HS (Homosexuals: Minors,
Risk on Return) Iran [2005]
UKAIT 00120

Asylum and Immigration Tribunal

# THE IMMIGRATION ACTS

Heard at: Taylor House, London
Heard on: 19 May 2005 and 22 July 2005
Prepared :22 - 28 July 2005

Determination issued:
4th August 2005

Before:

Ms C Jarvis
Senior Immigration Judge
Miss C Griffith
Immigration Judge

Between

Appellant

and

Secretary of State for the Home Department

Respondent

*This case is reported for what we say about the treatment of homosexuals in Iran, including minors, and the assessment of risk on return, in the light of the background evidence that we received; some of which post dates that which formed the basis for the determination in RM and BB (Homosexuals) Iran CG [2005] IUKIAT 00117(8 July 2005), and which determination has guided our deliberations and decision making.*

Representation:
For the Appellant: Ms J Rothwell of Counsel instructed by Scudamores Solicitors
For the Respondent: Ms P Clarke Home Office Presenting Officer
Interpreter: Mrs L Clark (Farsi - English)

## DETERMINATION AND REASONS

1. This is the appeal of (_____), national of Iran, whose date of birth is given as 29 June 1985. He appeals the decision of the Respondent made on 21 November 2003, to give directions for his removal to Iran,

following refusal to grant leave to enter or remain in the UK on asylum or human rights grounds.

2. The Appellant appeals to the Asylum and Immigration Tribunal pursuant to section 82 of the Nationality, Immigration and Asylum Act 2002, ( the 2002 Act), as amended by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, (the 2004 Act), by a notice of appeal dated December 2003 and the Tribunal has borne in mind the grounds of appeal set out in that notice, which refer to alleged prospective breach of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, as well as prospective breach of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as that Convention has been incorporated into United Kingdom domestic law by the Human Rights Act 1998.

3. The Appellant's case is that he has a well-founded fear of being persecuted, and of experiencing other serious harm, at the hands of the authorities in Iran, by reason of his membership of a particular social group, namely homosexuals in Iran, as a person who has already come to the adverse attention of the authorities there and who has a criminal record resulting from homosexual activity.

4. The history of the matter is this. The Appellant claims that he left Iran on or about 10 November 2002, and arrived in the UK, apparently at Purfleet, on about 3 December 2003, clandestinely, having travelled by lorry through a number of countries unknown to him. He was taken to police at Grays, who, on taking account of the fact that he was a separated child, handed him into the care of the local authority social services department. It was not until 16 December 2003 that the Appellant was taken to the Home Office, by a social worker, in order to lodge his claim to asylum.

5. A written statement of evidence in support of the claim was lodged, dated 27 December 2002, and the Appellant was interviewed by a Home Officer on 16 October 2003. The Respondent set out his reasons for refusing to recognize the Appellant as a refugee and refusing to grant leave to enter or remain on human rights grounds in a letter dated 20 November 2003 and a supplemental letter dated 12 January 2004.

6. The Appellant appealed to an Adjudicator, as she then was, of the Immigration Appellate Authority, Ms M Dean. His appeal was dismissed in a determination issued on 30 March 2004. The Appellant appealed to the Immigration Appeal Tribunal (IAT) and was granted permission to appeal.

7. In its determination of that appeal, issued on 14 January 2005, the IAT held that the Adjudicator had materially erred in law, in that she had failed to make findings of fact in relation to matters central to the

Appellant's claim, and to the assessment as to risk on return to Iran. The appeal was allowed to the extent that it was remitted to be heard afresh, other than by Ms M Dean. It is in this way that the appeal comes before us now.

8. The appeal before us is, by virtue of the Commencement No.5 and Transitional Provisions Order 2005, to be reconsidered by the Asylum and Immigration Tribunal (AIT) as if it had begun its life as an AIT appeal. It is governed by the provisions of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 (the 2004 Act), including provisions that amend the Nationality, Immigration Asylum Act 2002, (the 2002 Act). In particular we refer to Section 103A of the 2002 Act, as inserted by Section 26 of the 2004 Act (unification of appeal system); and the Asylum and Immigration Tribunal (Procedure) Rules 2005 (the 2005 Procedure Rules).

9. We remind ourselves that when hearing a case by way of reconsideration, the Tribunal must first decide whether or not the determination discloses a material error of law. It is only where that question is answered in the affirmative that it is open to the Tribunal to go on to consider what relief, if any, should be granted, and whether or not fresh evidence, if any, should be admitted.

10. That decision, in this case, was reached by the IAT, in the terms and for the reasons set out in paragraph 7 above, in the light of which we proceeded by way of a fresh, full reconsideration. We received oral evidence from the Appellant with the assistance of a Farsi speaking interpreter. We are satisfied that, with the able assistance of Mrs Clark, the Appellant was enabled to give all the evidence that he wished to, in terms that the Tribunal was able to understand.

11. We have before us all the documents referred to above including interview records, and the Respondent's letters, in which he sets out his reasons for refusing the Appellant's application (the Home Office appeal bundle). Also before us was the Respondent's Country Assessment of April 2005. In addition, Ms Clarke lodged an article entitled 'Should I Convert to Judaism?', and an article entitled 'Q & A about being Gay and Frum (a religious observant Jew), downloaded from the internet.

12. From the Appellant, we received his three statements ; a chronology; Psychiatric reports of Dr F E Winton dated 5 February 2004 and 25 April 2005; medical report of Dr Juliet Cohen, November 2003, and addendum dated 27 February 2004; Photographs of scarring to the Appellant's person; three expert reports from Anna Enayat, dated 4 March 2004, 24 April 2005, and 19 July 2005; Article downloaded from Roozonline, 21 July 2005 " The Execution of Two Gay Young Men"; Article from the Times of London, 22 July 2005 :"Public Execution for the Teenagers Convicted of Rape", and various reports from bodies including Amnesty International; Radio Free Europe; Voice of America;

Human Rights Watch; the UK FCO; US State Department; European Parliament, and UNHCHR.

13. The Appellant lodged two cases: the decision of the New Zealand Refugee Status Appeals Authority No.74665/03, 7 July 2004, and the determination of the IAT in RM and BB (Homosexuals) Iran CG [2005] UKIAT 00117.

14. Aware that the IAT was shortly to give authoritative guidance relating to issues before us, we adjourned the hearing of this appeal, part-heard, on 19 May 2005, having concluded the oral evidence, to enable us to take into account that guidance. We reconvened the hearing on 22 July 2005, when we were able to receive a copy of that case, and receive a written skeleton argument from Ms Rothwell, and oral submissions from both representatives, in order to conclude the hearing. We reserved our determination, which we now give with our reasons.

**The Law and the Burden and Standard of Proof**

15. In reaching our decision we have borne fully in mind the relevant law and immigration rules, including the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, and the Handbook on Procedures and Criteria for Determining Refugee Status ( ' The Handbook ) ( Geneva, January 2000). By Article 1(A) (2) of the Refugee Convention the term "refugee" shall apply to any person who:-

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

16. We remind ourselves that it is for an Appellant to satisfy us that there is a reasonable degree of likelihood, or real risk that, should he or she have to leave this country, he or she will be required to return to a country where he or she fears persecution for a Convention reason, that is to say, for reasons of race, religion, nationality, membership of a particular social group or political opinion. We apply throughout the lower standard of proof as referred to in R -v- SSHD ex parte Sivakumaran [1988] Imm AR 147 and the Court of Appeal in Karanakaran -v- SSHD [2000] INLR 122. We have also been guided by the judgment of the Court of Appeal in the case known as Ravichandran and Others [1996] Imm AR 97, and in particular, we have borne in mind the definitions of persecution found there; the leading judgment having been given by Simon Brown LJ. We consider whether or not the Appellant is a person in need of international protection not only at the date of application and of the Respondent's decision, but also today, (R -v- SSHD ex parte Adan [1998] INLR 325

HL).

17. The Appellant places specific reliance on Article 3 of the ECHR. It is for an Appellant to show that there are substantial grounds for believing that he or she is at real risk of ill-treatment contrary to Article 3 ECHR, which prohibits torture, inhuman or degrading treatment or punishment. The standard of proof equates to that in asylum appeals (see MM(01/TH/994) IAT 4 June 2001 and Kacaj (01/TH/00634) 19 July 2001. Where there is a failure to show a breach of Article 3, there may be a breach of the right to physical and moral integrity under Article 8. Unlike Article 3, Article 8 rights are qualified rights protecting the right to respect for private and family life, home and correspondence. It is for an Appellant to show that one or more of such qualified rights is engaged and that there is an interference with such a right or rights. The Respondent must then show that any interference pursues a legitimate aim, is in accordance with the law and is proportionate.

18. In coming to our determination, following Section 85 (4) of the 2002 Act, we may take into account evidence about any matter which we think relevant to the substance of the decision, including evidence which concerns a matter arising after the date of decision.

19. It is recalled that Professor Hathaway's categorisation of human rights recognised by the International Bill of Rights has been approved by the UNHCR; by the UK IAT in Gashi and Nikshiqi ; by the Court of Appeal in Ravichandran (above) and by the Court of Appeal in Haci Demirkaya [1999] INLR 441. The House of Lords gave approval in general to Professor Hathaway's approach in the case of Horvath -v- SSHD [2000] Imm AR 552. (See also the Law of Refugee Status, Professor James Hathaway, Butterworths, 1991). Following Professor Hathaway's categorisation of human rights, Article 3 is concerned with Category 1 rights, a breach of which, will always amount to persecution under the Refugee Convention, assuming that it is by reason of one or more of the reasons set out in Article 1(A) (2) of the Refugee Convention. Article 8 is concerned with Category 2 rights, a breach of which would constitute persecution under the Refugee Convention except in circumstances constituting allowable derogation under Article 15.

20. While the ECHR was not designed to impact on immigration control it has, to some degree, been interpreted by the Strasbourg Court in a manner which does have that effect. The rationale for applying Art 3 ECHR to expulsion cases is that “it is an affront to fundamental humanitarian principles to remove an individual to a country where there is a real risk of serious ill-treatment”.

21. Where the ECHR is invoked by an Appellant/Applicant on the sole ground that, if refused the right to enter or remain, they are likely to be subject to treatment in breach of the ECHR which is not sufficiently severe to engage Art 3 then the English courts are not required to

recognise that any other article of the ECHR is engaged. Where treatment in the country of origin falls outside Art 3 there may be cases which justify the grant of exceptional leave to remain on humanitarian grounds and such cases would be subject to the ordinary principles of judicial review.

**Summary of the Case**

22. The Appellant is a national of Iran, born on 29 June 1985, in Tehran, where he lived with his parents and his one sibling, an older brother. The Appellant is a young gay man, who had four homosexual relationships whilst in Iran, between the ages of thirteen and seventeen.

23. The first relationship, which was with a classmate, lasted from when the Appellant was thirteen , until he was about fourteen or fifteen, when his partner moved away from the area, with his family.

24. The Appellant struck up a second relationship with a young man who lived nearby. The two tended to meet at the Appellant's home as both his parents worked and his brother was often out with friends. However, on an occasion when they were engaged in intimate sexual relations, the Appellant's mother arrived home unexpectedly and discovered them in the Appellant's bedroom. His partner was physically ejected from the house and the Appellant was locked in his room until his father came home later that night. His father beat him. Thereafter, he did not get on at all with his parents, who were angry with him. If they were suspicious about the Appellant's movements, they tried not to give him any opportunity to have time to himself, and took him to school and tried to collect him also. He was forbidden to spend any time with his partner, and in this way, that relationship was brought to an end.

25. The Appellant next formed a relationship with a young man whom he had come to know through his previous partner. They would meet in a park near school, as students were permitted to leave the school premises during the day. One day, unable to think of anywhere else where they could go, he and his boyfriend decided that they would go into the school premises to have sex. The building was a large one, and they went to the top floor, to the area leading to the roof, and found an empty classroom on the top floor. Classes were still going on in other parts of the school. The Appellant knew that his parents would arrive to collect him in about half an hour.

26. There were no windows in the classroom, and with the door closed, they thought they would not be disturbed. There was no key in the door so they could not lock it. However, whilst the Appellant and his boyfriend were having sex, a cleaner came into the room. He was a large man, aged about forty years. On seeing the two, naked, and in the act of sexual intercourse, he called the school Bassij, and locked

the door. The two knew that there was no escape. They dressed, and then sat on chairs and waited.

27. When the Bassij arrived, with the cleaner, they asked him what he had seen. The cleaner stated that he had seen the two naked, having sexual intercourse. During the questioning, the Appellant was sitting on a chair with a board (a writing slope) attached; that swings round, and on which you can write. It was made of metal, and meant that there was no need for a desk. One Bassij kicked the chair that the Appellant was sitting on and he fell, catching his lip on the metal handle of the writing slope attached to the chair next to him, causing injury to his mouth. The Bassij were swearing at the Appellant and his boyfriend. One Bassij picked up the Appellant from his chair and began slapping him in the face and swearing at him. Two other Bassij were beating the Appellant's boyfriend. During these assaults, the Appellant sustained another injury to his face.

28. The two were dragged to a small room where they were locked in. After about 30 – 45 minutes, two of the school Bassij returned, accompanied by two Entazami. The Appellant was handcuffed to one Entazami, his boyfriend to the other. Swearing at them, and pushing them, the Entazami took the two out of the school, and they were driven to Shahrak Gharb station, (branch 123). The Bassij came also. Between the vehicle and the station building, one Entazami pushed the Appellant, who stumbled and caught a leg against some building materials that were there. The two were taken into the station, being hit and sworn at the while.

29. They were taken to the officer in charge, a Colonel Amoli. The Bassij recounted how and why the arrests had come about. The Appellant and his friend were asked by Amoli whether this was true. Neither replied. They were obliged to provide their parents' telephone numbers. There was no one at the Appellant's home when a call was made. The Appellant was locked in a cell. He does not know what had happened to his boyfriend at that stage. He was kept in the cell until his parents arrived at about 10.30 pm, when he was taken to see them, and they were told what had taken place.

30. It was arranged that the Appellant and his boyfriend would be taken to a Juvenile Correction Unit the following day. His parents left, and he was put back into the cell, which was locked. There was a bed and a blanket. There was no food unless it was paid for. As he had no money, he did not eat. He was not handcuffed overnight, but had to knock for along while before being permitted to use the toilet. He was frightened and anxious about what would happen the next day as he was aware of the penalties. He could not think straight.

31. The following morning, the Appellant was taken to the juvenile correction centre, which had its own court and its own prison. He was there taken before a judge. The name of the judge was Mosavi. A

Bassij from the school gave evidence as to what had occurred between the Appellant and his boyfriend, and the arrest and detention of the two. The Judge asked the Appellant whether he accepted what had been said. He told the Appellant that he had other witnesses there who would say the same thing as the first Bassij. Given what the judge said, the Appellant accepted that what had been stated by the Bassij was true. The judge told the Appellant that because he was under the age of eighteen (he was sixteen at the time), and because it was his first offence, he would be sentenced to only three months in prison and to seventy lashes. A payment of 1000 Tomans per lash was offered as an alternative. The judge told the Appellant that in some cases, a payment could be accepted in place of a prison term, but not in the Appellant's case. It seems that the Appellant's father paid the fine required to cancel the seventy lashes.

32. Before he was taken before the judge and sentenced, the Appellant was beaten and otherwise ill-treated. This beating and ill-treatment lessened after sentence.

33. Following the sentence, the Appellant was expelled from school and banned from studying further in Iran.

34. On entering the prison, the Appellant was placed in a cell with three other juveniles (two sets of bunk beds per cell). For the first three or four days, the cell inmates sat and talked about their lives. After that, they were given tasks to do: physical practice, painting, or handicrafts. Sometimes there was compulsory work to be done. Food was put in a metal bowl and a gardening spade used to dish it out. It was called broth but was liquid. They were given bread to eat with it. There was a corridor, and an area with a television. Often, there were about a hundred young people trying to watch the television at the same time.

35. Other inmates, most of whom were quite friendly, had been given sentences for offences such as stealing a tape recorder or illicit sexual relations with a girl or with a boy. The guards were rough. A trumpet or other instrument was blown at 4am to wake the inmates, who were forced to run in the rain in the yard, and to jump like crows. That is, they were forced to put their hands behind their heads, crouch down and hop along.

36. The Appellant was placed in solitary confinement for a period of two days, by way of punishment, after an altercation with other prisoners in a lunch queue, when older inmates cut in front of him.

37. On release, the Appellant went to the home of a maternal cousin, (_____), who arranged and paid for him to take a taxi there. His cousin telephoned the Appellant's father who came to collect him. The relationship between the Appellant and his parents was very poor from then on. He had been expelled from school, and was prevented from studying further in Iran. He was not permitted to go out, nor to bring

friends home. He was given little or no pocket money. He stayed at home, or, increasingly, spent time with his cousin (_____), who lived about 20 minutes away, near Melat park, and who had a car.

38. In July 2002, whilst walking through the park on his way home from his cousin's house, the Appellant met a man who struck up a conversation with him. A relationship developed from this meeting .The man, who was older than the Appellant, was an adult. He was from a well to do background, and had his own apartment and a car and a motorbike. The Appellant was told that his new boyfriend's father owned a factory. However, he was secretive and, for example, never told the Appellant his full name. His new boyfriend arranged for the Appellant to start work at a men's clothing boutique in Tehran. He bought the Appellant clothes, shoes, everything, even cigarettes. The Appellant told his parents that he had found a job. They accepted that.

39. The apartment, which was on the first floor of the block, was not far from the Appellant's home. It was in an unfinished apartment block, and some of the apartments were not yet occupied. There was an underground car park. The apartment was very sparsely furnished. It looked out onto an internal courtyard, but there were no occupants as yet, as far as the Appellant knew, in the other apartments overlooking that courtyard.

40. The Appellant said that his new boyfriend taught him that they must be very discreet when they were out in a public place, and not openly show any affection for one another. They would go to the apartment about twice a week, if not more frequently. They were often physically affectionate whilst in the car park and on their way from the car park to the apartment. They had to take the stairs to the apartment as the lift did not work as yet.

41. On the afternoon of 25 October 2002, the Appellant and his boyfriend were at his boyfriend's apartment. They were naked and engaged in foreplay, when the door to the apartment was kicked open by two officials. The Appellant believes, although he is not certain, that they had been tipped off by neighbours who may have seen them coming and going, or seen them in the car park,

42. The officials told the two to dress. The Appellant put on his trousers and a T shirt. As they dressed, one official stood by each of them. Suddenly, the Appellant's boyfriend pushed the official standing nearest to him. The official fell to the floor. The Appellant's boyfriend made an attempt to escape, and the other official ran after him. In that instant, the Appellant decided to run out of the flat. He did not have time to take his coat, the pockets of which contained his identity card and various other personal items. Entering the main street, the Appellant took a taxi. He was able to pay as he had some cash in his back pocket. He went to the home of his cousin.

43. On 28 October 2002, the Appellant's father came to the cousin's home. He told the Appellant that on 27 October 2002, (two days and not two hours after the escape, as previously noted) the authorities, in the form of two Entazami, had come to the family home looking for the Appellant. They had searched the house. His parents had told the authorities that the Appellant was out and had not yet returned home. They had said this to protect him. Although the relationship was very bad, his parents did not want him to suffer at the hands of the authorities.

44. The Appellant's father told him that he must now leave the country and assisted by finding and paying an agent. The Appellant took a bus from Tehran toward the border. He was put into a container lorry. He left Iran on 10 November 2002 and after changing lorries some four times, he arrived in the UK on 3 December 2002. He arrived at Purfleet, as indicated above, and the authorities took him to the local social services department. A social worker took him to claim asylum on 16 December 2002.

45. Since arriving in the UK he has had no contact with his parents and does not wish to do so. He feels strongly that they have hurt him very deeply over the last few years. He has had nightmares since arriving in the UK and is terrified about being returned to Iran, where he would have problems with the authorities because he is gay. He has found no solace from being in the UK. He remains terrified of being returned to Iran.

46. The Appellant fears that on return he will be taken to the Sangi building where his file will be called up. He will be tied to a tree and interrogated and lashed until he confesses to whatever is demanded, whether it is true or not. He fears that he will be executed. He fears that these things will happen whether he is taken to the Sangi building or not. He feels powerless, out of control, and in great fear; all because he was having a consensual relationship with a man whom he loved.

47. The Appellant states that he continues to love his boyfriend. He does not know what has happened to him, but he fears for his safety. He has not had any relationships since arriving in the UK. He has no one in Iran whom he can trust to try to find out. He does not want to have any new relationship without knowing what has happened to his boyfriend and coming to terms with whatever that may be. He feels very low and does not wish to go out and make new friends in the UK.

48. The Appellant has kept in touch with his cousin, who told him some months ago that he had been to the Appellant's family home and found that his parents had moved away. At present, he does not know where his parents are.

49. The Appellant states that he is from Northern Tehran and has not seen a large number of transvestites walking the streets of Tehran as

asserted by the Respondent. Nor does he believe that sex change operations are frequently and openly carried out in Iran. He believes that because he has one conviction whilst still a minor and is wanted for a further offence, again whilst still a minor, it is not possible that he could return to Iran and enjoy a discreet homosexual lifestyle. He fears that on return he will be detained, tortured, and then killed because he is gay.

50. In his third statement the Appellant mentions fears arising from an encounter in Hyde Park in November 2004, with some unknown men who appeared to be Iranian and who looked as if they were members of Hezbollah. The Appellant was in the park with a friend who lives in London, whom he was visiting. These men, who reminded the Appellant of the Bassij, and who frightened the Appellant, approached the car in which he was with his friend. They had the Appellant's name and telephone number, and they made an unsuccessful attempt to stop the Appellant's friend from driving away. The Appellant was very frightened and shaken by this.

51. He was also worried by receiving a telephone call, a few weeks later, from an unknown male person, who simply said the Appellant's name before ending the call. A few days after that, the Appellant noticed men of Iranian appearance, driving cars near his home. These events have frightened him and caused him to fear that he is being followed.

52. The Appellant states that he does not know whether these people are after him or are in some way connected to the disappearance of his brother, who had left Iran in about August 2002 and gone to Turkey and then to Israel. The Appellant received email messages from his brother until about 7 January 2003. He would not tell the Appellant why he was in Israel. In 2004 the Appellant enlisted the help of the Red Cross to try to trace his brother, but without success to date.

53. In August 2004, the Appellant tried unsuccessfully to report his brother as a missing person to the Israeli Embassy. They told him to go to the police. This he did. He has produced a Metropolitan Police memo, giving Interpol's number and stating that as his brother is missing in Israel, they cannot help him. Then in November 2004 he was able to file a report with the Israeli Embassy, but the staff there were very suspicious of him, he felt, and would not give him a receipt. They do not answer the telephone when he calls. He sent information by post to the Embassy, and has produced a recorded delivery receipt dated 6 December 2004.

54. About eight months ago, the Appellant became interested in the Jewish faith, after a friend told him that Iranians were originally Israeli. He did some research, and made contact with a Jewish man through an internet chat room, with whom he has become friends. He has learned a little about the Jewish history and faith. He has been to a synagogue to ask about conversion. He feels that the people there were

suspicious of him because he is a Muslim. He was told that the path to conversion is a long and difficult one, and that he must study over a number of years before he would perhaps be ready for that. He remains interested in this as a possibility for the future, and is also looking at other avenues.

55. The Appellant has produced an expert report from Dr Juliet Cohen, dated November 2003 and an addendum dated 2004. Dr Cohen is a general practitioner of thirteen years standing, who works part-time in Oxford, as a GP, and part-time for the Medical Foundation for the Care of Victims of Torture (since 1997). She has experience in working with patients who have had traumatic experiences, both in the UK and abroad. She has acknowledged that her first duty is to the court. We are satisfied that we may receive her reports as expert evidence.

56. Dr Cohen notes the Appellant's disclosure that, between his arrival at the detention centre, and his being taken before the judge, he was subjected to not only physical, but also sexual abuse at the hands of wardens. He was slapped, punched in the chest and back and sworn at. Since then he has suffered intermittent nausea and haematemesis.

57. The wardens pinched his cheeks and touched him all over his body. They took off his clothes and touched his genitals. They kissed him and hit him, threatening him with further punishment. He was forced to give them oral sex and to masturbate. They attempted to rape him, by penile penetration of the anus, but did not succeed. Dr Cohen notes that whilst disclosing these events, the Appellant was visibly distressed, and stated that he found it very difficult to speak of such things. He was, he disclosed, then placed in a cell alone for two days. After that, he spent time in a cell with three others. There came a time when he had a fight with another prisoner who had touched his bottom. He was again placed in solitary confinement for a few days. He was then subjected to forced labour such as cleaning the toilets, and hard exercise. He lost weight. He was treated as an outcast by his family who viewed him as dirty and disgusting. He finds it very difficult to sleep and ruminates about the past.

58. He has a 2cm linear scar below the right eyebrow, which he attributes to a laceration from the edge of a desk during the beating in a classroom. The appearance is consistent with the attribution.

59. He has a 2cm linear scar at the lateral margin of the mouth on the left, which he attributes to a laceration from the corner of a metal part of a desk next to the one at which he was sitting when beaten in a classroom. The appearance is consistent with the attribution.

60. He has a 4cm ovoid scar just below the right knee attributed to a laceration from a metal bar, which he fell against after a shove on arrival at the police station. The wound was not sutured and took about one month to heal. The appearance is consistent with this attribution.

61. Dr Cohen is of the expert opinion that the Appellant has Post Traumatic Stress Disorder (PTSD), and a significant element of depression. She notes,having herself conducted research into this area, that late disclosure of sexual assault is a well-recognized feature of testimony. The reasons for this included shame, avoidance mechanisms, circumstances of the initial interview/s, including time; location, rapport, and gender of the interviewer and interpreter and non-verbal clues discouraging elaboration of detail, as well as anxiety state, depression, and sleep deprivation.

62. Dr Cohen advises further management of both the physical and psychological symptoms via the GP.

63. Following the 3 November 2003 report, Dr Cohen was asked to comment on the Respondent's letter of 12 January 2004. In her addendum of 27 February 2004, Dr Cohen states that her opinion is not formed solely on the basis of the account given by a patient. It is also based upon the responses given to many questions posed during examination, to elicit further details of experiences, and the associated symptoms and emotional responses. This procedure is normal medical practice, as well as that laid down in the Istanbul Protocol. These responses, as well as close observation of a patient, including posture, body language, gestures and expressions also assist in forming an opinion as to psychological state, and inform the assessment of the congruence of the findings elicited in taking the history, observation, and physical examination.

64. As to the scarring to the Appellant's person, she states that the scarring evident was accounted for in a clear and detailed manner, and is consistent with the attribution. She would not expect to see more scaring than is present given the nature of the injuries described and the passage of time. The sexual assault as described would not cause any scarring. It is well known that many methods of torture do not leave scarring and that psychological torture often has a far greater effect than physical torture.

65. Dr Cohen confirms that during the consultation, the Appellant was not drowsy, psychotic or confused and was able to give a clear account of himself. He has symptoms of depression and PTSD.

66. The Appellant has produced two reports from Dr F E Winton, dated 5 February 2004 and 25 April 2005. Dr Winton is a Consultant Psychiatrist, who trained at the Maudsley, and has worked as a Consultant for fourteen years. He is currently at the Phoenix Hospital in Bury St Edmunds, where he saw the Appellant. Dr Winton has acknowledged that as an expert his first duty is to the court. We are satisfied that we may receive his evidence as expert evidence within these proceedings.

67. From the 2004 report, we note that it is the expert opinion of Dr Winton that the Appellant developed moderately severe PTSD and depression as a result of events in Iran. His condition improved and became mild, but deteriorated again after receipt of the Respondent's refusal of his application, and became moderately severe again. He has PTSD and a Major Depressive Disorder. It is the opinion of Dr. Winton that the Appellant would benefit from both drug and debriefing therapies. (Diagnostic criteria are annexed to the reports as they are to those of Dr Cohen).

68. It is the expert opinion of Dr Winton, that were the Appellant to receive this therapy, his symptoms would improve to a small extent. If he were to receive the therapy and be granted asylum, his symptoms should become residual or absent within six months. Were he to be returned to Iran, his symptoms would deteriorate significantly and he would become a suicide risk.

69. On 26 April 2005, Dr Winton prepared an addendum to bring his expert opinion up to date. He is of the expert opinion that the Appellant still remains significantly depressed. The depressive features of his illness are more significant than the anxiety ones. He still has PTSD, although this has possibly lessened in intensity to a small degree. He had sensitive ideas of reference in that he believed people were looking at him when he was in the streets.

70. There has been a chilling intensification of his suicidal intent. He has clearly thought through the issue in a rational and determined fashion. It is the very firm opinion of Dr Winton that if the Appellant were to be told that he was to be removed to Iran, he would carry out his threat of suicide and kill himself.

71. In addition, the Appellant has produced three expert reports of Anna Enayat, of St Anthony's College Oxford, dated 4 March 2004; 24 April 2005, and 19 July 2005. The IAT in RM and BB also had before it evidence from Ms Enayat, and we refer further below to that evidence and the other evidence that was before the IAT, as well as the additional evidence of Anna Enayat, and other background evidence which was before us.

**The Background Evidence**

**72.** From the background evidence, it is noted that over the years since 1979 the UN Human Rights Commission and the UNHCR, amongst other bodies and organizations, have repeatedly condemned continuing human rights violations committed by the regime.

73. The traditional court system is not independent and is subject to government and religious influence. The judicial system has been designed to conform, where possible, to an Islamic canon based on the Koran, Sunna, and other Islamic sources. Article 157 provides that the

head of the judiciary shall be a cleric chosen by the Supreme Leader. The head of the Supreme Court and Prosecutor General also must be clerics.

74. Although the Constitution prohibits arbitrary arrest and detention, there is reportedly no legal time limit on incommunicado detention, nor any judicial means to determine the legality of detention. Suspects may be held for questioning in jails or local Revolutionary Guards offices.

**75.** Arbitrary arrest and detention has been and remains a feature within Iranian society. However, in March 1997 the decree to prohibit pre-trial detention of suspects, particularly the young, elderly, female or unwell, was issued by the Chief Justice (Ayatollah Mohammed Yazdi**).**

**76.** Four types of proof exist within the Iranian legal system. The application of confession, testimony, and oath and "the knowledge of the judge" remain unclear to those outside the Iranian judiciary. There is a marked concern that confessions are often gained by coercion and that the "testimony of righteous men" excludes women and members of religious minorities**.**

77. By law, the death penalty can be carried out for offences such as espionage; murder; armed robbery; abduction; rape; adultery or incest; sexual intercourse between a non-Muslim man and a Muslim woman; homosexual intercourse; drug smuggling; the use of arms to spread fear or alarm among the people, or deprive them of their freedom or security, or the spreading of corruption on earth (mofsed).

**78.** The Iranian authorities have said that many of the executions conducted in Iran relate to drug trafficking offences, but no corroborative statistics or information on the protection of human rights policies in dealing with such offenders is available. Numbers of stonings and deaths as a consequence are unclear, though most take place in the larger cities such as Teheran, Hamedan, Isfahan and Kermanshah. All are endorsed by the Supreme Court**,** including stoning of women found guilty of sexual relations outside marriage or who contravene the Islamic dress code**.**

79. However, the Iranian Foreign Ministry states that whilst execution is in Islamic law and cannot be overturned, the government is looking to alternative forms of punishment to stoning**.**

**80.** Prison conditions are harsh. Some prisoners are held in solitary confinement or denied adequate food or medical care in order to force confessions. Female prisoners reportedly have been raped or otherwise tortured while in detention. Prison guards reportedly intimidate family members of detainees and torture detainees in the presence of family members.

**81.** Paramilitary volunteer forces known as Basijis, and gangs of thugs known as the Ansar-e Hezbollah (Helpers of the Party of God), act as vigilantes, and intimidate and threaten physically demonstrators, journalists, and individuals suspected of counter-revolutionary activities. The Ansar-e Hezbollah often are aligned with particular members of the leadership. The Sepah-e Pasdaran-e Enghelab-e Eslami (Islamic Revolutionary Guards Corps (IRGC), was created by the revolutionary regime suspicious of the regular military. Its ground forces are said to number 100,000. It operates as the principal arm of domestic security, although it has to apply for a search warrant before it can raid a private home

**82.** The Basij, or Baseej (paramilitary volunteer forces), come under the control of the Revolutionary Guards**.** They are active in monitoring the activities of citizens, enforcing the hijab and arresting women for violating the dress code, and seizing 'indecent' material and satellite dish antennae**.** Ashura Brigades were reportedly created in 1993 after anti-government riots erupted in various Iranian cities. In 1998 they consisted of 17,000 Islamic militia men and women, and were composed of elements of the Revolutionary Guards and the Baseej volunteer militia**.**

**83.** Hezbollahi ("partisans of God") consist of religious zealots who consider themselves as preservers of the Revolution. They have been active in harassing government critics and intellectuals, and have firebombed bookstores and disrupted meetings. They are said to gather at the invitation of the state-affiliated media and generally act without meaningful police restraint or fear of persecution**.**

84. There are penalties for violating or attempting to violate the exit regulations, such as leaving or attempting to leave on an illegal or falsified document, ranging from 1 month to three years imprisonment and/or a fine, unless tried in a revolutionary court when the punishment may be far greater. Citizens returning from abroad are sometimes searched and interviewed by the authorities on return. It appears that the act of seeking asylum is not, in itself, regarded as punishable.

85. The government's human rights record remains poor, and abuses are not comprehensively addressed. The government has retained power through repression and intimidation. Reports of systematic human rights abuses including extra-judicial killings, summary executions, disappearances, widespread use of torture and other degrading treatment, continue. Likewise do reports of harsh prison conditions, arbitrary arrest and detention, lack of due process, unfair trials, infringement on citizens' privacy, and restrictions on freedom of speech, assembly, association, religion and movement. Despite the expressed plans of the immediate past President Khatami, for a tolerant diverse society, there is very little evidence of actual material positive change (See e.g. US State Department Report, CIPU Assessment; Human Rights Watch Report; Amnesty International

Report). Recent press media reports do not show any positive change, and it is noted that further executions were carried out in the recent past.

86. An extract from the April 2005 Country Assessment has this to say on homosexuals and transexuals, at Paragraphs 6.179 – 6.189 :

**"6.179** According to the Berlin COI Information Seminar Report 2001, although homosexuality is never spoken about and thus a hidden issue, in practice it is not difficult to encounter homosexuals in Iran. There are special parks in Tehran, known as homosexual meeting places. There are also a large number of transvestites walking around in North Tehran. Furthermore, sex changes are permitted in Iran and operations are frequently and openly carried out. **[77a]** A different sexual orientation may, however, create problems. Still, homosexuality is practised every day, and as long as this happens behind closed doors within your own four walls, and as long as people do not intend to proselytise 'transvestism' or homosexuality, they will most likely remain unharmed. **[3c](pg104)**

**6.180** According to the DIRB, technically, homosexual behaviour is sharply condemned by Islam, and the Islamic code of law Sharia law adopted by Iran. Sodomy is punishable by death if both parties are considered to be adults of sound mind and free will. **[2b]** It must be proven by either four confessions from the accused, the testimony of four righteous men who witnessed the act **[2b][15b]** or through the knowledge of a Sharia judge "derived through customary methods". If the accused repents before the witnesses testify, the penalty "will be quashed**". [2c](pg15)**

**6.181** According to the Berlin COI Information Seminar Report 2001,

> "From a legal point of view it is important to take a look at Iranian law particularly the Islamic Punishment Act, which carries the following provisions for homosexual acts:
>
> Art. 110: The prescribed punishment for homosexual relations in case of intercourse is execution and the mode of the execution is at the discretion of the religious judge.
> Art. 111: Homosexual intercourse leads to execution provided that both the active and passive party are of age, sane and consenting.
> Art. 112: Where a person of age commits homosexual intercourse with an adolescent, the active party shall be executed and the passive party, if he has not been reluctant, shall receive a flogging of up to 74 lashes.
> Art. 113: Where an adolescent commits homosexual intercourse with another adolescent, they shall receive a flogging of up to 74 strokes of the whip unless one of them has been reluctant.
> Art. 114 to 126 establish how to prove homosexual intercourse.
> Art. 127 to 134 relate to lesbian sexual relations. Punishment for sexual intercourse among lesbians is 100 lashes. If the offence is then repeated 3 times - the punishment is execution". **[3c](pg105)**

**6.182** So far, no cases of execution only on the grounds of homosexual relations have been identified. In fact, the burden of proof is quite high and it would be difficult to prove homosexual liaisons or intercourse. According to some reports in local papers there have been instances of execution of homosexuals. It is not confirmed whether the homosexual act alone led to execution or whether the person was accused on other charges too. **[3c](pg105)**

**6.183** According to a Reuters report of 18 July 2002, last year there were reports that a man accused of sodomising and then murdering his nephew was to be thrown over a cliff in a sack. This was given widespread publicity by the Iranian opposition in the UK and was taken up by other wires, but we have heard no reports that the sentence was ever carried out. **[5ba]**

**6.184** According to the Berlin COI Information Seminar Report 2001,

> "However, jurisprudence, burden of proof notwithstanding, certainly has used accusations of homosexuality. Furthermore, it does happen that homosexuality is mentioned as one of the accusations amongst other offences held against the defendant. For instance, accusations of homosexuality have been used in unfair trials, such as the case of a Sunni leader in Shiraz in 1996/97, who was clearly prosecuted for politicaly reasons. There have also been other political cases, although not in the recent past". **[3c](pg105)**

**6.185** According to the Ta'azirat of November 1983 (valid to June 1996) sentences of imprisonment for between 1 and 10 years and up to 74 lashes are possible. The death penalty may also be incurred if the act is deemed to be an "Act against God and corruption on earth". Since June 1996 the revised Ta'azirat omits direct threat of lashes or the death penalty. The penalties of lashing and of death are, however, still judicial options, even though they are not mentioned within the revised Ta'azirat. Reports suggest that since 1996 they have rarely been used. **[19a](pg18)**. Reports of use of the death penalty in cases where the only offence is sodomy/execution are extremely difficult to substantiate, and are held to be an unlikely sentence. More usually lashing is the punishment. **[2j]**

**6.186** However, strict though the legal position is, expert opinion consulted by the Canadian IRB in 1998 stated that,

> "Theoretically, homosexual behaviour is sharply condemned by Islam, but in practice it is present, and has been in the past, for the most part tolerantly treated and frequently occurring in countries where Islam predominates… 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." **[2j]**

**6.187** The same source stated that the police are not empowered nor do they actively pursue homosexual activity of any kind that is performed behind the "veil of decency" of closed doors. **[2j]**

**6.188** Sources indicate that there are held to be many differing levels of homosexual activity within Iranian society. 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. **[2j]** The key offensive practice is sodomy, or more particularly to be sodomised, as an unnatural inversion of God's creation, and some experts hold that "homosexuals" are understood in Iran to be willing passive partners. **[2j]**

**6.189** According to a DIRB Report of 1999, lesbian cases rarely come before the courts, as the case usually fails the test of proof of four righteous witnesses. Sources hold that lesbian behaviour in public is impossible to distinguish from accepted social contact between women in Iran. **[2o]** The source concludes,

> "Of female same-sex behaviour musahaqa almost nothing is known. Islamic law considers it sex outside marriage and therefore as adultery, with all the consequences already described. Yet because no penetration takes place, punishment is theoretically limited to one hundred lashes. In practice lesbian behaviour is regarded as relatively unimportant, because it usually takes place discreetly." **[2o]**

Other DIRB sources expand that lesbianism defined as genital contact between women is punishable by 100 lashes each and by death on the fourth offence. **[2c](pg15)**."

87. Many of the above points are also mentioned in the Amnesty International reports; Country Assessment; Human Rights Watch, and the other background evidence lodged.

88. We note at this point that we received the April 2005 Country Assessment, whereas the IAT in RM and BB received the October

2004 Assessment. It is for this reason that we have included the relevant section from the April 2005 Country Assessment above, although we cannot see that it contains information that is materially different from that which was before the IAT, and no such difference was drawn to our attention.

89. The determination of the IAT in the case of RM and BB is, of course, of the essence in our assessment of the evidence before us and in our consideration and findings as to the facts and as to risk on return. It is helpful and convenient to set out here, certain extracts from the evidence that was before the IAT, as well as their conclusions in relation to the expert and other background evidence that they received, as to the situation in general, as opposed to in relation to the individual Appellants before them. We note that the IAT found that the CIPU was not wholly accurate in all respects, and preferred the evidence of and referred to by Ms Enayat.

90. The IAT received expert evidence from Anna Enayat; a Mr K, member of the Iranian Bar; Professor Afshar; Professor Amin; the Honorary Legal Adviser to the UK Embassy in Tehran.

91. At paragraph 15 of the determination in RM and BB we find the relevant provisions of Iranian law on homosexuality, which we reproduce for ease of reference and because the Country Assessment does not accurately summarize them:

**"Relevant Iranian legal provisions**

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.

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. "

92. Having considered all the evidence, which included translations of certain judgments of the Iranian Courts, pertaining to cases involving charges concerned with homosexuality and homosexual acts, the IAT reached its general conclusions at paragraphs 108 – 124:

**"Conclusions**

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

93. We also received three reports from Anna Enayat, as we have indicated, and two of those were prepared after the hearing before the IAT, which concluded on 15 February 2005. Having referred to the determination of the IAT, we next summarize two articles which we received at the hearing on 22 July 2005, and then consider the additional material that we have from Anna Enayat. We also note that she has given permission for her reports in the case of RM and BB to be lodged in these proceedings.

94. Evidence was placed before us, in the form of an article from the Times of London dated 22 July 2005 and an article from the internet, from Roozonline, 21 July 2005, to show that two young teenage men, one said to be eighteen and one still a minor, were subjected to public execution by hanging, apparently after having more than 200 lashes inflicted upon them; on Tuesday of this week, in Justice Square, in the city of Mashhad. Both articles state that whilst the sentence was ostensibly handed down following a conviction for rape of another teenage boy, both British and other Gay Rights groups accuse the Iranian authorities of using the conviction on the charge of rape as a smokescreen to justify killing homosexuals, and of torturing the two young men into wrongful confession. The lawyer for one of the two, stated that a plea to commute the death sentence for the young man who was still a minor was rejected. He stated that the two had not understood that gay relations were forbidden.

95. We note that Ms Enayat, in her evidence, (paragraph 39 of RM and BB), states that there was a tendency of the Iranian authorities only to report cases which satisfied their model of a corrupt homosexual. At paragraph 43, she was of the expert opinion that for the most part, since the Revolution, there would not be a discreet gay community in Iran, although she thought that there was a certain degree of co-ordination and contact.

96. In her report of 24 April 2005, Ms Enayat refers to her December 2004 report and her testimony before the IAT in the cases of RM and BB. She states that material dealing with the charge of an "immoral act" is of direct relevance in the case that is before us, given the Appellant's testimony that he already has a conviction, since it illustrates further the range of charges and penalties available to judges. In four Supreme Court Act cases reviewed, a sentence of imprisonment was imposed either on account of an "immoral act", or where the judge was faced with confessions that were in some way defective from the viewpoint of the Shari'a, and the judge also made use of his powers to impose a discretionary penalty under Article 115.

97. Ms Enayat makes clear that "crimes against public morality/virtue" (e,g, adultery, fornication, sodomy, pimping, non-penetrative homosexual acts), are referred to under this general term. But this does not mean that these acts are only criminal offences and only prosecutable as such, if they are committed in a public place.

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***98.*** Further, it is to be noted that where such an offence is committed in public, the offender will receive, "…***in addition to the legal penalty for that offence, a prison sentence of ten days to two months and up to 74 lashes of the whip."***

***99.*** Whether or not an act committed in private is prosecuted depends, simply, on whether it is discovered and brought to the attention of the authorities.

***100.*** Ms Enayat draws attention to two further new developments since the hearing in the cases of RM and BB. They are these. First, the coming into existence of the Social Protection Division of the Judiciary. Since the Autumn of 2004, the Iranian judiciary has been in the process of establishing, under its own supervision, a new organization to police moral crimes. The Division may be regarded as a sort of state run Neighbourhood Watch (although it is also to have units in workplaces etc) with wide legal powers, operating under the supervision of the Head of the Judiciary and the Prosecutor General. At the grass roots, it is to be run by volunteers, whose principle purpose is to discover and report 'monkerat' (i.e.moral) crimes. 'Monkerat' is short for 'enjoining the good and forbidding the evil' that is the duty incumbent on all Muslims to promote 'virtue'). In effect, in Iran, this means the prevention and prosecution of moral offenders, including

'cleansing society of criminal elements and reinforcing the work of the party of God'. [We note that 'monkerat' or 'morals police' have already been in existence in Iran for some years. See e.g. the determination of the RSAA of New Zealand in Refugee Appeal No.74665/03].

***101.*** These Grass roots units will be established through society and will be organized and supervised by a unit called the popular movement', acting as a deputy of the central council. Its duty will include collecting all the information received from informants and giving it to the provincial head of the local Social Protection Division (SPD), to be logged on computer, and for decisions to be made as to the action to be taken in each case. There is an obligation to take such action set out in the Articles of Association of the SPD.

***102.*** Among other duties will be that of gathering information on the social ills of each neighbourhood and region, and about 'deviant individuals'.

***103.*** Lawyers protested about the creation of the SPD, but received no response from the judiciary. The actions of the judiciary have not been contested by the current, conservative dominated parliament.

***104.*** Ms Enayat emphasizes that there are a number of ways in which homosexuals in Iran might be vulnerable to discovery and prosecution. There are various government/religious institutions that survey public morality, as well as private complaints to the judiciary or the police, which they are obliged to follow up. The new SPD will, says Ms Enayat, add considerably to the insecurity of gay people in Iran.

***105.*** Ms Enayat refers to the 15 March 2005 reports of the death sentence being passed upon two men, following the discovery, by the wife of one of them, of a video film showing the two engaged in homosexual acts. Neither man was accused of any crime. According to the confession of one, he had made the film by way of an insurance policy against his older and richer partner perhaps deciding to withdraw the financial support that he was providing in return for sex.

***106.*** Ms Enayat states that it is unprecedented to find such a report in the Iranian press, because such trials are normally held in camera. She states that it is worth noting that the newspaper in question has over the past two years made a point of reporting on moral offences where able, and has published a number of courageous investigative articles, often of the social circumstances of vulnerable women who have been sentenced to death or long periods of imprisonment. She further notes that a homosexual was publicly executed in Mashhad in December 2004.

***107.*** We also note the mention of numbers of child deaths in the article in the Times of 22 July 2005, including that of a sixteen year old young woman who was hanged for sex before marriage. Medical

reports, apparently declared inadmissible, had suggested that she was mentally ill. We also note that the writers of the article in the Times did not put their names to the piece, which is simply 'By Our Foreign Staff'. We take the view that this step was considered necessary as a protective measure for journalists and some of those who informed the journalists.

***108.*** Ms Enayat is of the opinion that a convert to Judaism would face very real problems in Iran, owing to the repugnance felt by the Islamic establishment for the State of Israel. [We do not mention that aspect of the evidence further as Ms Rothwell made it clear that the Appellant has not pursued his interest in a possible conversion, and so did not wish it to be considered as a part of his fears on return to Iran].

***109.*** In her report of 19 July 2005, Ms Enayat dealt with two matters. The first is to do with legal proceedings involving a juvenile, and the second provides further detail about the SPD, which is already up and running.

***110.*** Ms Enayat explains that according to Article 1210 of the Civil Code, the beginning of adulthood is when a child reaches puberty – 9 lunar years for girls and 15 lunar years for boys, when they may, with permission of their father or paternal grandfather, marry. At this age children are, by post 1979 Shari'a based legislation, regarded as having reached the age of criminal responsibility and are subject to the provisions of the criminal code (The Law of Islamic Punishment). Notwithstanding these rules, in other spheres, the law applies the concept of "mental development" in order to determine the age of maturity. This causes legal complications and ambiguities. In practice, for the purposes of all legal transactions or dealings other than marriage or divorce, or punishment for the contravention of the criminal code, government institutions treat as immature, a person who has not yet reached18 solar years as established by their birth certificate. Persons under 18 must have a guardian to oversee the conduct of their affairs.

***111.*** In Juvenile Courts, procedures are based on the principle that an accused has not reached maturity, but where he is over 15 lunar years, the provisions of the criminal code will apply to him as if he were an adult.

***112.*** Trials in Juvenile Courts are held in camera and only parents or legal guardians, defence lawyers, if instructed, and witnesses, may be present. Where there is no access to a child's parents, then the court is obliged to appoint a lawyer for the child.

***113.*** Ms Enayat states that any judgment would be explained and served to the parents of a juvenile, and copies served to them and /or any lawyer that may have been instructed. Prisons do issue release documentation, which would normally be given to the parents.

***114.*** There is no public record of such cases, so that information about the proceedings and the conviction and sentence would not be available through the media, or on request from a court, by a member of the public.

***115.*** It is possible in some circumstances to obtain a copy of an old court judgment through a lawyer, or through a known acquaintance of someone working in the courts, to whom a person could safely pay a bribe. However, in Juvenile Proceedings, which are secret, that could only be done by the juvenile, with the help of his parents or a lawyer instructed by him. Further, the authorities are very careful about allowing information on proceedings concerning homosexual acts to enter the public arena.

***116.*** A request by a young person for copies of such documents would arouse suspicions. If a person were wanted for a further offence, then it is likely that there would be reluctance to assist in obtaining records, on the part of individuals, for fear of endangering themselves, and of being detained for questioning as to the whereabouts of the individual.

***117.*** On the SPD, Ms Enayat confirms that the plan is very much a reality. It has been stated by the Head of Judiciary that the units will take the place of the police who have proved ineffective, and will provide much greater control over society. Some 210 units have actually been in operation over the past few months, with 1970 accredited volunteers, functioning in offices, mosques, educational institutions and neighbourhoods. They will provide ‘guidance’ where they observe moral offences and where the offence is serious, will report it to the disciplinary forces of the judiciary’ for further action to be taken.

***118.*** The June 2005 elections in Iran, which have resulted in a new president, Mahmoud Ahmadinejad, who is a representative of the fundamentalist right; have raised concerns that over the next few months we will see further deterioration of the general human rights situation in the country and, most especially, a tightening of controls over personal conduct. There is scant prospect that the SPD will fade away.

## Assessment of Credibility and Findings

## The Refugee Appeal

119. We must make findings as to the credibility of the Appellant and the claim in the light of the totality of the evidence that is before us, including the background evidence. The Respondent took the view that the Appellant's claim was not credible. He considered that there were aspects of the account that were implausible, and unsupported by other evidence, so he was not satisfied that the Appellant had shown that his claim was to be regarded as true.

120. We have set out in some detail, summaries of both the evidence of the Appellant and that of the clinicians on his behalf, as well as the background evidence, so that it can be plainly seen that there is support for very much, if not all of the Appellant's case to be found in the background evidence. We concur with Ms Rothwell in finding that to be so, and in finding that to be a significant indicator in his favour insofar as the assessment of credibility is concerned.

121. Ms Clarke in her submission relied upon the Respondent's letters of refusal. In particular, the Respondent did not accept that the Appellant would have been found guilty of homosexual intercourse on the evidence of one cleaner. However, as Ms Rothwell pointed out, the Appellant's case was that when he was brought before the court, and under pressure, having been told that there were other witnesses ready to testify, he actually confessed, after the Bassij had given evidence as to what the cleaner had told him. The judge had proceeded, based on the confession, by way of judicial knowledge.

122. The Appellant has given his account in very great detail in relation to the discovery, the arrest, detention, charge, trial and sentence, as well as what happened to him whilst serving his sentence. We find that his account is consistent with the background evidence, and that of the experts, in particular Ms Enayat, on whose evidence the IAT placed considerable weight in the cases of RM and BB. We find no reason to take any different approach insofar as her careful and comprehensive evidence is concerned.

123. We find that the Appellant has made mention of specific facts such as the placing of particular objects within a setting, and the happening of quotidian events, such as the daily routine in the Juvenile Detention Centre, that cause us to form the view that he gives the account that he does because he was there and because it happened, as he says that it did. We agree with Ms Rothwell, for the reasons she advances, that the Appellant is to be regarded as a reliable witness with a credible claim.

124. We further agree with Ms Rothwell, for the reasons that she advances, that it is not appropriate to hold against the Appellant his

late disclosure of the serious harm that befell him after he had been detained, and before he was brought to trial. We are satisfied that we may rely upon and give weight to the expert evidence of Dr Cohen and Dr Winton in relation to the Appellant's physical and mental health. We rely upon Dr Cohen's opinion, which is shared by every other expert in the field of whom we are aware; that late disclosure of sexual abuse is common, for reasons of shame amongst others, and we find that in this case it does not detract from the credibility of the Appellant or his claim.

125. In relying upon the expert evidence of both doctors, we have noted and given weight to the information provided by Dr Cohen as to the factors taken into account by a clinician when assessing a patient, from which it is clear that much more than the account of the patient is considered (see paragraph 63 above).

126. Importantly, we remind ourselves that in addition to the barriers created by the experience of the abuse, there is also to be taken into account the fact that the Appellant was still a minor at the time of his arrival in the UK, when he made his claim, and is still only a young adult now. His experiences of being questioned by adults about his life have been extremely negative, and these factors may be regarded, we find, as having added to his difficulty in disclosing and reluctance to disclose the abuse, as well as the factors highlighted by Dr Cohen.

127. Ms Clarke submitted that in addition to the delay in telling the full story, the Appellant had not produced any evidence in support of his claimed detention, conviction and sentence. However, we note what is said in that regard by Ms Enayat, and find that it is clear that it is reasonably likely that the Appellant speaks the truth when he says that he was not given any documents about his charge, trial and conviction, and that any papers such as there were would be with his estranged parents. He did not have a lawyer. We find that it is not reasonable to expect him to have approached his parents or his cousin (_____), in order to try to persuade them to procure and /or send him documents, given the difficulties and dangers that such a course plainly holds for any concerned. We find that the lack of supporting evidence in this regard does not go to show that the events did not occur. On the contrary, we find that the Appellant's account is comprehensive, detailed, clear, consistent (internally and externally), coherent and compelling.

128. For similar reasons, we find that the account he gives of the relationship that he had immediately before leaving Iran, and the events that caused him to flee the country, also occurred as he has stated. Again there is the full, consistent detail and the plausible noting of small points, unlikely to be observed or recounted by a person who had not had the experience described. The Appellant does not know for certain how the authorities came to know that he and his boyfriend were in the apartment on that day in 2002. He believes, and we find his belief genuine and reasonably likely to be correct; that neighbours may

have informed upon him. We do note and apply the finding of the IAT in RM and BB, to which Ms Clarke drew our attention, which urges caution on the part of Immigration Judges when considering allegations that family or friends may have informed upon an individual to the authorities. This is because the consequences of such an act can be so dire. (Paragraph124 of RM and BB).

129. In this case, however, the Appellant does not say that it was family or friends. On the contrary, his evidence is that although his parents came to hate him, as he sees it, nevertheless, they did not wish him to be killed or harmed, and they did not inform on him. Indeed they had helped him to escape. His cousin, the person with whom he had spent time and with whom he had built up a degree of trust, has continued to keep in touch and to be of some support. It is not alleged that it was the cousin who informed. We note that the Monkerat, or morals police, were in existence at the time. We note that the Appellant and his boyfriend did embrace within the confines of the car park in the apartment building, which they visited regularly and frequently. Parts of the building were still under construction, and builders and other connected persons would have been in the vicinity as well as some occupants. We find that there is a reasonable degree of likelihood that there was an informer who brought the situation to the attention of the authorities.

130. It is clear from the findings of the IAT in RM and BB, that where allegations are brought to the attention of the authorities, then they will act. See, for example, paragraph 123 of the determination. Claimed offenders would be arrested, detained, and questioned. We see no reason to find other than that the Appellant's account of events in this regard is to be considered reliable.

131. As to the Appellant's interest in possibly converting to Judaism, we note that he does not pursue before us any claim that he would thereby be exposed to any risk on return. That is because he has decided not to pursue any such conversion. The information is provided merely for completeness and we need consider it no further.

132. The same is true in relation to his concerns about the strange men who approached the Appellant and his friend in Hyde Park, and the subsequent telephone calls, as well as his efforts to trace his brother. We find, and we agree with Ms Rothwell in this regard, that they are the expressions of concern on the part of someone who is in fear. In such circumstances, events can, as Ms Rothwell submitted, take on potentially sinister meanings, and interpretations. We also note that a tendency to fear that he is being observed was mentioned by the clinicians as a feature of his presentation, and we find that this tendency may well have played a part in his interpretation of these events. We find that these aspects of the case are not materially relevant to the issues before us and that we need not make specific findings about them. We state, for clarity that they do not detract from

the credibility of the Appellant and his claim.

133. In reaching our findings as to credibility, we have applied the provisions of section 8 of the Asylum and Immigration (Treatment of Claimants Etc.) Act 2004. For all the reasons that we have given above, in all the circumstances of his case, bearing in mind that he was a minor when he left Iran and when he claimed asylum, we find that the fact that the Appellant travelled without a valid passport and exited Iran illegally , does not fatally adversely affect his credibility. Indeed, the Country Assessment shows that there are strict exit procedures in place at Tehran airport, and he would have had great difficulty in exiting that way without being detected and apprehended, even if he had had a passport and ticket. The same is true in relation to the fact that he did not claim asylum on arrival. He was taken to the local authority social services department, as a separated child, and social workers did not arrange to take him to the Home Office for some days. It is not appropriate that this delay be held against him so as to be fatally damaging.

134. We are satisfied that the Appellant has shown that the assaults he experienced actually occurred, for the reasons given, at the time of his arrest, detention, and subsequently. We remind ourselves of the very particular nature of the harm, which included very serious sexual assault, and find that this was serious harm inflicted by reason of his being a homosexual and that it amounted to his being persecuted and to breach of his right to freedom from torture, inhuman and degrading treatment or punishment under Article 3 ECHR.

135. For all the forgoing reasons, in the light of the totality of the evidence that is before us, we find that the Appellant and his claim are to be regarded as credible and that the relevant material primary facts are those summarized above, and taken from all the evidence of the Appellant, oral, written, and through the clinicians, as assessed in the light of the background evidence and the relevant case law.

**Risk on Return**

136. The Appellant would return to Tehran. He does not have a passport and so it would be necessary for the UK government to make arrangements with the Iranian authorities for a travel document to be issued. In order for this to happen, enquiries will be made centrally and locally, with the police and the security forces and the Bassij, about the Appellant. The authorities will thereby be fully aware of the Appellant's history and the fact that he has the criminal record that he does as a juvenile , for offences relating to his homosexuality (Lavat, including Tafkhiz). He has been expelled from school and prohibited from studying in Iran again.

137. He was a wanted person when he left the country, having fled the scene at his boyfriend's apartment, in October 2002, where the two

had been caught by the authorities, in an act that is reasonably likely to constitute an offence against public morality, such as Lavat or Tafkhiz. His father had come to the cousin's house a few days after the Appellant fled the scene, and told the Appellant that the authorities were seeking him.

138. In a society such as that described by the experts and in particular by Ms Enayat, which keeps such careful watch over its citizens; it appears unlikely that there would be no record of the events of 25 October 2002 and those that followed. Given the secrecy that has surrounded trials of those charged with offences connected to homosexuality, it has not been possible for the Appellant to find out what happened his boyfriend. A little information about such cases, sometimes comes into the public domain, thanks to courageous journalists, as Ms Enayat points out.

139. We find that it is reasonably likely that on return the Appellant's record will precede him, and he will be of adverse interest on arrival at the airport. Alternatively, when he arrives, he will be questioned and matters will come to light then. In either event he is reasonably likely to be prosecuted for illegal exit from Iran, as is shown in the background evidence (USSDR; CIPU, Ms Enayat March 2004, p87), and again this is a further channel through which his antecedents will come to light.

140. We find that he is liable to a prison sentence of 1 month to 3 years for the offence of illegal exit. He is then at risk of being persecuted or subjected to serious harm contrary to Article 3 ECHR, in detention, pending and after trial, by reason of his homosexuality, as happened to him whilst in detention pending trial in the Juvenile Correction Unit.

141. He is further liable to being charged and tried for Lavat or Tafkhiz, arising out of the events on 25 October 2002, of which there will be a record on his file. It is not known whether any formal summons or warrant has already been issued to, or in respect of the Appellant. Any such step in the legal process that may have been taken will come to light when his background is investigated. Thereafter, as the IAT found in RM and BB at paragraph 123, there is a real risk of serious harm to the Appellant. This would be either on the basis of confession of the Appellant, or knowledge of the judge, including the Appellant's criminal record, and any evidence the judge may have before him through any proceedings there may have been in relation to the Appellant's boyfriend, who may himself have confessed to acts with the Appellant that are crimes in Iran. There is a real risk that the Appellant would be found guilty and sentenced to a significant prison sentence, and lashes, where he would again be exposed to ill-treatment including ill-treatment amounting to being persecuted or other serious harm by reason of his homosexuality. In addition, he is at real risk of serious harm whilst in detention pending charge and trial.

142. Ms Rothwelll accepted that it was difficult to tell whether the public execution of the two young men reported in the Times and in the Rooz Online article, had arisen because of genuine convictions for rape, or whether it was a smokescreen to enable homophobic killings to take place. We are mindful of the evidence of Ms Enayat, in noting the very real difficulties of the media in reporting such matters. It is noted that there does not appear to be an issue that the two young men were homosexuals, one still a minor.

143. There is concern, as noted from the Rooz Online article, that both were minors when the alleged offences were committed, and that there had been use of deliberate delay until the minor defendants became adult, in order to try and punish them as adults, in circumstances where they might otherwise be regarded as minors, which is wholly unacceptable. We find that to delay the legal process for such a reason, or to such effect, if this occurred, may be regarded as persecutory and as breach of Article 3 rights, to include breach of Article 6 rights. Ms Rothwell acknowledges that the Appellant's case is not on all fours with those of the young men who were executed earlier this week. However, we find that the fact of, and circumstances apparently surrounding these public executions, constitute real cause for concern as to how the Appellant will be treated on return, and as to whether he may be made a scapegoat. This concern as to potential persecutory or other serious harm is a further factor, albeit not of great weight in itself, to be placed in the scales in favour of the Appellant. We remind ourselves of the low standard of proof that is applicable, and of the fact that the Appellant does not need to show that he will be killed in order to succeed in his claim.

**Membership of a Particular Social Group**

144. The characteristics of a particular social group can be identified both in negative and positive form. As extracted from the leading case law (including **Ward v Canada[1993] 2 SCR 689; Shah and Islam [1999] INLR 144, Montoya – v – SSHD [2002] EWCA Civ 620, and SSHD –v- Skenderaj [2002] EWCA Civ 567)** these can be summarised as follows:

a. There is no requirement for there to be a voluntary, associational relationship

b. Members need not be homogenous nor does the group have to exhibit any particular degree of internal cohesion

c. A particular social group may include large numbers of persons.

d. The group may not be defined simply on basis of a shared fear of being persecuted. The persecution must exist independently of and not be used to define the social group.

145. Following this three categories of the “particular social group concept” can be identified:

a. Groups defined by an innate or unchangeable characteristic; whatever the common characteristic that defines the group it must be one that the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or conscience.

b. Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association

and

c. Groups associated by a former voluntary status, unalterable due to historical permanence.

146. No issue has been raised as to the Appellant’s claim that he is a member of a particular social group, namely homosexuals in Iran. We find that his homosexuality is either an innate and unchangeable characteristic, or it is a characteristic that is so fundamental that he should not be required to change it. There are at least two theoretical schools. One that holds that homosexuality is innate, the other that it is a matter of political choice. A third would claim that both nature and nurture are involved. It would appear that on the facts of this case the Appellant has simply accepted that he is gay and has not mentioned any views that he may have on the nature of homosexuality. As there is no issue as to whether or not it is a characteristic that he should be required to change, and indeed Ms Clarke submitted that he should be free to lead what she described as an alternative lifestyle, we need explore this aspect no further.

147. In the light of all the evidence, we find that the discrimination experienced by homosexuals in Iran does include discrimination in law, not least through a lack of protective legislation, and discrimination in terms of criminalization of their daily lives; lack of access to an impartial, fair and independent police and judicial service, and punishment through that criminalization of their daily lives, that of itself is persecutory and contrary to Article 3 ECHR. There is further risk of ill-treatment in detention for those who are homosexual, by reason of their homosexuality, even if they are not in detention by reason of their homosexuality. We further find that the discrimination also includes societal discrimination by members of the population, from which the authorities either cannot or will not provide protection. As it was put by the President in the case of **ZH (Women as a Particular Social Group) Iran CG [2003] UKIAT 00207,** the lack of state protection is inherent in the discrimination relied on.

**Nexus**

148. Mere membership of a particular social group is not sufficient to enable a successful claim under the Refugee Convention. There must be some nexus between the persecution and the reason for persecution, that is, the persecution is for reasons of….membership of a particular social group.

149. In **Shah and Islam** Lord Hoffman said *"what is the reason for the persecution which the appellants fear?...important to notice that it is made up of two elements. First there is the threat of violence. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the state to do anything to protect them. There is nothing personal about this. The evidence was that the state would not protect them because they were women."*

150. We find that the evidence in the case before us shows that the ill-treatment of the Appellant is at the hands of the state, who make and enforce the discriminatory legislation, and who condone or fail to act to protect homosexuals who are further ill-treated in the course of detention, and within wider society. The state does not protect the Appellant, we find, because he is homosexual.

151. We find that the background evidence shows that a person with the characteristics of the Appellant would be at real risk of detention upon return, by reason of his membership of a particular social group, namely homosexuals in Iran, whether on arrival, or immediately thereafter.

**Risk After Entry**

152. If we are wrong in so finding, and the Appellant were able to enter Iran without receiving any adverse attention whatsoever, we find that it would only be a matter of time, before the Appellant would come to the attention of the authorities when information passes from the Monkerat or the SPD, to the judicial and other authorities. He would be a new person in the neighbourhood, wherever he went in Tehran, or elsewhere in the country. He has only his cousin so far as is known, and presumably would try to stay with him. His presence would be remarked upon by neighbours, who would ask questions. If the Appellant were to try to find employment, checks would be carried out on his history. He cannot study as he is prohibited, by an act of serious discrimination, from so doing. Should he try to do so, again his history would come to light. He would be under observation by the SPD, and there is no real likelihood that he could simply lead a discreet homosexual life. We distinguish the facts of this case from those in the case of **AT (Homosexuals:need for discretion?) Iran [2005] UKIAT 00119 27 July 2005**. Further, We accept the evidence of Ms Enayat that there is no gay community as such, no gay group or organization, in Iran, to whom the Appellant could turn for any meaningful support.

153. We find that the Appellant is at real risk of being persecuted and of experiencing other serious harm, in detention following arrival, whether he is charged and tried or not. We remind ourselves that there is no legal time limit on incommunicado detention and no means to determine the legality of detention. We find that the Appellant will already have been persecuted and subjected to other serious harm prior to the stage of charge and trial. So that even if he were to be found not guilty after a fair trial, which is unlikely given the manner in which the criminal justice system functions, as shown in the background evidence, or if he were able to achieve a reduction in sentence, to a fine, after a deliberately false prosecution, it would be too late.

**Conclusion on the Refugee Aspect of the Appeal**

154. For all the above reasons, we find that the Appellant has shown that he has a well-founded fear of being persecuted at the hands of the authorities, in Iran, by reason of his membership of a particular social group, namely homosexuals in Iran, and that he is thereby a refugee who needs and deserves surrogate international protection.

**Other Human Rights**

155. The Appellant relied on the Human Rights Act 1998. The Appellant claims that he is fearful that upon his return to Iran he will be severely ill-treated, tortured, or even killed. Upon the material facts of the matter which are those set out above and the background material before us, and for the same reasons as set out in relation to the Refugee aspect of the appeal, we find that the Appellant has shown that he will experience torture and cruel, inhuman or degrading treatment or punishment for the reasons claimed. We find that substantial grounds have been shown for believing that the Appellant would face a real risk of being subjected to treatment contrary to Articles 2 and /or 3 (see e.g. Chahal-v-UK [1997] 23 EHRR 413), and therefore this aspect of the appeal also succeeds.

156. Ms Rothwell pursued a separate limb of the claim, namely that the Appellant would be at real risk of serious harm contrary to Article 3 ECHR, and /or Article 8 breach of physical and moral integrity, on removal and or return, by reason of his poor mental health, and in particular that there is a reasonable degree of likelihood that he would commit suicide if returned to Iran. Ms Rothwell accepts that the Appellant would be able to receive medication and other psychiatric treatment in Iran. The focus is on the risk that he would commit suicide as noted by Dr Winton.

157. This becomes relevant only where the Appellant is to be returned as a failed asylum seeker. We have found him to be a refugee and we therefore deal with this aspect of the matter only for

completeness, as if he were a failed asylum seeker, which on our findings he is not.

158. Dr Winton described a chilling intensification of the Appellant's suicidal intent. He states that it is his very firm opinion that the Appellant would carry out his threat of suicide and kill himself if told that he was to be removed to Iran. We have no reason to doubt that opinion of Dr Winton, but we note that it was given on 26 April 2005, about three months ago. We did not receive any addendum to his report on 22 July 2005, and the Appellant did not himself give evidence about this.

**159.** Ms Clarke drew our attention to the Tribunal case of N Kenya in this regard, and to paragraphs 21 and 22 in particular, which she submitted provided guidance as to how this aspect of the case should be viewed. She did not lodge a copy of the case in question. However, we are aware that there is subsequent guidance from the Court of Appeal in relation to the approach to be taken to a situation in which there is concern that a person will commit suicide in the UK on being informed of removal directions. That is the case of **J [2005] EWCA Civ 629 23 May 2005.**

160. We note that the Court of Appeal identified three stages in a situation such as this. Two relate to circumstances pertaining in the UK, and the third to those in the receiving country. This case concerns the situation in the UK, as it is here that Dr Winton appears to state that the suicide would take place. This is described by the Court of Appeal as a 'domestic case', that is a case in which it is alleged that the breach of Article 3 rights will arise from the conduct of the UK authorities, where the state is said to have acted in a way, within its own territory, so as to infringe the enjoyment of Article 3 rights within that territory (paragraphs 16 and 17 of **J ).**

161. We note that where a person has been identified as being at risk of suicide, the Respondent arranges for him or her to be escorted during the journey. That being so, we find that there is no evidence in this case to show that this Appellant would be at real risk during the journey. The other key period is that spent in the UK between receipt of the notice of removal being served and the arrival of the escort.

162. We note that Ms Rothwell did not develop, in oral submissions, the argument set out at paragraph 10 of her written skeleton, which merely asserts breach of Articles 3 and 8 by reason of the fact that the Appellant presents a high suicide risk. Nor did she seek to respond to the brief submission made by Ms Clarke, that service of removal directions and removal of the Appellant would not, on the evidence, constitute breaches of any of those rights, in the circumstances of this case.

163. It appears that it is likely that the Appellant would be detained at

the point of service of the notice of removal directions. On the evidence before us, it is not to be presumed that he would receive other than appropriate care during detention so as to ensure that he did not attempt or commit suicide. Further, there is no evidence to show that appropriate arrangements would not be made by the Respondent, through medical, social, and other services, to ensure the Appellant's safety in the community, were he to remain in his home pending detention or pending reporting for removal. Ms Rothwell accepts that there is treatment for the Appellant's condition available in Iran, and she did not take us to any evidence to show that the UK authorities would not be able to hand him into the care of the Iranian authorities on arrival in Tehran, so as to prevent any breach of Article 8 or Article 8 rights at that stage.

164. In all the circumstances, following the guidance of the Court of Appeal in **J** , ( see 25-43 in particular) we find, on the evidence that has been produced, that it has not been shown that there would be a breach of Article 3, nor a breach of Article 8 ECHR, (the right to respect for physical and moral integrity). We find, following **J,** that the Appellant has not shown that there are substantial grounds for believing that there is a real risk of ill-treatment contrary to Article 3, in relation to this aspect of the claim. Ms Rothwell made clear that the Appellant did not allege any breach of other aspects of Article 8 ECHR. Following the judgment of the court in the case of Ullah and Do (above) it is not necessary for us to consider any other potential breaches of human rights in Iran.

**Summary**

165. For all the foregoing reasons, on the evidence that has been produced before us, the Appellant has made good his claims under the Refugee Convention and the ECHR, ( although not in relation to the claimed breach of Articles 3 and 8 ECHR by reason of the risk of suicide ), and both aspects of the appeal are allowed.

166. We allow the refugee appeal.

167. We allow the human rights appeal.

C JARVIS
Senior Immigration Judge Date: 28 July 2005