C5/2006/2451

Neutral Citation Number: [2006] EWCA Civ 1238
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT NO. HX/44557/2002]

Royal Courts of Justice
Strand
London, WC2

Wednesday, 26th July 2006

B E F O R E:

LORD JUSTICE BUXTON

LORD JUSTICE MAURICE KAY

SIR MARTIN NOURSE

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CLAIMANT/APPELLANT

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

DEFENDANT/RESPONDENT

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(DAR Transcript of
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MR N BLAKE QC AND MR F OMERE (instructed by Messrs Paragon Law, Finelook Studios, 7 Broad Street, Hockley Village, NOTTINGHAM NG1 3AJ) appeared on behalf of the Appellant.

MS J COLLIER (instructed by Treasury Solicitors, LONDON WC2B 4TS) appeared on behalf of the Respondent.

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J U D G M E N T

1. LORD JUSTICE MAURICE KAY: The appellant is of Iranian nationality. He is a homosexual. He arrived in the United Kingdom on 17 December 2001 and claimed asylum. The Secretary of State rejected his claim on 1 March 2002. There was an appeal to an adjudicator who dismissed it on 11 November 2002. The appellant was granted permission to appeal to the Immigration Appeal Tribunal. However, by the time his appeal came for substantive consideration, the transitional provisions of the Asylum and Immigration (Treatment of Claimants Etc) Act 2004 were in force. Accordingly, the appeal came before the Asylum and Immigration Tribunal. At a hearing on 3 June 2005, the AIT concluded that the determination of the Adjudicator contained material errors of law. It adjourned the matter for further reconsideration in the form of a hearing de novo. That hearing took place on 29 July 2005 and resulted in a determination promulgated on 15 August 2005. The AIT dismissed the appeal on both asylum and human rights grounds. It also refused permission to appeal to this court, as did Sedley LJ on the papers. However, on 31 January 2006, following a renewed oral application, Sedley LJ granted permission to appeal. In so doing he said:

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

The findings of the AIT

2. The principle findings of the AIT are contained in the following passages:

> "19. We find that the appellant is a practising homosexual in the United Kingdom, that he discreetly practised homosexuality in Iran and that he has an established relationship with Mr [A] in the United Kingdom. We find that all of the claimed events of 28 November 2001 are a fabrication, that the appellant was never detained by the authorities in Iran on account of his homosexuality, that his account of his escape from custody is totally untrue and that he was of no adverse interest to the authorities in Iran at the time that he left his country, or at the present time. We reject the appellant's evidence … that the authorities have shown ongoing interest in him since he left Iran. We find that the appellant could be removed to Iran, without such removal involving a real risk of persecution or treatment contrary to Article 3 of the ECHR …
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> "38. … we accept that the appellant has a long-standing and ongoing homosexual relationship with Mr [A] and we accept the veracity of both of the appellants' witnesses evidence, insofar as that evidence relates to the relationship between the appellant and Mr [A] …
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> "41. We accept that the appellant undertook military service and his

> evidence is that he was involved in homosexual relationships during that period of time, without any adverse results. We accept that evidence as true. We find as a fact that he subsequently participated in discreet homosexual activity without any adverse results. His evidence was that his relationship with [his partner in Iran] was conducted discreetly, which we accept. Applying the principles and conclusions set out in the IAT's Country Guidance determination in RM and BB, and having referred also to the subsequent AIT reported determination in AT, we conclude that the appellant's removal to Iran would not result in a real risk of persecution, or harm contrary to Article 3 of the ECHR … We find that the appellant's homosexual practices in Iran have never been such that his own homosexual activity is reasonably likely to result in adverse attention from the authorities in Iran … "

Country guidance on the position of homosexuals in Iran

3. In RM and BB [2005] UKAIT 00117 the AIT provided guidance on the treatment of homosexuals in Iran. It referred to the death penalty for sodomy but described that as "an extremely rare occurrence". It added:

> "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."

4. That paints a much grimmer picture than obtains in some other countries where the problem exists but is more one of societal discrimination. Plainly, there are particular problems for practising homosexuals in Iran.

The legal principles

5. Before the AIT, the appellant lost his appeal under Articles 2, 3 and 8 of the ECHR. He does not have permission to appeal to this court in respect of that. His appeal is limited to the position under the Refugee Convention. Article 1A(2) of that convention refers to a:

> "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion".

6. In Shah v Islam [1999] 2 AC 629 at page 643 C-E Lord Steyn said:

> "In some countries homosexuals are subjected to severe punishments including the death sentence. In Re GJ [1998] 1 NLR 387 the New Zealand

> Refugee Status Authority faced this question. Drawing on the case law and practice in Germany, the Netherlands, Sweden, Denmark, Canada, Australia and the USA, the Refugee Status Authority concluded in an impressive judgment that depending on the evidence homosexuals are capable of constituting a particular social group within the meaning of Article 1A(2) … This view is consistent with the language and purpose of Article 1A(2). Subject to the qualification that everything depends on the state of the evidence in regard to the position of homosexuals in a particular country I would in principle accept the reasoning in Re GJ as correct."

7. In the present case it is common ground that practising homosexuals in Iran constitute "a particular social group".

8. As in any similar case, the central question for the AIT was whether the appellant has a well-founded fear of persecution. The finding of the AIT that this appellant does not have such a fear is constructed on the fact that he was not persecuted during his earlier homosexual relationships in Iran prior to his departure because they were "conducted discreetly" and that it is not reasonably likely that he will be the subject of adverse attention from the authorities following return to Iran, by implication because any future homosexual relationship there would also be "conducted discreetly". In recent years, this type of analysis has received renewed consideration. It is instructive to begin with the decision of the majority of the High Court of Australia in S395/2002 [2003] HCA 71. There were two majority judgments. The joint judgment of McHugh and Kirby JJ contains these passages. First, from paragraph 40:

> "Persecution covers many forms of harm … Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it. But persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps - reasonable or otherwise - to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a 'particular social group' if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution."

And at paragraph 43:

> "The notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality. This is particularly so where the actions of the persecutors have already caused the person affected to modify

his or her conduct by hiding his or her religious beliefs, political opinions, racial origins, country of nationality or membership of a particular social group. In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the *harm* that will be inflicted. In many - perhaps the majority of - cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly".

9. The second majority judgment of Gummow and Hayne JJ contains these passages from paragraphs 80 to 82:

> "80. The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences?
>
> "81. It is important to recognise the breadth of the assertion that is made when, as in the present case, those seeking protection allege fear of persecution for reasons of membership of a social group identified in terms of sexual identity … Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense 'discreetly') may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality.
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> "82. Saying that an applicant for protection lived 'discreetly' in the country of nationality may be an accurate general description of the way in which that person would go about his or her daily life. To say that a decision-maker 'expects' that that person will live discreetly may also be accurate if it is read as a statement of what is thought likely to happen. But to say that an applicant for protection is 'expected' to live discreetly is both wrong and irrelevant to the task to be undertaken by the Tribunal if it is intended as a statement of what the applicant *must* do."

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:

> "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."

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.

The application of the principles to the present case

12. Much of this jurisprudence has developed over a short period of time in the recent past. How does it impact upon the present appeal? On behalf of the appellant Mr Nicholas Blake QC makes a number of submissions but it seems to me that they can be reduced to the following.

> 1) Having concluded that the appellant had conducted his previous relationship with a man in Iran discreetly and had thereby avoided the attention of the authorities, the AIT fell into legal error by not considering *why* the appellant had acted "discreetly"? This is an essential enquiry in the light of the authorities to which I have referred.
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> 2) The same error is repeated in relation to the position that would arise on return to Iran.
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> 3) The AIT failed to have regard to what the appellant had said in his second witness statement which contained these passages:
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> > "I am no longer living in fear as I was when I was living in Iran … In Iran I was forced to hide my relationship and I was not able to live openly with my partner. I want an average life and would like to be involved in a loving relationship. I do not believe that I should have to go without having a

> normal life and a partner whom I can be with openly and live in a society where I am accepted. This is what I would be forced to do without if I were forced to return to Iran."

The words "fear" and "forced" are particularly important.

4) The AIT failed to evaluate that as evidence of persecution against the backdrop of the Country Guidance case of RM and BB and the finding that where homosexuals are apprehended there is a real risk of at least "significant prison sentences and/or lashing". Mr Blake does not submit that, upon a proper application of the law, the AIT could only have allowed the appeal. He submits that there was evidence which, if properly considered, could have resulted in a successful appeal. On this basis he invites a remittal.

13. Against this, Miss Collier submits that the evidence entitled the AIT to conclude as it did. She emphasises the high threshold and contends that the evidence was susceptible to a permissible finding that the appellant had adapted and would again adapt his behaviour so as to avoid persecution in circumstances wherein it amounted to his preferred way of dealing with the problem and a way which was reasonably tolerable to him.

14. It seems to me that the problem facing Miss Collier's submissions is that, whilst she seeks to mould them to the language of the recent jurisprudence, the AIT simply ignored it. Although the AIT was referred to the country guidance authorities and to the leading recent authority on Article 8 of the ECHR (Huang [2005] EWCA Civil 105), it was not referred to S395/2002 or to the English authorities which have been influenced by it. Significantly in RM and BB, when giving country guidance, the AIT stated (paragraph 124) that it had not been addressed on the issue of discretion and whether people engaging in such acts can be expected to have been found to act discreetly "which was considered by the Australian High Court recently in S395/2002".

15. In my judgment, the decision of the AIT in the present case cannot be deconstructed and reassembled as an application of the relevant principles. Nor can it be said, as Miss Collier suggests, that the appellant's case is so weak evidentially that his appeal was bound to fail before the AIT in any event. For my part, I do not feel able to express a view on what the outcome would or might have been if the correct legal principles had been grasped and applied. For this reason, I am driven to the conclusion that the AIT fell into legal error and that the case will now need to be remitted for further reconsideration.

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.

17. The Tribunal will also need to make careful findings about the consequences for the relationship between the appellant and his current partner if the appellant were to be returned to Iran but his partner were to remain in this country (his stated intention). There are unanswered questions about what effect this would have upon the future expression of the appellant's homosexuality in Iran. These are difficult and complex questions. Their resolution will have to await further reconsideration by the AIT.

18. SIR MARTIN NOURSE: For the reasons given by my Lord, Lord Justice Maurice Kay, I agree that the appeal should be allowed and an order made in the terms proposed by him.

19. LORD JUSTICE BUXTON: I also agree that the appeal should be allowed and the order made in the terms proposed by Lord Justice Maurice Kay.

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.

Order: Appeal allowed.