



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Communicated on 11 October 2018

FIRST SECTION

Application no. 31428/18
S.A.C.
against the United Kingdom
lodged on 5 July 2018

STATEMENT OF FACTS

The applicant, S.A.C., is a Bangladeshi national, who was born in 1980 and lives in the United Kingdom. He is represented before the Court by Ms Javeria Ijaz, a lawyer practising in Harrow.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

1. The background to the applicant's asylum claim

The applicant entered the United Kingdom on 11 December 2007 with leave to remain as a visitor. His visa expired on 19 May 2008 and thereafter he overstayed his visa until he applied for leave to remain on 28 December 2012. That application was refused with no right of appeal.

On 8 June 2016 the applicant claimed asylum on the ground that he feared persecution on return to Bangladesh as a gay/bisexual man. The application for asylum was refused by the Secretary of State for the Home Department on 7 December 2016. The Secretary of State did not accept that the applicant was gay/bisexual and did not accept that he had given a credible account in support of his claim.

2. The decision of the First-tier Tribunal

The applicant appealed to the First-tier Tribunal (Immigration and Asylum Chamber) against the decision to refuse his claim for asylum or humanitarian protection, and claimed that his removal from the United

Kingdom would amount to a breach of his rights under Article 2 and 3 of the Convention.

The First-tier Tribunal identified the appropriate test in determining claims for asylum protection based on sexual orientation to be that set out by the Supreme Court in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 (see “Domestic law and practice” section below). In that case, the Supreme Court had unanimously held that it was not compatible with the Refugee Convention for a State party to refuse asylum to a gay person who, if returned to his home country, would deny his identity and conceal his sexuality in order to avoid being persecuted. In considering such cases, courts and tribunals had to consider a sequential four stage test as follows:

(i) Is the applicant gay, or someone who would be treated as gay by potential persecutors in his country of origin? If no, the claim should be refused. If yes:

(ii) Do openly gay people have a well-founded fear of persecution in the country of origin? If no, the claim should be refused. If yes:

(iii) In respect of his sexual orientation, on his return, will the applicant be open? If yes, he is a refugee and his claim should be allowed. If no:

(iv) If he would not be open, but rather live discreetly, is a material reason for living discreetly that he fears persecution? If yes, he is a refugee and his claim should be allowed. If no, then his claim should be refused.

In accordance with the Supreme Court’s guidance, the Tribunal first considered whether the applicant was indeed gay/bisexual. Having heard evidence from the applicant and his family and friends, it considered him to be a credible witness. It therefore disagreed with the Secretary of State and accepted that he was a gay and/or bisexual male.

The Tribunal considered stages (ii) and (iii) of the test in reverse order. It considered whether the applicant would live freely and openly as a gay/bisexual male on return to Bangladesh. In this regard, the applicant had stated – and the Tribunal accepted – that he would act discreetly with regard to his sexual orientation due to his fear of persecution on return.

In next considering whether the applicant’s fear was “well-founded” in the meaning of the Refugee Convention wording, the Tribunal had regard to the most recent Country Policy and Information Note on sexual orientation and gender identity, dated December 2016. According to the Note, while homosexuality was criminalised in Bangladesh, this was rarely enforced. Although it acknowledged that two high-profile gay activists had been murdered in 2016, the Note indicated that there was evidence of a gay community and there were support groups for gay men and transgender people. On the whole, it considered that societal treatment of LGBTI persons in Bangladesh did not in general reach the level of being persecutory or otherwise inhuman or degrading treatment.

Consequently, the Tribunal found that while the applicant might be subject to some level of “persecution” arising out of the disapproval of his family members, this did not give rise to a real risk of persecution such as to engage the Refugee Convention. The Tribunal therefore concluded, in a decision dated 8 March 2017, that the applicant’s fear of persecution was not well-founded, and that he had not established he was at real risk of persecution from either State or non-State actors.

An application for permission to appeal was refused in a decision promulgated on 2 August 2017.

3. The applicant’s further submissions to the Secretary of State

In November 2017 the Home Office published a new Country Policy and Information Note on sexual orientation and gender identity (see section on “Relevant country information” below). The new Note stated that:

“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 socio-economic 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”

It continued:

“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 [...]” and in relation to the possibility of internal relocation that “[...] 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 prosecution.”

The applicant made further submissions to the Secretary of State in December 2017 and requested that they be treated as a fresh claim for asylum and human rights protection. He claimed that the 2017 Country Policy and Information Note showed deterioration in human rights and democracy standards in Bangladesh, and that as a result his fear of persecution on return was well-founded. He further claimed that he would be tortured or killed by his family on return. He submitted an expert report written by a senior policy researcher, Dr. A, concerning current conditions for gay males in Bangladesh and for the applicant in particular. The report concluded that the applicant was at risk of persecution, harassment and even death on return as a gay/bisexual individual.

The Secretary of State rejected the submissions on 30 January 2018 and declined to treat them as a fresh claim, concluding that the content was not materially different to that raised in the previous claim and, as such, there was nothing to merit departure from the Tribunal’s finding that the applicant did not have a well-founded fear of persecution on return. According to the Secretary of State, while the 2017 Country Policy and Information Note suggested that he might be at some risk of persecution, such persecution

would not likely amount to a breach of his human rights. Furthermore, insofar as the applicant now relied on the risk of possible assault from his family, there was no evidence to demonstrate an inability to relocate within Bangladesh to avoid any possible assault.

4. The review by the Upper Tribunal

The applicant sought permission from the Upper Tribunal to apply for judicial review of the decision not to treat his submissions as fresh claim. He argued that anxious scrutiny had not been afforded to his claim, that both the report prepared by Dr. A and the 2017 Country Policy and Information Note had shown that the situation of LGBTI persons in Bangladesh had deteriorated since 2016, and that the fledgling gay community had been damaged by shifts towards conservative or extremist views. In particular, he contended that Dr A's report and the 2017 Country Policy and Information Note, which indicated that an LGBT person who did not conceal his sexuality might be at risk of persecution or serious harm, repudiated the Tribunal's finding that his fear of persecution was not objectively well-founded. As such, he submitted that the decision not to treat his submissions as a fresh claim was irrational.

The applicant was granted interim relief in the form of a stay against removal pending determination of his application by the Upper Tribunal. However, the Upper Tribunal refused the application for permission on 17 April 2018. The Upper Tribunal found that the Secretary of State had afforded anxious scrutiny to the applicant's further submissions, and that "express consideration" had been given to the 2017 Country Policy and Information Note. The Secretary of State had applied the correct test in making its decision on the further submissions and there was "no prospect" that an immigration judge might reach a different conclusion. The Upper Tribunal therefore certified the application as "totally without merit" and the stay on removal was lifted.

5. The Court of Appeal

The applicant sought permission to appeal to the Court of Appeal. On 3 July the Court of Appeal refused the application, finding no proper basis for criticism of the approach of the Upper Tribunal and "no realistic prospect of a successful appeal". The court found that the 2017 Country Policy and Information Note had been properly taken into account in the decision of the Secretary of State of 30 January 2018.

6. Notice of removal

The applicant was served with notice of a removal window of three months commencing on 2 July 2018.

On 6 July 2018 the Court granted an interim measure under Rule 39 of the Rules of Court to prevent his removal to Bangladesh prior to its consideration of his application.

B. Relevant domestic law and practice

1. Right of appeal to First-tier Tribunal, Upper Tribunal and Court of Appeal

Section 82(1) of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) provides for a right of appeal to the First-tier Tribunal (Immigration and Asylum Chamber) where the Secretary of State has decided to refuse a protection claim, has decided to refuse a human rights claim, or has decided to revoke protection status. A “protection claim” is defined as a claim made by a person that his removal from the United Kingdom would breach the United Kingdom’s obligations under the Refugee Convention, or would breach the United Kingdom’s obligations in relation to persons eligible for a grant of humanitarian protection.

Section 84 of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) provides that an appeal against the refusal of a protection claim must be brought on one or more of the following grounds:

“(a) that removal of the appellant from the United Kingdom would breach the United Kingdom’s obligations under the Refugee Convention;

(b) that removal of the appellant from the United Kingdom would breach the United Kingdom’s obligations in relation to persons eligible for a grant of humanitarian protection;

(c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).”

An appeal against the refusal of a human rights claim must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.

Section 11 of the Tribunals, Courts and Enforcement Act 2007 provides for a further right of appeal to the Upper Tribunal, with the permission of the First-tier Tribunal or the Upper Tribunal, on a point of law.

Pursuant to section 13 of the Tribunals, Courts and Enforcement Act 2007 there is a right of appeal to the Court of Appeal on a point of law arising from a decision of the Upper Tribunal. Article 2 of the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 provides that permission to appeal will not be granted unless the proposed appeal would raise some important point of principle or practice; or there is some other compelling reason for the Court of Appeal to hear the appeal.

Paragraph 353 of the Immigration Rules provides that further submissions made after an asylum claim has been determined will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

- “(i) had not already been considered; and
- (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection. ...”

The Secretary of State’s decision not to treat further submissions as a fresh claim is not a decision within the scope of section 82(1) of the Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014). As such, no right of appeal attaches to the decision. It is, however, open to challenge by way of an application for judicial review before the Upper Tribunal, *inter alia*, on the basis that it is incompatible with a Convention right. This is by virtue of section 6(1) of the Human Rights Act 1998, which makes it unlawful for a public authority to act in a way which is incompatible with a Convention right.

2. *Relevant case-law*

(a) **HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31**

The Supreme Court delivered judgment in 2010 in the case of *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31. HJ and HT were gay men from Iran and Cameroon, respectively, who sought asylum in the United Kingdom on the basis that they would face the risk of persecution on grounds of sexual orientation if returned to their home countries. The Supreme Court unanimously held that it was not compatible with the Refugee Convention for a State party to refuse asylum to a gay person who, if returned to his home country, would deny his identity and conceal his sexual orientation in order to avoid being persecuted, provided that the gay person’s situation could be regarded as “reasonably tolerable”.

The Supreme Court provided detailed guidance in respect of the test to be applied by the lower tribunals and courts in determining claims for asylum protection based on sexual orientation. The court described the test as essentially “an individual and fact-specific inquiry” to be conducted in stages. At paragraph 82 of the judgment, the Supreme Court set out the test as follows:

- “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."

With particular respect to the issue of concealment/discretion, the Supreme Court went on to hold as follows:

"... 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."

The Supreme Court therefore rejected the conclusion of the Court of Appeal that it was compatible with the Convention to refuse asylum to a gay person who concealed their sexual orientation on return to his home country, provided that their situation was "reasonably tolerable".

(b) LC (Albania) v The Secretary of State for the Home Department and The United Nations High Commissioner for Refugees [2017] EWCA Civ 351

The Court of Appeal considered the question of whether the guidance handed down in *HJ (Iran)* still remained sound in 2017. The appellant had argued that the guidance as to the approach in asylum claims based on sexual orientation set out therein was in need of updating in light of the EU Qualification Directive and post-*HJ(Iran)* CJEU case law (referred to below in Section C). The appellant argued that where a gay man would conceal his sexual orientation on return, then he should be considered a refugee, whatever the reason or reasons might be for that concealment.

The United Nations High Commissioner for Refugees (UNHCR) acted as Intervener in the case. The UNHCR submitted that while it accepted that the guidance set out in *HJ(Iran)* was correct, where the applicant meets stages (i) and (ii) of the test (namely, that he can show that he is gay and has a well-founded fear of persecution on return) there is or should be a “rebuttable presumption” that fear is a material reason for any concealment of his sexual orientation.

While the submissions made by the UNHCR were considered to have “strayed outside the bounds of the limited grounds of this appeal” the court noted it was not “helpful” to speak in terms of a presumption. In its judgment, the court found no inconsistency between *HJ(Iran)* and the later CJEU case law, noting at paragraph 52 that the CJEU cases:

“were not concerned with the possible circumstances with which step (iv) of Lord Rodger’s guidance in *HJ(Iran)* is concerned, i.e. that, upon return, a person would behave in such a way as to conceal the relevant characteristic, not in order to avoid persecution, but for unrelated reasons.”

It concluded at paragraph 53 of the judgment that:

“the legal analysis of Lord Rodger, which was the foundation of his guidance (in *HJ(Iran)*), is fully in line with the Geneva Convention and the Qualification Directive ... In my respectful view, the legal analysis of the Supreme Court, which draws a distinction between those who, if returned, would conceal their sexual orientation for fear of persecution and those who would conceal that aspect of their identity for entirely unrelated reasons, is principled and clearly right; ...”

C. Relevant European Union law

1. *Joined Cases C-71/11 and C-99/11, Bundesrepublik Deutschland v Y & Z [2012] EUECJ C-71/11 (“Y and Z”)*

In September 2012 the CJEU delivered a preliminary reference ruling, requested by the German Supreme Administrative Court (*Bundesverwaltungsgericht*), concerning the interpretation of EU Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country or Stateless persons as refugees or persons who otherwise need international protection and the content of the protection granted. Y and Z were nationals of Pakistan and had sought asylum in Germany, claiming that their membership of an Islamic reformist movement had forced them to leave their country of origin as they had been subject to persecution on grounds of their religious beliefs.

The referring court asked the CJEU, among other questions, whether the applicants could reasonably be expected to abstain from certain religious practices upon return to Pakistan. At paragraphs 79 and 80 of the judgment, the CJEU held as follows:

“79. It follows that, where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status, in accordance with Article 13 of the Directive. The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.

80. In the light of the above considerations, the answer to the third question referred in both cases is that Article 2(c) of the Directive must be interpreted as meaning that the applicant’s fear of being persecuted is well-founded if, in the light of the applicant’s personal circumstances, the competent authorities consider that it may reasonably be thought that, upon his return to his country of origin, he will engage in religious practices which will expose him to a real risk of persecution. In assessing an application for refugee status on an individual basis, those authorities cannot reasonably expect the applicant to abstain from those religious practices.”

2. Joined Cases C-199/12, C-200/12 and C-201/12, X, Y, Z v Minister voor Immigratie en Asiel (“X, Y and Z”)

In November 2013 the CJEU delivered a judgment interpreting the EU Qualification Directive 2004/83/EC in the context of asylum applicants fleeing persecution on the basis of their sexual orientation. X, Y and Z were nationals of Sierra Leone, Uganda and Senegal respectively. They sought refugee status in the Netherlands, claiming that they had a well-founded fear of being persecuted in their countries of origin by reason of their sexual orientation. The national court asked the CJEU for a preliminary ruling concerning the assessment of the applications for refugee status under the provisions of the EU Qualification Directive.

The CJEU noted that one of the questions asked by the referring court was essentially whether certain provisions of the EU Qualification Directive must be interpreted as meaning that it is unreasonable to expect that, in order to avoid persecution, an asylum seeker must conceal his homosexuality in his country of origin or exercise restraint in expressing it. The court held in this respect at paragraph 70 and 71 that:

“70. ... it is important to state that requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot be required to renounce it.

71. Therefore, an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution.”

The CJEU concluded at paragraph 79 of the judgment that:

“When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation.”

D. UNHCR Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees ('the Guidelines') (23 October 2012)

The Guidelines are intended to provide legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff. At paragraph 12 of the Guidelines addressing the substantive analysis of asylum claims, it is set out that:

“12. A proper analysis as to whether a LGBTI applicant is a refugee under the 1951 Convention needs to start from the premise that applicants are entitled to live in society as who they are and need not hide that. As affirmed by the position adopted in a number of jurisdictions, sexual orientation and/or gender identity are fundamental aspects of human identity that are either innate or immutable, or that a person should not be required to give up or conceal. While one’s sexual orientation and/or gender identity may be revealed by sexual conduct or a sexual act, or by external appearance or dress, it may also be evidenced by a range of other factors, including how the applicant lives in society, or how he or she expresses (or wishes to express) his or her identity.”

In respect of the definition of a “well-founded fear of persecution”, the Guidelines noted at paragraphs 16 and 17 that:

“16. The term “persecution”, though not expressly defined in the 1951 Convention, can be considered to involve serious human rights violations, including a threat to life or freedom as well as other kinds of serious harm. In addition, lesser forms of harm may cumulatively constitute persecution. What amounts to persecution will depend on the circumstances of the case, including the age, gender, opinions, feelings and psychological make-up of the applicant.

17. Discrimination is a common element in the experiences of many LGBTI individuals. As in other refugee claims, discrimination will amount to persecution where measures of discrimination, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned. Assessing whether the cumulative effect of such discrimination rises to the level of persecution is to be made by reference to reliable, relevant and up-to-date country of origin information.”

On the specific issue of concealment of sexual identity, the Guidelines stated at paragraphs 30 to 33 that:

“30. LGBTI individuals frequently keep aspects and sometimes large parts of their lives secret. Many will not have lived openly as LGBTI in their country of origin and some may not have had any intimate relationships. Many suppress their sexual orientation and/or gender identity to avoid the severe consequences of discovery, including the risk of incurring harsh criminal penalties, arbitrary house raids, discrimination, societal disapproval, or family exclusion.

31. That an applicant may be able to avoid persecution by concealing or by being ‘discreet’ about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. As affirmed by numerous decisions in multiple jurisdictions, a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in

order to avoid persecution. LGBTI people are as much entitled to freedom of expression and association as others.

32. With this general principle in mind, the question thus to be considered is what predicament the applicant would face if he or she were returned to the country of origin. This requires a fact-specific examination of what may happen if the applicant returns to the country of nationality or habitual residence and whether this amounts to persecution. The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences. It is important to note that even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetime. The risk of discovery may also not necessarily be confined to their own conduct. There is almost always the possibility of discovery against the person's will, for example, by accident, rumours or growing suspicion. It is also important to recognize that even if LGBTI individuals conceal their sexual orientation or gender identity they may still be at risk of exposure and related harm for not following expected social norms (for example, getting married and having children, for example). The absence of certain expected activities and behaviour identifies a difference between them and other people and may place them at risk of harm.

33. Being compelled to conceal one's sexual orientation and/or gender identity may also result in significant psychological and other harms. Discriminatory and disapproving attitudes, norms and values may have a serious effect on the mental and physical health of LGBTI individuals and could in particular cases lead to an intolerable predicament amounting to persecution. Feelings of self-denial, anguish, shame, isolation and even self-hatred which may accrue in response an inability to be open about one's sexuality or gender identity are factors to consider, including over the long-term."

The Guidelines cited, as examples, the United Kingdom and Finland as jurisdictions which have affirmed that a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution.

E. Relevant country information

1. Country Policy and Information Note - Bangladesh: Sexual orientation and gender identity (Version 3.0, November 2017)

The Note recalled that sexual activity between men, whether consensual or not, is illegal and that there are no laws in Bangladesh prohibiting discrimination on the basis of sexual orientation or gender identity. Further, the Note set out the following guidance for Home Office decision-makers at paragraphs 3.1.1 to 3.1.5.:

"3.1.1 Male same-sex sexual acts are criminalised in Bangladesh under Section 377 of the Penal Code and punishable by life imprisonment. However there have only ever been two arrests under the provision and no convictions ... There are, however, reports that Section 377, together with other legal instruments, have sometimes been used by the police to arbitrarily arrest, harass and intimidate LGBT persons. There have also been reports police use physical and sexual violence against LGBT persons.

3.1.2 However, in general, the available evidence does not establish that LGBT persons are systematically targeted and subject to treatment amounting to persecution or serious harm by the state.

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.

3.1.4. ...

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 socio-economic 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.”

2. European Asylum Support Office (EASO) Country of Origin Information Report Bangladesh Country Overview (December 2017)

In respect of treatment of, and attitudes towards, lesbian/gay/bisexual persons, the report noted that:

“A survey conducted among LGB persons in 2014 by the NGO Boys of Bangladesh and the LGBT community magazine Roopban found that 59 % of respondents had never faced discrimination due to their sexual orientation. Of 25.8 % of respondents who had experienced discrimination, the majority had no knowledge of, or no access to, legal support. More than half of all those interviewed said they lived in constant fear of their sexual orientation being discovered. The survey was conducted among 751 LGB persons from 8 cities, who had an average age of 25.

...

HRW reported in April 2016 that LGBT people interviewed by them had faced threats of violence, particularly following homophobic public comments by Islamic leaders. Activists working on gender issues said they had to conceal their identities and limit their work for reasons of personal safety.”

With a particular focus on gay men, the report set out that many have reportedly received threats of violence, but have been unwilling or unable to approach the police for support. Further, it was noted that gay men face a “high risk of societal discrimination” as traditional views are widespread in Bangladesh”.

The existence of a small number of civil society organisations serving the lesbian/gay/bisexual community was noted, however, so too was the vulnerability of gay activists to extremist groups. The report noted that a ‘gay-pride’ event was held in Dhaka in 2014 and 2015, but was cancelled after experiencing “permit issues” in 2016 and threats which had been issued in advance by Islamist groups and clerics.

3. *US Department of State Country Report on Human Rights Practices 2017 – Bangladesh*

The report cited discrimination based on sexual orientation and gender identity as one of the most significant human rights issues apparent in Bangladesh, and elaborated as follows:

“Consensual same-sex sexual activity is illegal under the law. LGBTI groups reported police used the law as a pretext to bully LGBTI individuals, as well as those considered effeminate regardless of their sexual orientation, and to limit registration of LGBTI organizations. Some groups also reported harassment under a suspicious behavior provision of the police code. Members of LGBTI communities received threatening messages via telephone, text, and social media, and some were harassed by police.

In May (2017), RAB forces raided the Chayaneer Community Center in Keranigan during a dinner organized by the LGBTI community from that area. According to witnesses, 28 individuals were arrested of the 120 persons present at the time of the raid. The witnesses also stated RAB separated the diners into small groups and beat them before identifying individuals for arrest. During the raid RAB announced to the media the raid was conducted based on suspicion of homosexual activity and allowed the media to photograph some of the arrested individuals. RAB later announced the attendees were not engaged in ‘illegal sexual activities’ at the time of the raid and were instead arrested for possession of narcotics--specifically ‘yaba’ (a combination of methamphetamine and caffeine) and cannabis. The court system remanded four of the individuals. Of the remaining 24 individuals, 12 were detained for further questioning and 12 were sent directly to jail.

Following these events and continued harassment, many members of LGBTI communities, including the leadership of key support organizations, continued to reduce their activities and sought refuge both inside and outside of the country. This resulted in severely weakened advocacy and support networks for LGBTI persons. Organizations specifically assisting lesbians continued to be rare. Strong social stigma based on sexual orientation was common and prevented open discussion of the subject.”

4. *Amnesty International Report 2017/8 - Bangladesh*

The organisation reported that LGBTI activists continued to be routinely harassed and subject to arbitrary detention by state and non-state actors in 2017/8. The report highlighted that:

“The killings of activists in 2016 by Ansar al-Islam intensified existing fears of the LGBTI community; many activists remained in hiding.

In May, 28 men believed to have been targeted for their perceived sexual orientation were arrested in Keraniganj, a neighbourhood of the capital, Dhaka, and charged with violating the Narcotics Control Act 1990. The arrests were made at a regular gathering known to be frequented by gay men.”

Further, the report noted that despite one arrest made in 2017, no convictions followed the deaths of several LGBTI activists in Bangladesh in 2016.

COMPLAINT

The applicant complains under Article 3 of the Convention that he faces a real risk of serious and irreversible harm upon return to Bangladesh as a gay/bisexual man.

QUESTIONS TO THE PARTIES

1. In the light of the current country information, would the applicant face a real risk of being subjected to treatment contrary to Article 3 of the Convention upon return to Bangladesh on account of his sexual orientation?
2. If returned to Bangladesh, would the applicant have to conceal his sexual orientation in order to avoid ill-treatment? If this were the case, would his removal be compatible with his Convention rights?