FEDERAL COURT OF AUSTRALIA

Nezhadian v Minister for Immigration & Multicultural Affairs

[2001] FCA 1415

FARSHID FARSI NEZHADIAN v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

W205 of 2001

FINN J

CANBERRA (HEARD IN PERTH)

18 OCTOBER 2001

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W205 OF 2001

BETWEEN:	FARSHID FARSI NEZHADIAN APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT
JUDGE:	FINN J

DATE OF ORDER:	18 OCTOBER 2001
WHERE MADE:	CANBERRA (HEARD IN PERTH)

THE COURT ORDERS THAT:

1. The application be dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W205 OF 2001

BETWEEN:	FARSHID FARSI NEZHADIAN APPLICANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGE:	FINN J
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PLACE:	CANBERRA (HEARD IN PERTH)

REASONS FOR JUDGMENT

1 The applicant, Farshid Farsi Nezhadian, is an Iranian who had his application under the *Migration Act* 1958 (Cth) ("the Act") for a protection visa refused by the Refugee Review Tribunal. Insofar as presently relevant, the grounds of that application related to his homosexuality and to the treatment in Iran of homosexuals and of homosexual activity.

2 The Tribunal accepted that Mr Nezhadian was a homosexual. Nonetheless it rejected his claim that the Iranian authorities were interested in him and that he fears arrest and persecution if he returns to Iran. That claim was considered to have been fabricated.

3 The amended application to this Court proceeded on three fronts, only one of which was seriously arguable as I indicated at the hearing at which the applicant was legally represented.

4 Before considering the three grounds advanced, the Tribunal's findings relevant to this application should be noted. Having accepted that homosexuals constituted a particular social group for the purposes of the 1951 Convention Relating to the Status of Refugees, but that for a member of such a group to meet the Convention requirements, he must have a well-founded fear of persecution for reasons of his membership of that group, the Tribunal went on:

"I accept the independent evidence referred to above and that provided by the adviser that indicates that homosexuality is specifically outlawed by the Islamic Penal Law that operates in Iran. I accept that the penalties for homosexual activity specified in the Penal Law and the Ta'azirat range from flogging to imprisonment. This indicates that homosexuals in Iran may in theory face treatment amounting to persecution. I accept that homosexuals in Iran can be treated in a way that may amount to persecution.

However, I do not accept that this means every homosexual person in Iran has a well-founded fear of persecution. I do not accept that the mere fact that homosexual conduct is illegal in Iran means that the applicant would have a well-founded fear of persecution because he is homosexual. The illegality of homosexual conduct in Iran is a relevant factor to consider but I am still obliged to consider whether there is a real chance that the applicant would face persecution for a Convention reason if he returns to Iran.

The independent evidence set out above, which I accept, suggests that there is a considerable difference between the explicit provisions of the Islamic Penal Code in relation to homosexuality and the situation in practice. The evidence indicates that the Iranian authorities do not actively seek out homosexuals and that the risk of prosecution for homosexuality is minimal as long as homosexual activities are carried out discreetly. There is nothing in the evidence before me to indicate that a homosexual man in Iran is at risk of attracting the attention of the authorities merely for being homosexual. Indeed, the evidence suggests that homosexual activity, as long as it is not overt and public, is tolerated and not uncommon in Iran. The independent evidence further indicates that there are places in Iran where men meet other men for the purpose of initiating sexual contact (including a park in central

Tehran that authorities are aware of). The applicant said it is true that if you behave discreetly and not provocatively you may not have difficulty. The information provided by the adviser discusses the legal sanctions. It concludes; "The fulfilment of all these conditions seems almost out of the question, leading to the conclusion that in practice it is only in very exceptional circumstances that persons are convicted and punished for adultery, and thus for homosexual behaviour."

On the applicant's own evidence, he was able to lead an active homosexual lifestyle from the age of approximately sixteen until his departure to Australia. He had three sexual partners. He was able to socialise with other homosexual men in his neighbourhood. He attracted sexual partners without the need to find partners in health clubs or similar places. He got to know his partners by visiting them at home and through their visits to his home. Authorities never questioned him and he had no specific difficulty with them. His family never questioned him and he encountered no difficulty.

This evidence concerning the nature and extent of his sexual activities is consistent with the independent evidence about the relative tolerance with which homosexuality is treated in Iran, notwithstanding the impression given by the provisions of the Penal Code. I have considered whether and how the applicant would be able to continue to live as a homosexual man if he returned to Iran. Given that the applicant had no difficulty meeting other homosexuals and being sexually active prior to leaving Iran, I am of the view that he would be able to resume this lifestyle if he returned to Iran. I accept that the applicant would need to be discreet if he wished to have homosexual relationships in Iran. I also accept that in some circumstances the need to be discreet would support a conclusion that the applicant had a well-founded fear of persecution. (See Woudneh v Inder & MILGEA, unreported, Federal Court, Gray J, 16 September 1988 at 18-19, also Applicant A per McHugh J at 359-360 and Kirby J at 388). However, I do not accept that in the applicant's case the need for discretion to avoid adverse consequences of itself amounts to persecution. On his own evidence the applicant was discreet in relation to his sexual activities in Iran before he came to Australia. The applicant did not claim that the need to be discreet caused him any significant detriment or disadvantage although he did indicate that he did worry. I can understand that the applicant does not like the limits imposed upon his behaviour in Iran (he said for example that it is not possible to go around without a shirt) but I do not accept that such limits amount to persecution in the Convention sense. Having regard to all the circumstances I expect that the applicant would continue to be discreet in his homosexual relationships and behaviour, to the same extent that he has been discreet in the past. Indeed the need to be discreet in relation to sexual relationships in Iran is not limited to homosexual relationships. The independent evidence indicates that unmarried heterosexual couples who are found together are liable to severe punishment. If anything, the independent evidence suggests that it is far easier for men to be publicly affectionate towards each other in Iran than it is for a man and a woman. Overall, I am of the view that the chance that the applicant faces persecution in Iran because he is a homosexual is remote and insubstantial. I am therefore not satisfied that he has a well-founded fear of persecution for this reason."

The Three Challenges to the Tribunal's Decision

5 *Ground 1*. This challenged directly the finding that Mr Nezhadian did not have a well-founded fear of persecution if returned to Iran for reasons of his being a homosexual. Alternate bases were advanced for this contention, the first being that the penalties for homosexual activity imposed by the Islamic Penal Code of Iran were themselves sufficient to ground such a fear; and second, that by accepting the need for "discretion" in relation to Mr Nezhadian's sexual activities, the Tribunal indirectly accepted he would be persecuted if returned to Iran for reasons of his homosexuality.

6 In relation to the contention that the Islamic Penal Code was persecutory per se because of the severity of the sanctions it imposed, counsel acknowledged that it would probably be regarded as a "courageous" submission in light of decisions of this Court in *MMM v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 324, *F v Minister for Immigration and Multicultural Affairs* [1999] FCA 947 and *Singh v Minister for Immigration and Multicultural Affairs* (2000) 178 ALR 742. In each of those cases the Court rejected submissions that the criminalisation of homosexual behaviour would be persecutory per se. As Madgwick J indicated in *MMM* at 330, for there to be persecution there must be some serious or significant actual detriment or disadvantage or a real and reasonably proximate prospect of such detriment must be shown. And so his Honour said (at 330):

"Thus, if it were shown that a law penalising private consensual homosexual acts by loss of liberty was routinely enforced and that appreciable penalties were in fact imposed thereunder, such a process, in my view, would suffice to warrant its description as persecution within the meaning of the Convention. Similarly, if it were shown that police were turning a blind eye to private violence perpetrated on homosexuals but not on other people."

7 The applicant has sought to distinguish these cases on the basis that they did not consider directly the significance of the penal sanctions imposed by the respective statutes concerned (ie Bangladesh in *MMM*; Iran in *"F"*; and India in *Singh*). It is apparent, though, that at least in *Singh*'s case explicit regard was had to the severity of the penalties imposed. The premise of the submission made there was that the provisions criminalising homosexual behaviour were "draconian": 178 ALR at 747. More importantly, in my view, the bare focus on penalty in the applicant's submission deflects attention from the requirement emphasised by Madgwick J of persecution as an actual as opposed to a theoretical prospect. That requirement in circumstances such as the present necessarily makes the manner of enforcement of the law a matter of no little importance.

8 As in the decisions which the applicant seeks to distinguish, I do not accept that the Convention extends to persecution as a theoretical prospect. I reject the contention that the Penal Code is persecutory per se.

9 The alternate submission is premised upon at least some level of enforcement of the Penal Code in Iran with penalties being imposed in the event of conviction. What the applicant takes objection to is the Tribunal's conclusion that, with the exercise of discretion, a person could avert the prospect of having the law enforced against him. Discretion, it is said, requires a curtailment of the capacity to be a homosexual and to be able to function as a member of that social group. Of itself, it involves a recognition of persecution and a fundamental violation of human rights.

10 The concept of "discretion" in relation to engaging in homosexual activity is one that has, on occasion, been utilised in the cases more often than not in circumstances where the Tribunal decision under review, as here, has used the concept in reasoning to its conclusion: see eg *"Applicant LSLS" v Minister for Immigration and Multicultural Affairs* [2000] FCA 211; *Gholami v Minister for Immigration and Multicultural Affairs* [2001] FCA 1091 at [14]; *Khalili Vahed v Minister for Immigration and Multicultural Affairs* [2001] FCA 1404 at [15]. For my own part I would have to say I consider that emphasis upon it as a concept in determining refugee status (whether on grounds of sexual preference, religious practice, political opinion or otherwise) has the real potential to be a distraction from the actual task required to be undertaken – the more so because its meaning may take its colour from the factual context in which it is used. If being "discreet" involves showing judgment in the guidance of one's own speech and action: cf OED "discreet", 2nd ed; what is of real importance is not the fact that discretion must be exercised, but rather (i) the reasons why discretion is necessary and (ii) the practical responses discretion ordains to be made. In light of the reasons for discretion, those responses might range from all but foresaking an activity, to engaging in it in secure surroundings or in circumstances of relative privacy, to taking minor precautions to avert an apprehended danger or difficulty, etc.

11 The Tribunal in the present case correctly identified the question it was required to answer: was there was a real chance that Mr Nezhadian would face persecution for a Convention reason if he returned to Iran? It had regard to a considerable body of independent country evidence and from it reached conclusions both about the manner of enforcement of the law and about the level of tolerance of homosexual activity in Iran. It accepted that the authorities did not actively seek out homosexuals and that the risk of prosecution was minimal so long as homosexual activities were carried out discreetly. It regarded the applicant's own evidence of his previous homosexual lifestyle as being consistent with the independent evidence about the relative tolerance with which homosexuality is treated in Iran notwithstanding the impression given by the Penal Code. It was accepted that there was a need to show "discretion" and that this resulted in the imposition of limits upon his behaviour. But the Tribunal found that having to accept those limits did not amount to persecution.

12 It was in my view open to the Tribunal to act on the country evidence in the manner it did. It properly acknowledged that the manner in which the law was enforced placed limits upon the applicant's behaviour. It was to these limits that the language of discretion was addressed. The discretion required would seem to have required that the applicant avoid overt and public, or publicly provocative, homosexual activity. But having to accept those limits did not amount to persecution. To use the language of Madgwick J in *MMM* at 330 they did not involve a serious or significant actual detriment or disadvantage. The conclusion arrived at was one properly open to the Tribunal on the evidence before it. It does not disclose any error of law.

13 *Ground 2*. It was contended that the Tribunal incorrectly applied the law in that it could not both accept the country information it relied upon and conclude there was no well-founded fear of persecution.

14 This submission was based on inconsistencies between the different sources of country information about prosecution and punishment for homosexual activity referred to by the Tribunal. The submission itself is addressed to the paragraph in the reasons of the Tribunal quoted earlier in these reasons in which the Tribunal said it accepted the country information. But in that paragraph the Tribunal clearly indicated what it drew from the country information and there was nothing in that which precluded it from concluding that the applicant did not have a well-founded fear of persecution whatever the demonstrable inconsistencies in the country information as a whole.

15 *Ground 3*. The contention is that the Tribunal erred in not considering whether there was any real chance that the current practice in relation to the pursuing and punishing of homosexuals would change in the reasonably foreseeable future. The basis of this submission is that because of the severity of the law itself, the need to consider a change of practice was required.

16 The short answer to this is that the country information did not itself suggest the possibility of change; it covered an eight year period; and it related the practice to the public transgression of Islamic morals which in turn, in the law itself, required eye-witnesses to an offence. Evidence before the Tribunal indicated that four eye-witnesses were needed. Given this interconnectedness of enforcement practice, proof of an offence and the moral purposes of both, there would in my view have needed to be some reason suggested by the material before the Tribunal before it could be criticised for not engaging in the particular speculation suggested. And there was no such reason. The interconnectedness to which I have referred would reasonably suggest constancy in the practice, not change.

17 In the event I can accept none of the challenges made to the Tribunal's decision. Accordingly I will order that the application be dismissed.

I certify that the preceding seventeen (17) numbered

paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finn.

Associate:

Dated: 16 October 2001

Counsel for the Applicant:	Ms C Searle
Counsel for the Respondent:	Mr P Macliver
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	20 September 2001
Date of Judgment:	18 October 2001