

AT AUCKLAND

Appellant:	AM (Egypt)
Before:	A N Molloy (Chair) Judge P Spiller (Member)
Counsel for the Appellant:	C Curtis
Counsel for the Respondent:	No Appearance
Date of Hearing:	18 November 2014
Date of Decision:	24 November 2014

DECISION

[1] The appellant is a national of Egypt. He appeals against the decision of a refugee and protection officer of the Refugee Status Branch (RSB) declining to grant his application for recognition as a refugee or protected person under the Immigration Act 2009 (“the Act”).

[2] The appellant claims to be at risk of being persecuted if he is returned to Egypt, because he is homosexual. The appeal turns upon whether his concern is objectively well-founded.

[3] In order to address the statutory issues common to all appeals of this nature, the Tribunal will first summarise the account presented by the appellant on appeal, including the testimony of the witness called on his behalf. It will then assess the credibility of that evidence, before making the findings of fact upon which the appeal is to be determined. The Tribunal will then outline the legislation governing such appeals, before assessing the appellant’s claim for refugee status and protected person status in light of those findings.

THE APPELLANT'S CASE

[4] The appellant was born during the 1970s and raised within a wealthy middle class family in Alexandria in Egypt, where his father still lives and where his sister also lives with her family. His mother passed away approximately four years ago.

[5] The appellant's predicament turns upon the fact that he is gay. While the social and religious dictates of Egyptian society make it impossible for him to overtly acknowledge this, he has faced continual harassment and prejudice as a result of looking and behaving in a way that was perceived to be different from the norm. This created difficulties for him throughout his school years, with both fellow pupils and teachers alike. A paternal uncle convinced his father to send him to a military school to toughen him up. He was perennially bullied and on at least one occasion subjected to a sexual assault from which he escaped before it became significantly more serious than it was. His early efforts to complain about his treatment in general were met with an unsympathetic response. He did not complain further.

[6] The appellant's experience in the public schooling system was little better. He found some relief at university, where class sizes were larger and the oppression was less apparent, but for years endured a large degree of social isolation. When he ventured out he encountered persistent harassment and catcalls whether in shops or on the street.

[7] After graduating with his bachelor's degree the appellant found it difficult to secure work. He attributes this to prejudice arising from his appearance and demeanour. He was eventually employed as a laboratory assistant at a local hospital, through the intervention of his brother-in-law. Even there, he had to endure snide comments and ostracism that he found debilitating. He resigned after approximately 18 months.

[8] The appellant found a degree of release through the trust fund his father had established for the benefit of the appellant and his sister. He used it to travel, and spent a semester studying languages in each of the United States and Germany. His ability to live in environments where he was not discriminated against provided him with great relief. He did not have to feel fearful or on his guard. This made the contrast upon his return home to Egypt all the more painful.

[9] In 2005 the appellant travelled to New Zealand to pursue further studies. He enrolled in a health sciences degree at a university in the South Island before

transferring to a different course in the North Island. He then moved to Auckland, where he undertook a course in information technology. Having completed that course he found that the competition for employment among graduates was high and eventually settled for work in sales and administration. He worked in that field for two years before moving to his present position with a charity, where he has worked for approximately the past two years.

[10] The appellant has understood himself to be gay for many years. He had his first sexual experiences when he was in the United States many years ago and has always been comfortable within himself about his sexuality. However, it was impossible to even acknowledge this in Egypt, much less manifest it through seeking a relationship. Despite feeling much more comfortable with life in New Zealand, he still maintained a degree of privacy about his personal life. He did not feel the need to hide or deny his sexuality as he had in Egypt but, if asked about it, simply tended to divert the question.

[11] In May 2012, the appellant married a woman who is a New Zealand citizen. In January 2013, he applied for residence in New Zealand on the basis of that relationship. It soon became apparent to Immigration New Zealand that the wife had become pregnant to another man and had given birth to his child within four months after the appellant's application for residence had been lodged. In August 2013 Immigration New Zealand wrote to the appellant to outline its concern that his marital relationship was not genuine and stable.

[12] The appellant conceded to the Tribunal that he had paid his wife a sum of money in return for her agreeing to continue with the residence application. In response to the Immigration New Zealand letter, he withdrew his application for residence. However, he knew that he could not return to Egypt and, within a short period after withdrawing the residence application, lodged his application for refugee and protected person status.

[13] After interviewing the appellant in late 2013, a refugee and protection officer issued a decision in early 2014, declining his application for refugee or protected person status. It is from that decision that he appeals.

[14] The appellant claims that he cannot return to Egypt. He could not openly acknowledge his sexuality. He would be ostracised by his family and it would be impossible to live there independently and safely. While he has survived in the past by hiding his sexuality as best he can, he is at an age where this would be increasingly difficult. This is particularly so because for the past 10 years, while he

has lived in New Zealand, he has become accustomed to not having to suppress his fundamental identity. He is currently in a relationship with a man whom he has known for approximately two years. They work together and have been a couple for approximately six months.

Evidence of AA

[15] AA is a New Zealand citizen. He is gay and has been out for approximately 15 years. He has known the appellant for approximately two years. They met at a previous work place and now work in different roles for the same organisation. Their relationship developed over a period of time and they have been partners for approximately six months.

Material and Submissions Received

[16] Counsel for the appellant forwarded a bundle of documents to the Tribunal under cover of a letter dated 21 October 2014. This included witness statements signed by the appellant and AA, counsel's submissions on behalf of the appellant, various items of country information relevant to the appeal, photographs and various references for the appellant. Further documents were forwarded under cover of a letter dated 7 November 2014.

[17] Following the hearing the appellant provided the Tribunal with copies of selected entries he had made on various gay social media sites in New Zealand dating back to the late 2000s. These were forwarded under cover of a letter from counsel dated 18 November 2014.

ASSESSMENT

[18] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

- (a) a refugee under the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention") (section 129); and
- (b) a protected person under the 1984 Convention Against Torture (section 130); and

- (c) a protected person under the 1966 International Covenant on Civil and Political Rights (“the ICCPR”) (section 131).

[19] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellant’s account.

Credibility

[20] While the hearing before the Tribunal is described as an appeal, it is in fact a *de novo* hearing in which the appellant’s claim for refugee or protected person status is considered afresh. Accordingly, the reasons given by Refugee Status Branch to explain why they have declined the appellant’s claim will rarely be relevant to the Tribunal’s decision on appeal.

[21] For the purposes of this appeal, however, it is appropriate to acknowledge that the evidence available to the Tribunal was different from that available to the refugee and protection officer in two important respects. Both address the complication with which the officer was faced, in having to reconcile the appellant’s claim to be homosexual with the fact that he married a woman in 2012.

[22] First, the Tribunal has been provided with copies of contributions made by the appellant on gay social media sites some years prior to his marriage in 2012. Second, the appellant is currently in a relationship with a man, from whom we have had the benefit of hearing.

[23] The appellant’s testimony is therefore bookended by evidence that supports his claim to be gay: documentary evidence that predates the marriage, and the testimony of his current same-sex partner that he is in a relationship that post-dates the marriage. In context, the Tribunal finds that the appellant’s marriage does not contradict his claim to be gay. It simply reflects an ill-advised (and dishonest) attempt to try to remain in New Zealand.

[24] While the appellant’s dishonesty is not to be condoned, it does not undermine the credibility of the core element of his claim; namely, that he is gay. Bearing in mind that the appellant has not returned to Egypt during the 10 years since he came to New Zealand, his actions are not inconsistent with his claim that he is subjectively afraid to return to Egypt now.

[25] The Tribunal accepts the evidence of the appellant and his partner. We find that the appellant is a national of Egypt, who is gay. He has in the past been

subjected to various forms of mistreatment and discrimination in Egypt because of people's perceptions of him. It is on that basis that we turn to consider the prospective risk of harm he might face if he were to return there now.

The Refugee Convention

[26] Section 129(1) of the Act provides that:

"A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention."

[27] Article 1A(2) of the Refugee Convention provides that a refugee is a 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 habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[28] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claim to Refugee Status

[29] For the purposes of refugee determination, "being persecuted" has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No 74665/03* (7 July 2004) at [36]-[90]. Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection: see *Refugee Appeal No 71427* (16 August 2000), at [67].

[30] In determining what is meant by "well-founded" in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed

to a remote or speculative, chance of it occurring. The standard is entirely objective: see *Refugee Appeal No 76044* (11 September 2008), at [57].

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Egypt?

[31] While there are no specific laws criminalizing homosexuality in Egypt, the authorities tend to target the gay community under the guise of public morality laws, which they use to justify making arrests and pursuing prosecutions.

[32] For example, Article 9 (c) of law 10/1961 states that “Anyone who habitually engages in debauchery or prostitution is liable to a penalty of three months to three years imprisonment” plus a fine; see Amnesty International *Making Love a Crime: Criminalisation of Same-Sex Conduct in Sub-Saharan Africa* (2013) p80. In practice, “debauchery” (translated from the Arabic term *di’ara*) has been interpreted as encompassing sexual excess, and is used to target the gay community; see Human Rights Watch *In a Time of Torture – The Assault on Justice In Egypt’s Crackdown on Homosexual Conduct* (February 2004) p13.

[33] While that Human Rights Watch report is 10 years old, similar contemporary examples can also be found. One article “Six men jailed for gay sex in Egypt” www.gaystarnews.com (29 September 2014) refers to six allegedly gay men being sentenced to two years in jail on charges of “committing debauchery”. It states:

“Gay sex is not explicitly criminalised in Egypt but gay men are often arrested and punished ... on morality charges under several laws, including debauchery, immorality or contempt of religion.”

[34] Article 98w of the Egyptian Penal Code, which proscribes “Contempt for Religion”, has also been used to prosecute homosexuals, as has Article 278, which proscribes “shameless public acts”; see Daniel Ottosson, The International Lesbian, Gay, Bisexual, Trans and Intersex Association (IGLA) *State-Sponsored Homophobia – A World survey of laws prohibiting same sex activity between consenting adults* (May 2010) p10; “Step out of the dark ages” *Middle East* (July 2008).

[35] A review of country reports discloses examples of sporadic campaigns conducted by the Egyptian authorities to target suspected homosexuals over the past 15 years. Many of those arrested have been detained, charged and placed upon trial, and those held in detention are vulnerable to serious abuse, including

torture; El Menayawi, Hassan “Activism from the closet: gay rights strategising in Egypt” *Melbourne Journal of International Law* (May 2006).

[36] One of the largest group arrests took place in 2001 when police raided a nightclub in what became known as the “Queens Boat” case. More than 50 men were arrested, detained and placed on trial. More than 20 of the men charged were convicted and sentenced to prison terms of three years; “Egypt’s homosexuals find home in cyberspace” *BBC News* (15 April 2010).

[37] The police arrested several groups of men suspected of being HIV-positive in 2007 and 2008, on suspicion of homosexual “behaviour”. Again, this resulted in convictions and sentences of imprisonment ranging from one to three years; see Human Rights Watch *Egypt: Court Upholds HIV Sentences, Reinforces Intolerance* (28 May 2008); “In the country of boys: a new book on gay life in Egypt sends shockwaves through Egyptian society” *Menassat* (14 July 2009).

[38] According to the United States Department of State *Country Reports on Human Rights Practices for 2013: Egypt* (27 February 2014) (“the DOS report”), there were “few” reports of violence against lesbian, gay, bisexual or transgender individuals. It qualified that, however, by stating that:

“...intimidation and the risk of arrest greatly restricted open reporting and contributed to self-censorship.”

[39] The DOS report also refers to the “significant social stigma and discrimination” faced by gay men, that “impede[s] their ability to organise or publicly advocate on [their own] behalf”.

[40] The Human Rights Watch report *Work on Him Until He Confesses: Impunity for Torture in Egypt* (31 January 2011) states (at p11) that:

“As the use of torture spread beyond political dissidents to ordinary citizens in police custody or connected to criminal investigations, Human Rights Watch documented ... the routine arbitrary arrest and torture of men suspected of consensual homosexual conduct.”

[41] According to some Egyptian activists there has recently been an increase in arrests “particularly targeting gay men and trans people”, as well as “reports of torture and mistreatment by police”; see “Police arrest 77 in gay crackdown in Egypt” www.gaystarnews.com (19 May 2014). That article suggests that approximately 77 lesbian, gay, bi-sexual, transgender or intersex people have been arrested since November 2012, including 11 in Cairo in May 2014 alone. It

states that men who are arrested are often subjected to physical and verbal abuse. They can be stripped, beaten and subjected to ridicule by police officers:

“Some say they were given ‘anal probe’ tests, a way of finding out if someone has had sex which is scientifically invalid, but still common in countries criminalising homosexuality.”

[42] Another article refers to the arrest of a group of 14 men “14 men arrested in Cairo for homosexual acts” www.gaystarnews.com (12 October 2013). It states:

“Egypt has a poor record on LGBT rights.

Under the Mubarak regime, homosexuality was seen as ‘taboo’, with strict punishments for those accused of being gay.

Following the revolution in 2011, conditions have not improved, with the previously-in-power Muslim Brotherhood’s delegation to the UN not considering gays to be real people.”

[43] The last sentence references the comment made by an Egyptian representative to the United Nations. He told the Special Rapporteurs on Freedom of Peaceful assembly and Association and on Countering Terrorism that sexual orientation was “highly controversial” and “not part of the universally recognised human rights”. He stated that the Special Rapporteurs should concentrate on the rights of “real people”: see Amnesty International *Fighting for Justice and Human Rights: Egypt’s women activists describe their struggle* (March 2013) p25.

[44] Another report identifies a “flourishing underground gay community” but refers to “an unusually high rate of arrests” between October 2013 and April 2014. It states that a significant number of the raids were targeting people in their homes rather than at known meeting places, as had typified past initiatives. This “rais[ed] concerns that the community is facing the start of a targeted crackdown”; Patrick Kingsley “Egypt’s gay community fears government crackdown” *The Guardian* (17 April 2014).

[45] In light of the country information available it is apparent that men suspected of being gay in Egypt are at risk of being subjected to imprisonment and serious physical abuse that would constitute a sustained and systemic breach of their core human rights.

[46] There is said to be a “flourishing” underground community in Egypt, and it is possible (though unlikely in the long term) that the appellant could avoid such harm by hiding or denying his sexuality. However, he seeks to live his life without having to conceal this aspect of himself. Contrary to the assertions made by the

Egyptian representative at the United Nations (see above), he has the right to live a meaningful private life and the right to be treated equally and without discrimination. Those rights, which are more fully articulated in *Refugee Appeal No 75665* (7 July 2004), derive from Articles 2, 17 and 26 of the ICCPR.

[47] Article 17 provides that everyone has the right to freedom from interference with private life, while Article 26 articulates the principle of equality or non-discrimination:

“Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

[48] Article 2 provides, in effect, that neither of the rights identified in Articles 17 or 26 can be undermined upon the basis of one’s sexual orientation; *Toonen v Australia* (Comm No 488/1992, CCPR/C/50/D/488/1992, (4 April 1994)).

[49] The prohibition of discrimination goes to the core of the Tribunal’s understanding of “being persecuted”. This was characterised by La Forest J as the “sustained or systemic violation of basic human rights demonstrative of a failure of state protection”; *Canada (Attorney General) v Ward* [1993] 2 SCR 689. His Honour described the concept of discrimination in matters affecting those “basic human rights” as “central to an understanding of the Convention” (p733). In doing so, he drew a link to the Preamble to the Refugee Convention, which in turn draws upon the Charter of the United Nations and the Universal Declaration of Human Rights, affirming the principle “that human beings shall enjoy fundamental rights and freedoms *without discrimination*” (emphasis added).

[50] The appellant is under no duty to forego his fundamental human right to freedom from arbitrary or unlawful interference with his privacy, family and home, in order to protect himself from the type of serious harm identified within the country information. To impose a form of self-censorship and denial in order to avoid other forms of serious harm would in itself give rise to serious harm for this appellant. The harm in question is largely fostered by the state through its enforcement of particular legislation, and accordingly he is unable to obtain protection from the state.

[51] The Tribunal therefore finds that objectively, on the facts as found, there is a real chance of the appellant being persecuted if he were to return to Egypt.

[52] Having answered the first principal issue in the affirmative, it is necessary to address the second.

Is there a Convention reason for the persecution?

[53] This question can also be answered in the affirmative.

[54] In *Refugee Appeal No 1312* (30 August 1995), the Refugee Status Appeals Authority found that sexual orientation is a characteristic which is either innate or unchangeable or so fundamental to identity or to human dignity that an individual should not be forced to forsake or change the characteristic. On that basis, it found that sexual orientation can be the basis for finding the existence of a particular social group.

[55] The Tribunal adopts that approach and finds that the appellant's predicament arises for reason of his membership of a particular social group in Egypt, namely, gay men.

Conclusion on the Claim to Refugee Status

[56] The Tribunal finds that the appellant has a well-founded fear of being persecuted in Egypt for a Convention reason. He is a refugee within the meaning of Article 1A(2) of the Refugee Convention and section 129 of the Act.

The Convention Against Torture

[57] Section 130(1) of the Act provides that:

"A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

Conclusion on the Claim under Convention Against Torture

[58] The appellant is recognised as a refugee. By virtue of section 129(2) of the Act (the exceptions to which do not apply) he cannot be deported from New Zealand. This is in accordance with New Zealand's *non-refoulement* obligation under Article 33 of the Refugee Convention. Accordingly, there are no substantial grounds for believing that he would be in danger of being subjected to torture if deported from New Zealand. He does not require protection under the Convention against Torture.

The ICCPR

[59] Section 131 of the Act provides that:

- “(1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.
- ...
- (6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment.”

Conclusion on Claim under ICCPR

[60] Again, for the reasons given, the appellant cannot be deported from New Zealand. Accordingly, there are no substantial grounds for believing that he would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand. He does not require protection under the ICCPR. He is not a protected person within the meaning of section 131(1) of the Act.

CONCLUSION

[61] For the foregoing reasons, the Tribunal finds that the appellant:

- (a) is a refugee within the meaning of the Refugee Convention;
- (b) is not a protected person within the meaning of the Convention Against Torture;
- (c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[62] The appeal is allowed.

“A N Molloy”

A N Molloy
Chair

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