



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

**Lord Reed
Lord Carloway
Lord Hardie**

**[2009] CSIH 30
XA160/07**

OPINION OF THE COURT

delivered by LORD REED

in the Application for Leave to Appeal
under Section 103B of the Nationality
Immigration and Asylum Act 2002

by

SMF

Applicant:

against

SECRETARY OF STATE FOR THE
HOME DEPARTMENT

Respondent:

For the Applicant: Bovey Q.C., Caskie; Drummond Miller

For the Respondent: Lindsay; Solicitor to the Advocate General

18 November 2009

Introduction

[1] The applicant is a national of Iran. On 5 September 2005 he applied to the respondent for asylum in the United Kingdom. On 3 November 2005 the application was refused. The applicant appealed against that decision to the Asylum and

Immigration Tribunal, under section 82 of the Nationality, Immigration and Asylum Act 2002 as amended. The appeal was heard by an immigration judge. On 19 January 2006 he refused the appeal. The applicant then applied under section 103A of the 2002 Act for an order requiring the Tribunal to reconsider its decision on the appeal. That application was decided by the Tribunal, in accordance with the procedure set out in Part 2 of Schedule 2 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and Part 3 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005 No. 230) ("the Procedure Rules"), as amended. With the consent of the parties, the Tribunal decided that the immigration judge had made a material error of law and that the Tribunal carrying out the reconsideration should re-hear the appeal *de novo* and substitute a fresh decision. The appeal was then re-heard by an immigration judge. On 17 July 2007 he substituted a fresh decision dismissing the appeal. The applicant then applied for permission to appeal to this court under section 103B of the 2002 Act. Permission having been refused by the Tribunal, he applied to this court, which heard his application for permission together with the appeal itself.

The claim for asylum

[2] When interviewed on behalf of the respondent on 8 September 2005, the applicant was recorded as claiming asylum on the basis that he had political problems in Iran. He had taken part in demonstrations there against the regime and had been detained. After his release he had taken part in further demonstrations and had again been arrested. After he was freed he had left Iran. At a further interview on 20 October 2005 he put forward a claim based on his being a homosexual.

[3] In the Tribunal proceedings, the applicant put forward his claim solely on the basis of homosexuality. He denied having made the statements recorded in the record of the

interview held on 8 September 2005. In relation to homosexuality, he claimed in a statement dated 30 November 2005 that he had been stopped in the street by police officers on an occasion in September 2004 and found to be in possession of pornographic videos showing homosexual acts. He claimed that he had been convicted of possessing illegal material and sentenced to a fine and to 88 lashes. He claimed that in about November 2004 he had engaged in homosexual relations in his home with B, the son of a family friend, and had been discovered by a relative who came unexpectedly into the room. He claimed that he had then been assaulted by B's father, who was also in the house. He claimed that in about January or February 2005 he had again engaged in homosexual relations with B in the principal room in the house where B lived with his family, and had been discovered by a number of B's relatives who came into the room. He claimed that he had again been assaulted by B's father. He claimed that B's family had then reported the matter to the authorities. He claimed that the court had received a medical report confirming that B was the passive partner. He claimed that a summons had been served at his parents' house, requiring him to attend court. He had not done so. Instead, he claimed that he had gone to Azerbaijan in order to seek a means of escape from Iran, intending to travel to another country. He denied having said at his initial interview in the United Kingdom, as he was recorded as having said, that he had gone to Azerbaijan for a holiday. He claimed that he had returned to Iran after a few days, and had lived there with a relative for some months. He claimed that he had then left Iran and had travelled to Turkey and another country before flying to the United Kingdom. He claimed that he feared that he would be executed if he returned to Iran. He claimed that he had not known where he was going after leaving Iran, and had not known that the United Kingdom was his

final destination. He claimed that his brother had paid a large sum to arrange his travel.

[4] In a further statement dated 11 May 2007 the applicant said that since arriving in Scotland he had realised that homosexuality was not wrong and did not have to be hidden: there was equal treatment of homosexuals in Scotland, and it was not a problem there to live with a homosexual partner or to go out together. He said that he wanted to stay in Scotland, to settle down and live freely and openly with a long-term partner. That would not be possible in Iran.

[5] In support of his claim the applicant submitted what purported to be a copy of a summons served on his mother requiring his attendance at court on 28 February 2005 "to investigate this matter". The summons bore to have been issued by the public prosecutor's office. It did not indicate the capacity in which the applicant was to attend court or the nature of the matter to be investigated. The applicant also submitted a medical report which confirmed that he appeared to have been whipped. Background material concerning the treatment of homosexuals in Iran was also submitted. It included reports of the execution of homosexuals, although in some at least of the cases it appears that there were other serious charges, and that the sexual behaviour involved rape, child abuse or coercion.

The Tribunal's decision

[6] The Tribunal accepted, in the light of the medical evidence, that the applicant had suffered a judicial lashing. Such a punishment could however have been imposed for any number of offences. Whether it had been imposed for possession of homosexual videos, as the applicant claimed, could only be decided in the light of his general credibility.

[7] The summons was a type of document that was easily fabricated. It said nothing specific. It could only be assessed in the light of the other evidence, and did not assist significantly in deciding on the credibility of the claim.

[8] The Tribunal found the applicant to be generally incredible, for a number of reasons:

(1) His denial that he had made the statements recorded at his initial interview, claiming asylum on the basis of his political problems in Iran, was incredible, and indicated that he was an unreliable witness as to his experiences in Iran and his reasons for travelling to the United Kingdom. The statements which he was recorded as having made were detailed. The interviewer and the interpreter had no interest in making up a claim to attribute to the applicant. The applicant had an interest in denying his previous statements, because he wished to change his ground.

(2) His denial that he had said at his initial interview that he had gone to Azerbaijan for a holiday was incredible.

(3) His having returned to Iran after going to Azerbaijan was seriously adverse to his claim, since it was inconsistent with a genuine fear that, if apprehended in Iran, he would be executed.

(4) His claim that he had not known where he was going after leaving Iran or that the United Kingdom was his final destination, although his brother had arranged his travel, was incredible.

[9] More specifically, in relation to the applicant's account of having engaged in homosexual activities with B, and of being liable to prosecution and punishment in consequence:

(1) His account of engaging in homosexual behaviour with B in the family living area of B's house was implausible: such behaviour would have been spectacularly reckless. It was even less likely that they would behave in that way if they had previously been discovered.

(2) His assertion that B and his family had nothing to worry about, because B was the passive partner, or was even portrayed as the victim of rape, was open to serious objections. The penalties in Iranian law were severe for both partners. There were even indications that greater stigma might attach to the passive partner. B's family would not wish to have one of its members publicly known to be a homosexual, since such activity was normally concealed in Iran, and would bring disgrace on the family. The claim that the applicant and B had been discovered together was nothing like the situation in a case of rape. It would be extremely vindictive of B's family to report the applicant, who was a family friend, to the authorities on false charges of rape, with consequences of severe punishment, possibly even execution, and dreadful family dishonour.

[10] The Tribunal concluded that, for all these reasons, the applicant had failed to establish that he was ever found by members of his own family, or by members of B's family, engaging in sexual relations with B; that B's family complained to the police; that criminal proceedings existed against the applicant for homosexual acts, or for rape; that fear of such proceedings explained his presence in the United Kingdom; or that the Iranian authorities had any adverse interest in him.

[11] As to whether the applicant was homosexual at all, the Tribunal found that this was "highly uncertain". He was not generally credible. His account of being homosexual was supported by a statement purportedly given by a witness who claimed to have had a homosexual relationship with him in the United Kingdom, but

the witness had not given evidence. The Tribunal concluded however that "there cannot be excluded a reasonable possibility that he is homosexual".

[12] In relation to the treatment of homosexuals in Iran, the Tribunal referred to a Country of Origin Information Report which stated (at paragraph 21.01):

"...although homosexuality is never spoken about and thus a hidden issue, in practice it is not difficult to encounter homosexuals in Iran...homosexuality is practised every day, and as long as this happens behind closed doors within your own four walls, and as long as people do not intend to proselytise 'transvestism' or homosexuality, they will most likely remain unharmed."

The Tribunal accepted that the position was as described in an earlier country guidance case on which both parties relied, namely *RM and BB (Homosexuals) (Iran)* CG [2005] UKIAT 00117. In summary, it was found in that case (at paragraphs 123-124) that although homosexual acts contravened a criminal prohibition on immoral acts, the interest of the Iranian authorities was essentially focused upon any outrage to public decency. They would also respond to reports made to them of persons carrying out homosexual acts in private, and there was a real risk that persons who were the subject of such complaints would be subjected to significant prison sentences or corporal punishment. The authorities did not seek out homosexuals, but might respond to complaints of homosexual activity being carried on. Homosexual acts carried out in private between consenting adults were most unlikely to come to the attention of the authorities.

[13] In relation to the possibility that the applicant was homosexual, the Tribunal stated, at paragraph 34 of its decision:

"It is overwhelmingly probable that if returned to Iran he will carry on any homosexual activity in a discreet and clandestine manner. There is no

indication he would act otherwise. His restraint would be mainly as a result of the social hostility, discriminatory legislation and policing which he wishes to avoid. Almost any sane homosexual would carry on that aspect of his life discreetly and clandestinely, as practically all homosexuals in Iran (many hundreds of thousands if not millions) clearly do. On the case law, that does not establish a case for international legal protection..."

The appeal against the Secretary of State's decision was accordingly dismissed.

The application for leave to appeal

[14] The Tribunal's conclusions in relation to the applicant's claims concerning events in Iran were not challenged. Counsel for the applicant however criticised the Tribunal's reasoning in paragraph 34 of its decision. The central criticism was that the Tribunal had in effect imposed on the applicant a requirement to avoid persecution by behaving in a discreet and clandestine manner (whatever that might mean), so modifying the behaviour which he would otherwise engage in. That modification was sufficiently significant in itself to place the applicant in a situation of persecution. Refugee status could not be denied by expecting a person to conceal aspects of his identity or suppress behaviour which he should be allowed to express. Reliance was placed on the joint judgment of McHugh and Kirby JJ in *S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71, which, it was submitted, should be preferred to the approach adopted by the Court of Appeal in more recent cases in England and Wales, such as *HJ (Iran) v Secretary of State for the Home Department* [2009] EWCA Civ 172.

Discussion

[15] The essence of the applicant's case before the Tribunal was that he was at risk of execution if he was returned to Iran, by reason of the authorities' interest in him arising from his homosexual behaviour with B. His fear of persecution was based upon an account of a judicial lashing for possession of homosexual videos, a complaint to the authorities about his behaviour with B, the issuing of a summons, and the prediction of capital punishment. That was the form of persecution in question. The applicant's claim failed because his assertions were comprehensively disbelieved. The Tribunal's conclusion on that matter is not challenged.

[16] The applicant's claim of fear of future persecution was not based, so far as appears from the material before us, upon a concern about being obliged, by fear of persecution, to behave discreetly if he were returned to Iran. He made clear his preference to remain in the more liberal society of Scotland, where homosexuality was not generally considered wrong, and where it was not a problem to live with a homosexual partner or to go out together: things which would not be possible in Iran. He did not however indicate (so far as appears from the Tribunal's decision, or from the submissions made to this court) that he would wish to live openly as a homosexual or go out with such a partner in Iran, or that any disinclination to do so would be due to a fear of persecution rather than to the social and religious attitudes towards homosexuals which are generally held in that country. In the paragraph on which the present application is founded, the Tribunal was not counselling or requiring the applicant to behave discreetly in order to avoid the effects of persecution. As we understand the decision, the Tribunal was simply saying that, even if the applicant was a homosexual as he claimed to be, there was no real risk of his being persecuted if returned to Iran, since he would be likely to conduct his private life in a discreet

manner. The proposition that he would do so solely or mainly in order to avoid persecution at the hands of persons for whom the government of Iran was responsible was not one that he appears to have put forward in his evidence, let alone established. If no such claim was made, the Tribunal cannot be regarded as having materially misdirected itself by reason of a failure to consider such a claim on the correct basis.

[17] In these circumstances, the questions considered in such cases as *S395/2002 v Minister for Immigration and Multicultural Affairs* and *HJ (Iran) v Secretary of State for the Home Department* do not in our view relevantly arise. The application for leave to appeal is accordingly refused.