

## **IMMIGRATION APPEAL TRIBUNAL**

Date of Hearing : 22 September 2003

Date Determination notified:

...09/12/03....

Before:

Dr H H Storey (Chairman)  
Mrs R Faux

Secretary of State for the Home Department

**APPELLANT**

and

**RESPONDENT**

### **DETERMINATION AND REASONS**

1. The appellant, the Secretary of State, has appealed with leave of the Tribunal against a determination of an Adjudicator, Mr D G Shimmin, allowing the appeal of the respondent, a national of Iran, against the decision to give directions for removal having refused asylum. Ms N Hough appeared for the appellant. Ms F McCrae of Counsel instructed by Brar & Co appeared for the respondent. To avoid confusion the respondent is hereafter referred to as "the claimant".
2. The Tribunal has decided to allow this appeal.
3. The Adjudicator accepted that the appellant had given a credible account of having formed an adulterous relationship with a woman as a result of which several men including her husband had assaulted him causing injuries requiring surgery. He had complained to the police but they said the matter was in the hands of the Sepah (Revolutionary Guard Corps). The latter had come to his house with a summons and had questioned his wife and threatened that if they did not find her husband they would take revenge on her children. They had pushed her around and detained her for two days.

After the claimant then fled the country, his wife and children followed two months later. the Adjudicator found in the light of these adverse experiences that the claimant and his wife would, if returned to Iran, face a well-founded fear of persecution on account of his membership of a particular social group, "the group being men in Iran who have committed adultery which has been witnessed by at least three others". She allowed the appeal on human rights grounds.

4. The grounds of appeal were extremely brief and were confined to the issue of whether the Adjudicator was correct to identify a Refugee Convention ground of membership of a particular social group.
5. Had we heard this case at first instance we doubt we would have found it as easy as did the Adjudicator to reconcile material inconsistencies in the claimant's account. But no challenge has been raised to the positive credibility findings and therefore, whatever we make of the issue of a Refugee Convention ground, it is plain that the claimant must succeed on Article 3 grounds. He established to the satisfaction of the Adjudicator that he faces a real risk of serious harm. Such harm reaches the threshold of treatment contrary to Article 3.
6. Miss McCrae sought to defend the Adjudicator's findings in respect of a Refugee Convention ground by reference to the Tribunal determination in the case of *Ameen* [2002] UKIAT 07246 in which it had been found that a person facing reprisals from strict fundamentalists in the Islamic Party (IM) in respect of an illicit affair faced a real risk of persecution partly on account of his religion. The Tribunal in that case considered that the fundamentalists would impute a religious opinion to the claimant. She submitted that on the evidence the Adjudicator should also have found that the persecution was on account of the claimant's political opinion: the adulteress's husband, she pointed out, was a member of Sepah and so the authorities would have imputed a political opinion to him.
7. Miss McCrae sought further to argue that the Adjudicator was right to identify a particular social group in this case. Male adulterers in Iran were, she maintained, a group having an immutable characteristic setting them apart from society as a whole, having acted contrary to Islamic Code. The judgement of the House of Lords in *Shah and Islam* [1999] 2 AC 629 clarified that cohesiveness was not a necessary condition of a particular social group. The group in this case has four elements: the claimant was Iranian, male, he had

committed adultery and had been prosecuted for it and his offence had been witnessed by three others.

8. We consider that Ms McCrae's attempt to raise Refugee Convention grounds based on religion and political opinion amounts to a request that we allow the appeal on grounds different from or additional to those given by the Adjudicator for allowing the appeal. Plainly the Adjudicator based his decision solely on the Refugee Convention ground of membership of a particular social group. However, we note first of all that the claimant's representatives did not submit a Respondent's Notice in accordance with Rule 19 of the Immigration and Asylum Appeals (Procedure) Rules 2003. Secondly, by analogy with the test set out in Rule 20, which governs variation of the grounds of appeal, we consider that we should only accede to a request from a respondent to uphold the Adjudicator's determination for reasons different from or additional to those given by the Adjudicator where it would be unjust not to allow the variation. We do not consider that there would be injustice in this case, since opportunity to put in a respondent's notice was not taken and the additional reasons advanced by Ms McCrae were not obvious.
9. However, even had we acceded to Ms McCrae's request, we do not consider on the evidence in this case that there was a basis for considering that there was a Refugee Convention ground, singly or cumulatively. On the evidence before the Adjudicator the reason why the claimant had been attacked and the authorities had subsequently prosecuted him for adultery was simply because he had contravened Iranian law. Whether or not the adulteress's husband was a member of Sepah, the claimant had not described him as acting against the claimant out of political motives. On the evidence his Sepah identity only affected the zeal with which he pursued the claimant, not the fact of pursuit. On his own account neither the authorities nor the individuals who had attacked him perceived their actions in religious or political terms. The position in the case of *Ameen* was very different. In that case the brothers of the appellant's girlfriend were fundamentalist Islamic believers who had referred details of his transgression to the IM Party: both the brothers and the Party perceived the transgression in partly religious terms.
10. As regards membership of a particular social group, we take as our starting point the Court of Appeal judgment in *Montoya* [2002] INLR 399 which endorsed the Tribunal's summary of the basic principles to be applied. These principles included:

'55(vii) applying the eisdem generic principle to the other four grounds, the PSG category must be

concerned with discrimination directed against members of the group because of a common immutable characteristic;

...

(x) in order to avoid tautology, to qualify as a PSG it must be possible to identify the group independently of the persecution;

...

(xii) a PSG cannot normally consist in a disparate collection of individuals;

(xiii) for a PSG to exist it is a necessary condition that its members share a common immutable characteristic. Such a characteristic may be innate or non-innate. However, if it is the latter, then the non-innate characteristic will only qualify if it is one which is beyond the power of the individual to change except at the cost of renunciation of core human rights entitlements;

(xiv) it is not necessary, on the one hand, for such a group to possess the attributes of cohesiveness, interdependence, organisation or homogeneity;

(xv) there is nothing in principle to prevent the size of PSG being large (e.g. women), but if the claim relies on some refinement or subcategory of a larger group, care must be taken over whether the resultant group is still definable independently of their persecution ...”

11. Applying these principles to the facts of the case, it may well be that a woman in the same position as the claimant would be able to raise an argument that she was a member of a particular social group since her position as a woman in Iran subjects her to discriminatory laws, e.g. those governing the number of witnesses required to prove adultery, setting her apart from society. However, in the case of the claimant, neither his nationality nor his sex was a basis for any discriminatory treatment that he received. Thus, the principal factors relied upon to identify him as a particular social group amounted to no more than those which defined his persecution. He was persecuted because he was an adulterer who had transgressed Iranian law. The argument for a particular social group in this case is wholly circular.
12. Accordingly we consider that the grounds of appeal are made out. The Adjudicator was wrong to allow the appeal on asylum grounds since there was in fact no Refugee Convention reason.

13. Thus the appeal is allowed on this ground. As already explained, however, the decision of the Adjudicator to allow the appeal on human rights grounds remains unchallenged and we must therefore confirm it.

**DR. H.H. STOREY  
VICE PRESIDENT**