Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/09748/2017**

THE IMMIGRATION ACTS

Heard at Field House **Decision & Reasons Promulgated**
On 23 March 2018 **On 1 May 2018**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

S B
(ANONYMITY DIRECTION MADE)
Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

Representation:

For the Appellant: Mr B Hoshi, instructed by Wilson & Co Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Bangladesh born in 1989. He appeals against the decision of First-tier Tribunal Judge Courtney dismissing his appeal against the refusal of his protection claim on asylum and human rights grounds on 23 November 2017.

Appellant's Immigration History

2. The Appellant came to the UK in 2009 as a student. In 2015 his leave was curtailed and he made an application for leave to remain on Article 8 grounds which was unsuccessful. In 2017 he claimed asylum on the basis

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that he is homosexual. The Respondent refused the Appellant's claim in September 2017 on the basis that there was sufficiency of protection and the Appellant could internally relocate. The Respondent expressly accepted that the Appellant had been living openly as a gay man in the UK. At paragraph 66 of the refusal letter she states: "It is therefore accepted that you have had problems with your family in Bangladesh and have been living as an openly gay man in the UK."

3. The Appellant's appeal was heard by First-tier Tribunal Judge Courtney on 1 November 2017. The judge noted the Respondent's concession that he was living openly as a gay man in the UK and accepted that the Appellant would face a real risk of persecution on return to his home area. However, the judge did not accept that there was a real risk of persecution for gay men throughout Bangladesh. She found that there was sufficiency of protection and it would not be unreasonable for the Appellant to internally relocate.

4. The relevant country policy and information note [CPIN] which was before the judge at the hearing on 1 November was version 2 published on 18 September 2017. However, shortly after the hearing on 16 November 2017 version 3 was published. Neither the Respondent nor the Appellant notified the judge of this development and the judge's decision, dated 21 November 2017, was promulgated on 23 November 2017. The judge specifically took into account the CPIN: Bangladesh sexual orientation and gender identity (September 2017), version 2.

5. The Appellant applied for permission to appeal on 5 December 2017. At this time he was represented by different solicitors to those instructing Counsel today. In granting permission, Judge Ford noted that the grounds were poorly drafted and did not focus or identify any arguable material error of law. However, he concluded that the CPIN: Bangladesh, sexual orientation and gender identity (17 November 2017) painted a very different picture as to the level of risk to those nationals of Bangladesh who are openly gay and the likelihood of protection being offered by the state to those individuals. It was arguable that the assessment of risk did not adequately reflect the Home Office's own guidance on the issue as at the date of decision. Permission was granted on that basis.

6. In her Rule 24 response the Respondent states:

> "3. In a comprehensive determination Judge Courtney has clearly considered all of the evidence presented including the Country Policy and information note to which Judge Ford refers at [3] of his decision of 20 December 2017. The judge analysed the evidence, applied the ratio of guiding case law including HJ (Iran) and concluded that the discrimination which the Appellant may receive living as an openly gay man in Bangladesh, on relocation to a major city such as Dhaka, will not amount to persecutory treatment.
>
> 4. It is of note that the Appellant only made a claim for asylum when he had no further avenue to remain in the UK. It is open for the Appellant to seek Entry Clearance to return to UK as [sic]

partner of someone who is settled in UK [sic] should he wish to do so. Any temporary separation clearly would not be disproportionate. During any separation social services would be seized by law of providing such care as is necessary as defined by law to the appellant's claimed partner."

Submissions

7. Mr Hoshi relied on his skeleton argument and submitted that the CPIN came out before the decision was promulgated but after the appeal hearing and that the new evidence, the CPIN, was first acknowledged at the permission stage. He submitted that where there is a misunderstanding or ignorance of an established and relevant fact, for example the existence of evidence that can result in unfairness such that it amounts to an error of law.

8. Mr Hoshi referred me to E and R v the Secretary of State [2004] EWCA Civ 49. In that case, E appealed to the Court of Appeal against the Immigration Appeal Tribunal's refusal to grant him permission to appeal. He had claimed asylum on the basis that he was a sympathiser of the Muslim Brotherhood and feared persecution on return to Egypt. The IAT concluded that mistreatment of Muslim Brotherhood members was related to the 2000 Egyptian elections and that any risk to E was now historic. E sought to challenge that finding by relying on two non-governmental organisation reports concerning country conditions in Egypt which had both been published after the IAT hearing but before the promulgation of its decision and which were not produced by him until after the promulgation of its decision. The new material was produced with E's application for permission to appeal. The IAT refused permission to appeal because the reports had not been before it at the date of the hearing.

9. Mr Hoshi submitted that the position of the Appellant R was very similar. He also appealed to the Court of Appeal against the IAT's refusal to grant him permission to appeal. He had claimed asylum on the basis that he was Christian and feared persecution on return to Afghanistan. The Tribunal concluded that since the Taliban were no longer in power any risk to R was now historic. R sought to challenge that finding by relying on a Home Office report concerning country conditions and an expert report which had both been published after the IAT hearing but before the promulgation of its decision and which were not produced by him until after the promulgation of its decision. The new material was produced with R's application for permission to appeal. The Tribunal refused permission to appeal because the material had not been before it at the date of the hearing.

10. In E and R, the Court of Appeal allowed the appeals and held that where it was shown that an important part of the Tribunal's reasoning was based on ignorance or mistake of fact it was permissible to admit new evidence to demonstrate the mistake. As to the failure to adduce evidence in

question until after the promulgation of the decision, Carnwath LJ stated at paragraph 94:

> "In the present case, the new evidence was not produced until after the decision was promulgated. Mr Kovats [Counsel for the Secretary of State] submits that in such circumstances the IAT would have been entitled to reject it, applying Ladd v Marshall principles, because it could have been made available earlier. We see the theoretical force of that submission. However, it ignores the practical realities. Assuming some legal assistance is available to the asylum seeker it is likely to be concentrated at the critical points in the process: that is, for the present purposes, the hearings before the Adjudicator and IAT and the consideration of possible appeal following receipt of their decisions. It seems unrealistic to expect continuous monitoring of potential new evidence in the intervening periods. Even if it were possible it would be very difficult for the IAT, as their stated reasons made clear, to handle such new evidence administratively. The obvious point to review the matter, where necessary, is part of an application for leave to appeal. If the discretion of the Tribunal is limited in the way we have suggested the extra burden should not be unmanageable."

11. Mr Hoshi submitted that the appeals of E and R were remitted to the Immigration Appeal Tribunal for consideration under the Ladd v Marshall principles. Mr Hoshi also relied on MM (Unfairness; E & R Sudan) [2014] UKUT 105 (IAC) in which McCloskey J undertook a detailed analysis of the authorities in the area including E and R and held:

> "A successful appeal is not dependent on the demonstration of some failing on the part of the First-tier Tribunal. Thus an error of law may be found to have occurred in circumstances where some material evidence, through no fault of the First-tier Tribunal, was not considered with resulting unfairness."

12. In the case of MM**,** the material evidence was a letter from the Appellant's solicitors who had represented at first instance and also on appeal. This evidence could with reasonable diligence have been obtained at an earlier stage and considered at the hearing. McCloskey J, in allowing the appeal, held at paragraph 25:

> "It is established that neither the rule in Al-Mehdawi v SSHD [1990] 1 AC 876, that a procedural failure caused by an applicant's own representative did not lead to an appeal being in breach of the rules of natural justice nor a failure to meet the first of the Ladd v Marshall principles, applies with full rigour in asylum and human rights appeals: see FP (Iran) v SSHD [2007] EWCA Civ 13. The decision of the Court of Appeal in E and R v Secretary of State points towards a broader approach in which the common law right to a fair hearing predominates."

13. Mr Hoshi submitted that the First-tier Tribunal was not aware of the updated CPIN and therefore this had led to unfairness in the asylum and human rights context. It was important to take a broad and permissive

approach. The evidence could and should have been before the First-tier Tribunal and the solicitor was not at fault. He invited me to apply the principles in Ladd v Marshall.

14. Firstly, could the evidence have been obtained with reasonable diligence for use at trial. The hearing took place on 1 November and the CPIN was published on 16 November and therefore it could not have been produced prior to the appeal hearing. The question is whether it ought to have been brought to the attention of the judge prior to the promulgation of the decision on 23 November. Mr Hoshi relied on Carnwath LJ's rejection of this argument at paragraph 94 of the judgment set out above. The permission stage was the obvious stage to produce such evidence. Mr Hoshi accepted that the Appellant's previous solicitor did not put forward such evidence, but fortunately for the Appellant the judge granting permission was aware of the new CPIN and aware of the solicitor's failure. There was also evidence from the Appellant's current solicitors, who contacted his previous solicitors to try and ascertain whether the CPIN of November 2017 was put before the judge prior to the decision. They received no response from their various communications.

15. Mr Hoshi submitted that, in any event, on these facts the evidence came up at the obvious point, the permission stage, and the fact that it was pointed out by the judge rather than the Appellant's instructing solicitors was irrelevant. This was the appropriate time to raise the new material and therefore the first principle in Ladd v Marshall was satisfied.

16. In relation to the second principle the question was: if the evidence had been adduced would it have had an important but not decisive result. Mr Hoshi submitted that another judge might well have come to a different conclusion had he seen the updated CPIN.

17. The First-tier Tribunal Judge found that the Appellant would have to live discreetly to avoid discrimination. At paragraph 59 she states:

> "Although if he were not to act discreetly in the place of relocation the Appellant may be the subject of some discrimination in his daily life. I do not consider that such discrimination even if taken cumulatively is capable of amounting to a real risk of being persecuted in Bangladesh. For the same reason I find that requiring Mr B to return to Bangladesh would not lead to a breach of the Qualification Directive or Article 3 ECHR. There is no reason why internal relocation to a major city should not ameliorate any risk to a level where it can no longer be considered to be real."

18. At paragraph 67 the judge found:

> "I accept that same sex relationships are viewed as socially unacceptable in Bangladesh and that life for Mr B and his partner would not be as easy there as in the UK. However, I do not consider that they would be prevented from living together there as a couple particularly if they were to reside in a more enlightened urban area such as Dhaka. Bangladesh's laws will not have a damaging effect on the parties' family relationship. There has been no suggestion that Mr

B and Mr T are part of a gay scene in London and they seem to live a low-key existence. In his witness statement of 20 October 2017, Mr T says only that in the UK 'we are able to go out to restaurants for dinner as a couple without feeling insecure or scared'."

19. Mr Hoshi submitted that the judge found the Appellant would have to live discreetly to avoid discrimination and the evidence in the new CPIN stated that this was enough to render relocation unreasonable. He submitted that principle three of Ladd v Marshall that the evidence is apparently credible but does not need to be incontrovertible, was not relevant. This was the Respondent's own guidance note. Accordingly, having found that the Appellant was an openly gay man at risk in his home area the appeal could be allowed on the facts found by the First-tier Tribunal Judge and the concession made by the Respondent.

20. Mr Melvin submitted that it would not be appropriate to tie the judge's hands and preserve any of the findings. Read as a whole there was very little difference between the CPIN of September 2017 and that of November 2017. The new evidence would not influence a further decision. The only difference between the CPIN was in relation to HJ (Iran). There was nothing new in the Secretary of State's policy. On the new evidence there was sufficiency of protection and there had been little change in Bangladesh.

Discussion and Conclusions

21. Mr Hoshi pointed out the differences between versions 2 and 3 of the CPIN. In relation to risk on return to Bangladesh as an openly gay man, version 2 states:

> "In general LGBT persons are not open due to social pressures and norms and to avoid a level of discrimination arising from this. But even when taken cumulatively this is not sufficiently serious by its nature or repetition as to reach the high threshold of serious harm." (2.3.14 and 3.1.3)
>
> "Effective state protection against societal discrimination may be available on the facts of the case." (3.1.5)
>
> "It would not in general be unreasonable for an actual or perceived gay man who is able to demonstrate a real risk in his home area because of his particular circumstances to relocate internally within Bangladesh." (2.5.5 and 3.1.5)

22. Version 3 states, risk on return as an openly gay man:

> "In general an LGBT person who does not conceal their sexual orientation or gender identity may be at risk of treatment which by its

> nature and repetition amounts to persecution or serious harm." (2.3.17 and 3.1.5)
>
> "In general the state appears able but unwilling to offer effective protection." (3.1.6)
>
> "Internal relocation will not be an option if it depends on the person concealing their sexual orientation and/or gender identity in the proposed new area for fear of persecution (3.1.7)."

23. Applying Ladd v Marshall, I find that the fresh evidence could not have been obtained with reasonable diligence for use at trial. The new CPIN was not published until 16 November and the hearing took place on 1 November. The Appellant's representatives were not obliged to continuously monitor potential new evidence in the intervening period between the hearing and the promulgation of the decision (E and R). The appropriate time to disclose such evidence would be on an application for permission to appeal. Version 3 of the CPIN was published days before Judge Courtney made her decision. It was therefore produced at the appropriate moment on the application for permission. I accept that the Appellant's previous solicitors failed to bring it to the attention of the judge granting permission. However, that was the date upon which permission was granted because the judge saw it as a Robinson obvious point. I adopt a broad approach in which the common law right to a fair hearing predominates in asylum and human rights context.

24. I also find that the second principle in Ladd v Marshall is satisfied: if adduced the fresh evidence would have had an important though not decisive influence on the result. There are significant differences between versions 2 and 3 as summarised above. Further, it would also have influenced the result in respect of very significant obstacles in paragraph 276ADE.

25. I find that the evidence is apparently credible although not necessarily incontrovertible. The evidence came from the Respondent and was not in dispute. Accordingly, I find that, had the judge been aware of it, he may well have come to a different conclusion. I set the decision aside on the basis that, through no fault of the judge, material evidence was not considered and that has resulted in unfairness.

26. I remake the decision as follows. Given the Respondent's concessions that the Appellant will live as an openly gay man in Bangladesh and would be at risk from his family on return, and the judge's finding that the Appellant would be at risk in his home area, then the issues to be decided are whether there is sufficiency of protection and whether it would be reasonable for the Appellant to internally relocate.

27. Applying the low standard of a reasonable degree of likelihood, the information contained in the CPIN leads me to conclude that the Appellant would be at risk of persecution or serious harm or treatment in breach of Article 3. I rely on the following paragraphs of the CPIN:

2.3.14 There is an indication that the rise in social media has led to an increase in hate speech against LGBT people. Whilst there are support groups for LGBT persons some have reduced their activities following the murder of two gay rights activists in 2016.

2.3.16 In general LGBT persons are not open due to social stigma, pressures and norms and to avoid a level of discrimination and violence arising from this. LGBT persons who openly express their sexual orientation or gender identity are likely to be socially excluded, receive threats of violence and some cases (particularly gay men) may be attacked by non-state actors. Widespread stigma and discrimination is also likely to restrict their participation in the community and the workforce and access to healthcare. The nature and degree of treatment may vary according to geography and socioeconomic status.

2.3.17 Therefore, in general, an LGBT person who does not conceal their sexual orientation or gender identity may be at risk of treatment which by its nature and repetition amounts to persecution or serious harm. However, each case must be considered on its facts with the onus on the person to demonstrate why their particular circumstances would put them at real risk from non-state actors.

2.4.1 Where the person’s fear is of persecution and/or serious harm by the state, they will not be able to obtain protection.

2.4.2 Where the person’s fear is of persecution or serious harm from non-state actors, decision makers must assess whether the state can provide effective protection.

2.4.3 Some sources indicate that many LGBT persons who experience societal ill treatment do not report the incidents to the police due to a fear of having to reveal their sexual orientation. LGBT persons from influential families may be able to access protection.

2.4.4 State authorities have been responsible for arbitrary arrests, detentions, harassment and discrimination towards LGBT persons with reports of the police physically and sexually assaulting them. There is some evidence of the authorities taking appropriate action. For example, the police are reported to have investigated the murder of the two gay rights activists in 2016 and one arrest was made.

2.4.5 In general the state appears able but unwilling to offer effective protection and the person will not be able to avail themselves of the protection of the authorities. However each will be needed to be considered on its facts.

2.5.3 It would not, in general, be unreasonable for a gay man who has chosen to live discreetly due to social or religious pressures to relocate internally within Bangladesh. However internal relocation will not be an option if it depends on the person concealing their sexual orientation and/or gender identity in the proposed new location for fear of persecution.

3.1.3 Reports indicate that LGBT persons are reluctant to be open about their sexual identity due to social stigma, pressures and norms, and to avoid a level of discrimination and violence by non-state actors, including family members and Islamic extremists arising from this. Similarly the LGBT community is closed and private.

3.1.5 In general an LGBT person who does not conceal their sexual orientation or gender identity may be at risk of treatment which by its nature and repetition amounts to persecution or serious harm. The nature and degree of treatment may vary according to geography and socioeconomic status. Gay rights activists and bloggers may be at greater risk due to their profile. Each case must be considered on its facts and merits.

3.1.6 In general the state appears able but unwilling to offer effective protection. However each will need to be considered on its facts.

3.1.7 Internal relocation may be reasonable depending on the person's individual circumstances. For example where they have chosen to live discreetly due to social or religious pressures. However, internal relocation will not be an option if it depends on the person concealing their sexual orientation and/or gender identity in the proposed new location for fear of persecution.

28. The Appellant's circumstances are that he lives openly as a gay man in the UK and would continue to do so in Bangladesh. Accordingly, applying the CPIN to the facts as found by the Respondent and the judge, there is a reasonable degree of likelihood that the Appellant would be at risk of persecution, serious harm or Article 3 treatment on return.

29. In relation to Article 8, I find that there are very significant obstacles to integration. The Appellant has satisfied the requirements of paragraph 276ADE of the Immigration Rules.

30. There was no challenge to the judge's finding that there was insufficient evidence to show that the Appellant and his partner had been living together for two years. The Appellant could not satisfy the requirements of Appendix FM. However, the judge accepted that the Appellant was in a long-tern relationship with his partner and therefore Article 8 is engaged. There was no challenge to paragraph 70 of the judge's decision which

dealt with the first four questions in Razgar. I find that the Appellant's removal would be disproportionate in the circumstances. The Appellant would be unable to continue his family life with his partner outside the UK and he would not be able to live openly as a gay man. The Appellant's right to family and private life outweighs the public interest in maintaining immigration control, particularly given the risks on return.

31. Accordingly, I find that there was material, which was not before the First-tier Tribunal Judge that has led to unfairness such that the decision should be set aside. On the new material the Appellant's case succeeds on asylum and human rights grounds. The decision of 23 November 2017 is set aside. The Appellant's appeal is allowed on asylum and human rights grounds, Article 3 and Article 8.

Notice of Decision

Appeal allowed.

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 her or any member of her 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.

J Frances

Signed Date: 27 April 2018
Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

J Frances

Signed Date: 27 April 2018
Upper Tribunal Judge Frances