

CO/10592/2005

Neutral Citation Number: [2007] EWHC 2528 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 23 October 2007

B e f o r e :

MR JUSTICE COLLINS

Between:

THE QUEEN ON THE APPLICATION OF B

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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(Official Shorthand Writers to the Court)

Mr David Chirico (instructed by Elizabeth Millar Solicitors) appeared on behalf of the
Claimant

Miss Susan Chan (instructed by Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T

1. MR JUSTICE COLLINS: The claimant in this case is Algerian. He was born on 25 December 1979. He came from a part of Algeria which was caught up in the civil war which was raging in the 1990s, and at the end of 1994 he left Algeria with his then guardian, who was an uncle, and arrived in this country on 1 January 1995. He was then just 15. He remained in this country, but after some months his guardian deserted him and he was left to his own devices. He had contacts in Belgium, and it seems he went there and sought to return to this country at the beginning of 1996. He had made use of false documents, and as a result was detained. The authorities did not then accept that he was under 18, and so he was detained in an adult prison. That detention remained in being from June 1996 until June 1997. He had claimed asylum in June 1996 and it was at that stage that he came to the notice of the authorities and was detained.
2. Following his release, he left this country in late 1997 and tried to go to Belgium. The context of that was that he had, through solicitors, appealed against the refusal of asylum. It is far from clear from the history and from the documents that are available precisely what was the sequence of events, but it seems that there was some hearing before an adjudicator in late 1996, and that his appeal was then turned down. It seems that he applied for leave to appeal to the Tribunal, and Mr Chirico has discovered documents which indicate that leave to appeal was granted in February 1997 and that there was a hearing arranged for May, later put off until June 1997. It is far from clear quite what happened in relation to that, following the claimant's release from custody when the authorities here were persuaded that he was indeed a minor, having been born in December 1979, as a result of evidence from the Algerian Embassy, as I understand it, and the production of a birth certificate.
3. The claimant says that he panicked when he discovered that he was required to go to see the immigration authorities. He was not given any advice through his solicitors as precisely what he should do, and it seems that he was unaware that there was, or certainly had been, an outstanding appeal before the Tribunal. There is a suggestion in the papers that in fact there may have been a remittal by the Tribunal for a fresh hearing before an adjudicator. But that certainly did not take place, if indeed there had been a remittal. Suffice it to say that he left, as he says, in a panic, and he was apprehended trying to get into Belgium with false documents and was sent back here. On arrival back here, he made a second claim for asylum.
4. Unfortunately it took the Home Office a substantial period of time to consider that claim, and a decision was not made to reject it until 2003. He then appealed to an adjudicator. The basis of his claim was that he was a homosexual and that he would be persecuted as such if he were to return to Algeria. He also raised an issue in relation to military service, but that has rightly not been pursued before me.
5. The appeal was dismissed by the adjudicator. There was an application for leave to appeal to the Tribunal which was successful, but the Tribunal dismissed his appeal by a decision of 18 November 2004. He attempted to appeal to the Court of Appeal, but was unsuccessful. He then made an application to the Secretary of State, asserting that he had made a fresh claim raising additional matters. That was a claim which was made in December 2005 and added to in March 2006 when some additional information was

provided. That claim was turned down by the Secretary of State by a decision of 4 May 2006, who then decided that it was not to be regarded as a fresh claim within the meaning of Rule 353, and that the claimant therefore had no entitlement to remain in this country. He had in fact, by the time the decision was made on 4 May 2006, lodged this claim for judicial review. It was in fact lodged on 22 December 2005.

6. Lloyd Jones J refused permission on the papers on 2 March 2006, accepting that, for the reasons set out in the acknowledgment of service, the claim was unarguable. However, following an oral hearing, on 17 May 2006 Holman J granted permission, but only on one ground, and that is that it was arguable that there was a realistic prospect that an immigration judge would find that the claimant was at risk of persecution because he could not or would not be discreet about his sexuality if he were to be returned to Algeria.
7. Holman J refused permission on a second ground, which sought to raise Article 8, and relied upon the relationship with a partner, a Mr S, that the claimant had established in this country. It was said that that had not properly been taken into account in deciding whether it was proportionate in terms of Article 8 to remove the claimant.
8. Mr Chirico has before me sought to raise that ground, as well as the one upon which permission was granted. It was dealt with in the skeleton arguments both by him and by Miss Chan, and in all the circumstances, I decided that I would allow him to argue the point, and he has done so. So that is also a live issue before me.
9. Let me now flesh out the background. There is no question but that the claimant is homosexual. It is not a case where that allegation is made, as sometimes occurs, in an attempt to establish a ground which is not a valid one. It is equally clear that there is evidence that he has a relationship with Mr S, and that that relationship they intend or hope to cement in the form of a civil partnership in this country. An application has been made for that purpose, although that was since the matter was put to the Secretary of State.
10. The adjudicator in her decision, and it is right that that can properly be regarded by the Secretary of State as the starting point because her findings of fact were not in any way overturned by the Tribunal, in relation to the homosexuality, made some material observations. Having seen and heard him and from his witnesses, she accepted that he was a homosexual. She went on:

"Although he claims in the witness statement that he has a partner with whom he has established a relationship, there is no statement from that partner only former partners and none of the former partners attended the hearing. There is a letter from [Mr S] which says that they have a relationship but do not live together and had decided their relationship was best when they had separate flats. There is no suggestion of a committed relationship here that would be interrupted if he were to return to Algeria."

So that was the situation as found by the adjudicator at that time, that time being

November 2003.

11. She then went on to consider the situation in Algeria in relation to homosexuals. She said that, other than the evidence of a journalist with experience from whom she had heard, there was little objective evidence of persecution of homosexuals in Algeria. She found that the evidence available fell short of showing homosexuals were persecuted. She then referred to the objective material, the country information, and she said this:

"The Home Office Country Information and Policy Unit of 27 October 2003 includes a report by the Dutch Immigration Service. At paragraph 3.4.5 of the report the only reference to homosexuals is as follows: ... 'although homosexual acts should be punished with two months to two years imprisonment according to the Criminal Code there is no actual prosecution of homosexuals in Algeria' ... That quote is from a UNHCR report. 3.4.5 continues ... 'homosexuality is tolerated in the Algerian society especially in the cities as long as it is not expressed very explicitly in public through behaviour and clothes. In the big cities, especially in Algiers, various meeting places for homosexuals can be found. People who openly admit their homosexual nature can experience bullying and intimidation by their social environment or members of the security forces'."

The adjudicator went on to comment that that is little more than the situation in this country. That, with respect, is a somewhat strange observation.

12. She went on:

"The various articles in the appellant's bundle refer to the punishments for homosexuals that are prescribed by law but there is no objective evidence of such punishment being carried out, particularly in Algeria. The article by Peter Tatchell is said to document the growing threat of Islamic fundamentalism but again is a very general article with no specific information relating to prosecution of homosexuals in Algeria. The only specific document is that relating to the case of a gay Algerian granted asylum in France in January 1997. However the individual concerned was a political activist, had founded an AIDS organisation and an organisation to promote human rights. His application for asylum was supported by several French AIDS and gay organisations suggesting that he had a particularly high profile. I find this distinguishes his position from that of the appellant's.

The other document relied on is the Internet News Article of 11 August 1997. However this refers to a pledge by the GIA to kill a variety of people who they consider offend Islamic principles including 'immodest or debauched women', those who use alcohol or drugs and those who do not pray. There is no evidence that the appellant cannot go about his business discreetly as he is doing here."

13. She went on to say that she did not think the GIA would have any interest in particular in the appellant. The GIA is an organisation which has been guilty of some fairly terrible acts of violence. It is an organisation which has some links with Al-Qaeda and is fundamentalist in its approach. There is some evidence that it has very recently come back to life to some extent, but it is far from clear that it would create any risk to homosexuals generally, and there is certainly no evidence that this claimant would be at any particular risk from the GIA. The adjudicator said that she did not accept that homosexuals per se would be at risk.
14. The Appeal Tribunal dealt with the matter in paragraphs 19 and 20. They said this:

"19. We are not satisfied that the adjudicator's assessment of the risk to the appellant on return shows any error of law. She has found in paragraph 31 with regard to the risk of the GIA that 'there is no evidence that the appellant cannot go about his business discreetly as he is doing here'. In the context she is clearly referring to his homosexuality as she is considering the risk to him as a homosexual from the GIA.

20. That being so the submission in the grounds of appeal that she is assessing the risk on the basis that he can alter his behaviour cannot stand. She has simply found that he behaves discreetly in the UK and so is reasonably likely to behave in the same way on return. He will not be at risk because homosexuality is tolerated as long as it is not expressed very explicitly in public through behaviour or clothes."
15. It is entirely unclear precisely what is meant by "expressing very explicitly in public through behaviour or clothes". Is the risk limited to those who flaunt their homosexuality in their behaviour or in their dress in public? Or is it sufficient that they are active homosexuals in the sense that they show to those who are perhaps of similar inclination their willingness and perhaps are inclined to try to engage in activities or put forward matters which support the notion that the gay community deserves respect and should not in any way be considered by the authorities or by a proper consideration of the Muslim faith as those who deserve to be regarded as lesser beings and so to be punished in one way or another?
16. The suggested fresh claim was supported by a number of statements, including of course the statement from the claimant himself, and what was said was that he had here in this country not acted in what could be regarded as a discreet fashion. He had joined Gay Pride marches. Photographs are produced showing his involvement. He had been involved also in various organisations supporting gay rights, and he asserted that, in those circumstances, it would be extremely hard for him to live a discreet life in a homophobic society such as Algeria. He also incidentally added that his family had disowned him and so he would not only have to deal with the loss of their support, but in his view they would cause trouble for him and report him to the police, and as a result he too would have difficulty in getting the necessary papers.
17. There were also statements from others who confirmed his activities in the gay community and his relationship with his partner. That was one which, on the evidence

now available and indeed having regard to the statements put before the Secretary of State back in March 2006, made it clear that they had met in 2001, had decided that they would like to live together, but unfortunately it seems that Mr S had got himself into difficulties in that he had become addicted to alcohol and had also taken drugs. This was something that the claimant was not in any way involved with. Indeed, he objected to drugs and he drank very little. No doubt his Muslim background contributed to that. However, he did not give Mr S up, albeit they did not live together, and he helped him through his addiction. Mr S has now come through it, and they in fact started to live together, as I understand it, towards the end of 2005 or at the beginning of 2006. The relationship is, as I have said, on the evidence of both of them, now a stable relationship, and there is evidence from others, which again was put before the Secretary of State, that that was indeed the situation.

18. There is also important evidence from a Dr Korzinski, to whom the claimant had been referred for mental health assessment. The conclusion of Dr Korzinski was that he had had a problem in understanding his homosexuality, but in the context of a supportive and progressive gay community he was now able to accept himself as a homosexual, and this understanding took place in the key developmental period from adolescence to adulthood. The doctor continues:

"He has no experience of living in a community in which his behavioural characteristics, that are distinctively feminine, would have to be masked. If he were to live in a society that has an institutionalised prejudicial hatred of homosexuality, comparable to racism, he would be at extreme risk within that society. He has none of the life skills that one would expect to have developed if his homosexuality had emerged in a repressive society. Survival in such a society requires highly developed skill sets that are honed during one's development over a period of many years. People living in these societies are condemned to a life in the shadows and the constant fear of being discovered. The claimant does not possess the necessary skill sets to live in such a society and it is extremely improbable that at this stage of his adulthood life that he would be able to develop such skills."

19. That is, it is submitted, of considerable importance because it shows that he would be unable to act discreetly in the sense that he would be unable to conceal the fact of his homosexuality now, whatever may have been the position if one had been looking at him growing up some years ago in a homophobic society.
20. Miss Chan submits that, because in Algeria there are no gay rights, there are no opportunities for displaying homosexuality with those who are of a similar mind, and it will be impossible for him not to be discreet. But that, I think, is not in accordance with the opinion given by the doctor as to what would be the inevitable result for this claimant were he to find himself back in the society in Algeria.
21. The doctor also referred to a mental problem in the sense that he had depression. That he was suffering from depression one would have thought was highly probable having regard to the situation in which he found himself. Whether or not any fear of return

was well-founded, it clearly existed subjectively, and in those circumstances to have hanging over him the possibility of return to a situation which he found intolerable would clearly produce depression. There were, however, specific matters referred to which the Secretary of State took issue with in due course, because he said that particular assertions were not supported by the notes taken by the officers in question.

22. That then was the fresh claim -- or the alleged fresh claim. What was fresh, if accepted, was the question of whether he could be discreet in his homosexuality if returned to Algeria and what effect that would be likely to have, and secondly upsetting the nature of the relationship with Mr S, which it was said was established to be far more permanent than was the situation when the matter was considered by the adjudicator.
23. The refusal letter by the Secretary of State of 4 May 2006 dealt in detail with the matters put forward. paragraph 7 referred to the adjudicator's finding that there was little objective evidence of persecution of homosexuals in Algeria, and no evidence that the claimant could not go about his business discreetly as he was doing in the United Kingdom. At paragraph 8 this was said:

"You have not submitted any further objective evidence documenting the persecution of homosexuals in Algeria. Rather you have submitted as new evidence a statement made by your client and photographs of your client's participation in the 2004 and 2005 Gay Pride marches with his partner. Your client states in paragraph 32 to 34 'I am not a discreet gay Muslim man. In summer, I enjoy sunbathing topless in Soho Square and on Hampstead Heath, and relaxed gay pavement cafe lifestyle that exists in London ...' It is noted that the evidence you have submitted on behalf of the applicant all dates from after the dismissal of your client's asylum appeal in 2003. It is considered that your client has gone out of his way to express his homosexuality in public in an attempt to further his asylum and human rights claim in light of the adjudicator's findings and your client's activities are purely intended to frustrate his removal from the United Kingdom. In any event it is not considered that participation in these marches adds anything to your client's claim. It is still open to your client to practise his homosexuality in Algeria albeit discreetly."

24. It seems to me that the assertion that this was a deliberate attempt to further the asylum claim, effectively casting doubt upon the genuineness of the evidence of his nature and the form in which his homosexuality demonstrates itself, is wholly unjustified, particularly in light of the evidence of the doctor. Of course, it may be that if the matter is investigated and tested, that that conclusion could be drawn, although it seems highly unlikely in light of the evidence which is produced. But having regard to the approach that should be adopted in these cases, to which I shall come in due course, by the Secretary of State, I do not think it was open to him to conclude as a matter of fact in that way and to reject the bona fides of the evidence of the claimant's personality. Again, there is the reference to "discreetly":

"It is still open to your client to practise homosexuality in Algeria albeit discreetly."

25. The letter then goes on to deal with the relationship with Mr S. It says:

"Consideration has also been given to the letter from [Mr S] dated 6 March in which he states that he and [the claimant] are in a relationship and have been living together since 2001."

26. Actually, the letter does not say that; that is an inaccurate representation of what is said. I have already indicated what the background was of the relationship between Mr S and the claimant. It goes on:

"There is no evidence to suggest that they are living together and in a stable and continuous relationship."

27. That is wrong. There was evidence that by then, early 2006, they were living together and were in a stable relationship. The fact that they had not been living together the whole time since 2001 is nothing to the point because it is the nature of the relationship and the circumstances of it which are material. If the Secretary of State had properly considered the evidence that was before him, he ought to have drawn the conclusion that there was material which suggested that the two had been together in the sense that they had a clear mutual attraction to each other, and that the claimant had in effect nursed Mr S through his alcoholism, and Mr S had had an effect for his part in helping the claimant with his depression and his ability to enjoy life in this country.

28. So there are two major errors in the letter that was written. That does not mean necessarily that the conclusion reached that this was not to be regarded as a fresh claim was a wrong one. What the Secretary of State had to consider was whether the material put forward, insofar as it was different from that which had been relied on before the adjudicator, might, if an appeal was heard, result in a different decision. Of course, the Secretary of State is entitled, in reaching his decision, to reject evidence if it is intrinsically incredible or if it flies in the face of decisions reached by an adjudicator in a previous appeal. What the Secretary of State should not do is to reach his own conclusions of fact when there are reasonable views to be held one way or the other about them. That applies particularly in the present case to the conclusion that he had deliberately attempted wrongly and no doubt dishonestly to exaggerate his homosexuality in order to better his asylum claim, and further there was the error in suggesting that there was no evidence to suggest the relationship between Mr S and the claimant was such as he asserted.

29. I still have to ask myself whether there is a reasonable possibility that if the Secretary of State were to maintain his refusal, there could be a different decision. It is important to note that the evidence as to persecution of homosexuals in Algeria is not strong if one bears in mind what has to be established in order to show persecution within the meaning of the Refugee Convention. Nowadays the matter is set out in a Directive from the European Union, which is Council Directive 2004/83/EC, Article 9 of which defines acts of persecution. That is translated into domestic law by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525), and Regulation 5 of that defines acts of persecution. 5(1) provides:

"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)."

30. Then examples are given, which include: discriminatory legal measures, and prosecution or punishment which is disproportionate or discriminatory. For some reason the regulations implemented in the Directive do not include Article 9(2)(f) of the Directive, which refers to acts of gender specific or child specific nature. However, that is not material for the purposes of this case.
31. In order to amount to persecution, the acts in question have to be sufficiently serious. What we have here, in the submission of Mr Chirico, is a private life or a lifestyle which can be translated into terms of Article 8 which will be seriously compromised by the homophobic society in Algeria. The claimant will be afraid of what might happen to him if he acts as he would normally act, having regard to his inclinations were he able to express his homosexuality openly as is the case in this country. He has hanging over him not only the prospect of a possible prosecution, albeit the evidence is that there have been none that have come to notice, but perhaps more importantly, not only discrimination but possible violence and possible arrest by police officers, and he fears the possibility of attacks from Muslim fundamentalists. Miss Chan says that that is all very speculative and there really is not any evidence to support it. However, as I say, it is to be noted that the whole basis of the determination was that he would act discreetly, as it was put, and the Secretary of State picks that up in the decision that he has reached.
32. If he is unable to act discreetly, would that make a difference? The way that the matter was dealt with suggests that it could. Certainly, as it seems to me, it is a matter that could, if tested, produce a different result, provided of course that the innate characteristics spoken to by the doctor are accepted and are established, and there is perhaps some further evidence in relation to what could happen in Algeria, although that is not essential.
33. One goes on then to consider the question of the relationship with Mr S. It seems to me that the length of time that the claimant has been here and the nature of the relationship, and whether or not it would be possible for that relationship to persist in Algeria, whether for a short time while the claimant was applying for entry clearance or for a longer time if the suggestion is that the relationship could continue there, are all relevant factors in deciding whether it would be proportionate to return. I do not for a moment suggest that they would necessarily prevail, but they should be considered, and they should be considered on the basis that there is a genuine long-standing relationship

with Mr S. That is a matter which has not been accepted hitherto, and that is a change of circumstances which, coupled with the other point could, I do not say would, result in a different decision. After all, one has to bear in mind, albeit his immigration history is not a particularly satisfactory one, the claimant arrived here when he was only 15. His activities in regard to immigration controls were when he was a young person, deserted by those who should have been responsible, and put in a position of having to fend for himself. He was then wrongly treated as an adult, it would seem, and as a result kept in prison for a year, which must have scarred him to no small extent.

34. In those circumstances, it may well be that there is a reasonable excuse for his past flouting of the immigration laws, and it is certainly a matter that ought to be considered in the round. But he has now been out of Algeria and for most of the time in this country for getting on for 13 years, and that for a person between the ages of 15 and 28 is a very substantial proportion of his life. That is also a relevant consideration in deciding whether, in the circumstances of this case, any return is proportionate.
35. There is no question but that immigration control will normally mean that return is proportionate, and it requires a special case to establish that it is not. But it seems to me that the circumstances of this case are such that at least that matter is capable of consideration, coupled with the question of whether he can discreetly exercise his homosexuality, and justifies, somewhat exceptionally, this court in saying that the Secretary of State did err in treating this as a claim which was not a fresh claim.
36. I have not referred to the number of authorities which are put before me, but I hope I have made it clear from what I have said that I have recognised and applied the principles which are somewhat familiar to me, because I have I think decided some of the cases which are involved. But this is a case in which I am prepared to allow this claim and to quash the decision made that this is not a fresh claim. I think the result will be that the Secretary of State should reconsider the matter, and if he decides that the claim should still be rejected, he should do so on the basis that it is a fresh claim, and that thereafter the claimant has a right of appeal to the Asylum and Immigration Tribunal.
37. MR CHIRICO: My Lord, I am very grateful. I have an application for the claimant's reasonable costs.
38. MR JUSTICE COLLINS: Yes, I do not think you can resist that, Miss Chan?
39. MISS CHAN: No, my Lord.
40. MR JUSTICE COLLINS: Are you legally aided?
41. MR CHIRICO: My Lord, no, not legally aided.
42. MR JUSTICE COLLINS: You have not got a schedule?
43. MR CHIRICO: There is not a schedule. I am very sorry.

44. MR JUSTICE COLLINS: In that case it will be that there be detailed assessment, if not agreed.
45. MR CHIRICO: My Lord, thank you.
46. MR JUSTICE COLLINS: I am sure if you put in a reasonable amount the Treasury Solicitor will -- I know she will act reasonably, but unfortunately there have been rather a lot of hearings on this. I should emphasise, as perhaps is obvious, that, in my view, this case turns purely on its own facts. I cannot see any reason why this should be cited as an authority for anything because I am simply applying what I regard as principles that have been established in other cases. Further, are you asking that the claimant be referred to by initials?
47. MR CHIRICO: We would be, my Lord.
48. MR JUSTICE COLLINS: He should be referred to as "B", and incidentally I think probably it is better that I should refer to the partner as "Mr S".