Case No: C5/2008/2132
C5/2008/2076

Neutral Citation Number: [2009] EWCA Civ 1432
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No. IA/08292/2007]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 18th November 2009

Before:

LORD JUSTICE HOOPER
LORD JUSTICE TOULSON
and
SIR DAVID KEENE

- -

Between:

OO (Sudan) **JM (Uganda)**	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -

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Mr S Chelvan (instructed Messrs Wilson and Co) appeared on behalf of the **Appellant**.
Ms J Collier (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

Sir David Keene:

1. These two appeals from the Asylum and Immigration Tribunal ("the AIT") are being dealt with together because they both raise an issue identified by Aikens LJ when granting permission to appeal. There is in addition a further separate ground of appeal arising in each case, which ground is not common to both appeals. It is clearly going to be convenient to take the common issue first.

2. That was defined by Aikens LJ in the following terms:

> "What is the proper construction of regulations 52(G) or 51(G) of the Refugee or Persons in Need of International Protection (Qualification) Regulations 2006 SI2006/2525? In particular, what constitutes an 'act of persecution' in circumstances where it is asserted that there are legal provisions in a country which are discriminatory so far as sexual behaviour is concerned but where these provisions may not be fully implemented in practice."

Those regulations there referred to, known usually as the Qualification Regulations, seek to implement in this country the European Council Directive 2004/83/EC ("the Qualification Directive") which laid down minimum standards for the qualification of third country nationals, or stateless persons, as refugees or as persons otherwise needing international protection.

3. Regulation 5 of the Qualification Regulations referred to by Aikens LJ provides, insofar as material for present purposes, as follows:

> "5.(1) In deciding whether a person is a refugee an act of persecution must be:
> (a) sufficiently serious by its nature or repetition as to constitute a severe violation of a basic human right, in particular a right from which derogation cannot be made under Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms; or
> (b) an accumulation of various measures, including a violation of a human right which is sufficiently severe as to affect an individual in a similar manner as specified in (a).
> (2) An act of persecution may, for example, take the form of:
> (a) an act of physical or mental violence, including an act of sexual violence;
> (b) a legal, administrative, police, or judicial measure which in itself is discriminatory or which is implemented in a discriminatory manner;"

That provision closely follows the wording of Article 9 of the Qualification Directive. Regulation 5(1) adopts the wording of Article 9(1) and regulation 5(2) the wording of Article 9(2).

4. It is perhaps, however, worth noting that, in the Directive, Article 9(2) begins with the words "Acts of persecution as qualified in paragraph 1 can *inter alia* take the form of […]". So there is there an explicit reference in Article 9(2) back to Article 9(1). That is not expressly present in regulation 5(2) of this country's domestic regulations, but on the usual principle of the supremacy of community law (see Section 2 of the European Communities Act 1972) the interpretation of regulation 5 in the domestic regulations must reflect the European directive which they are intended to implement.

5. I turn to the facts of these two appeals, but in both cases the essence is that the home countries of these appellants have, on the statute book, legislation making it a criminal offence for a man to engage in sexual acts with another man, and yet in both cases the AIT found that such legislation was not enforced. Does the mere existence of such legislation discriminating against those with a homosexual orientation amount to persecution under the Qualification Regulations? The appellants' case is that it does.

6. JM is a Ugandan citizen, now aged 34. He arrived in the United Kingdom in August 2000 and was granted to leave to enter as a visitor. He overstayed and claimed asylum. The evidence on appeal was that he realised that he was homosexual in his late teens. He went to Kenya to learn the art of hairdressing and beauty care, and while there he attended gay night clubs and bars and had a homosexual relationship. He then returned to Uganda and opened a hairdressing and beauty salon, which he ran for a number of years. The AIT noted that he was obviously effeminate in manner, but it found that he experienced no hostility in Uganda from either the authorities or seemingly from any quarter. He did not have any homosexual relationships while in Uganda and he claimed that this was because he could not have such a relationship, at least not openly, without suffering persecution. There was no dispute that he had never been arrested in Uganda, but he said that this was because he had not formed any gay relationship there.

7. He came to the United Kingdom at the invitation of a cousin who lived here. While in this country he frequented gay bars and formed homosexual relationships. He emphasised that he could express his sexuality openly in the United Kingdom. The AIT, in a lengthy and detailed determination, examined a large quantity of written background material about Uganda as well as hearing expert testimony put before it. It recorded that the Uganda penal code made it an offence to have carnal knowledge "against the order of nature", and that it was also an offence to engage in acts of procurement of gross indecency between men. However, it found that there was little, if any, objective evidence that such legislation was enforced. It said that there was no evidence of arrest or harassment of homosexuals by the authorities, or indeed by the population generally, apart from two instances of individuals being discriminated against at work. There was evidence of societal and cultural

disapproval of homosexuality but "very little specific incidents set out in detail as to harassment, arrest or prosecution" (paragraph 114).

8. It observed that there were gay bars and areas where gay people could meet in Uganda and it concluded that there was no reason why a committed homosexual relationship could not be maintained in that country. This appellant would in any event, it found, be discreet in his public behaviour if returned there, and his sexual identity would not be unreasonably constrained. The tribunal applied the approach set out by this court in the case of J v SSHD [2006] EWCA Civ 1238, since followed in HJ (Iran) and HT (Cameroon) v SSHD [2009] EWCA Civ 172, and concluded that on such a basis there was not a real risk of persecution if this appellant were returned to Uganda.

9. The appellant, OO, is a citizen of Sudan who arrived in this country in May 2004 and claimed asylum. He is now aged 36. His evidence was that he had gradually realised that he was homosexual; this had lead him to being repudiated by his family in Sudan although he was allowed to remain in the family home. The AIT seems to have accepted that he had had some form of sexual relationship with a man while in the Sudan but not that it was one involving anal penetration. The relevance of that is that it is penetrative anal intercourse with a man or a woman which is a criminal offence in Sudan. Once in this country he had had a number of casual, discreet, homosexual relationships. The AIT found that, if returned to Sudan, he would conduct his sexual activities discreetly and that he could reasonably be expected to tolerate such a situation so that the test in J was met. It also found that no one had been prosecuted for the offence of anal intercourse in Sudan and that, while there was societal discrimination against homosexuals there, there was no official discrimination against them. Thus the appellant would not be at risk of persecution or prosecution if returned.

10. It can be seen, therefore, that in both these cases now under appeal the factual position, as found by the AIT, was that there were laws on the statute book making it a criminal offence to engage in certain homosexual acts, particularly -- though not exclusively -- anal intercourse, but that these laws were not enforced. The laws were, and are, nonetheless there, and they are patently discriminatory.

11. Putting the Qualification Regulations and Directive on one side for the moment, the issue as to the extent to which discrimination can amount to, or contribute to, persecution under the Refugee Convention has been considered already in a number of leading authorities. One of the most recent and comprehensive is this court's decision in Amare v SSHD [2005] EWCA Civ 1600 [2006] Imm AR 217, where Laws LJ, with whom the other two members of the court agreed, dealt fully with the arguments, referring both to Professor Hathaway's well-known book "The Law of Refugee Status" and to decisions of the United Kingdom courts and those of Australia, South Africa and New Zealand. It was there accepted (paragraph 26) that measures of discrimination could amount to persecution if they led to "consequences of a substantially prejudicial nature for the person concerned", quoting Baroness Hale in ex parte Hoxha [2005] UKHL 19 at paragraph 35.

Thus, to that extent, there was an alignment of the obligations imposed by the Refugee Convention with the protection of basic or fundamental human rights. However, the court in Amare went on and was at pains to emphasise that this was subject to the anticipated violation of human rights norms reaching a "substantial level of seriousness if it is to amount to persecution" (paragraph 27). The court cited with approval the words of Staughton LJ in Sandralingham v SSHD [1996] IAR 97 at [114]:

> "Persecution must at least be persistent and serious ill-treatment without just cause…"

Thus the treatment feared has to be sufficiently severe.

12. For my part, I agree with those propositions which, in any event, are part of a decision by which we are bound. They accord with a passage in Professor Hathaway's book where he refers to the intention of those who drafted the Refugee Convention being:

> "to restrict refugee recognition to situations where there was a risk of a type of injury that would be inconsistent with the basic duty of protection owed by a state to its own population" (See page 104)

13. That passage brings out the important fact that the Refugee Convention is intended to provide international protection in place of protection by the individual's own state, and it follows that to amount to persecution the feared ill treatment has got to be of a severity which requires such international protection to be provided. It is not easy to see how an unenforced legislative provision, albeit discriminatory in nature, is normally going to meet such a requirement which is concerned with the realities of life in the individual's own country.

14. The decision in Amare was followed by this court, again unanimously and again in a homosexual case, in RG (Columbia) v SSHD [2006] EWCA Civ 57, [2006] Imm AR 297. In those circumstances I do not regard it as necessary to traverse yet again the same territory which has already been so recently explored in those decisions of this court. It seems to me that, subject to any change which can be shown to have taken place since Amare and RG (Columbia), the existence of a discriminatory legislative provision in an applicant's home country will, by itself, not normally amount to persecution unless it has consequences of sufficient severity for that individual. If the legislation does not appear to be enforced then it may sometimes be the case that the lack of enforcement has resulted in those being discriminated against changing their behaviour to avoid prosecution. In certain circumstances, that modification of behaviour may be so serious that it amounts to persecution. I will return to that aspect in a moment. But, subject to that, the absence of enforcement of a discriminatory legislative provision is likely to mean that the individual is not at risk from that legislation of suffering such harm upon return to his own country as amounts to persecution.

15. The appellants seek to argue that there has been a shift in international attitudes towards discriminatory legislation since Amare was decided in 2005, something described by Mr Chelvan on their behalf as "a shift in international consensus". For this he relies on three pieces of evidence. One is a purely British document indicating that the Foreign and Commonwealth Office seeks to promote the human rights of those who are homosexual or bisexual and to lobby for the de-criminalisation of homosexual behaviour in other countries. Such a document, commendable though it may be, seems to me to provide no evidence for the proposition that there has been a shift in the international consensus to similar effect.

16. The second matter on which reliance is placed is the fact that a United Nations Joint Statement of 18 December 2008, urging states to take all the necessary steps to decriminalise homosexual orientation, has now been signed by 66 member states. But since, as is pointed out by the Secretary of State, there are some 192 member states, it follows that only about one third of them have so far been prepared to align themselves with this Joint Statement's approach; the majority have not. This cannot, I am afraid, be described as an international consensus.

17. There is so far no basis for concluding that Amare and RG (Columbia) are now outdated. In those circumstances it seems to be clear that subject to any change which the Qualification Regulations and Directive may have brought about, the findings of fact in the present cases by the AIT fully justified the conclusion that there was no well-founded fear of persecution in either instance. I say that fully recognising that in some cases behaving discreetly is a course of conduct adopted by a person out of fear of what might happen to him at the hands either of the authorities or of members of the public in his home country if he does not. That is not the factual situation found by the AIT to be the case with either of these appellants; but, even if that had been the situation, there is now ample authority for the proposition that the test is whether such modification of his behaviour would be something he could not reasonably be expected to tolerate (see Z v SSHD [2004] EWCA Civ 1578 [2005] Imm AR 75 at paragraphs 15 and 16), J v SSHD at paragraphs 10 and 11, and HJ (Iran) at paragraph 31). The AIT in the present appeal applied its mind to whether that test was met and it found against the appellants.

18. What, then, is the impact of the Qualification Directive and Regulations? On behalf of the appellants, it is submitted that they have changed the situation since Amare was decided. This is Mr Chelvan's third reason for not following that decision, and here reliance is placed in part on the reference in regulation 5(2) and Article 9(2) to acts of persecution possibly taking the form of, amongst other things, discriminatory legal measures. That, however, cannot get the appellants very far. It is quite clear that regulation 5(2) of the Qualification Regulations is subject to regulation 5(1), just as Article 9(2) is subject to Article 9(1), something reinforced by the expression in Article 9(2), "acts of persecution as qualified in paragraph 1". So in both those measures one is taken back to the first paragraph where there is a "seriousness" requirement, as one would expect.

19. For convenience and brevity I will refer now only to the Directive rather than the Regulations as well. Under Article 9(1)(a), whatever the form the act or persecution may take, whether an act of physical violence or a discriminatory legal measure, it will only amount to persecution if it, by itself or in repeated form, is a sufficiently severe violation of basic human rights. Indeed, under that particular paragraph, 9(1)(a), the human rights which have to be severely violated are identified as those rights from which derogation cannot be made under Article 15 of the ECHR. Those are the rights under Articles 2, 3, 4(1) and 7; that is to say, the right to life; the right not to be subjected to torture or to inhuman or degrading treatment or punishment; the right not to be held in slavery or servitude, and the right not to be convicted of something which was not a criminal offence at the time of the act or omission.

20. It is of course right that the identification of those basic rights is preceded by the words "in particular"; this court, however, has held in SH (Palestinian territories) v SSHD [2008] EWCA Civ 1150 that this does not indicate that those rights are merely examples of the relevant rights but are exhaustive of what is meant by "basic human rights". Scott Baker LJ, who gave the leading judgment, accepted the arguments advanced on behalf of the Secretary of State in favour of construing the words in a definitional rather than a non-exhaustive sense. The reasons for so doing are set out in paragraph 43 of his judgment, which I need not repeat.

21. But it is on Article 9(1)(b) that Mr Chelvan relies when seeking to show that matters have changed since Amare was decided. There is no dispute between the parties that Article 9(1)(b), dealing with cases where there is an accumulation of various measures, allows for persecution to be established where there is a violation of human rights, where those rights are not confined to the non-derogable rights referred to in Article 9(1)(a). Ms Collier, on behalf of the Secretary of State, accepts that. So a sufficiently serious violation of Article 8 rights in an applicant's home country might amount to persecution. That perhaps is hardly surprising since it accords with our own domestic law as recognised in the case of J.

22. But the appellants' case is that under Article 9(1)(b) persecution is established simply from the existence of legislation in that country criminalising homosexual conduct because that patently interferes with his Article 8 rights and does so in a continuing way. For my part, I cannot accept that proposition. Article 9(1)(b) contains 2 indicators to the contrary. The first is that the violation of human rights under that provision has to be "sufficiently severe", a phrase which in itself imports a test of severity of impact on the individual.

23. The second is that those words are then followed by the phrase: "as to affect an individual in a similar manner as mentioned in (a)". That takes one back to the degree of impact referred to in Article 9(1)(a) involving a severe violation of basic human rights. The rights involved under (b) may well be broader than those referred to in (a), but I accept Ms Collier's submission that the reference to affecting the individual "in a similar manner" means that it has to be shown

that the impact on the individual is tantamount, or broadly equivalent, to a severe violation of one of the basic rights referred to in (a). The level of severity in terms of impact has to be similar if persecution is to be shown. That makes sense; there is no reason why one should be prescribing some lesser degree of impact on the individual under Article 9(1)(b) than under Article 9(1)(a).

24. In short, the Directive and the consequent Regulations do not widen the scope of the concept of persecution established under our own domestic case law. Decisions such as J and Amare remain good law. There has been no material shift in international consensus since those decisions, which remain binding on us. That is perhaps not surprising; the Directive had as its purpose the setting of minimum standards for member states to apply when deciding whether a person qualifies as a refugee, standards which must be met in member states. A particular state is entitled to be more generous towards those claiming asylum in its territory than the Directive would require if it so chooses, but it cannot fall below the minimum there set out.

25. It follows from this that, if persecution cannot be established under our jurisprudence independently of the Directive and Regulations, it is most unlikely that it can be established by reliance on those measures. Certainly the findings of fact in the present cases justified the AIT's conclusion that the appellants did not have a well-founded fear of persecution. The test in J was properly applied by the tribunals in both cases, and that discloses no error of law.

26. That deals with the issue which is common to both these appeals. In each of them, however, as I indicated at the outset, there is a separate ground for which permission to appeal has been granted. In the case of JM Aikens LJ granted permission "with even more reluctance" on the question of whether the AIT had reached a perverse finding of fact in paragraph 108 of its determination. Paragraph 108 dealt with what happened at and after a press conference held in Uganda by the gay community on 15 August 2007. The AIT commented as follows:

> "The purpose of the conference was to provoke debate and that seemingly was the result, positive or negative from the standpoint of those holding the conference. Notwithstanding the strong comments made in the press or the media, there was no indication that those who took part were arrested and no indication of any wider mob violence or repercussions against gay and lesbians in general. Once again, given the presence in Uganda of so many gay rights organisations as well as the usual Human Rights Watch and other NGO and other human rights organisations, it is surprising that no information has come to light in relation to overt violence, arrests, harassment or intimidation, arising from this conference or generally."

27. It is submitted on behalf of JM that the statement that "no information has come to light in relation to overt violence, arrests, harassment or intimidation arising from this conference" is plainly wrong. In support of that submission Mr Chelvan relies on two pieces of evidence. The first is a report put before the AIT by Max Anmeghicheam, who spent two-and-a-half weeks in Uganda after the press conference in 2007. As the AIT recorded in its determination he reported that there was an atmosphere of fear in the gay community with cases of people being fired from their jobs or disowned by their families because of their sexual orientation. He gave one example of someone losing his job, a man called Paul who had spoken out on television. Mr Anmeghicheam also stated that some people had suffered from violence but he gave no details of any such case. The second piece of evidence, more emphatically relied upon by the appellants, is an article dated 11 September 2007, published by the International Gay and Lesbian Human Rights Commission. The article does refer to three specific incidents of physical violence. Chronologically, the first was a week after the press conference when, on 22 August, a man, Dan K, was "verbally and physically abused" by parishioners at a church in Kampala. On 28 August a man named Brian was attacked by three strangers at around midnight, also in Kampala. According to the article the perpetrators reportedly said "he is the one" before beating him up and fleeing. Then on 31 August a woman was accosted by a man in a bar; the patron shouted "she is one of them", manhandled her and stopped her playing pool.

28. In the light of this material, Mr Chelvan argues that it was wrong of the AIT to find that there was no information about overt violence arising from the press conference or generally, and no indication of any wider mob violence or repercussions. However, he does accept that paragraph 108 had to be read in the context of the determination as a whole. For my part, I can see that some criticism may properly be made on the somewhat sweeping terms in which the AIT expressed itself in paragraph 108. However, this was one paragraph in a very lengthy determination running to 35 typed pages and 174 paragraphs. The sentence now under scrutiny does need to be read in the context of the determination as a whole, and then one finds that there are other passages which are less categoric in language. Thus, at paragraph 114 the AIT states "we can find very little specific incidents set out in detail as to harassment, arrest or prosecution".

29. At paragraph 102 it referred to "a paucity of any information identifying any specific incident", not, it is to be noted, an absence of such information. A similar phrase is used at paragraph 103. It seems clear that the AIT was concentrating on whether there was reliable evidence of specific incidents as opposed to more generalised and unproven assertions. Amongst the latter I would include Mr Anmeghicheam's report, which gives no specific examples of anyone suffering any form of violence and which did not even give a date for when the one incident identified -- the man Paul losing his job -- had occurred.

30. So one is left with the three incidents in the article of 11 September 2007, at least one of which may have nothing to do with the sexual orientation of the victim since the man, Brian, was attacked by three strangers one of whom apparently said "he is the one", whatever that may mean. There was no evidence to indicate that this attack was motivated by hostility towards gay men.

31. The end position on the evidence seems to me to be that there is indeed little firm evidence of any violence against homosexuals in Uganda, some limited evidence of certain individuals being discriminated against by losing employment, and no specific evidence of any arrests or prosecution. In those circumstances the AIT's overall conclusion that in general the evidence did not establish that there was persecution of homosexuals in Uganda was one properly open to it and not perverse. I would therefore reject this ground of appeal in the case of JM.

32. The issue specific to the appellant OO concerns his rights under Article 8 of the ECHR and in particular his right to respect for his private life. Permission to appeal was granted because of the AIT's findings in paragraph 68 and 69 of its determination in this appellant's case. It is therefore necessary to set out those two paragraphs. The AIT said:

> "68. We have considered the appellant's claim to have established a private life, in the sense which Mr Chelvan argues, during the period he has been in the United Kingdom from 2004. He has not established any permanent sexual relationship with a male partner such relationships as he has had being brief and sporadic. Applying the five stage test set out in Razgar [2004] UKHL 27 we can conclude that the appellant has established a private life although not with any particular individual. To return him to the Sudan will bring such private life to an end in circumstances which, we are satisfied, will be of such gravity as to potentially engage the operation of Article 8. That is because of the societal attitude in the Sudan to homosexuality in general. But the issue for us to consider, on the basis that that the respondent's reaction is legitimate, is whether or not the interference with the appellant's family life is proportionate to the legitimate public end sought to be achieved. We consider proportionality below.
>
> 69. In relation to this issue we bear in mind the decision of the House of Lords in Huang. We are not satisfied that to return the appellant prejudices his private life in a manner sufficiently serious to amount to a breach of Article 8. Although it will, undoubtedly, be more difficult for the appellant to

> continue with homosexual relationships in Sudan, we are not satisfied that he will be unable to do so. Further, we conclude that the manner in which he will do so will not draw the attention of the authorities either directly or through others because the appellant will behave with a degree of discretion. As we have already indicated it will not be a lifestyle he cannot reasonably be expected to tolerate. And we have already eliminated the argument that there might be a serious risk of prosecution and serious harm."

33. The argument which found favour at the permission stage of this appeal was that paragraph 68 contained a finding that there would be a breach of the appellant's Article 8 rights if he were returned to the Sudan and that in those circumstances there was no room to apply the "justification" tests under Article 8(2) as the AIT did in paragraph 69. The reference to the five stage test in Razgar is to those passages in the judgment of Lord Bingham of Cornhill, which appear at paragraph 17. It is worth reminding oneself of what he said. Lord Bingham identified the questions likely to arise where removal is resisted on Article 8 grounds. Those questions were:

> "(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private life or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

34. It can readily be seen that Lord Bingham there drew the well recognised distinction between whether Article 8 was engaged and whether it was breached, the latter issue turning on whether the interference with the rights under the Article was justified under Article 8(2). In those circumstances I am bound to say that I can see no obvious inconsistency in the AIT in the present

case finding in paragraph 68 that the circumstances were of sufficient gravity as to engage Article 8, thereby providing the answer to question 2 of the Razgar questions, and it finding in paragraph 69 that the Article would not in fact be breached.

35. Mr Chelvan, on behalf of the appellant, argues that, in paragraph 68 when the tribunal said "such private life" would come to an end, it was indicating that there was a flagrant breach of Article 8 rights. The tribunal was saying that the appellant's private life would be nullified by his removal. That is not how I read that passage. The AIT in paragraph 68 was saying that the appellant's private life in the United Kingdom would come to an end by his removal. Of course it would. The AIT was not saying that his private life would cease altogether if he were returned to Sudan; that is patently not the case, because the tribunal made it clear in paragraph 69 that his private life would continue in Sudan, albeit with greater difficulty over his homosexual relationships. The interpretation placed on paragraph 68 by Mr Chelvan appears to me to be a clear misinterpretation of what was being said.

36. In my judgment the AIT properly considered the impact of removal on this appellant's private life, including both how he would lead it in the UK if he was allowed to remain and how he would lead it in Sudan. It then weighed that degree of impact on him against the public considerations in favour of removal. That was an entirely proper approach. The tribunal's conclusion from this balancing exercise was one which, on the evidence, was properly open to it. I would reject this ground also and, for my part, I would dismiss this appeal.

Lord Justice Hooper:

37. I agree.

Lord Justice Toulson:

38. I also agree.

Order: Appeal dismissed