

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT
Royal Courts of Justice
Strand
London WC2

Thursday, 10 February 2005

BEFORE:
MR JUSTICE HENRIQUES

**THE QUEEN ON THE APPLICATION OF M
(CLAIMANT)**

-v-

**IMMIGRATION APPEAL TRIBUNAL
(DEFENDANT)
SECRETARY OF STATE FOR THE HOME DEPARTMENT
(INTERESTED PARTY)**

MR D CHIRICO (instructed by Patterson Sebastian & Co) appeared on behalf of the
CLAIMANT

MS S RAHMAN (instructed by the Treasury Solicitor) appeared on behalf of the
INTERESTED PARTY

The DEFENDANT was not represented and did not appear

J U D G M E N T

(As Approved by the Court)

1. MR JUSTICE HENRIQUES: The claimant is a Kenyan national and is a practising homosexual. He seeks judicial review of the Immigration Appeal Tribunal's decision of 9th January 2002 to refuse his application for leave to appeal to the Immigration Appeal Tribunal against the decision of the Adjudicator on 23rd November 2001 dismissing his appeal against refusal of asylum by the Secretary of State for the Home Department on 20th June 2001.

2. The claimant was 23 at the time of the Determination. At boarding school he had commenced a homosexual relationship with a school friend which continued thereafter. Despite attempts to keep his sexual orientation a secret in his home locality, his parents became suspicious and members of the local community became aware that he was a sexually active homosexual. He formed a long-term relationship and thereafter he and his partner were stoned and beaten up. He was disowned by his parents. He moved to friends' houses but when rumours reached the village he would be forced to move on.

3. On 20th April 1999 the claimant's partner was chased by a mob, caught, beaten unconscious and burnt to death by having a wheel placed around his neck and set alight. The claimant reported the matter to the police, who declined to assist. The claimant's family rejected him and he fled Kenya by air, arriving in the United Kingdom on 31st December 1999, and he claimed asylum on 2nd February 2000.

4. The Adjudicator found the claimant's account credible and held that he had a wellfounded fear of persecution by reason of his sexual orientation if returned to his home area in Kenya. The Adjudicator went on to find that the claimant could relocate to other areas of Kenya and dismissed his asylum appeal. He dismissed the claimant's appeals under Articles 3 and 8 of the European Convention on Human Rights, similarly on the basis that the claimant could relocate within Kenya.

5. The IAT refused the application for leave to appeal on the basis that:

"The Adjudicator went into the applicant's case with a great deal of care and explored the internal flight alternative fairly and comprehensively. He properly analysed the objective evidence and concluded that it would not be unduly harsh for the applicant to relocate in his particular circumstances. The Tribunal does not consider that any arguable error in his approach has been demonstrated on this issue or on his findings in respect of the points raised under Articles 3 & 8."

6. Permission to apply for judicial review was granted on 15th August 2002 by Crane J after an oral hearing, permission having earlier been refused on the papers by Stanley Burnton J. Crane J granted permission, limited to the ground "relating to Article 8 of the European Court of Human Rights Act, the right to family and private life".

7. The claimant submits that on the primary findings of fact as made by the Adjudicator there are substantial grounds for believing that his return to Kenya will lead to a flagrant denial of his right to respect for his private life in two principal ways:

(1) that he would face a real risk of serious physical harm as a result of his sexual orientation becoming known again in a different part of Kenya;

(2) that he could only protect himself from such risk by amending his behaviour to such a degree that his right to express his sexual identity would be nullified or entirely denied.

8. Accordingly, the claimant argues that the Adjudicator has erred in law in two respects:

(1) failing to give any or adequate reasons for his finding that the claimant's discreet approach to his homosexuality will protect him in future when it has not protected him from severe ill-treatment in the past; and

(2) failing to consider the extent to which this particular claimant would have to amend his behaviour to make it sufficiently discreet to remove a real risk of severe ill-treatment, and whether the circumstances in which such behaviour would be forced on the claimant would in themselves constitute a flagrant denial of his right to respect for his private life.

9. Likewise it is submitted that the IAT erred in failing to consider these failings.

10. The essence of the Adjudicator's errors, as ably submitted to me by Mr Chirico, is that the Adjudicator failed to give reasons as to why the claimant would be safe upon return to another part of Kenya. If the claimant continued to practise as a homosexual and formed a relationship, then it is submitted his activities would necessarily be noted and he would, wherever he happened to be in Kenya, be required to move on. Mr Chirico complains that the Adjudicator failed to give reasons as to why the claimant would be free from persecution on return. He made specific reference to the authority of *Demirkaya v Secretary of State for the Home Department* [1999] Imm AR 498 where Stuart-Smith LJ said this:

"If it is the opinion of the Tribunal that there has been such a significant change that the appellant is no longer at risk, it is incumbent upon [the Tribunal] to explain why this is so."

11. Accordingly, was the Adjudicator's reasoning inadequate? The Adjudicator stated at paragraph 37:

"I bear in mind my findings of fact. The appellant could re-establish his life in another part of Kenya."

12. He found that he would not have a well-founded fear of persecution in other parts of Kenya. He could live in a large town or city such as Nairobi. Kenya is a large country.

13. The essence of Mr Chirico's argument is based upon the following passage from the Determination:

"The appellant is a discreet and quiet individual and not a person who publicises or brings to the attention of others his sexual orientation. He attempted to keep his homosexuality a secret at school. He attempted to keep his sexuality a secret after he returned to his home area ... If the appellant was to be returned to another part of Kenya I find that he would live his life quietly and would practise his homosexuality discreetly. He would not publicise his sexual orientation or take steps to bring it to the attention of others."

14. Mr Chirico stresses the finding that the appellant attempted to keep his homosexuality a secret at school and thereafter in his home area, and that his attempts were unsuccessful. The discreet nature of his homosexuality did not prevent him suffering severe beatings, nor his partner being killed. Having failed in the past, it is submitted that there is a common sense inference that he will face a real risk of severe ill-treatment in the future if he continues to practise his homosexuality discreetly as he did before. Where evidence of past ill-treatment exists, it is an excellent indicator, it is submitted, of the fate that may await an applicant on return.

15. I have no hesitation in rejecting this submission. Paragraph 30 of the Determination contains some eight reasons (which I will refer to in summary form) justifying the proposition that the appellant did not have a well-founded fear of persecution on return to somewhere outside his home region.

1. He is a discreet and quiet individual.
2. He was not persecuted outside his home area.
3. When he sought refuge away from home he suffered no harassment or persecution, even though he practised his homosexuality.
4. He could expect no persecution from the state.
5. His family threatened but did not implement threats.
6. When he left his home area the mob made no effort to trace or pursue him.

7. The appellant's uncle, when advising the claimant to leave Kenya, was motivated by factors other than the family hostility towards the appellant.
8. The appellant never went further than 50 kilometres from his home when he fled.

The mob did not take steps to find him after he left his home area.

16. At least seven of these reasons support the Adjudicator's conclusion.

17. Mr Chirico contends that these arguments are disjunctive and if any one of them fails the claimant will face a real risk of a repeat of the ill-treatment he earlier suffered.

18. In my judgment these are good and compelling reasons for the conclusion that the appellant could re-establish his life in another part of Kenya in safety. At paragraph 31 the Adjudicator gave compelling reasons as to why it would not be unduly harsh to return the appellant to another part of Kenya. In certain respects those reasons complement his earlier reasoning.

1. The persecution was confined to his home area.
2. At 23 years the appellant does not have ties and would be able to start a new life.
3. He had no health difficulties.
4. He has the ability to live outside his home area.
5. The appellant himself anticipated no difficulty in gaining employment in another part of Kenya.

19. Accordingly, the Adjudicator found the internal flight alternative to be available to the claimant.

20. Ms Rahman submits that the Adjudicator's reasoning is quite clear. Away from the family and the mob the Adjudicator believed that the claimant had nothing to fear. The claimant is quiet and discreet by nature. He had not been persecuted when away from the locality of his family. His family would not implement any threats. The mob would not hunt him down and he could find employment.

21. I accept her argument. It was not in my judgment necessary for the Adjudicator to go any further and to consider conditions either in Nairobi or elsewhere in Kenya. The Adjudicator's conclusion was that the claimant would be safe anywhere outside a 50-kilometre radius of his family home. I find no flaw in the Adjudicator's reasoning, nor in his conclusion. I reject Mr Chirico's first ground.

22. His second submission is that the Adjudicator erred in failing to consider how far the claimant would have to adapt his behaviour to avoid risk and whether such enforced adaptation would in itself constitute a flagrant denial of his right to respect for his private life. The IAT erred in failing to consider this error.

23. Nowhere in the Determination does the Adjudicator contend that the claimant would have to adapt or change his behaviour in any way to avoid risk. The very thrust of the Adjudicator's reasoning was that whilst at home the claimant was a discreet and quiet individual, and he was not a person who publicised or brought to the attention of others his sexual orientation. No change of behaviour was called for upon his return to Kenya, save for a change of locality.

24. Nor was it suggested by the Adjudicator that the claimant behave or needed to behave in anything other than in his normal or natural way. It was not suggested that in order to avoid persecution he needed to specifically hide his sexual orientation or to rein himself in, as Ms Rahman put it, to any greater degree than he would naturally.

25. The High Court of Australia case (Appellant S 395/2002 v Minister for Immigration and Multicultural Affairs [2004] INLR 233) has been cited. In that case there was no internal flight alternative. The appellants were being returned whence they came. It was said:

"It would undermine the object of the Convention if it was a condition of protection that the person affected must take steps, reasonable or otherwise, to avoid offending the wishes of the persecutors, or if he were required to modify his beliefs or opinions or to hide his race, nationality or membership of particular social groups before he could obtain protection under the Convention."

26. In the present case the Adjudicator envisaged the claimant taking no contrived steps to avoid offending his persecutors, and modification of conduct was never suggested. Further, there is nothing to suggest that the claimant's behaviour has been amended by fear of threats. I am quite satisfied that the Adjudicator was not requiring the claimant to amend his conduct and reached the conclusion that he did in the expectation that the claimant, once returned, would behave as before.

27. The Australian case was considered in *Z v Secretary of State for the Home Department* [2004] EWCA Civ 1578 when specific reference was made to it, stating it represented no new departure in refugee law. In *Z* the Court of Appeal held that the IAT were entitled to find that the claimant's future conduct was not likely to expose him to persecution. In the present case, as Ms Rahman comments, it was open to the Adjudicator to find that any past persecution was intimately linked with the claimant's home area and close family, and that relocating to Nairobi would avoid that risk. The highest that the claimant can possibly pitch his case is that he needed to be discreet about his homosexuality to avoid persecution, even though all available evidence indicates that such was his natural demeanour.

28. In paragraph 38 the Adjudicator considered any possible application of Article 8 and concluded that the removal decision pursued the legitimate aim of the prevention of disorder, and that the interference with the appellant's right to physical and moral integrity is proportionate to that legitimate aim.

29. The House of Lords in *Razgar and Ullah* emphasised the very high threshold required when seeking to rely on Article 8. On these facts, legitimate immigration control would certainly mean that derogation from the rights would be proper and not disproportionate. Since the Adjudicator proceeded on the basis that Article 8 was engaged, I accept Ms Rahman's submission that there is no additional issue raised by the House of Lords' judgment in *Ullah*, a view Mr Chirico does not dissent from.

30. I have been referred to one possible error in the Adjudicator's factual review, when he stated that in the periods of refuge in which the claimant stayed away between April 1998 and January 2000 the appellant was able to practise his homosexuality and did so discreetly. In fact it was on 20th April 1999, in the middle of that period, that the murder of his partner occurred when the claimant and his partner had "parted for a day". Clearly that passage lends itself to more than one interpretation, but it is clear that the partner

was murdered in the locality of the claimant's family home and that over a period of time the claimant lived elsewhere and was able in safety to practise his homosexuality discreetly.

31. I am quite satisfied that this passage does not undermine the overall reasoning of the Adjudicator. No error of law has been demonstrated. The Determination was logical, well reasoned, thorough and, in my judgment, beyond criticism.

32. Finally, I pay tribute to both counsel. It was both of assistance and a pleasure to listen to them. I am grateful. Are there any further matters?

33. MR CHIRICO: My Lord, simply –

34. MR JUSTICE HENRIQUES: Public funding.

35. MR CHIRICO: Public funding and a detailed assessment.

36. MR JUSTICE HENRIQUES: You would like the usual order?

37. MR CHIRICO: Detailed assessment.

38. MR JUSTICE HENRIQUES: Detailed assessment of your costs. Yes, thank you very much. Thank you both.