



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05570/2019

THE IMMIGRATION ACTS

Heard at Field House
On 12 April 2021

Decision & Reasons Promulgated
On 27 May 2021

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

A H R
(ANONYMITY ORDER IN FORCE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Briddock, Counsel, instructed by Milestone Solicitors
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Following a “remote hearing” on 16 December 2020 I found an error of law in this case. My Reasons for Finding an Error of Law and my Decision to set aside the decision of the First-tier Tribunal were dated 26 February 2021 and were sent to the parties. I set out below that decision in its entirety because it will explain much of what I have to do today. For the avoidance of any possible doubt the anonymity order I made then remains in force.
2. When finding that there had been an error of law by the First-tier Tribunal I said the following:

REASONS FOR FINDING ERROR OF LAW

1 Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Appellant. Breach of this order can be punished as a contempt of court. I make this order because the Appellant is an asylum seeker and is entitled to privacy.

2 This is an appeal against a decision of the First-tier Tribunal dismissing the appeal of the Appellant against a decision of the Secretary of State refusing him asylum or other form of international protection and leave to remain on human rights grounds.

3 The short point is that the Appellant is a citizen of Bangladesh and claims to be gay but the First-tier Tribunal Judge did not believe him.

4 There are extensive and appropriate grounds of appeal that are supplemented by a "Response to Upper Tribunal Judge Coker's Directions dated 30-03-20" signed by Mr Briddock and dated 5 May 2020 and a document entitled "SSHD's Response to the Appellant's Grounds" signed by Mr Ian Jarvis, Senior Home Office Presenting Officer dated 11 May 2020. These were prepared after it was postulated that the appeal should be determined without a hearing. Judge Coker purported to decide the appeal but her decision was set aside because, contrary to the impression given to Judge Coker, the Appellant had not had proper notice of the proceedings.

5 It is necessary to look rather carefully at exactly what the First-tier Tribunal Judge decided before looking at how the decision is criticised.

6 It is the Appellant's case that he was born in Sylhet in Bangladesh into a Muslim family. He says that he realised that he was gay when he was about 16 years of age but he did not disclose that to anyone in Bangladesh. He arrived in the United Kingdom on a working holidaymaker visa ~~in August 2008~~ when he was 23 years old. He arrived in April 2009 ~~(not August 2008)~~ with leave which expired in April 2011.

7 He said that in June 2010 he met a man I identify as "BK" (see paragraph 18 of the witness statement) and formed an open and casual sexual relationship with him. That relationship ended and the Appellant lost contact with BK but it gave him the confidence to express his sexuality.

8 After his leave to be in the United Kingdom lapsed the Appellant overstayed and he was encountered in August 2011 working without permission. He was detained and applied for asylum. The application was considered under the (no longer existing) Detained Fast Track process. The application was refused and an appeal dismissed on 5 October 2011 by Immigration Judge Charlton-Brown. The Appellant's claim to be gay was not believed. He was refused permission to appeal the decision of the First-tier Tribunal but he was released from detention and he made further submissions in July 2012 which were refused in July 2017.

9 It is his case that he met another Bangladeshi national, who I identify as "K". There is inconsistency in the evidence about when they met but they said that in about April of 2012 they started a sexual relationship and had been cohabiting since February 2014. Mr K claimed asylum in July 2012 based on his sexuality and his being in a same sex relationship with the Appellant. The application was refused and a resulting appeal dismissed in October 2012. Mr K made a fresh claim for asylum in June 2017 on the same basis. That was refused but after judicial review proceedings he was allowed to appeal the decision. The appeal was dismissed on 1 July 2019.

10 The Appellant made further submissions seeking asylum on 24 November 2017 about five months after the application of Mr K. This was refused because it was not regarded as a fresh claim but again there were judicial review proceedings and although the application was reconsidered and refused it attracted a right of appeal. The decision was made on 20 May 2019 and an appeal dismissed by First-tier Tribunal Judge Abdar on 22 January 2020. The appeal before me is an appeal against Judge Abdar's decision.

11 It is accepted at least for the purposes of this appeal that if the Appellant is gay then he would be a refugee.

12 Before the First-tier Tribunal Mr Briddock helpfully and realistically accepted that Article 8 of the European Convention on Human Rights added nothing to the claim.

13 As is apparent from the above, the Appellant suffers the disadvantage of judicial decisions that neither he nor his claimed partner are gay.

14 Judge Abdar reminded himself of the decision known as Devaseelan [2002] UKIAT 702 and recognised, correctly, that the previous determination was the necessary starting point and that any evidence relied upon that could have been brought to the attention of Judge Charlton-Brown but which was not brought to her attention should be treated with particular circumspection.

15 Appropriately the judge then began by looking at the decision of First-tier Tribunal Judge Charlton-Brown which was determined under the Fast Track Rules.

16 Judge Charlton-Brown found inconsistencies in the evidence, particularly about whether the Appellant had made known his emerging sexuality when he was in Bangladesh. In particular, the Appellant had denied telling anyone that he was gay when he was in Bangladesh but had also indicated, contradictorily, in answer to questions in an interview that he *had* told someone in Bangladesh, called "Suhel", that he was gay.

17 Judge Charlton-Brown was also unimpressed by the late asylum claim and found that Appellant's credibility undermined by his professed ignorance of the fact that gay sexual activity was legal in the United Kingdom. The Appellant said that he was told that gay sex was not criminal conduct in the United Kingdom by his friend "Shardul" but Shardul did not give evidence before Judge Charlton-Brown or before Judge Abdar.

18 However, Judge Abdar did hear from another friend of the Appellant's, Mr M. Mr M said that he and the Appellant are childhood friends. They were at school and at college together and that the Appellant was picked on at school because of his "mild feminine manners". Mr M said that the Appellant did not tell him that he was gay but he knew the Appellant to be gay since around 2010 because of rumours in the community especially because of the Appellant's association with BK. Judge Abdar noted that no evidence or explanation had been given for Mr M not being called before Judge Charlton-Brown.

19 Judge Abdar noted that the evidence before First-tier Tribunal Judge Charlton-Brown was that the Appellant did not go to gay clubs in the United Kingdom because he feared that people of Bangladeshi origin would learn of his sexuality. Judge Abdar found that this contrasted with Mr M's evidence that the Appellant's sexuality was well-known even though it was the Appellant's case that his relationship with BK had lasted only a couple of months.

20 At paragraph 34 the judge said that he found Mr M's evidence unreliable and at paragraph 35 the judge said

"However, in the absence of credible and reliable evidence, I find no cause to depart from Ft-TJ Charlton-Brown's reasons and decision on the Appellant's claim as at the date of promulgation, being 5 October 2011."

21 Judge Abdar recognised that there was evidence before him that could not have been available before Judge Charlton-Brown, namely the Appellant's relationship with Mr K, because that post-dated the earlier application.

22 The Appellant's evidence was that he had met Mr K in October 2011 and soon after they met they kissed. Greater intimacies followed soon and they became a couple.

23 The Appellant was allowed to work and started a job as a chef in a café and invited Mr K to live with him. Evidence was provided that they had cohabited. The judge noted that the Appellant's witness statement for the appeal before him said that the Appellant met Mr K on 31 March 2012 and asked Mr K to "move in" in February 2014 but the further submissions statement said they met in October 2011 and, in January 2014 the Appellant asked Mr K to move in.

24 Having reflected on matters, Judge Abdar accepted the explanation that some of the inconsistencies were the result of typographical errors rather than untruths. Nevertheless he found that the Appellant had not satisfied him that he was gay.

25 At paragraph 43 of the Decision and Reasons the Judge Abdar described the Appellant as someone who had made "repeated applications and being a keen litigator" but found no evidence of the Appellant making any effort to substantiate his first claim for asylum.

26 The judge noted that the Respondent did not regard the photographic evidence of the Appellant attending a Gay Pride event in London 2017 with Mr K as indicative that either of them were gay.

27 The Respondent acknowledged evidence linking the Appellant with gay support groups but noted that it was not a precondition that a person associating with the group was gay and the proof of cohabitation was not proof of sexual activity or attraction.

28 Judge Abdar also noted that there was no statement from Mr K was provided with the further submissions although there were letters of support from Mr K's friends.

29 At paragraph 46 the Judge Abdar said

"I take account that Mr Briddock's submissions that the corroborating evidence does not prove that the Appellant is gay but demonstrates that the Appellant is however, I agree with the Respondent's views on the Appellant's evidence and I find that the evidence is not such which could not have easily been manipulated to fit the Appellant's purposes, noting the fact that the majority of the evidence the Appellant relies on to corroborate the Appellant's account dates from 2017, being the year the erstwhile further submissions were refused prior to the Appellant's further submissions of November 2017."

30 Judge Abdar also noted that the Appellant and Mr K were cross-examined on their living arrangements and described the evidence as "largely consistent" but added, "in my view, the evidence is not such that would not be common knowledge between friends and those sharing a living space together."

31 The Appellant's alleged partner, Mr K's evidence is considered in the First-tier Tribunal's Decision and Reasons starting at paragraph 48 although much of the analysis seems to look at the history of his giving evidence rather than what he actually said.

32 Mr K had applied for asylum in July 2012 having entered with a work permit in June 2007 and overstayed. The application was refused and an appeal dismissed by First-tier Tribunal Judge Robinson in October 2012. Further submissions led to a further appeal which was heard and dismissed by First-tier Tribunal Judge Welsh.

33 Judge Welsh had noted that Judge Robinson had found that Mr K and the Appellant had fabricated their account and made findings concluding that Mr K gave inconsistent and unreliable evidence. Judge Robinson found that a Ms B had simply accepted what she had been told. The Appellant's evidence had been rejected by Judge Charlton-Brown. First-tier Tribunal Judge Welsh had little evidence before her although there were witness statements but not oral evidence from Ms B and Mr I. Judge Welsh found that Mr K had failed to prove that he was gay. This was a view based on an accumulation of inconsistencies, lack of detail,

inherent implausibility and failure to produce documentary evidence or call witnesses of the kind that might be expected. Judge Welsh's reasons included a finding that Mr K and the Appellant's membership of ELOP (East London Out Project) and CAGS (Croydon Area Gay Society) was indicative of contrivance rather than commitment.

34 Judge Welsh found that the Appellant and Mr K had given "inconsistent evidence about the frequency of their attendance at these groups and they gave inconsistent evidence on what happens in the meetings". A supporting witness, a Mr I, was disbelieved by Judge Welsh for the same reasons given by Judge Robinson and Judge Welsh concluded that the Appellant and Mr K had come together to support a false asylum claim.

35 Judge Welsh found there was very little evidence to explain why Ms B decided that Mr K and the Appellant were gay and doubted the veracity of Ms B's evidence. Mr K was also disbelieved because of the lateness of his claim and particularly his insistence that he did not know that he could claim asylum on the basis that he was gay until he met the Appellant.

36 Judge Abdar found the evidence from Mr K before him to be the same as the evidence before Judge Welsh and he found no reason to depart from Judge Welsh's decision that Mr K was not to be believed and neither was the Appellant. At paragraph 56 of his Decision and Reasons he described the Appellant as a "co-conspirator" with Mr K.

37 Judge Abdar noted that, unlike Judge Welsh, he had heard from Ms B in person and heard her cross-examined. Ms B's evidence is that she had known the Appellant from when they were in Bangladesh together but she met the Appellant in the United Kingdom for the first time when he was in detention. Someone had contacted her from Bangladesh and asked her to help. Ms Begum thought that Mr K was gay because of his "gentle manners". She had not thought that the Appellant was gay until he told her about his relationship with Mr K.

38 Judge Abdar found that he agreed with Judge Robinson, whose views were accepted by Judge Welsh, that Ms Begum had simply accepted what she had been told and that believing somebody to be gay because of their gentle manners was not a strong reason.

39 Judge Abdar considered the evidence of Mr R, who gave evidence of meeting and knowing the Appellant and Mr K since sometime in 2016. They had met at a nightclub in Camden. Mr R was a refugee from Sri Lanka and is accepted to be gay.

40 When cross-examined Mr R confirmed that he did not know the Appellant and Mr K outside the gay community.

41 Judge Abdar said that although he had no reason to doubt Mr R's credibility he found his knowledge to be limited and based on occasional contact. Judge Abdar did not find that evidence reliable.

42 He also heard from a Mr RR, who had known Mr K since July 2013. Once their friendship had developed Mr K told him that he was in a gay partnership with the Appellant. Mr RR said that he was "surprised at first" but "it has been years that I know them as a couple".

43 Judge Abdar did not doubt Mr RR's sincerity but said he was "unable to accept Mr [RR]'s brief evidence based mostly on what he has been told to be reliable".

44 Judge Abdar then considered the evidence as a whole. He found the Appellant's evidence to be unreliable and the documentary evidence not supportive of his account. He did not find the witnesses to be reliable or that their evidence "countermands the number of material flaws" in the Appellant and Mr K's evidence in establishing their sexuality. He dismissed the appeal.

45 These findings were challenged in grounds drawn by Mr Briddock. I consider those grounds now.

46 He began by pointing out that the judge had heard from the Appellant and Mr K and four others, namely Ms Begum, Mr R, Mr M and Mr RR.

47 Mr M's evidence was considered separately and was not believed but the sincerity of the other witnesses was accepted. This is explained at paragraphs 58, 60 and 61 (or thereabouts) respectively, where Ms B, Mr R and Mr RR were found to be not reliable. However, Judge Abdar expressly found Mr RR to be sincere (paragraph 61). Mr Briddock said that it must follow that Judge Abdar accepted that Ms B was told in 2012 and Mr R in 2013 that the Appellant is gay and in a relationship with Mr K. The grounds contend that the Judge did not explain why evidence of this kind from a person accepted to be truthful was discounted.

48 The grounds also complain that the evidence of Mr M was not treated properly. At set out above, Mr M had said that he had known the Appellant at school and college and recalled his being picked on at school for his "mild feminine manners" but that he did not know the Appellant to be gay until 2010 when the Appellant was "talked about" in "our circles" as being a gay man, his often being seen with Mr AK who Mr M described as a "renowned gay man" and his never having a relationship with a woman or his never talking about women. Judge Abdar viewed this evidence "with circumspection". He was particularly concerned that no explanation had been given for Mr M not giving evidence in the previous appeal and there being a contradiction in the Appellant's alleged openness about his sexuality and there having been no attempt to find the first partner BK who Mr M said was a "renown gay man".

49 The grounds maintain that the judge had not given any thought to the criticised speedy nature of the Fast Track proceedings when noting that Mr M had not given evidence previously.

50 The grounds say there was no contradiction in relation to the Appellant's openness about his sexuality and his not wanting people in the Bangladeshi community to know that he was gay. It is the Appellant's case that the Appellant had a partner but there was no reason to assume that was somehow publicising his sexuality to a Bangladeshi or other audience. The criticism of failing to find the former first sexual partner is not justified because it was made plain that this was the first encounter of its kind and it was a short-lived relationship.

51 Ground 2 complains that there was no regard to proceedings being conducted under the Fast Track Rules. Mr Briddock was at pains to emphasise before me, as he does in his papers, that there was no suggestion that the decision in the Fast Track case was to be ignored. It had not been set aside; it had not been challenged by judicial review; it was a necessary starting point but the starting point had to be illuminated by the fact that the process was criticised. However, this does have to be tempered with the fact that, as far as I can see, the Appellant did not complain that his presentation was rushed at the first hearing.

52 Ground 3 is more subtle but I consider important. It is that the First-tier Tribunal Judge discounted evidence that the Appellant is gay because the conduct could be attributed to another explanation.

53 The point is, for example, the Appellant and Mr K were cross-examined about their living arrangements and habits and whilst it was accepted that they gave consistent evidence the judge said, "in my view, the evidence is not such that would not be common knowledge between friends and those sharing a living space together". This might conceivably be a reason to regard it as of limited relevance but it is not a reason to discount it or disbelieve it,

according to the grounds. The grounds say that it was “reversing the standard of proof” but clearly mean “reversing the burden of proof”.

54 The Judge’s finding that the evidence was “not such which could not have easily been manipulated to fit the Appellant’s purposes” is not an appropriate direction or observation when the test is whether it was reasonably likely that it could be genuine.

55 Ground 4 refers to unexplained findings and refers to particularly to paragraph 43 of the Decision and Reasons where the Judge says:

“Despite making repeated applications and being a keen litigator, I have no evidence of the Appellant making any or any genuine effort to substantiate the Appellant’s first claim for asylum on grounds of being gay and fearing persecution on return to Bangladesh”.

56 The grounds assert that the Appellant has not made “repeated claims”, rather he has made one fresh claim and the reference to not “making any or any genuine effort to substantiate” his first claim makes no sense and is certainly not a reason for disbelieving the claim.

57 As indicated, this produced a response from Mr Jarvis which I now consider.

58 Paragraph 5 is important. The Secretary of State has urged that Judge Abdar gave detailed reasons for rejecting the additional witness evidence insofar as it went to the core evidence for sexual identity. There was no contradiction or tension, just a finding that the Appellant does not like. The main response to ground 2 is there was no case raised that the Fast Track decision was rushed through and unfair to this Appellant.

59 Ground 3 is just a complaint that the Judge had accepted evidence of cohabitation but not evidence of more.

60 The point was that the Appellant and his main partner witness were disbelieved in other proceedings and the judge found no reason to come to another conclusion.

61 Mr Briddock’s response to Upper Tribunal Judge Coker’s directions which is itself dated 5 May 2020 is full and illuminating. I consider the response to ground 1. At paragraph 8 it is asserted that:

“It is not correct, therefore, that the witnesses are merely repeating what they had been told. Their sincere belief is based on years of interaction and friendship with the Appellant and his partner.”

62 This is a matter of some importance because ground 1 is built on a premise that needs to be tested and Mr Briddock particularly was very helpful in taking me through the evidence. In her statement Ms B says that she has known the Appellant since they were in Bangladesh and she understood he had started a same sex relationship with his partner in April 2012 and she was not surprised that the partner was gay but had not suspected the Appellant was gay. However, she said there was “never been any doubt in my mind” that the Appellant is gay since she was told and said that she was “convinced they are gay men” and expresses the view that “anyone who sees them together would have no doubt about it”.

63 This is not very detailed evidence. It might mean that anybody seeing them together would know they were gay because of the way they interacted with each other but that is not explained although, if true, it certainly indicates the Appellant has claimed for some time to be gay.

64 The statement of Mr R explains that he is gay and is a refugee as a consequence. Paragraph 5 is particularly telling. After explaining that the Appellant and his partner had tried to initiate a conversation in a language that he does not speak he said:

“I didn’t understand what they said. They didn’t tell me they were gay or that they were together, but you don’t need one to tell you to know they are together when you see them kissing and cuddling. On that occasion, we had a nice chat and exchanged phone numbers.”

65 At paragraph 8 he says he is “convinced” that they are gay and in addition to seeing them at various gay clubs: “I have also seen them kissing and cuddling while I’d been dancing or chatting away to others”.

66 The statement of Mr R R says that he is from Bangladesh and knows the Appellant’s partner because they used to play cricket together. He was surprised to learn that the partner was gay but “it has been years that I know them as a couple. They complement each other perfectly. They are kind and caring to each other.” He strongly believed that they were a genuine couple.

67 The evidence of Mr M was treated differently but his evidence was to the effect that he had known the Appellant for some time. He had not thought that the Appellant was gay but on reflection realised he had not heard him talking about girls.

68 One of these witnesses, Mr R, particularly bases his belief that the Appellant and his partner are gay on seeing them interacting physically in appropriate settings on more than one occasion. I find this evidence particularly significant. It might be untruthful. It is hard to see that it is mistaken. If it is truthful and the Appellant is not gay it follows that the Appellant and his partner are straight men who are not only identifying with gay support groups but attending gay nightclubs where they exchange physical intimacies in a way that satisfies a gay man that they are indeed gay and are doing it not because they are gay but because they want people to think, wrongly, that they are gay.

69 The First-tier Tribunal Judge dealing with this witness at paragraph 60 says:

“Whilst I had no reason to doubt Mr R’s credibility, I find Mr R’s knowledge of the Appellant and Mr K to be limited, only seeing them occasionally at clubs ... I do not find Mr R’s evidence to be reliable.”

70 I do not know what Judge Abdar means by this. I cannot make any sense of that finding in the light of the evidence that I have set out above. I stress, that evidence might not be true but that was not the reason for discounting it. I do not know what is unreliable about it or if the incidents spoken of happened why the judge was so willing to assume they were not indicative of two people who are gay.

71 I have reflected carefully on my obligation to determine if there is an error of law and to avoid the temptation of thinking that a decision that I might not have made must be wrong. I acknowledge too that the Judge Abdar has gone to a lot of trouble to decide the appeal in accordance with Devaseelan.

72 For all that I can find no lawful explanation for rejecting Mr R’s evidence and that undermines the decision as a whole.

73 I find this point the most persuasive and the others less compelling.

74 I am not impressed with the “Fast Track” points. There is no suggestion that the case was rushed through Fast Track unfairly and the decision should not be discredited because the system was unfair unless the unfairness was exhibited in this case.

75 It is going too far to say that the Judge reversed the burden of proof but I agree that the Decision and Reasons does suggest that the Judge lost sight of the low standard of proof and, perhaps, tended to equate unreliable evidence that the Appellant is gay with evidence that he is not gay.

76 It is right to emphasise that whilst there might be reasons to give little weight to the evidence supporting the Appellant's contention that he is gay none of the evidence is good evidence that the Appellant is not gay and the standard of proof is low.

77 The error of law is that Judge has accepted much of the evidence as truthful but has not given cogent reasons for finding it unreliable. The reasons, such as they are, do not show any appreciation of the depth of the evidence contained in a few short phrases.

78 Mr Briddock said that if I set aside the decision it had to be because the decision was perverse and I should allow the appeal outright. That was a bold submission. Mr Avery was right when he said that credibility was an evaluative whole exercise and if it was done wrongly then the proper course was to do it again. That may not always be right but it is right here.

79 I set aside the decision of the First-tier Tribunal. I direct that the appeal be heard again in the Upper Tribunal. I see no reason why it should not be done by video link and it is likely to be listed for a remote hearing. If either party objects to that the objection should be made forthwith and will be considered.

80 I anticipate the hearing will last three hours. I do not see any need for an interpreter.

81 I see no need for further evidence and if the parties wish to serve it then it must be served in appropriately bound indexed form and any witness evidence should be in a statement drawn to stand as evidence-in-chief without the need of further questions and served on the party and the Tribunal no less than seven days before the hearing. Any application to rely on further evidence must be made in the appropriate form.

Notice of Decision

The First-tier Tribunal erred in law. I set aside its decision and I direct that the Appeal be heard again in the Upper Tribunal. Directions for the proper conduct of that hearing are set out above.

3. It will be apparent from sub-paragraph 10 above that this is an appeal against the decision of the First-tier Tribunal dismissing the Appellant's appeal against the decision of the respondent on 20 May 2019 refusing him asylum or other kind of international protection.
4. It is for the Appellant to prove to the low "real risk" standard that he is entitled to international protection.
5. At the start of the hearing in response to my invitation to comment on an overview of the case Ms Cunha rightly and helpfully reminded me that credibility was not the only issue in the case. If I decided that the Appellant is indeed gay as he claims, he must also show, as explained in **HJ (Iran) v SSHD (Rev 1) [2010] UKSC 31** that in the event of his return he faced ill-treatment or would avoid such ill treatment being discreet because he was afraid to be himself. Even in countries where gay people risk persecution on account of their sexuality gay people not always refugees. Some gay people are not going to do anything that creates a real risk of their sexuality being discovered because that is how they chose to live.
6. The Appellant gave evidence before me adopting a witness statement signed as long ago as 27 November 2019. I have alluded to the gist of this evidence above. The essential points that he makes are that he is a Bangladeshi national born in 1984 and that he was brought up in the Muslim tradition. He came to the United Kingdom as

a working holidaymaker in May 2009. He realised at the age of about 16 that he was gay. He knew this would be regarded as shocking by his family.

7. He talked about a brief relationship with a man that confirmed his sexual identity and then his growing friendship with the witness "Mr K". He described in some detail his first sexual experience with Mr K and their decision to move in together and make a home together.
8. He confirmed that neither of their families would accept them in Bangladesh. They had become used to the freedom to express their relationship in the United Kingdom and that they:

"Would be forced to conceal our sexuality in Bangladesh for fear of persecution and getting harmed if not killed. We would have to live in fear of our sexuality being discovered. We wouldn't be able to live with each other as we wouldn't be able to justify why two men live together unless they are gay."

9. He was cross-examined.
10. He confirmed, as is clearly the case, that he had been disbelieved in earlier hearings.
11. He was also asked about his relationship with his "sponsor".
12. The sponsor, Mrs B, gave evidence, out of turn with the consent of the Presenting Officer, because that was convenient for her.
13. In outline she said she had known the Appellant "from when he was living in Bangladesh" and he told her that he started in a same sex relationship with his partner Mr K in April 2012. She did not think that he was gay until he told her that. She did believe Mr K to be gay because of his "gentle manners".
14. She said at paragraph 7:

"There has never been any doubt in my mind that [the appellant] is a gay man, since he initially told me about his attraction and relationship to [Mr K]. I am convinced they are gay men. Anyone who sees them often would have no doubts about it. I am quite surprised that the Home Office and Immigration Judges have not believed them to be gay."

15. She was cross-examined.
16. There was some uncertainty in her evidence about when she first met the Appellant. She claimed at one point to have met him in Bangladesh but that is hard to reconcile with the evidence that she had left Bangladesh before he was born.
17. Although this was a "face to face" hearing it was possible at short notice to arrange for a video link and I heard by video link the evidence of Mr M at page 47 in the bundle. He adopted the statement signed on 28 November 2019.
18. He said that he was a British citizen who was born in Sylhet in Bangladesh and he had known the Appellant since childhood. They went to the same school together.
19. He said he had not realised that the Appellant was gay when they were in Bangladesh but with the illumination of hindsight he realised that he never remembered him talking about girls and he was picked on for his "mild, feminine manners".

20. He had known since 2010 that the Appellant is gay. He remembered the Appellant being “talked about” because of his association with a renowned gay man who I identify as BK. He realised how the Appellant had never talked about a woman or had never been known to be in a relationship with a woman and he assumed he was in fact gay.
21. He now knew the Appellant’s partner Mr K and he said it was something he would “know by the way they are always together and behaving in a loving manner towards each other that they are a couple”.
22. He confirmed that in his opinion they would not be able to live like that in Bangladesh.
23. He was cross-examined.
24. He accepted that much of what he knew was from gossip. He did not really know the Appellant’s partner.
25. The Appellant’s partner, “Mr K” gave evidence. He adopted a statement made on 27 November 2019.
26. He explained that he was a Bangladeshi Muslim born in Sylhet in 1985. He arrived in the United Kingdom in 2007 with a work permit and thought himself unable to return to Bangladesh at the expiry of his visa because he feared persecution because he is gay.
27. He talked about claiming asylum and the appeal being dismissed.
28. He explained how homosexuality was seen as something that could be cured by exorcism that often involved beatings. He talked about his emerging sexuality and his realisation at the age of about 16 that he was gay.
29. He explained how he had had other partners before the Appellant.
30. He moved in to live with his uncle in October 2011 when he met the Appellant for the first time at his uncle’s home. His uncle and Mrs B’s husband were close friends and he and the Appellant had more and more to do with each other and a relationship started. More details are given in the statement. He could not imagine living in Bangladesh. He would be forced to conceal his identity and to live discreetly.
31. He was cross-examined.
32. In answer to questions he said it was just not normal in the Bangladesh community for men to live together. He confirmed the Appellant was the first man with whom he had shared a home. He emphasised that “we are not single, we are partners”.
33. As he did before the First-tier Tribunal, Mr R gave evidence before me. I considered his evidence particularly at sub-paragraphs 68, 69 and 70 above.
34. Mr R explained that he was given asylum in the United Kingdom because of his sexual orientation. He is a gay man. He frequents gay nightclubs. He also dresses as a drag queen.

35. He remembered getting to know the Appellant and his partner at a gay club. He remembered his relationship with the Appellant and his partner beginning because they assumed from his appearance that he, like them, was from Bangladesh and they spoke to him in a language that they expected him to understand but he did not. He comes from Sri Lanka. That was only significant because it gave them a reason to remember the conversation.
36. They “got on” and he went on to say that he was “convinced that [the Appellant and Mr K] are gay men. Besides having seen them visiting gay clubs, I have also seen them kissing and cuddling while I’ve been dancing or chatting away to others”.
37. I made it clear in my reasons for finding error of law that if that evidence proved reliable it was likely to be important.
38. In cross-examination he accepted that it is possible that not everyone he had seen at a gay nightclub was gay and that not every couple who were seen fondling each other were gay. He could not judge a person’s soul. He had only met them in the clubs but he was satisfied they were gay.
39. Mr RR also gave evidence. He similarly adopted his statement. He said that he plays cricket with the Appellant’s partner. After they had known each other for some time the Appellant’s partner explained that he was gay. Mr RR was himself born in Bangladesh and he found it surprising that Mr K was prepared to admit to being gay because it is socially unacceptable in Bangladesh but he did not condemn Mr K. He was satisfied that they were living as a gay couple and he wanted to support them.
40. He had been to their home to visit. He had not seen them fondling each other but the way they reacted to each other was just not the way men normally behaved. They were talking and touching “not like two men usually do”.
41. In evaluating this evidence I am very aware that the Appellant and his partner had been disbelieved in other proceedings. It is also my view that they have not been disbelieved because they have been shown unequivocally to be dishonest but because in each case an amalgam of factors, including the late claim for asylum left the judges in doubt having reviewed the evidence as a whole.
42. I begin by considering the evidence that only I have heard.
43. The evidence of Mr RR is of limited value. He was not able to explain in much detail when pressed how he knew the Appellant and his partner to be gay and he did not spend a great deal of time with them. Nevertheless he told me quietly and calmly that he got to know Mr K and was surprised to be told by him that he was gay but when he met Mr K’s partner the Appellant he was able to accept the claim that they were gay simply by the way they reacted.
44. I am entirely satisfied that he told the truth as he perceived it.
45. This evidence is not conclusive but it clearly adds to the picture of the Appellant and his partner identifying themselves as gay men. It was not their opening line in the conversation but I accept the evidence that as Mr RR got to know Mr K, Mr K thought it important to say a bit more about himself and revealed that he was gay

and this news, although initially surprising to Mr RR, became believable as he saw more of them.

46. If the Appellant and his partner were “case building”, whether dishonestly or to support a genuine case, the revelation that they are holding themselves out as gay might have been expected at an earlier stage.
47. This evidence points entirely one way and that is in favour of the Appellant being gay but it is not determinative.
48. The evidence of Mr R the drag queen was particularly helpful. I have no reason to doubt that he is a gay man. He can be expected to be a little more aware than other people about the behaviour and conduct of other gay people. He was perfectly open to the possibility of people going to gay clubs who are not gay and even the possibility of people who are not gay expressing physical signs of affection. Nevertheless it was clearly his view that the Appellant and his partner are a gay couple. There was no evidence that he was in the habit of giving evidence in support of gay people. There was no reason to think that he was being rewarded in any way. There was really no reason whatsoever to do anything other than accept at face value his claim that he believed the Appellant and his partner to be gay because he had seen them on several occasions, become friendly with them, seen them reacting to each other and they were in his mind clearly a gay couple.
49. Clearly Mr R could not have given evidence in this Appellant’s appeal before Judge Charlton-Brown. He had not met the Appellant and the Appellant had not started his relationship with Mr K.
50. I have not been told the reason for Mr R not giving evidence in support of Mr K. It is feature of First-tier Tribunal Judge Walsh’s decision in Mr K’s case that Mr K did not rely on supporting evidence from the gay community. This causes me to give a degree of circumspection to his evidence. The point was not explored in cross-examination and I still found his evidence to be truthful, as did the First-tier Tribunal Judge.
51. I also find it reliable because I find it very unlikely that he could be so wrong in his assessment of the Appellant.
52. The other evidence was not particularly helpful.
53. Mrs B did not really add much. Her evidence was a little confused in places. I do not suggest she was dishonest in the sense of somebody trying to be deceitful but the evidence of her chronology was unclear in places and her claim to have known the Appellant from Bangladesh without explanation was just wrong. I make it clear that I do not regard her as a liar but there was something muddled about her evidence which left it being of limited value.
54. Mr M in truth did not add much. He was basically reporting on gossip in the community. However I accept he was telling the truth as he understood it and his evidence, and Mrs B’s evidence to a lesser extent, do have a confirmatory role.
55. The Appellant and his partner have the disadvantage of being disbelieved and there are clearly aspects of the stories that are unsatisfactory. However the story is capable

of being believed and when I consider it illuminated by the evidence that is unique to this hearing before me or these proceedings I am quite satisfied that on the low standard of proof that the Appellant and his partner are gay men.

56. I have reflected also on Ms Cunha's absolutely correct reminder that that is not the end of the story but their evidence is plain that they have no wish to return to Bangladesh because societal disapproval would be so strong that they could not express their affection. I accept that they would want to show an element of discretion like they do in the United Kingdom. Their physical expression is at gay clubs where such behaviour is unobjectionable.
57. When Mr K became friendly with a cricket partner he did not immediately make known his sexual orientation. That is entirely different from suggesting that they are living so discreetly that they would not attract attention. Indeed the evidence of Mr M is, I find, useful in this respect. They have attracted attention in the United Kingdom. Word has got round. I am quite satisfied to the low standard that they would be known as gay people in Bangladesh if they express themselves in they would want to do, that is in the understated way that they do in the United Kingdom.
58. I do not accept that being gay in Bangladesh necessarily attracts persecution but I have reminded myself of the Country Policy and Information Note Bangladesh Sexual Orientation and Gender Identity published by the Respondent in November 2017. This is identified as version 3. Paragraph 8.2 is headed "Societal Violence and Discrimination Towards Gay and Bisexual Men". It refers to men who have sex with men being beaten and feminised males being abused and victimised. At paragraph 8.2.4 there is reference to the Australia's Department of Foreign Affairs and Trade of July 2016 Report saying that gay men face a "high risk of societal discrimination" and "visible gay men face a high risk of violence, including being killed."
59. I am quite satisfied from that evidence that openly gay people in Bangladesh may very well be persecuted and that is sufficient to establish a real risk of persecution in this case.
60. I am also satisfied that this Appellant is a gay man who would not want to suppress expressions of his sexuality in Bangladesh but that any such expressions would bring such a risk that he would probably suppress his feelings to avoid persecution and that is sufficient to make him a refugee.
61. I confirm that I have considered all of the papers before me.
62. There is evidence of the Appellant's supporting gay groups in the United Kingdom and photographs of him with his partner. These things are not conclusive at all and are not said to be but they add to the picture of the Appellant being a gay man. I have given them little weight in reach my conclusion that the Appellant is indeed gay as he claims to be.
63. Putting everything together I allow his appeal. The Appellant is a refugee.

Notice of Decision

This appeal is allowed.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 13 May 2021