Case No: C4/2005/0692

Neutral Citation Number: [2005] EWCA Civ 1600
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 20th December 2005

Before:

LORD JUSTICE MUMMERY
LORD JUSTICE LAWS
and
LORD JUSTICE WALL

- -

Between:

AMARE	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Frances Webber & Gaenor Bruce (instructed by **The Enfield Law Centre**) for the **Appellant**
Steven Kovats (instructed by **The Treasury Solicitor**) for the **Respondent**

- -

Judgment

Laws LJ:

1. This is an appeal against the decision of the Immigration Appeal Tribunal (the "IAT") notified on 20 December 2004 by which the IAT dismissed the appellant's appeal against the determination of the adjudicator promulgated on 28th January 2004. The adjudicator in his turn had dismissed the appellant's appeal against the decision of the Secretary of State refusing her claim to enter the United Kingdom on asylum and human rights grounds. Permission to appeal to this court was granted by the IAT on 19th January 2005.

2. The appellant is a citizen of Ethiopia born on 4th July 1977. Her father was an Eritrean and her mother an Ethiopian. They separated when she was four. At length she entered the United Kingdom on 13th February 1999 and claimed asylum on arrival. She said that Eritreans in Ethiopia were being exposed to arrest, imprisonment and deportation. She was to claim she had become a member of an organisation, the ELFRC, which was banned in Eritrea. The removal directions which the Secretary of State had issued had in fact specified Eritrea as the removal destination; however, at the hearing before the adjudicator the Home Office Presenting Officer undertook to amend the directions so as to specify Ethiopia. In the result the only live issue when the matter came before the adjudicator was not whether the appellant if returned might be persecuted on political or racial grounds, but whether she would be at risk by reason of the fact that she is a homosexual.

3. The adjudicator, who accepted the appellant's evidence and that of a woman with whom she had had a sexual relationship, said this (paragraph 8):

> "The appellant is also homosexual. In May 1997 she began a relationship with an Italian woman whom she met at a gymnasium. The other woman made the first advance. Their relationship was very secretive because homosexuality is illegal in Ethiopia. It is regarded as a "disease" and a sin, and is socially unacceptable. If discovered, she would have been beaten and insulted. She herself felt that her feelings and inclinations were abnormal and unnatural. She felt shame, guilt and fear. The relationship ended after a year because of the need for secrecy and the appellant's anxiety. Since coming to the United Kingdom the appellant has had another homosexual relationship. In 2000 she met Ms Delia Franco, a Swedish citizen of Eritrean origin. Their relationship ended in June 2002 when Ms Franco moved to Crete in order to take up employment there. The appellant is not currently in a relationship. Her parents did not, and do not, know about her homosexuality."

4. The adjudicator proceeded to consider the in-country information. The IAT summarised and in part quoted the adjudicator's conclusions as follows:

> "8. The Adjudicator accepted the fact that homosexuality is illegal in Ethiopia and that it is culturally unacceptable to the great majority of Ethiopians. He also accepted, quite properly in our judgment, that for the purposes of the Refugee

> Convention, the appellant is a member of a social group. He also accepted that the appellant had a genuine subjective fear of persecution on return. He, therefore, went on to consider whether that fear was well founded. In paragraph 19 of the determination, the Adjudicator said:
>
> > 'The evidence shows that homosexuality is illegal and culturally unacceptable in Ethiopia. However, the fact of the matter is that the appellant has not been persecuted in the past in that country for that reason. She managed to have a homosexual relationship there for a year without discovery or incident, apparently because the affair was conducted in secret. There is no evidence before me that the appellant would consider it essential to her identity as a homosexual woman that she adopt an overt style of homosexual behaviour in public such as would be likely to draw attention to herself from the authorities or the general public. If she were to return to Ethiopia and conduct herself there as she did before, there would be no real risk of prosecution or persecution … On the evidence before me, I conclude that this appellant's fear is not well founded'."

And so the adjudicator rejected the appellant's claims put forward both under the Refugee Convention and Article 3 of the European Convention on Human Rights ("ECHR"). There was also a claim under ECHR Article 8. As regards that, the adjudicator was satisfied that the appellant had established a private life in the United Kingdom and that her removal to Ethiopia would constitute an interference with it. However he concluded that her return would not be disproportionate given the legitimate aim of firm but fair immigration control.

5. For reasons I shall explain I shall have to return to the adjudicator's determination, but it is convenient first to turn to the IAT decision, which bore the brunt of the criticisms advanced by Ms Webber on the appellant's behalf. Before the IAT reliance was placed on ECHR Articles 3 and 8, and the Refugee Convention. The IAT's determination, though it contains what Mr Kovats for the Secretary of State accepts is an error of law, is in my view very well reasoned, balanced and sensitive. A number of authorities, to which I shall have to return, are cited and discussed.

6. After referring also to international measures such as the International Covenant on Civil and Political Rights of 1966 ("the ICCPR"), the International Covenant on Economic Social and Cultural Rights of 1966 (the "ICESCR") and the Universal Declaration of Human Rights of 1948, as well as the ECHR and the Refugee Convention, the IAT considered (paragraph 30) the Country Report prepared by CIPU in April 2004. The IAT's conclusions were then essentially expressed in three paragraphs which I shall set out:

> "34. The assessment that we are required to make is set against the background set out in the CIPU assessment. Homosexuality is illegal in Ethiopia under Article 600 of the Penal code. The practice is punishable by a term of simple imprisonment of between 10 days and three years. Practising

homosexuals would only be prosecuted if denounced, owing to the difficulty of finding evidence to satisfy the court. Although the likelihood of prosecution is small, homosexuality is not well regarded by Ethiopian society. Even the most educated in Ethiopia see the practice as perverse and contrary to reason and the teachings of the church. Concerned that homosexuality is becoming more visible in Addis Ababa local authorities have reacted to a recent spate of people coming out as gay or lesbian. It is clear that society at large regards homosexuality as deviant behaviour, probably resulting from poor parental upbringing. Nevertheless, the background material speaks of an emerging gay culture, in the sense that homosexuality is becoming more visible, see CIPU paragraph 6.169. The appellant's own statement speaks of her having a relationship lasting for about 12 months with her friend, A., a teacher in the Italian school in Addis Ababa. Whilst it is clear the relationship experienced difficulties because of the appellant's and her partner's subjective anxiety the appellant and A. went out in public where they could 'pass off' as friends. It is clear that the nature of the relationship was secretive in a way that would not have occurred had the relationship been heterosexual. Nevertheless, the appellant herself experienced no harassment or persecution, although it was the fear of it that eventually had its toll upon the relationship.

…

36. In our judgment, the appellant is able to form and develop homosexual relationships in Ethiopia without the serious possibility of being prosecuted or convicted of offences arising from her homosexuality. The appellant is not a political activist nor feels compelled to make outspoken criticism of societal discrimination against homosexuals. Her simple wish is to form relationships with other women that may develop into a sexual relationship akin to marriage. Such relationships are no more 'flamboyant' than most heterosexual relationships. To adopt Ms Webber's expressions, she will no more 'flaunt' her sexuality than do most heterosexuals. Sharing a home (or homes) with a partner in an urban setting in a relationship where each goes out to work, may raise questions about the appellant's sexuality by those around her but the background material does not establish it will result in harm to her. If such a relationship can be classified as 'being discreet', it does not seem to us to be very different from the conventional married lives of many other couples who neither flaunt their sexuality nor adopt an overtly heterosexual lifestyle. She may not have the support of her family but then she does not have that support in the United Kingdom. If she is effectively estranged from her parents, the familial pressure to marry reduces the risk of a forced marriage and the corresponding risk of marital rape.

It is far too speculative to suppose that those around her will identify her as a lesbian and demonstrate their disapproval of her activities by acts of sexual or other violence upon her. It did not happen during her last relationship. If there is an element of the secretive about her relationship, that is a result of her understandable reluctance to expose herself to societal disapproval or even humiliation. It does not seem to us that this reticence can be equated with the denial of a meaningful private life by adopting a camouflage, the failure of which would result in severe criminal penalties and almost complete marginalisation, as risked by the Iranian appellant in **Refugee Appeal No. 74665/03**. Her fundamental right to be a homosexual is not compromised. The limitations on her private life do not amount to a denial of it in any real or flagrant sense. There are no serious risks associated with the potential judicial and extra-judicial consequences of exercising this fundamental human right. It is true that she will not receive the approbation afforded her as a wife and mother in traditional Ethiopian society and this probably amounts to discrimination. It is the inevitable consequence of her sexual orientation. Such differential treatment cannot, in our judgment, overcome the high threshold necessary to amount to persecution or an Article 3 violation.

37. There remains, however, the gnawing dissatisfaction that, in Ethiopia, she cannot form and develop a homosexual relationship in the way that she would wish to do and as, indeed, she was able to do in the United Kingdom. As it happens, both the relationships that she has formed have ended, (one in Ethiopia and one in the United Kingdom), albeit for different reasons. It is difficult to speak with certainty as to the reasons for those failures. There is a reasonable likelihood her first relationship was subjected to particular strains because of societal attitudes towards homosexuality in Ethiopia. There is the real possibility that this will impact upon the nature of the relationship or relationships that she will form in due course in Ethiopia. There is the real possibility of history repeating itself and that her own or her partner's sense of insecurity will destabilise the relationship. Nevertheless, we do not consider that this differential impact in Ethiopia justifies the description of persecution or amounts to inhuman or degrading treatment. Similarly, whilst it amounts to a limitation on the enjoyment of her private life, the interference is not such as to amount to an Article 8 violation. The appellant's sexuality comes at a price but it is not so high as to require the international community to provide surrogate protection."

7. Ms Webber for the appellant articulates in her skeleton argument four issues derived from the grounds of appeal:

> "(a) Whether the impact on an individual of the fear of discovery, and of the need for secrecy in homosexual relationships, can amount to either persecution under the Refugee Convention or a flagrant violation of article 8 of ECHR so as to preclude removal from the UK;
>
> (b) Whether the Tribunal erred in holding that the impact of the need for concealment on the appellant did not amount to persecution or to a flagrant violation of Article 8;
>
> (c) Whether it erred in holding that a homosexual could lawfully be expected to modify her behaviour by concealing her sexuality;
>
> (d) Whether the Tribunal erred in its assessment of the appellant's ability to form and develop homosexual relationships in Ethiopia by (inter alia) failing to have regard to relevant information."

8. In advancing her arguments on these issues Ms Webber (as well as making certain submissions on the facts) developed a wide-ranging theme involving, to use her own words, a "human rights based approach to persecution". I shall discuss this theme, but there is a prior issue before one gets either to that or to Ms Webber's four points on the IAT's decision. Since the adjudicator's determination post-dated 9th June 2003, the IAT only possessed jurisdiction to embark on an appeal from that determination on grounds of error of law: see the Immigration and Asylum Act 2002 s.101(1) which I need not set out. If there was no arguable error of law the IAT had no power to entertain an appeal; and if that were the case, any other errors of law by the IAT would be neither here nor there. The first focus of the case, therefore, must be the adjudicator's determination.

Error of Law by the Adjudicator?

9. Ms Webber's skeleton argument did not assert an error of law by the adjudicator. Nor did the grounds of appeal. As I have said, Ms Webber's submissions were directed against the IAT. Their decision was of course the subject of the appeal; but in such a case as this the appeal is misconceived unless it includes, as a principal ground, a particularised allegation of error of law by the adjudicator coupled with a reasoned submission that the IAT failed to correct it. The same approach must apply on appeal from a re-consideration decision under the new unified system instituted by the Asylum and Immigration Act (Treatment of Claimants etc) Act 2004, where the question is whether the original appellate decision was flawed by error of law.

10. Pressed in argument with the question what error of law by the adjudicator was relied on, Ms Webber referred to paragraph 19 of his determination which I have cited as it was quoted by the IAT. I repeat this passage from paragraph 19 for convenience:

> "She managed to have a homosexual relationship there for a year without discovery or incident, apparently because the

> affair was conducted in secret. There is no evidence before me that the appellant would consider it essential to her identity as a homosexual woman that she adopt an overt style of homosexual behaviour in public such as would be likely to draw attention to herself from the authorities or the general public."

Ms Webber submits that this betrays an error of law: the adjudicator has failed to consider whether, if the appellant adopted an open homosexual lifestyle in Ethiopia, she would face persecution. The reasoning in paragraph 19 involves an illicit requirement that the appellant, if she were returned to Ethiopia, should conceal her homosexuality as the price for avoiding persecution. Mr Kovats accepts that if that were a fair reading of what the adjudicator said at paragraph 19 it would indeed amount to an error of law. He referred (albeit in the context of the assault on the IAT's decision) to *Z v Secretary of State* [2005] IAR 75, in which at paragraph 16 Buxton LJ said (after referring to earlier authority):

> "… 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. If the IAT in our case refused Mr Z asylum on the basis that he was required to avoid persecution they did not respect the jurisprudence of *Ahmed* [sc. reported at [2000] INLR 1]."

11. Mr Kovats accepts that the IAT made just such a mistake of law in stating (paragraph 23) that "[a] person can properly be expected to take *some* steps to ensure the risk he faces is reduced". This is the error I referred to at paragraph 5. However as I have indicated absent an error of law by the adjudicator such a mistake by the IAT would be neither here nor there; and Mr Kovats submits that paragraph 19 of the adjudicator's determination imposes no such illicit requirement as Ms Webber suggests. He says that the sense of the paragraph is not that the appellant *should* act secretly or discreetly in her private life so as to avoid persecution, but that as a matter of fact that is how she *would* conduct herself, having done so previously. So far as it goes, that seems to me to be right on a fair reading of the paragraph, and I do not consider that conclusion to be displaced by paragraph 8 of the determination (which I have set out), on which Ms Webber relied. But Ms Webber's bow had another string, though again the point was one principally taken against the IAT. She says that it was not in any event reasonably open to the adjudicator or the IAT to hold on the facts that the appellant on being returned to Ethiopia could live discreetly as a female homosexual "behind closed doors" – for example, sharing a flat with a partner. The reason was that Ethiopian society dictated that unmarried women lived with their parents, or at least with other family members, preferably including a male relative. All women are expected to marry; only after marriage may a woman leave the family home, and then it must be to live with her husband and his family. A woman who transgressed this cultural rule, and being unmarried lived away from her family, would be regarded, in effect, as a prostitute.

12. Ms Webber's difficulty is that there was no evidence of this before the adjudicator, and the case was never put in that way in the appeal before him. Nor, indeed, was

there any such evidence before the IAT. Application was made at the hearing in this court to admit new evidence, in the form of a witness statement by the appellant. It is to the effect that she informed her counsel of these circumstances after the hearing had been concluded. She was prompted to do so because during the hearing the IAT had suggested that she could live with a girlfriend if she was sharing a flat. Counsel asked for the hearing to be reconvened, and told the IAT of these instructions given by the appellant. As I understand it, the appellant was not recalled to the witness-box. In any event, as I have indicated, none of this surfaced before the adjudicator.

13. In those circumstances the adjudicator cannot, in my judgment, be held to have perpetrated a legal error for failure to take this point on the facts. He dealt with the case as it was put to him. It is true that there are cases in the books in which an immigration appellate tribunal has been overturned on grounds of error of law because it has failed to deal with some matter which was not, in fact, put to it. But those are exceptional instances where the matter in question was so glaring that it should have been obvious to the tribunal. There is no argument that this case falls into that category.

14. Ms Webber submitted that the adjudicator made another, free-standing, legal mistake. It arose in the context of his consideration of the question whether for the purposes of ECHR Article 8 the appellant's removal to Ethiopia would be disproportionate. At paragraph 24 he stated at one stage, "… I am limited to considering whether [the Secretary of State's] decision was outwith the reasonable range of responses to the appellant's Article 8 claim…". If the adjudicator had indeed adopted that approach, it would have been an error. It was derived from a line of authority exemplified by the Tribunal decision in *M*Croatia* [2004] INLR 327, which was however laid to rest in this court by *Huang* [2005] 3 WLR 488, decided (at a date after the adjudicator's determination in this case) in the light of *Razgar* [2004] 2 AC 368 in their Lordships' House. The court held in *Huang* that upon an issue of proportionality arising in an Article 8 case the adjudicator must arrive at his own conclusion, although "he is only entitled on Article 8 grounds to favour an appellant outside the rules where the case is truly exceptional" (paragraph 60).

15. In fact however, as Mr Kovats pointed out, the adjudicator did not decide the case on the basis of what may be called the *M*Croatia* approach. He held in paragraph 24 that because the Secretary of State had considered the Article 8 claim by reference only to the appellant's family life, not her private life, and since on his view it was "the private life aspect which [was] in issue", the question of proportionality was at large for him to decide, and he did so. His reference to the *M*Croatia* approach only arose "[i]f I am wrong in thinking that the question is open to me to decide". In fact, given *Huang*, it was not only open but obligatory for him to decide the question. It follows that there is nothing in this argument, and in fairness Ms Webber acknowledged as much in the course of Mr Kovats' submissions.

16. For those reasons there is in my judgment nothing in these particular points which were levelled against the adjudicator's determination. Subject to what follows I conclude that there was no error of law on his part. On that footing the IAT was bound to dismiss the appeal to it (indeed, it should not have given permission to appeal). But I do not think it would be right to leave the case without addressing Ms Webber's wide-ranging submissions as to the nature of the appellant's relevant legal rights. As I have indicated the focus of her theme, in her own words, was a "human

rights based approach to persecution". I address this in part out of respect for the argument which was scholarly and well-researched, drawing attention to high authority in other jurisdictions. In addition the approach she has supported may well be sought to be advanced in other cases, and for reasons I shall give I am of the view that it has to be treated with very considerable care. Accordingly it seems to me at least to be opportune to offer some observations about these matters now. It may be thought that anything we say on the subject will merely be *obiter*. In the particular circumstances I would not be deterred by that. But in any event I apprehend that Ms Webber would submit that not only the IAT, but also the adjudicator (despite the difficulties, formidable in my view, regarding lack of evidence, and the way the case was put) ought to have proceeded on the footing that these rights possess the character she urges upon us; and that had that been done, a different result might or would have been arrived at. Moreover she had a further submission which is of some relevance here, though I am bound to say it seemed to me to be advanced as something of a footnote. It was to the effect that in dealing with the Article 8 claim the adjudicator failed to consider the injury which the appellant's being returned to Ethiopia would inflict on her private life, in terms (as Ms Webber put it) of her "psychological integrity and ability to develop relationships". This submission, though concerned with Article 8 rather than the asylum claim, may be said to engage Ms Webber's wider arguments or at least to be related to them.

"A Human Rights Based Approach to Persecution"

17. It is convenient to set out the well known definition of "refugee" contained in Article 1A(2) of the 1951 Refugee Convention:

> "… the term 'refugee' shall apply to any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of the country…"

Ms Webber developed her argument discursively. I will express it in my own words. (1) Persecution, for the purposes of the Refugee Convention, has to be understood as an affront to internationally accepted human rights norms, and in particular (at least in the context of the present case) the core values of privacy, equality and dignity. This marches with the definition of persecution offered by Professor Hathaway of the Osgoode Hall Law School in his well known work "The Law of Refugee Status" (pp.104-105): "the sustained or systemic violation of basic human rights demonstrative of a failure of state protection". (2) On that footing, discrimination on grounds of gender is a conspicuous source, or instance, of persecution. Such discrimination may be "structural", that is, endemic or institutionalised in a particular society, and is so in Ethiopia; and the combination of discrimination against women and discrimination against homosexuals is an especially poisonous mix liable to give rise to the risk of persecution of persons in the appellant's position. (3) The IAT and the adjudicator failed to approach the case on that legal basis. (4) In consequence they gravely underestimated the impact on the appellant of the predicament she would face as a female homosexual if she were returned to Ethiopia.

18. As I have indicated the IAT referred to a number of international human rights texts, and these foundation instruments are the backdrop to Ms Webber's submissions. She relied on a wide range of authority. I will describe the cases of particular significance.

19. The proposition that the criminalisation of homosexual conduct is offensive to basic human rights norms is, Ms Webber submits, well supported by the decision of the Constitutional Court of South Africa in *National Coalition* CCT 11/98, [1999] ICHRL 161. The question was whether the common law offence of sodomy was repugnant to constitutional provisions which prohibited discrimination on grounds of sexual orientation. The IAT in the present case cited passages from the judgment of Ackermann J at paragraphs 28 and 32 which with respect I need not repeat. They also cite this passage from Sachs J (paragraphs 108-109: I include some words not set out by the IAT):

> "Outside of regulatory control, conduct that deviates from some publicly established norm is usually only punishable when it is violent, dishonest, treacherous or in some other way disturbing of the public peace or provocative of injury. In the case of male homosexuality however, the perceived deviance is punished simply because it is deviant. It is repressed for its perceived symbolism rather than because of its proven harm… The effect is that all homosexual desire is tainted, and the whole gay and lesbian community is marked with deviance and perversity. When everything associated with homosexuality is treated as bent, queer, repugnant or comical, the equality interest is directly engaged… The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginalised and turned in on itself."

20. The IAT referred also (paragraph 15) to the decision of the European Court of Human Rights in *Dudgeon v UK* [1982] 4 EHRR 149, in which it was held that laws of Northern Ireland which criminalised acts of sodomy between consenting adult males in private were repugnant to ECHR Article 8; the domestic law was changed in consequence. Neither *National Coalition* nor *Dudgeon* was an asylum case. But one of Ms Webber's other cases was *Refugee Appeal No 74665/03*, [2005] INLR 68, a decision of the New Zealand Refugee Status Appeals Authority. The facts were very striking. The appellant was an Iranian national and a homosexual. The evidence was that the Iranian Penal Code prescribed the death penalty for homosexual acts, and from time to time the death penalty was exacted. So was the "lesser" penalty of flogging. The headnote to the INLR report contains this summary (68-69):

> "To avoid criminal penalties, extra-judicial beatings, societal disapproval, public humiliation, discrimination and unequal treatment, most homosexuals in Iran have to be 'discreet' and hide their homosexuality. They are thus denied a meaningful 'private' life. The appellant's wish to escape this situation was not an activity at the margin of the protected right to privacy. There was a real risk that if the appellant were to return to Iran, he would not be able to live openly as a homosexual and would have to choose between denying his sexual orientation, or

> facing the risk of severe judicial or extra-judicial punishment. Accordingly, he was at risk of persecution by reason of his membership of a particular social group."

The Authority at paragraph 57 cite Lord Hoffmann's well known statement in *Ex p. Shah* [1999] 2 AC 629, 650-651:

> "In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention. It is concerned not with all cases of persecution, even if they involve denials of human rights, but with persecution which is based on discrimination. And in the context of a human rights instrument, discrimination means making distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being to equal treatment and respect."

The Authority's reasoning proceeds on the footing that human rights norms underpin the scope of protection afforded by the Refugee Convention. This is evident, first, from paragraph 66, where the Authority state:

> "Professor Hathaway points out that reliance on core norms of international human rights law… to define forms of 'serious harm' within the scope of 'being persecuted' is not only compelled as a matter of law, but makes good practical sense for at least three reasons…"

I will cite from the first and third of the three reasons:

> "(i) One must look at *how states themselves* have defined unacceptable infringements of human dignity if we want to know which harms they are truly committed to defining as impermissible. Human rights law is precisely the means by which states have undertaken that task.
>
> …
>
> (iii) International human rights law provides refugee law judges with an automatic means – within the framework of legal positivism and continuing accountability – to contextualise and update standards in order to take new problems into account. Because international human rights law is constantly being authoritatively interpreted…, there is a wealth of wisdom upon which refugee decision-makers can draw to keep the Convention refugee definition alive in changing circumstances. This flexibility of international human rights law makes it possible to address new threats to human dignity through refugee law, but to do so without asserting either subjective or legally ungrounded perceptions of 'what's right, and what's wrong'."

Then at paragraph 82 the Authority state:

> "If the right is not a core human right, the 'being persecuted' standard of the Refugee Convention is simply not engaged. If, however, the right in question is a *fundamental* human right, the next stage of the inquiry is to determine the metes and bounds of that right. If the proposed action in the country of origin falls squarely within the ambit of that right, the failure of the state of origin to protect the exercise of that right, coupled with the infliction of serious harm, should lead to the conclusion that the refugee claimant has established a risk of 'being persecuted'. In these circumstances there is no duty to avoid the anticipated harm by not exercising the right, or by being 'discreet' or 'reasonable' as to its exercise."

In later paragraphs the Authority refer to *Dudgeon* (paragraph 105) and cite copiously from *National Coalition* (paragraphs 106-110).

21. In *S* [2003] HCA 71, (2003) 203 ALR 112, [2004] INLR 233 the High Court of Australia, sitting seven justices, had to consider (in the context of a refugee claim) questions of concealment or discretion in relation to sexual conduct. At paragraphs 40 and 43 (in passages also cited by the IAT in the present case) McHugh and Kirby JJ, speaking for the majority, said this:

> "40. 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 purposes of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality…
>
> 43. 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 the person acts to avoid the harmful conduct, he or she will suffer harm."

22. Lastly I should refer to two cases decided here. *Jain* [2000] INLR 71 concerned a homosexual man from India who feared that he would not be able to live openly in a homosexual relationship if he were returned there. His appeal to the adjudicator against the Secretary of State's refusal of his asylum claim was dismissed on the ground that homosexuals were not a "particular social group". The IAT did not

decide that question, but dismissed his further appeal on the ground that in any event he did not have a well-founded fear of persecution. Before the Court of Appeal the Secretary of State accepted, in light of the House of Lords' decision in *Shah and Islam* [1999] INLR 144, [1999] 2 WLR 1015, that the appellant was a member of a particular social group, namely practising homosexuals. The Court of Appeal dismissed the appeal on the merits, holding that on the facts found by the IAT they were entitled to conclude that there was no reasonable likelihood of persecution. However in my opinion certain observations made by Schiemann LJ in the course of his judgment provide, if I may respectfully say so, illuminating guidance as to how in this jurisdiction the relation between human rights norms and the law of refugee status is to be understood (77C-78C):

> "The [Refugee] Convention is a humanitarian measure of enormous value. It is a living instrument whose meaning is flexible. What might not be regarded as persecution at one time may come to be so regarded at another. Inevitably views change with time, and views will differ between States and within States. It is clearly desirable that the international community moves with a certain degree of consensus in relation to what it regards as persecution, for otherwise burdens will be imposed upon those States who are most liberal in their interpretations and whose social conditions are most attractive. If intolerable burdens are imposed there is a risk that such States will resile from their observance of the Convention standards, which would be a disaster.
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> As it seems to me there is now a broad international consensus that everyone has a right of respect for his private life. A person's private life includes his sexual life, which thus deserves respect. Of course no person has a right to engage in interpersonal sexual activity. His right in this field is primarily not to be interfered with by the State in relation to what he does in private at home, and to an effort by the State to protect him from interference by others. That is the core right. There are permissible grounds for state interference with some persons' sexual life, eg those who most easily express their sexual desires in sexual activity with small children, or those who wish to engage in sexual activities in the unwilling presence of others. However, the position has now been reached that criminalisation of homosexual activity between consenting adults in private is not regarded by the international community at large as acceptable. If a person wishes engage in such activity and lives in a State which enforces a criminal law prohibiting such activity, he may be able to bring himself within the definition of a refugee. That is one end of the continuum.
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> The other end of the continuum is the person who lives in a State in which such activity is not subjected to any degree of

> social disapprobation and he is as free to engage in it as he is to breathe.
>
> In most States, however, the position is somewhere between those two extremes. Those who wish to engage in homosexual activity are subjected to various pressures to discourage them from so doing. Some pressures may come from the State: eg State-subsidised advertising or teaching to discourage them from their lifestyle. Other pressures may come from other members of the community, without those members being subjected to effective sanctions by the State to discourage them. Some pressures are there all the time. Others are merely spasmodic. An occasional interference with the exercise of a human right is not necessarily a persecution. The problem which increasingly faces decision-makers is when to ascribe the word 'persecution' to those pressures on the continuum. In this context Mr Shaw, who appeared for the Secretary of State, reminded us of the references in *Shah and Islam* to the concept of serious harm and the comment of Staughton LJ in *Sandralingham and Ravichandran v Secretary of State for the Home Department* [1996] Imm AR 97, 114, where the Lord Justice stated:
>
> > 'Persecution must at least be persistent and serious ill-treatment without just cause…'."

23. The other case is *Ex p. Hoxha* [2005] UKHL 19 in their Lordships' House, decided after the IAT determination in the present appeal. In large measure *Hoxha* was concerned with Article 1C(5) of the Refugee Convention which provides for cessation of the Convention protection in certain circumstances. But Ms Webber relies on passages in the opinion of Baroness Hale as showing the potency of discrimination against women as an engine of persecution. First at paragraph 32:

> "If sexual violence is used in this way [sc. as a means of political oppression], the consequences, not only for the woman herself but also for her family, may be long-lasting and profound. This is particularly so if she comes from a community which adds to the earlier suffering she has endured the pain, hardship and indignity of rejection and ostracism from her own people. There are many cultures in which a woman suffers almost as much from the attitudes of those around her to the degradation she has suffered as she did from the original assault. The UNHCR Guidelines recognise that punishment for transgression of unacceptable social norms imposed upon women is capable of amounting to persecution."

At paragraph 35 Lady Hale cited a passage from the 2002 UNHCR *Guidelines on Gender-related Persecution*, which Ms Webber prays in aid:

> "While it is generally agreed that 'mere' discrimination may not, in the normal course, amount to persecution in and of

itself, a pattern of discrimination or less favourable treatment could, on cumulative grounds, amount to persecution and warrant international protection. It would, for instance, amount to persecution if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned…"

Then at paragraph 36 Lady Hale says this:

"To suffer the insult and indignity of being regarded by one's own community… as 'dirty like contaminated' because one has suffered the gross ill-treatment of a particularly brutal and dehumanising rape directed against that very community, is the sort of cumulative denial of human dignity which to my mind is quite capable of amounting to persecution. Of course the treatment feared has to be sufficiently severe, but the severity of its impact upon the individual is increased by the effects of the past persecution. The victim is punished again and again for something which was not only not her fault, but was deliberately persecutory of her, her family and her community."

24. Ms Webber referred to other materials testifying to the inequalities and forms of discrimination to which women have been and are subjected, and also to the "Asylum Gender Guidelines" published in November 2000 for the assistance of the Immigration Appellate Authority in this jurisdiction. This latter document contains these statements:

"1.9 Even where gender is not a central issue in an asylum

claim, giving consideration to gender-related aspects of a case will assist in fully understanding and determining the whole of an asylum claim.

2A.7 Discrimination (and discriminatory treatment) may:

- Amount to 'serious harm' within the meaning of the Refugee Convention;

- Be the/a factor which turns 'harm' into 'serious harm' and a breach of human rights (for example – discriminatory access to police protection or education) and

- Be a factor in failure of state protection in the Refugee Convention (thus the State may protect some groups in society and not others)."

25. Founding on all these materials, Ms Webber developed her argument which I have sought to encapsulate in the four propositions set out above at paragraph 17. The first two express the substance of her submission on the law.

26. I have no difficulty with a great deal of the case put forward by Ms Webber. Thus Lord Hoffmann's observation that "the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the Convention" (*Ex p. Shah* [1999] 2 AC 629, 650-651) is of a piece with the proposition that refugee law aspires to protect values of basic human rights, which are affronted by practices of discrimination perpetrated or tolerated by the State. Discrimination against women and against homosexuals, and especially a mix of the two, may depending on the facts be particularly repugnant to these values. I would not with respect wish to differ, even were I free to do so, from the statements of Baroness Hale at paragraphs 32 and 36 of *Hoxha* which I have set out.

27. But the alignment of the State obligations imposed by the Refugee Convention with the protection of basic or fundamental human rights is subject to important qualifications. These are well known, and are no less important than the alignment itself. First is the fact that the Convention only requires protection to be afforded in case of particular violations of human rights norms: those arising "for reasons of race, religion, nationality, membership of a particular social group or political opinion". Secondly the violation, or rather prospective or apprehended violation, must attain a substantial level of seriousness if it is to amount to persecution. This latter proposition is vouchsafed by a number of statements in the texts upon which Ms Webber herself relies. As I have shown Schiemann LJ in *Jain* drew attention to references in *Shah and Islam* to the concept of serious harm, and to the comment of Staughton LJ in *Sandralingham and Ravichandran* that "[p]ersecution must at least be persistent and serious ill-treatment without just cause…". Lady Hale in *Hoxha* acknowledged at paragraph 36 that "the treatment feared has to be sufficiently severe". In *S* in the High Court of Australia McHugh and Kirby J stated that "[w]hatever from 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."

28. These two limitations or, as I would prefer to call them, conditions of the scope of the Refugee Convention are in no sense ancillary or incidental. They are the very focus and expression of the distinct obligation of international protection accepted by the contracting States. Certainly, there is much learning to show that the Convention is to be treated over time as a living instrument and construed as such (see for example the passage from Schiemann LJ's judgment in *Jain* which I have cited). But this is no licence for the courts, in the cause of protecting or enlarging human rights, in effect to impose on the State obligations which in truth they have not undertaken. In my opinion there is an important difference between the courts' approach to a measure which does no more nor less than establish rights and duties effective in, as it were, our unilateral domestic law and their approach to a measure consisting in an international agreement. In the first case, the courts' duty is to construe and apply the measure according to English canons of construction. In the second case, the courts must keep a weather eye on the fact that they are dealing with the product of negotiation between contracting States, which is likely to represent the reach of what the contracting States were able to agree. In *Hoxha* at paragraph 85 Lord Brown of Eaton-under-Heywood cited the observations of Lord Bingham of Cornhill made both in *Brown v Stott* [2003] 1 AC 681, 703 and in *European Roma Rights Centre* [2004] UKHL 55, [2005] 2 AC 1, paragraph 18:

> "'[I]t is generally to be assumed that the parties have included the terms which they wished to include and on which they were able to agree, omitting other terms which they did not wish to include or on which they were not able to agree', and caution is needed 'if the risk is to be averted that the contracting parties may, by judicial interpretation, become bound by obligations which they did not expressly accept and might not have been willing to accept'."

Mr Kovats also cited the observations of Lord Hope of Craighead in *Hoxha* at paragraphs 8 – 9, which with great respect I need not set out.

29. An instance of the former class of case is the Human Rights Act 1998. It gives municipal effect to the principal provisions of the ECHR, and of course the ECHR is an international treaty. But once it is enacted as part of domestic law, the courts' concern is to construe and apply its provisions *as* English law (qualified by the obligation imposed by s.2 of the Act to take account of the Strasbourg jurisprudence). There is no analogue to the distinct necessity, arising in the second class of case, to mark and to respect the edge of a negotiated international consensus.

30. For these reasons authority concerned with the administration of what I have called unilateral domestic law, such as *National Coalition* and *Dudgeon*, is of limited assistance in considering the application of the Refugee Convention. And I would, with great respect, express some reservation as to the reasoning of the New Zealand Refugee Status Appeals Authority in *Refugee Appeal No 74665/03*, in particular this observation at paragraph 66, which I have already cited:

> "Professor Hathaway points out that reliance on core norms of international human rights law… to define forms of 'serious harm' within the scope of 'being persecuted' is not only compelled as a matter of law, but makes good practical sense …"

This, and some of what follows in the Authority's decision, seems to me to underscore the alignment between the State obligations imposed by the Refugee Convention and the protection of basic or fundamental human rights so heavily as to underplay the importance of those defining characteristics of the Convention which are represented by the two conditions which I have described; though I should acknowledge the Authority's reference to "the infliction of serious harm" at paragraph 82.

31. More generally, I have to say I think that Professor Hathaway's definition of persecution – and it is expressly offered as a definition – has to be treated with a degree of caution. Its terms are "the sustained or systemic violation of basic human rights demonstrative of a failure of state protection". These words give no very clear place to the requirement of gravity or seriousness, and they contain no recognition of the condition that protection is only to be afforded under the Convention in case of violations arising for the stated reasons. I would also draw another conclusion, which recalls the fourth proposition I have attributed to Ms Webber: that the appellate authorities gravely underestimated the impact on the appellant of the predicament she would face as a female homosexual if she were returned to Ethiopia. I do not think

that that is so; but there is a deeper point. If Ms Webber's argument for a human rights based approach to persecution were to be accepted without qualification as she advanced it, there would in my judgment be a risk that tribunals might make what could be described as the opposite mistake. The Convention is not there to safeguard or protect potentially affected persons from having to live in regimes where pluralist liberal values are less respected, even much less respected, than they are here. It is there to secure international protection to the extent agreed by the contracting States. While, as I certainly accept, the sense to be accorded to persecution might shift and stretch as the international consensus develops, the Convention's guarantees remain limited by the two conditions I have described.

32. I would not wish it to be thought that these conclusions in some way run against the grain of human rights norms and aspirations. I hope they go in the opposite direction. There is, if I may say so, much wisdom in Schiemann LJ's observation in *Jain* (which I have set out) that absent international consensus burdens will be imposed upon those States which are most liberal in their interpretations and whose social conditions are most attractive, and that would carry great risks. Likewise, in my judgment, if courts proceed to apply the Convention without marked respect for the edge or reach of what the contracting States agreed.

33. For all these reasons Ms Webber's wider argument cannot avail her. It exposes no error of law by the adjudicator (nor, for that matter, by the IAT).

34. I would dismiss the appeal.

Wall LJ:

35. I agree.

Mummery LJ:

36. I also agree.