Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

The Risk of Persecution or Serious Harm Faced by Divorced Women with Illegitimate Children, and by Women Subjected to Domestic Violence in Bangladesh

Question(s) at stake:

1) Whether the appellant, a divorced woman with an illegitimate child previously subjected to domestic violence, would upon return to Bangladesh face a real risk of persecution under the Refugee Convention or treatment contrary to Article 3 of the European Convention on Human Rights (ECHR), 2) Whether removing the appellant from the UK would be in breach of her and her first child's rights under Article 8 of the ECHR, and 3) Whether internal relocation would be possible for her and her second child.

Outcome of the ruling:

Divorced women with an illegitimate child and without family support are "likely to have to endure a significant degree of hardship" on return to Bangladesh, (para. 109) including social prejudice, discrimination, and difficulties finding housing and employment. However, such treatment and living conditions do not reach the high threshold of persecution under the Refugee Convention or inhumane treatment in reach of Article 3 rights of the ECHR.

Under Bangladesh's Muslim Family Law, "the mother, or in her absence her own family members, has the right to custody (*hizanat*) of an illegitimate child". (para. 110b) However, allegations of immorality proven in court may strip the mother of her rights.

A woman subjected to domestic violence may be denied effective state protection due to being a woman and may therefore face a real risk of persecution under one of the Refugee Convention reasons. Namely, "women in Bangladesh" as a "Particular Social Group" (PSG).

In light of the Country Guidance (CG) findings, the Upper Tribunal concluded that upon return to Dhaka the appellant would not face persecution or serious harm under the Refugee Convention. The appeal was dismissed on “asylum, humanitarian protection and human rights grounds under Article 3 of the ECHR”. (para. 130) However, the appeal was allowed on “human rights grounds under Article 8 of the ECHR”. (para. 130)

Topic(s):

- Immigration and Asylum

Keywords:

- Applicant's credibility
- Domestic violence
- Gender based persecution
- International protection
- Real Risk of persecution
- Right to respect for family life

Tag(s):

- Customary law

Author(s):

- Mirzac, Iulia (Birmingham Law School, University of Birmingham)

Country:

United Kingdom

Official citation:

SA (Divorced Woman – Illegitimate child) Bangladesh CG [2011] UKUT 00254 (IAC)

Link to the decision:

https://tribunalsdecisions.service.gov.uk/utiac/37567

ECLI:

No ECLI number / ECLI number unknown

Date:

11 July 2011

Jurisdiction / Court / Chamber:

Upper Tribunal (Immigration and Asylum Chamber)

Remedy / Procedural stage:

Appeal from the Asylum and Immigration Tribunal

Previous stages:

- On 20 January 2010, a senior immigration judge set aside the previous decision of the Asylum and Immigration Tribunal (AIT) because it was found to contain a material error of law. “[T]he appeal was adjourned for a second stage reconsideration” hearing. (para. 3)
- On 15 September 2009, the AIT Immigration Judge Kanakaratnam dismissed SA’s appeal against the Home Office (HO). SA requested, and was granted, a reconsideration of the dismissal decision.
- On 23 July 2009, the HO refused SA’s application for asylum.

None of the official citations of the previous stages are available.

NB: Subsequent to the second stage reconsideration order of 20 January 2010, the AIT was abolished and the appeal was transferred to the Upper Tribunal (Immigration and Asylum Chamber) for a hearing.

Subsequent stages:

No information found.

Branches / Areas of law:

Administrative law; Asylum law

Facts:

The appellant, Ms SA, was born in Bangladesh on 10 December 1981 to a middle-class Muslim family. In May 2001, she married OFK. The couple lived in SA's family home. In September 2002, OFK travelled to the United Kingdom on a student visa. On 2 November 2002, SA was granted leave to enter the UK and stay until December 2006 as a dependent of her student husband. After arrival in the UK, she lived with her husband and his relatives.

On 18 June 2005, while living in the UK, SA and her husband gave birth to their daughter ZK. SA "experienced domestic violence at the hands of her husband and they separated in December 2006 when the appellant left the matrimonial home". (para. 6) The child lived with her father and stayed in touch with SA on a daily basis until an incident in January 2007, during which the police was called to intervene. To avoid similar incidents in the future, the appellant was advised against visiting her former matrimonial home. In the process, SA lost contact with her daughter. About 18 months after the couple's separation, SA "secured a contact order from the Family Court" and OFK cooperated with it. (para. 6) The order granted SA contact with her daughter on weekends.

"The appellant obtained a decree absolute of divorce from her husband [on] 23 January 2008". (para. 6) In August 2007, SA returned to Bangladesh. On 13 September 2007, she applied for a UK student visa, but her application was refused. When attempting to enter back into the UK later that month, the appellant was informed that her status as a dependent of her student spouse was cancelled in light of the couple's separation. "She was granted temporary admission to the UK", which expired later in 2007. (para. 2) In October 2007, "she unsuccessfully appealed her student visa application refusal and the cancellation of her leave". (para. 2)

In April 2009, whilst in the UK, SA had her second child but by a man different from the father of her first child. She claimed asylum on the basis that "as a single divorced female with a dependent child born out of wedlock", she would face a real risk of persecution on return to Bangladesh. (para. 2)

SA's asylum application was refused in July 2009 and her appeal against the decision was dismissed. Upon reconsideration, the dismissal decision was set aside for containing a material error of law. A senior immigration judge of the Asylum Immigration Tribunal (AIT) found that "the issue of how the appellant would be treated by society" for being a divorced woman with an illegitimate child had been inadequately dealt with. (para. 2) Namely, the dismissal decision did not contain sufficient reasons for departing from the country background information that served as evidence. According to this evidence, despite the existence of anti-discrimination laws, their level of enforcement was low, especially in rural areas. For this reason, the country background information noted that, *"returning to Bangladesh with a child born out of wedlock would be 'an enormous physical and social risk for a woman to take'"* (para. 3). Additionally, the dismissal decision failed to assess the credibility of "the appellant's account of having been rejected by her immediate family on account of having had an illegitimate child". (para. 3) Moreover, the dismissal decision failed to adequately consider the impact that removing SA from the UK would have "on her relationship with her daughter" and their rights under Article 8 of the ECHR. (para. 5)

The current appeal

The current appeal before the Upper Tribunal was heard as a Country Guidance case on the risk of persecution and serious harm faced by a single and divorced "woman with an illegitimate child on return to Bangladesh" (para. 88). The Upper Tribunal also addressed "the issue of the return of women who have been subjected to domestic violence". (para. 71) The appeal was a "second stage reconsideration hearing" in which SA's appeal was "to be determined completely afresh save" the accepted findings of fact established by the immigration judge at the first hearing concerning the domestic violence incidents. (para. 6) During the hearing, new evidence emerged regarding the matrimonial history of the appellant's parents. SA informed the Upper Tribunal that her parents had been divorced. Both of them had remarried and had children with their new partners. When asked why she had not previously disclosed that information, the appellant

explained that she had been embarrassed to admit that “her parents had children about the same age as her daughter”. (para. 9) She was disclosing this information now, she stated, because she was advised by her representative to do so. The appellant also noted that her daughter, ZK, who was over 5 & ½ years old at the time of the hearing, was “diagnosed with Global Developmental Delay and a communication disorder”. (para. 125) At the time of the current appeal, ZK was in the primary care of OFK and the two had “leave to remain in the United Kingdom until 10 August 2011”. (para. 6)

The basis of the appellant’s asylum claim remained that she and her youngest child faced a real risk of persecution and serious harm upon return to Bangladesh. Having an illegitimate child would prove sexual immorality to her Muslim family and community, and runs against Islamic law and prevailing social norms. The appellant argued that as a divorcee and single “woman with a child born out of wedlock”, (para. 27) she would face double stigmatization. SA “and her son would be treated as social outcasts” in Bangladesh. (para. 3) Without her family’s support and without male guardianship, she would be perceived as sexually available. Therefore, she would be harassed, discriminated against, and unable to secure housing and employment. In arguing that this amounted to persecution, the appellant relied on the opinion of Baroness Hale in the House of Lords decision in *Hoxha and Anor v SSHD* [2003] UKHL 19 that discrimination and ostracism of a female victim of rape as a weapon of war in Kosovo could amount to persecution. SA’s “son would face rejection by her family, social prejudice and discrimination from the wider community”, including at school. (para. 38) Enforcement of laws against discrimination, domestic violence, and gender-based violence was weak. There was evidence to suggest that this was because the authorities were unable or unwilling to help women with questionable moral standing. Furthermore, the appellant argued that returning to Bangladesh would separate her from her daughter with whom she enjoyed weekly contact in the UK. This would amount to a disproportionate breach of their rights to family life under Article 8 of the ECHR.

The respondent submitted that the Upper Tribunal's starting point should be the determination in *RA and Others (Particular Social Group – Women) Bangladesh* [2005] that women in Bangladesh did not constitute a PSG for the purposes of the Refugee Convention. The respondent conceded that at the time of the hearing "the decision was five years old", but argued that the situation for women in the appellant's position "had improved since then". (para. 27) Although the country still had a lot of progress to make in order for women to enjoy equal rights with men, the country background evidence noted a continued improvement in that regard. Despite being a predominantly male-dominated society, public attitudes were changing. The state was committed to achieving gender equality as evidenced by "an increase in the number of women in parliament", by "the recent cabinet approval of the Domestic Violence (Prevention and Protection) Bill", and by successful efforts to decrease the number of acid attacks on women. (para. 27) Domestic abuse victims could access support from local authorities and NGOs, and women could access micro-credit opportunities. Significantly, "the High Court had recently ruled that wearing a veil by Muslim women was a matter of personal choice". (para. 27)

The respondent also argued that SA's credibility was damaged by the fact that she did not reveal earlier her parents' divorce. It was no longer credible that the appellant would receive no support from her family because of her being a divorcee. The fact that "her mother was a divorced woman" who "had managed to find alternative accommodation" and a new partner indicated that the appellant would be able to do the same. (para. 29) Furthermore, the appellant's fear of extra-judicial punishment in Bangladesh was unfounded. "There was very little evidence" to suggest that a single "woman with a child born out of wedlock […] would face persecution". (para. 27) Additionally, both sufficient protection and internal relocation would be available to SA and her child. Lastly, the respondent submitted that SA did not establish that she would face conditions that reached the very high threshold of Article 3 of the ECHR. Returning the appellant to Bangladesh would not result in an infringement of her rights under Article 8 of the ECHR either, because she would be able to communicate with her daughter from Bangladesh using modern technology.

Ruling:

The Upper Tribunal heard an extensive amount of country background information and expert evidence in oral and written form. The ruling can be divided into two main parts. The first is concerned with giving Country Guidance on two issues: on the return to Bangladesh of divorced women with a child born out of wedlock as well as on the return of women who have been subjected to domestic violence. The second part of the ruling is concerned with determining SA's appeal.

Country Guidance

The most important conclusions are as follows:

1. "There is a high level of domestic violence in Bangladesh". Despite government efforts to improve the situation, there is a disinclination among police officers "to act upon complaints". (para. 110a) A "woman subjected to domestic violence may not be able to obtain an effective" state protection because of her gender. Therefore, the persecution she feared she would be at risk of would be domestic violence for a Refugee Convention reason – membership of the PSG "women in Bangladesh". However, each case must be determined on its own facts. (paras. 74, 110 (a))

   The Upper Tribunal reached this conclusion by applying the "sufficiency of protection" test in *Bagdananvicius and Anor v SSHD* [2003]. According to *Bagdananvicius and Anor v SSHD*, the test is satisfied where there is evidence of a "willingness and ability on the part of the receiving state to provide" a reasonable level of protection from a well-founded fear of ill-treatment. (para. 72) The Upper Tribunal also followed the House of Lord's guidance in *SSHD v K and Fornah* [2006] on the meaning of a PSG, as well as Lord Hope's observations in *Shah and Islam* [1999]. Both quoted the UNHCR 2002 *Guidelines on International Protection*, which define a PSG as a "*group of persons who shared a common characteristic other than their risk of being persecuted, or who were perceived as a group by society".* The characteristic

must be “innate, unchangeable, or […] otherwise fundamental to the identity, conscience, or exercise of one’s human rights” such that it sets the group apart from the rest of the society. (paras. 72 – 73)

2. “Under Muslim law, as applicable in Bangladesh, the mother, or in her absence her own family members, has a right to custody of an illegitimate child”. (paras. 75, 110(b))

3. “In custody and contact disputes, the decisions of the superior courts in Bangladesh indicate a fairly consistent trend”: the principle of the welfare of the child tends to be prioritized over the application of personal law. However, allegations of immorality may disqualify the mother from custody or contact with her child. (para. 110(c))

   In reaching this conclusion, the Upper Tribunal noted the expert evidence according to which “the provisions of the *Guardians and Wards Act 1890* [are] read together with the personal law of the parties. […] Under the Hanafi school of Muslim law, which would apply to Sunni Muslims, the father, if alive, is […] the legal guardian of the […] child […] the mother is entitled to the custody *(hizanat)* of the male child until […] age of 7 and for a female child until […] puberty, unless she is otherwise disqualified” owing to “immoral” conduct. (para. 76)

4. Where a child’s illegitimacy becomes known in the community, the mother may face social prejudice and discrimination. However, “she is not likely to be at a real risk of physical harm in urban centres”, such as in Dhaka, for that reason alone. (para. 110(d))

5. Divorced women with an illegitimate child and without family support would likely have to endure a significant degree of hardship on return to Bangladesh, including discrimination, sexual harassment, and difficulty in finding housing and employment. However, it is unlikely that such treatment would be above the high threshold of persecution or inhumane treatment contrary to Article 3 of the ECHR. (para. 110(e))

The Upper Tribunal reached this conclusion by noting that a woman in this position may be able to secure a job in the garment trade, access some degree of rudimentary state support, and obtain accommodation, albeit of a low standard. While there is institutionalized discrimination against children born out of wedlock, a child would not be prevented from enrolling in a state school because of his or her illegitimacy. (paras. 103, 106, 109, 110(e))

Determination of the appellant's case

The appeal was allowed and the determination of the AIT was set aside. In remaking the decision, the Upper Tribunal dismissed the appeal on "asylum, humanitarian protection and human rights grounds under article 3 of the ECHR". (para. 130) However, SA's appeal was allowed on "human rights grounds under article 8 of the ECHR". (para. 130)

The most important findings are the following:

1. Assessment of the appellant's credibility: The Upper Tribunal accepted the AIT findings of fact concerning the appellant's credibility, including her claims about the circumstances of her separation from her husband and of her two children's birth. However, the Upper Tribunal did not find credible SA's explanation for not having previously disclosed that her parents had been divorced. Furthermore, oral evidence provided by the appellant during the hearing – on matters such as the circumstances in which SA's parents found out about her son and the appellant's recent contact with her mother and a friend in Bangladesh – was found to be "not entirely consistent". The Upper Tribunal did not believe that SA's "father has disowned her". (para. 120) Nor that she would be cut off from her parents and their support upon return to Bangladesh. (paras. 111–119)
2. "[I]t is unlikely that the child's illegitimacy would be discovered. […] His father's name appears on his birth certificate" and country background evidence suggests most divorced women continue to claim marital status to preserve their status in society. (para. 122) There is no evidence to suggest

that SA's former husband, or his family, would seek to threaten or otherwise harm her in Bangladesh. Moreover, there would be no question of the appellant having committed adultery given that "she was [already] divorced from her husband when the child was conceived". (paras. 120–122)

For these reasons, the appellant would be entitled to custody of her illegitimate child and would not be at risk of losing her custody rights. "By the same token, she would avoid the general societal discrimination shown towards women with illegitimate children in Bangladesh" (para. 122).

3. In the worst-case scenario, the appellant would return to Bangladesh with no family support. While she would face significant barriers to integration as a single woman with a young child, employment opportunities in the garment trade would be available to her, including "some sort of accommodation, albeit of a low standard", and some state support. (para. 109) As such, the conditions SA would face, albeit dire, would not "amount to persecution or a breach of her rights under article 3 of the ECHR". (paras. 109 and 123)
4. "The appellant has established [a] private and family life in the United Kingdom" such that her removal at the time of the hearing would have amounted to a disproportionate interference with her rights under Article 8 of the ECHR. (para. 125) The respondent is to determine the length of leave to grant, which could be expected to be in line with that of SA's first daughter, KZ. (paras. 125–129)

In reaching this conclusion, the Upper Tribunal applied the principles in *EB (Kosovo) v SSHD* [2008] and *R (Razgar) v SSHD* [2004], which state that any such interference must be proportionate to the legitimate public end that is sought. The Upper Tribunal also followed the cases of *LD (Article 8 – Best Interests of Child) Zimbabwe* [2010] – which ruled that normal family life cannot be enjoyed by correspondence or occasional visits – and of *ZH (Tanzania) v SSHD* [2011] – which ruled that a child's best interests must be of primary importance in a decision affecting the child.

Main quotations on cultural or religious diversity:

Referring to the country background information and the expert evidence, the Upper Tribunal noted:

“We can readily agree […] that the situation of Bangladeshi women must be located in the context of a rapidly shifting society and economy in which social transformation and instability had produced contradictory effects. […] progress in gender parity and primary education, reductions in fertility and female mortality and the entry of women into the wage labour force on the one hand but on the other high mortality rates, the risk of serious violence in the home and public places and enduring economic and socio-cultural discrimination” (para. 55)

“The High Court in Bangladesh has outlawed punishments handed down by Islamic edicts *fatwa*s after a series of cases of women being beaten, caned and whipped for “offences” they were judged to have committed by the village elders and the High Court has ruled that wearing a veil by Muslim women holding public office was a personal choice” (para. 59)

“Nevertheless, despite these positive factors […] state legislation and institutions frequently disregarded women's rights and as a matter of practice women did not enjoy fundamental rights and freedom to the extent that men did. This is largely due to women having unequal status in the family and generally being of lower socio-economic status, having lower literacy and less mobility. […] Illiteracy, early and forced marriage, high maternal mortality, social and religious restrictions coupled with instances of torture, abandonment and limited job opportunities all contribute to the plight of women according to women’s groups.” (para. 61)

“The serious manifestation of violence against poor women in Dhaka, which included physical and psychological violence inflicted by the husband or the husband’s family, burning of wives, acid attack, suicide as a result of physical and psychological torture as well as violence against women in the work place and on the way to and from work was noted in the survey by the World Bank and reported its report entitled ‘Improving Living Conditions for the Urban, Poor Bangladesh Development Series Paper No. 17’” (para. 65)

“Owing to the prevalent patriarchal attitude towards women, in most cases complaints are not recorded properly by the police, evidence is hard to produce or establish” (para. 66)

“According to Dr Saddiqi deeply entrenched patriarchal attitudes which do not take women’s concerns seriously produces procedural and administrative indifference or bias. Police are especially reluctant to become involved in marital disputes. […] Women may be unwilling to report abuse because the police force is overwhelmingly male and few women will feel comfortable confiding in male police officers, especially if the crime is of a sexual nature. […] The large cultural emphasis, especially in disputes between couples, is on compromise through mediation and arbitration out of court.” (para. 67)

On the question of the rights of the mother of an illegitimate child to custody or contact with a child of a marriage or former marriage, the Upper Tribunal noted:

“Under the Hanafi school of Muslim law, which would apply to Sunni Muslims, the father, if alive, is considered to be the natural and legal guardian of the person and property of his minor child while the mother is entitled to the custody (*hizanat*) of her male child until he has completed the age of 7 years and for a female child until she has attained puberty, unless she was otherwise disqualified.” (para. 76)

“a commentator […] noted that the right to *hizanat* belonged to the mother *‘qua mother and nothing can take it away from her except her own misconduct’* […] not all cases of misconduct necessarily destroy the right to *hizanat* and that the question was whether such misconduct was *‘detrimental to the child’* i.e. *‘is it likely to injure the child?’*, with such injury being physical or moral and finally that *‘unchastity…disqualifies [the woman] from exercising the right of hizanat’.*” (para. 77)

On the question of the risk of persecution and serious harm to the divorced mother of an illegitimate child, the Upper Tribunal noted:

“It is important in our view to make a distinction between a woman with an illegitimate child who is married and one, like the appellant, who is divorced. The

report by the US Bureau of Citizenship and Immigration Services [...] before us quoted a research fellow at Harvard University stating that the safety of a woman in Bangladesh who has a child out of wedlock depended primarily on the woman's religion and secondary on her economic status. If the woman was Muslim the very existence of the child proved the mother's adultery. In contrast to other countries, such as Saudi Arabia and Pakistan, where such a woman would be imprisoned and ostracised, in Bangladesh the situation depended on the woman's immediate family and on her class background [...] a woman in Bangladesh who had an illegitimate child would most probably be treated as a social outcast depending on her social status or monetary conditions. She would be worse off if she came from a middle or lower middle income [sic] group as they were the most vulnerable to societal pressure and bear the brunt of failing to keep up a social façade." (para. 82)

"Although it may have been the case that in 1992 a Bangladeshi anthropologist said that from a cultural point of view ideally unmarried women should remain at home under male protection and control until they were able to marry, the position in 2010 seems to be different." (para. 98)

"There is now an increasing number of divorced women from the middle classes in urban centres so that the appellant would not be unique as a divorced woman. We take the view that the appellant does not come from a particularly strict family so far as the question of divorce and new relationships is concerned. The appellant, herself, rather surprisingly has been prepared to embark upon a relationship outside marriage as a result of which she conceived a child. It is significant that she was divorced from her husband when the child was conceived so that there is no question of her having committed adultery." (para. 120)

Main legal texts quoted in the decision:

International law

- Convention on the Elimination of all Forms of Discrimination against Women (adopted 18 December 1979, entered into force 6 December 1984) (CEDAW)

- Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)
- EU Council Directive 2004/83/EC on Minimum Standards for the Qualification Status of Third Country Nationals or Stateless Persons or Refugees or as Persons Who Otherwise Need International Protection (No longer in force; date of end of validity 21 Dec 2013; repealed by Directive 2011/95/EU)
- European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS 5 (ECHR)
- UN Convention on the Rights of the Child (adopted 30 November 1989, entered into force 2 September 1990) (UNCRC)

UK domestic law

- Borders, Citizenship and Immigration Act 2009
- Immigration Rules (adopted 23 May 1994, entered into force 1 October 1994)
- Refugee or Person in Need of International Protection (Qualification) Regulations SI2006/2525 (adopted 18 September 2006, entered into force 9 October 2006) (Protection Regulations)
- Statement of Changes in Immigration Rules CM6918 (the amended Immigration Rules)

Bangladeshi Domestic Law

- Acid Crime Prevention Act 2002
- Acid Control Act 2002
- Domestic Violence (Prevention and Protection) Bill
- Dowry Prohibition Act 1980
- Guardians and Wards Act 1890
- Women and Children Repression Prevention Act 2000 (amended in 2003)

Cases cited in the decision:

Risk assessment

- **Refugee Convention**

- *AM and AM (Armed Conflict – Risk Categories) Somalia CG* [2008] UKAIT 00091
- *SR (Iran) v Secretary of State for the Home Department* [2007] EWCA Civ 460

- **Article 3 ECHR**

- *Kalashnikov v Russia* [2002] ECHR 596
- *Pretty v United Kingdom – 2346/02* [2002] ECHR 427

- **Article 8 ECHR**

  UK cases

- *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39
- *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40
- *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41
- *Huang v Secretary of State for the Home Department* [2007] UKHL 11
- *LD (Article 8 – best interests of child) Zimbabwe* [2010] UKUT 278
- *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27
- *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4

European Court of Human Rights cases

- *Boultif v Switzerland* (2001) 33 EHRR 50
- *Mokrani v France* (2005) 40 EHRR 5
- *Sezen v Netherlands* (2006) 43 EHRR 621

Particular Social Group

- *RA and Others (Particular Social Group – Women) Bangladesh* [2005] UKIAT 00070

- *Secretary of State for the Home Department v K and Fornah* [2006] UKHL 46
- *Shah and Islam* [1999] UKHL 20

Internal relocation

- *Bagdananvicius and Anor, R (On the Application of) v Secretary of State for the Home Department* [2003] EWCA Civ 1605
- *Januzi v Secretary of State for the Home Department and Others* [2006] UKHL 5
- *Secretary of State for the Home Department v AH (Sudan) and Others* [2007] UKHL 49

Commentary

The Risk of Persecution or Serious Harm Faced by Divorced Women with Illegitimate Children, and by Women Subjected to Domestic Violence in Bangladesh

Country Guidance (CG) cases have been an integral part of the UK immigration system since 2001. They are a unique fact-based form of assessment because they involve the evaluation of a large body of evidence related to the overall socio-political conditions in a specific country, as well as the particular circumstances of an individual case. They have a binding effect on subsequent cases concerning similar issues and factual evidence (Clayton and Firth 2018: 389).

The CG case of *SA* is an authoritative precedent on the conditions faced by single or divorced women with an illegitimate child, as well as those faced by women at risk of domestic violence on return to Bangladesh. *SA* [2011] builds on previous caselaw and continues an ongoing trend concerning women who face allegations of immorality, discrimination, as well as gender-based and domestic violence under the remit of the Refugee Convention and the European Convention of Human Rights (ECHR).

Significantly, in ruling that ‘women in Bangladesh’ are capable of forming a “Particular Social Group” (PSG) for Convention purposes, the Upper Tribunal in *SA* broadened the scope of protection for women at risk of gender-based persecution

in Bangladesh. The Upper Tribunal came to this conclusion by applying the House of Lords' guidelines on what constitutes a PSG in *Shah and Islam* [1999] and in *K and Fornah* [2006]. Prior to *SA* [2011], the authority on this matter was the case of *RA and others (PSG – Women) Bangladesh* [2005], which rejected "women in Bangladesh" as a PSA. This may be because *RA* is a pre-*Fornah* decision. However, given that the *2002 UNHCR Guidelines* – on which the House of Lords in *Fornah* relied – were already published, the Upper Tribunal would have strengthened its determination in *SA* by expanding on why it came to a different conclusion than in *RA*. This could have been achieved, for example, by differentiating between the evidence presented before the Tribunal in the two cases.

Nonetheless, finding that 'women in Bangladesh' are capable of forming a PSG enabled the Upper Tribunal to rule that the risk of domestic violence faced by some women on return to Bangladesh could amount to persecution for a Refugee Convention reason. In so doing, the Upper Tribunal strengthened the protection available to female asylum seekers at risk of domestic abuse in Bangladesh. The Upper Tribunal relied on the extensive evidence that showed the Bangladeshi authorities' efforts in this regard, including "[t]he fact that the Domestic Violence (Prevention and Protection) Bill had recently been approved by the cabinet", (para. 27) state-run shelters for victims fleeing domestic abuse, and community-based projects aimed at changing prevailing attitudes towards violence among male family members and in-laws. However, it found that the evidence pointed to a weak enforcement of laws aimed at protecting women, which was due to the frequent and institutionalized disregard for women's rights and the overall unequal status of women in Bangladeshi society. Victims of domestic violence are likely to be denied effective state protection because the police force tends to regard domestic violence as a private matter. Consequently, allegations made by women against their spouses or in-laws are usually not investigated.

On the other hand, the Upper Tribunal in *SA* held that the treatment and conditions faced in Bangladesh by single women with an illegitimate child and without family support would not reach the high threshold of persecution or

inhumane treatment contrary to Article 3 of the ECHR.

The Upper Tribunal accepted that women in this position are "likely to have to endure a significant degree of hardship", (para. 109) including social prejudice, discrimination, as well as difficulties in finding employment and housing. For instance, it noted that the poor living conditions in slums – the home of the majority of migrants in Dhaka – pose significant health hazards to residents. Nevertheless, it noted that while, "*[w]e do not underestimate the difficulties which this would present [...] the purpose of the Refugee Convention and that of the ECHR, however, is not to assist persons to live at the economic level to which they have become accustomed [in the UK]*" (para. 123). This approach is consistent with a previous decision in *FB (Lone Women – PSG – Internal Relocation – AA (Uganda) Considered) Sierra Leone v SSHD* [2008], in which it was held that removal would be unlawful where a woman's only means of survival on return would be beggary, crime, prostitution, etc. By contrast, in *SA* the country background evidence showed that employment opportunities in the garment industry and rudimentary state support would be available to women in the appellant's situation.

Therefore, SA's appeal was dismissed on "asylum, humanitarian protection and human rights grounds under article 3 of the ECHR". (para. 130) The appellant's case also failed because it emerged that she had previously not been entirely truthful with the Tribunal in relation to her family circumstances in Bangladesh and her relationship with her divorced parents. This damaged her previously established credibility.

However, the Upper Tribunal held that SA's removal "would amount to a disproportionate interference" with her Article 8 rights because her oldest child had leave to remain in the UK under the custody of the appellant's former husband. (para. 124) The Upper Tribunal came to this conclusion by applying House of Lords precedents and it strengthened its reasoning by noting that they are consistent with the Strasbourg approach. As such, in allowing SA's appeal on Article 8 grounds, the Tribunal prioritized the interests and welfare of SA's daughter and their right of family life (Pobjoy 2015).

Almost a decade later, the UK Home Office continues to use *SA* as a basis for assessing Bangladeshi gender-based asylum applications involving Bangladeshis. CPIN (2018:38) notes that "*since the promulgation of SA, laws aimed at protecting women continue to remain largely unimplemented due to stereotypes and gender bias, lack of gender sensitivity on the part of law enforcement officials*". Bangladesh continues to record high rates of violence against women, including sexual and domestic abuse, dowry, fatwa-related violence, acid throwing, forced marriage, and honour killings (EASO 2017: 60-63; CEDAW 2016:16-38). Therefore, a similar case may be brought before the Tribunal in the near future. Until then, the current country guidance remains good law.

Literature related to the main issue(s) at stake:

UNHCR guidelines cited in the judgement:

- UNHCR 'Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (Geneva 2002) (UNHCR Gender Guidelines)
- UNHCR 'Guidelines on International Protection: "Membership of a Particular Social Group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (Geneva 2002) (UNHCR PSG Guidelines)

Reports cited in the judgement:

- Human Rights Watch, '"Will I Get My Dues … Before I Die?" Harm to Women from Bangladesh's Discriminatory Laws on Marriage, Separation and Divorce' (Human Rights Watch 2012), available at < https://www.hrw.org/report/2012/09/17/will-i-get-my-dues-i-die/harm-women-bangladeshs-discriminatory-laws-marriage> accessed 7 July 2020.

Guidelines and reports cited in the commentary:

- European Asylum Support Office, ‘Country of Origin Information Report: Bangladesh Country Overview’ (EASO 2017)
- Home Office ‘Country Policy and Information Note: Bangladesh Background information, including internal relocation’ (London 2018)
- Home Office ‘Gender Issues in the Asylum Claim’ (London 2018)
- United Nations Committee on the Elimination of Discrimination Against Women (CEDAW) ‘Concluding observations on the eighth periodic report of Bangladesh’ (Geneva 2016)

Academic literature cited in the template commentary:

- Clayton, Gina and Georgina Firth. 2018. *Immigration and Asylum Law*. Oxford: Oxford University Press.
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Other literature:

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- Mullally, Siobhan, 2011. “Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progressive Narrative?”. *International and Comparative Law Quarterly* 60(2): 459–484.

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Suggested citation of this case-law comment:

Mirzac, Iulia (2024): The Risk of Persecution or Serious Harm Faced by Divorced Women with Illegitimate Children, and by Women Subjected to Domestic Violence in Bangladesh, Department of Law and Anthropology, Max Planck Institute for Social Anthropology, Halle (Saale), Germany, CUREDI041UK012, https://doi.org/10.48509/CUREDI041UK012.