AJ (Risk to Homosexuals) Afghanistan CG [2009] UKAIT 00001

Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

Heard at Field House
On 28 October 2008

Before

Senior Immigration Judge Batiste
Senior Immigration Judge Southern
Professor R. H. Taylor

Between

AJ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Nasim, instructed by Mayfair Solicitors
For the Respondent: Mr S Kandola, instructed by Treasury Solicitors

1. *Though homosexuality remains illegal in Afghanistan, the evidence of its prevalence especially in the Pashtun culture, contrasted with the absence of criminal convictions after the fall of the Taliban, demonstrates a lack of appetite by the Government to prosecute.*
2. *Some conduct that would be seen in the West as a manifestation of homosexuality is not necessarily interpreted in such a way in Afghan society.*
3. *A homosexual returning to Afghanistan would normally seek to keep his homosexuality private and to avoid coming to public attention. He would normally be able to do so, and hence avoid any real risk of persecution by the state, without*

the need to suppress his sexuality or sexual identity to an extent that he could not reasonably be expected to tolerate.

4. *So far as non-state actors are concerned, a practising homosexual on return to Kabul who would not attract or seek to cause public outrage would not face a real risk of persecution.*
5. *If some individual, or some gay lobby, tried to make a political point in public or otherwise behaved in a way such as to attract public outrage, then there might be a sharp response from the Government.*
6. *A homosexual may be relatively safe in a big city (especially Kabul) and it would take cogent evidence in a particular case to demonstrate otherwise. The position in smaller towns and in rural areas could be different and will depend on the evidence in a specific case.*
7. *Relocation to Kabul is generally a viable option for homosexuals who have experienced problems elsewhere, though individual factors will have to be taken into account.*
8. *The evidence shows that a considerable proportion of Afghan men may have had some homosexual experience without having a homosexual preference. A careful assessment of the credibility of a claim to be a practising homosexual and the extent of it is particularly important. The evaluation of an appellant's behaviour in the UK may well be significant.*

DETERMINATION AND REASONS

1. The Appellant, a citizen of Afghanistan who was born on 1 January 1982, seeks reconsideration of the determination of Adjudicator Harmston of the IAT, dismissing his appeal against the Respondent's decision on 6 July 2004 to refuse him leave to enter, asylum/human rights claim refused, and to set removal directions to Pakistan.

History of the Appeal

2. The Appellant arrived in the UK on 2 April 2003 and made an application for asylum on arrival. He was granted temporary admission until 3 April 2003 when he was due to return to Heathrow for an interview. He failed to attend and the Respondent's decision was therefore reached on non-compliance grounds. His appeal against this decision was heard by an Adjudicator (Mr D.R.M. Harmston) on 29 October 2004. The Adjudicator accepted the Appellant's explanation for non-attendance at the interview and allowed his appeal to this limited extent. The Adjudicator also accepted the Appellant's submission that he was born in Afghanistan and was a citizen

of that country although he had spent many of his formative years in Pakistan.

3. The Adjudicator then considered the substance of the Appellant's asylum claim which was based upon his professed homosexuality. His material findings of fact are as follows:

> "18. The Appellant's claim is based upon his homosexual activities in Afghanistan. This occurred in the period between 1998 when the family moved into Jalalabad and April 2001 when the Appellant left Afghanistan. His story is that a few months after returning to Afghanistan he met Mr K, who was about nine years older than him, and started a homosexual relationship. This was disapproved by his parents but he continued it and then in 2001 it brought trouble. The Taliban were in power in Afghanistan at that time and enforced Sharia law very strictly. Homosexual activities were taboo. Gay people could expect very severe punishment from the Taliban if they were caught.
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> 19. In the early part of 2001 someone told the Taliban about a homosexual relationship between the Appellant and Mr K. The local Taliban leaders sent a messenger and called in the Appellant's father who was given lectures on his son's homosexual activities and was warned that he could possibly face a death sentence. Despite this the affair continued and eventually the Appellant's parents were asked to hand him over to the Taliban. They refused and they were killed and his younger brother disappeared and was probably killed. It was as a result of that that the Appellant left Afghanistan on 15 April 2001 and started his journeys to Mozambique and South Africa. I find that the Appellant's claim is plausible. He claims to have realised that he had homosexual tendencies whilst he was in Pakistan. He also claims to have been involved in gay relationships in the UK. There is therefore a thread of consistency running through his story and there is no reason to disbelieve it."

4. However notwithstanding these positive credibility findings, the Adjudicator concluded that since the Appellant had left Afghanistan, the Taliban had been ousted and the objective evidence showed that under the current government he would not be at any real risk on or after return to Kabul of any material ill-treatment entitling him to international protection as a consequence of his homosexuality. The Adjudicator also rejected the Appellant's evidence that he was involved with a UK national in a homosexual relationship amounting to family life under Article 8, principally because the alleged current partner did not attend the hearing, offered no explanation for his non-attendance, and had not signed the written statement produced at the hearing.

5. On 21 February 2005, the Appellant obtained permission to appeal from a Vice- President of the IAT. However, following reorganisation and the abolition of the IAT, the appeal was heard as a first stage reconsideration by a panel of the AIT

(Immigration Judge Macdonald, Ms S. E. Singer and Mr A.J. Cragg CMG) on 27 April 2006. That panel concluded that the Adjudicator did not make any material error of law and that the original determination of the appeal should stand.

6. On 1 June 2006 a Senior Immigration Judge granted permission to appeal to the Court of Appeal on the limited basis that it was arguable the Tribunal had failed to properly consider all the relevant objective evidence concerning the prevailing attitude to homosexuals in Afghanistan.

7. On 26 July 2006, the Court of Appeal promulgated its judgement in J v SSHD [2006] EWCA Civ 1238. This case also related to a homosexual, though from Iran rather than Afghanistan. In that case, the Tribunal had concluded that appellant would not be at any real risk of persecution because he could continue to act with discretion on return to Iran and would not therefore come to the adverse attention of the authorities. The Court of Appeal allowed that appeal on the basis that the Tribunal had erred in failing to consider the reasons why the Appellant had opted for discretion and whether maintaining that discretion was something which the Appellant could reasonably be expected to tolerate.

8. On 17 January 2007 the Court of Appeal with the consent of the parties ordered second stage reconsideration in this appeal on the following terms:

> "The appeal against the determination of the AIT dated 9 June 2006 be allowed to the extent that the appeal be remitted to the AIT for the latter to carry out a second stage reconsideration of the Appellant's appeal limited to determining whether the Appellant faces a real risk of persecution by reason of his homosexuality and/or the restrictions on his ability to live in Afghanistan as a practising homosexual."

9. The material parts of the Court's statement of reasons are as follows.

> "9 Whilst it is not accepted by the Respondent that any other matters expressly raised in the Appellant's grounds give rise to arguable errors of law, it is accepted that it is arguable the Adjudicator appears not to have considered whether any obligation on the Appellant to practise homosexuality "discreetly" in order to avoid persecution, could itself amount to persecution.
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> 10. Although the Appellant never appears to have argued or provided evidence, whether before the Adjudicator/AIT, that the requirement to act "discreetly" would amount to persecution, it is arguable that the Adjudicator should have made a finding as to whether any restrictions on his ability to live as a homosexual amounted to persecution.

> 11. On this basis the parties have agreed that the appropriate course is for the matter to be remitted to a differently constituted AIT, who can then consider whether, having regard to the objective evidence, the Appellant faces a real risk of persecution by reason of his homosexuality and/or the restrictions on his ability to live as a practising homosexual."

10. This case was then identified as offering the potential for country guidance and was prepared by the parties on that basis. By this route and on this limited scope the appeal came before us for second stage reconsideration.

The Hearing

11. We were supplied by the parties with the objective evidence listed in the Appendix hereto. These documents included expert reports by Dr Niaz Shah, Dr Martin Lau and Dr Antonio Giustozzi. They were complemented by oral evidence from Dr Lau. We also heard oral submissions from both Representatives, which we shall deal with as needed in the appropriate context. Essentially however the submissions were mainly concerned with directing us to the relevant case-law and to the material aspects of the objective evidence to support their respective points of view. All the oral evidence and submissions are fully set out in our record of proceedings and we confirm that we have taken into account all the evidence and submissions in reaching our conclusions, even if we do not consider it necessary, in order to explain our conclusions and reasoning, to deal with every document and submission specifically.

12. As can be seen from the passages quoted above from the Adjudicator's determination, the information given in it concerning the Appellant's sexuality was rather brief and indeed there was no reason for the Adjudicator to have gone further given the issues argued before him. However, given that he did not accept the existence of family life for the purpose of Article 8 with his claimed partner in the UK, and given the task we have been set by the consent order and the nature of the objective evidence before us, we asked the Representatives to identify the underlying evidence concerning the Appellant's sexuality to enable us to understand more fully the extent of the Adjudicator's acceptance at the end of paragraph 19 that there was "no reason to disbelieve" the Appellant's account of his homosexuality and experiences, and what this meant in terms of the Appellant's attitudes.

13. Mr Nasim referred us to the Appellant's written statements, the material parts of which can be summarised as follows. In 1988

due to a tribal dispute in Afghanistan in which the Appellant's elder brother was killed, the Appellant's remaining family moved from Jalalabad, where the Appellant was born, to a village in Pakistan near Lahore. The Appellant was then about five or six years old. He went to primary school and it was there that he first became aware of his attraction towards homosexual relations. In 1998, when the Appellant was about 16 years old the family, under pressure from the authorities in Pakistan to repatriate, returned to Afghanistan and Jalalabad. Some months after his arrival, he met Mr K, who was then about 25 years old and lived nearby. Mr K had, in the Appellant's words, a tendency towards homosexual relations, and he and the Appellant maintained a close contact with each other, finally deciding to live together as partners. When his family became suspicious, they asked him about his relationship with Mr K, which the Appellant acknowledged. His father asked him to discontinue the relationship but, given the Appellant's refusal to do so, remained silent. Later, local people became aware of the relationship and reported this to the Taliban. The Appellant's father was called in by the Taliban and given lectures about homosexuality and that it was punishable with death. When the relationship continued his father was asked to hand the Appellant over to the Taliban, but he refused to do so even when threatened with severe consequences. One night in April 2001, when the Appellant was absent from his house, his family was attacked by the Taliban. His father and mother were killed. His brother was taken away and the Appellant believes he was killed also. The Taliban also attacked Mr K's house and set it on fire after killing him. Thus the whole of the Appellant's immediate family had been killed. With the help of his wider family and friends he escaped from Afghanistan, arriving in the UK some two years later in April 2003.

14. In October 2003 the Appellant met a man at a gay club and they began a brief homosexual relationship which ended in December 2003. In February 2004 the Appellant met another man at a gay nightclub and they thereafter lived together. It is this relationship which the Adjudicator concluded did not constitute family life for the purpose of article 8, given that the claimed partner did not attend the hearing, explain his absence, or sign a written statement. Mr Nasim asked us to note that given the limited nature of the original permission to appeal and of the consent order by the Court of Appeal this evidence had not been brought up to date. However the evidence before the Adjudicator which was accepted as credible was that the Appellant first identified his homosexual tendencies in Pakistan; had a long relationship in Afghanistan; and had had two relationships in the UK. This justified the

assessment of the Appellant as a "practising homosexual" as described in the consent order.

15. Mr Kandola did not dissent from this and we have proceeded on the basis of this profile. Given that our task is to assess the Appellant's position in the context of the expert and other objective evidence, it is therefore to this that we now turn.

The Expert Evidence

16. Dr Shah, who is a law lecturer at Hull University has provided a written report which offers an insight into perceptions of sexual activity between men and its prevalence in Afghan society, and the material differences between this and Western perceptions of homosexuality. Given that Dr Shah was brought up in Pashtun culture with Pashto as his mother tongue, and as a Moslem in the Hanafite tradition, we consider that these insights are material and relevant, even though he came from Pakistan (where he obtained a law degree) rather than Afghanistan. Dr Lau in his oral evidence, although he did not agree with the extent of Dr Shah's analysis, accepted that he would be well familiar with customs in Afghanistan given that the border between the two countries was rather artificial and the tribes lived on both sides of the border. Dr Lau confirmed that the Pashtun comprise 38% of the population of Afghanistan.

17. Dr Shah, whose observations relate mainly to Pashtun culture, categorises male relationships in the following way:

    1. Catamite (Koni, Sesth) - Many young boys are sodomised who may not agree to it out of love for the active partner but can be persuaded for various reasons to consent, though they are not professional male prostitutes. News of this is very often reported in Afghan society.
    2. Beloved (Mehboob, Meshooq, Ashna) - Mature men (both married and bachelors) keep younger boys as friends. In this relationship it is not necessary that sex takes place. If sex does take place it is usually with consent. The mature male is the active partner and the kept boy is the passive partner.
    3. Friend (Yari) - This is a relationship between the two boys of the same age who may feel affection for each other. Essentially sex does not take place in the majority of cases but there is a possibility that it will. If it does it is regarded as consensual. Yari is almost as popular as love affairs between male and female for example in universities and other places. They

are not regarded as homosexual in the sense that this is understood in the United Kingdom. They are heterosexuals and after attaining marriageable age they marry women.

4. Eunuchs (Hijara) – There is a long tradition of eunuchs in Afghanistan. In some cases they are sodomised but usually they dance and sing. In big cities they are more likely to provide massages and sex.

18. Dr Shah reports that Pashto literature is full of references to Mehboob, Yari and Koni. However he is not aware in the literature of any tradition of gay relationships as understood in the West where two males openly express love for each other and want to live as a couple to the exclusion of any sexual relationship with a female. Nevertheless the emergence of gay relationships cannot be ruled out after the exposure of Afghan society to the Internet and other sources of information, and in 2005 a gay couple of Afghan origin got married in Pakistan. He considers that it is important to note that many asylum seekers of Afghan origin tend to identify themselves as gay which may not genuinely be the case.

19. He says that it is hard to assess whether these various forms of sexual relationship as practised in Afghanistan are socially allowed because of the prevailing social hypocrisy about male sexual roles in society. However he strongly believes that if two males decide to have sexual relationships and live together they will be prosecuted by police and persecuted by non-state actors. On the other hand mere inclination to love young boys with or without having sex with them is practised and tolerated. He assesses the risk overall in the following way:

> "2.3.1 I feel, as indicated above, if someone declares himself as gay or wants a gay relationship, he will be persecuted. A man can be a gay secretly but the minute it is known there will be a serious risk of persecution by state and non-state actors. In general, family members feel ashamed of a gay person in the family and his membership is regarded as a stigma on the family. If family feel the same about catamites but there is a subtle difference between gays and catamites. Gays want to live life as a gay person whereas catamites are usually young boys who can be persuaded for different reasons to have sex with another male. ….
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> 2.3.2 Geography and who rules the country are also important factors. If a gay person is living in a big city, it might be relatively safe and there is greater possibility the gay relationships might be kept secret for longer periods. If he is in town/village, it will be difficult to keep it secret and once it is discovered the reaction from non-state actors will be very strong. The question of who is ruling the country or a particular Providence is very relevant. If the rulers are Taliban or other religious parties, persecution and death is certain. Taliban killed several people on the ground of

> homosexuality. If the government of Afghanistan is secular and liberal the chances of official persecution is not very likely but they may be prosecuted under article 427 of the Afghan Penal Code if caught red-handed or if the matter is reported to police. Non-state actors will also be a real threat to gay persons.
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> 2.4.1 Homosexuality was and is practised in Afghan society. The attitude of society is hypocritical. If homosexuality is secret or not discussed openly then it is tolerated. Homosexuals are generally not respected. If two males are caught in the act of sex and the fact is made public, it could lead to serious consequences as it then becomes a matter of family honour. Serious consequences include death by non-state agents. As indicated above, social status and wealth play a role in determining the nature of the dispute between the families of the two males involved.
>
> 2.4.2 I do not think that Afghan society as a whole is familiar with the concept of gays: consenting adults to sexual relationship living together Ramón as understood in the United Kingdom… as indicated above both gays and lesbians will be seriously persecuted by non-state actors (as it is regarded against Islam) and prosecuted by police under the Afghan Penal Code."

20. Having said that Dr Shah also offers a subtle view of the attitude of Islamic law to homosexuality differentiating between different Islamic schools of thought:

> 2.2.2 The punishment mentioned in article 427 for sodomy and homosexuality is only a tazir punishment (punishment which is not fixed by the Koran or Sunnah, the two primary sources of Islamic law, where the court has discretion). Those committing crimes of Had, Qisas and Diyat (cases where punishment is fixed by the Koran and Sunnah where the court has no discretion) shall be punished according to the provisions of the Hanafi School of Islamic law.....
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> 2.2.3 ..... The view of Imam Abdul Hanifa, the founder of Hanafi school, is noted in the authoritative book of Hanafi law. Imam Abu Hanifa says that there is no fixed penalty (Had) for sodomy, and therefore the accused should be corrected by tazir… the view of Imam Abu Hanifa in general prevails over all other views in the Hanafi tradition. The penal code of Afghanistan 1976 is mainly based upon the views of Imam Abu Hanifa which is why article 427 treats sodomy as tazir crime and is punishable with "long imprisonment" instead of the death penalty. It is a matter for the discretion of the court having regard to the circumstances of each case."

21. Dr Lau is a barrister and a reader in Law at the School of Oriental and African Studies in the University of London. He is the chief examiner of Islamic law for the external LLB at the University of London and his current position involves intensive research on modern Afghan law. He has made many visits to Afghanistan since the fall of the Taliban and is heading an EU Commission project on the reform of the justice sector in Afghanistan. He states in his written report that despite official

and societal disapproval of homosexuality there is ample anecdotal evidence suggesting that in reality it is practised with some frequency. However most of these men would not refer to themselves as being homosexual because they had sex with men, but would argue that the absence of women in their lives forced them to have sexual encounters with other men. He summarised his conclusions in the following terms:

> "13. Given the legal position concerning homosexuality, any open display of someone's homosexuality would be extremely dangerous. In seven years of frequent visits to Afghanistan I have never met any Afghan who would admit to being homosexual. The general opinion seems to be that homosexuality is a western phenomenon which does not exist in Afghanistan and that the few cases which do occur have to be punished harshly as a matter of Islamic law. In my opinion an openly gay man would be ostracised by society and would sooner or later come in conflict with the law. If convicted, the punishment would involve long imprisonment, perhaps even death.
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> 14. In conclusion, in my opinion homosexuality is an offence under Afghan law. There is evidence showing that there have been convictions where homosexual conduct thus confirming that the offence does not only exist on "paper". In my opinion it would be quite impossible to be openly gay in Afghanistan because of societal disapproval and official prosecution."

22. In his oral evidence, Dr Lau adopted his report and responded to questioning. He identified a UN study concerning juvenile offenders in prisons in and around Kabul. He acknowledged that this should be treated with some caution as it was not precise but it appeared to suggest that 14% of those boys in the prisons checked had been accused or convicted of homosexual behaviour. He was not sure what exactly was said about the number of convictions, nor could he describe the precise circumstances of any specific case. This was however the only report he had been able to find on statistics for homosexuality and he agreed to provide a copy of it to the Tribunal as it did not appear to be available on the internet. He did not really know how many juveniles were covered in the report and would have to check.

23. Following the hearing Dr Lau sent us the report in question, which is by the UN Office on Drugs and Crime and is entitled "Assessment Report on the implementation of the Juvenile Code". It is dated May 2007. It is convenient to summarise the relevant matters at this point. It states that in January 2007, some 388 juveniles were in juvenile rehabilitation centres across Afghanistan. In March 2006, 69 juveniles (58 boys and 11 girls) were held at the centre in Kabul. In March 2007, the number held in Kabul had increased to 130 (112 boys and 18 girls). Across the country as a whole, theft and robbery

accounted for 33% of the charges made, murder and assault for 30% and homosexuality for 12%. There was no geographical distribution of the homosexuality statistic between Kabul and elsewhere. Nor was there any information about the number of convictions. However the following general observation was made:

> "It seems uncontroversial that under Islamic law homosexual behaviour is condemned and falls into the category of adultery (zina) as it is considered to be sex with an illicit partner. In national statutory legislation consensual sexual activities with a person of the same sex is not regulated as being an offence. Some juveniles charged with homosexual behaviour were very young. One juvenile that is charged under this category is 11 years old and therefore under the age of criminal responsibility, one other juvenile is 13 and one 14 years old. It thus seems probable that some juveniles charged with homosexual behaviour are rather victims of rape or forced prostitution than having engaged in consensual sexual activities. Since the lines between the two acts are undefined in Afghanistan it is common that the victims of a moral offence are arrested and detained; victims of rape are treated as persons having committed the crime until proved innocent."

24. Dr Lau went on in his oral evidence to say with regard to risk of being detected as homosexuals, that people who fall foul of the system have usually been detected locally. Communities normally look after themselves and they make reports leading to arrests. Official statistics give only a small segment of what happens on the ground. The writ of the central government is relatively limited and most communities outside Kabul look after themselves. The Afghan police are to a degree predatory and on occasion charge people with crimes with a view to extracting a bribe. Thus police can be proactive but normally they would be reactive and an investigation would be triggered by a complaint.

25. There were important distinctions between perceptions in Afghanistan and the West as to public behaviour. Thus although men might in public hold hands this was not regarded in Afghanistan as having a sexual connotation. However behaviour which falls outside the accepted norms, for example not getting married or having relationships beyond a certain age, will begin to get people talking and can lead to risk. The Taliban certainly took this very seriously.

26. With regard to legal consequences, Article 247 of the Afghan penal code was only one basis upon which a homosexual could be prosecuted. The Afghan Penal Code was an addition to Islamic law and not an alternative to it. Article 1 of the Penal Code made clear that there those committing crimes against God such as Hodod, which could include homosexuality, could be punished in accordance with Islamic religious law.

27. Dr Lau was asked about Dr Shah's analysis of Afghan attitudes to homosexuality and did not agree with it to the extent described. He considered that openness would be unacceptable. There was a lot of folklore about Pashtun practices which perhaps reflected ethnic tensions between the Pashtun and other tribes. Dr Lau was also asked if he had any knowledge of any individual convicted post-Taliban of homosexual activity. He said he did not, but he could surmise from the UN study to which he had referred that perhaps 10 to 15 boys in prison had been charged with homosexuality. This limited statistical information reflected the fact that the system covered by the statistics was limited. Only about 10,000 people were imprisoned in Afghanistan but the number was rising quickly. Not too much weight should be given to the limited number of convictions. His impression of the system was that people who fall foul of their local communities go to prison.

28. The third expert report is by Dr Giustozzi is who is a research fellow at LSE with a large number of publications about Afghanistan to his credit and who has carried out a number of research projects about the country. He agrees that from a legal standpoint homosexuality is banned and that potential prosecution under Islamic law or under article 427 of the penal code is possible. He also confirmed the existence of abuses by the security forces in similar terms to Dr Lau. He also stated as follows:

> "4... The last known execution for homosexual practices dates back to the Taliban period. Prison sentences are still handed out to homosexuals. For example in 2002-2003 79 individuals have been arrested for homosexuality in Afghanistan according to the figures of the Ministry of Interior. In 2003-2004 the number rose to 111 and in 2004-2005 to 124. I could not find any figures for 2005-2006 but in 2006-2007 the number of crimes of homosexuality recorded by the Attorney General's office was 159. By no means were these cases concentrated in the provinces. In 2002-2003 there were 11 cases in Kabul, with another in 11 cases reported in 2003 -2004, 36 in 2004-2005 and 25 in 2006-2007. In 2004 even an American adviser to the Afghan government was reportedly arrested for having a homosexual relationship with an Afghan man.
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> 5. Since the reach of the government is very limited and rarely extends beyond the cities and the main administrative centres, in the countryside Islamic law is most often is still applied, which means that their homosexuality would still be punished with death. I do not know of any case of homosexual [sic] executed in the villages but I have heard of several executions of adulterers in the villages on the basis of Sharia law. Given the cultural context, outlined below, the possibility of summary executions of homosexuals seems to be very real....

> 6. With regard to non-state actors, in Afghanistan attitudes towards homosexuality vary between the religious establishment and the tribal one. The attitude of the clergy is very negative, as the practice of it is condemned by religious laws. On the other hand among several Pashtun tribes homosexual practices have long existed, especially among the warrior elite. In the tribal environments sex between men is acceptable as long as those indulging in it are also married and have children. They are also expected not to give publicity to their sexual conduct. It is also considered shameful to serve in the passive role. This is why senior members of the tribe use young men and boys as lovers, who can then leave behind the shame of the passive ("female") role by taking over one day the male role as they grow older. What is not acceptable even in tribal Afghanistan is homosexual couples, who refused to marry women and indulge exclusively in consensual homosexual relations. Generally it is not acceptable for a non-married man to start a relationship with another man, except as his junior partner."
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> 10. Kabul city itself is not safe from the abuses of the security forces. Throughout 2003 and 2004, the situation in terms of policing in Kabul has improved somewhat, due to the completion of the training of the first few batches of recruits at the Police Academy and to a larger plan to train existing policeman. However UN police advisers agree that on the whole the effectiveness of such training programs has been very limited….
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> 11. From late 2004 a deterioration of security has been reported in the number of provinces including Kabul….
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> 12. Corruption is rife within the police force as the staff tries to make up for low income by asking bribes or imposing arbitrary taxes on the population..
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> 13. In conclusion [the Appellant] would be punishable with imprisonment in Afghanistan if his homosexuality was known to the authorities. The conditions of Afghanistan's jails are still well below international standards and given the record of abuses of the police and the cultural attitudes prevailing in the country, it is likely that [he] would be subjected to a even worse treatment than the average prisoner."

29. We should perhaps add at this point that, although it was not included in Dr Giustozzi's report, he is cited in the latest COIR report offering the following view:

> "10. It is not difficult to track people down in Afghanistan, although it might take some time. Neighbours and landlords will check people's backgrounds, because everyone thinks in terms of security, and so they would want to check the newcomer's background in their home area. Further, messages are sent across the country via chains of communications based on personal contacts, and it would be natural to investigate where someone was from in order to see what role they could play in such a network. The Postal Service's unreliable and only delivers to the district centres, not the villages, so that travellers are often used to deliver messages and goods to relatives and friends."

30. That is the substance of the expert evidence from which it can be seen that there are some differences in tone and degree between them to which we shall return later. However they appear offer a broad consensus that sexual activity between men is to some degree prevalent in Afghan society possibly due to a lack of access to women in particular circumstances, but that two adult unmarried homosexuals living together openly as a couple to the exclusion of women could be at risk of prosecution by the state if it came to their attention, with the prospect of long imprisonment on conviction under Article 247 of the Penal Code, or even death under Sharia law, although there very little specific evidence of this having actually occurred post Taliban. We turn now to the remaining objective evidence.

The Other Objective Evidence

31. We began by looking at the evidence about the prevalence of sexual activity between men in Afghanistan. The CIPU report of 2005 reported at paragraph 6.277 a local mullah as saying that between 18% and 45% of men in the Kandahar area engaged in homosexual acts and that a professor at Kandahar Medical College estimated that about 50% of the city's male residents had sex with men or boys at some point in their lives. A psychiatry professor compared Afghan men to prison inmates saying that they had sexual relations with men because men were more available than women.

32. A report from the Los Angeles Times of 3 April 2002, which is the source for much of the CIPU comments confirms that the rarely acknowledged prevalence of sex between Afghan men is an open secret, largely due to the segregation of women and this would appear to be the source of the reports in the 2005 CIPU reports about Kandahar. The report offers considerably more detail than is contained in the CIPU report and confirms that both local religious authorities and the medical establishment consider male sexual activity to be prevalent with various sources suggesting that 50% of men could be involved at some point in their lives, though they would not regard themselves as being homosexual. Public conduct such as holding hands, kissing and wearing make-up would not be regarded as sexual conduct.

33. Paragraph 6.278 of the CIPU report of April 2005 goes on to state as follows:

> "A Danish fact-finding report of June 2004 reported that according to the UNHCR and the Cooperation Centre for Afghanistan homosexuality is forbidden in Afghanistan. UNHCR noted that it is difficult to say anything definite about conditions for homosexuals

> because there is no one who is prepared to declare that he is a homosexual or whose homosexuality is publicly known. The CCA knew of the existence of homosexuals but had never heard about homosexuals being punished. UNHCR were unaware of any cases under the new government in which homosexuals had been punished. UNHCR also noted however that behaviour between men which would arouse curiosity in many Western countries such as holding hands, kissing or embracing is not considered explicitly sexual behaviour in Afghanistan. UNHCR were of the view that homosexuality was common in Afghanistan due to the strong degree of separation between the sexes. Moreover according to the source homosexuals do not have problems provided they can keep their sexual orientation secret and do not overstep other social norms within their family. For example men of homosexual orientation can be forced into marriage and a possible conflict with only arise if the man refused to marry.

34. A report of the International Commission of Jurists of 2005 confirmed that there were credible reports of suspected homosexuals being buried alive during the Taliban period following summary trials, but there was nothing in that report covering the post-Taliban period.

35. Thus there is ample support for the view expressed by the experts that sexual activity between men in Afghanistan is fairly highly prevalent, probably due to the segregation of, and limited access to, women, but that many of the men involved do not regard this as homosexual activity.

36. However neither Islamic law nor the Afghan penal code makes this distinction. The article in the LA Times cited a source a saying that during the period of the Taliban the number of men involved in sexual activities with other males in Kandahar fell from 50% to 10% but following the fall of the Taliban was rising back to previous levels. In such circumstances we looked for evidence of prosecutions and convictions for homosexuality in the post Taliban period, bearing in mind that the population of Afghanistan was assessed in the 2004 US State Department report as being about 28.5 million. In doing so we accept Dr Lau's evidence that statistics in Afghanistan are somewhat rudimentary and that the writ of central government is limited.

37. In reality there is nothing beyond what was said by the experts. Dr Lau said that he was personally unaware of any convictions. The statistics cited by Dr Giustozzi (though he said that prison sentences are still handed out to homosexuals) all appear to be of arrests and not convictions/sentences, and even the arrests run at the rate of less that 150 per year. Of those, the numbers of arrests in Kabul were very few indeed. The UN paper concerning the juveniles in prison in and around Kabul, supplied by Dr Lau, was from a very small sample; was very

unspecific about the individual cases; and also appeared to relate to arrests rather than convictions.

The Relevant Law

38. We turn next to the relevant law. A refugee is a person who falls within Article 1(A) of the 1951 Geneva Convention and to whom the exclusion clauses in regulation 7 do not apply. Article 1(A) describes a refugee as a person who

> "Owing to a 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."

39. The terms of the remittal to us are limited to considering whether having regard to the objective evidence the Appellant faces a real risk of persecution by reason of his homosexuality and/or the restrictions on his ability to live as a practising homosexual. The Court of Appeal in J, which is referred to in the consent order, held following the analysis of the House of Lords in R v Immigration Appeal Tribunal, Ex p Shah and Islam [1999] 2 AC 629 and with the agreement of both parties that "practising homosexuals in Iran" constituted a particular social group, given the legislative penalties imposed upon them under Iranian law.

40. Mr Kandola suggested that in the context of Afghanistan a more appropriate particular social group would be "homosexuals who conduct relationships to the exclusion of women and who do not conform to social norms." As potentially serious penalties are imposed by law in Afghanistan on homosexuals generally, we do not consider that it is appropriate to distinguish between different categories. We therefore consider that "practising homosexuals in Afghanistan" also constitute a particular social group and this provides the Convention reason asserted in this appeal.

41. We also remind ourselves that Maurice Kay LJ pointed out at para 11 of J:

> "If there is one thing upon which all the authorities are agreed, it is that persecution is, in the words of Lord Bingham of Cornhill in Sepet and Bulbul [2003] 1WLR 856 at paragraph 7, a 'strong word', requiring a high threshold. It has been variously expressed, but the language of McHugh and Kirby JJ [*in the High Court of Australia S395/002 [2003] HCA 71, [2004] INLR 233*]... - 'it would constitute persecution only if by reason of its intensity or duration the person

> persecuted cannot reasonably be expected to tolerate it ' – has been adopted in a number of recent authorities including Z [*Z v SSHD 2005 ImmAR 75*] (at paragraph 12) and Amare v SSHD [2005] EWCA Civ 1600 paragraph 27, and RG (Colombia) v SSHD [2006] EWCA Civ 57 paragraph 16."

42. We also note that when the Tribunal reconsidered the appeal of J in HJ (Homosexuality – reasonably tolerating living discreetly) Iran UKAIT 00044 it identified the task set for it by the Court of Appeal in the following terms:

> 39. We take as our starting point that when assessing whether a person who is a homosexual would face risk of persecution or serious harm on return to his own country we must take a factual, not a normative approach. That is to say we must focus on the factual issue of how it is likely he *will* behave given the evidence we have about how and why he has behaved up to now. It is wrong for a decision-maker to apply a normative approach which focuses on how it is thought an applicant *should* behave. However, we take from the way in which the Court of Appeal has formulated its questions that in examining how such a person will behave we have to examine whether that will entail for him having to live a life which he cannot reasonably be expected to tolerate because to do so would entail suppression of many aspects of his sexual identity. We are confident that when referring to what an appellant can "reasonably be expected to tolerate" the Court of Appeal had in mind an objective, not a subjective test.

43. The Court of Appeal, as Mr Kandola submitted, recently returned to the issue of homosexuality in Iran in the case of J in XY (Iran) v Secretary of State for the Home Department [2008] EWCA Civ 911 and concluded as follows:

> 7. It is on the basis of these findings that it is accepted by Mr Nicholson that not every active Iranian homosexual is entitled to asylum in this country. If homosexuals in Iran are discreet, there is no real risk of their being apprehended and punished. If they have previously been arrested or are wanted by the authorities on account of their homosexual activities, different questions arise. In the present case, however, as has been seen, the Immigration Judge rejected the Appellant's claim to be wanted on account of his affair with A.
>
> 8. However, discretion and clandestine sexual behaviour are not complete answers to the issues that may arise in cases such as the present. If the Appellant is returned to Iran, he will have to carry out his sexual activities clandestinely. A persecutory situation is capable of existing by reason of the fear and stress engendered by that risk. That was considered by the Court of Appeal in *J* [2006] EWCA Civ 1238, an appeal which was confined to the application of the Asylum Convention to the appellant's claim: his Convention rights were not addressed. Maurice Kay LJ, in a judgment with which the other members of the Court of Appeal agreed, referred to the decision of the High Court of Australia in *S395/2002* [2003] HCA 71 and said:
>
> > 10. In our jurisdiction Lord Justice Buxton demonstrated in *Z v SSHD* [2005] Imm AR 75 that the approach of the

High Court of Australia had in turn been influenced by English authority, particularly *Ahmed v SSHD* [2000] INLR 1. Having referred to the judgment of Simon Brown LJ in *Ahmed*, he said at paragraph 16:

"It necessarily follows from that analysis that a person cannot be refused asylum on the basis that he could avoid otherwise persecutory conduct by modifying the behaviour that he would otherwise engage in, at least if that modification was sufficiently significant in itself to place him in a situation of persecution."

11. That brief extract is particularly helpful because it brings together the principle articulated by the High Court of Australia and the underlying need for an applicant to establish that his case contains something "sufficiently significant in itself to place him in a situation of persecution". If there is one thing upon which all the authorities are agreed it is that persecution is, in the words of Lord Bingham of Cornhill in *Sepet and Bulbul* [2003] 1 WLR 856 at paragraph 7, "a strong word" requiring a high threshold. It has been variously expressed but the language of McHugh and Kirby JJ to which I have referred – "it would constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it" – has been adopted in a number of recent authorities including Z (at paragraph 12) and *Amare v SSHD* [2005] EWCA Civ 1600, paragraph 27, and *RG (Columbia) v SSHD* [2006] EWCA Civ 57, paragraph 16.

....

16. In the present circumstances, the further reconsideration should be by a differently constituted Tribunal. It will have to address questions that were not considered on the last occasion, including the reason why the appellant opted for "discretion" before his departure from Iran and, by implication, would do so again on return. It will have to ask itself whether "discretion" is something that the appellant can reasonably be expected to tolerate, not only in the context of random sexual activity but in relation to "matters following from, and relevant to, sexual identity" in the wider sense recognised by the High Court of Australia (see the judgment of Gummer and Hayne JJ at paragraph 83). This requires consideration of the fact that homosexuals living in a stable relationship will wish, as this appellant says, to live openly with each other and the "discretion" which they may feel constrained to exercise as the price to pay for the avoidance of condign punishment will require suppression in respect of many aspects of life that "related to or informed by their sexuality" (Ibid, paragraph 81). This is not simply generalisation; it is dealt with in the appellant's evidence.

9. Buxton LJ said:

20. I would only venture to add one point. The question that will be before the AIT on remission will be whether the applicant could reasonably be expected to tolerate whatever

> circumstances are likely to arise were he to return to Iran. The applicant may have to abandon part of his sexual identity, as referred to in the judgment of Gummow and Hayne JJ in *S*, in circumstances where failure to do that exposes him to the extreme danger that is set out in the country guidance case of *RN and BB*. The Tribunal may wish to consider whether the combination of those two circumstances has an effect on their decision as to whether the applicant can be expected to tolerate the situation he may find himself in when he returns to Iran.

10. Whether the issue whether an applicant can reasonably be expected to tolerate his personal or family circumstances if he is returned to his country of nationality is more appropriately considered under the Asylum Convention or under Articles 3, and more particularly 8, of the European Convention on Human Rights is something that it is unnecessary to decide. So far as the Asylum Convention is concerned, however, I would place emphasis on paragraph 11 of Maurice Kay LJ's judgment and the requirement of persecution.

11. The remitted appeal of *J* was heard by the AIT in February 2008 and the decision of the President, sitting with Senior Immigration Judges Storey and Mather, is reported as *HJ (homosexuality: reasonably tolerating living discreetly) Iran* [2008] UKAIT 00044. The Tribunal's determination is summarised as follows:

> It is a question of fact to be decided on the evidence of the appellant's history and experiences as to whether a homosexual appellant "can reasonably be expected to tolerate" living discreetly in Iran. Enforcement of the law against homosexuality in Iran is arbitrary but the evidence does not show a real risk of discovery of, or adverse action against, homosexuals in Iran who conduct their homosexual activities discreetly. The position has not deteriorated since *RM and BB*.

12. The Tribunal stated:

> 41. In his witness statement of 10 February 2007 and in his evidence before us the appellant has claimed that living discreetly as a homosexual in Iran was for him a matter of living in extreme fear and of having to live a lie every day of his life. However, we prefer the evidence he gave in his statement in 2001 immediately on or after his arrival - and when his past in Iran was fresher in his mind - when he said of his homosexuality in Iran:
>
> "The penalties were not something I thought about. It was more important for me to pursue my right to a private life and to think and act the way I wanted to. Also in my relationship with "A" it was more important for me to be with him than to think about what the police might do to me."
>
> 42. It was clearly possible for the appellant to live in Iran, from the age of fifteen to his leaving at the age of thirty one, as a gay man without discovery or adverse consequences. In our judgment the appellant was able to conduct his

homosexual activities in Iran in the way that he wanted to and without any serious detriment to his own private and social life. The evidence does not indicate that he experienced the constraints Iranian society placed on homosexual activity as oppressive or as constraints that he could not reasonably be expected to tolerate.

...

44. We acknowledge that the way in which he is able to live as a gay man in the UK is preferable for him and we are satisfied that this informs his view that it is "impossible" for him to return to Iran. We acknowledge too that the appellant is now much more aware of the legal prohibitions on homosexuals in Iran and the potential punishments for breach of those prohibitions. On any return, to avoid coming to the attention of the authorities because of his homosexuality he would necessarily have to act discreetly in relation to it. We are satisfied that as a matter of fact he would behave discreetly. On the evidence he was able to conduct his homosexual activities in Iran without serious detriment to his private life and without that causing him to suppress many aspects of his sexual identity. Whilst he has conducted his homosexual activities in the UK less discreetly, we are not persuaded that his adaptation back to life in Iran would be something he could not reasonably be expected to tolerate. We consider that as a matter of fact he would behave in similar fashion as he did before he left Iran and that in doing so he would, as before, be able to seek out homosexual relationships through work or friends without real risk to his safety or serious detriment to his personal identity and without this involving for him suppression of many aspects of his sexual identity.

45. The evidence of suppression of aspects of the appellant's life in Iran in comparison to his life in the UK is limited. In Iran he could not go to gay clubs as he can in the UK. Public displays of affection to a homosexual partner may lead to a risk of being reported to the authorities which is not so in the UK. The appellant's ability to be open about his sexuality as has been the case in the UK was not possible for him throughout his thirteen adult years in Iran and three years as a minor. But he did have friends who knew of his sexuality, he was able to socialise with them and he was able to tell his family. If a wish to avoid persecution was ever a reason why he acted discreetly in Iran it was not, on the evidence, the sole or main reason. It is difficult to see on the evidence that a return to that way of living can properly be characterised as likely to result in an abandonment of the appellant's sexual identity. To live as the appellant did for thirteen years did not expose him to danger. The appellant may well live in fear on return to Iran now he is aware of the penalties which might be arbitrarily imposed were he to be discovered. The question as to whether such fear reaches so substantial a level of seriousness as to require international protection has to be considered objectively and in the light of the evidence as we have found it to be. Homosexuals may wish to, but cannot, live openly in Iran as is the case in many countries. The conclusions in *RM and BB* as to risk remain

> the same. This appellant was able to live in Iran during his adult life until he left in a way which meant he was able to express his sexuality albeit in a more limited way than he can do elsewhere. In particular we have regard to the fact that the evidence as found shows that the appellant's sexuality was not known to the authorities when he left Iran. Objectively we cannot see that the level of seriousness required for international protection is in this case reached.
>
> 46. Buxton LJ describes the question before this Tribunal as "whether the applicant can reasonably be expected to tolerate whatever circumstances are likely to arise were he to return to Iran"; and further " the applicant may have to abandon part of his sexual identity…in circumstances where failure to do that exposes him to extreme danger". The circumstances to be tolerated are the inability to live openly as a gay man as the appellant can in the UK. The part of sexuality to be abandoned is on the evidence also the ability to live openly as a gay man in the same way the appellant can do elsewhere. To live a private life discreetly will not cause significant detriment to his right to respect for private life, nor will it involve suppression of many aspects of his sexual identity. Enforcement of the law against homosexuality in Iran is arbitrary but the evidence does not show a real risk of discovery of, or adverse action against, homosexuals in Iran who conduct their homosexual activities discreetly. The position has not deteriorated since *RM and BB.* On the evidence we find the appellant can reasonably be expected to tolerate the position on any return.

Accordingly, the appeal was dismissed.

13. In the present case, the relevant part of the Immigration Judge's determination is in paragraphs 61 and 62:

> "61. I do not accept that the Appellant, simply on the basis that he is a homosexual, would be at risk of treatment that amounts to persecution or breaches his human rights, if he is returned to Iran. Although I accept he is a homosexual and does form part of a particular social group in Iran, he is not entitled for his appeal to succeed simply on that basis. Mr Nicholson implies that the Appellant's appeal should succeed because the Appellant would have to abandon his sexual identity upon returning to Iran. I do not accept that this is the case. The Appellant does not simply abandon his sexual identity if he is required to carry on his sexual activities with a same-sex partner with some care or discretion. All persons, of whatever sex, involved in intimate relationships conduct themselves with such care and discretion. It is clear from the Appellant's own evidence that he conducted his own sexual relationship with Mustafa with some care and discretion as he was fully aware of the likely result of such activity coming to the attention of the Iranian authorities. It is therefore not reasonably likely that he would be careless or indiscreet regarding his sexual activities, if they resumed upon his return to Iran.

> 62. There is no evidence to suggest that the Appellant came to the attention of the authorities on account of any political or religious activity and as such he has no profile which would bring him to the attention of the Iranian authorities if he is returned there. I do not accept that the Iranian authorities are aware of his homosexual activity and therefore they would have no interest in him if he is returned to Iran."

> 14. It is correct that the Immigration Judge did not expressly consider the question posed in *J.* However, it is clear from his findings that for a number of years the Appellant carried on an active sexual relationship with A. The reason he left Iran was not stated by him to be his intolerable situation as a clandestine homosexual, but his fear of arrest and punishment because of the detection of his relationship and the arrest of A. He was disbelieved on the basis for his alleged fear. It was for him to establish that he could not reasonably be expected to tolerate his condition if he were returned to Iran. He did not establish, or even assert, facts on which such a finding could be based. Mr Nicholson stressed his situation as a young man living with his family, unable to carry on his sexual activity at home and having to resort to public baths. However, there is no finding that on return he would resume his relationship with A, and no finding that if he did they could not resume their sexual life in the same manner as before. Mr Nicholson's contentions involved speculation for which the groundwork had not been established before the Immigration Judge.

44. Of course this caselaw relates to Iran rather that Afghanistan but the principles and approach described are of wider application. We consider that the guidance offered in XY itself and the approach followed in the reconsideration of J by the Tribunal in HJ, are appropriate for our assessment also. We should also mention that there is at this time no extant country guidance relating to Afghanistan specifically that is of direct relevance to the issues before us.

Our General Conclusions

45. The experience and qualifications of the three country experts offer interesting contrasts. Dr Shah and Dr Lau are academic lawyers. Dr Giustozzi is not. He is a research fellow with a degree in international relations. Dr Shah was brought up in Pakistan but in the Pashtun and Hanafite Moslem tradition. Dr Lau and Dr Giustozzi are westerners, albeit with extensive experience in Afghanistan and of involvement in Afghan affairs. We have found their evidence to be helpful in assessing the context of homosexuality in Afghanistan on which there appears to be relatively little other objective evidence. There are differences between the experts' opinions but we consider that these reflect their differing expertise and experience.

46. In understanding the complex nuances of life in Afghan society, we prefer, where there are differences, the evidence of Dr Shah who himself comes from the Pashtun/Hanafite tradition to that

of the other experts who are westerners and who, however well informed, are essentially outsiders looking in on that society. Additionally, much of what Dr Shah has said is supported by the well-researched and informative article in the LA Times. Moreover Dr Lau's suggestion in oral evidence that the folklore of Pashtun homosexuality may have something to do with ethnic rivalry would not apply to Dr Shah, who is himself a Pashtun and is better able to describe his own society.

47. The most striking point of difference is in Dr Shah's strong focus on Afghan perceptions of relationships between men; its prevalence in Afghanistan; and the need to contrast this with western perceptions of homosexuality. This is touched upon by Dr Lau in his report, but in oral evidence he declined to subscribe to the extent of Dr Shah's analysis. Dr Giustozzi in his report does not pick this issue up at all.

48. Our understanding of the main contrasts highlighted by Dr Shah are these:

    1. Both Islamic law and the Afghan penal code (Article 247) criminalise pederasty/sodomy without distinction, save that under Article 247 if one of the parties is under 18 it is an aggravating factor. Dr Lau suggested that although the term "pederasty" appears in the official English translation of Article 247 in context a better translation would be sodomy. UK law has decriminalised homosexual acts between consenting adults, but regards paedophilia as a very serious offence.
    2. Article 247 prescribes "long imprisonment" for an offence, which leaves judicial discretion. Dr Shah opines that the Hanafite School, which is dominant in Afghanistan, considers the death penalty would not be appropriate under Islamic law either but would impose long imprisonment. Under UK law adults engaging in sex with under age boys could face lengthy imprisonment.
    3. In Afghan society there is a tacit acceptance of the various types of homosexual behaviour described by Dr Shah, including sex with under age boys provided it is not conducted openly and particularly if it is consensual. Such acceptance, particularly outside the big cities, would be unlikely for adult males who chose to live together as adults to the exclusion of women. In the UK there is strong social condemnation of paedophilia.
    4. In Afghan society men and boys who engage in homosexual behaviour due to the constraints of access to females, would not regard themselves as homosexual but heterosexual, even if after marriage they continue to engage in homosexual activity. In the UK, there is

more open interaction between males and females and hence a clearer distinction between homosexuals and heterosexuals.

49. What then does this mean in terms of the risk of persecution?

50. We accept from what has been shown to us that Afghan law as such, be it under Article 247 of the penal code or under Islamic law, does not make a distinction between the different types of homosexuality identified by Dr Shah, save to identify aggravating circumstances. However it is clear from the objective evidence of the Taliban period that the Taliban did not make such distinctions in their brutal approach to homosexuality which is implicit in the evidence of executions by them and in the LA Times article identifying the dramatic if temporary decline in homosexuality in Kandahar, a Pashtun centre, during their rule.

51. We accept that sexual acts between males, often including boys, is extensively practised, particularly among the Pashtun (at least so far as the evidence before us is concerned) though, if this is mainly due to a lack of access to women outside marriage, we would expect that it might be reflected to some degree among other groups subject to the same constraints and social environment. We accept also that many of those males who have engaged in sexual acts with other males may not regard themselves as homosexuals and, given the prevailing culture of hypocrisy around this subject, would be unlikely to admit to being homosexuals. However, from Dr Shah's analysis it is clear that mature men, both married and unmarried, maintain sexual activity with younger males. It follows, if homosexual activity is so prevalent (perhaps extending according to some reports to as much as half the male population at some point in their lives) that this is reflected in more relaxed social attitudes towards such acts. It also explains the relaxed approach to men holding hands, kissing in public and wearing make-up.

52. Nevertheless, as we have said, all three experts maintain that two adult unmarried homosexuals living together openly as a couple to the exclusion of women could be at risk of prosecution by the state if it came to their attention. But what is the likelihood that it would come to their attention and what is meant by "open"?

53. Dr Lau said that the police were more likely to be reactive to complaints by the community than proactive, but could exploit their position to extract bribes to supplement their income. This was taken up by Dr Giustozzi in his description of police

corruption. It is in this context we consider that the lack of evidence of any convictions for homosexuality in the post-Taliban period is very significant. The statistics cited by Dr Giustozzi from the Attorney-General's Office appear to relate to arrests only. He is not a lawyer and may not appreciate the important distinction between arrests, charges and convictions. If even up to 150 people a year were being arrested as he suggests, one would expect to see some evidence of trials and convictions. Yet Dr Lau said he knew of no such conviction. Indeed Mr Nasim was unable to identify anything in the objective evidence before us about any trial or conviction for homosexuality in the post Taliban period. Dr Lau said that not too much weight should be given to the lack of statistics because of the rudimentary systems in place and the limited area over which the writ of central government runs. But even if we make full allowance for this and restrict our enquiry to the Kabul area, there is still nothing. The UN report on juveniles to which Dr Lau referred to in his reports and subsequently sent on to us did not identify any convictions. There are a number of western and international agencies operating in Kabul since the fall of the Taliban. Many (Dr Lau included) have been involved with the development of the justice system there. It is simply not plausible given the prevalence of sex between men and thus the potential for prosecution, and given the local rivalries that exist between different communities and families with the potential for informing, that there would not by now be clear evidence, if there was any appetite by the authorities to pursue homosexual activity in the courts, of convictions if they had occurred, irrespective of the adequacy of the collected statistical data. Thus we conclude that Dr Giustozzi's point in paragraph 4 of his opinion that "prison sentences are still handed out to homosexuals" is simply not born out either by his reference to a limited number of arrests or by the objective evidence as a whole.

54. Of course if some individual, or some gay lobby, tried to make a political point in public or otherwise behaved in a way such as to attract public outrage, then there may well be a sharp response from the authorities. But there is no evidence that this has happened in practice, and we consider it is very unlikely that a person brought up in an Islamic society such as Afghanistan would credibly consider that it was an essential part of his sexual identity to make a public political point about it to the extent of attracting public outrage. This is reflected in Dr Shah's conclusions at the end of his report that:

> "3.2.1 Homosexuality is practised and tolerated as long as it remains secret. Usually, homosexuality is an open secret but once it is made public, it could lead to persecution and prosecution by state and non-state agents.

> 3.2.4 The society regards homosexuality as a shame and unIslamic but is tolerated in its various forms. Homosexuals are not respected. Open declaration of being gay and lesbian will outrage the society."

55. We conclude that a homosexual returning to Afghanistan would normally seek to keep his homosexuality, be it with an adult male or otherwise, private and to avoid coming to public attention. In the Afghan context he would normally be able to do so without the need to suppress his sexuality or sexual identity to an extent that objectively he could not reasonably be expected to tolerate (per HJ). He would be assisted in this by the fact that what we would see as manifestations of affection such as holding hands and kissing in public are not seen in Afghan society as controversial. Dr Shah suggests that a gay person may be relatively safe in a big city as opposed to a small community and there is obvious sense in that. It would, in our assessment, take credible evidence in a particular case to demonstrate otherwise.

56. There is a further point arising from the observation by Dr Shah that:

> "It is important to note that many asylum seekers of Afghan origin tend to identify themselves as gays which may not genuinely be the case."

57. This is an important point. In a society in which sexual activity between males is so prevalent, many asylum seekers from Afghanistan may in the past have had some homosexual experience. That does not necessarily mean that they are practising homosexuals and would not prefer heterosexual relationships if women were available. Nor does it necessarily imply that they would on return engage in open homosexual activity and/or public campaigning for gay rights that could cause public outrage and lead potentially to adverse attention by the state. It is also a very proper reminder that in the Afghan context a carefully reasoned assessment of the credibility of a claim to be a practising homosexual and the extent of it, is particularly important. The evaluation of an appellant's behaviour in the UK, and the persuasiveness of the evidence about it, may well be a significant factor in this assessment.

58. Thus we conclude that, so far as the Afghan state is concerned and notwithstanding the legal criminalisation of homosexuality, a practising homosexual on return to Kabul who did not seek or cause public outrage would not face a real risk of persecution and would not face restrictions on his ability to live as such that would amount to persecution.

59. We then turn to the risk from non-state actors. This has been raised by the experts and by highlighted by Mr Nasim. We accept that there is a problem, identified by Dr Shah and Dr Giustozzi, with policemen seeking to make up their incomes by extorting bribes. It is not suggested in the reports that there is specific evidence that this extortion by police is focused on homosexuals but is a general problem. Dr Giustozzi suggests in paragraph 12 of his report that this could even amount to imposing an arbitrary tax on the population. Mr Nasim suggests that homosexuals may be in a somewhat weaker or worse position than others given the lack of availability of a sufficiency of protection from the authorities for them and given the illegality of homosexuality. However we do not consider, having regard to the prevalence of homosexuality in the population, there is any adequate basis for maintaining that the risk of extortion as a homosexual by the police in this respect amounts to a real risk.

60. It was also suggested by Mr Nasim, on the basis of Dr Shah's report that there is a risk to homosexuals from non-state actors if the local community becomes aware of adult homosexuals living together to the exclusion of women. As we have indicated above, Dr Shah states in paragraph 2.3.2 of his report that:

> "If a gay person is living in a big city, it might be relatively safe and there is a greater possibility the gay relationships might be kept secret for a longer period. If he is in the towns/village it will be difficult to keep it secret and once it is discovered the reaction from non-state actors will be very strong. The question of who is ruling the country or a particular province is very relevant."

61. We conclude from this, and from our general assessment of social attitudes described above, that a homosexual living in Kabul who does not invite public outrage would not be at any real risk from non-state agents. We have seen little objective evidence about the position outside Kabul. Dr Shah's comments suggest that there is a similar position in the other big cities. Certainly there is no evidence before us of any post-Taliban convictions for homosexuality (and the social attitudes they reflect) elsewhere in Afghanistan either. However in this context, Dr Lau's caution about the limited nature of central government statistics and the limited area over which central government has sway, has greater weight and we consider that there is force in Dr Shah's concern about what could happen if a homosexual comes from and returns to a small community, or a province or area under the control of religious parties. An assessment of this, if required in any particular case, will have to depend on the evidence available and the specific facts.

However, as the venue for returns to Afghanistan is Kabul, our conclusions about the situation there should be sufficient to resolve most appeals.

62. Issues may arise concerning internal relocation for homosexual returnees originating from other areas than Kabul. In the light of our conclusions described above we consider that relocation to Kabul is a viable option in general terms for homosexuals. Obviously though individual factors in any specific case will have to be taken into account also.

63. Thus we conclude, so far as non-state actors are concerned also, that a practising homosexual on return to Kabul who would not seek to cause public outrage would not face a real risk of persecution as such and would not face restrictions on his ability to live as such that would amount to persecution.

Our Conclusions Concerning the Appellant

64. Finally we turn to out assessment of the Appellant's individual position. It follows from our general conclusions that the Appellant could not succeed in his appeal simply on the basis of being a practising homosexual. However, Mr Nasim emphasised in his submissions to us that the essential basis of his asylum claim was his past homosexual activities in Afghanistan, what it revealed about him, and its particular consequences.

65. We start by recognising that the facts as we have described them above were accepted by the Adjudicator as credible, having had the opportunity to hear and assess the Appellant's oral evidence that we have not. The sustainability of those findings of fact is not under challenge before us. On that basis, we agree with Mr Nasim that the Appellant's established profile demonstrates several aggravating factors that have the effect of materially raising the risk to him, though we note that even under the Taliban he was able to live for several years in a homosexual relationship in Jalalabad with an older man without difficulties. Be that as it may, in early 2001, he fell foul of some people in his community who denounced him to the Taliban. He did not flee but continued in this relationship even after he was aware that it was known locally and was the subject of some public outrage and had come to the attention of the Taliban. Given the reputation of the Taliban this was either exceptionally brave or very foolhardy but it is an established fact which we have to take into account. It suggests a willingness to take risks with his life in order to maintain his homosexual lifestyle. Thereafter his father refused to hand him over to the Taliban upon request and maintained this refusal

even after threats were made against him. Thus the stakes and the consequent risks were raised again with the result that eventually the Taliban raided the Appellant's family home killing his family and then also killed his partner and burned his home. We are bound to factor this willingness to take risks despite the prospect of severe consequences into our evaluation of how the Appellant would behave if returned, and whether it would cross the threshold of real risk of persecution.

66. In any community such a tragic incident as that in 2001, with so many deaths, would have attracted considerable local attention. The Appellant as a participant in the homosexual relationship and the sole survivor would have attracted considerable notoriety. As a consequence we conclude he would still now be readily identifiable in his home community. We do not consider that he could in reality maintain any real anonymity or a private life in those circumstances, and would be at real risk in his home area from non-state agents who know of his history and would watch and target him. Thus we conclude that he would face the real risk of persecution in his home area.

67. The question then arises of internal relocation to Kabul. As simply a practising homosexual who would wish to keep his life private, we would not consider, in light of our general findings, that he could not safely relocate. However we have to take into account the prospect that his history will catch up with him and that his demonstrated willingness to take risks could expose him to public outrage even in a big city like Kabul. We have had regard to the quoted passage in the COIR from a previous paper by Dr Giustozzi concerning the practice of neighbours and landlords checking out a newcomer's background. In this case, on its very particular and exceptional facts as established by the Adjudicator, we consider that that there is a real risk that his past notoriety would catch up with him in Kabul, with similar consequences to those he would face were he to return to Jalalabad. In those circumstances we find, albeit marginally, that he does not have a viable internal relocation option and is entitled to asylum.

DECISION

68. The Adjudicator made a material error of law. The following decision is accordingly substituted:

> "The Appellant's appeal against the Respondent's decision is allowed."

Signed Dated
3 December 2008

Senior Immigration Judge Batiste

APPENDIX OF OBJECTIVE EVIDENCE

DATE	DOCUMENT
2008/10/16	LA Times Article
2008/08/30	Lesbians, Gay, Bisexuals, Transgender Rights Report
2008/08/29	COIR Report
2008/05/15	Report by Dr Giustozzi
2008/05	World Survey by International Lesbian and Gay Association
2008/03/15	Report by Dr Lau
2008/03/11	Excerpt from US State Department Report
2008/03/10	Report by Dr Shah
2008/03/08	US State Department Report
2007/05	UNODC Report
2007	UNHCR Eligibility Guidelines for Refugees
2007	Report by Afghan Independent Human Rights Commission
2005/04	UNHCR Report
2005/04	CIPU Report Extract
2005	Sydney Morning Herald Article
2004/09/06	Article by Rex Wockner
2004/09/01	Pak Tribune report
2004/07/05	Reuters Report
2004/05/20	ECRE Statements
2004/05	ECRE Guidelines
2004/01/04	Afghan Constitution
2004	US State Department Report
2003/03/01	Gay & Lesbian Review
2003	Article by Martin Kuplens-Ewart
2002/10	UNHCR Report
2002/05/24	Scotsman Article
2002/04/03	LA Times Article
2002/03/07	HRW report
2002/01/12	Times Article
2002	IJRL Guidelines
2001/12/21	Article by Lou Chibbaro
2001/11/06	Article by Paul Varnell
2001/10/02	Village Voice Article
2001/09/28	Article by Sam Handlin
2001/08/27	Life under the Taliban by Saira Shah
2001	Article in ELR by Mark Bell
1999/09	Amnesty International Document
1998/06/12	ILGA Report
1976	Article 427 of Afghan Penal Code
1976	Article 1 of the Afghan Penal Code

Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

Heard at Field House
On 28 October 2008

Before

Senior Immigration Judge Batiste
Senior Immigration Judge Southern
Professor R. H. Taylor

Between

AJ

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

FUNDING DETERMINATION

The Tribunal is satisfied that, at the time the Appellant made his application for permission to appeal to the IAT and for the reasons indicated in the grant of permission, there was a significant prospect that the appeal would be allowed upon reconsideration. It orders that the Appellant's costs are to be paid out of the relevant fund, as defined in Rule 33 of the Asylum and Immigration Tribunal (Procedure) Rules 2005

Signed Dated
3 December 2008

Senior Immigration Judge Batiste