and March 2013. When his leave expired the appellant made two unsuccessful applications for leave outside the rules. He was encountered on 12 November 2014 attempting to marry one AY, a male. He was detained and served with notice of liability to removal as an overstayer. The appellant then claimed asylum. His claim was placed in Fast Track procedures then operating at the Harmondsworth IRC. By the time his appeal was heard he was no longer in the Detained Fast Track system.
4. The respondent did not accept the appellant's claim that he was gay and that he had had relationships with two men in Bangladesh. It was not therefore accepted that he had been attacked in Bangladesh because of his sexuality or that his family had harassed and threatened him. The appellant and AY were given marriage interviews and their answers were regarded as inconsistent on a number of points. Applying the guidance provided in *HJ (Iran) and HT (Cameroon)* [2010] UKSC 31, the respondent's refusal letter concluded as follows:

“67. It is not accepted that you are gay or someone who would be treated as gay by potential persecutors in your country of origin.

68. It is accepted from the objective evidence contained in the Country of Origin Information Report that gay people who live openly would be liable to persecution in your country of origin (Bangladesh).

69. You claim that you would hide your sexuality on return to your home country.

70. You claim that you would do this because you would be killed if you were openly homosexual.

71. Therefore, applying the test outlined in the above case law, your claim fails to meet the criteria of a person in need of international protection as it fails the test at the first stage in that it is not accepted that you are gay or somebody who would be treated as gay by potential persecutors in Bangladesh.”

5. The judge heard evidence from the appellant. The judge was told that AY had “disappeared”. The judge stated that he did not find the appellant to be a “persuasive, reliable or candid witness”. As to whether the appellant was gay or not, he stated as follows:

“... I am prepared to accept that the appellant is of a homosexual persuasion. That is not the same as me saying that I found him to be truthful or credible. I am saying no more than that I cannot say that there is not a real risk that he is of that persuasion. Indeed, even his own counsel described his evidence as “flaky” and she realistically acknowledged many of the shortcomings in the appellant's evidence.”

6. There are obvious difficulties with this paragraph, not least the judge's reference to a person's sexual orientation as a "persuasion". More importantly for the purposes of this appeal, the judge's mode of expressing himself has resulted in an at best ambiguous finding regarding the appellant's claim that he is gay.
7. The judge recorded that no evidence was called on the question of how the appellant would behave on return to Bangladesh and, on that basis, he found the appellant had not discharged the burden of showing he would be persecuted. He went on to find in the alternative that, even if the appellant would conceal his homosexuality through a fear of being persecuted, he would not be persecuted. He noted that laws criminalizing homosexual behaviour were not enforced. Familial and societal disapproval was not sufficient to reach the threshold of persecution. The judge made an adverse credibility finding in respect of the appellant's claim to have been attacked in Bangladesh in 2008 or 2009. The judge's survey of the background materials provided did not show that gay people were persecuted. The judge accepted the appellant's family wanted nothing more to do with him. However, the appellant could live safely elsewhere in Bangladesh.
8. The grounds seeking permission to appeal to the First-tier Tribunal argued the judge erred by failing to have regard to submissions and background materials suggesting there is persecution of gay people in Bangladesh. Permission was refused as the grounds were considered nothing more than mere disagreement with the decision. However, in granting permission to appeal, Upper Tribunal Judge Rintoul pointed out that the respondent had accepted the appellant could not live openly as a gay man in the refusal letter and it was arguable there was insufficient analysis of the issue of whether the appellant would live discreetly.
9. The respondent has filed a rule 24 response opposing the appeal on the basis the judge's analysis was sufficiently detailed and his conclusions ones which were open to him.
10. I heard submissions on whether the judge made a material error of law. It is not necessary to set them out. Ms Sesay relied on the written grounds seeking permission to appeal. Ms Isherwood made valiant efforts to argue the decision was sustainable, although she acknowledged there were difficulties in so doing arising from the judge's failure to have regard to the respondent's concession of fact. The parties were in agreement that, if I found the decision was erroneous, the appeal should be sent back for a fresh hearing.
11. I reserved my decision on the question of whether the judge made a material error of law.

### **Error of law**

12. Plainly the judge erred by failing to have regard to the important

concession made by the respondent as set out in paragraph 68 of the reasons for refusal letter. The respondent's primary position was that the appellant was not genuinely gay and he was feigning homosexuality for the purposes of his asylum claim. Paragraph 68 was therefore an expression of the respondent's view if the appellant were in reality gay. However, I do not see that as diminishing the effect of the concession as to the general position regarding openly gay men in Bangladesh.

13. In *HJ (Iran) and HT (Cameroon)* [2010] UKSC 31 the Supreme Court gave definitive guidance on the correct approach to appeals such as this one. Lord Rodger expressed it this way:

*"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 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.”.

14. In this case, as mentioned above, the judge’s finding on whether the appellant was gay was ambiguous. Overall he made an adverse credibility finding against him. In his conclusion in paragraph 42 he again expressed himself in ambiguous terms regarding whether he accepted the appellant was gay.
15. The judge dealt with the element of how the appellant would behave on return to Bangladesh solely by reference to his counsel’s failure to call evidence on it. If correct, that was an important oversight on her part but I do not believe the judge was entitled to treat such an important issue in this summary manner. The appellant had been asked at his interview whether he would behave discreetly in Bangladesh and, if so, why. He had explained that he had returned to Bangladesh to try to make his family understand (QQ57-60) but he was not open about himself to other people because it was “risky”. His answers to questions about how he would behave show that he said he would not express his sexuality openly because of the risk that “something would happen” to him (QQ367-371). Even though his solicitors had not thought to include this part of the claim in his appeal statement it was nonetheless important evidence which needed to be heard and tested. The judge made no finding at all on how the appellant would behave.
16. In looking at the alternative position in which the appellant would choose to live discreetly through fear of persecution, the judge relied on the background evidence as showing there was not a real risk that an openly gay man would be persecuted on that account. Of course, that finding is inconsistent with the respondent’s concession on the point.
17. I set aside the judge’s decision because it is vitiated by material error of law. The decision contains inadequate findings and reasons. The appeal must be heard de novo in the First-tier Tribunal by another judge. To assist with that task I make the following directions:

### **DIRECTIONS**

- (1) The appeal will be heard de novo by any Judge of the First-tier Tribunal except Judge G Jones QC on a date and at a place to be notified;
- (2) There are no preserved findings of fact;
- (3) If the respondent wishes to reconsider her concession regarding the general position for gay men living in Bangladesh, any supplementary reasons for refusal letter should be served on the appellant and filed with the Tribunal no later than 28 days before the date of hearing in the First-tier Tribunal;
- (4) The First-tier Tribunal must make clear findings of fact with respect to all relevant matters, including but not limited to:

- the appellant's claim that he is a gay man;
- that his family has disowned him and threatened him on this account;
- that he had sexual relationships in Bangladesh which led to him being attacked and that an FIR was filed;
- that he has lived with a male partner in the UK;
- that he lives openly as a gay man in the UK; and
- whether he would live discreetly on return to Bangladesh and, if so, why;

(5) The respondent must file and serve the marriage interview transcripts and any officer's notes relating to those interviews, if not already filed and served;

(6) If either party wishes to file additional evidence not previously filed, a consolidated bundle should be prepared containing the fresh evidence and all the evidence previously filed, which bundle must be filed at the Tribunal and served on the other party no later than 14 days before the hearing. The appellant may wish to consider preparing a supplementary witness statement to ensure that all relevant issues have been addressed; and

(7) Unless informed to the contrary, the First-tier Tribunal will assume the grounds of appeal are limited to protection issues.

## **NOTICE OF DECISION**

The Judge of the First-tier Tribunal made a material error of law and his decision dismissing the appeal is set aside. The appeal will be heard again de novo 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  
2016**

**Date 16 February**

**Judge Froom,  
sitting as a Deputy Judge of the Upper  
Tribunal**