



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

Appeal Number: PA/07434/2016

**THE IMMIGRATION ACTS**

**Heard at FIELD HOUSE  
On 9<sup>th</sup> May 2017**

**Decision & Reasons Promulgated  
On 12<sup>th</sup> May 2017**

**Before**

**DEPUTY JUDGE OF THE UPPER TRIBUNAL  
G A BLACK**

**Between**

**MD M R**

Appellant

**and**

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

Respondent

ANONYMITY ORDER MADE

**Representation:**

For the Appellant: Mr S Hyder (Simon Noble solicitors)

For the Respondent: Mr E Tufan (Home Office Presenting Officer)

**DECISION AND REASONS**

1. The appellant in this matter is Mr MR. I shall refer to the parties as “the appellant” and “the respondent.” This is an error of law hearing. The appellant appeals against a decision of the First-tier Tribunal (Judge Oliver)

(“FTT”) promulgated on 1<sup>st</sup> March 2017 in which the appeal was dismissed on asylum and humanitarian protection grounds.

### **Background**

2. The Appellant is a citizen of Bangladesh. He appealed on the grounds of his sexuality, that he was gay and would face persecution on return to Bangladesh where homosexuality is criminalised. The FTT accepted that appellant’s claim that he was gay but found that he faced no real risk on return. The FTT found that the appellant was not an activist campaigner for gay rights, that there was a buoyant gay scene in Bangladesh and that the appellant would be able to live openly in Bangladesh [28].

### **Grounds of appeal**

3. In grounds of appeal the appellant argued that the FTT erred by failing to consider the guidance in **HJ(Iran)** as to risk on return, the background material and other evidence. The FTT made inconsistent findings as to risk on return by finding the appellant was not at risk because he was not an activist in gay rights.

### **Permission to appeal**

4. Permission to appeal to the Upper Tribunal (UT) was granted by DFTJ Macdonald on 24<sup>th</sup> March 2017. In granting permission the DUTJ found that the FTT’s findings on the critical issues were brief [28] and that it was arguable that the FTT failed to consider all the relevant background material and failed to properly apply **(HJ(Iran))**.

### **Rule 24 response**

5. The respondent opposed the appeal and argued that the FTT found that there was discrimination but not persecution in Bangladesh. There is a buoyant gay scene on the internet and the appellant would be able to live there openly.

### **Submissions**

6. At the hearing before me Mr Hyder argued that the FTT found that the appellant would be perceived as gay and face persecution [26]. There was ample background evidence to show that there was a real risk in Bangladesh and the FTT failed to specifically engage with the issues raised in **HJ(Iran)**. Mr Hyder relied on his grounds of appeal and his skeleton argument together with background material. The FTT made no clear findings on the risk from the appellant’s family (paragraph 4.2 grounds). The critical issue was whether in the event that the appellant lived openly he would face persecution. Whilst accepting that section 377 of the

Criminal Code in Bangladesh was rarely if ever enforced the authorities in Bangladesh used other sections of the law against LGBT persons.

7. In response Mr Tufan contended that the FTT made no error because it dealt with the issues of risk on return albeit briefly at [28]. Much of the material relied on by the appellant was historical. Mr Tufan relied on the 2016 Home office guidance. The appellant would be able to live in Dhaka where there was a gay community and the appellant would face no risk. The background evidence relied on by the appellant was not objective.
8. Mr Hyder responded that the appellant relied on background material that had also been used as a reliable source by the Home office. The appellant would not be protected by the police if he were harmed by non state agents. The appellant's case was presented on the basis that he was beaten by his uncle and that he feared recriminations from his family and Islamists.

### **Discussion and conclusion**

9. I decided that there was a material error of law in the decision and reasons. The FTT assessment of the critical issue of risk on return was dealt with very briefly and appears to have been decided on the discrete issue that the appellant was not an activist and therefore would not face ill treatment even if he lived openly as a gay man. The FTT made specific reference to **HJ(Iran)** at [26] finding that the appellant was gay and will be persecuted on return. In the following paragraphs the FTT considered background material. There was no proper analysis with reference to the guidance in **HJ(Iran)** which in my view amounts to a material error in law. Whilst accepting that an activist would undoubtedly face a risk of ill treatment that is by no means the whole picture as set out in the background material.

10. There is a material error of law in the decision which shall be set aside in so far as the FTT fails to deal with risk on return at [28].

### **Re making the decision**

11. I heard submissions from both representatives as to the applicability of the guidance in **HJ(Iran)**. There is no country guidance case dealing with the issue of sexual orientation in Bangladesh. It is accepted that homosexuality is criminalised but that section 377 of the Penal code is not enforced to prosecute gay persons. I conclude that there is no evidence of any systematic and sustained persecution by the State. There is some level of discrimination and harassment towards gay persons by law enforcement officers and the public. It is accepted by the respondent that LGBT persons form a Particular social group(PSG) but that the question to be considered will be whether or not the particular person will face persecution on account of membership of that group. This involves consideration of whether or not a gay person will be able to live freely and openly and if not why not. The Home office guidance entitled Bangladesh: sexual orientation and gender identity 2016 concludes that there

is no real risk of prosecution under the law (paragraph 2.3.7), with which I agree. However, I have considered the guidance at 6.2.2 which quotes the USSD report 2015 “Although the law that criminalises homosexual relationships is not systematically applied it reinforces a general climate of homophobia and impunity for those who persecute LGBT individuals. Moreover the law is applied in an unofficial manner without recorded prosecution by state and non state agents”. The background evidence also establishes that gay people do not report incidents to the police for fear of having to reveal their sexuality (7.1.1). Further a Human rights watch report April 2016 found that LGBT persons interviewed stated that they faced threats of violence, particularly after homophobic comments by Islamic leaders and that activists were at particular risk for their personal safety (7.1.7). Whilst there is also reference to the existence of a gay community in Dhaka, it is not described as public or open community. Having considered the evidence in the light of the FTT’s conclusion that the appellant is gay and that he will live openly in Bangladesh, it is my view that in so doing he faces a real risk from non state agents of persecutory behaviour including violence from family members for which there is no sufficient state protection. The FTT accepted the appellant’s evidence as credible and whilst making no specific findings about his family and the threats made, I proceed on the basis that the appellant’s claim in its entirety was accepted by the FTT. On the evidence the appellant would not be able to live openly in his home area nor in any other place in Bangladesh where he faces a risk from non state agents and there is inadequate State protection given the background evidence that the police act with impunity and act unofficially in law enforcement. I have also taken into account the background evidence that shows social exclusion is prevalent in society and that fundamentalist values have created an environment where the gay community is prevented from living freely ( Global Human rights defence report 2015 2.2.2). I am satisfied that the limbs in **HJ(Iran )** are made out and that the appellant will not be able to live freely or openly in Bangladesh for fear of persecution.

### **Decision**

12. I allow the appeal on asylum and humanitarian protection grounds.

Signed  
2017

Date 11<sup>th</sup> May

GA Black  
Deputy Judge of the Upper Tribunal

**Direction Regarding Anonymity - rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014**

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.

NO FEE AWARD

Signed  
2017

Date 11<sup>th</sup> May

GA Black  
Deputy Judge of the Upper Tribunal