

**COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
DESIGNATED IMMIGRATION JUDGE BILLINGHAM,
IMMIGRATION JUDGE BAILEY-KING
AA/04063/2007**

Royal Courts of Justice
Strand, London, WC2A 2LL

10/11/2009

Before:

**LORD JUSTICE RIX
LORD JUSTICE MOSES
and
LORD JUSTICE RIMER**

Between:

MM (IRAN)

Appellant/Claimant

- and -

**SECRETARY OF STATE FOR HOME
DEPARTMENT**

Respondent/Defendant

**Ms Victoria Laughton (instructed by Immigration Advisory Service Solicitors Unit) for
the Appellant**

Ms Sarah Hannett (instructed by Treasury Solicitors) for the Respondent

Hearing date : Friday 17th July 2009

HTML VERSION OF JUDGMENT

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1. The appellant, MM, arrived in the UK from Iran, hidden in a lorry, on 6 February 2003. It must be a matter for regret that his status here is still unresolved, although not as a result of any delays on the part of the Home Office, despite three detailed tribunal decisions.
2. On this appeal, two questions are raised regarding the adequacy of the reconsideration conducted by Designated Immigration Judge Billingham and Immigration Judge Bailey-King in their determination dated 5 November 2008. One question concerns MM's safety on return as a Christian convert: he had been baptised in August 2003. The second question concerns his mental health and whether he was at risk of suicide if returned to Iran.

The background

3. MM is an Iranian male now some 37 years old. He claimed asylum on the basis of his homosexuality on 7 February 2003. The Home Office refused asylum by a decision letter dated 18 March 2003, which doubted his credibility but in any event said that the discreet practice of homosexuality did not present a real risk in Iran. MM appealed.
4. His appeal, at which MM gave evidence, was heard by Adjudicator Kealy on 31 July 2003. Mr Kealy's determination, dismissing MM's asylum claim, was published on 13 August 2003. Mr Kealy accepted that MM was a homosexual, but not that he had been arrested, as was claimed, for a homosexual offence arising out of his relationship with a friend. Rather, Mr Kealy found that the 2001 arrest of which MM had given evidence was for being drunk, which had been the very first explanation which MM had given when speaking of this arrest. Mr Kealy made no clear findings as to what had precipitated MM's departure from Iran, which MM claimed had been due to his friend's arrest (and his own escape from arrest) on the ground of their homosexual liaison. In any event, Mr Kealy was not persuaded that MM would be persecuted or ill-treated for his homosexuality in Iran: although homosexuality was illegal, country information evidenced a generally tolerant attitude to it. MM's removal to Iran would not therefore be illegal.
5. However, MM was not returned to Iran. Subsequent evidence was to reveal that a mere four days after Mr Kealy's determination, on 17 August 2003, MM was baptised at the Elim Christian Fellowship Church in Croydon, which he had begun attending. His interest in Christianity had not, however, been mentioned before Mr Kealy.
6. Some three and a half years later in February 2007 MM made a fresh application for asylum, which was accepted as a fresh claim but rejected by the Secretary of State on 22 March 2007. That fresh claim generated a new right of appeal. MM's appeal came before Immigration Judge Pullan on 24 September 2007. MM again gave evidence. His appeal was now based on his homosexuality, his Christian conversion, and his mental health problems. It is and has been common ground that in the intervening years MM's mental health had declined.
7. In his determination dated 9 October 2007, IJ Pullan made the following findings concerning these matters. As for homosexuality, he confirmed Mr Kealy's findings, that MM was homosexual, that he had been arrested for drunkenness (and dancing) but not for homosexuality, and that there was in general no real risk to MM on return by reason of his homosexuality. In the meantime, *RM and BB (Homosexuals) Iran CG [2005] UKAIT 00117* had been decided, on which IJ Pullan relied as supporting that conclusion. He also relied on MM's own evidence that he had since his Christian conversion given up homosexual activity in the UK. In the circumstances, IJ Pullan found that there was no evidence of a real risk that MM would be suspected as a homosexual on arrival back in Iran, and that there was no likelihood of anything beyond very discreet behaviour on his part in this regard.
8. As for Christian conversion, IJ Pullan was assisted by *FS and others (Iran - Christian Converts) Iran CG [2004] UKIAT 00303*. He rehearsed the distinctions there made between the ordinary discreet convert, who would be able to practise Christianity without untoward risk, and the more active convert, pastor, church leader, proselytiser or evangelist, or other convert to whom an additional risk factor might attach (eg a woman), who would be at real risk, and found that MM fell into the former category. He accepted, however, on the evidence of MM, supported by letters from two pastors, that MM's conversion was genuine. He said:

"he was carefully instructed, observed and assessed before being publicly baptised, and...his commitment to church attendance, though it has varied to some extent with his circumstances, is sufficiently consistent to show genuineness" (at para 33(vi)).

9. As for MM's mental health, IJ Pullan accepted the medical reports before him in their entirety. He made the following findings about him:

"49...[MM] suffers from PTSD, depression, auditory hallucinations, and persecutory ideas of reference of modest severity; it could be an indication of early schizophrenia. He has been on medication of varying intensity but needs psychological intervention. His attitude is one of hopelessness and returning him to Iran would be likely to worsen his PTSD and depression. He thinks about suicide, which is a real possibility although he has no plans at present. It is imperative [MM] has access to psychiatric services to review his safety and ensure his access to, and compliance with, medication."

10. However, IJ Pullan also found that Iran had greatly improved mental health care and that there would be access to therapeutic drugs, such as fluoxetine, an anti-depressant medication prescribed to MM. He referred to MM's three sisters and one surviving brother in Iran and said that MM "has not said they would not help him in his hour of need". He addressed himself to the relevant tests in *J v. SSHD* [2005] EWCA Civ 629 and concluded:

"53. Reviewing all these factors, although a decision to return [MM] would have a negative effect on his feelings of hopelessness and may well lead to further thoughts of suicide, with the availability of support and medication in this country I cannot find that his potential distress would come near the threshold of Article 3 ill-treatment. The same would apply in the circumstances of his escorted journey to Iran."

As for the situation in Iran itself, he found that MM would have the support of his family and access to medical facilities, and that his diagnosed illnesses would not "reach the higher threshold required in a foreign case where the problem flows partly from a naturally occurring medical condition".

11. IJ Pullan therefore dismissed MM's second appeal. This was a sympathetic and careful consideration of MM's situation, but still resulted in the rejection of MM's renewed asylum claims.
12. MM then applied for an order for reconsideration, which was granted by Senior Immigration Judge King on 5 November 2007. The submission made to him, which he accepted as arguable for these purposes, was that MM's mental condition might disable him from being discreet in his sexual or religious activities. Although SIJ King was dubious whether this argument had been presented to IJ Pullan, he considered that it merited further consideration.
13. On 29 February 2008 SIJ McKee determined the first stage reconsideration and found that IJ Pullan had erred in two respects. Indeed, he said that these errors of law had been common ground. He said:

"Although the immigration judge's determination is very careful and thorough, the parties did agree that it is flawed in two respects. First, having accepted that the appellant is a homosexual, an apostate and a depressive, with suicidal ideation and symptoms of PTSD, the judge has stopped short in considering what these characteristics might entail when the appellant returns to Iran. He finds that the appellant is unlikely to evangelize Muslims or to engage in homosexual activity otherwise than discreetly, but does not consider the possibility that the appellant's homosexual orientation and Christian conversion may come to light during the interrogation which, the judge accepts, the appellant may well have to undergo on returning as a failed asylum seeker. His mental illness might render him unable to give a satisfactory account of himself, or to conceal proclivities which would antagonize his interrogators.

Secondly, the judge has assumed, without direct evidence from the appellant, that he has three sisters and one brother still in Iran and still able and willing to give him succour when he gets home. They have not, observes the judge, "*said they would not help him in his hour of need.*" This may not be a sufficient answer to the question posed by the Court of Appeal in *J* [2005] EWCA Civ 629, whether there are "*effective mechanisms*" in the receiving state to reduce the risk of suicide on return, family support being an important element of this.

At the 'second stage' of the reconsideration, the Tribunal will need to re-assess the likelihood of serious harm befalling a person with the appellant's characteristics on return to Iran as a failed asylum seeker, and the likelihood of the appellant's receiving treatment and support to alleviate his mental health problems and to mitigate the risk of suicide (bearing in mind the high threshold in 'foreign health cases')."

14. And so the matter went forward for reconsideration by DIJ Billingham and Bailey-King whose determination is dated 5 November 2008, and is the subject of this appeal. MM gave evidence for the third time before them.

The reconsideration determination

15. The determination begins by recording the limited scope of the determination, as being whether IJ Pullan had "failed to consider the effect the Appellant's mental illness might have on his ability to undergo the possible interrogation on return about his claimed apostasy and homosexuality and whether that illness would be properly treated and supported on return to Iran" (para 3).
16. That introduction, by using the expression "claimed" in relation to MM's conversion and homosexuality, suggests that the tribunal on this occasion might not be prepared to approach its task by reference to the findings of fact of previous determinations which had already accepted those matters. However, it would seem that in theory the -tribunal was prepared to proceed on the basis of those previous findings, for the determination went on to say (at para 6.1):

"The Appellant's homosexuality had been accepted by the previous judges and it was agreed by the parties that that issue combined with the overall credibility of the Appellant about his sexuality and conversion would not be challenged in this appeal."

17. That is in accord with the jurisprudence of this court as stated for instance in *DK (Serbia) v. SSHD* [2006] EWCA 1747 at paras 22/25 (Latham LJ) and *HF (Algeria) v. SSHD* [2007] EWCA 445 at paras 14/18 (Carnwath LJ). It would seem therefore that the tribunal would proceed directly to the limited questions raised with it by the order for reconsideration on the basis that MM was a homosexual and Christian convert.
18. Indeed, the only matter which was challenged in this context, and that was done on behalf of MM, was the finding that MM's arrest in Iran had not been for homosexuality, but for drunkenness and dancing. The tribunal was prepared to allow MM a third attempt to persuade it that the previous findings concerning his arrest had been wrong. That attempt, however, failed. Because it failed, it appears that the tribunal regarded MM as prepared to use exaggeration in support of his claims.
19. It was perhaps for this reason that, despite the agreement that the reconsideration would go forward on the basis of previous findings as to MM's homosexuality and Christian conversion, the tribunal ended by developing its own views on these subjects, which were distinctly more sceptical than IJ Pullan had been, especially with regard to MM's Christianity.
20. Thus, as for homosexuality, the tribunal said this:

"30. The previous determinations in this case have been read and we agree that it is likely that the Appellant has been a practising homosexual although on his own evidence he has resisted any form of homosexual activity in this country...

32. For these reasons and because the Appellant told us that he had not been in any homosexual relationship [for] the six years he had been in the UK, we doubt that the Appellant, although accepted as being homosexual by the previous judges, had been in trouble with the authorities for that reason. We consider that if he had been practising homosexuality in Iran, he would be able to again in the future by keeping the same low profile."

21. Although in her grounds of appeal and skeleton argument on behalf of MM, Ms Victoria Laughton complained of the tribunal's findings relating to MM's homosexuality, at the hearing of this appeal she made it clear that she no longer relies on that complaint. In my judgment, she is correct not to press this point, because the tribunal's findings do not go so far as to dispute MM's homosexuality. She concentrated instead on the findings as to his Christianity, which the tribunal expressed as follows:

"34. The Appellant had not had any interest in Christianity before he came to the UK. It formed no part of his early evidence and his conversion did not occur until he was in Croydon and then later when he was baptised. There are some puzzling aspects to [this] part of his evidence. Certainly the baptism did not take place until after the Refusal Letter was served. ...He accepted that he was no longer able to practise the religion as Croydon was too far away and he had no money to get there. *We found that this was inconsistent with a genuine believer* who would find a way of living in Croydon with his community....

35. We have come to the decision that the Appellant's religion, like his homosexual leanings have been exaggerated to enhance his asylum claim. *We consider that his religious conversion was tactical...* The Appellant's lapse in the practice of Christianity in recent times, we consider is indicative of how he would behave in Iran. There would be no need for him to proclaim his faith in Iran as he stated he would in evidence to the Court as his belief would appear to be very superficial and not based upon any passionate zeal for the creed. There was no evidence of proselytising in the UK. We consider that he would be unlikely to be at risk in Iran as if he practised at all, which we doubt, he would do so with the same discretion as he would in pursuing his homosexuality" (emphasis added).

22. On behalf of the Secretary of State, Ms Sarah Hannett concedes that these remarks, to the extent that they have been emphasised in the preceding quotation, constitute an error of law, in that the tribunal was wrong to revisit the question whether MM's conversion to Christianity was genuine. She submits however that this was not a material error, in that the tribunal would in any event have been bound to have reached the same conclusion as it did as to the absence of any real risk arising out of MM's Christianity.

23. So far I have not stated the tribunal's findings as to the two points upon which it had been asked to reconsider MM's asylum appeal. The tribunal reached those points in its final paragraphs, as follows:

"36. Ms Chandran [then appearing for MM] would have us consider the effect of his mental health on the overall danger to his safety and health in Iran. She asked us to put the factors of his homosexuality and his religion together with his mental health and consider that he would be more at risk because his mental health would prevent him from giving the correct responses at the immigration point in Tehran and cause him to confess both of these activities which are illegal in Iran. We consider that despite the fact that the Appellant has been sectioned twice, the reports of his mental

health do not reveal any such serious illness that it could not be treated by the mental health authorities in Iran....

37. We consider that despite this concern [of the medical reports, that the risk of suicide would be increased if MM were to be returned to Iran], and following the case of *Bensaid v. UK*, we do not consider that the Appellant would be at risk under Article 3 ECHR on return since not only would he be escorted to ensure that he would not be able to commit suicide on the journey, but we are also satisfied that the medical services in Iran are sufficient to assist him. In any event, the evidence is not compelling that he would actually do so since the one report of an attempted suicide would appear to reflect his chosen lifestyle [viz, living rough on the streets in preference to NASS accommodation available to him in Stoke] and the depression he gets into, rather than the result of an extreme psychotic state. We also do not think that he would be in such a state that he would voluntarily confess to the authorities that he was a Christian convert and a homosexual..."

24. In that last sentence the tribunal expressed its view on the first of the two matters which it had been asked to consider. It nowhere dealt with the second question which it had been asked in particular to consider, and that was whether MM did have the support of three sisters and a brother in Iran as part of the available mechanisms of support for his mental health on return. The tribunal had earlier referred to MM's evidence that his siblings "would have nothing to do with him" (at para 13), but it made no finding as to whether this was true or not. It will be recalled that IJ Pullan had said that MM had not claimed his siblings "would not help him in his hour of need", and that SIJ McKee, in ordering a second stage reconsideration, had considered this to be an arguable error of law, *sc* as constituting inadequate reasoning for the purpose of applying the tests in *J*, in which context, as SIJ McKee had observed, family support was an important element.

25. This was the context in which MM's appeal came before this court. There were originally more grounds of appeal, but in the end Ms Laughton pressed only two of them, as follows.

The first ground: the tribunal's failure to accept MM's genuine conversion to Christianity.

26. Ms Laughton took issue with the Secretary of State's submission that the conceded error whereby the tribunal went behind previous findings as to the genuineness of MM's conversion to Christianity was immaterial. In this respect Ms Hannett submitted that such an error would not matter because, on the corrected hypothesis that MM was a genuine Christian convert, there was no risk to him on return even if it be supposed that MM would, perhaps because of his mental illness, disclose his conversion: *sec FS (Iran)*. His faith had none of the factors which that authority suggested might put him at risk.

27. In my judgment, however, the tribunal's error cannot be dealt with at this stage in that way. First, the primary point of the reconsideration which MM obtained was so that the tribunal could investigate the question whether MM's mental illness, and thus any lack of discretion on his return, might put him into a category of real risk. It is hardly for this court to answer that question, which has been given to the tribunal, unless it can truly be said that the exercise of reconsideration was, as a matter of law, never properly there to be undertaken in the first place. The tribunal's own answer does not assist, for that is simply that MM would *not* voluntarily confess his Christianity (or his homosexuality) on his return. That answer, so far as his Christianity is concerned, is readily understandable from the tribunal's point of view, for it considered that his profession of Christianity was not genuine. That rationale, however, can no longer survive the Secretary of State's concession. In my judgment, it is not possible in this case for this court to answer the question which was posed to the tribunal but not answered by it. Thus it is feasible that MM would, because of his mental illness,

emphasise or exaggerate his Christianity, or come to speak of it in a manner which detracted from the view that he could be trusted by the authorities to practise his apostate religion discreetly. That was the very issue on which the tribunal's view as a finder of fact was required.

28. Moreover, there were additional risk factors, which might also emerge under interview upon his return. There was his homosexuality, of which he might speak: indeed, he said that he would tell the truth about both his homosexuality and his apostasy, and gave as his reason the fact that the authorities would find about them anyway. There was also the fact that he had been arrested in the past, if only for drunkenness and dancing: but these were unislamic offences, and might add to his risk profile. Such additional risk factors are discussed in *FS at para 190*, viz

"Where an ordinary individual convert has additional risk factors, they too may well be at a real risk. ..These risk factors may not relate to religious views at all. It is the combination which may provoke persecutory attentions where, by itself, the individual conversion would have been allowed to pass without undue hindrance...The role of family as a source of protection should be examined carefully in individual cases."

Such considerations emphasise, to my mind, that this court cannot supply what is wanting in the tribunal's reconsideration, which is an answer to the very question which the order for reconsideration posed.

29. Therefore on this first ground, the Secretary of State's concession leads on, in my judgment, to the necessity to allow this appeal and remit the matter to a fresh tribunal.

The second ground: the tribunal's failure to ask whether, in particular in the absence of family support, there is a real risk of breach of article 3 by reason of the danger of suicide.

30. This was the subject-matter of the second issue on which SIJ McKee required reconsideration. However, the tribunal did not state its findings on this point. Ms Hannett submits that it may be assumed that there would be no family support, which was MM's evidence before the tribunal: even so, the tribunal's findings on the subject of MM's mental illness were unassailable. In this connection Ms Hannett relied on *D v UK* (1997) 24 EHRR 423, *Bensaid v. UK* (44599/98, BAILII: [2001] ECHR 82) and *N v. UK* (26565/05, 27 May 2008, BAILII: [2008] ECHR 453), and in this jurisdiction on *J*. In one form or another, the tribunal had addressed all the matters which / required to be considered, and had answered the test adversely to MM. In the light of the finding that the medical services in Iran were adequate to assist MM, there was no need to consider the additional factor of family support.
31. Ms Laughton disputed this conclusion and submitted that a particular sensitivity arose where an applicant's mental illness and susceptibility to suicide were themselves due in part to treatment suffered by the applicant in his country of return, thereby setting up a subjective fear of ill-treatment which, even if not objectively well-founded, nevertheless enhanced the risk: see *Y and Z (Sri Lanka)* [2009] EWCA Civ 362 at paras 50, 61. In the present case MM complained that during his 6 months under arrest he had been tortured, and there was medical evidence that MM demonstrated "fairly classical" symptoms of Iranian male survivors of torture, and that his PTSD symptoms seemed to date from the time of his imprisonment.
32. In sum, and in circumstances where MM's appeal must in any event lead to the remission of his case to the AIT for further consideration, it seems to me that, on balance, the issue of whether there is a real risk of article 3 ill-treatment to MM by reason of his mental condition and his susceptibility to suicide, and in the light of such support as his family might be able to give him, should also be remitted to the AIT. Both IJ Pullan and SIJ McKee considered that family support was of significance to

this issue, and the latter ruled that there had been inadequate treatment of such an issue without a clear finding as to whether the important element of family support was present. Since then, MM has given evidence denying the availability of such support, and there has been no finding on that question. The question of family support may equally be relevant to the first issue (see the quotation from *FS* at para 28 above).

33. I have significant doubts whether, even in the absence of family support. MM's appeal can sustain the difficulties or the jurisprudence ranged against him. Nevertheless, particularly in the light of the history of these proceedings whereby the second issue on which second stage reconsideration was required has not been specifically answered, I am just persuaded that I cannot find that MM's appeal on this ground must inevitably be decided against him. Therefore I would remit it as well.

Conclusion

34. In conclusion, I would allow this appeal. MM's appeal to the AIT must be remitted to a new tribunal for fresh consideration of the matters ordered for reconsideration by SIJ McKee. It will be for the tribunal hearing that remission to consider whether the *Y and Z* point properly arises on that remission.

Lord Justice Moses :

35. I agree.

Lord Justice Rimer :

36. I also agree.