

IN THE IMMIGRATION APPEAL TRIBUNAL

MV (Risk – Homosexuals) Ukraine CG [2003] UKIAT 00005

Heard: 09.04.03
Typed: 17.04.03
Sent out: 29/05/2003

IMMIGRATION AND ASYLUM ACTS 1971-99

Before:

John Freeman (chairman)
Mr CAN Edinboro and
Mr AA Lloyd JP

Between:

appellant

and:

Secretary of State for the Home Department,
respondent

DECISION ON APPEAL

Mr H Mohammed (solicitor, Mohammed & Co, Preston) for the appellant
Miss K Prendergast for the respondent

This is an appeal from a decision of an adjudicator (Mr TR Jones), sitting at Salford on 16 September 2002, dismissing an asylum and human rights appeal by a homosexual citizen of the Ukraine, who by then was 18. Leave was given on the basis of grounds relating to the general situation of such persons in that country. The appellant had at first asserted a fear of the “Mafia” [Ukrainian rather than Sicilian gangsters]; but this was not pursued before us.

2. One ground which was not in the original ones concerned the appellant’s relationship with Mr Alistair Clarke (ironically the draftsman of the grounds): a homosexual citizen of this country, whom he met in a Chinese restaurant in Manchester. We gave leave to add it (claiming that the appellant’s removal would amount to a disproportionate interference with his

family or private life, since that article 8 point had in any case been dealt with by the adjudicator.

3. The main complaint in the grounds of appeal is that the adjudicator did not consider a report entitled ‘The situation of gay men and Lesbians in Ukraine’. It is said to be an English summary of a report originally published there in 2000, in Ukrainian and Russian by an organization called ‘*Nash Mir*’ [‘Our World’] in Lugansk. It was sponsored by the Royal Netherlands Embassy, and the Soros Foundation, and was referred to before us as the ‘Soros report’, though it does not emanate from them. It was before the adjudicator, though rather late in the day (sent in on 12 September), and (we were told on instructions from Mr Clarke) referred to at the hearing; but he did not mention it when touching on the background evidence at § 27.
4. The appellant’s own sexual history included, according to the adjudicator, “two passing homosexual relationships in Ukraine, meeting other men but not residing with them”. He was unclear about whether they were legal, and said he had been embarrassed to reveal them at first. He did not tell the adjudicator about any problems he might have had over this, rather than from the “Mafia”: a statement put before us suggested that one of the men concerned had blackmailed him to get what he wanted, and that he himself had been beaten up, and got no help from the police. We cannot see why the adjudicator was not told about this; but, since these were transitory relationships, it is no more than part of the general picture of life for homosexuals in the Ukraine.
5. Going on to the Soros report, we should say at once that it seems (especially after we were referred by Miss Prendergast to those passages which do not particularly help the appellant’s case) to be an admirably balanced work. We shall pick out those referred to by both sides which seem to be of any serious relevance.

Page number summary

3	1	“... the opinion that gays and lesbians should be allowed to live as they like, so long as they remain not too visible, is most widespread in our modern Ukrainian society. According to our own experience, active homophobia is not widespread”: mass prosecution, beatings and blackmail are history, but public displays of affection between men are “all but unthinkable”
3	2	Attitudes differ considerably between the cities and countryside.
3	3	Officials are reluctant to acknowledge the existence of homosexuals.
4-5		Former President Leonid Kravchuk regards the problems of sexual minorities as having a low priority (and expresses personal distaste for their practices)
5		The judicial system is weak, without enough human rights expertise: there is no mention of sexual orientation in the legislation.
6	1	“Same-sex families” are neither forbidden nor acknowledged by the legislation.
	2	Consensual sodomy is <i>not</i> punishable by law: the age of consent for both heterosexual and homosexual relations is the same (16). The current CIPU report at § 6.65 shows the Ukraine was the first of the former Soviet republics to legalize sodomy, in 1991.
7	1	“The overwhelming majority of gays and lesbians has not yet come out of the closet” – though at the same time “55% of the

people polled do reveal their sexual orientation – at least to their acquaintances and friends who are outside the lesbian and gay community”

- 2 There is a general atmosphere of distrust towards homosexuals, but a process of improvement in society’s attitude towards them is clearly underway: “fears concerning Ukrainian society’s intolerance towards gays and lesbians are far too exaggerated”.
- 8 Many more respondents in the countryside had met violence (14.8%) or blackmail (11.5%) as a result of “coming out” than the national average (7.3% in either case)
6. The other source of evidence to which we were referred was an e-mail sent on 26 February 2003 by Andriy Maymulakhin of ‘Our World’ to supporters in this country. It refers to a particular police investigation in Dnepropetrovsk, Ukraine of a murder, it would seem of a homosexual, which took place there in the summer of 2002. The complaint is that police officers, in the course of an investigation which perhaps inevitably was centred on the homosexual community in that city, used psychological pressure, blackmail and other threats, with some evidence of physical violence. A number of individual case-histories are given.
7. On the **article 8** ground, we drew Mr Mohammed’s attention to the course of action suggested by the Court of Appeal in **Amjad Mahmood [2000] INLR 1**, and asked him whether the appellant could not return to Kyiv (formerly Kiev) and apply in the usual way from there for a visa to rejoin Mr Clarke here. Mr Mohammed agreed that he would be able to do that. Although the two of them might not have been living together in this country for long enough (two years) to satisfy the requirements of the Immigration Rules, we note what is said in **Amjad Mahmood** about such an application not being necessarily bound to succeed for it to be the right course; and also about the entry clearance officer on such an application himself being bound to give effect to article 8.
8. We do not see any reason in the context of these two people’s history, dating back to last year, why a temporary separation should be considered disproportionate to the legitimate purpose under article 8.2 of maintaining an effective system of immigration control. States are entitled, as shown by **Amjad Mahmood**, to insist on an orderly process of family, or similar reunions, without necessarily giving preference to those who have contracted relationships in this country over those who have to wait, sometimes for longer than they should, to apply from outside.
9. So long as this appellant would face no real risk on return to the Ukraine, which is the main question we have to decide, then we do not see why he should not be required to apply from there to rejoin Mr Clarke. We do not think, especially in the light of **Ullah [2002] EWCA Civ 1856**, that any potential breach of article 8 in the Ukraine could prevent this appellant being returned there, since, so long as he faced no real risk of persecution or article 3 ill-treatment in the Ukraine, there is no reason why he should not pursue his chosen form of private or family life by way of such an application.

10. Refugee Convention/article 3 Human Rights Convention

We should like to repeat our view that the Soros report, though prepared by a pressure-group, is an exceptionally well-balanced piece of work, which might well put to shame the productions of a number of well-known, and supposedly independent country experts. It is clear from it that homosexuals still have a number of problems in the Ukraine, especially in the countryside. This appellant said in his statement of evidence form he had last lived in Rostov on Don, one of the largest cities, and would be returned, if at all, to the capital Kyiv. The investigation practices of the Dnepropetrovsk police are clearly regrettable, though there may well be problems in following up a murder which they seem at least to have suspected had taken place within what public attitudes no doubt made a somewhat close community. We were not, however, referred to anything in the Soros report or elsewhere to show that they are likely to be typical of police attitudes generally in the Ukraine.

11. The picture we do get from the Soros report is of a country where there is no legal discrimination against homosexuals, who wish to engage only in consensual practices, but where public attitudes remain somewhat unreconstructed. This is no doubt inevitable, where legislation leads public opinion, rather than following it: but, just as in this country not all that long ago, a process of general enlightenment is clearly taking place. On the basis of the Soros report, we see no present real risk for homosexuals in cities such as Kyiv or Rostov on Don, unless they deliberately advertize themselves as such.

Appeal



John Freeman (chairman)