Heard at Field House
On: 3 November 2004

MN (FINDINGS ON SEXUALITY) Kenya [2005] UKIAT 00021

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

28 January 2005

Before:

Mr J Perkins, Vice President
Mr J Widdup
Mr A E Armitage

Between

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the appellant:	Mr P Jorro, of Counsel, instructed by Fisher Jones Greenwood
For the respondent :	Mr P Deller, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Kenya. He was born on 7 December 1974 and so is now twenty-nine years old. He appeals the decision of an Adjudicator, Mr R.B.L. Prior, who in a determination promulgated on 29 March 2004 dismissed his appeal against the decision of the Secretary of State that he was not entitled to refugee status and that removing him from the United Kingdom was not contrary to his rights under the European Convention on Human Rights.

2. At the start of the hearing Mr Jorro briefly renewed a request that had been made earlier today in writing that we adjourn the hearing. It

seems that the key point in this case will be decided by the Court of Appeal in a case due to be heard in November 2004 called Z v SSHD. Without in any way wanting to be disrespectful of the Court of Appeal, we decided it was not appropriate to adjourn this hearing. In the end we decided that the case had to be remitted. It may be that the parties will not want it listed until the judgment of the Court of Appeal in that case has been given. However that is something that the Adjudicator will have to decide.

3. According to paragraph 10 of the determination it was the appellant's case that he faces a real risk on return to Kenya of persecution by the Mungiki in particular and by the people of Kenya generally by reason of his homosexuality. The authorities in Kenya cannot give him sufficient protection against either enemy because they have persistently shown strong and systemic prejudice against homosexuals.

4. It was the appellant's case that he was a 'very senior person in the Mungiki movement'. Additionally, he said that he is homosexual and had a close relationship with one [ ]. He described [ ] as his only lover. They had kept the nature of their relationship secret but [ ] had left a note to the appellant's family telling them of the relationship between the appellant and [ ]. The appellant said that after his partner's death the note was discovered and the news spread. The appellant's family and friends and fellow members of Mungiki felt betrayed by his homosexuality. He was denounced and had to leave. His father cursed him and said that he would prefer it if the appellant was dead. The appellant fled to Nairobi and his business premises were destroyed. He stayed with a friend in Nairobi before escaping to the United Kingdom.

5. The appellant emphasised that he feared not only the Mungiki but also the general public by reason of his homosexuality. The appellant told the Adjudicator that he had kept a secret his homosexuality since he had arrived in the United Kingdom. It was known only to his general medical practitioner and a small group of people he trusted. He said that he did not want his homosexuality known amongst the Kenyan community in the

United Kingdom. The Adjudicator found that this indicated it was not oppressive to the appellant to suppress his homosexuality.

6. The Adjudicator has not made clear findings of fact. We do not know how much, or what parts, of the appellant's case the adjudicator accepted or what risks the appellant would run in the event of returning to Kenya and making known his homosexuality, or, perhaps most importantly or all, what it would mean to the appellant to suppress his homosexuality. In the absence of clear findings on these points we find the determination inadequately reasoned and it is mainly for this reason that, with the agreement of both representatives, we decided to 'remit' the appeal.

7. However we wish to explain this decision further.

8. According to the grounds of appeal, the appellant, in a skeleton argument put before the Adjudicator, complained that he risked persecution in Kenya 'either in the form of serious physical harm (without recourse to adequate state protection) in the exercise of his basic human right to express his sexuality or in the form of fear of such physical harm causing him to have to repress his basic human right to express his sexuality.' This point had not been considered and the appellant was given permission to appeal for it to be considered.

9. Mr Jorro submitted, and we agree, that it is trite immigration law to say that a person's claim to refugee protection cannot be defeated by telling him not to do the thing that attracts persecution. Mr Jorro submitted that it was therefore unacceptable to say that a homosexual could avoid persecution by suppressing his homosexuality. If he is homosexual he should not be expected to deny that. He relied particularly on a decision of the High Court of Australia, Appellant S395/2002 v Minister of Immigration and Multicultural Affairs [2004] INLR 233. That was a decision made by seven judges of the High Court of Australia including the Chief Justice. Four of them found for the asylum seeker. We set out below

an extract from the judgment of Gummuwh J and Hayne J. At paragraph 78 onwards they said:

> [78] 'The central question in any particular case is whether there is a well-founded fear of persecution. That requires examination of how *this* applicant may be treated if he returns to the country of nationality. Processes of classification may obscure the essentially individual and fact-specific inquiry which must be made.
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> [79] The dangers of arguing from classifications are particularly acute in matters in which the applicant's sexuality is said to be relevant. Those dangers lie within the notions of "discretion" and "being discreet": terms often applied in connection with some aspects of sexual expression. To explain why use of these terms may obscure more than they illuminate, it is useful to begin by considering Convention reasons other than membership of a social group defined in terms of sexual identity.
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> [80] If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences should be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be "discreet" about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well-founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences.
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> [81] It is important to recognise the breadth of the assertion that is made when, as in the present case, those seeking protection

allege fear of persecution for reasons of membership of a social group identified in terms of sexual identity (here, homosexual men in Bangladesh). Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular form of physical contact. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense 'discreetly') may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality.'

10. It is instructive to look at the reasoning of the minority judges in that case. Gleeson CJ, Callinan and Heydon JJ were all concerned that the appellant had not put his case on the basis that led to the majority decision. He had not complained that he would be persecuted by having to suppress his sexuality. The point is that the minority judges in that case did not disagree with the reasoning of the majority. They simply did not accept that it applied to the facts before them.

11. Of course this is not a decision that binds us but we would be foolish not to give a lot of respect to the learning of the Australian court when delivering a considered judgement concerning the operation of an international convention that binds the United Kingdom.

12. We were also reminded of the decision of the Court of Appeal in Iftikhar Ahmed v SSHD [2000] INLR where Simon Brown LJ said at page 8 paragraph (d) '... I cannot see how this consideration avoids the need to address the critical question: if returned, would the asylum seeker in fact act in the way he says he would and thereby suffer persecution?'

13. The point made by the Court of Appeal is that refugee status is to be awarded to people who risk persecution in the country of which they are a national. It is not the business of a person deciding an application for refugee status to enquire into the reasonableness of their conduct. What matters is their need of protection.

14. The Court of Appeal also referred to Sahm Jain v SSHD [2000] Imm AR 76 where Schiemann LJ recognised that 'criminalisation of homosexual activity between consenting adults in private is not regarded by the international community at large as acceptable.' That case also emphasised that persecution is not normally established by an occasional interference with the exercise of a human right.

15. Mr Jorro emphasised that homosexuality is a matter of sexual identity rather than sexual activity. We accept that. Whether or not a person's homosexuality is an innate characteristic or chosen behaviour is immaterial. In either case it is not something that he should not be required to give up even if he could.

16. Putting these things together, we find it wrong to approach cases of this kind on the basis that a homosexual is not entitled to refugee status just because he could avoid persecution by conducting his sexual activities discreetly, for example "behind the veil of decency". Such an approach diminishes a person's sexuality to a series of private sexual acts. It is possible (although in our view unlikely) that this approach is appropriate in some cases. We do not accept that such an approach is a proper one unless it flows from the asylum seekers description of his homosexuality and how he seeks to express it.

17. However we must also emphasis that a person is not entitled to refugee status just because the expression of his sexuality will attract societal disapproval (or worse), or that a person who avoids such disapproval by being discreet is *necessarily* subjected thereby to internationally unacceptable restraint.

18. We have considered the argument at least implicit in Mr Jorro's submissions that a person should not be expected to avoid persecution by restraining or modifying his sexual behaviour in any way.

19. We do not accept take a person is entitled always to behave as he wishes and then complain of persecution if his conduct attracts any kind of approbation. For example it is well understood that a person's "right" to

religious freedom, including the freedom to proselytise his religion, is not unqualified. It must be balanced against another person's right not to be bothered by the claims of a different religion in which he has no interest. Similarly it is not necessarily persecution for a person to be made reluctant to gratify his sexual desires because of legislation against, or societal intolerance of, his chosen means of gratification. Schiemann LJ in Jain recognised that the state can interfere properly with some person's sexual lives, for example "those who most easily express their sexual desires in sexual activity with small children, or those who wish to engage in sexual activities in the unwilling presence of others".

20. We do not accept that any kind of restriction on any kind of homosexual (or other) behaviour is necessarily persecution but, as explained above, decisions about whether the kind of disapproval a homosexual faces amounts to persecution should start on the footing that, by international standards, homosexual behaviour should not be regarded as criminal.

21. Most societies restrain expressions of sexuality. A person who wants to take part in a sexual act that international standards would regard as criminal is not being persecuted if he is restrained. Such non-persecutory restraint, we find, would include not only forms of sexual expression that would be regarded internationally as criminal, but would also included expressions that are disturbing in any particular society. In some societies kissing in public between people of opposite sexes is acceptable. In others it is not. In some societies it is acceptable for grown men to hold hands. In others it is a least questionable behaviour. Societies have different ideas about what constitutes acceptable dress in public place. It is not necessarily persecution because a person is expected to conform to social mores.

22. That said we emphasis that, in our experience, homosexuals generally do not complain that they risk persecution because they want to

take part publicly in sexual acts. To suggest otherwise is a narrow, wrong and probably offensive description of homosexuality.

23. We are persuaded that a person who can avoid persecution for his homosexuality only by living a lie, that is by persistently, and against his will, so organising his affairs that he lives furtively and at a constant worry of discovery is being oppressed. Further, depending on the nature of the oppression and his response to it, such oppression could well be so severe that it is persecutory.

24. We also considered a decision of RPG Haines QC, sitting in the Refugee Status Appeals Authority of New Zealand, Refugee Appeal No 74665 03. Again we recognise, of course, that it is not a binding authority but it is a very closely reasoned and instructive decision. The appellant there gave evidence of how his homosexuality resulted in his being derided at school, and detained by the Monkerat and warned that his conduct could be punished with 100 lashes. He enrolled at a different secondary school where he was caught taking part in a sexual act. He was harangued by his friend's family and then severely beaten by his friend's brother. Soon afterwards he was expelled. For a long time he was too frightened to leave his home. He then learned to mix with other homosexuals and enjoyed different partners but always acting furtively, subject to the "overriding imperative" to conceal his behaviour. His family did not support him and he became so unhappy that he attempted suicide on two or three occasions. He was deeply troubled at the prospect of condign punishment at the hands of the state. For him "life would be meaningless without the ability to express feeling and desire". For him the expression of his sexuality was not a matter of discretion but a matter of keeping his sexual orientation "carefully hidden". Given these findings it is not surprising that he was found to risk persecution.

25. We find it important that we do not fall into the mistake of stereotyping homosexuals as if all aspects of a person's sexuality can be encompassed in that one word. Some homosexuals will want to be discreet

about their homosexuality. They will regard it as a private matter and not something they want to share with the world at large. For other people it will only be part of their sexual experience and not something they want to assert or make known generally. For others expressing their homosexuality will be at the centre of how they live as people.

26. These things emphasise that it is essential in cases of this kind to make very clear findings about what a person will want to do to express his sexuality if returned to the country of which he is a national.

27. Mr Jorro submitted in argument that it would be unusual for a person not to want to disclose his homosexuality to some extent. That may well be right. It is still something that would have to be proved. We do not regard it as self- evidently and necessarily right in every case. Further we do not accept that any restraint in behaviour in response to societal or legal pressure is persecutory.

28. The first step in cases such as this is to decide unequivocally from the background material if there is a real risk of homosexuals being persecuted in the country of which the appellant is a national. This is an important question. Persecution requires serious and, usually, persistent ill-treatment. In almost every society in the world there are occasions when some homosexual is badly treated because of his sexuality. We do not accept that in this case the Adjudicator has made properly reasoned and clear findings. We do not know if homosexuals generally risk persecution in Kenya. The existence, or absence, of criminal sanctions is not definitive. It may be that the law is not enforced or that it is enforced in a limited way. An adjudicator must decide if there is a real risk of persecution in the country being considered.

29. We do not accept that the mere fact that a homosexual will face a degree of social oppression means that he will be persecuted. Not all oppression amounts to persecution. We are reminded of the comment of Staughton LJ in Sandralingam & Ravichandran v SSHD [1996] Imm AR

97 at 114 “Persecution must at least be persistent and serious ill treatment without just cause”.

30. If homosexuals do risk persecution in Kenya by reason of their homosexuality, then the Adjudicator must decide if there is a risk to this particular appellant.

31. In order to do this the adjudicator must decide firstly if the appellant is going to do something because of his sexuality that will expose him to real risk of persecution. If he is then the appellant is entitled to protection.

32. If he is not then the Adjudicator must ask if the appellant will want to do something that would put him at risk. Some people will be happy to live discreetly. However if the appellant wants to do something that he feels inhibited about doing then he must explain what, and why, and the adjudicator must decide if the legal or societal pressures that restrain the asylum seeker are so severe that they are described properly as persecutory.

33. We realise that this approach will require the appellant to give evidence about matters that may well be very private to him and anyone questioning him or assessing his evidence must be careful to show proper respect for his situation. Nevertheless a person seeking international protection must be prepared to prove his case. It may be that a person’s ability to set out his fears will reveal much about the extent and nature of his alleged fear of persecution.

34. It will also be necessary for the appellant to show that any persecution that he risks cannot reasonably be avoided by removing to a different part of Kenya.

35. In the circumstances and for the reasons given we allow the appeal to the extent that we direct that it be heard again by an Adjudicator other than Mr Prior.

36. We hope the Adjudicator hearing the case the next time will be careful to make very clear findings on the matters listed above.

37. We thank Mr Jorro and Mr Deller for their very helpful submissions in this interesting case.

Jonathan Perkins
Vice President