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Heard at Field House

HA (Article 3-Refugee-
Adultery-Punishment) Iran CG
[2003] UKIAT 00095

On 1 October 2003

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

17.10.03

Before:

**P R LANE (CHAIRMAN)
J A O'BRIEN QUINN QC**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

APPELLANT

and

RESPONDENT

Appearances

For the appellant: Mr C. Buckley, Senior Home Office Presenting Officer.

For the respondent: Ms N. Braganza, Counsel, instructed by Msrs Berryman Shacklock, Solicitors.

DETERMINATION AND REASONS

1. The appellant, who is the Secretary of State for the Home Department, appeals with leave against the determination of an Adjudicator, Mr D. E. Colyer, sitting at Nottingham, in which he allowed on asylum grounds the respondent's appeal against the decision of the Secretary of State to give directions for his removal from the United Kingdom.
2. The respondent is a citizen of Iran, now aged 30. He is married with twin children. His work in Iran was that of a salesman of mobile telephones. In 2002 he began to rent a shop in Oronieh. A divorced woman called Mahboobeh Lotfi came to the shop to purchase a

telephone line. A friendship developed between her and the respondent.

3. On 15 June 2002 the couple went in the respondent's car to a lake, which was situated close to a small village. They had sexual intercourse in the car, at the lakeside. Unfortunately for them, the couple had not noticed that people coming home from their farms had seen them. The couple were sitting naked in the car when there was a knock on the window and "about eight people were standing outside who were insulting the couple for their actions. They were both dragged from the car and beaten with kicks and punches before having to put their clothes back on. One of the men phoned the police to say that they had caught some people committing Zena" (determination, paragraph 37).
4. The couple were arrested by the police. The following morning the brother of Mahboobeh attended the police station and attacked the respondent. Also present were some of the witnesses from the previous evening (paragraph 39).
5. The respondent was taken to court. Four witnesses gave evidence against him. On 6 August 2002 he was sentenced 'to a hundred lashes and then death by stoning. Mahboobeh was sentenced to a hundred lashes' (paragraph 42).
6. The respondent then apparently was able to appeal to the appeal court, and, moreover, to be released on bail, subject to a surety of approximately \$50,000.
7. Having been told "that 99 per cent of cases that went to appeal failed and the original decision would be upheld and that his only option to prevent being killed was to leave the country", the respondent did so by departing in the boot of a car that had been arranged by an agent. The respondent's journey was controlled by agents until he eventually arrived in the United Kingdom, where he claimed asylum (paragraphs 45 and 46).
8. The Adjudicator found the respondent's account to be credible. As for what might happen to the respondent in terms of the Iranian legal system, the Adjudicator had this to say:-

'48. I accept in total the report of Professor Haleh Afshar who is an immanent (sic) and well-qualified academic expert on Islam and Iran and as such able to give a very persuasive opinion which I accept. Her opinion being that there is a high level of probability that the [respondent] would face execution in Iran. According to Iranian law adultery is a cardinal sin, in a country that is ruled by the faith. In the case of an adulterous couple Article 61 of the Iranian Islamic Qassas laws condones their murder.

49. Honour killing is not considered to be a crime at all...the Qassas laws allow the state to stone the "sinners" to death. She further comments on the position regarding bail by stating that it is quite common for courts to release individuals on bail pending appeal or further trials. The accused and sometimes even prisoners are required to place a substantial sum or deeds of their houses as security against their temporary release. Again I accept this opinion and it is consistent with the account given by the [respondent].

50. I also note from the background material that the punishment of stoning for adultery is not a mere threat but is carried out and in the words of one of the parliamentary representatives these are difficult but necessary punishments that put the fear of god into potential sinners'.

9. Given his findings, the Adjudicator concluded that the respondent had 'well-established according to the lower standard of proof that he faces a real risk of the most severe treatment if he returns to Iran. I find that the treatment is way beyond that acceptable in international standards of legal process and acceptable punishment'(paragraph 54).

10. The Adjudicator then turned to the question of 'whether in these circumstances this [respondent] faces persecution or prosecution. The [respondent's] contention being that because Iran is an Islamic state the religious laws therefore have a political dimension. Thus failure to adhere to the strict tenants (sic) of religious law imply a rejection of the political/religious order and that the [respondent's] adulterous act is contrary to the religious law and offends the political/religious order and will be perceived as a rejection of the same' (paragraph 54).

11. Paragraphs 55 and 56 of the determination are where one finds the Adjudicator's conclusions:-

'55. I find that according to the proper standard of proof that having examined the objective documents and considered the [respondent's] evidence which I accept that this is the correct interpretation of the situation. Although the respondent should have known what the consequences were of entering into an adulterous relationship he opened himself up to risk of retribution by his one act of indiscretion but this one act is likely to result in what I find as a wholly disproportionate consequences because of the religious code and system of policing what the Iranian Authorities may considered (sic) to be social deviancy.

'56. I find therefore that this is in effect an instance of both religious and/or political persecution for which the [respondent] is entitled to protection of the international community under the 1951 Refugee Convention. I find that the persecution is and would be carried out

by the state itself or by its agents and that it is reasonably likely that he would be arrested at Tehran airport on arrival'.

12. The Adjudicator went on to find that, on the facts, irrespective of his findings on the Refugee Convention, the respondent, as a convicted adulterer facing death by stoning, would be at real risk of treatment contrary to Articles 2 and 3 of the European Convention for the protection of Human Rights and Fundamental Freedoms.
13. In his Grounds of Appeal, the Secretary of State did not seek leave to appeal the decision under Article 3 of the ECHR. Whilst he did seek such leave in respect of Article 2, contending that the respondent had not shown 'a near certainty' of death, if returned, Mr Buckley did not seek to pursue that issue before the Tribunal.
14. Accordingly, the question for us is whether the Adjudicator was wrong to conclude that the respondent has a well-founded fear of being persecuted in Iran by reason of religion or political opinion, or both.
15. For the appellant, Mr Buckley submitted that the reference to religion in Article 1(2) of the Refugee Convention should not be given a 'strained interpretation'. Persecution on the grounds of religion means what it says and there was no evidence before the Adjudicator that the respondent, as an adulterer, was seen by the Iranian authorities as a person who had rejected Islam altogether or adopted any other form of religious belief. The law against adultery was of general application and it could not be said that anyone who contravened a law rooted in a dominant religion of a particular country was persecuted on the grounds of religion or, indeed, political opinion. The respondent was not regarded in any sense as a political opponent of the Iranian regime.
16. For the respondent, Ms Braganza submitted that the persecution could legitimately have been found by the Adjudicator to be partly political and partly religious in nature. It all depended upon the particular facts of the case and the situation disclosed by the evidence of the conditions in the particular country in issue. The motive of the victim of the persecution was not necessarily a conclusive factor in determining whether the persecution was for a Refugee Convention reason. On the contrary, persecution must be looked at through the eyes of the persecutor and any deliberate conduct on the part of the victim was academic. The Refugee Convention must, she said, be applied 'broadly'. Faced with the evidence in this case, the Adjudicator had, Ms Braganza submitted, reached a view that was not plainly wrong. The question he had to determine was a mixed one of fact and law.
17. As the US State Department Report on Iran for 2001 makes plain, the constitution of that country, ratified after the 1979 Revolution, 'established a theocratic Republic and declared as its purpose the

establishment of institutions and a society based on Islamic principles and norms' (appellant's bundle, page 13). The Government 'is dominated by Shi'a Muslim clergy. The head of state, Ayatollah Ali Khamene'i, is the Supreme Leader of the Islamic Revolution and has direct control over the armed forces, the security forces, and the judiciary'. Later in the same report, we observe that a 'Council of Guardians reviews all legislation passed by the Majles [or consultative assembly] for adherence to Islamic and Constitutional principles. The Council consists of six clerical members who are appointed by the Supreme Leader, and six lay-jurists who are appointed by the head of the judiciary and approved by the Majles'.

18. At page 55, the report goes on to opine that the 'influence of conservative Government clerics, which pervades the judiciary, often prevents citizens from receiving due process or fair trials. The Government uses the judiciary to stifle dissent and obstruct progress on human rights. The Government infringes on citizens' privacy rights, and restricts freedom of speech, press, assembly, and association. Over the last 2 years, the Government has closed nearly all reform-oriented publications, and brought charges against prominent political figures and members of the clergy for expressing ideas viewed as contrary to the ruling orthodoxy'.
19. On the same page, it is observed that the 'Government restricts freedom of religion. Religious minorities, particularly Baha'is- who are viewed not as a religious group, but as a heretical group and a subversive political organization- continue to suffer repression by conservative elements of the judiciary and security establishment. In July 2000 10 Iranian Jews were tried and convicted on charges of having illegal contact with Israel'.
20. At page 56, the US State Department Report notes that during 2001 'citizens continued to be tried and sentenced to death in the absence of sufficient procedural safeguards. In 1992 the domestic press stopped reporting most executions; however, executions continue in substantial numbers according to the UN and other reporting'. According to 'exiles and human rights monitors' it may be the case that 'many of those executed for criminal offenses, such as narcotics trafficking, actually are political dissidents.' Later on page 56, press reports are cited in the case of a woman stoned to death on charges of appearing in pornographic films. There were also at least two cases of women stoned to death for murdering their husbands.
21. At page 58, the US State Department Report observes that 'stoning and flogging are prescribed expressly by the Islamic Penal Code as appropriate punishments for adultery'. Public floggings were also 'increasingly used for a wide range of social offenses including breaches of the dress code, despite opposition from Interior Ministry officials who question the effectiveness of such punishment. For

example, eight men convicted of drinking alcohol and causing public disturbance were flogged publicly in Tehran in July.'

22. At page 60, there is specific reference to the court system which, as we have already noted, 'is subject to Government and religious influence. It serves as the principal vehicle of the State to restrict freedom and reform in the society'. There are several different court systems. The most active ones are the 'traditional courts' which adjudicate civil and criminal offenses and the Islamic Revolutionary Courts, which try cases involving threats to the Islamic Republic, narcotics crimes, economic crimes, and official corruption. In addition there is a special clerical court which examines alleged transgressions within the clerical establishment and a military court which deals with the army, police and revolutionary guards. Finally, a press court hears complaints against publishers, editors and writers. The Supreme Court has 'limited authority to review cases'.
23. The US State Department considers that the 'judicial system has been designed to conform, where possible, to an Islamic canon based on the Koran, Sunna and other Islamic sources'. Interestingly, 'many aspects of the pre-revolutionary judicial system survive in the civil and criminal courts. For example, defendants have the right to a public trial, may choose their own lawyer, and have the right of appeal. Trials are adjudicated by panels of judges. There is no jury system in the civil and criminal courts. If a situation is not addressed by statutes enacted after the 1979 revolution, the Government advises judges to give precedence to their own knowledge and interpretation of Islamic law, rather than rely on statutes enacted during the Pahlavi Monarchy'.
24. At page 42 of the appellant's bundle, there is what appears to be a page from a website of the Iran-e-Azad organisation, to which we were referred by Ms Braganza. It sets out the details of Article 83 of the Penal Code. This provides that the penalty for adultery under that Article, called the law of 'Hodoud', is flogging for unmarried males and female offenders, whilst married offenders may be punished by stoning regardless of gender. A man is buried up to his waist and a woman up to her neck (Article 102). Article 104 of the law of Hadoud provides that 'the stones should not be so large that a person dies after being hit with two of them, nor so small as to be defined as pebbles, but must cause severe injuries'.
25. The website commentary, which is clearly not sympathetic to the Iranian regime, states that the latter 'carries out stoning in the name of Islam' but that 'stoning is not an Islamic punishment and the Qu'ran makes no mention of it'.
26. Many other passages in the appellant's bundle deal with the punishment of stoning to death, both for adultery and other illicit sexual relations and other crimes, such as murder. For example, at

page 148 there is a press release, which describes stoning to death as 'just one example of gross human rights violations in Iran'.

27. At page 139 in the bundle, Ms Braganza drew our specific attention to a web-site from Christianity Today, dealing with sentences of death handed down to Nigerian Muslim women convicted of adultery under Islamic legal systems operating in certain Northern states of Nigeria.
28. Until the coming into force of the Human Rights Act 1998, which in effect incorporated into domestic United Kingdom law the provisions of the ECHR, the primary avenue for those seeking the protection of the United Kingdom against threatened harm in a foreign country, was the Refugee Convention. The latter Convention remains, of course, of great importance in our law. However, the ability of claimants to rely directly upon the ECHR means that there is no excuse for an Adjudicator or, indeed, the Tribunal to succumb to the temptation of distorting the proper interpretation of the Refugee Convention, in a case where it is manifest that a person should be given international protection.
29. Although not cited before the Tribunal in the current proceedings, this point is clearly made by Buxton LJ in *Januzi* [2003] EWCA Civ 1187. Commenting upon the judgement of the Court in *AE and FE* [2003] EWCA Civ 1032, the learned Lord Justice said (at paragraph 25) that 'this court considered that on some occasions, sight had been lost of the centrality of refugee considerations when considering issues under the Refugee Convention; and that human rights considerations - important though they are, but not engaged by the Refugee Convention - had been allowed to play a part'.
30. In essence, the present appeal involves answering the question of whether the Adjudicator, faced with the information on Iran set out above, was correct to agree with the respondent's contention 'that because Iran is an Islamic state the religious laws therefore have a political dimension' and that a failure to adhere to such a law implies 'a rejection of the political/religious order' and that it would be 'perceived as a rejection of the same' (determination, paragraph 54).
31. The Tribunal is in no doubt that the Adjudicator fell into error in agreeing with this proposition.
32. The Adjudicator's first mistake was to be beguiled by the asserted description of the Iranian Penal Code proscribing adultery as a 'religious' law. A law against adultery is, however, no more 'religious' than a law against murder. Both have their ultimate origin in the Ten Commandments, as described in the Book of Genesis, and, thus, are a part Judeo-Christian teaching, as they are of Islamic teaching. Adultery may well be 'a cardinal sin, in a country that is ruled by the faith', to quote Professor Afshar (bundle p32). However, so too is

murder. As we have seen, that offence is punishable in Iran by stoning to death.

33. It might be said that, today, many people regard the laws against murder and other offences against the person as justified, not on religious grounds, but on the basis that these laws protect society. However, it is apparent that adultery can be regarded by both religious and non-religious people alike, as potentially destructive of family life and, hence, as damaging to society. This is as true in Iran as other countries.
34. The logic of the Adjudicator's stance is that, because Iran is a theocratic state, anyone who violates its laws, and faces punishment as a result, can be said to be at risk of persecution by reason of religion. In the Tribunal's view, such an interpretation substantially distorts the purpose of the Refugee Convention. The logic would mean that an Iranian thief, who faced imprisonment for that offence, could, without more, successfully claim refugee status, since imprisonment is, in the abstract, a sufficiently serious consequence as to be capable of amounting to persecution. The fact that the law against theft, along with the law against adultery or murder, has its ultimate origin in a religious code does not make it fall within one of the Refugee Convention heads.
35. The contention that the Refugee Convention is engaged because the laws in Iran have a 'political dimension' is also, in the Tribunal's view, thoroughly misconceived. Indeed, it falls foul of the proposition, categorically rejected by the Tribunal in **Gomez** (00TH02257), that "even in countries such as Colombia where the boundaries between the political and the non-political have been heavily distorted by the conduct of paramilitary bodies and drug cartels, every case where such a body persecutes someone must be on account of an imputed political opinion". There are no Colombian-style drug cartels in Iran, so far as we are aware, but the point being made in **Gomez** is nevertheless relevant here. All laws necessarily have to some extent a "political dimension" but that does not mean that a person who transgresses a law is on that account being persecuted for a political reason.
36. Ms Braganza sought to defend the Adjudicator's finding in relation to political opinion in two ways. First, she said that it was permissible to identify a mixture of politics and religion in the persecution. With respect, however, that argument falls for the simple reason that if, as here, there is, upon analysis, no rational basis for finding either a religious element or a political element to the alleged persecution, there is nothing with which either such element can be 'mixed'.
37. Ms Braganza's second point was that it was wrong to look at the motivation of the victim of persecution. What mattered was the motivation of the persecutors. Again, however, this does not advance

the respondent's case. The respondent is not a person who holds any political views which are adverse to the Iranian regime. He finds himself in his present position because he decided to satisfy his sexual appetite by engaging in adulterous intercourse in what turned out to be a public place. There is no evidence whatsoever that the Iranian regime regards him as having done this as some form of political protest. In reality, he is no more or less than the victim of a criminal law against illicit sexual behaviour.

38. Ms Braganza put the case on the basis that the political opinion in this case is imputed. But, as we have already stated, there is no indication at all that the Iranian regime imputes any such opinion to this respondent.
39. Ms Braganza also submitted that the 'disproportionate' nature of the punishment facing the respondent is something which brings his case within the Refugee Convention. The immediate question, however, is: with what is the sentence to be compared, in arriving at a finding that it is 'disproportionate'? It is trite refugee law that a criminal sanction can constitute persecution, for a Refugee Convention reason, if disproportionately applied. For instance, where two people commit the same criminal offence, under identical circumstances, but one is punished more severely than the other because he or she belongs to an ethnic group viewed with disfavour by the authorities, the Refugee Convention is engaged. Discrimination is, indeed, often of great importance in determining issues arising under the Refugee Convention.
40. Here, however, we have no evidence that the respondent is being treated differently from others in the same position as himself in Iran, on account of his race, religion, nationality, membership of a particular social group or political opinion. On the contrary, as the appellant's bundle of evidence makes plain, he is one of a regrettably large number of individuals who, each year, are sentenced to death for a variety of offences which, if committed in many other countries, would not carry the death sentence or, indeed, be criminal offences at all.
41. The categorisation of the punishment facing the respondent as disproportionate must, accordingly, depend upon comparing his case with those who commit adultery in such other countries. But how does such a comparison bring the case within the Refugee Convention? The Adjudicator, at paragraph 55, considered that the 'wholly disproportionate consequences' of the adultery arose 'because of the religious code and system of policing what the Iranian authorities may considered to be social deviancy'. With respect to the Adjudicator, it is difficult to understand what this means. The argument appears to be that, because adultery is punished more severely in one country than another, or is punished at all, the reason for the disparity between the countries is to be found in the religious and/or

political nature of the Iranian state, so that anyone who falls foul of the law is as such to be regarded as facing persecution by reason of religion or political opinion.

42. If that is the argument, we are back at paragraphs 34 to 38 of this determination.
43. A State is entitled to subscribe to a legal code under which those coming within its jurisdiction are entitled to protection, on the ground that, if returned to their own countries, they face punishment that the host State regards as abhorrent. Such abhorrence will necessarily be rooted in the difference between what punishment (if any) the person could expect to receive in the host State and what he faces in his home State. Such a legal code is to be found in the ECHR, as introduced into our domestic law by the Human Rights Act 1998. The Refugee Convention, however, has a narrower ambit, in that the disparity in treatment as between the different States cannot in itself cause one of the "Convention grounds" (race, religion etc.) to come into play, if it would not otherwise do so. Were it to have such an effect, a prisoner who faced "death row" in one of the States of the USA would be a refugee in the United Kingdom, whatever his crime.
44. In order to see whether it might be of any assistance to the respondent, the Tribunal has examined the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status. Neither paragraphs 71-73 dealing with religion, nor paragraphs 80-86, dealing with political opinion, afford any support to the propositions advanced on his behalf.
45. In her submissions, Ms Braganza drew the Tribunal's attention to material in the respondent's bundle, dealing with prosecutions for adultery in certain Northern, Muslim states of Nigeria. It is, of course, the case that many Muslim countries have laws which impose severe maximum penalties for adultery and fornication. One such is the Zina Ordinance in Pakistan. That Ordinance appears to be rooted in Islamic law, to the same extent as is the equivalent provision in the Iranian Penal Code. In this regard, it is, in the Tribunal's view, noteworthy that in *Shah and Islam* [1999] Imm AR283, the House of Lords felt compelled to take particular care in analysing whether women in Pakistan, who might be charged under the Zina Ordinance, fell within the Refugee Convention, as being members of a particular social group. On the approach taken by the Adjudicator in the present case, there would have been no need for such a course to be adopted; the claimants could successfully have argued persecution on the grounds of religion.
46. The Tribunal concludes that the Adjudicator was wrong in law to find that, on the facts of the case, the respondent is entitled to refugee status in the United Kingdom. The respondent's removal to Iran is, as we have already stated, precluded by the uncontested finding that

the he would face treatment contrary to Articles 2 and 3 of the ECHR, were he to be returned.

47. The appeal of the Secretary of State on the asylum issue is accordingly allowed.

P R Lane
Vice President