

**AT AUCKLAND**

<b>Appellant:</b>	<b>AD (Egypt)</b>
<b>Before:</b>	A N Molloy (Member)
<b>Counsel for the Appellant:</b>	I Anand
<b>Counsel for the Respondent:</b>	No Appearance
<b>Date of Hearing:</b>	30 November & 6 December 2011
<b>Date of Decision:</b>	15 December 2011

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**DECISION**

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**INTRODUCTION**

[1] The appellant is a national of Egypt. He claims that he is at risk of being persecuted if he is returned to Egypt because he is homosexual.

[2] This is the second time that the appellant has claimed refugee status in New Zealand and the first time he has sought protected person status. The appeal turns upon the veracity of additional evidence produced by the appellant in connection with his claim.

[3] The Refugee Status Branch (“RSB”) found that this amounted to a significant change in circumstances such that it had jurisdiction to consider the appellant’s second claim. As will be seen, the Tribunal rejects that evidence, however it finds the oral evidence given by three supporting witnesses to be persuasive.

**Background**

[4] The appellant arrived in New Zealand in 2008 and applied for refugee status under the Immigration Act 1987 (“the 1987 Act”). The relevant parts of that

Act have since been superseded by the coming into effect of the Immigration Act 2009 (“the 2009 Act”).

[5] The appellant’s first claim was determined under the 1987 Act by a refugee status officer who issued a decision declining his application on 24 June 2010. The appellant’s first appeal was declined by the body then established for that purpose, the Refugee Status Appeals Authority (“the Authority”): *Refugee Appeal No 76566* (7 October 2010).

[6] The appellant lodged a further application for refugee status on 4 March 2011. By the time the appellant’s second claim was determined by the RSB in June 2011, the 2009 Act had come into force. Under the 2009 Act, the appellant’s claim was also to be considered as though it were a claim for protected person status under the Convention against Torture (“CAT”) and the International Covenant on Civil and Political Rights (“ICCPR”).

[7] A different refugee and protection officer of the RSB considered the appellant’s second claim under the 2009 Act. The RSB was directed by section 140 of the 2009 Act to first consider whether “there has been a significant change in circumstances material to the [appellant’s] claim since the previous claim was determined” in order to determine whether it had jurisdiction to consider the appellant’s second claim. The RSB found that it did have jurisdiction, but issued a decision declining to recognise the appellant as a refugee or a protected person.

[8] The appellant has exercised his right to appeal against that decision under section 195(2) of the 2009 Act. The Tribunal is therefore directed by section 200(7) of the 2009 Act to determine the matter in accordance with section 198(1) namely to conduct its orthodox inquiry into whether to recognise the appellant as:

- (a) a refugee under the Refugee Convention (section 129); and
- (b) a protected person under the Convention Against Torture (section 130); and
- (c) a protected person under the ICCPR (section 131).

[9] Before assessing the appellant’s claim it is necessary to briefly outline the basis upon which the appellant first applied for refugee status and the Authority’s reasons for dismissing his first appeal. The Tribunal will then outline the account

presented by the appellant in respect of his second claim for refugee status and protected person status. It will then assess the appellant's credibility, before making the findings of fact upon which the appeal is to be determined. The Tribunal will then outline the legislation governing such appeals before assessing the appellant's claim for refugee status and protected person status.

### **The Appellant's First Claim for Refugee Status**

[10] The following is a summary of the account advanced by the appellant in connection with his first claim.

[11] The appellant claimed to be at risk of being persecuted in Egypt because he is homosexual. He had been sexually involved with men since the mid-1970s, but had married under pressure from his mother.

[12] The appellant maintained sexual relationships with various men throughout his married life. His wife eventually tired of his duplicity. She commenced divorce proceedings and the marriage ended in early 2008. The wife then told the appellant's brothers why she had obtained the divorce. The brothers threatened to kill the appellant.

[13] The appellant left Egypt and arrived in New Zealand in late 2008. He was awarded a work permit and met his current partner, FF. They entered into a civil union in mid-2009.

[14] The appellant left his job when his employer asked for money in exchange for help to obtain a further work permit. With no job and no further employment prospects at that time, the appellant was unable to obtain a further permit. Accordingly, he lodged his first claim for refugee status with the RSB in early 2010. He claimed that if he returned to Egypt his brothers would kill him because he is homosexual. Even if they did not, he would be seriously harmed if it became known that he was living with a man with whom he had entered into a civil union.

[15] After interviewing the appellant, a refugee status officer issued a decision in mid-2010, declining the appellant's first claim. He then appealed to the Authority.

### **Decision of the Refugee Status Appeals Authority on the First Appeal**

[16] The Authority declined the appellant's first appeal. It found that key aspects of the appellant's evidence were inconsistent and implausible.

- [17] The appellant gave fundamentally inconsistent accounts concerning:
- (a) the timing of his first sexual relationship with a man and as to the identity of the man;
  - (b) his introduction to subsequent sexual partners and as to the number of his sexual relationships;
  - (c) how, why and when his wife discovered his sexual relationships with men;
  - (d) whether evidence of his sexuality was placed before the court in Egypt; and
  - (e) the last time he saw his wife.

[18] Other aspects of his claim were also found to be implausible. For example, the manner in which the appellant claimed that his sexual partners had solicited his attention at his family home was found to be implausibly indiscreet given that the appellant was supposedly trying to hide his sexuality. It also found that it was implausible that the appellant's brothers were unable to locate him before he left, given the apparently inadequate steps taken to avoid them doing so.

[19] The Authority also identified various aspects of the evidence given by FF to be of concern.

[20] The Authority did not overlook various letters of support tendered by members of FF's family, or the evidence given orally by one acquaintance of the appellant. However, the Authority noted that the acquaintance was not closely involved with the couple, and that, in light of the unavailability of any family members of FF to give evidence in person, the content of their letters did not outweigh the numerous credibility problems identified by the Authority.

[21] The cumulative effect of these concerns was such that the Authority was unable to rely upon any of the evidence advanced by the appellant beyond his bare biographical details. The Authority accepted that the appellant and FF had entered into a civil union, given the clear evidence to that effect, but found that there was no credible evidence that the underlying relationship was genuine. The Authority also found that there was no credible evidence upon which it could conclude that the appellant is homosexual, or that he conducted any relationships of a homosexual character with men in Egypt or New Zealand.

## **The Appellant's Second Claim for Refugee Status**

[22] The second claim was premised upon the assertion that, within a month after the Authority had published its decision, the appellant received two letters from his brothers in Egypt. They had learned of his civil union and reiterated their intention to kill him if he were to return to Egypt. The appellant lodged his second claim in reliance upon this new evidence.

[23] The RSB accepted that it had jurisdiction to consider the appellant's second claim for refugee status, but found that the letters were not genuine. It declined his second refugee claim and his claim for protected person status.

## **The Second Appeal**

### *The appellant's evidence*

[24] The appellant maintained that the letters are genuine. He does not know who informed his brothers about his relationship with FF but believes it could be any one of a number of Egyptian nationals who have visited Egypt from New Zealand.

[25] His second appeal was supported by three witnesses.

### *Evidence of FF*

[26] FF is biologically male but lives as a woman. She refers to herself as such, as do her family members. FF gave evidence, much as she had during the appellant's first appeal hearing, that her relationship with the appellant is genuine and is based upon their mutual love.

### *Evidence of GG*

[27] GG is a national of Iran, with residence in New Zealand. He has known the appellant and FF for about six months and has been flatting with them for approximately two months. He described them as a normal couple. He says that he has heard them and observed them in everyday situations, in social situations with friends and at home. He has heard them converse with each other and argue with each other. He clearly distinguished their relationship as an intimate one rather than one of being two male flatmates.

### *Evidence of ZZ and VV*

[28] ZZ is the biological sister of FF. She says that she was effectively brought up by FF, and regards her more as a mother than a sister. She now has a young family of her own and sees the appellant and FF several times a week.

[29] VV is the biological niece of FF but was raised by her from the time of her birth until she was in her mid-teens. Now in her twenties, VV works fulltime and raises her own family. She lives some distance from the couple but sees them at least twice a month. When they see each other, they spend several hours together.

[30] Both witnesses are close to FF and clearly regard her as the hub of their extended family. They spoke candidly of their observations of the appellant's relationship with FF during the past two years or more. Both witnesses view the relationship between the appellant and FF as genuine.

[31] While aware that FF has had relationships with men in the past, VV explained that FF had not sought to bring those partners within the family sphere. The relationship with the appellant has been different from the outset. It has been a source of happiness both for FF and for her extended family.

### **Material Received**

[32] Counsel provided submissions, statements and country information to the Tribunal under cover of letters dated 16 and 24 November 2011. On the first day of the hearing, he handed up two letters in support of the appellant and a statement in English signed by the witness GG. Counsel also forwarded a bundle of country information under cover of a letter dated 8 December. The information comprised a series of articles. Unhelpfully, counsel made no submissions with respect to the relevance of any of that material.

### **ASSESSMENT**

#### **Credibility**

[33] When considering the credibility of the appellant's second claim, the Tribunal is entitled to rely upon any finding of credibility or fact made by the Authority in connection with the appellant's first refugee appeal. Section 231(1) of the 2009 Act provides that:

“On any appeal or matter, the Tribunal may rely on any finding of credibility or fact

...

(b) by any appeals body in any previous appeal or matter determined by the appeals body that involved the appellant or affected person...”

[34] The Tribunal has no hesitation in relying upon the findings of the Authority relating to the appellant’s claim to have left Egypt because of threats made to his life by his brothers, following disclosure of his sexuality by the appellant’s former wife.

[35] The Authority articulated its basis for rejecting the appellant’s credibility in that connection in comprehensive and compelling terms. Further, the evidence offered by the appellant in support of his second appeal reinforces his lack of credibility. The Tribunal also notes the remarkable timing of the receipt of two letters from the appellant’s brothers. More than two years since he last had contact with them, the appellant asks the Tribunal to accept the coincidence that he received written death threats only three weeks after the delivery of the Authority’s decision declining his appeal. Added to that, the appellant could not adequately explain why his brothers would write to him at all, given that he is illiterate. The letters are not accepted as genuine.

[36] In the context of the appellant’s claims as a whole, the Tribunal intends to rely upon the Authority’s findings to the extent that the Authority rejected the appellant’s claim to have fled from Egypt in fear for his life.

[37] The Tribunal also finds it unsurprising that the Authority came to the conclusions it did with respect to the remainder of the appellant’s account, given the evidence presented in support of the first appeal.

[38] However, the Tribunal must consider evidence that was not made available to the Authority. It has had the benefit of having heard from three witnesses, each of whom has had the opportunity to observe the appellant and his partner in their domestic environment. All three gave evidence about the apparent sincerity of the relationship. While FF’s family members spoke mostly about the benefit of the relationship to their “mother”, it is clear that they regard the relationship to be genuine and believe the love and affection between the two to be mutual. The Tribunal is left with the clear impression that if they perceived the relationship to be a sham from the appellant’s point of view, they would have expressed that view in a forthright manner.

[39] It is accepted that the appellant has been in a same-sex civil union partnership for more than two years. He entered into that relationship in New Zealand before he had applied for refugee status the first time, and at a time when he did not need to claim refugee status in order to remain in New Zealand.

[40] The Tribunal therefore finds that it is appropriate to depart from the findings of the Authority to the extent that it is satisfied that he is homosexual and that he is in a genuine relationship with FF. In reaching that conclusion the Tribunal emphasises that, on the evidence available to the Authority, its decision was justified. The different finding reached by the Tribunal is entirely attributable to the credible *viva voce* evidence of family members and a friend, none of whom gave evidence before the Authority.

[41] The appellant's second claim will therefore be assessed on the basis that he is homosexual and that he is living in a genuine relationship with another man.

## **THE ISSUES**

[42] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

- (a) a refugee under the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention") (section 129); and
- (b) a protected person under the 1984 Convention Against Torture (section 130); and
- (c) a protected person under the 1966 International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

[43] The Tribunal turns first to the appellant's claim under the Refugee Convention.

### **The Refugee Convention**

[44] Section 129(1) of the 2009 Act provides that:

"A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention."



[45] The Inclusion Clause in Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

“... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

[46] In terms of *Refugee Appeal No 70074/96* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

### **Assessment of the Claim to Refugee Status**

*Whether objectively, on the facts as found, the appellant has a well-founded fear of being persecuted if returned to Egypt*

[47] For the purposes of refugee determination, “being persecuted” has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No 74665/03* (7 July 2004) at [36]-[90]. Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection – see *Refugee Appeal No 71427* (16 August 2000), at [67].

[48] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008) at [57].

*Country information relating to the predicament of homosexuals in Egypt*

[49] The Tribunal adopts much of the analysis undertaken by the Authority in connection with the predicament of homosexual men in Egypt – see *Refugee Appeal No 76566* (7 October 2010) at [97]-[102].

[50] The Authority found that, while there are no specific laws that specifically criminalise homosexuality in Egypt, “public morality laws” have been used to prosecute men suspected of being homosexual. These include Egypt’s “Law on the Combating of Prostitution” (Law 10 of 1961), which punishes the “habitual” practice of *di’ara* (translated into English as “debauchery”) with fines and terms of imprisonment of up to three years.

[51] The Authority explained that in practice, the interpretation of the Arabic term *di’ara* has encompassed sexual excess, and has been applied to homosexuality; Human Rights Watch *In a Time of Torture – The Assault on Justice In Egypt’s Crackdown on Homosexual Conduct* (February 2004) p13.

[52] The Authority continued, at [98]:

“The Egyptian Penal Code has also been used to prosecute homosexual behaviour, notably, Article 98w which proscribes “Contempt for Religion”, and Article 278 proscribing “Shameless public acts”; see The International Lesbian, Gay, Bisexual, Trans and Intersex Association (IGLA), Daniel Ottosson *State-Sponsored Homophobia – A World survey of laws prohibiting same sex activity between consenting adults* (May 2010) p10; “Egypt’s homosexuals find home in cyberspace” *BBC News* (15 April 2010); “Step out of the dark ages” *Middle East* (July 2008).”

[53] After reviewing various country reports over the preceding decade, the Authority concluded that the Egyptian authorities rely upon these laws to conduct sporadic arrests of suspected homosexuals:

[99] ... Many of those arrested are detained, charged and placed upon trial; El Menayawi, Hassan “Activism from the closet: gay rights strategising in Egypt” *Melbourne Journal of International Law* (May 2006). Whilst held in detention a number have been subject to serious abuse, including torture; *ibid*. In 2001, one of the largest group arrests of suspected homosexuals took place when police raided a Y City discotheque. Some 55 men were arrested, detained and placed upon trial. Convictions of three years imprisonment followed for 21 such persons, in what became known as the “Queens Boat” case; “Egypt’s homosexuals find home in cyberspace” *BBC News* (15 April 2010).

[100] In recent years, suspected HIV-positive men have become a particular target of the authorities. Several such groups of men, suspected of homosexual behaviour, were rounded up and arrested by police in 2007 and 2008, resulting in convictions and sentences of imprisonment ranging from one to three years. On 14 January 2008, for example, a Y City court sentenced four men to one year of imprisonment upon “debauchery” charges, and on 28 May 2008, a Y City appeals court upheld sentences of three years imprisonment imposed on five gay men; see Human Rights Watch *Egypt: Court Upholds HIV Sentences, Reinforces Intolerance* (28 May 2008); “In the country of boys: a new book on gay life in Egypt sends shockwaves through Egyptian society” *Menassat* (14 July 2009).”

[54] The United States Department of State *Country Reports on Human Rights Practices for 2009: Egypt* (11 March 2010) (“the DOS report”) refers to the practice of arresting suspected homosexuals:

“Although the law does not explicitly criminalize homosexual acts, in at least one case, police targeted homosexual persons and arrested them on charges of debauchery. On January 2, police arrested 10 men in Y City on charges of debauchery. Authorities forced the men to undergo HIV tests and anal examinations in detention. Following a May 27 court order, police released the men on May 30 and 31.”

[55] The DOS report also refers to the “significant social stigma” faced by homosexual men in Egyptian society as a whole.

[56] The Tribunal finds no reason to depart from the conclusion reached by the Authority on the basis of the country information referred to, that:

“... those suspected of homosexual behaviour in Egypt are punished with severity, including imprisonment and serious physical abuse that constitutes a sustained and systemic breach of their core human rights”.

[57] That conclusion is supported by recent country information. For example, the Human Rights Watch report *Work on Him Until He Confesses: Impunity for Torture in Egypt* (30 January 2011) states (at p11) that:

“As the use of torture spread beyond political dissidents to ordinary citizens in police custody or connected to criminal investigations, Human Rights Watch documented ... the routine arbitrary arrest and torture of men suspected of consensual homosexual conduct.”

[58] Broad political developments since the “Arab Spring” have also brought the issue of sexuality to light in the context of the democratic electoral process. According to one article provided by counsel: “Egypt Islamists use homophobia to win votes” *Afrol News* (5 May 2011):

“Homosexuality is becoming an issue in the upcoming Egyptian elections, with the Muslim Brotherhood already being accused of spreading homophobia to win votes.”

### *Breach of fundamental human rights*

[59] The appellant has the right to live a meaningful private life and the right to be treated equally and without discrimination. Those rights, which are more fully articulated in *Refugee Appeal No 75665* (7 July 2004), derive from Articles 2, 17 and 26 of the ICCPR. Article 17 provides that everyone has the right to freedom from interference with private life, while Article 26 articulates the principle of equality or non-discrimination:

#### **“Article 26**

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against

discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

[60] Article 2 provides, in effect, that neither of the rights identified in Articles 17 or 26 can be undermined upon the basis of one’s sexual orientation; *Toonen v Australia* Communication No 488/1992, CCPR/C/50/D/488/1992 (4 April 1994).

[61] The prohibition of discrimination goes to the core of the Tribunal’s understanding of “being persecuted”, characterised by La Forest J as the “sustained or systemic violation of basic human rights demonstrative of a failure of state protection”; *Canada (Attorney General) v Ward* [1993] 2 SCR 689. His Honour described the concept of discrimination in matters affecting those “basic human rights” as “central to an understanding of the Convention” (p733). In doing so, he drew a link to the Preamble to the Refugee Convention, which draws in turn upon the Charter of the United Nations and the Universal Declarations of Human Rights, affirming the principle “that human beings shall enjoy fundamental rights and freedoms *without discrimination*” (Emphasis added).

[62] If the appellant were to return to Egypt it is possible (though unlikely in the long term) that he could continue to avoid physical harm by keeping any knowledge about his true self from his friends and family. He may avoid questions about his marital status and he may even be able to conduct occasional sexual relationships upon a clandestine basis.

[63] However, the appellant seeks to live his life without having to conceal his sexuality. Consideration of the country information outlined makes it clear that there is a real chance that the appellant would be seriously harmed if he were to live openly as a homosexual in Egypt.

[64] As the Authority found in *Refugee Appeal 74665* (7 July 2004), at [114], to deny an appellant the protection of the Refugee Convention because he or she could abandon a core right is effectively to become complicit in the infliction of serious harm. The appellant is under no duty to forego his fundamental human right to freedom from arbitrary or unlawful interference with his privacy, family and home, in order to protect himself from harm.

[65] The Tribunal finds that objectively, on the facts as found, there is a real chance of the appellant being persecuted if he were to return to Egypt.

*Is there a Convention reason?*

[66] Having answered the first principal issue in the affirmative, it is necessary to address the second. In short, the appellant's predicament is for a Convention reason. In *Refugee Appeal No 1312* (30 August 1995), the Authority held that sexual orientation can be the basis for finding the existence of a particular social group. It found that sexual orientation is a characteristic which is either innate or unchangeable or so fundamental to identity or to human dignity that an individual should not be forced to forsake or change the characteristic. The Tribunal adopts that approach and accepts that homosexuals form a particular social group in Egypt.

[67] The appellant's predicament arises for reason of his membership of a particular social group, namely, homosexuals.

*Conclusion on claim to refugee status*

[68] The Tribunal finds that, objectively, on the facts as found, there is a real chance of the appellant being persecuted if returned to Egypt. His predicament is on account of his membership of a particular social group: homosexuals. The appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention.

### **The Convention Against Torture**

[69] Section 130(1) of the 2009 Act provides that:

"A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

[70] The appellant is recognised as a refugee. By virtue of section 129(2) of the Act (the exceptions to which do not apply) he cannot be deported from New Zealand. This is in accordance with New Zealand's *non-refoulement* obligation under Article 33 of the Refugee Convention. Accordingly, the appellant is not a person requiring protection under the Convention Against Torture. He is not a protected person within the meaning of section 130 of the Act.

### **The ICCPR**

[71] Section 131(1) of the Act 2009 provides that:

“A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.”

[72] For the reasons given in relation to the Convention Against Torture, the appellant cannot be deported from New Zealand. Accordingly, he is not a person requiring protection under the ICCPR. He is not a protected person within the meaning of section 131(1) of the Act.

## CONCLUSION

[73] For the foregoing reasons, the Tribunal finds that the appellant:

- (a) is a refugee within the meaning of the Refugee Convention;
- (b) is not a protected person within the meaning of the Convention Against Torture; and
- (c) is not a protected person within the meaning of the ICCPR.

[74] The appeal is allowed.

“A N Molloy”

A N Molloy

Member

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