Neutral Citation Number: [2008] EWCA Civ 911

Case No: C5/2007/0169

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
AA/00377/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2008

Before :

LORD JUSTICE MOORE-BICK
LORD JUSTICE STANLEY BURNTON
and
MR JUSTICE LEWISON

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Between :

XY (IRAN)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

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- -

John Nicholson (instructed by **Parker Rhodes**) for the **Appellant**
Susan Chan (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date: 21 July 2008

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Judgment

Lord Justice Stanley Burnton:

1. This is an appeal by XY from the determination of Immigration Judge M Davies promulgated on 4 December 2007 dismissing his appeal against the Secretary of State's refusal of his application for asylum. Immigration Judge Davies's determination was made on a second stage reconsideration. An earlier decision of the Tribunal, dated 22 February 2007, also rejecting his appeal, had been the subject of an order for reconsideration dated 29 March 2007 and Senior Immigration Judge Moulden in a decision dated 31 August 2007 held that the original decision was flawed by reason of an error of law.

2. The Appellant is a young man, aged 25, who is a national of Iran. His asylum claim was based on his homosexuality. He claimed to have had a long, seven-year relationship with a friend to whom I shall refer as A, during the course of which they had sexual intercourse at A's house, when his family were absent, or in a shower cubicle at the local public baths. He said that A had been arrested in October 2006; the Appellant's father had told him that it was because of their homosexual relationship, which the Appellant assumed had come to the attention of the authorities because staff at the public baths had informed on them. He had hid for a time at his aunt's house, until his father found an agent to get him out of the country. Since arriving here in November 2006 he had learnt from his family that a court summons had been issued against him. He feared that if returned to Iran he would be found guilty of homosexuality and stoned to death.

3. Important parts of the Appellant's case were in issue before Immigration Judge Davies. It was common ground before him that the Appellant should have the benefit of the original Immigration Judge's findings that he was a homosexual who had been involved in a long-term relationship with A. Beyond that, the facts were in issue. Essentially, the factual issues were:

   (a) Had the Appellant been detected by the authorities in Iran as a homosexual?

   (b) Was his partner A arrested and detained?

   (c) Was the Appellant summoned to attend court?

4. Immigration Judge Davies addressed these issues and decided each of them adversely to the Appellant. Mr Nicholson, for the Appellant, made a secondary submission to the effect that the Immigration Judge was not entitled to make these findings. However, the Immigration Judge gave adequate reasons for these findings and I see no basis on which they can be impugned for error of law.

5. Mr Nicholson's primary submission was that the Immigration Judge erred in law because he failed to consider a question that the decision of this Court in *J* [2006] EWCA Civ 1238 shows must be addressed in cases like the present, namely whether the Appellant could reasonably be expected to tolerate the fact that he would have to conduct his sexual life clandestinely were he to return to Iran.

6. In order to understand this submission, and indeed the decision in *J*, it is necessary to say something about the situation of homosexual men in Iran. Homosexuality is illegal in Iran. Men who wish to have an active homosexual sex life must do so in

private and avoid their sex life coming to the attention of the authorities. If it does, they risk suffering punishment that may amount to cruel or inhuman treatment or worse. The position was summarised by the Immigration Appeal Tribunal in its country guidance decision *RM and BB (Homosexuals) Iran CG* [2005] UKIAT 00117 as follows:

> 123. 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.
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> 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. We also consider,

> bearing in mind the consequences for persons prosecuted successfully for such actions, that Adjudicators should view with healthy scepticism claims that family members or friends or neighbours reported such actions to the authorities. Given the severity of the consequences we consider that proper caution should be exercised in assessing claims that people came to the attention of the authorities in such ways. This must be particularly so in the case of family members and friends. In our view, it is the case that homosexual acts carried on in private between consenting adults are most unlikely to come to the attention of the authorities and it is the case, and we think it is common ground, that the authorities do not seek out homosexuals but rather may respond to complaints of consensual homosexual activity being carried on. That then is the context in which these appeals must be decided.

7. It is on the basis of these findings that it is accepted by Mr Nicholson that not every active Iranian homosexual is entitled to asylum in this country. If homosexuals in Iran are discreet, there is no real risk of their being apprehended and punished. If they have previously been arrested or are wanted by the authorities on account of their homosexual activities, different questions arise. In the present case, however, as has been seen, the Immigration Judge rejected the Appellant's claim to be wanted on account of his affair with A.

8. However, discretion and clandestine sexual behaviour are not complete answers to the issues that may arise in cases such as the present. If the Appellant is returned to Iran, he will have to carry out his sexual activities clandestinely. A persecutory situation is capable of existing by reason of the fear and stress engendered by that risk. That was considered by the Court of Appeal in *J* [2006] EWCA Civ 1238, an appeal which was confined to the application of the Asylum Convention to the appellant's claim: his Convention rights were not addressed. Maurice Kay LJ, in a judgment with which the other members of the Court of Appeal agreed, referred to the decision of the High Court of Australia in *S395/2002* [2003] HCA 71 and said:

> 10. In our jurisdiction Lord Justice Buxton demonstrated in *Z v SSHD* [2005] Imm AR 75 that the approach of the High Court of Australia had in turn been influenced by English authority, particularly *Ahmed v SSHD* [2000] INLR 1. Having referred to the judgment of Simon Brown LJ in *Ahmed*, he said at paragraph 16:
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> > "It necessarily follows from that analysis that a person cannot be refused asylum on the basis that he could avoid otherwise persecutory conduct by modifying the behaviour that he would otherwise engage in, at least if that modification was sufficiently significant in itself to place him in a situation of persecution."
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> 11. That brief extract is particularly helpful because it brings together the principle articulated by the High Court of Australia and the underlying need for an applicant to establish that his

> case contains something "sufficiently significant in itself to place him in a situation of persecution". 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] 1 WLR 856 at paragraph 7, "a strong word" requiring a high threshold. It has been variously expressed but the language of McHugh and Kirby JJ to which I have referred – "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 (at paragraph 12) and *Amare v SSHD* [2005] EWCA Civ 1600, paragraph 27, and *RG (Columbia) v SSHD* [2006] EWCA Civ 57, paragraph 16.
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> ….
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> 16. In the present circumstances, the further reconsideration should be by a differently constituted Tribunal. It 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 judgment of Gummer and Hayne JJ at paragraph 83). 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 "related to or informed by their sexuality" (Ibid, paragraph 81). This is not simply generalisation; it is dealt with in the appellant's evidence.

9. Buxton LJ said:

> 20. I would only venture to add one point. The question that will be before the AIT on remission will be whether the applicant could 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 judgment 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 *RN and BB*. The Tribunal may wish to consider whether the combination of those two circumstances has 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.

10. Whether the issue whether an applicant can reasonably be expected to tolerate his personal or family circumstances if he is returned to his country of nationality is more appropriately considered under the Asylum Convention or under Articles 3, and more particularly 8, of the European Convention on Human Rights is something that it is unnecessary to decide. So far as the Asylum Convention is concerned, however, I would place emphasis on paragraph 11 of Maurice Kay LJ's judgment and the requirement of persecution.

11. The remitted appeal of *J* was heard by the AIT in February 2008 and the decision of the President, sitting with Senior Immigration Judges Storey and Mather, is reported as *HJ (homosexuality: reasonably tolerating living discreetly) Iran* [2008] UKAIT 00044. The Tribunal's determination is summarised as follows:

> 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*.

12. The Tribunal stated:

> 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:
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> > "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."
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> 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.

…

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.
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> 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.

Accordingly, the appeal was dismissed.

13. In the present case, the relevant part of the Immigration Judge's determination is in paragraphs 61 and 62:

> "61. I do not accept that the Appellant, simply on the basis that he is a homosexual, would be at risk of treatment that amounts to persecution or breaches his human rights, if he is returned to Iran. Although I accept he is a homosexual and does form part of a particular social group in Iran, he is not entitled for his appeal to succeed simply on that basis. Mr Nicholson implies that the Appellant's appeal should succeed because the Appellant would have to abandon his sexual identity upon returning to Iran. I do not accept that this is the case. The Appellant does not simply abandon his sexual identity if he is required to carry on his sexual activities with a same-sex partner with some care or discretion. All persons, of whatever sex, involved in intimate relationships conduct themselves with such care and discretion. It is clear from the Appellant's own evidence that he conducted his own sexual relationship with Mustafa with some care and discretion as he was fully aware of

> the likely result of such activity coming to the attention of the Iranian authorities. It is therefore not reasonably likely that he would be careless or indiscreet regarding his sexual activities, if they resumed upon his return to Iran.
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> 62. There is no evidence to suggest that the Appellant came to the attention of the authorities on account of any political or religious activity and as such he has no profile which would bring him to the attention of the Iranian authorities if he is returned there. I do not accept that the Iranian authorities are aware of his homosexual activity and therefore they would have no interest in him if he is returned to Iran."

14. It is correct that the Immigration Judge did not expressly consider the question posed in *J.* However, it is clear from his findings that for a number of years the Appellant carried on an active sexual relationship with A. The reason he left Iran was not stated by him to be his intolerable situation as a clandestine homosexual, but his fear of arrest and punishment because of the detection of his relationship and the arrest of A. He was disbelieved on the basis for his alleged fear. It was for him to establish that he could not reasonably be expected to tolerate his condition if he were returned to Iran. He did not establish, or even assert, facts on which such a finding could be based. Mr Nicholson stressed his situation as a young man living with his family, unable to carry on his sexual activity at home and having to resort to public baths. However, there is no finding that on return he would resume his relationship with A, and no finding that if he did they could not resume their sexual life in the same manner as before. Mr Nicholson's contentions involved speculation for which the groundwork had not been established before the Immigration Judge.

15. For these reasons, I would dismiss this appeal.

Mr Justice Lewison:

16. I agree.

Lord Justice Moore-Bick:

17. I also agree.