IN THE IMMIGRATION APPEAL TRIBUNAL

Heard at:	Field House	Decision number:	**YF (Homosexuality – not legal but no real risk) Eritrea CG [2003] UKIAT 00177**
Heard on:	25th November 2003		
Date typed:	27th November 2003		
Date promulgated:	4th December 2003		

Before:

MS D K GILL (CHAIRMAN)
MR. D M FROOME

Between:

Appellant

And

The Secretary of State for the Home Department — Respondent

DETERMINATION AND REASONS

Representation:

For the Appellant: Ms. D De Souza, of Counsel, instructed by Ziadies Solicitors.
For the Respondent: Ms. M. English, Senior Home Office Presenting Officer.

1.1 The Appellant (who is a national of Eritrea) has appealed, with leave, against the determination of Mr. H R A Martineau, an Adjudicator, who (following a hearing on 14th March 2003 at Surbiton) dismissed his appeal on asylum and human rights grounds under Section 69(5) and under Section 65 of the Immigration and Asylum Appeals Act 1999 against the Respondent's decision of 14th March 2003 to give directions for his removal to Eritrea and to refuse his asylum and human rights claims.

1.2 The Appellant's asylum claim was certified. The Adjudicator did not uphold the certificate.

2. This Determination is being reported because we consider:

(a) the legality (or otherwise of homosexual activity in Eritrea; and

(b) whether the objective situation relating to homosexuals in Eritrea is such that there is, in general, a real risk of persecution or Article 3 ill-treatment.

Our conclusions are set out at paragraphs 17.4 and 18.5 respectively.

3.1 **The basis of the Appellant's claim:** The Appellant went to perform his national service from 1st September 1999. During his military service, he began a

j

homosexual relationship with a man, one Tewolde. Prior to this relationship, he had not had a homosexual relationship because it was difficult to conduct such relationships. On 15th January 2002, the two of them were found in a compromising situation by two military policemen, who beat and kicked them severely. They were placed in an underground prison for 4 months, while having to perform forced labour. They were given a strong warning by a colonel that, if found again in an active homosexual relationship, they would be severely punished and even killed. The two lovers were then sent to separate establishments. They were both publicly exposed and upbraided before their fellow soldiers and this led to persistent mockery. The Appellant found himself in a constant state of terror and decided to escape from the army. Since this would amount to desertion and he would be shot for that, he had to leave his country. In late July 2002, he obtained a week's leave. He found an agent. On 1st August 2002, he went to the police and reported the harassment and persecution he had suffered. He asked if he could take action against the colonel who had belittled and threatened him. However, the policeman also abused and mocked him. He realised that, as a homosexual, he had no hope of being understood in Eritrea because of the prevailing prejudice, although government policy documents state that those with a homosexual orientation are to be respected. He arranged his departure with the agent and then returned to his unit, to await the day. He subsequently left Eritrea. At his interview, the Appellant said that he was continuously in his army until the day he left, which was a period of over 3 years. In oral evidence before the Adjudicator, the Appellant said that he became consciously homosexual from the age of 17 years and that he had escaped from his national service. He attributed the extension of his service to the war with Ethiopia. When asked how long his extended service was intended to last, he said that he was not released and that his duty was to serve until peace.

3.2 **The Determination:** At paragraph 14 of the Determination, the Adjudicator accepted that the Appellant is a homosexual.

3.3 It is appropriate to set out paragraphs 11(1), 15, 16 and 17 of the Determination, which state:

> *11(1) CIPU, para.6.140: Homosexual activity is legal for men and there have been no reports of discrimination [against] or persecution of homosexuals;*
>
> *15. Next, I note that the appellant's claim to have been victimised and publicly shamed for his homosexuality is not matched by any incidents or trends recorded in any of the country literature. It is directly contrary to the only passage about homosexuality in the literature before me. I note also that by his own account the appellant had despaired of life in his country and set about engaging an agent before he tried to obtain redress from the police. This is not a logical sequence of events. At the time when he set about escaping from his country in order to be free from the military, the pilot demobilisation scheme had been completed. The appellant had produced to the respondent at interview a certificate of military service. Further, I find it hard to believe that if the appellant had had to continue his service beyond the minimum 18 months, he would have told his interviewer simply that the period of service was 18 months, without mentioning at least the possibility of extension or recall.*
>
> *16. Because it is contradicted by the sense of the country information, I reject the appellant's account of being persecuted for his homosexuality. With that there falls also his case that he needed to get out of the army in order to be free of such persecution. Even were his account of persecution true, it would be so exceptional that there is on the material before me no real risk of its being repeated if he is returned. The issue and possession of a certificate of national service, with his answer about the length of service,* ***suggest strongly that the appellant is not in breach of his obligation in this respect****. At the time of the appellant's escape, conscripts had every reason to believe that they were on the verge of demobilisation. That too tells against the appellant's claimed motivation.* ***So, while the Appellant would in my opinion be entitled to asylum if his account were true and in accordance with the recorded conditions in his country, I find that he has not***

j

> ***sufficiently made out his case as to either the risk of being persecuted for his membership of social group, or his status as a defaulter or deserter.*** *Even if he has deserted from the forces, he claims to have done so after the end of hostilities, so that he would not be liable to the penalty for deserting in time of war. That appears a deliberate exaggeration, made with intent to deceive.*
>
> *17. As there is no evidence of a general – or indeed personal and particular – risk of persecution or mistreatment for homosexuals in Eritrea, there is no case made out as to any breach of any of the articles of the ECHR by reason of the appellant's homosexuality as a reason for mistreatment in breach of Art.3, or by interference with his private and family life, which of course includes his sexuality. None of the other articles cited can avail the appellant, given my findings of fact.*

4. We first heard submissions as to whether the Adjudicator had found that the Appellant is not a deserter. In the event that he had not, then the Tribunal would have had to consider whether a remittal for adequate findings of fact was appropriate.

5. Ms. De Souza submitted that there is no clear finding that the Appellant is a deserter. The second and third sentences of paragraph 16 suggest, in Ms. De Souza's submission, that the Adjudicator was accepting that the Appellant was a deserter. She asked us to remit the appeal for a fresh hearing.

6. Ms. English submitted that the Adjudicator had rejected the Appellant's claim that he was a deserter. This is clear, in her submission, from reading paragraphs 15 and 16 as a whole.

7. We asked the representatives to withdraw from the hearing, whilst we considered the Determination and the submissions. Having considered the matter, we informed the parties that we had benefited from hearing their submissions and we were satisfied that the Adjudicator had rejected the Appellant's claim that he was a deserter or defaulter. We give our reasons for reaching this decision, in paragraphs 14.1 and 14.2 below.

8. We then heard submissions on the risk on return, which we reminded the parties had to be assessed in accordance with the following:

   (a) that the Appellant had been found by the Adjudicator to be a homosexual;

   (b) that the Adjudicator had rejected the Appellant's claim as to his alleged problems during his military service on account of his homosexuality; and

   (c) that the Adjudicator had rejected the Appellant's claim that he was a deserter or a defaulter.

9. Ms. De Souza submitted that, even though the Adjudicator had rejected the Appellant's claim that he was a deserter, he would be perceived by the Eritrean authorities as a deserter. This is because he left the army on account of his problems due to his homosexuality. She referred us to specific passages on pages 1, 2, 3, 4, 13, 24, 57, 69, 70, 72, 76, 87 and 88 of the Appellant's bundle. Given the overall objective situation as to the human rights record of the Eritrean authorities, Ms. De Souza submitted that the Appellant would be perceived as a deserter. On arrival in Eritrea, he would be questioned and carefully scrutinised at the airport. He would have to give an account of his opinions and beliefs and sexual orientation. He would have to say where he had been and why. This would expose him to the risk of being detained on arrival in Eritrea, imprisoned and persecuted. The Appellant would also be prosecuted for his homosexuality. He would not have a fair trial. He would be

j

subjected to inhuman or degrading treatment or punishment. In Ms. De Souza's submission, the Appellant was at risk of persecution on account of being a failed asylum seeker.

10. Ms. English submitted that there was nothing in the Appellant's circumstances which would draw the adverse attention of the Eritrean authorities, on his arrival in Eritrea. He may well be held for a short while, so that his identity could be established. However, there was no real risk that he would be taken into detention. He does not have any political affiliation. He is not of mixed ethnicity. He is not a deserter. There is no evidence that failed asylum seekers are at risk of persecution or inhuman or degrading treatment simply on account of being failed asylum seekers. With regard to the Appellant's homosexuality, Ms. English referred us to paragraph 11(1) of the Determination and to paragraph 6.123 of the Report of the Country Information and Policy Unit of the Immigration and Nationality Directorate (the CIPU Report) dated October 2003, which states

> *According to the British Embassy in Asmara, Penal Code Proclamation of 1957 No. 158/1957 Book V Title IV Section II strictly prohibits "Sexual Deviations", among which is performing sexual acts with someone of the same sex. Confirmation is given that such acts are prosecuted and punished. However the International Lesbian and Gay Association state that same sex sexual activity is legal for men and women in Eritrea, and that there have been no reports of discrimination or persecution of homosexuals.* ***[43] [14]***

According to Annex D to the CIPU Report, the sources of this information are:

> [43] Letter from the British Embassy in Asmara – July 2003.
>
> [14] The International Lesbian and Gay Association (ILGA) – World Legal Survey Eritrea, 1999.

11.1 Ms. De Souza submitted that the two sentences in paragraph 6.213 of the CIPU Report are conflicting. She submitted that the last sentence of paragraph 6.213 should be given any weight at all. This is because the ILGA stated, in their Introduction to the World Legal Survey (dated 1999, last updated 21st July 2002, on page 79 of the Appellant's bundle):

> *In the interests of accuracy we have tried, wherever possible, to quote original texts, whether of legislation, of court judgments or of news stories. However, considerable difficulties exist:*
>
> - *often the source information is provided in very summarised form, leading to considerable uncertainty about its meaning;*
> - *apparently reliable information (even from expert or government sources) can subsequently turn out to be incorrect, or overtaken by later events;*
> - *differing legal and political traditions, together with the difficulties of translation, can be further sources of inaccuracy;*
>
> ***For these reasons users of the information should consider carefully the texts and their source (which we have always tried to indicate) and be aware that they may not be correct.***

11.2 Bearing this in mind, Ms. De Souza submitted that we should place weight on the first two sentences of paragraph 6.213, which relate to the proclamation by the Eritrean government itself.

11.3 Ms. De Souza also referred us to paragraph 6.153 of the CIPU report, which states:

> *However Amnesty International report that over 200 Eritreans who had originally entered Sudan were deported back to Eritrea from Malta in September 2002 and detained on arrival.*

j

They were held incommunicado and without charge or further explanation. There were fears for their safety since many had allegedly deserted from the army.

11.4 Ms. De Souza submitted that this shows that the Appellant would be detained on arrival in Eritrea, whatever country he is returned from.

12. We reserved our Determination as to the risk on return.

13. We have decided to dismiss the appeal. We now give our reasons.

14.1 As we have said above, we are satisfied that it is clear from the Determination as a whole that the Adjudicator rejected the Appellant's claim that he is a deserter or a defaulter. The sentence beginning: "*So, while the appellant would in my opinion ….*" in paragraph 16 is unfortunately worded. However, when this sentence is read as a whole, we are satisfied that what the Adjudicator meant is:

(a) that if the Appellant's account had been true and in accordance with the recorded conditions of his country, then he would in the Adjudicator's opinion be entitled to asylum;

(b) however, the Appellant had not sufficiently made out his case as to the risk of being persecuted for his membership of a social group and, further, that he had not sufficiently made out his case as to his status as a defaulter or deserter.

This construction of his particular sentence is supported not only by the fact that a comma appears after "*social group*" and the words "*or his status as a defaulter or deserter*" but also upon a reading of paragraphs 15 and 16 as whole.

14.2 The words "*strongly suggest*" in paragraph 16 might, on one view, suggest that the Adjudicator had not made up his mind. However, in the next sentence, the Adjudicator referred to the fact that, at the time of the Appellant's escape, conscripts had every reason to believe that they were on the verge of demobilisation. He considered that this "*too tells against the Appellant's claimed motivation (for leaving the army)*". We are satisfied that, in the sentence which includes the words "*strongly suggests*", the Adjudicator was simply saying that the facts he referred to in that sentence – namely, the issue and possession of a certificate of national service together with his answers about the length of service – were facts which suggested strongly that the Appellant is not a deserter or a defaulter. However, these facts were not the only facts the Adjudicator took into account, as is evident from reading paragraphs 15 and 16 as a whole. He considered that it was not logical for the Appellant to have attempted to obtain redress from the police after he set about engaging an agent. He noted the lack of any objective evidence, apart from the passage in the CIPU Report he had referred to, about homosexuality in Eritrea. He took into account the fact that, at the time of the Appellant's escape, conscripts were on the verge of demobilisation. He then went on, in the sentence beginning "*So, while ……..*" to reject the Appellant's claim that he is a deserter or defaulter.

15. We now consider the risk on return, based on the facts (a), (b) and (c) as set out in paragraph 8 above.

16.1 We have no hesitation in rejecting Ms. De Souza's submission that the Appellant would be perceived as a deserter or a defaulter. As the Adjudicator noted, he is in possession of a certificate of national service. Any risk of his being suspected as a

j

deserter or defaulter is so far below the low standard of a reasonable likelihood as to be speculative and remote.

16.2 Much of the objective evidence to which Ms. De Souza referred us in the Appellant's bundle refers to the general human rights record of the Eritrean government, the risk of arbitrary detention, the ill-treatment of detainees and their prolonged detention. If Appellant is not at real risk of being detained, then there is no real risk that he would suffer ill-treatment in detention.

16.3 Page 13 of the Appellant's bundle makes reference to many long-term Eritrean refugees in Sudan who fear persecution on return to Eritrea on account of their links with the ELF (Eritrean Liberation Front). This does not assist the Appellant because he does not any political association.

16.4 Ms. De Souza also relied on paragraph 6.153 of the CIPU report, which we have quoted at paragraph 11.3 above. However, according to Amnesty International, most of the deportees were allegedly deserters. Not only is the Appellant not a deserter, he is in possession of a national service certificate. Paragraph 6.123 therefore does not assist him.

16.5 On his arrival in Eritrea, it is reasonably likely that the Appellant would be questioned. We accept that the Eritrean authorities would want to establish his identity, nationality and background. The Adjudicator rejected his claims as to his alleged problems in the army – which means that the Adjudicator found that he had fabricated these aspects of his claim. He would therefore have no reason to say to the Eritrean authorities that he left Eritrea because he experienced problems in the army. He is not of mixed ethnicity. He has had no political association. He is not a deserter or defaulter. He is not reasonably likely to be perceived as a defaulter or defaulter. There is nothing in the objective material to suggest that there is a real risk that he would be detained or persecuted or subjected to Article 3 ill-treatment simply on account of being a failed asylum seeker. Given these facts, we agree with Ms. English that there is no real risk that he would be detained; neither is there any real risk that he would be subjected to persecution or inhuman or degrading treatment. For the reasons we give below, there is no real risk that, even if his sexual orientation emerged during any questioning, he would be detained or subjected to treatment which amounts to persecution or inhuman or degrading treatment or punishment.

17.1 We turn now to consider whether there is any real risk of the Appellant experiencing treatment amounting to persecution or inhuman or degrading treatment on account of his sexual orientation. It is clear that the first two sentences of paragraph 6.213 of the CIPU report contradict the last sentence, in two respects:

(a) as to whether homosexuality is legal in Eritrea.

(b) as to whether homosexual acts are prosecuted or punished by the Eritrean authorities.

17.2 With regard to issue of legality, the first two sentences are, in fact, sourced from the letter from the British Embassy in Asmara dated July 2003. The source is not, as suggested by Ms. De Souza, the Eritrean government itself. The British Embassy has relied upon the Penal Code Proclamation. On the other hand, the ILGA states (as indicated in the last sentence of paragraph 6.213) that homosexuality is legal. We note the caution the ILGA gives in relying on its World Legal Survey. We also note the article on page 88 of the Appellant’s bundle, which is attributed to a BTM

j

Horn of Africa Correspondent in Harrow, Johannesburg and which is published on the "Behind the Mask" website on gay and lesbian affairs in Africa. The first paragraph of this article refers to homosexuality as being legal under "Interim Eritrean law". The last paragraph on the same page states:

> *"According to the **unimplemented** Eritrea law, homosexuality is legal …"*

(our emphasis)

17.3 We then noted that paragraph 5.1 of the CIPU report states that a Transitional Constitution was decreed on 19th May 1993, that it has since been replaced by a Constitution which was adopted on 23rd May 1997 but which has not been implemented. In the same paragraph, President Issayas is reported as saying that the provisions of the Constitution have not been implemented fully.

17.4 On the evidence before us, we conclude that, under the terms of the Constitution adopted on 23rd May 1997, homosexuality is legal. However, the provisions of that Constitution in so far as they relate to homosexuality have not been implemented yet. Whether the provisions of the Penal Code of 1957 No. 158/1957 Book V Title IV (to which the letter from the British Embassy refers) is still in force would (it seems) depend on the provisions of the Constitution adopted on 23rd May 1997. The fact that the British Embassy suggests, as recently as July 2003, that homosexuality is prohibited tends to suggest that the provisions of Penal Code are, at least to the extent that it prohibits "Sexual Deviations", still effective. We are therefore led to conclude (although hesitantly, given the lack of sufficient objective material before us) that homosexuality is technically not legal in Eritrea but will become legal when the provisions of the Constitution of May 1997 become fully implemented.

18.1 We now turn to consider whether the objective evidence before us shows that homosexuals are at real risk of receiving treatment amounting to persecution or inhuman or degrading treatment or punishment. The existence of laws against homosexual activity do not, per se, engage Article 3. The Appellant must show that there is a real risk that he would be prosecuted (see the judgement of the Court of Appeal in Z [2002] EWCA Civ 952, reported at [2002] IAR 560. The same principle applies in considering whether the Appellant faces a real risk of being persecuted on account of his homosexuality.

18.2 We therefore have to consider what treatment the Appellant is reasonably likely to face in Eritrea on account of his homosexuality, regardless of the fact that homosexual activity is at present still illegal. The evidence before us in this respect is also conflicting. The letter from the British Embassy states that "Confirmation is given that such acts are prosecuted and punished". It is not clear who is said to be giving the "confirmation" – does the British Embassy confirm this from its own information or has the British Embassy had it confirmed to them by some other source ? Furthermore, there is no information supplied as to the circumstances in which the persons prosecuted were arrested, when the arrests and prosecutions took place (whether before or after the adoption of the Constitution in May 1997), the punishments received etc.

18.3 The article on the "Behind the Mask" website on gay and lesbian affairs in Africa dated 5th November 2003 (page 88 of the Appellant's bundle, which is attributed to BTM Horn of Africa Correspondent in Harrow, Johannesburg) refers to 6 gay men having been arrested by Asmara military police in October 2003. The article states that they were held in Asmara for some days and then transferred to Diabeto prison, outside Asmara to the north. The article states that "no legal case had been brought"

j

against the men – which means that they had not been charged. However, we note that this article refers to the Eritrean military police saying that those arrested were involved in "gay behaviour in a public bathroom". The article also refers to observers saying that, in the previous year, in a similar case, the government aired programmes on the dangers of homosexuality and displayed 5 gay men from "the house of detention". However, we note that the article does not state who the observers are and we are therefore not able to assess the reliability of this information. We also noted that pages 89 and 90 of the Appellant's bundle are a transcript of an interview with an Eritrean student in South Africa, He makes various assertions, including that there are gay civilians and military personnel who are either in prisons or have been executed. However, we are not told where he gets his information from, how reliable his sources are, how recent are any incidents he refers to, whether the offenders in question were found engaging in homosexual acts in public places or in private places. In the circumstances, we are able to place very little (if any) weight on the interview at pages 89 and 90 of the Appellant's bundle.

18.4 Against the documentary evidence referred to in paragraphs 18.2 and 18.3 above, we have to set the following evidence:

(a) that the ILGA states that there have been no reports of discrimination or persecution of homosexuals in Eritrea. (We bear in mind the caution which the ILGA's Introduction to the World Legal Survey" gives and also that this is according to their World Survey of 1999);

(b) that the U.S. State Department (USSD) Report on Eritrea dated for 2002 dated March 2003 is completely silent on any problems being faced by homosexuals in Eritrea;

(c) that the Appellant's bundle includes reports from international human rights organisations such as Human Rights Watch and Amnesty International. Our attention was not drawn to anything in these reports which specifically refer to the problems experienced by homosexuals in Eritrea.

It is inconceivable that, if persons engaged in homosexual activity in Eritrea are at real risk of persecution or inhuman or degrading treatment or punishment, there would not be some reference to this in the USSD report or the Human Rights World reports or the Amnesty International reports.

We considered that the two articles at pages 91 to 96 of the Appellant's bundle do not relate to the situation of homosexuals in Eritrea. Indeed, the first article (at pages 91 to 93) specifically refers to the countries of Botswana, Namibia, South Africa, Zambia and Zimbabwe. The second article (at pages 94 to 96) is about various countries including Zimbabwe, Uganda, Kenya, Nigeria but we can find no reference in it to Eritrea.

18.5 We considered that the evidence before us as to any problems which homosexuals may be subjected to in Eritrea is very limited. We conclude as follows:

(a) that there is no evidence at all that homosexuals are at real risk of discriminatory treatment by members of the general population in Eritrea.

(b) that, provided homosexual activity is engaged in discreetly and in private, it is not reasonably likely that the Eritrean authorities would be interested in prosecuting the individual or subjecting the individual to treatment amounting

j

to persecution or inhuman or degrading treatment. We stress that this conclusion has been reached on the basis of the article mentioned at paragraph 18.3 above which refers to the arrest of 6 gay men in October 2003. We see no reason, for the purposes of this appeal, to question the reliability or otherwise of this article. However, it has to be borne in mind that this article is obtained from a website on gay and lesbian affairs. This being evidence from a source which is not apartsian, this article may not be seen as evidence which is reliable if there is produced other reliable evidence to the contrary.

18.6 We note that the Appellant was consciously homosexual from the age of 17 years. On the Adjudicator's findings, he experienced no problems in Eritrea on account of his homosexuality until his departure from Eritrea in September 2002, at the age of about 33 years. On the Adjudicator's findings, he did not come to the adverse attention of the Eritrean authorities on account of his homosexuality whilst he was in Eritrea. There is therefore no reasonable likelihood that he would do so, if returned to Eritrea. The Adjudicator's finding that it was not credible that the Appellant would have received the ill-treatment he claimed to have received in the army is in line with our conclusions on the objective evidence. It is not reasonably likely that the Appellant would receive treatment which would amount to persecution or in breach of his Article 3 rights from members of the general population.

19. For all of the above reasons, we are satisfied that the findings of the Adjudicator that the Appellant's removal to Eritrea would not be in breach of the United Kingdom's obligations under the Refugee Convention or in breach of his rights under Article 3 are fully sustainable. Ms. De Souza relied on Article 6 – the right to a fair trial. However, there is nothing to suggest that there are any outstanding charges against the Appellant. In any event, given that his removal would not be in breach of his rights under Article 3, any claim under Article 6 cannot succeed (Ullah & Do [2002] EWCA Civ 1856).

20. It follows that we must dismiss the appeal.

Decision

The appeal is DISMISSED.

Ms. D. K. GILL
Vice President

Date: 27th November 2003