



HIGH COURT OF AUSTRALIA

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APPELLANT S395 OF 2002 v MINISTER FOR IMMIGRATION AND MULTICULTURAL
AFFAIRS

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The High Court of Australia today allowed an appeal from two men who claimed to have a well-founded fear of persecution in their native Bangladesh because of their homosexuality.

The men arrived in Australia in 1999 and applied for protection visas, claiming refugee status. Their application was rejected by the Immigration Department, the Refugee Review Tribunal, the Federal Court and the Full Court of the Federal Court.

The RRT raised doubts about their credibility, rejecting claims they were forced to leave their Dhaka home, that they had lost their jobs and that a religious court had issued a fatwa sentencing them to death by stoning. It also rejected the claim by one that he could not get work between 1980 and 1991, was sentenced to 300 lashes in 1985, and was attacked in his home with a previous male partner. The RRT said the men had conducted themselves discreetly in the past and rejected their claims that they had suffered, and would suffer, serious harm. The RRT did accept that the men were shunned by their families and may have been the subject of neighbours' gossip, but held that this did not constitute persecution.

The men claimed the Federal Court erred in failing to hold that the RRT's decision involved an error of law, involving incorrect interpretation of the Migration Act or an incorrect application of the Act to the facts. They said that, having determined that homosexuality was unacceptable in Bangladesh and could lead to potential harm such as being bashed by police, the RRT erred in then holding that the men did not have a well-founded fear of persecution.

The High Court, by a 4-3 majority, allowed the men's appeals. It held that the RRT should have considered what might happen if they had lived openly as a homosexual couple. The majority held that the RRT also fell into jurisdictional error by dividing Bangladeshi homosexuals into two groups – discreet and non-discreet – and failed to consider whether the men might suffer harm if police, employers or others became aware of their homosexuality. Although they were discreet, it did not necessarily follow that they would not be persecuted. The question was whether particular individuals had a well-founded fear of being persecuted even though other members of a particular social group had not suffered persecution.

The Court ordered the RRT to redetermine its review of the Immigration Department's decision.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*