HJ (homosexuality: reasonably tolerating living discreetly) Iran [2008] UKAIT 00044

ASYLUM AND IMMIGRATION TRIBUNAL

THE IMMIGRATION ACTS

Heard at: Field House Date of Hearing: 25 February 2008

Before:

Mr Justice Hodge, President
Senior Immigration Judge Storey
Senior Immigration Judge Mather

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the Appellant: Ms L. Hooper, instructed by Paragon Law Solicitors
For the Respondent: Ms J. Collier, instructed by the Treasury Solicitor

It is a question of fact to be decided on the evidence of the appellant's history and experiences as to whether a homosexual appellant "can reasonably be expected to tolerate" living discreetly in Iran. Enforcement of the law against homosexuality in Iran is arbitrary but the evidence does not show a real risk of discovery of, or adverse action against, homosexuals in Iran who conduct their homosexual activities discreetly. The position has not deteriorated since RM and BB.

DETERMINATION AND REASONS

1. The appellant was born on 6 June 1970. He is an Iranian male who is homosexual, who practised homosexuality in Iran and who has continued to do so since his arrival in the United Kingdom. He claimed asylum on arrival in the UK on 17 December 2001.

2. The asylum claim has a lengthy history following its rejection by the respondent. His appeal was dismissed by an adjudicator but the IAT remitted the case for further consideration. In July 2005, Immigration Judge Hodgkinson again dismissed the appeal. The appellant's appeal to the Court of Appeal was allowed

in July 2006 and reported as J v Secretary of State for the Home Department [2006] EWCA Civ 1238. The appeal was allowed on the basis that the AIT should reconsider a number of matters set out in the judgements of Maurice Kay and Buxton LJJ.

3. A good deal turns on the evidence of the appellant. He gave evidence before us. We also heard evidence from Ms Anna Enayat, a senior associate member at St Anthony's College, Oxford. She is an expert on Iran, and has given evidence before this Tribunal in a number of cases focussing on the position of homosexuals in Iran. We have read and considered all the statements made by the appellant. We have also had regard to the evidence as summarised in previous determinations. Ms Enayat, as well as giving evidence, produced two detailed country reports on this and another case. Each side produced detailed bundles and together a joint authorities bundle. Both counsel produced full and helpful skeletons, for which we are grateful.

4. In granting permission to the Court of Appeal in this case Sedley LJ stated that:

> "There is no single decision… which answers this straightforward question… does it amount to persecution… if the clandestine character of the homosexual activity which there has been in the past and will be on return in the future is itself the product of fear engendered by discriminatory legislation or policing which itself violates the individual's human rights?"

5. In allowing the appeal, Maurice Kay LJ said that this Tribunal:

> "…will have to address questions that were not considered on the last occasion, including the reason why the appellant opted for 'discretion' before his departure from Iran and, by implication, would do so again on return. It will have to ask itself whether 'discretion' is something that the appellant can reasonably be expected to tolerate, not only in the context of random sexual activity but in relation to 'matters following from and relevant to, sexual identity' in the wider sense recognised by the High Court of Australia (see the judgement of Gummow and Hayne JJ at para 83 [*5395/002 2003 HCA71*]). This requires consideration of the fact that homosexuals living in a stable relationship will wish, as this appellant says, to live openly with each other and the 'discretion' which they may feel constrained to exercise as the price to pay for the avoidance of condign punishment will require suppression in respect of many aspects of life that are 'related to or informed by their sexuality' (ibid, para 81). This is not simply generalisation; it is dealt with in the appellant's evidence."

6. Buxton LJ added a further point:

> "The question that will be before the AIT on remission will be whether the applicant can reasonably be expected to tolerate whatever circumstances are likely to arise were he to return to Iran. The applicant may have to abandon part of his sexual identity, as referred to in the judgement of Gummow and Hayne JJ in S, in circumstances where failure to do that exposes him to the extreme danger that is set out in the country guidance case of RM and BB (Iran) CG2005 UKAIT

00117. The Tribunal may wish to consider whether the combination of these two circumstances may have an effect on their decision as to whether the applicant can be expected to tolerate the situation he may find himself in when he returns to Iran."

Persecution

7. An act of persecution is defined in the Refugee or Person in Need of International Protection Regulations 2006 [SI 2006 No. 2170] (hereafter "the Protection Regulations") 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 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 so as to affect an individual in a similar manner as specified in (a)…
>
> …
>
> (3) An act of persecution must be committed for at least one of the reasons in Article 1 (A) of the Geneva Convention.

8. Maurice Kay LJ pointed out at para 11 of J:

> "If there is one thing upon which all the authorities are agreed, it is that persecution is, in the words of Lord Bingham of Cornhill in Sepet and Bulbul [2003] 1WLR 856 at paragraph 7, a 'strong word', requiring a high threshold. It has been variously expressed, but the language of McHugh and Kirby JJ [*in the High Court of Australia S395/002 [2003] HCA 71, [2004] INLR 233*]... - 'it would constitute persecution only if by reason of its intensity or duration the person persecuted cannot reasonably be expected to tolerate it ' – has been adopted in a number of recent authorities including Z [*Z v SSHD 2005 ImmAR 75*] (at paragraph 12) and Amare v SSHD [2005] EWCA Civ 1600 paragraph 27, and RG (Colombia) v SSHD [2006] EWCA Civ 57 paragraph 16."

Parties' Approach

9. It is accepted that for a person to be openly gay in Iran would attract a real risk of persecution (see in particular RM and BB). The issue therefore is whether the need for the appellant to be discreet about his sexuality on return to Iran would itself constitute persecution within the meaning of the Refugee Convention.

10. It is the respondent's position that self-restraint due to fear will be persecution only if it is such that a homosexual person cannot reasonably be expected to

tolerate such self-restraint. Where a person does in fact live discreetly to avoid coming to the attention of the authorities he is reasonably tolerating the position.

11. The appellant argues that persecution is based on discrimination. Thus the impact of non-discrimination provisions in international instruments, taken together with the right to private life, make it clear that sexual orientation and sexual life are core human rights and protected rights. There are no non-discreet groups of gay men in Iran. The necessary requirement on a gay man in Iran to exercise discretion is to suppress aspects of his life related to his sexuality and a denial of that sexuality. The suppression is driven by the condign punishments meted out to convicted homosexuals. The real risk of serious physical harm is a strong causative factor in the "discretion" that is exercised. "Discretion" on return is not something that the appellant in this case can reasonably be expected to tolerate.

12. Ms Hooper for the appellant in her skeleton and in her submissions was in effect raising wide ranging general arguments concerning the different respects in which discrimination against homosexuals constitutes a violation of basic human rights. These arguments come very close to a claim that, given the discrimination against homosexuals in Iran, on a proper application of the law any homosexual person from Iran is entitled to international protection. We have not addressed these arguments separately since to do so would deflect from the task set for us of answering the specific questions posed by the Court of Appeal as they relate to this appellant.

Case law

13. We have read and considered the analyses of the various cases quoted by Maurice Kay LJ and the authorities quoted to us by the parties. We note also that the Protection Regulations reflect the high threshold required for persecution, requiring that an act of persecution must be "sufficiently serious… as to constitute a severe violation of a basic human right."

14. The appellant places particular reliance on the human rights based approach to persecution and on the Australian case of S 395 at para 43.

> "43. In many, perhaps the majority of cases, however, the applicant has acted in the way that he or she did only because of the threat of harm. In such cases the well-founded fear of persecution held by the applicant is the fear that unless the person acts to avoid the harmful conduct, he or she will suffer harm. It is the threat of serious harm with its menacing implication that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider the issue properly…"

15. The respondent relies on the analysis of the human rights approach to persecution as set out in the judgement of Laws LJ in Amare [2005] EWCA Civ

1600. He too has regard to S in his analysis. Amare concerned an appellant who was homosexual as did Jain [2000] INLR 71, referred to in the judgement. In Jain, Schiemann LJ said at page 77:

> "However the position has now been reached that criminalisation of homosexual activity between consenting adults in private is not regarded by the international community at large as acceptable. If a person wishes to engage in such activity and lives in a state which enforces a criminal law prohibiting such activity he may be able to bring himself within the definition of a refugee. That is one end of the continuum.
>
> The other end of the continuum is the person who lives in a state in which such activity is not subjected to any degree of social disapprobation, and he is as free to engage in it as he is to breathe.
>
> In most states, however, the position is somewhere between these two extremes. Those who wish to engage in homosexual activity are subjected to various pressures to discourage them from doing so. Some pressures may come from the state: e.g. state-subsidised advertising or teaching to discourage them from their lifestyle. Other pressures may come from other members of the community, without those members being subjected to effective sanctions by the state to discourage them. Some pressures are there all the time. Others are merely spasmodic. An occasional interference with the exercise of a human right is not necessarily a persecution. The problem which increasingly faces decision-makers is when to ascribe the word persecution to those pressures on the continuum. In this context, Mr Shaw, who appeared for the Secretary of State, reminded us of the references in Shah and Islam to the concept of serious harm and the comment of Staughton LJ in Sandralingham and Vichandran v Secretary of State for the Home Department [1996] ImmAR 97, 114, where the Lord Justice stated:
>
> > 'Persecution must at least be persistent and serious ill treatment without just cause'."

16. Laws LJ went on to say at para 27:

> "…the alignment of the State obligations imposed by the Refugee Convention with the protection of basic or fundamental human rights is subject to important qualifications. These are well-known, and are no less important than the alignment itself. First is the fact that the Convention only requires protection to be afforded in cases of particular violations of human rights norms: those arising 'for reasons of race, religion, nationality, membership of a particular sexual group or political opinion. Secondly the violation, or rather prospective or apprehended violation, must attain a substantial level of seriousness if it is to amount to persecution."

And further at para 31:

> "The Convention is not there to safeguard or protect potentially affected persons from having to live in regimes where pluralist liberal values are less respected,

> even much less respected, than they are here. It is there to secure international protection to the extent agreed by the contracting states.
>
> While, as I certainly accept, the sense accorded to persecution might shift and stretch as the international consensus develops, the Convention's guarantees remain limited by the two conditions I have described."

Country information

17. RM and BB remains the lead country guidance case on the issue of risk to homosexuals in Iran. The Tribunal there concluded:

> "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 a person who claimed to have observed homosexual acts… *[a person accused of homosexual conduct]* would be subjected to significant prison sentences and/or lashing."

They further concluded that:

> "homosexual acts carried on in private between consenting adults are most unlikely to come to the attention of the authorities… and… that the authorities do not seek out homosexuals but rather may respond to complaints of consensual homosexual activity being carried on."

18. The IAT reached those conclusions in RM and BB after a full analysis of extensive expert evidence and background country information. Ms Enayat's evidence made a significant contribution to the conclusions in that case. Her evidence before us updates that evidence.

19. In her reports before us, she provides an update at part 2 of the situation of homosexuals in Iran between 2005 and January 2008. There are, she says, very few official statistics. In the nine months from March to December 2006, 53,971 people were arrested for immoral relationships. The passage on homosexuals taken from an official report states:

> "2,148 persons were arrested for the crime of sodomy (lavat) which thankfully showed no significant growth… Most of those arrested were between fifteen and twenty years old. 9% were married men."

Ms Enayat says: "[t]his is the first time there has been any acknowledgment from Iranian establishment sources of the extent of arrests among those suspected of homosexual acts". Homosexual acts are classified as "crimes against public virtue". She concluded in her report:

> "Crimes against public virtue include adultery and fornication… sodomy, tafkhiz and lesbianism… pimping, immoral relationships between a man and a woman unrelated to one another… violations of the moral code committed in public

> places… establishing a house of corruption… and dealing in or showing to third parties pornographic material."

Ms Enayat confirmed the view summarised in RM and BB at para 108 that little information is available on these matters given the "customary secrecy" exercised by the judiciary where moral crimes are concerned. She concluded in her report:

> "It is difficult to determine whether this new information demonstrates a deterioration in the position of homosexuals over the past two or three years, or whether the situation it reflects has been constant since the 1979 revolution brought to light by better communications, in particular the internet."

She considers it impossible to say whether there has been an increase in the arrests for sodomy, given the paucity of information. However, the report she quotes as above seemed to suggest there had been no significant growth.

20. Her report and the evidence before us set out the new information that has come to light since 2005. She considers the position summarised in RM and BB remains current. The part of the criminal code concerning homosexuals is being renewed in parliament, with more specific descriptions of the penalties faced by those convicted of the crime. These are to provide that penetrative sodomy attracts an automatic death sentence, reduced to one hundred lashes for an unmarried man, but the person who is the passive partner or the man who is married and forces sodomy is subject to an automatic death penalty. Non-penetrative acts as defined attract a sentence of one hundred lashes, lying naked under the same cover without necessity ninety-nine lashes and kissing, touching or stroking with lascivious intent seventy-four lashes in the discretion of the judge. On any view such punishment constitutes persecution.

21. Ms Enayat considers that Iranian authorities have adopted a more aggressive policy against moral offenders of all kinds since 2004. There were active attempts in 2004 and 2005 by the Basij authorities to entrap homosexuals through internet chatrooms. She reports that:

> "after the execution in August 2005 of two young men in Mashhad, apparently but by no means certainly on charges of homosexual rape of a minor, the government of the Netherlands and the government of Sweden both suspended intended deportations of Iranian gays."

She provides examples of death sentences imposed or pending and cites a series of cases confirming the overall repressive nature of treatment and punishment of homosexuals in Iran.

22. Ms Enayat also gave evidence of the beginnings of the establishment, since autumn 2004, of a Social Protection Division of the judiciary. She described this as "a sort of state-run neighbourhood watch". It is manned by volunteers whose principal purpose is to discover and report moral crimes. She says that in many

parts of Iran the Social Protection Division has begun operations and cites examples of their activity, although none in the quoted reports relate to homosexual activity. She also commented at para 3.6.3:

> "respected international human rights reports routinely remark on the uneven, arbitrary and unpredictable application of the law in Iran."

23. In reply to questions from the appellant's counsel, Ms Enayat said that, since the election of the current President of Iran, the drive by the establishment to stamp out ways of life that are anti-Islamic has increased. Police do pick up moral offenders. This has created alienation in society and there have been demonstrations against this. Generally, there has been an increase in surveillance.

24. In cross examination, Ms Enayat accepted that men can kiss and hug when greeting and walk arm in arm. Men can socialise in public, they can go shopping and go to dinner together. She thought the aggressiveness of the surveillance of the society had changed since she gave evidence in RM and BB. The "neighbourhood watch" exposed people to greater risk of discovery than previously. She accepted that it is possible for men to meet through work and social relationships and as a consequence form homosexual relationships. She said that people are informed upon. She said that one public park in Teheran is used as a pick-up scene for homosexuals and homosexual prostitutes, but described that as a seedy place that not many gays would use. In relation to the Social Protection Division, she said that the norm is not ever to mention the existence of homosexuals. There are, she said, no figures on homosexuals, or on drug use, or on boys and girls being together.

25. Ms Enayat herself quite properly stated in her report that it was:

> "difficult to determine whether this new information demonstrates a deterioration in the position of homosexuals over the past two to three years."

We agree. It remains clear, as it was at the time of RM and BB, that those who confess to homosexual acts or are convicted by whatever means are at real risk as they face condign punishment. The establishment of the Social Protection Division of the judiciary with its neighbourhood watch aspect is a new development. Its exact reach is not known but it is clear that its focus is on moral crimes in the wide sense used in Iran. But there is no evidence that their work is focussed particularly on homosexual conduct. Even assuming that the extent of surveillance of the private lives of citizens in Iran has increased in recent times and that homosexuality is one of the moral crimes which is subject to this increased surveillance, the evidence before us falls well short of showing that this surveillance has reached such levels that Iranian citizens who engage in homosexual activities in private run a real risk of discovery. It must also remain the case, as the Tribunal concluded in RM and BB at para 124, that given

"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 will follow."

The appellant's evidence

26. The appellant originally claimed that he left Iran after escaping from police custody following him being arrested on suspicion of engaging in homosexual activity. This claim was comprehensively disbelieved by the immigration judge and has not been pursued. But the judge accepted that the appellant practised homosexuality discreetly in Iran. There is therefore no evidence that the appellant when in Iran was known by the authorities to be homosexual and that because of that knowledge is at risk on any return.

27. The appellant's evidence taken from his various statements is that when at school he was trying to have relationships with other boys. At the age of fifteen he was beaten by the headteacher and expelled for holding hands with another student. He was unable to get into another school and worked in a market. From the age of nineteen he spent two years in the army. Throughout his army days he had relationships with other men.

28. On return from the army, he worked for a few years at the market, where he met a gay man whom he was quite fond of. Later, he started working as a taxi driver. He then worked for the owner of a money exchange called "A", with whom he had a gay relationship for some nine months prior to leaving Iran. These matters, save for the circumstances in which the appellant claims he left Iran, are part of the accepted evidence.

29. In the appellant's statements signed in 2001 he said:

> "17. I escaped Iran because I was going to be persecuted for being a gay man. Me being homosexual is like needing food and water – it is natural for me. The only place it is not natural is in Iran. The penalties were not something I thought about. It was more important for me to pursue my right to a private life and to think and act the way I wish to. Also in my relationship with "A" it was more important for me to be with him than to think about what the police might do to me. "

30. However, in a witness statement signed on 10 February 2007, directed no doubt to issues raised by the Court of Appeal's judgement in July 2006, the appellant gives somewhat different evidence as to why he conducted his homosexual activities "discreetly" before his departure from Iran. In summary he said:

> "1 It is impossible for anybody who is homosexual living Iran because it is extremely important that you keep your homosexuality hidden.

2 I could never admit to people that I wanted to be in a gay relationship and that I wanted to have a future with a man and build my life with another man.

3 I would also hear about things that had happened to homosexual people in Iran on the news or through newspapers. I would hear about how they had been targeted and ill treated and knew they could quite easily be me. This would make me extremely afraid. I was always scared of being caught because I knew what the consequences were to me. However, being a homosexual is who and what I am and it is something that I cannot change and therefore I had no option but to continue practising my homosexuality even though I did so in fear. Having to live a lie every day of my life and having to live with the fear of what would happen to me if I was caught was an intolerable way for me to live in Iran."

31. In evidence to us we were told by the appellant that his mother and brother knew he was gay and he did not have to pretend to his mother and brother. He confirmed his relationship with "A" had lasted nine months and he told a few friends about this so he was open with them. He spent many nights with "A" and a lot of time with him. They went out in public, but did not do anything together. They went to city gardens and parks. He agreed it was possible to have gay relationships whilst he hid his sexuality from all but a few people. He had told people in Iran in response to questions that he did not want to get married and he agreed he did not have to answer any questions that were put to him about why he was not married from friends and colleagues, but he only told a handful of people and his family.

32. The appellant agreed he was not living a lie with his family and a handful of friends who knew he was gay. He agreed he was not completely isolated because of "A" and his friends and the man at the market. He agreed he was able to admit to a handful of people that he wanted to live with and have a life with a man. He got to know people with whom he might have gay relationships through work and they exchanged confidences once they got to know each other. He did not go to an internet chatroom or to the park, as he said the latter would "take your life away". He denied he could now go to Iran and form relationships with people he could meet in the ordinary course of life. He described that as "extremely hard now". He was taken through the quote from 2001 set out above, and confirmed that he did not think about the penalty.

33. It was put to him that he was not constantly scared and afraid in Iran, but he said that he was. He said that he did not know that the penalties would be so harsh. He accepted that he did not leave Iran until he was thirty one. When asked why he did not try to leave earlier, he said that nothing had happened to him. He was asked if he had been able to tolerate life and he said that it was extremely hard. He agreed he had been able to discuss his sexual identity with "A" and with two or three friends. They could host barbeques in a private garden. It was put to him that he could go back to Iran but he did not wish to do so. He replied that he could not live openly in Iran. He said it was not possible to go back as

"everybody knows about it now", referring to his homosexuality and apparently relying on the story that had been disbelieved i.e. that he had come to the attention of the authorities.

34. The appellant said that kissing on the cheek was possible in Iran between men, but kissing on the lips is impossible. He denied that men could walk arm in arm.

35. From prior to the AIT hearing of this case in July 2005 up to November 2007, the appellant was in a relationship in the UK with "HA". This relationship has we were told now ended. The Tribunal has therefore not had to consider the issues that might have arisen were the appellant to be returned and "HA" to remain in this country.

36. In his statement of 10 October 2007, the appellant described his life as a gay man in the UK with his former partner "HA". He said he could go to pubs, clubs, parks and friends' homes on a regular basis. He could relax with his gay friends and:

> "this is our sexual identity and it is extremely liberating for me to be able to discuss my sexual identity with other people who have the same sexual identity."

37. He says he is able to feel part of a group, as opposed to being isolated in Iran. In Iran he did not have a life, and in the UK he has a life that he wants and the only life that is acceptable to him:

> "I feel liberated by even very basic things like holding hands with "HA" in public and being able to put my arm around him in public. As I have stated earlier, I could not go back to the life that I had in Iran and this would be intolerable for me."

Court of Appeal Questions

38. We turn now to the questions raised by the Court of Appeal as set out in paragraphs 5 and 6 above.

39. We take as our starting point that when assessing whether a person who is a homosexual would face risk of persecution or serious harm on return to his own country we must take a factual, not a normative approach. That is to say we must focus on the factual issue of how it is likely he *will* behave given the evidence we have about how and why he has behaved up to now. It is wrong for a decision-maker to apply a normative approach which focuses on how it is thought an applicant *should* behave. However, we take from the way in which the Court of Appeal has formulated its questions that in examining how such a person will behave we have to examine whether that will entail for him having to live a life which he cannot reasonably be expected to tolerate because to do so would entail suppression of many aspects of his sexual identity. We are confident that when

referring to what an appellant can "reasonably be expected to tolerate" the Court of Appeal had in mind an objective, not a subjective test.

40. To answer the Court of Appeal questions we look first at the evidence relating to the appellant's history and experiences in Iran. We find from this evidence that from the age of fifteen to the age of thirty one when he left Iran he identified himself as homosexual. He had relationships at the age of fifteen at school, for which he was penalised. He had relationships with other men for two years in the army from the age of nineteen which were not noted by the authorities. For the following approximately ten years, the evidence is he had a friendship with one gay man and a nine month relationship with "A" before leaving Iran. His mother and one brother knew of his homosexuality. He had friends who also knew. He was able to make contacts through work. Some social life was open to him.

41. In his witness statement of 10 February 2007 and in his evidence before us the appellant has claimed that living discreetly as a homosexual in Iran was for him a matter of living in extreme fear and of having to live a lie every day of his life. However, we prefer the evidence he gave in his statement in 2001 immediately on or after his arrival - and when his past in Iran was fresher in his mind - when he said of his homosexuality in Iran:

> "The penalties were not something I thought about. It was more important for me to pursue my right to a private life and to think and act the way I wanted to. Also in my relationship with "A" it was more important for me to be with him than to think about what the police might do to me."

42. It was clearly possible for the appellant to live in Iran, from the age of fifteen to his leaving at the age of thirty one, as a gay man without discovery or adverse consequences. In our judgment the appellant was able to conduct his homosexual activities in Iran in the way that he wanted to and without any serious detriment to his own private and social life. The evidence does not indicate that he experienced the constraints Iranian society placed on homosexual activity as oppressive or as constraints that he could not reasonably be expected to tolerate.

43. Before turning to consider what would be the appellant's position on return, we must consider the evidence of his homosexual activities in the UK. From that evidence it is clear that he has felt able to express his homosexuality much more fully in the UK. Although it is fair to say that he did not describe his activities in the UK as encompassing highly extroverted forms of homosexual activity, he has found welcome the ability to go to pubs, clubs, parks and friends' homes on a regular basis and be able to hold hands and put his arms around gay friends. He has also given evidence that on the basis of his experiences in the UK, his life here is the only one he wants and the only one that is acceptable or tolerable to him.

44. We acknowledge that the way in which he is able to live as a gay man in the UK is preferable for him and we are satisfied that this informs his view that it is

"impossible" for him to return to Iran. We acknowledge too that the appellant is now much more aware of the legal prohibitions on homosexuals in Iran and the potential punishments for breach of those prohibitions. On any return, to avoid coming to the attention of the authorities because of his homosexuality he would necessarily have to act discreetly in relation to it. We are satisfied that as a matter of fact he would behave discreetly. On the evidence he was able to conduct his homosexual activities in Iran without serious detriment to his private life and without that causing him to suppress many aspects of his sexual identity. Whilst he has conducted his homosexual activities in the UK less discreetly, we are not persuaded that his adaptation back to life in Iran would be something he could not reasonably be expected to tolerate. We consider that as a matter of fact he would behave in similar fashion as he did before he left Iran and that in doing so he would, as before, be able to seek out homosexual relationships through work or friends without real risk to his safety or serious detriment to his personal identity and without this involving for him suppression of many aspects of his sexual identity.

45. The evidence of suppression of aspects of the appellant's life in Iran in comparison to his life in the UK is limited. In Iran he could not go to gay clubs as he can in the UK. Public displays of affection to a homosexual partner may lead to a risk of being reported to the authorities which is not so in the UK. The appellant's ability to be open about his sexuality as has been the case in the UK was not possible for him throughout his thirteen adult years in Iran and three years as a minor. But he did have friends who knew of his sexuality, he was able to socialise with them and he was able to tell his family. If a wish to avoid persecution was ever a reason why he acted discreetly in Iran it was not, on the evidence, the sole or main reason. It is difficult to see on the evidence that a return to that way of living can properly be characterised as likely to result in an abandonment of the appellant's sexual identity. To live as the appellant did for thirteen years did not expose him to danger. The appellant may well live in fear on return to Iran now he is aware of the penalties which might be arbitrarily imposed were he to be discovered. The question as to whether such fear reaches so substantial a level of seriousness as to require international protection has to be considered objectively and in the light of the evidence as we have found it to be. Homosexuals may wish to, but cannot, live openly in Iran as is the case in many countries. The conclusions in RM and BB as to risk remain the same. This appellant was able to live in Iran during his adult life until he left in a way which meant he was able to express his sexuality albeit in a more limited way than he can do elsewhere. In particular we have regard to the fact that the evidence as found shows that the appellant's sexuality was not known to the authorities when he left Iran. Objectively we cannot see that the level of seriousness required for international protection is in this case reached.

46. Buxton LJ describes the question before this Tribunal as "whether the applicant can reasonably be expected to tolerate whatever circumstances are likely to arise were he to return to Iran"; and further " the applicant may have to abandon part

of his sexual identity…in circumstances where failure to do that exposes him to extreme danger". The circumstances to be tolerated are the inability to live openly as a gay man as the appellant can in the UK. The part of sexuality to be abandoned is on the evidence also the ability to live openly as a gay man in the same way the appellant can do elsewhere. To live a private life discreetly will not cause significant detriment to his right to respect for private life, nor will it involve suppression of many aspects of his sexual identity. Enforcement of the law against homosexuality in Iran is arbitrary but the evidence does not show a real risk of discovery of, or adverse action against, homosexuals in Iran who conduct their homosexual activities discreetly. The position has not deteriorated since RM and BB. On the evidence we find the appellant can reasonably be expected to tolerate the position on any return.

Decision

47. This appeal was remitted to this Tribunal for further reconsideration of the appellant's asylum claim which had been dismissed by the Tribunal on 11 August 2005. For the reasons given the appellant's appeal remains dismissed.

Signed:
Mr Justice Hodge, President
Date: 18 April 2008