RM and BB (Homosexuals) Iran CG [2005] UKIAT 00117

IMMIGRATION APPEAL TRIBUNAL

Dates of Hearing: 9 August 2004 & 15 February 2005
Date Determination notified: 8th July 2005

Before:

Mr D K Allen (Vice President)
Mr A R Mackey (Vice President)
Mr C P Mather (Vice President)

Between:

APPELLANTS

and

Secretary of State for the Home Department

RESPONDENT

In this determination, we provide guidance on the issue of risk to homosexuals in Iran.

DETERMINATION AND REASONS

1. The Appellants are both citizens of Iran. They both appeal to the Tribunal against determinations of Adjudicators (in the case of B, a determination of Mr P J Wynne who dismissed his appeal against the Secretary of State's decision of 29 January 2003 to issue directions for his removal from the United Kingdom and refusing asylum; and in the case of E, against the determination of Mr P V Ievins dismissing his appeal against the Secretary of State's decision of 27 June 2002 to issue directions for his removal from the United Kingdom and refusing asylum).

2. These appeals have been heard together as they were identified as raising a common issue, that of risk to persons identified as homosexuals or as being involved in homosexual practices, on return to Iran. The hearings took place on 9 August 2004 and 15 February 2005. Ms N Rogers, for Fisher Jones Greenwood appeared for B, and Mr I Ali, for Ahmad & Williams, appeared on behalf of E. Mr S Kovats, instructed by the Treasury Solicitor, appeared on behalf of the Secretary of State.

3. We should like to record at the outset our indebtedness to Counsel and those instructing them for the considerable amount of work that has gone into the preparation and presentation of these appeals. We have benefited from having had put before us a great deal of evidence, much of it very detailed, concerning the relevant issues. We have listed in an appendix the main sources placed before us, upon which we have relied. Our main conclusions are to be found at paragraphs 123-4.

4. B was found credible by the Adjudicator, subject to a couple of qualifications. He accepted, therefore, that he had had problems since childhood on account of his homosexuality. He had been caught by an officer committing a homosexual act with another man, whilst engaging in military service, and was made to lie on sand and pebbles and lashed seventy times with a cable.

5. Later, in 1998, B and a man, NK, with whom he was in a relationship, were having sexual relations at NK's house when they were seen by NK's mother through a window which faced the garden. She reported this incident to officials. They were both taken away by officials and ill-treated and the Appellant was sentenced to four years and four months imprisonment and one hundred and twenty lashes. The Adjudicator accepted that he served his prison sentence in appalling conditions and was severely ill-treated whilst imprisoned.

6. He and NK were both released in August 2002. They met by chance some two months later and went to a half-built school to have sex. Whilst in the course of this, B heard a noise and saw officials coming quietly and told NK of this and made his escape. He believed that NK was captured and heard NK screaming. He went on a bus to a relative's house in Esfahan and discovered, via his relative, that his house had been raided and his mother detained for one night, although she had been released on bail. He was advised to leave the country and did so, coming to the United Kingdom via Turkey.

7. The Adjudicator concluded that there was no reliable evidence that NK had been executed, and the fact that the Appellant thought he had been was not enough. Even if NK had been prosecuted, there was no way of knowing whether that was for homosexuality or for that offence coupled with something else. It was clear from B's evidence that when the officials arrived, they could not possibly have witnessed any sexual activity between B and NK. The Adjudicator did not believe that B would be of any interest to the Iranian authorities on account of the incident at the building site. The military would not be involved. There would not be any evidence under Shari'a law to enable proceedings to be brought, let alone for a conviction to result. The Adjudicator did not believe that the Appellant would even be arrested.

8. B also produced medical evidence. A Dr Winton said that B suffered from paranoid schizophrenia associated with depression, anxiety and obsessional compulsive disorder. He did not, however, consider that B had post-traumatic stress disorder. A Dr Nazar diagnosed B as having depressive disorder associated with psychotic features. He did not consider that he showed any first rank symptoms of schizophrenic illness, but despite this difference between himself and Dr Winton concluded that B suffered from a severe mental illness within the meaning of the Mental Health Act 1983. At the time of this report in March 2003, B was being treated with a combination of anti-depressant and anti-psychotic medication and arrangements had been made to offer him regular follow-up appointments at Dr Nazar's outpatient clinic. Dr Nazar considered that it was too early to make a prognosis, particularly as B was uncertain of his future.

9. The Adjudicator did not accept that B was a schizophrenic. He preferred Dr Nazar's opinion because he was the doctor who had had more dealings with B and was treating him, and considered that treatment for depression was likely

to be available to B in Iran given the objective evidence which the Adjudicator had considered.

10. Permission to appeal against that decision was granted in September 2003 on the basis that it was arguable that the Adjudicator's finding that the Appellant had been arrested, sentenced and imprisoned for a previous act of homosexual conduct placed him at greater risk from the authorities than practising homosexuals without such a conviction.

11. E is also a homosexual, having had his first homosexual contact at the age of seventeen. At the time of the hearing before the Adjudicator, he was twenty-six years old. He has never experienced any problems with the state on account of his sexuality. His claimed fear of return to Iran arises as a consequence of his involvement in the making of a video in 2002. He had decided to get together with two friends of his, also homosexuals, to make a video in order to educate the gay community about safe sex. Six people were portrayed in the film actually having sex, four gay men and two lesbians. E provided the premises where the film was made and also was the on-screen presenter.

12. The Adjudicator found this claim credible. He also accepted that the authorities in Iran had found out that this film had been made and that E was in some way involved. He found E's evidence somewhat speculative as to how the police found out, but nevertheless accepted that the matter had come to their attention. He did not, however, accept that there was a serious possibility that E had been summonsed. The summons had not been produced, E having said that his family in Iran did not send it to him because they were strictly religious and ashamed of him. The Adjudicator noted, however, that E's uncle knew about it and was sympathetic and had arranged for E's departure from Iran together with his brother, who had been caught having sex with another man. The Adjudicator considered that if the summons really did exist, the Appellant's uncle could have sent it on to him in the United Kingdom.

13. The Adjudicator found a lack of evidence as to the extent to which people were prosecuted in Iran for making pornographic videos. It was unclear as to what, if any, offence had been committed under Iranian law. He did not consider it was sufficient to say that Iran was a repressive society where any form of the expression of or promotion of homosexual behaviour would lead to a prosecution, if not death. He therefore concluded that E was not at risk on return.

14. In the grounds of appeal, the Adjudicator is criticised for not asking E during the hearing why his uncle could not have obtained the summons for him, despite the hostility of his family. It is noted that, in any event, the authorities had become aware of E's actions. Permission was granted on the basis that on the facts found by the Adjudicator and in the light of the country information, it was arguable that E would be at risk on return to Iran.

Relevant Iranian legal provisions

15. We set out first of all the relevant provisions of Iranian law on homosexuality. These are contained in Appendix 1 to the report of Ms Enayat (an expert who

gave evidence on behalf of B) of 1 June 2004 and are accepted by the Honorary Legal Adviser to the British Embassy in Tehran, who also provided evidence.

Chapter 1 – the definition of Lavat

Article 108: Lavat is an act of congress [vati] between males whether in [the form of] penetration or of tafkhiz [the rubbing of thighs/of the penis against thighs].

Article 109: Both the active and passive partners to lavat are subject to the Hadd [punishment].

Article 110: The Hadd [punishment] for lavat where penetration has occurred is death and the method of execution is at the discretion of the Shari'a judge.

Article 111: Lavat is punishable by death so long as both the active and passive partners are mature, of sound mind, and have acted of free will.

Article 112: If a mature man commits an act of lavat with a minor [immature youth] the active partner [ie mature man] will be executed and the passive partner will, unless he has acted under duress, receive up to seventy-four lashes of the whip.

Article 113: Whenever an immature person commits an act of congress [vati: ie whether penetrative or in the form of "*tafkhiz* or other similar acts"] with another immature person [both] will receive up to seventy-four lashes unless one of them has acted under duress.

Chapter 2 – the methods of proving lavat

Article 114: The Hadd [crime] of lavat is proven by confession repeated four times before a Shari'a judge.

Article 115: Less than four confessions do not incur the Hadd [punishment] and the person who confesses will be subject to a discretionary punishment [ta'zir].

Article 116: Confession is valid where the confessor is mature, of sound mind, in control, has free will and [acts with] intention.

Article 117: The Hadd [crime] of lavat is proven by the witness of four just men who have observed the act.

Article 118: The Hadd of lavat is not proven by the witness of fewer than four just men and the witnesses will be subject to the Hadd for slander [qazaf].

Article 119: The witness of women alone, or in conjunction with men, does not prove the Hadd of lavat.

Article 120: The Shari'a judge may rule [issue a verdict] on the basis of the knowledge which he has acquired by normal/generally acceptable methods.

Article 121: The Hadd of tafkhiz and similar acts between two men, without penetration, will be punished by one hundred lashes for each [party to the act].

Note to Article 121: If the active partner is "non-Muslim" and the passive partner is Muslim, the punishment for the active partner is death.

Article 122: If tafkhiz and similar acts are repeated three times, and have each time incurred the Hadd [punishment], on the fourth offence the Hadd [punishment] will be death.

Article 123: If two men, unrelated to one another, lie, without necessity, naked under the same cover, they will each be punished by up to ninety-nine lashes of the whip.

Article 124: If a person kisses another with lascivious intent, they will be punished by up to sixty lashes of the whip.

Article 125: If a person who has committed an act of sodomy [lavat] or the rubbing of thighs [tafkhiz] or similar acts repents before witnesses have

delivered their testimony, he will not be subject to the Hadd punishment. If the person repents after the testimonies have been delivered, he will be subject to the Hadd punishment.
Article 126: If sodomy [lavat] or the rubbing of thighs [tafkhiz] or similar acts is established by confession, and the person who has confessed subsequently repents, the judge may request the Vali-ye Amr [supreme leader] to exercise clemency.

16. These are provisions taken from book 2 of the law of Islamic punishment. We have Ms Enayat's commentary on these provisions in the bundle, and we shall turn to this subsequently.

Background evidence and relevant case law

17. The Iran Country Report of October 2004 has a section on homosexuals and transsexuals. It is said at paragraph 6.171 that there are special parks in Tehran, known as homosexual meeting places, and there are also a large number of transvestites walking around in North Tehran. It is said that a different sexual orientation may create problems, but as homosexuality is practiced every day, as long as this happens behind closed doors within one's own four walls and as long as people do not intend to proselytise transvestism or homosexuality, they will most likely remain unharmed.

18. The report then sets out a number of the provisions of the law of Islamic punishment which we have set out above. It is said at paragraph 6.174 that so far no cases of execution solely on the grounds of homosexual relations have been identified and it notes that the burden of proof is quite high and it would be difficult to prove homosexual liaisons or intercourse. There is reference to reports in local papers to instances of executions of homosexuals but it does not confirm whether the homosexual act alone led to execution, or whether the person was accused of other charges also. There is also reference to a Reuter's report of 18 July 2002 on a man accused of sodomising then murdering his nephew who was to be thrown over a cliff in a sack. No reports had been received that the sentence was ever carried out, however.

19. The report at paragraph 6.178 also quotes the Canadian IRB in 1998 that though theoretically homosexual behaviour is sharply condemned by Islam, in practice it is at present, and has been in the past, for the most part tolerantly treated and frequently occurring in countries where Islam predominates and that in practice it is only public transgression of Islamic morals that is condemned, and therefore Islamic law stresses the role of eye-witnesses to an offence. The same source also states that the police are not empowered to pursue and nor do they actively pursue homosexual activity of any kind performed behind the "veil of decency" of closed doors. It is also said at paragraph 6.180 that sources indicate that there are held to be very differing levels of homosexual activity within Iranian society and that in rural areas even "*lavat*" sexual activity can be considered socially to be compensatory sexual behaviour for heterosexual sexual intercourse and the practitioners held not to be homosexuals.

20. In Mr Kovats' replacement skeleton argument, there are a number of references under the heading at paragraph 7 to the effect that in practice the Iranian authorities tolerate homosexuality as long as it is discreet. We refer

only to the most recent of these. There is a letter from the British Embassy in Tehran dated 18 May 2004 referring to advice given by the Honorary Legal Adviser that laws against homosexuality are rarely enforced and have not been for some years and the last case of capital punishment she recalled was fifteen years ago. In a subsequent letter from the same source of 13 June 2004, the Honorary Legal Adviser was not aware of any convictions having been made under Article 120 but said that statistics of this kind were not available and there had been none in her own long experience.

21. The point is made at section 11.4 of the UNCHR/ACCORD 7th European Country of Origin Seminar in Berlin of 11-12 June 2001 at page 337 of Mr Kovats' bundle that the fact that irrespective of the standard or burden of proof, the sentence for homosexuality is death is a very important element in any assessment and it is said that it would be inappropriate to water down the existence of the death sentence with arguments of a high burden of proof, relative tolerance or the fact that there is no systematic effort to prosecute homosexuals. UNHCR had not been able to trace any cases of execution only on the grounds of homosexual relations and reference is made to the fact that the burden of proof is quite high and it would be difficult to prove homosexual liaisons or intercourse.

22. There is also reference to the Australian Refugee Review Tribunal case NO1/37352 (2001), at pages 452 to 456 of the Secretary of State's bundle, setting out independent evidence considered by that Tribunal concerning homosexuals in Iran noting that there had been no executions of homosexuals carried out in recent years and that the authorities would be unlikely to bring charges unless an individual had been notably indiscreet or was of interest to them for other reasons. In a further decision of the Australian Refugee Review Tribunal, case NO1/37891 (2001), it was said at page 469 that while the legal penalty for sodomy/homosexuality is execution, it is extremely difficult to get a conviction on those grounds. Amnesty International admits that it is difficult to substantiate reports of execution for sodomy or homosexuality and speculates at best, it is said, on its implementation. Attention is drawn to the fact that the position of homosexuals does not feature in the US State Department Report for 2003.

23. Mr Kovats also drew our attention to two decisions on admissibility by the European Court of Human Rights. These both concerned Iranian homosexuals. In the first case, that of F v United Kingdom, application 17343/03 (2004), the Court observed, at page 495 of Mr Kovats bundle, that the materials examined by the domestic authorities and submitted by the applicant did not disclose a situation of active prosecution by the authorities of adults involved in consensual and private homosexual relationships. It is said that there are no recent substantiated instances of trials solely on the basis of such relationships and that concrete examples relate to rape of minors or political activists. It is said that this is at least partly accounted for by the high burden of proof for such offences (eg four eye-witnesses) whilst it is also asserted that Islam is more concerned with public immorality and not with what goes on in the privacy of the home. It is said that the few sources which refer to trials or execution for homosexual offences occurring in recent times appear vague and unspecific. The Court agreed with the comment in the Danish report on 16 January 2002 which was a fact-finding mission to Iran in

September 2000 that the homosexual community would be expected to know of incidents of trials for homosexual offences alone.

24. More recently in the case of IIN v The Netherlands, application no 2035/04, points very much to the same effect are made at pages 12 and 13 of that judgment. The Court considered such materials as a general report on Iran of the Netherlands Ministry of Foreign Affairs of 24 August 2001, a more recent report from the same source of April 2004, the UNCHR background paper on refugees and asylum seekers from the Islamic Republic of Iran dated January 2001, the position paper on persecution of homosexuals in Iran issued by the UNCHR branch office in German in January 2002, the Danish fact-finding mission to which we have referred above whose report was issued on 16 January 2002, a Canadian Refugee Board report on treatment of homosexuals in Iran dated 11 February 1998 and updated on 20 January 2003, and what was at that time the most recent Country Information and Policy Unit Assessment of the Home Office.

Expert evidence

25. We also had evidence from the British Embassy in Tehran's Honorary Legal Adviser. She is an Iranian lawyer of some twenty-five years experience who holds a degree in law and will have passed examinations enabling her to practice at the level of barrister, such certificate being renewable on an annual basis. This particular Honorary Legal Adviser sits on the Human Rights Commission of the bar and is active on the Committee for the Defence of the Rights of Women and Children.

26. There is a letter from the British Embassy in Tehran dated 18 May 2004 referring to advice given by the Honorary Legal Adviser that laws against homosexuality are rarely enforced and have not been for some years, and the last case of capital punishment she recalled was fifteen years ago. In a subsequent letter of 13 June 2004 from the same source, the Honorary Legal Adviser was not aware of any convictions having been made under Article 120, but said that statistics of this kind were not available and there had been none in her long experience.

27. We also have evidence from Ms Anna Enayat, who is a senior associate member of St Anthony's College, Oxford and the Middle East Centre there. Her evidence is contained in two reports dated 1 June 2004 and 16 December 2004, and in addition we have her full comment on the translation of cases provided by Mr K (an Iranian lawyer who also gave evidence before us) which was submitted by the Home Office, and a table numbering the judgments referred to. We also heard oral evidence from Ms Enayat.

28. In her report of 1 June 2004 Ms Enayat commented on the Adjudicator's determination in B and also on the Country Report and various other aspects of the evidence concerning the situation for homosexuals in Iran. She did not argue that the Iranian authorities conducted continuous witch hunts or actively sought out homosexuals who practised in private, but considered it to be extremely unlikely that if for some reason a case was brought to their notice it would not be investigated and prosecuted. It was clear that there were practising homosexuals in Iran and it was "well known" that homosexual men made contact with one another in parks in Tehran, the Dameshjoo Park being

the location most frequently mentioned in the literature, but it could not be inferred from the existence of such meeting places and the fact that undoubtedly many homosexuals managed to avoid prosecution that a practicing homosexual does not face risks. Nor did she consider that it could be inferred that there was anything resembling a publicly accepted "gay scene" in Iran. Homosexuals did not congregate in an overt fashion. Urban parks were patrolled by members of the Basij and other morality police units, some in plain clothes. Homosexuals who avoid showing overt signs of their sexual orientation in public can for the most part avoid being targeted by the controls. Enforcement of the law is inconsistent on the part of the Iranian authorities.

29. Ms Enayat considered that the law concerning homosexuality was accurately if briefly summarised in the CIPU so far as sodomy is concerned, but she referred to other aspects of non-penetrative homosexual acts which the law also covers, and took issue with the description in the CIPU Report of some of the articles from the law of Islamic punishment of which we have set out her translations above.

30. Ms Enayat emphasised that contrary to what is said in the CIPU, there was no revision of the law in 1996 concerning homosexual acts. She emphasised however that in practice homosexual acts may be subjected to what is known as a ta'zir punishment. This is in essence a discretionary punishment, that is to say a punishment whose kind and severity is at the discretion of the judge. This contrasts to a Hadd punishment which is one fixed in divine law and which must be applied if the crime if proven. The post-1979 codification categorises crimes according to the principles of the Shari'a and divides the five books of the law on this basis. According to Shari'a law, a ta'zir penalty is at the discretion of the judge. However the subjects of book five of the codification which deals with the tazirat does not cover all the contexts in which a ta'zir punishment can be applied; many articles of the law concerning homosexuality set out in book two of the codification include some acts to which in practice a discretionary punishment is attached. For example where lashes are concerned, ta'zir or discretionary punishments are distinguished from Hadd punishments by the expression "up to" ninety-nine or sixty-four lashes rather than a fixed quantity.

31. As regards what is said in the Country Report on methods and standard of proof, she contended that the CIPU does not consider the substance of the methods of proof. She noted that the text of the law gives equal weight to the three alternative methods of proof (witnesses of four just men, confession of the accused repeated four times or the knowledge of the judge derived through customary methods) and stated that it is erroneous to believe that witnesses are the most important form of proof and that confession is often induced by torture and the admission of circumstantial/ordinary evidence under the rubric of the "knowledge of the judge" means that the legal framework is far more flexible than is generally believed.

32. With regard to "the knowledge of the judge", this was defined in the 1992 Iranian textbook of general criminal law as meaning "the judge's certainty that a crime has been committed ...". The acquisition of such knowledge has, for the judge, the status of proof in the sense that whenever the judge becomes certain of the truth/reality [of what has occurred] he has no need to hear other

types of proof such as confession or witness. The "knowledge of the judge" has the same weight whether the case is criminal or civil.

33. Ms Enayat considers that the "knowledge of the judge" is a term used in Shia Islamic jurisprudence for what can, broadly speaking, be described as circumstantial/ordinary evidence. According to Ayatollah Gilani who for many years has been head of the Supreme Court, for the crime of Lavat (and other divine right crimes) the "knowledge of the judge" is the most important method of proof.

34. As regards the Country Report on the enforcement of the law, Ms Enayat contended that the source for much of what was said in an article by Maarten Schild regarding the discrepancy between legal theory and actual practice concerned homosexuality in Islamic societies in general rather than current practice in Iran. She reiterated the view that we have set out above, that whether or not the Iranian police actively seek out homosexuals, if they caught two men engaged in whatever form or stage of sexual relations or received a report of the existence of such a relationship they would almost certainly investigate. She referred to the fact that there are campaigns against moral offenders of all kinds conducted intermittently in Iran. She also stated that an important aspect of the vulnerability of practising homosexuals is the scope given in Iranian-Islamic law to private complaints, and that very many court cases involving moral contraventions of one kind or another are in fact initiated by such a "complaint" which may be brought directly to the courts by a private citizen or by one or other of the agencies which police morality in Iran. This is a large source of insecurity for a practising homosexual in Iran.

35. She went on to state that the Iranian government judiciary and press all adopt a general policy of "silence" over homosexuality and that trials dealing with "moral contraventions" are for the most part held in camera. She referred to interviews with judges concerning homosexual offences and the frequency on which they are brought before the Iranian courts.

36. As regards capital charges, she referred to the variety of methods of execution which exist in cases where sodomy is established. It is hard, she stated to find systematic documentation about the sentences imposed on homosexuals by the courts. She considered that there are good reasons to believe that executions of homosexuals take place without being reported. The difficulties lie in the fact that cases of homosexuality as with nearly all cases which offend public morals are heard in camera and that from the early 1990s the Iranian government according to international monitors ordered the Iranian press not to report on all executions. Homosexuality is a taboo subject in Iran and the family and friends of persons convicted of homosexual offences are extremely unlikely to campaign or publicise a conviction owing to the social stigma attached to trial and conviction on a charge of homosexuality. She considered that it is a generalisation to state that death sentences are only imposed where a multiple offence has taken place.

37. As regards non-capital offences, for the same reasons there is no information about the extent to which non-capital homosexual offences are punished. There are some references in evidence from such sources as an Iranian newspaper, an interview with the presiding judge of the Ershad Judicial Centre and other sources which in general terms deal with cases involving

moral evil or illegitimate relationships. She stated that in cases of non-penetrative homosexual acts or homosexual acts which have been proven by fewer than four confessions the punishment would generally be lashes although imprisonment, given the concept of ta'zir, would in certain circumstances be an option. Many sentences not involving lashes would not be recorded either, as the judiciary does not announce them all because the crimes are commonplace. She stated that lashes are sometimes commuted to fines under Article 22 of the law of Islamic punishment but this only applies to ta'zir punishments and could not for example apply to a punishment of lashes for a Hadd crime such as tafkhiz.

38. In her evidence before us on 9 August 2004, Ms Enayat developed some of the points made in her reports. As regards risks for homosexuals who conducted such acts in private, the law did not distinguish between public and private acts except if the people were in a mosque or public building there would be extra penalties for sodomy and other homosexual acts. A person could be convicted without the authorities seeing the act, on the basis of a confession or the knowledge of the judge. In effect it would be on the basis of circumstantial evidence and how that was assessed.

39. As regards known cases of execution for homosexuality alone, she had seen none that had come into the public sphere through the international press, though Mr K would give evidence concerning cases. There was a tendency of the Iranian Authorities only to report cases which satisfied their model of a corrupt homosexual.

40. With regard to what had been said by the British Embassy that knowledge of the judge was hardly ever used, there was reference to this in the "legal loopholes" document that formed part of the evidence in E's case, including a reference to the knowledge of the judge being used in 2.5 per cent of cases. Admittedly this was only based on a sample of 48 cases taken at random from the Ershad Judicial Centre's case files.

41. She had never heard that the judiciary were given instructions or guidance as to how to deal with cases of homosexuality. The law on homosexuality was no different now from how it had been when initially introduced in 1982 to 1983. A person caught could confess under duress and this was very frequent, and they could be medically tested so that traces of sexual activity could be detected. This could be used in evidence as part of the knowledge of the judge if the police had seen a couple together.

42. Ms Enayat had read Professor Afshar's report and also Professor Amin's and thought in general they were reliable, though she queried one or two small points. Professor Amin was an expert on the Iranian legal system. As regards Professor Afshar's report there was an error at page 4 concerning the ta'zirat in that there was no mention of homosexuality in the ta'zirat code. It was an understandable error, and otherwise she agreed with the report and the error did not make any difference to the gist of the report.

43. Discovery of homosexuals could happen by chance or by reports of other people or sometimes there were moral "crusades" and they might seek out homosexuals. She agreed that homosexual activity would usually be carried out in private. It was very rare for two men to live together in Iran beyond

student age, and though it was not an offence it could arouse neighbourhood suspicions as being very unusual. As regards whether Iranian men behaved in a way that could be seen as homosexual in the West, men kissed when they met, and would go out arm-in-arm, and this was not seen as a problem. As regards holding hands she was unsure, and had rarely seen it. It was clear that people were taken to court and punished though it was unclear what happened in the courts. She was asked whether the homosexual community in Iran would not publicise prosecutions and punishments, and she said that there was no gay community in Iran in that sense. As a lobby for publicity it would be dangerous and a family would not publicise it if, for example, their son was executed for homosexuality. She had no evidence of executions without publicity, questioning how she could know about that. The family would be forbidden to talk about it. She did not attach weight to the US Report, which made no mention of homosexuals in Iran. She was not aware of any case of where a homosexual couple had been prosecuted as being together and having been reported by the neighbours. For the most part she thought that since the Revolution there would not be a discreet gay community in Iran. She thought that there was a certain degree of coordination and contact. There were raids on homosexuals in parks in Tehran.

44. We also heard evidence from Mr K who was a registered member of the Iranian Bar with a number of years experience of legal practice in Iran. He had provided two statements, the first dated 1 June 2004 and the second of 16 December 2004.

45. In the first report he stated that Islam considers homosexuality to be a sexual deviation leading to a perverted act which goes against the natural order God intended for mankind. According to Shari'a law, if two male adults are proved to be engaged in homosexual intercourse, both parties will be condemned to death. He states that sexuality is not a private matter in Islamic society, and there is no acceptance of gay culture or homosexuality as a lifestyle choice, and no tolerance of, or excuses for, homosexual activity.

46. He referred to relevant provisions of the Iranian Penal Procedure Code and the Civil Code which set out the appropriate punishments depending on the nature of the homosexual act. He stated that in the case of sodomy, as the punishment is the death penalty, it is compulsory that the defendant be represented by a first-class attorney, this being the highest rank of defence lawyer within the Iranian legal system. If the accused person is unable to employ a lawyer by himself, then an attorney would normally be appointed by the judiciary. This would happen through the medium of the Bar Association. He stated that he had witnessed cases and defended such clients who had committed the crime and who were sentenced to the death penalty in Iran. Although it was not final and could be appealed in the Supreme Court, he claimed that there was a special court which was provided for such cases which simply gave a stamp of approval to the previous verdict without considering the defence. No journalist was allowed to report on these cases and no lawyer could obtain a copy of the file documents. He stated that there was no statistical evidence as to the number of people killed for this crime each year, given the threats to families not to talk about the reason for death. He also stated that the Islamic clerics insisted that these cases remain private

to try and protect the Islamic society from being corrupted, and that publicity might cause other people to commit these sinful activities.

47. It became necessary to adjourn the hearing of 9 August 2004 since Mr K who had been due to give evidence on that day, produced two books, one of which was a digest of judgments over a ten-year period to 1999 concerning criminal cases and the other being a textbook for practitioners. Though as regards the former he only wished to rely on one of those cases Mr Kovats indicated that he would wish to see what the other cases said, and as regards the latter Mr Kovats preferred to see this in the context of the book as a whole. It was therefore necessary to adjourn in order to enable the relevant documents to be translated and commented on.

48. At the hearing on 15 February 2005 we heard oral evidence from Mr K. He confirmed that the contents of his statements were correct. Many people practised homosexuality in Iran and could meet openly if they were not committing anything. They could freely meet and talk, but if they touched each other or held hands or kissed or did something similar then it would be a crime and they would be arrested. If something happened in private and no one knew, then no one could do anything about it and the same would be true for any crime. A crime had to be discovered. If it were discovered then it was highly possible that there would be a prosecution.

49. With regard to the suggestion by the Honorary Legal Adviser that more recently the judiciary had been given guidance to be more lenient with regard to those crimes, he said that there was a difference between what was announced by the judiciary and what they actually did. He recalled a time when a United Nations human rights representative wanted to come to Iran and make a report, and the judiciary and the solicitors talked about having to deal with the crime in a lenient way as they did not want to be talked about and blamed by the human rights organisations, but at the same time they could not put aside their religious laws on such questions. He referred to an interview with Ayatollah Sanei at page 512 of Ms Rogers' bundle, where it was said that it would not be possible to put aside execution of homosexuals.

50. With regard to his own experience of people being prosecuted for homosexual acts, he had acted every year, as lawyers were required to, in accepting such cases without a fee and he had had two or three cases where he had had to defend a client.

51. In one case a university student had committed homosexual acts in the dormitory, and it was proved that he had done it and he had been sentenced to death. This was in 2000 or 2001.

52. He had read the reports of both Professor Afshar and Professor Amin. With regard to the former he agreed with her views as to the likelihood of arrest and punishment on return for homosexual activities. If other people carried out homosexual acts there would be another law in relation to which they would be tried. This was Article 639 of the Islamic law, and could give rise to one to ten years' imprisonment and was appropriate for someone such as E, who had provided a place for others to commit these crimes. For making and appearing on the video that would be the range of likely sentence.

53. On cross-examination Mr K said that he had qualified as a first class attorney in 1996 to 97. He had left Iran in March 2002. As regards the pro bono cases, there was not a given quota, but it depended upon the number of people who needed help. He had appeared in many of these cases, but only two or three had been in connection with homosexual crimes. As regards the case other than the dormitory case, this had involved factory workers who had committed homosexual acts and there was no witness and they had not confessed and they said they were just joking around and were given lashes. This was because according to the law the case could not be proved, and this was Article 115. If you were involved in the crime but did not confess four times then you would be subjected to lashes.

54. The student had been sentenced to death because he had confessed. They had found sperm in his body. There was no way for him but to confess. He had carried out homosexual acts for a long time with another student, and his room mate had realised this and reported it to the people responsible for the dormitories, and they had put the person under surveillance and entered the room at the time he was arrested. He knew he would receive the death sentence and he had confessed. He did not, however, confess until the coroner's report arrived, and even if he had not confessed, the crime would be proved by the personal knowledge of the judge according to Article 120. He had confessed after the witness had given evidence. Mr K did not know whether the sentence had in fact been carried out. He had referred to the role of the coroner in that case and this was not only in respect of death but also other matters and as a consequence of there being aspects of legal medicine involved in the case including such matters as drink driving or wife beating. In a case such as this the body of the passive person was referred to a doctor who also knew about the law, and they would confirm what had happened. It was not the case that one of the parties had died.

55. With regard to the interview with Ayatollah Sanai, he agreed that unless you had full proper confessions or four witnesses with the specified conditions you could not convict of a capital offence but only the ta'zir offence. The Ayatollah referred to the difficulty and unlikelihood of proof on the basis of four confessions or four just witnesses, and Mr K agreed with this. He also agreed with what Professor Afshar said about holding hands and kissing. Islam taught that they were brothers and you could kiss the face and hold hands and he did not mean they would be at risk in that way but referred to a different kind of touching and kissing.

56. He stated that in cases where there was lashing this would be one hundred lashes. He was asked why they were lashed if the case had failed, and said they had committed some act against Islamic laws, and ta'zir was a kind of punishment that the judge would determine as regards the kind and extent, and he could decide whether it would be lashes or less than ten years in prison, and it was in the discretion of the judge. It was put to him that he had said that the cases could not be proved and he said they could not prove the intercourse part of the act. The factory workers had been joking; one of them took off another's trousers and "put a pipe on his back" so they thought they had perhaps committed homosexual acts and had investigated. The judge had realised it was just a joke, so they were sentenced to lashes only so that they would not repeat the act.

57. We have the translations of the Iranian court judgments which were submitted by the Treasury Solicitor to the Tribunal on 23 December 2004. We also have a further report from Ms Enayat dated 27 January 2005 commenting on the judgments. The translated judgments all come from the chapter on Lavat in the compilation by Bazgir whose title is translated as "*The Law on Islamic Punishment as mirrored known in Supreme Court Rulings: Hodud Crimes Against Public Virtue*" Tehran 1999 to 2000. There is also a book entitled "*An Explanation of the Islamic Punishment Code*" by Zera'at. In her report of 16 December 2004, Ms Enayat commented on a report by the Honorary Legal Adviser to the British Embassy of 27 October 2004 and also on the Bazgir and Zera'at books. She stated that her response drew on forty-one Persian language court verdicts included under the title "*Sodomy and tafkhiz in the Law Bank of the Tehran Judiciary*", this being an internet database which may be freely accessed. Of the forty-one verdicts, thirty have been taken by the Law Bank from the compilation by Bazgir and the cases would have been sent to Tehran. Six are from a legal textbook entitled "*A Selection of Judgments from the Criminal Courts*" compiled by Sabri in 1999, and four are from the annually published proceedings of the General Council of the Supreme Court. One is a ruling of the Disciplinary Court of Judges. Four out of six of the verdicts in the Sabri compilation are from the court of first instance and one is a ruling on an appeal to the Supreme Court.

58. Ms Enayat dealt first with the jurisdiction of the Supreme Court of Iran. It is a court of cassation and also functions as a court of appeal for the review of verdicts by the Public and Revolutionary Courts in cases including those where the crime is punishable in law by execution or stoning or where punishment is in excess of ten years' imprisonment. A review is confined to points of law. The Supreme Court may uphold the decision of the lower court or may quash its verdict and acquit the defendant or may remit it back for rehearing either to the original court or to a different court at the same level.

59. Ms Enayat made the point that the judgments published in the compilation by Bazgir and Sabri and reproduced in the judiciary's Law Bank represent a selection from the Supreme Court chosen to illustrate the way various benches of the court have interpreted and applied the law. The cases cannot therefore be viewed as representing either a comprehensive picture or a statistical sample but are selected to illustrate the variety of situations which from a legal point of view may arise in the courts and illustrate problematic rather than routine cases.

60. Ms Enayat made the point that there are no systematic crime statistics published in Iran for any type of offence, but noted that in the year 2002 to 2003 over 86,000 criminal cases were classified as "crimes against public virtue". She also made the point that there is no general concept of precedent in the Iranian legal system and that the judgments therefore do not constitute case law in the sense of which the common law would understand it. The cases appealed to the Supreme Court in the compilations were only those for which the original charge was sodomy. If the original charge was, rather than penetrative sodomy, tafkhiz, for which the punishment is 100 lashes, the provincial Court of Appeal would be the correct authority. Where the verdicts of the court of first instance were quashed they were usually remitted to a different court of first instance to be reheard, though in two cases they were returned to the court of issue. Ms Enayat added that to the best of her

knowledge there are no published examples of the rulings of provincial Courts of Appeal.

61. She was asked to comment on the documentation produced by Mr K on the 9 August 2004, this being the Bazgir case reports and a student book on criminal law in Iran. The extracts sought to be relied on were copied to the Honorary Legal Adviser and she was asked to respond to a number of questions drafted by Mr Kovats.

62. The Honorary Legal Adviser stated that the case histories provided related to the 1970s and 1980s when immediately following the revolution judgments were often much harsher than now and a number of unqualified persons were being admitted to the judiciary and other institutions and therefore these case histories did not necessarily reflect the current situation which was more amenable to international pressure and scrutiny. She was aware that five to six years ago judges circulated an unpublished letter recommending the avoidance of sentences involving stoning, and instead lashes or imprisonment that were to be used and crimes if possible can lead to lesser offences under ta'zirat rather than Hadood.

63. In her letter of 23 October 2004 the Honorary Legal Adviser made the point that other than in the case of confessions, establishing sodomy had been committed was almost impossible as four pious men well known for their righteousness must give testimony that they entered the scene of committing of the sin, approached the individuals committing the act and observed with their own eyes the full and complete commitment of the act according to its definition. She made the point it is very difficult if not impossible for ordinary social human beings to continue the act of intercourse with its full definition of such acts in such way as to provide full observance for four pious men well known in the society for their righteousness and who had entered the scene in order to condemn them to death. She stated that if the witness testimony ascertains apparent intercourse, then the punishment of the perpetrators will not be life threatening but they will be condemned to whipping. She stated that complaints were lodged only in case the perpetrator forces the act of sodomy upon the victim. She also stated that a glance of the judgements available in respect of illicit sexual relations of two or more males reveals that almost all of the charges concerned child molestation. She stated that to the best of her knowledge homosexuals have not yet appeared before a court unless there has been a complaint lodged against them by an interested party such as parents and even in such cases the perpetrators manage to persuade the court to issue an acquittal by stubborn insistence on their innocence or that their acts fall short of the definition of full and complete sodomy. It is also of course the case that they can declare their remorse and repentance which will lead to them not being punished in the above ways. She stated that with regard to the cases they were all prosecuted after complaints were lodged with court by the victim or next of kin, and where defendants were not acquitted they were sentenced to whipping. In such cases the evidence was mainly the acknowledgement of guilt and confession by the perpetrator. She stated that the maximum punishment in cases cited in the book is 74 lashes and also says that the appeal courts usually overturn the judgments of the first instance courts. She stated that it is not known if the judgment which resulted in execution was actually carried out. She also said that there are no statistics on cases in Iran pertaining to homosexual acts and to the best of her

knowledge homosexuals had not been prosecuted as there have been no complaints against them and charges may involve child molestation and rape.

64. She also responded to further questions from the British Embassy as follows. She was asked whether the knowledge of the Judge under Article 120 was sufficient to prove an offence of sodomy and answered yes that a Judge could make a final verdict where, in theory, they would have to be a person of integrity and be impartial, experienced and learned but only if left in no doubt after listening to witnesses and cross examination would the offence be proven. To avoid the death penalty, confession would have to be made before any witness testimony was heard otherwise its value was diminished.

65. Ms Enayat took issue with specific comments of the Honorary Legal Adviser as regards certain aspects of these reports. First of all she criticised the comment that the case histories provided relate to the 1970s and 1980s where it is said that judgments were often much harsher than they are now. In fact the earliest case in the compilation is number 4/136 where the death sentence was issued in July/August 1989, and the majority are from the period 1991 to 1995. She also criticised the Honorary Legal Adviser's comment that complaints are only lodged in cases where the perpetrator forces the act of sodomy on his victim. She cited eight examples in the Bazgir compilation which did not involve force and two in the Sabri compilation. As regards the comment that homosexuals to the best of the Honorary Legal Adviser's knowledge had not yet appeared before a court unless there was a complaint lodged against them by an interested party, if this meant an individual in the homosexual's personal sphere, there were at least three examples in the Bazgir compilation of men charged with sodomy without the question of force being raised where the complainant was clearly the public prosecutor. She notes that the identity of the complainant in some of the case summaries is obscure.

66. Ms Enayat noted that out of the twenty eight appeals considered by the Supreme Court, six resulted in outright acquittal in the court of first instance appealed by the complainant, five of which were confirmed by the Supreme Court and one remitted to be reconsidered; twelve resulted in a conviction for sodomy and a death sentence on that account in the court of first instance, ten of which were quashed by the Supreme Court for procedural reasons and were remitted to be reheard and one case resulted in the conviction of a minor for sodomy who was sentenced to seventy four lashes confirmed by the Supreme Court. Nine cases resulted in a conviction in the court of first instance for tafkhiz or an immoral act. In six of these cases the Supreme Court confirmed the verdict and sentence and in one case the court ruled that there was inadequate evidence of tafkhiz and the case was remitted. There is no information on the verdicts handed down at the remitted hearings or the response of the Supreme Court to them. There is some indication however in one or two of the cases of what happened on remittal. Case number 22 (Sabri) (1993) involved the court of the first instance ruling on a case of forced sodomy remitted by the Supreme Court in 1992 to 1993 which is not among the Bazgir collection. The verdict of the original court was not stated but the new court declared its agreement with the Supreme Court and sentenced the man to one hundred lashes on account of tafkhiz.

67. Ms Enayat made the point that the identity of the complainant is not always clear. In cases of charges of sodomy of a minor the complainant was always

the next of kin of the child. In several of the cases of sodomy not involving rape the complainant was the public prosecutor. Ms Enayat reiterated the point that the risk of a complaint being made by a neighbour, servant, spouse or other person in their orbit is a large source of insecurity for a practising homosexual in Iran. It is clear from Article 727 of the law of Islamic punishment that there are certain Articles of the law for which a case may be brought by a private complainant and in which the prosecution ceases on the withdrawal of the complaint. None of the Hadd crimes and none of the crimes against public virtue under book 5 of the law of Islamic punishment are included in this list. The fact that a complaint is made by a private individual does not in itself determine whether the case is treated by the courts as a public or private matter.

68. Ms Enayat also made the point that in some of the case histories it is unclear what method of proof was used. The knowledge of the judge was the method of proof used in ten of the fifteen cases in which the method was explicitly set out. In two cases confession was the method of proof and in three cases confession accompanied by reference to a medical certificate was cited. In the case of both confirmed death sentences the method of proof was "the knowledge of the judge". In six of the ten cases where the knowledge of the judge was the method of proof, the Supreme Court confirmed the verdict of the court of first instance. In no case was the "witness of four just men" used as the method of proof. She also made the point that the case histories supply abundant indication of the use of knowledge of the judge in Hadd cases. She noted that this conflicts with the statement in the Honorary Legal Adviser's report from the letter of the British Embassy of 13 June 2004 concerning a lack of awareness of any convictions being made under Article 129 and the absence of statistics. Ms Enayat went on to make the point that quite apart from the verdicts in the Bazgir collection, it is rather puzzling that the Honorary Legal Adviser should believe the use of the knowledge of the judge to be redundant since articles on the subjects are regularly published in the contemporary law literature, and she cited examples of this.

69. As regards the Honorary Legal Adviser's comment that the maximum punishment in cases cited in the book was seventy four lashes, in six cases the Supreme Court confirmed verdicts of tafkhiz at 100 lashes. In two cases prison sentences (of six months and five years respectively) were confirmed by the Supreme Court.

70. As regards the Honorary Legal Adviser's view that the appeal courts had usually overturned the judgments of the first instance court, this was in fact done in ten of the twenty eight cases. In two cases verdicts were returned to the court of issue for clarification, in one case the Supreme Court exceptionally ordered a review of a confirmed death sentence, and in six cases outright acquittals by the court of first instance were confirmed, though in one case an acquittal was overturned. The majority of death sentences were overturned and the case remitted. The majority of sentences for the lesser offences of tafkhiz or an immoral act were confirmed by the Supreme Court.

71. As regards whether the death sentence was carried out, Ms Enayat noted that given the attitude of the Iranian authorities in the relevant period it was highly unlikely that executions would have been announced, though there was some

evidence from the UN Special Representative for Iran and Amnesty International concerning numbers of executions.

72. In her conclusions Ms Enayat stated the view that, for the reasons set out above, the cases could not be treated as a statistical sample. It was clearly not the case that only cases of child molestation come before the courts. She concluded that the knowledge of the judge is a commonly used method of proof across the various types of case. She considered that the examples showed that certain judges of the Supreme Court have been pedantic about what can be accepted as evidence of penetration (case 32/106 and case 18/108 are examples of this) and have frequently rejected the evidence of a medical certificate alone. It was also the case that the medical reports were drawn up before the advent of DNA testing and there was no information on the attitude taken by the courts since that development. She considered it to be evident that the courts have readily accepted verdicts of tafkhiz (non-penetrative homosexual acts) generally based on either the knowledge of the judge or confessions that are viewed as imperfect from the point of view of each Shari'a. There was no published material on cases that began with charges of tafkhiz or of immoral acts since of course these would not be appealed in the Supreme Court.

73. In the light of the evidence thus far, Mr Kovats stated on behalf of the Secretary of State that it was accepted that if a person were prosecuted for homosexual acts, there was a real risk, depending upon the evidence, of conviction and, if convicted, of whipping. The main focus, therefore, was the likelihood of prosecution and whether there was a real risk of evidence leading to a conviction. It was accepted that if whipping did occur, it was not in dispute that it would give rise to a breach of a person's Article 3 rights

Submissions

74. In her submissions, Ms Rogers first addressed the specific determination in the case of B. She referred to paragraph 33 of the Adjudicator's determination. It was notable that it was difficult from the objective evidence to show how often the death penalty was now used in Iran. The expert evidence referred to the various reasons for this, such as problems in getting evidence in a moratorium on reporting executions and a degree of sensitivity on the part of the authorities. It was clear, however, from the evidence that executions did take place, even if not for homosexual acts alone. Mr K had given evidence today of the death sentence being passed for homosexual acts.

75. The Iranian law on homosexuality was complex, and Ms Rogers suggested that the easiest summary to follow was that at page 193 and thereafter in the bundle. The Honorary Legal Adviser did not seek to differ from this. She took it that its accuracy was not contested. The Appellant did not need to show that he would be executed. Mr Kovats had conceded that lashing would be such as to cross the Article 3 threshold and this was clearly right. Under article 112, seventy-four lashes would be meted out and otherwise ninety-nine lashes under articles 123 and 124. If the evidential basis for sodomy with penetration was not proved before the judge, then the fallback position was a large number of lashes, even though the evidence was somewhat shaky. Article 115 was relevant in this regard. If there were other evidence, then according to Mr K, the discretionary punishment would occur where there was

not a good evidentiary basis. The example from his experience in this regard was relevant. One hundred lashes had been imposed.

76. The Tribunal was referred to Ms Enayat's summary of the Bazgir cases at pages 660 to 666 of the bundle. She said that none of the cases were non-penetrative sex charge cases. A case only went to the Supreme Court if the original charge was sodomy. There was therefore no information about cases where the charge initially was one concerning non-penetrative homosexual acts. At page 662, there were examples of discretionary punishments and this could be up to ten years imprisonment.

77. With regard to the Secretary of State's position concerning the likelihood of prosecution if homosexual acts were carried out in private, this tied in with what had been found by the Adjudicator, though the Adjudicator said that such a prosecution would be impossible. Mr K and Ms Enayat said it was not impossible. Ms Enayat referred to the likelihood of other parties such as family members or neighbours reporting such acts, as in the case of B itself where the mother of his friend had told the authorities. Iranian law did not excuse from prosecution an act done in private. Of course, it would need to be brought to the attention of the authorities, but the question was whether that ever happened.

78. At page 679 there was reference to the insecurity in Iran for homosexuals. Mr K had described a case where his client was informed on by someone else in the dormitory. The reason for this went back to the religious views on homosexuality. Pages 142 and 143 in Mr K's first report dealt with this. The Tribunal was referred to Ms Enayat's comments at page 675 concerning the Honorary Legal Adviser's suggestion that public acts or cases where the complainant were a victim were the only ones where there was a prosecution. It was clear that there was a wide range of offences attracting punishments from lashing to imprisonment, quite apart from the death penalty. The UNHCR, at page 336 of Mr Kovats' bundle, did not really grapple with the wider picture and nor did a report at page 257 of his bundle.

79. The Adjudicator's finding that it was impossible for a person to be prosecuted if they carried out acts in private was not sustainable. The evidence was that there was a real risk that an Appellant carrying out homosexual acts in private would be likely to be persecuted or be at real risk of a breach of their Article 3 rights. The Tribunal was referred to the last paragraph at page 341.

80. As regards the case of IIN put in by the Secretary of State, the European Court of Human Rights had not had the benefit of the kind of evidence that the Tribunal had and its conclusions were unsustainable. The evidence did not bear out the ECHR's conclusions. B's case showed that it was not just a question of public morality and a lack of concern as to what happened in the home. Today's evidence was far from being "vague and unspecific" and reference was particularly made to Mr K's evidence. As regards the case involving homosexual acts in the dormitory, the dormitory could still be a home like a home shared with parents. It was more public but it was still a home. In that case, the bystander had felt compelled to report the acts and this was akin to the situation of a neighbour or a family member. It offended their morality and that was at the heart of this.

81. There was no more recent Iranian case law than that in Bazgir, but no doubt in time later case law would manifest itself. Journalists were not allowed to report as cases occurred, but only with hindsight and only after a number of years were they examined by scholars and the cases mainly involved prosecutions for non-penetrative sex. Ms Enayat had made the point with regard to prosecutions that it was difficult to obtain material. Clearly there was a high number of prosecutions for acts against morality. There was no change in Islam or Islamic law to indicate that homosexuality was now tolerated in Iran. The laws remained in place. The interview with the Ayatollah at pages 512 to 514 made it clear that there was no softening in the approach of the state. The Tribunal was also referred to Ms Rogers' summary of the evidence at paragraph 11(b). There were still a lot of prosecutions for homosexual offences. At page 671 in Ms Enayat's second report, there was highlighting of the statistics on prosecutions for immorality. There were no statistics for any particular offences in groups, but there were some 86,000 crimes against public virtue recorded, and this was indicative of a fierce Islamic regime with no tolerance in law for crimes against public virtue.

82. In his submissions, Mr Ali referred us to his skeleton argument. The Adjudicator had accepted that E was homosexual and the authorities were aware of the film having been made and that E was involved in some way. A lot of the objective evidence was relevant to both cases. He also referred to the expert reports in his bundle, firstly that of Professor Afshar. She had concluded that E was likely to be arrested and punished for behaving immorally. Page 12 referred to the definition of the crime. It was possible that he would face the death sentence.

83. Two particular points arose from the evidence. The first was that there was a deliberate lack of reporting by the Iranian authorities which made the task of deciding harder and therefore the expert evidence was highly important. Secondly, as regards those reports, the points had been put to the experts and their evidence from all the evidence as a whole was consistent with a risk to E. Therefore, the reports of the experts should be given great weight. Ms Enayat had considered the reports of his experts to be valid and had largely agreed with Professor Afshar. She had said that E's punishment would be at the complete discretion of the judge and he would likely be convicted on the basis of the knowledge of the judge. It was of significance that the authorities were aware of the video and E's appearance in it.

84. With regard to the Honorary Legal Adviser's views, it was argued that the evidence of the experts should be preferred. There were no disclosable statements from the Honorary Legal Adviser and her evidence had not been tested. The experts' reports were much more detailed and clearly evaluated the relevant articles and cited evidence. It was significant that Ms Enayat had said that the authorities would not be likely to overlook homosexual activities in private if they would not overlook kissing and hugging.

85. The experts were also supported by further evidence in Mr Ali's bundle, and he referred to pages 35 to 54 in this regard. The first-hand evidence was much more relevant on the question of whether homosexuals were in fact pursued and prosecuted. The essence of the evidence was that this did take place. In the light of the authorities' knowledge of E's activities and also his fears from his own family, even if the sentence was prison or lashing, he would be at real

risk of persecution or breach of his human rights. Otherwise, Mr Ali was grateful to Ms Rogers for the evidence she had obtained and the submissions made on that with which he associated himself.

86. In his submissions, Mr Kovats referred first to the case of IIN in the European Court of Human Rights. This was not binding but was clearly of relevance. Clearly, the Court had considered a range of materials in coming to its conclusion that the claim should be rejected as being manifestly ill-founded. The conclusion was very similar to the earlier decision in F v UK which was in Mr Kovats' authorities bundle.

87. As regards the public order point, it was accepted that the offence did not have to be committed in public but the relevance was what was germane to public prosecution policy. The mode of proof showed that it was seen as a public decency offence. Realistically, there were never going to be four witnesses to a private offence. This was not the only mode of proof, but was indicative of the essential public decency element. The evidence supported this at page 225 to 228 in B's bundle in this regard in the extract from Maarten Schild's chapter on Islam.

88. Mr Kovats referred to Ms Enayat's first report, at page 153. Whereas on paper it was criminal and there was condign punishment, in practice the authorities did not actively pursue homosexuals unless their actions were carried out in public and comprised a public challenge to the social code. It was nevertheless possible that discreet homosexual behaviour would come to the attention of the authorities and be reported, so it was then a question of what the authorities would do. Mr Kovats accepted that this was a difficult and sensitive issue. It was difficult to ascertain what the evidence was and what the facts were on the ground. There was a lot of evidence before the Tribunal but it was not easy to know what to conclude from it with regard to the risk of the person being reported. As to the case mentioned by Mr K, it was queried whether a university dormitory could properly be equated with a bedroom in a private house. An Iranian university was a public place and he managed to disturb part of a body of good Muslims and so there was a public element. Also the Tribunal did not have the full facts, for example as to why the person was reported and whether it was on the basis of a personal quarrel or political difference. All that could be safely said was that there were no confirmed cases where people had been convicted of private consensual adult sodomy. The two cases in Bazgir, although they were death sentences, involved in one case the rape of a minor and the other sodomy committed by a prison officer on prisoners. Even if one looked at lesser punishments, it was not possible to say that there were any confirmed cases where it was the result of a private consensual adult relationship. It could be that this was so in some cases, but we could not be confident as the facts were lacking.

89. Pointing the other way as cases such as F and IIN did, it could be argued that there was no real risk of such a prosecution and this was also the view of the Honorary Legal Advisor. She was, like Mr K, a practising lawyer in Iran, though with more experience. By contrast to her experience, Mr K had been practising in Iran for about six years and had said he had taken part in many trials but only gave two examples of cases involving homosexual offences. Mr Kovats had dealt with the student case. The other case appeared to have had a public element also, not having taken place behind closed doors. Professor

Afshar and Mr K accepted that there was nothing untoward in showing a fairly marked degree of personal affection and, even in the United Kingdom, people committing sexual acts in public might well be arrested. The evidence was overwhelming that there was no real risk of capital punishment for the Appellants. There was no evidence of such for homosexual activities alone. Today's letter from the Home Office referring to the Agence France Press document was of relevance in this regard. The point was endorsed by the case law.

90. It was clearly necessary to deal with the risk of whipping and ta'zir punishment also. Neither side had been able to find statistics on prosecutions for homosexual offences alone. It was argued that the weight of the evidence was that the Iranian authorities were concerned with homosexuality insofar as it was a challenge to the Islamic social and moral code, and if this were right it followed that they would not be interested in discreet private adult homosexual activity, and this was consistent with the lack of cases. If matters were brought to their attention, then this was a difficult question and it could be that personal influence played a part and that a person with influence with the local judiciary could be in a different position from an outraged parent who could be put to one side. It would be necessary to look at each case on its own facts. It was not argued that there could never be a case where an Iranian homosexual was not at risk, but it needed more than a mere discreet adult homosexual relationship conducted in private.

91. It was said that the Iranian judicial system was secretive, but there had been a number of public pronouncements, for example that by the Ayatollah set out at pages 512 to 514 of Ms Rogers' bundle. The Ayatollah had accepted that it was highly unlikely that the capital offence would be proved. Also, there were the executive regulations concerning regulation of punishments in 2003 at page 244 onwards and page 248 contained the relevant article. There it was said that the news of execution and the sentence would be announced in the press. This was for capital offences only. Given that regulation and the lack of evidence from the homosexual community, one could be confident about the lack of risk of execution in Iran for homosexuals.

92. Turning to the particular appeals, B's concerned the error of law jurisdiction only. It was argued that there was no error of law in the determination. Ms Rogers had concentrated on paragraph 33 of the determination and especially the use of the word "impossible". That sought to make one word bear far too much weight. It needed to be read as a whole and it meant that there was no real risk. The determination was full and detailed. The Adjudicator had not had the extra evidence that the Tribunal had, but that did not show that he had been guilty of an error of law. His findings of primary fact were not challenged. He accepted that B had been punished while on military service and that action had been taken by a rebuffed senior officer, but this was not to be equated with a case of two parties on an equal footing or in a private relationship. There was a public element to military service. The Adjudicator had also accepted that B had been convicted and imprisoned for four years and four months. It was significant that it was his second offence and the punishment was clearly substantial, but it did not cause him to leave Iran. It was the third incident that led to this.

93. In paragraph 27, the Adjudicator had dealt with this. There was no reliable evidence that the partner had been executed. The Adjudicator had considered the objective and expert evidence and came to his conclusions. If the Tribunal accepted Mr Kovats' submission concerning the strong public decency/public order element then the Iranian authorities, while they would respond immediately to a complaint, would not consider it was the kind of offence that they would prosecute years after when the threat to public order had long passed. The military would not be involved.

94. As regards his mental health and punishment for leaving Iran illegally, this had been dealt with in the skeleton. The Adjudicator had gone on to state that homosexuals could meet quite openly in Tehran and this was consistent with what the Tribunal had heard. So, whether or not he engaged in discreet adult homosexual relations depended upon the evidence in the case. The Adjudicator's conclusions were sustainable.

95. As regards his departure from Iran, considered at paragraph 36, this was dealt with in the replacement skeleton. With regard to the issue of his mental health, the Adjudicator had come to proper findings on this. He was entitled to prefer the diagnosis of depression. In Bensaid, it had been held that a schizophrenic would not face a real risk of breach of his Article 3 rights on return. The threshold was a high one. There was evidence at pages 412 to 416 at tabs 9 and 10 of Mr Kovats' bundle concerning the evidence of medical services for mental health in Iran. The Adjudicator had dealt with the determination in P.

96. As regards E, the jurisdiction here was error of fact as well as error of law. The Adjudicator had accepted that he was homosexual and was able to pursue a homosexual life in Iran without experiencing problems from the authorities. He was the presenter of the video about homosexuality and he provided the premises for the filming, although he had not performed in the film. He was therefore at no risk of prosecution on the basis of carrying out homosexual acts. The Adjudicator had accepted his claim that the film had come to the attention of the authorities. The Adjudicator had not accepted that the summons was served.

97. None of the evidence put before the Tribunal referred to the specifics of his case. No copies of the summons had been provided and no evidence was provided as to what had happened to the other people involved in the film. On the basis of the Adjudicator's assessment of the evidence at paragraphs 10 and 14, he was entitled to find that there was no summons. In this case, therefore, the evidence did not show a real risk. The findings of fact were sustainable. Therefore, whatever the Tribunal found concerning the general situation, both Appellants failed. He relied on the references in the skeleton to the evidence.

98. With regard to pages 643 to 692 of Ms Rogers' bundle, which Mr Kovats had only received that day, he was unlikely to be in a position to challenge points on translation as it would not be a good use of resources. Issue was not taken with the table at page 668 as far as it went, but it did not go to the issue in this case which was whether an ordinary homosexual was at risk of prosecution and conviction. The Bazgir cases showed that the Iranian judiciary approached its task in the proper way. The Supreme Court was very ready to

intervene when the requirements of the law were not met, and overturned convictions when there was a lack of detail in the evidence. The Iranian judicial process was proper. A person prosecuted would receive a fair trial. Mr K had not said that defendants did not get a fair trial in Iran and these cases involved ordinary offenders and not political offenders, so that was not relevant here. In conclusion, it was accepted on behalf of the Secretary of State that homosexuals in Iran were a particular social group.

99. By way of reply, Ms Rogers argued, with reference to the particular facts of the case in B, it was argued that Mr Kovats' submissions were inconsistent in that either the authorities were very interested in B on account of his previous history (thirteen years before) or not with regard to events very soon after his release in 2002. The facts of the case contradicted the Secretary of State's main submission that homosexual acts were against public decency. The Adjudicator accepted that there was a risk of very severe punishment when caught in a private act in a private home. With regard to the point made by Mr Kovats concerning public authorities' influence on the reporting of an incident and contrasting this with the situation of angry parents, it was necessary to look at the facts of the case. In any event, this was contradicted by what was said by the Honorary Legal Adviser in her letter of 23 October 2004 on the second page.

100. As regards IIN, it was relevant to note that Mr Schild's evidence was repeated in the objective evidence produced to the ECHR and updated at page 7 where this was entirely a replica of what Mr Schild had said in 1993. So therefore this repeated old material, which did not even relate to Iran but pertained generally to Muslim countries, but was presented as an up-to-date report. This weakened the authority of the ECHR's decision. The Tribunal was also referred to Ms Enayat's report at page 158 and the references in the CIPU Report which condensed a lot of other reports. If that evidence was unravelled, then the amount of independent fact-finding that had gone on was in fact minimal.

101. With regard to page 6 in IIN and the Danish report in the Secretary of State's bundle, it may be that there was not access to the necessary information and that the reports should be seen in that light. In respect of the report of executions, reference was made to page 174. There was clearly frustration at a lack of reporting and some executions were not reported. As regards the point on executive regulations, the Tribunal was referred to Article 30 at page 250. Not enough was known about the Honorary Legal Adviser. It was not said that she was not qualified as claimed but she seemed to have sparse knowledge. For example, at page 411 concerning the absence of capital punishment cases for a fifteen year period, this was to be contrasted with the cases now produced. Much of what she said about article 120 not being used, again should be contrasted with pages 660 onwards. It seemed that she now accepted that a judge could make a final verdict based on article 120. If she had knowledge going beyond Bazgir, then she did not show it. Ms Enayat dealt in detail in her report of 16 December 2004 with the Honorary Legal Adviser's very short conclusions.

102. As regards B's appeal, the word "impossible" meant what it said and should be taken in the context of the Adjudicator's general conclusions. With regard to this, article 120 was sufficient and there were cases before the Tribunal

where the knowledge of the judge had been employed, and Mr Kovats had accepted that B was of interest to the authorities in the past, initially the military and later being subjected to severe punishment. This was enough for knowledge of the judge even if there was no evidence other than circumstantial concerning his activities on the building site. It could not be said that there would be no risk to him. Even if he did not face the death penalty, there was ample law and sufficient evidence for the Tribunal to conclude that he was at real risk, especially given his history and that he would be prosecuted on return.

103. With regard to the Home Office letter of 15 February 2005, even an unsuccessful asylum applicant could be at risk according to that, so why would B not be of interest. His mother had been detained on the night after he ran away.

104. Noting the medical evidence, it was conceded that an Iranian homosexual who was active in private or public faced a risk of prosecution if caught. This created insecurity. This had been mentioned by Ms Enayat. The second psychiatric report at pages 317 to 325 was before the Tribunal. His mental health problems related to his abnormal beliefs that he could be identified as a homosexual. People were prosecuted for any type of homosexual act and for such a person return had a heightened risk that their return would be inhuman or degrading.

105. Mr Ali, by way of reply, referred to the grounds of appeal and, in particular, ground 3. There was a question of where the summons was, and there was evidence in E's bundle. There were two statements, the first of 15 May 2002 at page 1 of the bundle at paragraph 13, and paragraph 20 of the second statement at page 8. He accepted that the Tribunal would be slow to disturb the Adjudicator's findings of fact, but his conclusions were flawed, firstly because the issue of the summons was not raised in the reasons for refusal letter and also only E had been represented at the hearing before the Adjudicator. It was accepted that the summons had still not been produced, but E in his statement said that he could not produce it as he feared his family. He had expanded on this point in his supplementary statement. The family had it and his uncle had never possessed it.

106. In any event, there was the fact of the video and the Adjudicator's acceptance that the authorities were aware of that. It was clear from the expert evidence that he would be at risk.

107. With regard to IIN, Mr Ali adopted the points made by Ms Rogers and argued that the Tribunal should note the contrast between the evidence before it and that before the European Court of Human Rights. If the Tribunal accepted what Mr Kovats said that people were only pursued if their behaviour was public, then the video had been made for general distribution and therefore for public purposes. The report of the Honorary Legal Advisor should be contrasted with Ms Enayat's second report. Page 554 was of particular relevance to this. The Bazgir document referred to dealt with an actual conviction. At page 51 of the bundle, there was a reference to the killing of three gay men and two lesbians. This was a consequence of the Iranian government's policy calling for action against homosexuals. The letter of the Home Office of 15 February 2005 pointed to the absence of guarantees and

risk to a person whose asylum claim had failed. With regard to the question of a fair trial, the Tribunal was referred to the Secretary of State's bundle at page 343 and the country report at paragraph 5.16 to 5.34 which confirmed that the traditional court system was subject to government and religious influence.

Conclusions

108. We consider first the translations of the Iran Court Judgments contained in the Bazgir book. The title of this is translated as follows "The law of Islamic punishment as mirrored in Supreme Court rulings: Hadoud crimes against public virtue (Tehran 1999 to 2000)." These were commented on by the Honorary Legal Adviser and by Ms Enayat as set out above. Ms Enayat, as well as commenting on the translations, set out a table numbering the judgments and summarising the verdicts. We bear in mind the point made by Ms Rogers at paragraph 11 of her summary of evidence that it is important to note that these cases only represent a selection of the cases that will have been heard by the Iranian courts. It is also the case that they are only cases which have been appealed to the Supreme Court, and we accept that it is extremely difficult to assess how many criminal cases in the Iranian court system will have been homosexuality related crimes. We note also, as Ms Rogers points out, firstly that there is no general concept of precedent in Iranian law, which means that a ruling by the Supreme Court in one case will have little or no bearing on subsequent cases on the same issue, and secondly that the outcome of cases returned for hearing by the Supreme Court is unknown. They are also cases concerning only instances where the defendant was originally charged with sodomy, since those are the cases over which the Supreme Court has jurisdiction. It is said in Ms Enayat's report that in the cases where the defendant was originally charged with Tafkhiz, the provincial court of appeal would be the correct appellate authority. We also take from Ms Enayat's report the fact that cases are very likely to be heard in camera, information is unlikely to be published at the time of hearing or conviction, and the suggestion that Iran is responding to international pressure on its use of the death penalty and other human rights violations by suppressing information about its legal system, such that little information is publicly available about current practices. It is clear that a number of these cases were remitted by the Supreme Court. Case number 105, where the death penalty was confirmed, is a case where the charge was murder and Tafkhiz. Case 110 concerned forced sodomy and again the death sentence was confirmed. The same is true of case 112. The sentence in that case however was 74 lashes. The accused who received the lashes was fifteen years old at the time of the crime. There are also examples of acquittals being confirmed. Case 116 involved a sentence of six months in the case of forced sodomy but it was not a case of sex with a minor or a case of rape. In case 117, the sentence was six years where the relationship was with a fifteen year old and was deemed consensual. It is clear that case 110 was proved on the basis of knowledge of the judge. Case 112 appears to have involved a confession. It is unclear what the method of proof was in case 116. Case 117 appears to have involved the knowledge of the judge. Case 125 involved sodomy, and the death sentence was confirmed by the Supreme Court. This was proved on the basis of the knowledge of the judge, and a sentence of 100 lashes in Case 126 was again on that basis. The same outcome and the same method of proof applied in case 128. Cases 129 and 130 are cases where a sentence of 100 lashes was confirmed by the Supreme

Court. Case 133 involved a similar sentence with the method of proof being the knowledge of the judge in this case.

109. Ms Enayat made the point that the cases cannot be viewed as representing either a comprehensive picture or a statistical sample but are selected to illustrate the variety of situations which, from a legal point of view, might arise in the courts and be problematic as opposed to routine. She also made the point that there are no systematic crime statistics published in Iran for any type of offence, although she noted that in the year 2002 to 2003 slightly over 86,000 offences were classified as "crimes against public virtue" which would clearly include sodomy and Tafkhiz.

110. Ms Enayat's comments on the reports of the Honorary Legal Adviser take issue first of all with what it is said about the period to which the case histories relate. Ms Enayat made the point that the great majority of cases pertain to the period 1991 to 1995. She noted also that 19 of the 28 Supreme Court cases were cases of "child molestation". There are eight examples in the Bazgir compilation of cases which did not involve "force". She made the point that there are at least three examples in the Bazgir compilation of men charged with sodomy where the complainant was clearly the public prosecutor rather than it being a complaint by an "interested party" as referred to by the Honorary Legal Adviser. She referred to case 1/135 of 1990 in which two men aged 18 and 26 years old respectively were convicted of sodomy and sentenced to execution by the first instance court on the basis of confessions and a medical report. The sentence was overturned by the Supreme Court and remitted on the basis that the medical certificate did not provide decisive evidence of intercourse between them, and in Court the Appellants denied the act despite the confessions. She referred next to case 13/133 of 1992 where a man was charged with committing sodomy with two others. The Supreme Court confirmed the sentence of 100 lashes. The court in the first instance concluded that although there was inadequate evidence of sodomy, non penetrative sex (Tafkhiz) was proven on the basis of the knowledge of the judge. The complainant was the public prosecutor.

111. Case 14/117 of 1992 was a case where three men were charged with sodomy and acquitted for lack of evidence by the Court of first instance. The complainant was the public prosecutor, who appealed the case on the basis that they had confessed under interrogation and in the presence of an investigating magistrate, and if sodomy could not be proven the evidence was sufficient to prove Tafkhiz. The Supreme Court rejected the appeal.

112. Case 8, in the Sabri collection, of 1992, was a case where a thirty-six year old man was charged with sodomy and a fifteen year old boy was charged with submission to sodomy. The Court found that the evidence of penetrative sex was inadequate and that the confessions of both parties were flawed but there were adequate grounds to impose a discretionary ta'zir penalty. The thirty-six year old was sentenced to 74 lashes and exile for a period of five years and the boy, who had not at the time of the crime reached the age of maturity (fifteen lunar years) was sentenced to 39 lashes of the whip. The complainant was the public prosecutor.

113. As regards the Honorary Legal Adviser's comments on declarations of remorse and repentance, Ms Enayat referred to articles 125 and 126 and

concluded that even in cases where repentance follows a confession it is not in the power of the judge hearing the case to absolve the individual on the basis of their repentance and the Supreme Court has ruled that judges in the court of issue are expected to evaluate the "quality" of a repentance following confessions. Ms Enayat concluded that the verdict based on the knowledge of the judge has an equivalent status in Shia jurisprudence to guilt established on the basis of witnesses.

114. With regard to the Honorary Legal Adviser's comment that none of the cases resulted in a conviction for sodomy except one in 1994, she noted that in fact there are two cases on the Bazgir compilation where the Supreme Court confirmed the conviction of sodomy and the death sentence. The first of these is case number 31/112 of December 1994 to January 1995 where an eighteen year old committed homosexual rape on a nine year old boy and was sentenced to death by being thrown from a height. The second case no 27/125 confirmed in July 1993 was that of a prison guard convicted for multiple acts of sodomy with his charges.

115. As we have seen, of the twenty-eight appeals considered by the Supreme Court, six resulted in outright acquittal in the court of first instance, five of these being confirmed by the Supreme Court and one being remitted for reconsideration, and twelve resulted in a conviction for sodomy and a death sentence on that account in the court of first instance, ten of which were quashed for procedural reasons and remitted to be reheard. Nine cases resulted in a conviction in the Court of first instance for Tafkhiz and in six of these cases the Supreme Court confirmed their sentence but in one case remitted it on the basis of inadequate evidence. We note that there is no information in the sources on the verdicts handed down at the rehearings or the response of the Supreme Court to them.

116. Ms Enayat also commented that, as we have already noted, in a number of the cases of sodomy not involving rape the complainant was the public prosecutor rather than being the victim or his next of kin. It is the case that where the person was charged with sodomising a minor, the complainant was always the next of kin of the child.

117. At page 679 of the bundle in the course of this report Ms Enayat also made the point that as a consequence of the status given to private complainants in the Iranian legal system, a large source of insecurity for a practicing homosexual in Iran is that a complaint may be laid against him by a neighbour, servant, a spouse or any other person in his orbit, either out of a sense of moral rectitude or for revenge. She stated that such complaints automatically trigger a Court hearing and, if the judge so decides, the formulation of charges. A crucial distinction is said to be not so much between the private or public status of the original complainant but rather whether or not the case can be dismissed if the private individual or association withdraws the complaint. None of the Hadd crimes and none of the crimes against public virtue under Book 5 of the law of Islamic punishment are included on the list of articles of the law where if a case is brought by a private complainant prosecution will cease on the withdrawal of the complaint.

118. As regards cases where the prosecution resulted in a sentence of whipping, and the Honorary Legal Adviser's view was that evidence was mainly the

acknowledgement of guilt and confession by the perpetrator, but Ms Enayat made the point that in some of the case histories it is unclear what method of proof was used. Where the method is set out, the knowledge of the judge was the method used in ten of the fifteen cases, and confession by itself was the method of proof in two of the fifteen cases and in three cases confession accompanied by reference to a medical certificate was cited. In both confirmed death sentence cases the method of proof was the knowledge of the judge. It is clear that in no case was the "witness of four just men" used as the method of proof. Ms Enayat concludes that the case history supplied abundant indication of the use of the knowledge of the judge in Hadd cases and this evidence conflicts with statement of the Honorary Legal Adviser reported in the British Embassy's letter of 13 June 2004.

119. Ms Enayat also took issue with the Honorary Legal Adviser's view that the maximum punishment in cases cited in the book is 74 lashes. In six cases the Supreme Court confirmed verdicts of Tafkhiz and 100 lashes. As regards the Honorary Legal Adviser's view that the appeal courts usually overturn the judgments of first instance courts, it was the case in fact that they had only done so in ten of the twenty-eight cases. In six cases the Supreme Court confirmed outright acquittals by the Court of first instance and in one case an acquittal was overturned. The majority of death sentences were overturned and the case remitted. However the Supreme Court confirmed the majority of sentences for the lesser offences of Tafkhiz or an immoral act. Ms Enayat also comments that it is highly unlikely that the executions in two cases of death sentence for sodomy in the Bazgir compilation would have been announced, given the approach of the Iranian authorities in this period.

120. Ms Enayat set out her conclusions at paragraphs 687 to 689 of the bundle. Among these is her conclusion that the knowledge of the judge is a commonly used method of proof across the various types of case. She also considered it to be clear at least from the examples that certain of the Supreme Court Judges have been pedantic about what can be accepted as evidence of penetration and have frequently rejected the evidence of a medical certificate alone and that the arguments brought are that medical evidence of penetration of the "passive" partner does not by itself establish that the penetration was by the accused or that evidence of penetration did not necessarily involve penetration by the penis. She also makes the point that the medical reports were drawn up before the advent of DNA testing. She also considers it to be evident that the Courts readily accept verdicts of Tafkhiz, generally based either on the knowledge of the judge or confessions which were viewed as imperfect (as proof of penetration) from the point of the Shari'a. There is no published material on cases which began with charges of Tafkhiz or immoral acts since, as noted above, these would not be appealed in the Supreme Court. She concludes that the judgments demonstrate that in general sodomy and Tafkhiz (whether forced or not) are dealt with in evidential frameworks that are far more flexible than that allowed by the picture given in the CIPU and many other accounts and they have drawn a greater variety of punishments.

121. In his supplementary skeleton argument of 13 February, Mr Kovats accepted on behalf of the Secretary of State that the material now available shows that there are prosecutions and convictions in Iran for offences of Lavat and Tafkhiz, though he suggests that details are sparse and most of the cases are

cases of child abuse and or rape. It is also accepted that there are two instances where the death penalty for Lavat was confirmed by the Supreme Court and notes that neither was a simple case of buggery, in one where the victim was a nine year old boy and in the other the defendant was a prison guard convicted on account of buggery of several prisoners which did not give the impression of being a consensual homosexual relationship.

122. We have derived a good deal of assistance from the translated case summaries and also from Ms Enayat's careful commentary on them. We see no reason to disagree with the comments she makes or the conclusions that she draws from them. We have therefore had the benefit of a significant degree of more specific information than appears to have been available to previous courts. One comment we would make at the outset is to express our agreement with Mr Kovats in stating that an impressive level of care exists in the Iranian legal system with regard to these matters. This can be seen from the number of cases remitted by the Supreme Court for a variety of reasons and in particular, as regards potential capital sentences, the formalities required by the system. In this regard it is relevant to refer to the translation of the e-mail question put to Ayatollah Sanai at pages 512 to 513 of Ms Rogers' bundle. It is clear that the specified manner of proving Hadd, ie four confessions or four just witnesses of the specified conditions: "most often and generally has not been and will not be witnessed after the age/time of the St Imams". The Ayatollah is also of the view that the ways of proving are limited to those two ways and nothing else. The degree of detail and observation required is, as was pointed out in Ms Enayat's report, of such a degree as to make it extremely unlikely that in the absence of confession a capital sentence would be imposed.

123. We consider that we can properly conclude from the evidence that it is most unlikely, given the statistics and the problems of proof, that the death penalty for sodomy is anything other than an extremely rare occurrence. It is clear however that, and here we are in agreement with paragraph 24 of Ms Rogers summary of the evidence, those guilty of immoral acts under Article 147/115 and Tafkhiz under Article 121 face harsh punishments which can include long prison sentences up to six years and up to one hundred lashes. We remind ourselves of what Mr Kovats accepted on behalf of the Secretary of State that a sentence of lashing would be such as to give rise to a breach of Article 3 rights. Although we agree with Mr Kovats that the interest of the Iranian authorities in homosexual offenders is essentially focused upon any outrage to public decency, it is in our view clear that the authorities would not simply ignore, as Mr Kovats suggested they might in certain situations, reports made to them of persons carrying out homosexual acts albeit in private. If a complaint is brought to the authorities then we are satisfied that they would act upon that to the extent that they would arrest the claimed offenders and question them and thereafter there is a real risk that either on the basis of confessions or knowledge of the judge which might arise from such matters as previous history or medical evidence or the evidence of the person who claimed to have observed the homosexual acts, that they would be subjected to significant prison sentences and/or lashing.

124. Given that we consider therefore that there is a real risk that a person who comes to the authorities' attention for having committed an act falling within the relevant provisions of the code, it must follow that since this can be presumed to be known by those engaging in such acts, such actions would be

likely to be carried out carefully. We have not been addressed on the issue of discretion and whether people engaging in such acts can be expected to act discreetly, which was considered by the Australian High Court recently, in Appellant S395/2002 v Minister for Immigration [2003] HCA 71. That is another argument for another day and we would not wish this determination to be interpreted as imposing a requirement of discretion, but rather a recognition that in the legal context in which homosexuals operate in Iran it can be expected that they would be likely to conduct themselves discreetly for fear of the obvious repercussions that would follow. We also consider, bearing in mind the consequences for persons prosecuted successfully for such actions, that Adjudicators should view with healthy scepticism claims that family members or friends or neighbours reported such actions to the authorities. Given the severity of the consequences we consider that proper caution should be exercised in assessing claims that people came to the attention of the authorities in such ways. This must be particularly so in the case of family members and friends. In our view, it is the case that homosexual acts carried on in private between consenting adults are most unlikely to come to the attention of the authorities and it is the case, and we think it is common ground, that the authorities do not seek out homosexuals but rather may respond to complaints of consensual homosexual activity being carried on. That then is the context in which these appeals must be decided.

125. We turn to the individual appeals. We consider first of all the appeal of B. As we have seen, much of his claim was believed by the Adjudicator, but the Adjudicator did not accept that there was reliable evidence that B's partner NK had been questioned or tortured nor that he had identified B to the people who detained him. The Adjudicator did not make findings on the matter set out in B's statement at paragraph 23 that the authorities had taken his mother into detention but released her on bail, the security being her house deeds. The information about the execution of NK came from his sister who relayed this information to the relative with whom B went to stay after he escaped from the officials. There is therefore some evidence, in relation to which the Adjudicator did not come to conclusions, indicating an interest in him on the part of the authorities after his escape and which is consistent either with him having been recognised at the time or perhaps more likely that he was identified by NK. In the light of B's history having been found to be credible by the Adjudicator we consider that it is of clear importance that findings be made on the credibility of this aspect of the claim. This appeal is therefore remitted for consideration afresh by an Adjudicator other than Mr Wynne. It will come before the AIT, which will decide how it should proceed.

126. In the case of E, the Adjudicator again found his claim to be essentially credible. He did not however, as we have seen, accept that there was a serious possibility that E had been summonsed given the fact that the summons had not been produced. He surmised that E's uncle would have been able to provide it, since he was sympathetic to E, whereas E's immediate family was strictly religious and ashamed of him. The point was made on E's behalf that his uncle should not be assumed to have ready access to the summons and therefore the finding that failure to produce it meant that it did not exist was flawed.

127. We see force to the submission on behalf of E. The Adjudicator was not entitled to assume that the summons did not exist, purely on the basis that his uncle had not sent it to him. Proper findings need to be made on this point, and it may be at the same time that the nature of the offence under Iranian law which it is said has been committed by E can be clarified. Certainly, the evidence of Professor Afshar is far from conclusive on the point. This appeal is also remitted for consideration afresh, by an Adjudicator other than Mr Ievins. Again it will come before the AIT which will decide how it should proceed.

D K ALLEN
VICE PRESIDENT

APPENDIX

Iran Country Reports of April and October 2004

Reports of Ms Anna Enayat of 1 June 2004 and 16 December 2004 and her commentary of 27 January 2005

Reports of Mr K dated 1 June 2004 and 16 December 2004

"Islam" by Maarten Schild (in "Sexuality and Eroticism Amongst Males in Moslem Societies (1991) p179)

Translation of e-mail question to Ayatollah Ozama Sanei

Report of Professor Afshar of 8 February 2003

Report of Professor Amin of 27 July 2003

US Department of State Report 2003

Netherlands Report of August 2000

Danish Report on Fact-Finding Mission to Iran of September 2000

UNHCR/ACCORD Information Seminar of 11/12 June 2001

Letters from the British Embassy in Tehran, 18 May 2004 and 13 June 2004