FEDERAL COURT OF AUSTRALIA

WABR v Minister for Immigration & Multicultural Affairs [2002] FCAFC 124

IMMIGRATION – Applicant from Iran – claim of homosexuality – whether Tribunal should have found that the penalty facing a person convicted of homosexuality in Iran constituted persecution *per se* – whether the Tribunal should have had regard to the possibility of an adverse change in the attitude of the Iranian authorities towards homosexuals.

Migration Act 1958 (Cth) ss 5, 36

Chan Yee Kin v Minister for Multicultural and Ethnic Affairs (1989) 169 CLR 379 followed

Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 followed

MMM v Minister for Immigration and Multicultural Affairs [1998] 90 FCR 324 cited

F v Minister for Immigration and Multicultural Affairs [1999] FCA 947 approved

Satinder Pal Singh v Minister for Immigration and Multicultural Affairs (2000) 178 ALR 742 applied

Applicant LSLS v Minister for Immigration and Multicultural Affairs [2000] FCA 211 cited

Minister for Immigration and Multicultural Affairs v Jang (2000) 175 ALR 752 distinguished

WABR v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

W 517 OF 2001

SPENDER, O'LOUGHLIN AND GYLES JJ

10 MAY 2002

PERTH

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W 517 OF 2001

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	WABR APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT
JUDGES:	SPENDER, O'LOUGHLIN AND GYLES JJ
DATE OF ORDER:	10 MAY 2002
WHERE MADE:	PERTH

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The Appellant pay the Respondent's costs which costs are to be taxed in default of agreement.

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

IN THE FEDERAL COURT OF AUSTRALIA	
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BETWEEN:	WABR APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGES:	SPENDER, O'LOUGHLIN AND GYLES JJ
DATE:	10 MAY 2002
PLACE:	PERTH

REASONS FOR JUDGMENT

THE COURT

1 The appellant, an Iranian citizen, arrived in Australia on 28 September 2000. He was, at the time of his arrival, aged twenty-two. Two months or so later, on 21 November, he lodged an application for a protection visa with the Department of Immigration and Multicultural Affairs ("the Department") pursuant to the provisions of the *Migration Act 1958* (Cth) ("the Act"). The grounds upon which the appellant sought refugee status were that he was a homosexual and a Christian and that he feared arrest and persecution by the authorities if he were returned to Iran.

2 The appellant claimed that he had been involved in homosexual activity since he was sixteen. He said that one of his former partners, a man named Arman, had been arrested; he claimed that it was because of Arman's homosexuality. As homosexuality is a very serious offence in Iran, punishable by death, and as he was worried that Arman might identify him as a former partner and as a practicing homosexual, he left the country.

3 He travelled to Turkey but returned to his family in Iran after about a week's absence; he had found that he was in need of more money to make good his escape from Iran. He convinced his father to lend him $3,100 although he was able, so he claimed, to avoid telling his father the true reason why he had to leave the country.

4 The applicant also claimed that he had adopted the Christian faith about a year prior to his departure. However, he acknowledged that he had not yet been baptised and he also acknowledged that he had failed to mention his conversion when he first arrived in Australia. He said, in a subsequent statement, that the omission had occurred because he was "not well and was suffering from malaria".

5 His application to the Department for a protection visa was unsuccessful. On 22 December 2000, a delegate of the Minister for Immigration and Multicultural Affairs ("the Minister") refused to grant the appellant the visa. On 29 December, the appellant applied to the Refugee Review Tribunal ("the Tribunal") for a review of that decision. Once again, he was unsuccessful. On 21 May 2001, the Tribunal affirmed the delegate's decision not to grant the visa. The appellant next sought a review of the Tribunal's decision before a single judge of this Court. His application came on for hearing before Finn J on 20 September, but on 18 October 2001, his Honour dismissed the application. The appellant has now appealed to this Court. As the application to the judge at first instance was filed prior to 2 October 2001, it is not necessary for this Court to consider the regime that was introduced into the Act by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth).

6 Section 36 of the Act provided at the time of the appellant's application for a class of visa to be known as a protection visa. Subsection (2) of that section states that:

"(2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australian to whom the Minister is satisfied Australia has protection obligations under the Refugees convention as amended by the Refugees Protocol."

The Refugees Convention which is referred to in the section, means the Convention relating to the status of refugees, done at Geneva on 28 July 1951 and the Refugees Protocol means the Protocol relating to the status of refugees, done at New York on 31 January 1967: [See s 5 of the Act]. Article 1A(2) of the Convention defines a refugee as 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 or who, not having a nationality and being outside the country of his former residence … is unable or, owing to such fear, is unwilling to return to it."

This means, in practical terms, that it was necessary for the Minister's delegate and, on review, for the Tribunal, to be satisfied, that the appellant was a refugee as defined in Article 1A(2) of the Convention. Whether the appellant is a person to whom Australia has protection obligations is to be assessed upon the facts as they existed at the time when the decision was made. However, that assessment also requires a consideration of the matter in relation to the reasonably foreseeable future.

7 A fear is well-founded if there is a "real chance" of persecution for any one or more of the five Convention reasons: see *Chan Yee Kin v Minister for Multicultural and Ethnic Affairs* (1989) 169 CLR 379 at 389 per Mason CJ, at 398 per Dawson J, at 407 per Toohey J and at 429 per McHugh J. That subject was further developed in the joint judgment of Brennan CJ, Dawson, Toohey Gaudron, McHugh and Gummow JJ in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 572:

"A fear is "well-founded" when there is a real substantial basis for it. As Chan shows, a substantial basis for a fear may exist even though there is far less than a 50 per cent chance that the object of the fear will eventuate. But no fear can be well-founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. A fear of persecution is not well-founded if it is merely assumed or if it is mere speculation."

FINDINGS AND REASONS OF THE TRIBUNAL

8 The Tribunal accepted that the appellant was homosexual. It was also satisfied that homosexuals are a "cognisable group in Iranian society for the purpose the Convention". The Tribunal found that the appellant arranged to come to Australia via Malaysia because it was cheaper than the other options that he had investigated and because it was easy for him to gain lawful entry into Malaysia. However, the Tribunal also found that the appellant has never been interviewed or arrested by the Iranian authorities because of his homosexuality – or for any other reason. It rejected his claim that the Iranian authorities were interested in him; it also rejected his claim that he feared arrest and persecution if he were to be returned to Iran. The Tribunal considered that these last mentioned claims had been fabricated by the appellant.

9 The Tribunal accepted that homosexuality is specifically outlawed in Iran by the Islamic Penal Code and that penalties for homosexual activity range from death to flogging to imprisonment. That indicated to the Tribunal that, in theory, homosexuality in Iran can be treated in a way that may amount to persecution. However, the Tribunal did not accept that these findings meant that every homosexual person in Iran has a well-founded fear of persecution. In particular the tribunal member said:

> "I do not accept that the mere fact that homosexual conduct is illegal in Iran means that the [appellant] would have a well-founded fear of persecution because he is a homosexual. The illegality of homosexual conduct in Iran is a relevant factor to consider but I am still obliged to consider whether there is a real chance that the [appellant] would face persecution for a Convention reason if he returned to Iran."

10 Relying upon a substantial amount of country information, the details of which were included in its reasons, the Tribunal concluded that there was nothing in the evidence to indicate that a homosexual person in Iran was at risk of attracting the attention of the authorities merely because he or she was homosexual. It held that the evidence indicated that the Iranian authorities do not actively seek out homosexuals and that the risk of prosecution for homosexuality is minimal, as long as the homosexual activities are carried out discreetly. The Tribunal went further. It found that the evidence suggested that homosexual activity, as long as it was not overt and public, was tolerated and not uncommon in Iran. Most importantly, having regard to the contents of the grounds of appeal in this case, the Tribunal recorded that the appellant had conceded that, if one behaved discreetly and not provocatively, a homosexual person "may not have difficulty." The Tribunal further recorded that the appellant had not claimed that the need to be discreet had caused him any significant detriment or disadvantage.

11 The Tribunal would not accept that the appellant would be at risk of being arrested by reason of his homosexuality, nor would it accept that he was at risk because his friend, Arman, had been arrested in mid 2000. The Tribunal considered that the appellant's evidence about his discreet relationship with Arman was consistent with the independent evidence that indicated that the Iranian authorities did not actively pursue homosexuality

unless the participants acted with great indiscretion in public. Furthermore, the Tribunal did not believe the appellant when he said that he was able to obtain $3,100 from his father by telling his father that his life was at risk but without disclosing the reasons. In addition, the Tribunal did not believe that the appellant, if he were truly in fear of persecution, would have returned home from Turkey to obtain more money: he would have contacted his family by some means, such as the telephone, and have them send money to him in Turkey. The Tribunal concluded this aspect of its reasons by saying:

"Overall, whilst I accept that the applicant is homosexual, I reject his claim that the authorities are interested in him and that he fears arrest and persecution if he returns to Iran. I am of the view that the applicant fabricated this claim in an attempt to create for himself the profile of a refugee. In the circumstances, I am not satisfied that the Iranian authorities had any adverse interest in the applicant at the time he left Iran, or that they have any adverse interest in him currently."

The Tribunal also rejected the appellant's claim that he feared persecution because of his conversion to Christianity. However, as that claim was not pursued before Finn J, nor in the present grounds of appeal, it is not necessary to address it in these reasons.

the reasons in the court below

12 Finn J concluded that the Tribunal had correctly identified the question that it was required to answer: was there a real chance that the appellant would face persecution for a Convention reason if he returned to Iran? He noted that the Tribunal appreciated that there would be a need, on the part of the appellant, to show "discretion" and that this would result in the imposition of limitations upon the appellant's behaviour. However, as his Honour pointed out, the Tribunal found that having to accept those limitations did not amount to persecution in the circumstances of this particular case. His Honour, in concluding that the reasoning of the Tribunal was correct, said:

"The discretion required would seem to have required that the applicant avoid overt and public, or publicly provocative, homosexual activity. But having to accept those limits did not amount to persecution."

His Honour would not accept that the Convention extended to persecution as a theoretical prospect; he rejected the contention that the Islamic Penal code is persecutory *per se*.

THE FIRST GROUND OF APPEAL - persecution *per se*

13 The first of the two grounds of appeal addressed the question of persecution *per se*. It claimed that:

"The learned Judge erred in finding that the Refugee Review Tribunal ('Tribunal') was not in error in failing to consider that the nature of the penalty facing a person convicted of homosexuality in Iran constituted persecution per se under the Refugees Convention."

The appellant faced several factual difficulties in pursuing this ground of his appeal. In the first place, the Tribunal was not considering the circumstances of a person who had been convicted of homosexuality. It was considering the circumstances of a young homosexual male whose sexual preference was not known to the authorities. Secondly, on an issue of credit, the Tribunal did not believe the appellant when he said that he feared arrest and persecution if he returned to Iran. The Tribunal noted, as a matter of fact, that there was nothing in the evidence "to indicate that a homosexual man in Iran is at risk of attracting the attention of the authorities merely for being homosexual".

14 In his particulars in support of the first ground of appeal, the appellant relied upon the fact that the Tribunal had accepted that the Islamic Penal Code prescribes the death penalty for homosexual intercourse and floggings of 100 lashes for homosexual conduct without intercourse. He also relied upon the fact that although the Tribunal found that the penalties under the Code were rarely, if ever, carried out, the Tribunal did not find that the penalties were never carried out. The appellant submitted that:

"Finn J should have found that the Tribunal should have balanced the risk of the penalty being enforced against the severity of the penalty to determine whether the applicant had a well founded fear of persecution."

15 With respect, the short answer to this point is that the Tribunal had made this evaluation. It achieved this by recognising both of these factors in the course of its reasons. Finn J concluded that the Tribunal had arrived at a decision that was "properly open to the Tribunal on the evidence before it." The Tribunal had balanced the risk of the penalty being enforced against the severity of the penalty to determine whether the appellant had a well-founded fear of persecution. It drew attention to the enormity of the penalties but it was persuaded, partly by the information that it obtained from the country information, and partly by its findings about the appellant's personal attitudes, that this appellant was not at risk of persecution in Iran, either because of his homosexuality or because he had applied for refugee status in Australia.

16 It was submitted on behalf of the appellant that acceptance by the Tribunal of a need for "discretion" in relation to the appellant's homosexual activities was tantamount to an acceptance by the Tribunal that the appellant would or might be persecuted for that reason if he returned to Iran. It was further submitted on his behalf that the existence of penalties, which included the death penalty, for homosexual intercourse was, of itself, sufficient to ground a well-founded fear of persecution. This statement cannot be one of universal application. Indeed, the Tribunal found that it did not appropriately describe the circumstances of the present appellant. It was of the opinion that he did not, as an individual, have that fear. That finding would be consistent with there being no finding that the appellant had not been and would not

continue to be discreet. Such a finding is enough to dispose of this appeal, but in deference to the arguments of counsel weturn to the remaining issues.

17 Madgwick J in *MMM v Minister for Immigration and Multicultural Affairs* [1998] 90 FCR 324 rejected a submission that the circumstance that homosexual acts are prohibited by law with criminal sanctions necessarily amounted to persecution of homosexuals. It may well be that his Honour's conclusion was influenced by the fact that the Bangladeshi law, which he was then considering, did not prescribe the death penalty for homosexuality: the maximum penalty was transportation for life or imprisonment for up to ten years. Nevertheless, conscious of the fact that prosecution for homosexual conduct was not actively pursued by the authorities, his Honour said at 331-332:

"If serious official harm is offered or threatened to homosexuals, because they wish privately to give expression to their sexuality, there is, in my view, no legal reason why, in particular circumstances, this might not amount to persecution.

However, in this case, all that was shown was the existence of the law and no evidence of its enforcement. Nor was there any demonstration that in the moderately near future there was a real chance that the law might be pressed into service."

18 There are decisions of single judges of this Court that suggest that the fact that there would be a need for an applicant for refugee status to be discreet in the pursuit of his or her homosexual activities is not necessarily of critical importance.

19 Burchett J in *F v Minister for Immigration and Multicultural Affairs* [1999] FCA 947 at [4] was satisfied that "the severe Islamic law in respect of homosexuality was not zealously enforced in practice". At a later stage in his reasons, he concluded, based on the particular facts of that case, that "there is only a remote chance any persecution would, in practice, face the applicant, if he is a homosexual, in Iran" [13]. What is more, the mere possession of some homosexual feelings might not necessarily be enough. So much will be dependent on the particular circumstances of the individual applicant. A person who has been publicly denounced as a practicing homosexual is not to be compared with a person, such as the present appellant, whose homosexuality is private and unknown to all but his partners and who finds no difficulty in keeping his sexual preferences a secret. As Burchett J noted at [14]:

"It cannot reasonably be maintained that, simply because a country's law restricts sexual activity between consenting adults, those who do not wish to obey it are ipso facto persecuted, whether it is enforced by the authorities or not."

It is not appropriate to submit that the ability to publicly proclaim one's sexual preference is an essential right, the denial of which would or could amount to

persecution. Significantly, Burchett J pointed out that "all persons in Iran, whatever their sexual orientation, have to be discrete in sexual matters". In any event, that issue has not arisen in this case and it is not necessary to express a concluded opinion on the subject. The appellant made it clear in his evidence that he had kept secret his sexuality – not just from the authorities, but also initially from his family. There was not, therefore, a need for the Tribunal to consider any question of public proclamation. In assessing whether there was a well-founded fear of persecution the Tribunal was entitled, as it did, to have regard only to the personal circumstances of the appellant.

20 In *Satinder Pal Singh v Minister for Immigration and Multicultural Affairs* (2000) 178 ALR 742, ("*Singh*") the Tribunal had accepted that the applicant's homosexuality meant that he would be a member of a particular social group within the meaning of Article 1A(2) of the Convention. It also accepted, although with considerable doubt, that the applicant in the case before it was, in fact, a homosexual. It accepted his claims that attitudes towards homosexuals were harsh in the Punjab and that he had been assaulted by his lover's father, by some villagers and by the police to whom he and his lover had been reported. The Tribunal concluded that the appellant faced a real chance of persecution in his home area by reason of his homosexuality; he was well-known in the locality for his homosexual activities. However, after considering whether the appellant faced a real chance of persecution by reason of his homosexuality in the whole of India (and finding that he did not) the Tribunal came to the view that it would not be unreasonable to expect the applicant to relocate to another part of India. In coming to that conclusion, the Tribunal referred to independent country information concerning the question of homosexuality in India. It noted that s 377 of the Indian Penal Code created a criminal offence of sodomy, punishable by imprisonment for life, even though the offence may be committed by consenting adults. However, despite that law of general application throughout India, the Tribunal noted that the evidence did not indicate that it was generally enforced. The learned primary judge quoted with approval the following passage from the Tribunal's reasons:

"The clear weight of available evidence is that, notwithstanding the existence of draconian provisions under the Indian Penal Code and widespread disapproval of homosexual behaviour, any chance of homosexuals actually facing persecution in the larger cities of India, such as New Delhi or Bombay, is remote and increasingly so; and the Tribunal finds accordingly."

21 In *Singh*, the decision of his Honour was not determined by the harshness of the penalty for which provision was made in the Penal code; it was determined by the evidence which pointed, as a matter of fact, to the finding that the authorities did not generally pursue consenting adult homosexuals who conducted their affairs in private and with discretion; there had to be some real prospect of significant, actual detriment or disadvantage. It is true that *Singh* was a case whether the main issue was the question of re-location, but that is not a distinguishing feature from this case. Just as the Tribunal and the Court in *Singh* had concluded that there was no real prospect of the relevant law being enforced, so here the Tribunal

and his Honour in the Court below have found that the risk of prosecution was minimal so long as the appellant acted discreetly.

22 The applicant in *Applicant LSLS v Minister for Immigration and Multicultural Affairs* [2000] FCA 211 ("*Applicant LSLS")* was a Sri Lankan man who claimed that he should be given refugee status on the basis of his homosexuality because he feared persecution in his home country. In confirming the decision to refuse him a protection visa, the Tribunal said:

"The evidence is that [the applicant] can avoid a real chance of serious harm simply by refraining from making his sexuality widely known – by not saying that he is homosexual and not engaging in public displays of affection towards other men. He will be able to function as a normal member of society if he does this."

Ryan J, who heard the matter when the applicant sought a review of the Tribunal's decision, quoted that passage from the Tribunal's reasons and commented:

"Implicit in this finding of the Tribunal is the view that a level of discretion for the purpose of avoiding persecution is to be expected of the applicant. The consequential further finding of the Tribunal was that the level of discretion which it imputed as necessary to avoid persecution is '**reasonable**' in that it would not require the applicant to retreat from any of the identifying features of the social group to which he belongs."

23 The applicant in *Applicant LSLS* claimed that the Tribunal had been in error because, as he contended, a characteristic which identified his membership of a particular social group included a right to public proclamation of his homosexuality for the purpose of meeting prospective sexual partners; consequently it was wrong – and an error of law – to impose on him "a degree of discretion". The Tribunal had addressed that argument in its reasons, saying, *inter alia*:

"People of many sexual orientations exist in society and practise their sexual preferences privately without feeling a need to proclaim those preferences to the world. Public manifestation of homosexuality is not an essential part of being homosexual."

The process by which the Tribunal determined the extent to which the applicant could safely communicate his sexual preference was accepted by Ryan J who considered the process "unexceptionable". His Honour dismissed the application. We see no reason for departing from the line of authority that has evolved from these single judge decisions.

24 Ms Searle, counsel for the appellant, sought to rely upon the decision of Wilcox J in *Minister for Immigration and Multicultural Affairs v Jang* (2000) 175 ALR 752 ("*Jang*"), in support of her argument of persecution *per se*. That was a case of a Chinese national who had sought refugee status on the ground that she had converted to Christianity. The findings of fact in that case

disclosed a history of arrest, imprisonment and ill-treatment that she had suffered at the hands of the authorities prior to her escape from China. The presence of that factual background meant that it is not a decision that can have any meaningful application to the facts of this case. The particular passage in the judgment of his Honour upon which the appellant relied was as follows, at [27]:

> "However, where the feared persecution arises out of action taken by government officials to enforce the law of the country of nationality, or to implement a policy adopted by the government of that country, it will be much more difficult for an Australian decision maker to reach satisfaction that there is no real risk of the refugee applicant being persecuted if returned to that country."

Unlike the circumstances in *Jang*, there was not, in this appeal, any question of "action taken by government officials to enforce the law of the country of nationality, or to implement a policy adopted by the government." The decision in *Jang* cannot assist the appellant.

25 It is within the ambit of the Tribunal's decision-making process to investigate:

- whether homosexuality is, or is not, a criminal offence in a particular country; and

- whether, if it is, there is, or is not, a policy of enforcement and prosecution.

If, as is the case of Iran, homosexuality is a criminal offence, but if, as a finding of fact, the Tribunal is satisfied that the authorities do not actively pursue offenders, the Tribunal is within its rights in expecting that potential offenders would act with discretion and that they would refrain from publicising their sexuality.

the second ground of appeal – the possibility of enforcement

26 The appellant argued that the Tribunal should have looked to the possibility of an adverse change in the attitude of the Iranian authorities. He argued that there might come a day when, for example, the authorities might actively pursue and prosecute homosexual activity. It was said that this submission was based on the decision in *Chan* that a "real chance" requires a look to the future to assess whether the fear is more than remote or insubstantial. The difficulty with this submission is that it omitted to note that, in assessing what might happen in the future, it is appropriate to have regard to what has happened in the past. As to that, the Tribunal had ample material supporting the proposition that the authorities were not actively pursuing and prosecuting homosexual activity, but it had no material whatsoever to suggest that there might, at some unspecified stage in the future, be an adverse change in policy. As the primary judge pointed out, the country information relied upon by the Tribunal covered an eight year period. To do as the

appellant would wish the Court to do, would amount to engaging in an exercise in speculation. Such an exercise is not required as part of the "real chance" test. In any event, the Tribunal was alert to the need for it to have regard to the future. It said, at an early stage of its reasons, that one of its tasks, in determining whether an applicant was a person to whom Australia had protection obligations, required it to give "consideration of the matter in relation to the reasonably foreseeable future." The second ground of appeal must be rejected.

conclusion

27 In our opinion, the appellant has not been able to point to any error of law, either in the findings of the Tribunal or the decision of his Honour in the Court below. Quite apart from the fact that the Tribunal had found that the appellant did not have a subjective fear of persecution, it was open to the Tribunal to conclude, on the material that was before it, that there was no active program for the prosecution of homosexuals in Iran, so long as they were discreet and conducted their affairs privately. It was also open to the Tribunal to conclude that it was reasonable to expect that the appellant would accept the constraints that were a consequence of the exercise of that discretion.

28 The appeal should be dismissed with costs.

I certify that the preceding twenty-eight (28) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Spender, O'Loughlin and Gyles.

Associate:

Dated: 10 May 2002

Counsel for the Applicant:	Ms CA Searle
Solicitor for the Applicant:	Gadens
Counsel for the Respondent:	Mr P MacLiver

Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	6 May 2002
Date of Judgment:	10 May 2002