**Neutral Citation Number: [2000] EWCA Civ 3009**
IN THE SUPREME COURT OF JUDICATURE

Case No: IATRF 99/0437/4

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
The Strand
London WC2

Wednesday 6th October, 1999

B e f o r e:

LORD JUSTICE EVANS
LORD JUSTICE SCHIEMANN
LORD JUSTICE ROBERT WALKER

- - - - - -

SAHM SUNDER JAIN
Appellant

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

- - - - - -

(Computer Aided Transcript of the Palantype Notes of
Smith Bernal Reporting Limited, 180 Fleet Street,
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Official Shorthand Writers to the Court)

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MR R SCANNELL and MISS J BOND (Instructed by Messrs Magrath & Co, London W1R 9PA) appeared on behalf of the Appellant

MR M SHAW (Instructed by Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Respondent

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J U D G M E N T

Wednesday 6th October, 1999

LORD JUSTICE EVANS: Lord Justice Schiemann will give the first judgment.

LORD JUSTICE SCHIEMANN: The appellant claimed political asylum. He came to this country from India aged 23. Whilst in this country he realised he was a homosexual. He is now aged 32. We are told he is a practising homosexual. He fears that if he has to go back to India he will be unable to live openly in a homosexual relationship.

He is entitled to remain here if he can bring himself within the definition of a refugee in the Geneva Convention, namely that he has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of nationality and is unable, or owing to such fear is unwilling, to avail himself of the protection of that country.

His claim to asylum was rejected by the Special Adjudicator on the basis that he did not belong to a particular social group. The Special Adjudicator did not decide whether or not he had a well-founded fear of being persecuted for that reason. He appealed.

The Immigration Appeal Tribunal did not decide whether or not he belonged to a particular social group. They rejected his appeal on the basis that he had not shown that he has a well-founded fear of being persecuted because he was a homosexual. He appeals to this court pursuant to section 9 of the Asylum and Immigration Appeals Act 1993 which provides that:

> "Any party may bring a further appeal on any question of law material to a determination by a Tribunal."

It is common ground that the approach of this court should be that set out in two cases. The first is called Kagema v Secretary of State for the Home Department [1997] Imm AR 137. The relevant passage from the judgment of Aldous LJ being at page 140 where he said this:

> "Mr Ashford-Thom, who appeared for the Secretary of State, submitted that the word `persecution' was an ordinary English word and it was for the special adjudicator to decide whether the facts as found amounted to persecution for a Convention reason. The fact that a court might, or would have, come to a different conclusion did not mean that the special adjudicator had erred in law. That only arose if this court concluded that the special adjudicator's conclusion was unreasonable, in the sense that it was a decision that no reasonable adjudicator could come to.
>
> That I believe to be correct."

The other case is a case called Blanusa, unreported, decided by a division of this court consisting of Henry, Ward LJJ and myself on 18th May 1999 (reference IATR 1998/1495/4) where the court was dealing with a state of affairs where some might take one view and some might take the other. I said this, at page 5:

> "... where the evidence reveals a state of affairs where a person properly instructed as to the relevant law could have come either to the conclusion that there was a reasonable likelihood of persecution or to the conclusion that there was not a reasonable likelihood of persecution then this court has no power to interfere. Parliament has given the power to make the relevant decision in cases such as this to a specialist tribunal rather than to

this court."

Following the decision in R v Immigration Appeal Tribunal *ex parte* Shah and Islam v Secretary of State for the Home Department [1999] 2 WLR 1015, a decision of the House of Lords, the Secretary of State accepts that the appellant is to be regarded as a member of a particular social group, namely practising homosexuals. It may be that this is not to be regarded as the proper group and that the proper group should be regarded as "those perceived to be homosexuals" or some other grouping. For the present case it is unnecessary to explore the point further. Thus the issue decided by the adjudicator is not before us. The issue before the Tribunal was whether the applicant had a well-founded fear of being persecuted in India for this reason. The resolution of this issue involved a decision of whether he had shown that there was a reasonable likelihood of something happening to him which is properly characterised as persecution. There was no evidence of any persecution of the appellant whilst he was in India. That is of no particular significance since he was not then a practising homosexual.

The passages in the judgment of the Immigration Appeal Tribunal which are most relevant to this appeal are as follows. The first appears at page 15:

> "The adjudicator accepted that Mr Jain was truthful. When the appellant came to the United Kingdom at the age of 23 he was not living openly as a homosexual but during the five years he has spent in the United Kingdom he has formed an association with another man and is a practising homosexual. Indeed it is only since arrival here that he says he has realised he is homosexual. He fears that if he has to go back to India he will be unable to lead what is to him a `normal lifestyle', by which he means will be unable to live openly in a homosexual relationship; he says he risks prosecution, that neighbours may hand him over to the police and raids by them once they know that he is homosexual will take place at his home. He says furthermore that he has heard that it is illegal to be a homosexual in India and therefore it will not be easy to find a partner and he will be expected to enter into an arranged heterosexual marriage."

The next passage is at page 20 where the Tribunal says this:

> "The first question to address is by whose standards or perceptions must we must judge either the persecution or whether homosexuals are a particular social group. Is it by the perceptions and standards of the UK, is it by the perceptions and standards of supranational or international conventions or is it by the perceptions and law of the country to which the asylum seeker will be returned? And do we judge both issues by the same criteria?"

The next passage is at page 22 and deals still with same matter. The Tribunal says this:

> "`Cultural relativity' in persecution is an important but difficult area. As Mr Haines said in MN, whether the treatment feared amounts to persecution or not involves normative judgments beyond mere fact finding based on a domestic criteria or standard in the country of asylum (Osaghae v INS held that `persecution means punishment for political, religious, or other reasons that our country does not recognise as legitimate)'.
>
> As we said at the outset there is an international standard there is our own domestic standard and there is the standard in the country of origin.
>
> To judge all issues in all cases arising under the Refugee Convention by the criteria of the country from which the asylum seeker comes could be to deny that very protection which the Convention provides for. Yet to deny a country its right to adhere to mores,

> to cultural attitudes and to laws different from one's own and which make up its inherent being cannot be acceptable if the Convention is to have any truly international acceptability. The problem is to hit the right note. That note, we suspect can change with time. Also we can see that the punishment for behaviour which is unacceptable can be judged by one standard, for example international norms, whilst in the same case the cultural attitude or mos is judged by another, for example that of the country to which the asylum seeker may be returned.
>
> As was said in Re: MN in New Zealand `... this does not require every culture to use an identical approach.'
>
> We turn to the issue of persecution and ask ourselves whether, upon the facts which have been stated by the appellant himself and which are not in dispute and upon the background information made available to us together with the other evidence ... Mr Jain will encounter upon his return to India what may, looked at objectively, amount to persecution."

The next passage is at page 24, where the Tribunal says this:

> "We do not find it very difficult therefore to reach the conclusion as follows."

It then sets them out:

> "1. Section 377 of the Indian Penal Code criminalises sodomy as `carnal intercourse against the course of nature'. The punishment for conviction is up to 10 years' imprisonment and a fine.
>
> 2. There have been no known recent charges or convictions for sodomy.
>
> 3. The law does not criminalise homosexuality as such but contemporary Indian society in general regard the practice as sexually deviant.
>
> 4. There are changes of attitude current `in the air'.
>
> 5. The appellant would probably be expected (by his family we assume) to enter into a `heterosexual' marriage. There is no evidence he would be forced to do so.
>
> 6. Given the attitude of society at least in some areas together with the attitude of the police and the existence of sodomy on the statute book there is a reasonable likelihood that a person known to be practising homosexuality or perceived to be a homosexual may not receive sympathetic treatment from the police should he have to report to them.
>
> 7. Conditions in detention or jails are generally regarded as being at best most uncomfortable and police still have a general reputation for brutality.
>
> 8. If he does not openly show himself to be a homosexual the risks of anything occurring outside his family must be down to chance encounter."

Then in a new paragraph unnumbered:

> "The suggestion of raids is vague and indeterminate, and the possibility thereof does

not come up to a reasonable likelihood. As Mr Shankardass says [that was the Secretary of State's witness] there is a constitutional challenge already mounted to section 377, there is an association in India which espouses most vocally the cause of the homosexual, the climate in India is changing. Our overall view is that the chance of anything happening to the appellant which goes beyond discrimination or even harassment and amounts to persecution is not reasonably likely."

Then on page 26 the Tribunal summarises its position as follows:

"1. That the presence on the statute book of Section 377 Indian Penal Code does not itself amount to a breach of any fundamental human right which we would regard as a core right, applying the decision in Gashi and Nikshiki. But even if it did there is no evidence upon which to base a finding that there is a reasonable possibility that Mr Jain may face prosecution thereunder.

2. That whilst there is evidence of extensive parts of society in India viewing homosexuality as sexually deviant this does not apply to all society.

3. That whilst there is evidence that anyone perceived to be a homosexual is liable to harassment and discrimination, there is nothing before us to suggest that the appellant, should he return to India, is reasonably likely to be so treated that it amounts to persecution."

It was suggested by Mr Scannell in reply that the finding which was numbered 6 implies an acceptance by the Tribunal of the likelihood of torture. Whilst finding 6 may involve some degree of euphemism (which I would respectfully suggest is undesirable in decisions of this sort), nonetheless it is in my judgment clear from the decision read as a whole that the Tribunal was not persuaded that there was any reasonable likelihood of torture.

Mr Scannell submits that on a proper reading of the Tribunal's decision it appears that their reasoning is inadequate and that therefore a reasons challenge is open to him. He submits that the decision is (I quote from his written submissions):

"... consistent with the Appellant being handed over to the police if he lives openly as a homosexual and being at risk of `brutality' in their hands."

Speaking for myself, I would not disagree with that careful formulation. But in my judgment its correctness is not enough to enable this appeal to succeed. It has to be shown either (1) that the Immigration Appeal Tribunal were not entitled to come to the conclusion that what is reasonably likely to happen to the appellant would not amount to persecution; or (2) that the Immigration Appeal Tribunal came to that conclusion by applying the wrong legal test as to what constitutes persecution. I can add a third possible challenge which is made here, namely that the Tribunal's conclusions were not expressed with the requisite degree of clarity or did not deal adequately with the main submissions.I look at these in turn.

1. If it had been shown that the appellant would be reasonably likely to be imprisoned or treated brutally by the police, with the State being indifferent, for indulging in homosexual acts in private, for my part I would accept that this might well amount to persecution. However, it has not been shown. On the contrary, the Tribunal was clearly of the view that there was no reasonable likelihood of him being prosecuted, and there was no reasonable likelihood of a police raid on his premises should the disapproval of the neighbours take the form of drawing him to the attention of the police. No direct form of physical pressure by the community was

clearly evidenced or accepted by the Tribunal as being reasonably likely. I make that comment remembering what the appellant said in interview were his fears as to what might happen.

2. Mr Scannell submits that the Tribunal's comments at page 22 (cited above) show that it misdirected itself in its approach to the question whether or not given acts amounted to persecution. He submits that the Tribunal's decision is consistent with the possibility that they considered brutality and imprisonment because of homosexual acts in private could not amount to persecution because of local cultural prejudices against homosexual acts. I do not consider that this criticism is justified on a fair reading of the decision as a whole. The comments are immediately followed by the sentence "we turn to the issue of persecution", which perhaps indicates that in making those general comments earlier on in the judgment the Tribunal was not indicating a particular approach to the definition of persecution.

In my judgment the Tribunal in those comments was doing no more than to reflect on the difficulties in an area where perceptions in different countries are changing and where it is undesirable to lay down further definitions. The 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 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.

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 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 to 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.

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 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-takers 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 & Islam to the concept of serious harm and the comment of Staughton LJ in Sandralingum & Ravichandran v Secretary of State for the Home Department [1996] Imm AR 97 at page 114, where the Lord Justice stated:

"Persecution must at least be persistent and serious ill-treatment without just cause ..."

I note that it has not been suggested that the appellant and the partner which he had at the time of the hearing, from whom I understand he has now separated, or indeed anyone else wish together to travel to India if he were sent back there. In those circumstances it seems to me that what the appellant can be taken to have shown is no more than it will not be easy for him to find a homosexual partner in India, that if he did there would be some expression of disapproval by significant sections of the public and that he would be expected by many to enter into a heterosexual marriage. Those are the basic facts as found by the Tribunal on the evidence adduced by the parties. In my judgment, on those facts the Tribunal were entitled to find that there was no reasonable likelihood of persecution. They made no error of law and dealt adequately with the main points made by the applicant.

For my part, I am conscious of decisions such as Modinos v Cyprus 16 EHHR 492, where the court held that a policy of not prosecuting provides no guarantee that this policy will continue. Moreover, I appreciate that the very existence of a legal prohibition can continuously and directly affect a person's private life. It may be that in some not greatly dissimilar circumstances facts could be shown from which a Tribunal would be entitled to infer that a particular individual had a justified fear of persecution. I would not like generalise. However, I am satisfied that in the present case the Tribunal neither erred in its legal approach nor reached a conclusion which was not open to them on the facts as they found. I am also satisfied that it expressed its reasons with sufficient clarity.

Therefore, I would dismiss this appeal.

LORD JUSTICE ROBERT WALKER: I agree.

LORD JUSTICE EVANS: I also agree and would add just the following.

1. In the light of the House of Lords' judgments in R v Immigration Appeal Tribunal ex parte Shah and Islam v Secretary of State for the Home Department [1991] 1095 it has become common ground, in the present case, that either homosexuals or practising homosexuals (it matters not which for the purposes of this case) form a particular social group within India, and that the applicant is entitled to refugee status if he has a well-founded fear of persecution there for that reason.

2. The majority in the House of Lords held that the words "particular social group" should be defined in terms of discrimination against that group (see Lord Steyn at page 1,026F and Lord Hoffmann at 1,032F and 1,033G). I agree with Mr Shaw, counsel for the Secretary of State, that the relevant discrimination here on the findings of the Immigration Appeal Tribunal is the presence on the statute book in India of section 377 of the Penal Code which makes sodomy an offence. I am more doubtful whether any relevant discrimination is also to be found in the findings made by the Immigration Appeal Tribunal with regard to the attitude of the police, as Mr Scannell submits that it is.

3. For my part I am anxious to emphasise that the applicant makes this application as a homosexual male who seeks, or would seek, an adult male partner and whose homosexual practices would be conducted in private with that partner. I assume this in his favour. If there was any suggestion that section 377 discriminates in India against homosexual men who engage in homosexual practices with minors or in public then, in my view, entirely different considerations would arise. Needless to say, those would militate strongly against the applicant. More generally, there is, I suspect, in the basis on which the present case has been argued before us an inbuilt assumption as to the extent to which homosexuality and homosexual practices should be permitted in a modern State. But it is unnecessary for us to explore that issue further.

4. Finally, as regards the legal definition of persecution, we have been referred to the Law of Refugee

Status by James C Hathaway, and to the four categories of human rights which under the Convention are entitled to respect as enumerated by him at pages 108 and following. One approach to the present case is to include among these rights a right to respect for a person's private life and, by extension, a right for him or her to engage in sexual practices, homosexual or otherwise, as they find necessary for their personal satisfaction. I am not sure that this is the correct approach. If a State imposes or threatens punishment for what is regarded for the purposes of the Convention as legitimate sexual activity, then I wonder whether the actual or threatened loss of liberty is not the relevant form of persecution; similarly, if the State permits its own police, or even private citizens, to inflict physical injury or some other form of serious harm on the transgressors. It seems to me that under the Convention the individual enjoys the right not to be persecuted for his private legitimate behaviour.

ORDER: Appeal dismissed with costs.
(Order not part of approved judgment)

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