

## THE HIGH COURT

[2008 No. 1194 J.R.]

BETWEEN/

SA (ALGERIA)

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND REFUGEE APPEALS TRIBUNAL

APPLICANT  
RESPONDENTS**JUDGMENT of Mr. Justice Hogan delivered on the 24th January, 2012**

1. The applicant, Mr. A, is an Algerian national who is also homosexual. He was a singer and played the drums in an otherwise female band which typically sang at weddings and other social gatherings. Mr. A. now seeks leave to challenge a decision of the Refugee Appeals Tribunal dated 26th September, 2008, which rejected this application for refugee status by reason of his sexual orientation, largely due to the *de facto* circumstances of homosexuals in Algeria, but also by reference to the fact that he failed to apply for asylum during a two month sojourn in Spain and France in the latter part of 2003.

2. The applicant's account may be summarised as follows: in the mid-1990s a state of nascent civil war existed in Algeria. Islamic fundamentalist groups engaged in many terrorist activities, often directed at those who engaged in activities that these groups considered to be "corrupt" and "un-Islamic" practices, such as the playing of music. Mr. A. contends that he was singing (while dressed in female attire) at one such wedding in 1995 when the hotel was attacked. He surmises that the terrorist group heard the singing and that this prompted the attack.

3. Mr. A. was then arrested following the arrival of the police. He contends that the police originally suspected that he might have been involved in a terrorist group and that he was detained for twelve months. Following investigations by the gendarme, he was released. At his s. 11 interview, Mr. A. maintained that he was arrested by reason of his homosexual orientation "because he was signing with women at parties." (I should interpose here by observing that country of origin information- in this instance, a 2004 report issued by the research directorate of the Immigration and Refugee Board, Ottawa on the treatment of homosexuals by Algeria - suggests that "only extremely effeminate men are recognised as homosexuals in Algeria.") At a later point Mr. A. suggested that he had been charged because of suspicion that he was involved with the terrorists.

4. The interview continued thus:

"Q: So then they thought that you were not gay, if they released you after one year?

A: If they knew that I was gay, they would abuse me in jail.

Q: So what was the investigation about?

A: I told them I am only a singer and that I don't have any links with terrorists. They did their investigation and they found I don't have any terrorist links.

Q: Earlier when I asked [what] the charges were, you said being gay so why were they investigating about terrorists?

A: They thought I was connected with the terrorists, but I am not. I am only a singer.

Q: So they did not arrest you for links with terrorism, they arrested you for being gay?

A: There was confusion in the country then. God knows what actually happened there."

5. Following his release, Mr. A. says that he went to Tunisia for two months in 1999. During that sojourn it appears that he was imprisoned for two weeks for some unspecified crime. It appears that in the late Autumn 2003 he travelled to both France and Spain on a Schengen visa. Although he says that he indicated to the French authorities that he wanted to apply for asylum, he was nonetheless sent back to Spain. He was then returned to France in December, 2003 where he was deported to Algeria.

6. The applicant ultimately arranged with a trafficker to travel by boat to Italy in March 2006. He spent a week in Italy before arriving by air in Ireland on 18th March, 2006.

7. The Tribunal member ultimately found against the applicant for the following reasons:-

"He continued to live in Algeria after being released from prison which was presumably sometime in 1996. He then went to Tunisia in 1999 but returned again to Algeria. While he says that society discriminates against homosexuals in Algeria, I cannot find any specific act of persecution that allegedly occurred between 1996 and the time that he ultimately came to this country. I find it difficult to conclude that the applicant suffered serious ill treatment in 1996 from the time whilst in Algeria before he left that country. In order to be classified as persecution, I am of the view that somebody must be seriously ill treated in their own country in order to qualify within that definition...

This applicant seems to have travelled to a number of European countries since 2003 and the time when he arrived in this country. For example, he travelled to France and Spain and he once told the French authorities that he wanted to claim asylum, it appears that he never made any formal application for asylum and other grounds for Spain. It is claimed that he was unaware of the asylum procedure for claiming in those countries is not a satisfactory explanation as to why he did

not attempt to claim asylum properly in either of those countries.

Whilst homosexuals in Algeria are discriminated and harassed ...I am not satisfied that the extent of any harassment and discrimination as far as this applicant is concerned amounts to persecution."

### **Whether the treatment of homosexuals in Algeria can give rise to a Convention claim?**

8. It would appear that the Tribunal member accepted in broad measure the applicant's narrative. It is thus not in dispute but that the applicant is homosexual and that, as such, he would suffer harassment and discrimination in Algeria. So far as the detention of the applicant in 1995 is concerned, the Tribunal member appears to have taken the view that this was probably because of suspicion of involvement in terrorism, but also because the applicant's sexual orientation was probably held against him. Beyond that, no specific act of harassment or discrimination which would in and of itself constitute discrimination has been identified.

9. It is common case that homosexuality remains illegal in Algeria, although the Canadian report (2004) indicated that prosecutions were very rare. An Amnesty International report in 2003 concluded that:-

"Homosexuality is a taboo subject in Algeria, as it is in various other countries in North Africa and the Middle East. In practice, the shame associated with homosexuality means that few individuals openly reveal their sexual orientation. Homosexuals may suffer harassment from the security forces and society in general."

10. A report from the UK Border Agency in 2003 observed that homosexuality is "barely tolerated" in Algerian society. It added that a "homosexual lifestyle is possible provided discretion is exercised."

11. In the light of this information, we can now assess the Tribunal member's conclusions. So far as the first ground - homosexual lifestyle - is concerned, the Tribunal member's conclusion amounts to a finding that the applicant would come to no harm were he to adopt a discreet lifestyle and not flaunt his homosexuality.

12. Perhaps the first comment to make is that it is, with respect, a fallacy to suggest - as the Tribunal member appears to have done - that international protection will be available only where the applicant has actually suffered persecution in the past in his home country. It must be remembered that the Geneva Convention protects those who can show that they have a well founded fear of persecution. The test, therefore, is essentially forward looking, although, of course, the past experience of the applicant (and the other members of the social group to which he or she belongs) may often present the surest guide to any assessment of whether the fear is well founded. There is accordingly no basis in law for saying that just because an applicant did not suffer persecution in the past that he or she cannot qualify as a refugee. What counts is whether there is a well founded fear that this may occur were the claimant to be returned to their country of origin.

13. Second, it is not seriously disputed but that homosexuals form part of a social group for this purpose. Article 1A(2) of the Convention provides that a refugee is one:-

"...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, unwilling to avail himself of the protection of that country..."

14. Sexual orientation is moreover an intrinsic and essentially immutable feature of human identity: see, e.g., the comments of Ryan J. in *MA v. Refugee Appeals Tribunal*, High Court, 12th November, 2010, and those of Smyth J. in *E v. Refugee Appeal Tribunal* [2011] IEHC 149. It is not simply a question of performing physical sexual acts with a member of the same sex as distinct from a member of the opposite sex: it is rather a defining feature of that very identity. We know from the work of Freud, Jung, Kinsey and others that sexual orientation defines key aspects of the individual's more general orientation to the world around them. This is sometime revealed in subtle ways, ranging from aesthetics and mannerisms on the one hand to friendships on the other.

15. Third, a homosexual cannot, therefore, be expected to sublimate or conceal their very identity in order to escape the wrath of a state or societal forces condoned by the state. This was the very point made so eloquently by the various members of the UK Supreme Court in their seminal judgments in *HJ (Iran) v. Home Secretary* [2010] UKSC 31, a case where the asylum claimants were homosexual males from Iran and Cameroon respectively.

16. No words of mine could adequately summarise these powerful judgments. A brief extract from the judgment of Lord Hope must suffice for present purposes:-

"The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does. Those others will include everyone with whom he will come in contact, in private as well as in public. The way he conducts himself may vary from one situation to another, with varying degrees of risk. But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result and that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this inquiry."

17. One must, of course, disregard for this purpose social and family pressures to conform to what might be regarded as social orthodoxy, whether in Algeria or elsewhere. Nor must we overlook that what must be feared is that an applicant will be persecuted. While this term is not actually defined by the Convention, it may be noted that Article 9(1)(a) of the EC Council Directive 2004/83/EC ("the Qualification Directive") states that acts of persecution must:-

"(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights ... or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)."

18. The fundamental question, therefore, is whether the applicant is likely to have to endure a severe violation of his basic human rights if he is returned to Algeria in the sense now contemplated by Article 9 of the Qualification Directive. If the applicant were returned, it is unlikely that his homosexual orientation will be concealed, given his position as a singer and drummer in a female band.

This is likely to mark him as effeminate - and, by extension, homosexual - in the eyes of Algerian society. This appears to be his only gainful occupation and, moreover, it is a vital part of the way of life that he clearly enjoys. But is it likely that he will suffer persecution?

19. It may be accepted that the position of homosexuals in Algeria does not equate with that in Iran where the country of origin information available to the UK Supreme Court in *HJ (Iran)* indicated that homosexuals were sometimes subjected to appalling persecution, including capital punishment. The situation in Algeria seems possibly closer to the situation in Cameroon, where the country of origin information in the companion case to *HJ (Iran)* suggested that homosexuals could be and sometimes were prosecuted and imprisoned, albeit that the decision to prosecute was often prompted by haphazard and arbitrary factors.

20. It is, of course, true that, as Lord Hope noted in *HJ (Iran)*, the Geneva Convention is not designed to guarantee for the claimant the same standard of human rights protections in his country of origin as would, for example, exist in modern Ireland. It is thus irrelevant that a claimant cannot be as true to his sexual orientation in Algeria as would be the situation in Ireland. The question rather is again whether the applicant has a well founded fear of persecution. Could he reasonably believe that he might suffer persecution at some stage in the future?

21. The applicant has, therefore, established substantial grounds for contending that the Tribunal member erred in law by failing to ask:

i. How is the applicant likely to be treated if he is returned to Algeria?

ii Would such treatment amount to persecution, i.e., would he be likely to suffer significant and severe violations of his human rights?

22. The questions I have posed may be said to contain subtle and important distinctions as compared with the questions posed, either expressly or by implication, by the Tribunal member. Of course, for an administrative tribunal to ask the wrong question is in itself a species of jurisdictional error: see, e.g., *Killeen v. Director of Public Prosecutions* [1998] 1 I.L.R.M. 1.

#### **The applicant's failure to claim asylum in Spain and France**

23. It remains to consider the applicant's failure to apply for asylum in either France or Spain. While the Tribunal member was entitled to reach the conclusion on the evidence that the applicant could have applied for asylum in those countries, this is not necessarily dispositive in a case such as the present one. Normally, the failure to claim asylum at the first opportunity goes to the overall credibility of the applicant: see, e.g., the comments of Smyth J. in *E*, a case where the applicant, a Nigerian, claimed to be a homosexual who was fleeing from persecution in that State. In other words, the fact that the claimant did not avail of an earlier opportunity in a safe country to claim asylum strongly indicates that his claim is not genuine.

24. Unlike the situation in *E*, however, there is here no suggestion that the claimant is not generally credible. This raises the difficult and somewhat troubling question as to whether a claimant who might otherwise have a valid entitlement to international protection is to be debarred *simply* by reason of his failure to claim asylum at an earlier opportunity in a different country. In this respect, the present case is different from *E*, a case which in other respects is quite similar to the present one.

25. In the end I have concluded that in this respect as well the applicant has established substantial grounds for challenging the Tribunal's decision. I will accordingly grant the applicant leave to apply for judicial review and will discuss the form of the order with counsel.

APPROVED: Hogan, J