R v Secretary of State for the Home Department ex parte Zia Mehmet Binbasi

Queen's Bench Division

[1989] Imm AR 595

Hearing Date: 25 July 1989

25 July 1989

Index Terms:

Political asylum -- homosexual -- overstayer subject to deportation -- claimed asylum as member of a social group -- refused by Secretary of State -- whether in the circumstances obtaining in Cyprus the decision was reasonable -- whether the Secretary of State should have exercised his discretion outside the rules, in favour of the appellant in the light of alleged breaches of the European Convention on Human Rights, in Cyprus. HC 169 paras 153, 165: United Nations Conventions relating to the status of Refugees 1951 (Protocol 1967) a IA(2): United Nations Handbook on procedures and criteria for determining refugee status 1979, para 77: European Convention on Human Rights a 8.

Held:

The applicant was an overstayer against whom the Secretary of State had decided to initiate deporation proceedings. He claimed political asylum: he was a practising homosexual: he claimed refugee status as a member of a social group against which there was discrimination in Cyprus. The Secretary of State had expressed the view that homosexuals per se could not constitute a social group within the meaning of article IA (2) of the Convention. Counsel challenged that, asserting that in some jurisdictions a wide interpretation of the relevant article had been adopted which would include homosexuals: for the Secretary of State it was argued that a true interpretation of the Convention would exclude homosexuals unless they were overt homosexuals: that the Convention did not guarantee to an individual the full range of freedoms he would enjoy in the United Kingdom. A judgment had to be made as to whether the interference with freedom was sufficiently serious to merit asylum. Following Mendis a person could not claim asylum on the basis of fear of persecution arising from some future activity in which he could refrain from taking part.
Counsel for the appellant also argued that Cyprus was in breach of the European Convention on Human Rights to which it was a signatory because it did not protect the rights of consenting adult homosexuals: the Turkish Republic of Northern Cyprus was not a signatory to the Convention. Following Soering a person should not be returned to a State where Convention obligations were being breached in a way which would adversely affect the individual. For the Secretary of State it was contended that the hypothetical circumstances which might arise in relation to that submission did not render the Secretary of State's refusal to exercise his extra-statutory discretion in favour of the appellant unreasonable.
Held:
1. The Secretary of State's refusal to grant the applicant asylum was not unreasonable.
2. The court would be slow to interfere with the exercise of the Secretary of State's extra-statutory discretion: on the facts, it had not been exercised unreasonably.

Cases referred to in the Judgment:

Atibo v Immigration Officer, Heathrow [1978] Imm AR 93. Dudgeon v United Kingdom [1981] 4 EHRR 149.
Secretary of State for the Home Department v Otchere [1988] Imm AR 21. Secretary of State for the Home Department v Sivakumaran and ors [1988] AC 958: [1988] Imm AR 147.

Chandawadra v Immigration Appeal Tribunal [1988] Imm AR 161. Moezzi v Secretary of State for the Home Department (unreported, CA, 6 October 1988).
Norris v Republic of Ireland (ECHR) (6/1987/129/180) The Times 31 October 1988. Mendis v Secretary of State for the Home Department [1989] Imm AR 6. Soering v United Kingdom (ECHR) (1/1989/161/217) The Times 8 July 1989.

Counsel:

D Pratt for the applicant; D Pannick for the respondent
PANEL: Kennedy J

Judgment One:

KENNEDY J: This is an application for judicial review of a decision of the Home Secretary not to grant asylum, which decision was communicated to the applicant, a Turkish Cypriot, by a letter to his solicitors dated 19 July 1988. The letter also indicates that the existing deportation order must stand and declines to grant the applicant leave to remain. The applicant claimed asylum on the basis that he had a well-founded fear that if returned to Cyprus, he would be persecuted because he is a practising homosexual.
In dealing with the application for asylum, the Home Secretary notes the opinion expressed by the applicant's own legal adviser, that in Cyprus there is no persecution of any person for being a homosexual, and then expresses two opinions of his own, namely:
1. that an arrest for a homosexual offence punishable under Cypriot law would not amount to persecution and
2. that homosexuals cannot be considered as a particular social group under the terms of the 1951 United Nations Convention on the Status of Refugees.
It is those two opinions which are now being challenged before me. On behalf of the applicant it is contended that if he had properly directed himself as to the law and as to the evidence which was before him, the Home Secretary could not have subscribed to either of them.
Even when asylum is not granted, the Home Secretary has an extra-statutory perogative discretion to allow an applicant asylum to remain in the United Kingdom. For present purposes, it is accepted that the discretion can be judicially reviewed. The applicant now contends that in declining to exercise his discretion, the Home Secretary failed to have regard to a material consideration, namely that in Cyprus conditions prevail which amount to a breach of article 8 of the European Convention on Human Rights, to which both Cyprus and the United Kingdom are parties.
The issues being those which I have just outlined, it is unnecessary for me to say much about the applicant's history to date. Suffice to say that he came to the United Kingdom in 1977, at the age of 19, and overstayed when his leave to remain as a student expired in 1979. In 1985 he met and began to share accommodation with a male partner, and in 1986 they had contracted to purchase a flat before he was served with a deportation order.
Representations were then made to the Home Secretary and, in an initial response dated 18 February 1988, it was said on behalf of the Secretary of State:
". . . that there are no laws against homosexuals in Cyprus and no active persecution of homosexuals there."
The applicant then instructed fresh solicitors who obtained additional information, including information as to Cypriot law. On 9 May 1988, those solicitors invited the Secretary of State to reconsider his decision. That led to the letter of 19 July 1988, which contains the decisions which are now being challenged in these proceedings.
It is clear from the enquiries which have been made by the applicant's present solicitors that homosexual acts, even when committed consensually between adults in private, are still contrary to the criminal law in Cyprus, and in the Turkish Republic of Northern Cyprus there have been a few prosecutions each year for what are described as "homosexual cases",

although many have been discontinued. Since 1982, three offenders have received sentences of imprisonment, the maximum sentence being one of four months' imprisonment.
According to Mr Hasam Balman, the Cypriot lawyer who has been consulted, homosexuality is still a great social stigma in Cyprus and, if the applicant wishes to live there with a male friend, he is going to find life very difficult. Mr Balman knows of no male couples living openly together under the same roof. He points out that the Turkish Republic of Northern Cyprus is a very small place -- it has a population of about 180,000 -- so that if the applicant were to carry on his homosexual activities, it would soon be known that he was doing so. He would be shunned, made fun of and ridiculed but, apart from risking prosecution, he would not be victimised in any other way. As Mr Balman makes clear, in the sentence quoted by the Secretary of State in the letter of 19 July 1988, no one is persecuted in Cyprus simply for being homosexual.
Having set out the material facts, I can return to the issues in dispute and, like counsel, I shall start with the decision in relation to the application for asylum and the applicant's attempts to pray in aid the 1951 Convention. Article 1A(2) of that Convention (which is reflected in paragraphs 153 and 165 of the Immigration Rules HC 169) states that 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 that country . .
."
For the applicant, Mr Pratt contends that the Secretary of State misdirected himself when he expressed the view that homosexuals cannot be considered for the purposes of article 1A(2) as a particular social group. He invites my attention to the 1979 Handbook on procedures and criteria for determining refugee status produced by the Office of the United Nations High Commission for Refugees, which states in paragraph 77:
"A 'particular social group' normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, ie race, religion or nationality."
In Secretary of State for the Home Department v Otchere [1988] Imm AR 21, the Immigration Appeal Tribunal was concerned with a man who had been a member of a military unit in Ghana which had enjoyed a high public profile during an earlier regime. In the course of argument, the Tribunal was told that the words "a particular social group" had in some jurisdictions been widely construed. For example, a definition used by the Board of Immigration Appeals in the United States was:
"a social group of persons all of whom share a common immutable characteristic. The shared characteristic might be an innate one such as sex, colour, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the characteristic that defines the group, it must be one that the members of the group cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."
Mr Pratt submits that homosexuals fit easily within that helpful definition as emphasized by the applicant in paragraph 9 of his affidavit, part of which reads:
"We are a social group; we have certain sexual and physical characteristics which we cannot change, we live together in a sexual relationship, unlike other men, we share our finances and domestic arrangements and plan our futures like married couples, we congregate socially at places where other homosexuals are to be found, we recognise and find comfort in socialising with each other, and we are identified by society at large as a group, to which epithets can be attached by way of identification, some of which, such as Gay, are neutral, others such as Queer or Poof are derogatory."
For the respondents, Mr Pannick submits that when the words "particular social group" are considered in their context in article 1A(2), it is possible to see more clearly what they mean. Homosexuals, he submits, are a group, but their only common characteristic is a sexual preference which, if it is revealed at all, is normally only revealed in private. A group cannot be a

social group if its only common characteristic is so concealed. Mr Pannick concedes that this narrower approach may exclude some of those who are victims of oppression in their own countries but, he submits, that any wider approach would render the whole definition largely unnecessary, because if the draughtsmen had intended anyone who had a well-founded fear of being persecuted to be able to claim the status of a refugee, they could easily have said so. Mr Pannick points out that the Handbook to which I have been referred is, as is apparent from the preface, only "a practical guide and not a treatise on refugee law", so its value as an aid to construction of the Convention is limited. In ex parte Sivakumaran [1988] AC 958, Lord Goff rejected the view expressed in the Handbook in relation to another point of construction. Although it seems clear that in the United States a body equivalent to an Immigration Appeal Tribunal has adopted a wide interpretation of the words "social group", there is, submits Mr Pannick, no reason why I should do the same.

For the purposes of the present case, it seems to me that it was unnecessary for the Secretary of State to decide whether homosexuals can be considered as a particular social group, because it is clear that in Cyprus there is no discrimination against homosexuals who are not active. So for there to be a well-founded fear of being persecuted, the social group would have to be restricted to active homosexuals.

That is really the second submission made by Mr Pannick, for he points out that it is not a necessary consequence of being homosexual that the individual performs homosexual acts. Some weight must be given to the word "membership" which is used in article 1 of the Convention. In the case of Atibo [1978] Imm AR 93, the Immigration Appeal Tribunal had to consider a claim for asylum by a citizen of Mozambique who, if returned there, would have been allowed to practise his religion but not to proselytize. His claim failed, showing, submits Mr Pannick, that a man cannot demand asylum under the Convention just because if he is returned to his country of origin he will not be able to enjoy the full range of freedoms he would enjoy in the United Kingdom. In reality, a judgment has to be made as to whether the interference with freedom is sufficiently serious to merit asylum.

In 1951 those who drafted the Convention were not seeking to guarantee all human rights. They had a more modest aim, namely to protect those who are genuinely fearful that if they returned to their homeland they will be persecuted simply because of who they are or what they have done. As was pointed out in the Atibo case, persecution is a strong word. In the case of Mendis [1989] Imm AR 6, it was contended for the Secretary of State that a man cannot claim to be a refugee on the basis of fear of persecution arising from some future activity in which he can refrain from taking part. Neill LJ said at page 18:

". . . I propose to leave for decision on another occasion the question whether there may not be cases where a man of settled political conviction may be able to claim refugee status because it would be quite unrealistic to expect him, if he were returned to a foreign country, to refrain from expressing his political views for ever."

Balcombe LJ, at page 22, was prepared to go further. He said:

"In my judgment a person is not at risk of being persecuted for his political opinions, if no events which would attract such persecution have yet taken place. If this were so, a person could become a refugee as a matter of his own choice; all he would have to do would be to establish the following two propositions:

(1) If, when I return to my native country, I speak out, I will be persecuted;

(2) I will speak out.

This is tantamount to saying that a person who says he proposes to invite persecution is entitled to claim refugee status. That I do not accept."

Staughton LJ was not prepared to go quite as far as Balcombe LJ. He said at page 22:

"If a person has such strong convictions, whether on religious or other grounds, that he will inevitably speak out against the regime in his country of origin, and will inevitably suffer persecution in consequence, it may be that he should properly be treated as a refugee. In such a case it could be questioned whether his future conduct would be voluntary in any real sense."

Even if the approach of Staughton LJ is adopted, Mr Pannick submits, and I accept, that on the facts of the present case the Secretary of State was entitled to conclude that if the applicant is returned to the Turkish Republic of Northern Cyprus it is not inevitable that he will openly behave

in a homosexual manner, nor is it inevitable that if he does so he will inevitably suffer, as a result, anything which would properly be described as persecution. If he does openly behave in a homosexual manner, he may be discriminated against, but the Secretary of State was entitled to take the view that the degree of discrimination would not be such as to have the quality of persecution (see Moezzi v Secretary of State for the Home Department, Court of Appeal 6 October 1988, unreported). (Moezzi v Secretary of State of the Home Department concerned an Iranian national who had been refused political asylum in September 1985. An application of judicial review had been dismissed by McCullough J. While in the United Kingdom the appellant had married an Indian national. Sir Roualeyn Cumming-Bruce delivered the leading judgment with which Fox and Lloyd LJJ agreed. The relevant passage (page 8 of the transcript) reads:
"A further point has been made, arising from the situation of the appellant's Indian wife. There was material pointing to the fact that the marriage would not be recognised in Iran because she is Hindu and is not prepared to abandon her religion and accept the tenets of the Muslim faith. Therefore, if the marriage were not recognised, their child would be treated as being born out of wedlock.
The Secretary of State was entitled, when considering that facet of the family situation, to consider that there might well be a risk that the marriage would not be recognised and in my view it was open to the Secretary of State, if so minded, to regard that as a risk of discrimination as compared with a risk of persecution. If the Minister of State took the view that the degree of discrimination was likely to be such as not to have the quality of persecution, he was in my opinion entitled so to find.")
Of course, on the evidence, if the applicant were to indulge in certain types of homosexual activity he would risk prosecution, but the Secretary of State was, submits Mr Pannick, entitled to recognize that the risk of prosecution would be avoided by self-restraint, that statistically the risk does not seem to be very great, and that even where there is a prosecution, the consequences, relatively speaking, are not particularly dire.
For the applicant, Mr Pratt has sought to deal with this aspect of the case by contending that if the applicant is returned to Northern Cyprus, he will inevitably so behave as to attract attention, and that such attention, carrying with it in the final resort the risk of a prosecution resulting in a short sentence of imprisonment, must be regarded as persecution. In my judgment this decision cannot be struck down as unreasonable because the approach advocated by Mr Pratt did not commend itself to the Secretary of State.
Turning now to the refusal of the Secretary of State to exercise his perogative discretion, Mr Pannick submits, and I accept, that although the refusal to exercise that discretion in favour of the applicant can be judicially reviewed, this court will be slow to interfere and must bear in mind that exhypothesi the applicant has no right to remain under the immigration laws or by virtue of an established claim to asylum.
Mr Pratt's submission is quite simple. He submits that any State which has laws which do not even protect from prosecution men who indulge in consensual homosexual acts in private contravenes article 8 of the European Convention on Human Rights which, insofar as it is material, provides that:
"1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of his right except such as is in accordance with the law and is necessary in a democratic society . . . for the protection of health or morals."
To support this part of his submission, Mr Pratt relies on two decisions of the European Court of Human Rights, namely Dudgeon v United Kingdom [1981] 4 EHRR 149 and Norris v Republic of Ireland, The Times, 31 October 1988.
Mr Pratt then points out that both the United Kingdom and Cyprus subscribe to the European Convention, and he submits that a State cannot, or at least as a matter of discretion should not, send a citizen to a State where, to the knowledge of the returning State, Convention obligations are being breached in a way which will adversely affect the citizen being returned (see Soering v United Kingdom, The Times, 8 July 1989). In the present case, Mr Pratt submits that there is an

added difficulty in that from the Turkish Republic of Northern Cyprus it may not be possible to petition the European Court.
For the respondent, Mr Pannick submits that in the context of immigration, article 8 has no application and there was no obligation on the Secretary of State to take it into account (see Chandawadra v Immigration Appeal Tribunal [1988] Imm AR 161). There was not even an ambiguous statutory power which the Convention might assist the Secretary of State to construe.
Even more significantly, to my mind, Mr Pannick submits that in deciding whether or not to do what he would normally do once he concluded that the applicant was not a refugee, the Secretary of State cannot be criticized for failing to act upon the possibility, as yet untested before the European Court, that Northern Cyprus may be in breach of an article of the Convention by continuing to regard as criminal certain types of conduct in which the applicant, if he returned to Northern Cyprus, might or might not choose to indulge. In other words, Mr Pannick submits, and I accept, that there is here nothing to show that the manner in which the Secretary of State exercised his discretion was so unreasonable that this court ought to interfere. Accordingly this application fails and is dismissed.

DISPOSITION:

Application dismissed

SOLICITORS:

Bindman and Partners London NW1; Treasury Solicitor