IN THE ASYLUM AND IMMIGRATION TRIBUNAL

at Manchester

AT (Homosexuals: need for discretion?) Iran [2005] UKAIT 00119

Heard: 13.07.2005
Signed: 20.07.2005
Sent out: 27.07.2005

NATIONALITY, IMMIGRATION AND ASYLUM ACTS 1971-2004

Before:

John Freeman (a senior immigration judge) and
Paul Cruthers (an immigration judge)

Between:

appellant

and:

Secretary of State for the Home Department,

respondent

Mr G Brown (counsel instructed by SFN Solicitors, Burnley) for the appellant
Mr C Wood for the respondent

DETERMINATION AND REASONS

This decision is reported solely for the approach to the facts of such cases suggested at §§ 27-28.

This is a case where the Immigration Appeal Tribunal allowed an appeal from a decision of an adjudicator (Mr JDL Edwards), sitting at Manchester on 2 April 2004, dismissing an asylum and human rights appeal by a citizen of Iran, and directed a fresh hearing before another adjudicator. Under the transitional provisions of the 2004 Act (see 2005 No. 65 (C.25) article 5.1a and 5.2), the case proceeds as if it were a reconsideration following review by the Asylum and Immigration Tribunal: since the Immigration Appeal Tribunal directed a fresh hearing, the parties agreed that we should deal with the case as if we were sitting to hear the appeal for the first time.

2. The appellant is a homosexual: though he never had any face-to-face confrontation with the Iranian authorities over that, he says he fled when he realized a member of his *côterie* had been arrested by them, apparently leaving an incriminating video in their hands, showing unseemly activity on the part of this appellant and others. His case before us was based partly on the consequences of that history, including the issue of summonses against him since he left, if accepted; and, if not, on what was said to be the real risk on return of Refugee Convention persecution or article 3 ill-treatment, if the relevant international law did not require him to express his predilections in the relatively discreet way he

had so far adopted in public. There is no issue as to the appellant's homosexual life-style in Iran; but there are serious live issues over the existence of the video and the genuineness of the summonses.The appellant had enjoyed two homosexual liaisons while in this country; but by the date of the hearing before us both had come to an end, so no article 8 point was argued on any private life he might have had of that kind.

3. The **appellant's history** appears in his statement of evidence form [SEF], interview, and a further statement, all of which he adopted as part of his evidence in chief. Briefly, he was born in Teheran in 1976, and had first engaged in buggery with a contemporary called Dawood when both were only 14: later a school-mate of theirs called Mohsin had become involved too in their activities, which took place in Mohsin's house, where no-one else was usually present. One occasion with Dawood at the appellant's family home did become known to his brother, and so to his parents; but they did not take it seriously.

4. In 1992, when the appellant was 16, he went as a trainee to a shoe factory, and lost touch with Dawood and Mohsin, but then established. a liaison with another young man called Abbas. Some time after finishing military service, when he was 21, the appellant met two others, Arash and Hussein. The four of them started going to "*Park Daneshjoo*" (literally, 'Student Park', though the appellant said it did not form part of any campus) which he described as "a park for gays to meet in": it is referred to in the background evidence, to which we shall return in due course. There they met two others of like mind, Behnood and Hamid.

5. Arash was later arrested and not seen again, apparently because of what the authorities considered the outrageous way he dressed. This led to a temporary decline in the outdoor meetings of the others, though the appellant and Abbas continued to engage in buggery with each other. Eventually the meetings in the park, going on to the cinema, resumed, and the appellant began to indulge in the same practice with the other three, without Abbas being aware of it. There is no suggestion that any buggery took place, other than in private.

6. The five of them used to have private parties every fortnight: on 15 April 2001, one was to be held at Hussein's house. The appellant however had to take his mother to see her doctor, so rang Hussein to say he could not come. When Hussein insisted, the appellant became suspicious, and took his mother to stay with his sister for the night. Next day his brother rang to say the security forces had been to their family house looking for him: the appellant realized, according to him, that they must have been at Hussein's when he was pressing him to come to the party.

7. The appellant had no idea, as he confirmed before us, how the police got to know what sort of party they were having; but he knew, he said, that his life was in danger, and he must leave the country, which he did, first going to a cousin at Karaj, who arranged the services of an agent, through whom he crossed the Turkish border and claimed asylum on 18 May 2001, saying he had got here by road (presumably in the back of a lorry) that same day.

8. The appellant's case was that the video which must (he assumed) have fallen into the hands of the police when they raided Hussein's house showed the five of them kissing on trips they had made to various places. There was only one cassette, though it had been recorded at various times on various cameras: they

had made it to remind themselves of happier times when for some reason they were unable to meet. In view of the different customs on such matters in the Middle East, we asked the appellant whether he and his friends were exchanging the kind of kiss normal between men who know each other well in that part of the world: he said no, they were kissing on the lips. The video would also have exposed them to suspicion as they were discussing sex-change operations.

9. The appellant had got permission to appeal from the original adjudicator decision by means of the **summonses**, which he had produced for the first time with his grounds of appeal: how that amounted to an arguable error of law on the part of the adjudicator is more than we can say, but not something we are required to explain. (The Tribunal had allowed the appeal and directed a fresh hearing on the basis that the adjudicator had not made any finding as to whether the video was in the hands of the authorities: again this was a little odd, as clearly he had not accepted the existence of such a video at all, but again we are not called on to give any explanation for that).

10. The hearing before the adjudicator took place on 2 April 2004, at a time when the appellant had been in this country for just under three years. This is what the adjudicator recorded, at § 17:

…he had heard from his family that the authorities had been looking for him and correspondence had been received there demanding his attendance at a police station. He did not have these documents.

In the appellant's original grounds of appeal to the Tribunal, it was said at § 3:

The Appellant has mentioned the summons throughout his claim but was in the process of obtaining them. Unfortunately he did not receive them until after his Appeal Hearing. The Summon was faxed across from Iran and have been translated.

While translated "papers of summon" and "letter from the Iranian authorities" were attached to the grounds of appeal, this history is not, as it happens, true: there is nothing about any summonses in the appellant's SEF statement (A9-10), filed by his previous solicitors on 18 December 2001, just seven months after he arrived and claimed asylum in this country. At his interview on 22 March 2002, where he was accompanied by a representative who intervened as and when she saw fit (see B9), there is no mention of them either. The appellant's notice of appeal to the adjudicator, filed by his present solicitors on 27 January 2004, equally says nothing about any summonses.

11. Nevertheless the appellant was granted permission to appeal to the Tribunal on the basis of the summonses; and they said at § 5, (after allowing the appeal and directing a fresh hearing on the point about whether the video was in the hands of the authorities):

In addition to the above, the Adjudicator accepted that there were certain summonses issued by the authorities against the appellant, however these summonses were not available to the Adjudicator.

Regrettably, this is not quite accurate either: what the adjudicator had actually said, at § 24e, was this:

I note that the summons that the appellant says was sent to his address has not been produced to me. The appellant seemed to me to be an intelligent individual, who has been properly advised throughout his claim. He would realise the importance of such items, and I find it surprising that he took no steps to produce it.

It is clear from the adjudicator's general negative credibility findings at § 25-26 that he did *not* accept that any summons had been issued against the appellant.

12. Before us, the appellant produced the originals of the documents which are attached to his solicitors' letter of 11 July 2005, and we numbered them in order of production. The appellant also produced two envelopes (exhibits 2 and 3), one stamped and post-marked in Persian, but without anything we were able to read to show the date it was sent: the other had no post-marks at all, but was said to have been sent inside a larger envelope through a courier service. He was not able to say what had come in each of the envelopes: one at least had also contained a personal letter. Exhibit 1, which he said had been sent him by his family, is headed, in translation "*Administration of justice of the Islamic Republic of Iran: Paper of summon*": it is dated, Persian-style, "*1380/2/4*" [agreed Gregorian equivalent 24 April 2001] directs the appellant's appearance 15 days later [ie 9 May] at the "*Judicial complex of Hashemi, section 1117*", the "*Subject of incrimination: Unlawful relations*". The original is completed in handwriting on an A5 printed form, showing the usual crescent and scales motif.

13. The appellant went on to say that he had asked his family to send the originals of exhibits 4 and 5 after the adjudicator hearing as he had not been able to produce them then. Exhibit 4 is a handwritten document on A5 paper with a printed crescent heading, completed with the date (agreed equivalent 17 April 2001), requiring the appellant to report to police station no. 115 the next day for "*explanation regarding the above offence*", which had been stated at the top as "*Immodest acts*". Exhibit 4 is on a similar form to exhibit 1, headed "*Administration of justice of the Islamic Republic of Iran: Warrant of Arrest*", and is dated (agreed equivalent) 2 May 2001; but it does not direct the appellant's immediate arrest, instead requiring his appearance at the same "judicial complex" seven days later (ie 9 May). It alleges his "*… failure to attend on the last occasion*", and announces an intention to arrest the appellant if he does not do so this time.

14. In cross-examination the appellant maintained that these documents had indeed been sent to his family after his departure. In closing, Mr Wood suggested that, on the background evidence, the one headed "*Warrant of Arrest*" would not have been supplied to them. However we pointed out to him that, while the point of an immediate warrant would have been defeated by handing it over to the suspect's family, the operation of this one was apparently suspended, pending his appearance or not on 9 May; so that it might reasonably have been handed over to secure that, and Mr Wood realistically withdrew this argument. Mr Brown for his part frankly acknowledged that the timing of production of the summonses did go against their authenticity; but he argued that this should not be held against the appellant on the more crucial question of whether the authorities had seized a video showing him as he claimed. We shall come to that point when we have reached our conclusions on the authenticity of all these documents, after reviewing the rest of the evidence.

15. **Background** Mr Brown did not refer us to any background evidence as such, relying instead on the extensive review of it in **RM & BB (Homosexuals) Iran CG [2005] UKIAT 00117.** The Tribunal's primary conclusions, at § 123, were as follows:

We consider that we can properly conclude from the evidence that it is most unlikely, given the statistics and the problems of proof, that the death penalty for sodomy is anything other than an extremely rare occurrence. It is clear however that, and here we are in agreement with paragraph 24 of Ms Rogers summary of the evidence, those guilty of immoral acts under Article 147/115 and Tafkhiz under Article 121 face harsh punishments which can include long prison sentences up to six years and up to one hundred lashes. We remind ourselves of what Mr Kovats accepted on behalf of the Secretary of State that a sentence of lashing would be such as to give rise to a breach of Article 3 rights. Although we agree with Mr Kovats that the interest of the Iranian authorities in homosexual offenders is essentially focused upon any outrage to public decency, it is in our view clear that the authorities would not simply ignore, as Mr Kovats suggested they might in certain situations, reports made to them of persons carrying out homosexual acts albeit in private. If a complaint is brought to the authorities then we are satisfied that they would act upon that to the extent that they would arrest the claimed offenders and question them and thereafter there is a real risk that either on the basis of confessions or knowledge of the judge which might arise from such matters as previous history or medical evidence or the evidence of the person who claimed to have observed the homosexual acts, that they would be subjected to significant prison sentences and/or lashing.

16. We are prepared to assume, for present purposes, that, if the video existed and was in the hands of the authorities, then, though it could certainly not lead to any death sentence for sodomy, it might conceivably lead to a lashing for lesser immoral acts, which on the European jurisprudence would amount to "inhuman or degrading treatment" contrary to article 3 of the Human Rights Convention. There is nothing in the summons procedure they are said to have adopted to indicate that a capital charge was even contemplated, though again a conviction for "unlawful relations" or "immodest acts" between men may be assumed to merit a lashing under Iranian law.

17. Mr Wood referred us to § 6.179 of the April 2005 CIPU report, which cites a report of a seminar held in Berlin in 2001 to the effect that

There are special parks in Tehran, known as homosexual meeting places. There are also a large number of transvestites walking around in North Tehran. Furthermore, sex changes are permitted in Iran and operations are frequently and openly carried out. A different sexual orientation may, however, create problems. Still, homosexuality is practised every day, and as long as people do not intend to proselytise 'transvestim' or homosexuality, they will most likely remain unharmed.

18. This has to be read in the light of the evidence of a "country expert" called Anna Enayat, set out in **RM & BB** at § 28:

It was clear that there were practising homosexuals in Iran and it was "well known" that homosexual men made contact with one another in parks in Tehran, the Dameshjoo Park being the location most frequently mentioned in the

literature, but it could not be inferred from the existence of such meeting places and the fact that undoubtedly many homosexuals managed to avoid prosecution that a practicing homosexual does not face risks. Nor did she consider that it could be inferred that there was anything resembling a publicly accepted "gay scene" in Iran. Homosexuals did not congregate in an overt fashion. Urban parks were patrolled by members of the Basij and other morality police units, some in plain clothes. Homosexuals who avoid showing overt signs of their sexual orientation in public can for the most part avoid being targeted by the controls. Enforcement of the law is inconsistent on the part of the Iranian authorities.

19. The Tribunal in **RM & BB** did not express any specific view on that evidence, perhaps because of their § 124:

Given that we consider therefore that there is a real risk that a person who comes to the authorities' attention for having committed an act falling within the relevant provisions of the code, it must follow that since this can be presumed to be known by those engaging in such acts, such actions would be likely to be carried out carefully. We have not been addressed on the issue of discretion and whether people engaging in such acts can be expected to act discreetly, which was considered by the Australian High Court recently, in Appellant S395/2002 v Minister for Immigration [2003] HCA 71. That is another argument for another day and we would not wish this determination to be interpreted as imposing a requirement of discretion, but rather a recognition that in the legal context in which homosexuals operate in Iran it can be expected that they would be likely to conduct themselves discreetly for fear of the obvious repercussions that would follow.

20. **Findings of fact and conclusions on history** In view of the background evidence about public displays of homosexuality, we are prepared to accept that the appellant and his friends might have kissed each other on the lips while on outings; but we have no doubt that they would have done so with some discretion. There is nothing to support the appellant's own evidence as to the police raid on Hussein's and presumed discovery of the video, except for the summonses (by which we mean all the police and court documents produced). While so far as we know there is nothing intrinsic on the face of any of these to show they are not genuine, the timing of their production raises a serious question about that. Each of them is directed to the appellant in April or May 2001, and the presumption, in the absence of any evidence to the contrary, must be that they were sent to or served at his family home during those months.

21. The appellant claimed asylum on 18 May 2001, and was already represented by London solicitors when his SEF was filed on 18 December that year. Either they or his present firm represented him at his interview on 22 March 2002: that may have been his present solicitors, from Burnley, as the interview took place in Liverpool, and it was they who filed notice of appeal to the adjudicator for him on 27 January 2004. Yet there was no mention of any summonses till he appeared before the adjudicator on 2 April that year, and no production of even a copy of them (at first apparently faxed ones) till his application for permission to appeal from the decision which followed. We agree with what the adjudicator said (see **11**) about this appellant being intelligent and well advised, and we cannot accept that, if summonses had genuinely reached his family home in April or May 2001,

they would not have made any appearance in his asylum claim till nearly three years had passed.

22. We fully recognize that someone who has a genuine fear of persecution may sometimes resort to lies, or even the concoction of false documentary evidence, to support a case about which he is less than optimistic. However, bearing that note of caution in mind, we have to consider the evidence about the video in the light of what we have found to be the appellant's serious falsehood on the summonses. As we have already made clear, we take the view that any lip-kissing would probably have been performed fairly discreetly in the first place: would it have been recorded by video as claimed?

23. The appellant's case is that it was so recorded as a memento for the members of his group when they were unable to see each other. We can see no reason why they should have chosen for that purpose to record acts which the appellant claims (and we are prepared to accept) would have exposed them to "inhuman or degrading treatment" if they fell into the hands of the authorities. We cannot claim any particular knowledge of the ways of homosexuals, still less of Iranian homosexuals; but we are entitled to use what we know of human nature, so far as it appears common to mankind in general.

24. Couples in general habitually derive considerable comfort, when apart, from photographs of each other, and would no doubt do so from videos too; of course groups of more than two also exist, where sexual activities are engaged in together. In the absence of a degree of voyeurism, which has not been suggested in this case, however, we do not see why mementos should need to take the form of the protagonists or others kissing, rather than the kind of holiday or other portrait pictures so well known to most people. That is especially so where such mementos should be as risky as these are said to have turned out. We cannot see why those concerned should have wished to remember each other discussing sex-change operations, when there had been nothing said about any of them contemplating such drastic measures. We take the view that this element was brought in simply to make the effect of the video more explicit, though it seems from the CIPU report (see **17**) that there was no risk attached to such operations in themselves.

25. We do not think much of Mr Brown's point that the appellant could have invented an even more explicit video if he had chosen. Refraining from an outrageous lie in favour of a moderate one is rarely a real recommendation for truthfulness. Bearing in mind the appellant's willingness to use what we have found to be concocted evidence in the form of the summonses, we have no doubt that his evidence about the video was also made up to explain what it was that put him at risk with the authorities, when he had refused the invitation to Hussein's, allowing him to escape any direct confrontation with them.

26. We do not accept the appellant's evidence on either the video or the summonses, and we see nothing in the rest of his history to put him at any real risk on return. For the avoidance of doubt, we do not accept that there was a raid on Hussein's at all, in view of what the appellant found it necessary to claim about the video; but, if there was, it would have disclosed no evidence likely to put the appellant at risk without the video, without which there was nothing to support whatever Hussain might have said about him: see **RM & BB** at § 122 for the Tribunal's view that

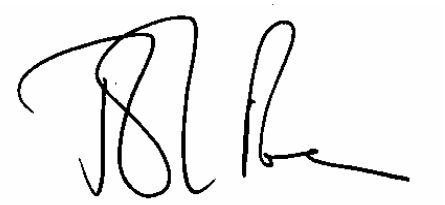
there is "an impressive level of care" within the Iranian legal system, at least so far as the formalities are concerned.

27. **Generic risk** We have chosen this name to indicate Mr Brown's subsidiary argument, relying on the point left open by the Tribunal in **RM & BB** at § 124 (see **18**), and taken up before them by the New Zealand Refugee Status Appeals Authority [RSAA] in **Refugee Appeal No. 74655/03**, to which he also referred us. The RSAA held that homosexuals, in Iran there as here, could not be required to conduct themselves with discretion: the crucial passage is perhaps at § 114:

By requiring the refugee applicant to abandon a core right the refugee decision-maker is requiring of the refugee the same submissive and compliant behaviour, which the agent of persecution in the country of origin seeks to achieve by persecutory conduct.

28. Whether there is or is not a "core right" for persons of any sexual orientation to conduct themselves with discretion in their public sexual practices is not something we need in our view decide, though we should have thought that such discretion was part of the ordinary consensus of civilized mankind (and still more so of a number of races considered "uncivilized", so far as they still exist). The reason is that this appellant on our findings of fact, and his own expressed intentions for the future, has never shown the slightest wish to engage in homosexual conduct in any way in the face of the public or the authorities, such as might expose him to any real risk, on the background evidence, on return to Iran. Whether he has or does not have a "core right" to go in for that sort of thing, his return will not expose him either to Convention persecution or ill-treatment.

Appeal dismissed



John Freeman
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