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FLAMERS, FLAUNTING AND PERMISSIBLE PERSECUTION

R.G. (Colombia) v. Secretary of State for the Home Department [2006] E.W.C.A. Civ. 57

ABSTRACT. This note analyses a recent case of the English Court of Appeal in which the applicant, R.G., a gay, H.I.V. positive Colombian claimed asylum on grounds of persecution due to his sexuality. Both the Asylum and Immigration Tribunal and the Court of Appeal rejected R.G.'s claim for asylum. The Court of Appeal's first and most significant reason was that the alleged persecution was not sufficiently serious or life threatening, since R.G. had not suffered actual physical violence throughout the 13 years that he had lived as a closeted gay man in Colombia. Secondly, the court considered the real reason for R.G.'s seeking asylum was his desire to access free health care in order to manage his H.I.V. His allegations of persecution on the grounds of sexuality were viewed as a sham. This note is critical of the approach taken by the Court, which, it is argued, displays an insensitivity to the complexity of sexual identity and its performance and has the effect of perpetuating and legitimating discrimination against lesbians and gay men.

KEY WORDS: asylum, discretion, gay, H.I.V., medical treatment, persecution, refugee

Introduction

This note analyses a recent case of the English Court of Appeal, *R.G. (Colombia) v. S.S.H.D.*,[1] in which the applicant, R.G., a gay, H.I.V. positive Colombian, claimed asylum on grounds of persecution due to his sexuality. This case note will discuss the reasoning behind the rejection of R.G.'s claim, considering how the concept of 'permissible persecution' and the violence of the home state is perpetuated through the underdeveloped and inadequate jurisprudence of the English court.

[1] [2006] E.W.C.A. Civ. 57. per Buxton L.J., Gage L.J. and Lloyd L.J. concurring (hereafter R.G.).

Although R.G. had been in a relationship when he lived in Colombia, he had led a closeted lifestyle there for 13 years.[2] R.G. arrived in the U.K. in 2001 and claimed asylum arguing that he faced persecution in Colombia because of his sexuality and his H.I.V. positive status. Around this time he became involved with another overseas national who was also claiming asylum in the U.K. The Home Office refused R.G.'s initial application for asylum. Consequently, he appealed to the Asylum and Immigration Tribunal (A.I.T.) in 2003, which rejected his application. R.G.'s subsequent appeal to the Court of Appeal, which relies on much of the reasoning provided by the A.I.T., was also rejected.

In evidence R.G. stated that he had lived with the presence of death squads which carry out "social cleansing" of homosexuals, prostitutes, drug-users, vagrants and those with mental disabilities.[3] He also described how he had been the victim of blackmail by a man named Lopez, who had threatened to disclose his H.I.V. positive status. R.G. stated that since living in the U.K. his mannerisms had become more 'overt' and that to return him to Colombia with these gay identified traits would increase the risk of persecution. An additional factor in R.G.'s claim rested on his H.I.V. status and his inability to afford anti-retroviral treatment. His sister had informed R.G. that treatment was available for those with H.I.V. free of charge through the National Health Service in the U.K.

The A.I.T. was shown evidence of the "social cleansing" activities of paramilitaries in Colombia. According to the U.N.H.C.R. report 'International Protection Considerations Regarding Colombian Asylum Seekers and Refugees', these campaigns "are often tacitly supported by some segments of the local communities, and as in the case of political murders, are often committed with impunity" (U.N.H.C.R. 2006, p. 182). The report continued that irregular armed groups and paramilitaries impose rigid gender norms on communities under their influence and exact severe punishments for violations of these norms such as "flogging, mutilation, disfigurement of the face or other parts of the body with acid or sharp instruments and public humiliation" (U.N.H.C.R. 2006, pp. 223–224). Thus,

[2] *Supra* n. 1, at para. 2.

[3] On the persecution of gays and lesbians in Colombia see Amnesty International (2004); U.S. Department of State Annual Human Rights Report (2005) and U.N.H.C.R. (2006).

these findings seem to show that as a sexually transgressive gay man R.G. is at risk of attack from guerrilla groups.[4]

Notwithstanding this information, the Court of Appeal rejected R.G.'s claim for refugee status, even though they acknowledged the real danger presented by death squads. The court rejected the claim on the basis that his sexuality would have remained secret irrespective of the threat from death squads because his secrecy was influenced more by social disapprobation than by fear of violence. Furthermore the requirement for R.G. to be discrete in living out his sexuality was not considered to be sufficiently burdensome to amount to persecution. The court noted:

> R.G.'s case was based on a change in his behaviour in the United Kingdom, which it was said would lead to a difficulty that he had not had previously in concealing his homosexuality. That in itself suggests that his situation when he left Columbia had not imposed significant or sufficiently serious difficulties or behaviour upon him.[5]

The note is critical of the Court's imposition of discretion as a valid way to conduct one's personal life, and the finding that some levels of discrimination, bordering on the persecutory are permissible. First, however, the position of lesbians and gay men is outlined with reference to the definition of refugee under the 1951 Convention Relating to the Status of Refugees (hereafter the "Convention").[6]

Lesbians, Gay Men, and the Social Group Definition

The Convention defines a refugee in Article 1A(2) as any 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 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, is unable or, owing to such fear, unwilling to return to it.

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[4] Guerrilla groups have been responsible for much of the maintenance of gendered and sexual norms in communities; the demobilisation process may loosen guerrilla control of community norms thereby allowing more fluid understandings of gender and sexuality to arise. See U.S. Department of State (2005); Human Rights Watch (2005); Amnesty International (2006) and Human Rights Watch (2001a).

[5] *Supra* n. 1, at para. 15.

[6] Convention Relating to the Status of Refugees 1951, 189 U.N.T.S. 150 as amended by the Protocol Relating to the Status of Refugees 1967, 606 U.N.T.S. 267.

Crucial for the purposes of the Convention is whether lesbians and gay men constitute a "social group". In *Jain*[7] the Court of Appeal held that lesbians and gay men in India did not constitute a "social group"; in *Vraciu*,[8] the opposite was found by the A.I.T. which has been criticised for its invasive questioning of Mr Vraciu's homosexuality (McGhee 2000). The House of Lords case of *Shah and Islam*,[9] discussing the position of women accused of adultery in Pakistan, said that lesbians and gay men could constitute a social group, finding that persecution is not the essential factor which defines the existence of homosexuals.

Within the context in which the claim of discrimination is made, subversive enactments of gender and the acting out of non-normative sexual identity must be subordinated to an oppressive heteronormative standard. Factors such as the threat of prosecution, social disapprobation, and government campaigns can contribute to a claim of persecution, but are not necessarily sufficient to prove persecution to a level that is physically and mentally intolerable (Clayton 2004, p. 381).

The problem of the closet

The secrecy, denial and closeting that is associated with homosexuality is seen by some U.K. judges as an acceptable way for individuals to conduct their private lives. In the case of *Jain v. S.S.H.D.*, the A.I.T. found that if the claimant lived discreetly as a gay man his continued safety and protection would be ensured. What this finding endorses is life conducted beneath the 'socio-sexual' radar. The problem with this is that the person is then potentially exposed to threats from the wider community and cannot rely on the intervention of the police or relevant security forces to protect him or her from discrimination and the threat of vigilantism. R.G.'s defiance of Colombian social norms, his self-identification as a gay man and the potential accusations of H.I.V. status create a space ripe for blackmail and abuse. Colombia's legislation protecting the rights of sexual minorities appears to have little impact on social attitudes to homosexuality. Examples of police acquiescence to and endorsement

[7] *Jain v. Secretary of State for the Home Department* [2000] I.N.L.R. 71.

[8] *R. v. Secretary of State for the Home Department, ex parte Vraciu* (1995) (I.A.T. No. 11559).

[9] *R. v. Immigration Appeal Tribunal and another, ex parte Shah; Islam and Others v. Secretary of State for the Home Department* [1999] 2 A.C. 629.

of vigilante justice and reprisals against those engaging in non-normative gendered and non-normative sexual behaviour can be seen in a number of cases brought before the A.I.T.[10] The victim's options for protection and redress through the state become severely limited. In Colombia lesbians and gay men experience threats of exposure, fear of recrimination in the form of public humiliation, beatings, rapes, social ostracism, and death.[11] Jenni Millbank argues that this ''invisibilising'' effect perpetuates the violence of the home state through the host state's judicial decision making process. She notes, ''[t]hrough the norm of invisibility decision-makers have continued to employ the violence of the law to force applicants back into their home country closets'' (Millbank 2005, p. 120).

What constitutes persecution?

In *R.G.* the judiciary assumed that it is easy and appropriate for a claimant to return to the closet when he or she is sent home. The court's interpretation is couched in terminology that evidences a failure on their part to understand the threats of violence and blackmail that can surround single gender intimate relations in states where lesbian and gay sexuality is given some level of formal protection but is still perceived as socially abhorrent.

The approach of the Court of Appeal to R.G.'s situation was dismissive. R.G.'s fears of persecution by death squads were viewed as unrealistic and excessive.[12] The difficulty of his living a secretive lifestyle in a state where non-normative sexual behaviour is punished by 'social cleansing' was considered a remote risk that could be lessened by taking 'one or two precautions'.[13] R.G. had not experienced any actual physical violence, but lived with the perpetual threat of it. The court's belief in secrecy as protective may lead to complacency about the refugee's potentially very dangerous position in Colombian

[10] Amnesty International (2004); *Z. v. S.S.H.D.* [2004] E.W.C.A. Civ. 1578, a gay Zimbabwean man; *Bazdoaca v. S.S.H.D.* [2004] E.W.H.C. 2054, a gay Moldovan; and *Alena Hadiova v. S.S.H.D.* [2003] E.W.C.A. Civ. 701, outlining the harassment of a Czech Roma lesbian.

[11] Human Rights Watch (2001b), http://www.hrw.org/reports/2001/farc/colmfarc0801.pdf#search = %22gay%20and%20colombia%22. Also see I.L.G.A. website http://www.ilga.info/Information/Legal_survey/americas/colombia.htm.

[12] On social cleansing in Colombia, see Human Rights Watch (1994).

[13] *Supra* n. 1, at para. 7.

society, leaving him/her open to exposure and persecution.[14] By following non-normatively gendered patterns of familial life in Colombia, an individual is likely to invoke suspicion and attract the attention of social cleansing agents. The court has created an illusion of relative safety within Colombian society for gays and lesbians and has relied on an understanding that the claimant's behaviour will return to a level of sexually normative decipherability.[15]

Flamers and flamboyancy

R.G. considered whether it was persecutory for the A.I.T. to require a change in behaviour on the part of the claimant in order to ensure his or her safety. The Court of Appeal noted that such a change of behaviour must not be excessive, and it must be a manageable rather than a persecutory burden.[16] Buxton L.J. notes the Australian High Court decision of S. quoting McHugh and Kirby J.: "whatever form harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it".[17]

Lord Justice Buxton refers to R.G.'s concern that, if forced to return to Columbia:

> since he had been in the U.K. his mannerisms had changed so much that they were more open and overt through living in a society where homosexuality is better accepted... for that reason he would be identified as a gay person.[18]

In the A.I.T. hearing, the adjudicator found that R.G.'s concerns regarding his mannerisms were excessive and out of a sense of self-preservation R.G. "would regulate his behaviour accordingly so as not to draw unwelcome attention to himself".[19] The adjudicator continued his risk assessment indicating that "elementary precautions" need to be taken to ensure his continued safety.[20] These

[14] For more on the situation of lesbians and gay men in Colombia see http://www.ilga.info/Information/Legal_survey/americas/colombia.htm, accessed 13 June 2006.

[15] For more on closeting see Kendall (2003, pp. 738–745) and Walker (2000).

[16] See *Ahmed v. Secretary of State for the Home Department* [2000] I.N.L.R. 1.

[17] *Supra* n. 1, at para. 16.

[18] *Supra* n. 1, at para. 2 (*per* Buxton L.J.).

[19] *Supra* n. 1, at para. 6 (quote from A.I.T., *per* Buxton L.J.).

[20] *Supra* n.1, at para. 6–8 (*per* Buxton L.J.).

elementary precautions are not outlined in the House of Lords judgment but may have included living a closeted existence, denying one's sexuality in public, acceptance that one is unable to live openly with one's partner and coping with the continued threat of social cleansing from guerrilla groups. The court went on to establish that excessive modification of behaviour has been recognised as persecutory citing the English cases of cases *Z. v. S.S.H.D.*[21] and *Danian v. S.S.H.D.*[22] Jurisprudence from other jurisdictions is mixed.[23] Whilst Canada, New Zealand and the U.S.A. have all acknowledged that requiring behaviour modification as a means to avoid persecution constitutes an unacceptable limit on the expression of an individual's identity, Australia has only recently begun deciding in favour of lesbian and gay refugees as to the unacceptability of closeting an individual's sexuality.[24] The U.K. meanwhile, as the case of *R.G.* indicates, is still willing to endorse an argument of discretion regarding sexuality.[25]

The consequence of the Court of Appeal's findings is that R.G. is placed in a situation reminiscent of medieval witch trials. The court asks "if returned, would the asylum-seeker in fact act the way he says he would and thereby suffer persecution?"[26] The court said that if R.G. is returned to Colombia he will, contrary to his testimony, modify his behaviour in order to protect himself from persecution. If R.G. does as he says and is "flagrant" with regard to his sexuality there is an increased likelihood that R.G. will be persecuted thereby proving the court wrong but proving himself right with potentially fatal effect. If however the court is right and R.G. does modify his behaviour, he is still in the unenviable position on the metaphorical dunking stool. By modifying his behaviour R.G. returns to his closeted lifestyle and must accept the continued threat of blackmail and a decline in health due to the effects of H.I.V./A.I.D.S. and lack

[21] [2004] E.W.C.A. Civ. 1578.

[22] [1999] I.N.L.R. 533.

[23] [1999] I.N.L.R. 533. See further Kendall (2003); Dauvergne and Millbank (2003).

[24] On closeting and 'flaunting' see McGhee (2004); Bergman (1993); Richman (2002) and Howe (1997).

[25] On the historical development of U.K. refugee policy in relation to lesbians and gay men see Millbank (2005).

[26] *Supra*. n. 1, at para 10.

of medical treatment. Additionally the testimony from the Doctor who examined R.G. noted that:

> If he [R.G.] is returned to Colombia, it is likely to be highly traumatic for him. Firstly, he would have to immediately try to repress his sexuality and live a double life... (when I asked him how he would be affected by this, he said: ''For me, it would be to die'').[27]

Upon his return to Colombia R.G.'s options become limited regarding the expression of his sexuality. He can live as an 'out' gay man and be prepared for the social ramifications of that which are potentially fatal, or he can live a closeted existence, which he has already said would emotionally destroy him. Aligned with his failing health R.G. gets metaphorically dunked and held under upon his return to Colombia.

Behaviour modification has intermittently and in differing contexts been found to be persecutory.[28] In order for it to be viewed as intolerable, a further factor needs to be present. Lord Justice Buxton poses two clarifying questions regarding the nature of persecution and its connection to behaviour modification. Is R.G. being required to modify his behaviour and, if so, does the modification place R.G. in a situation of persecution? R.G. stated that when he lived in Colombia his lifestyle was covert and secretive, ''he lived quietly with his partner and had not incurred difficulty for 13 years''. His explanation for this quiet life was due to the threat of persecution. The life that R.G. has been living in the U.K. is similarly sedate: ''[H]e lives quietly with a partner as neither of them is well and they go to a gay disco for people from Latin America once every two months''.[29] There is the continual theme of a ''quiet life'' both in Colombia and the U.K., and the reasons for this quietness are very different. In Colombia, the ''quietness'' stemmed from a fear of violence and reprisals, whereas in the U.K., the ''quietness'' is due to the ill health of R.G. and his partner. This begs the question of whether in future it would be better for a gay man to argue before the court that he has immersed himself in the gay scene, has entered into an 'out' gay lifestyle, goes clubbing, has lots of sex with other men and lives an overtly gay existence in comparison to a relatively staid lifestyle in the

[27] *Supra* n. 1, at para. 17 (testimony of Dr. Bell, *per* Buxton L.J.).

[28] *Supra* n. 29.

[29] *Supra* n. 1, at para. 13.

country of origin in an attempt to indicate the maximum increase in behaviour modification.

It is the perceived lack of change in R.G.'s social life whilst in the U.K. and the return to a similarly quiet social life in Colombia which has provided what amounts to a reasonable excuse for sending R.G. back to his home state; but this reasoning still smacks of a double standard being legitimated in U.K. courts. The reason for R.G.'s quiet life in Colombia was because of the threat of violence. Managing that violence through repression of one's identity perpetuates persecution, and jurisprudential affirmation of such a finding validates that persecution.[30]

Discretion was an integral part of R.G.'s guarantee of safety and thus his preclusion from physical persecution. The term flaunting has been used as an indicator of how lesbian and gay sexuality is presented in public.[31] By living out one's sexuality discreetly it is assumed by the courts that one automatically excises flaunting from one's behaviour. The 2005 case of *Amare v. S.S.H.D.*[32] invoked the term ''flaunt'' in its assessment of Amare's ability to hide her sexuality. Laws L.J. noted the approach of the A.I.T. towards non-normative sexualities in Ethiopia.

> Her simple wish is to form relationships with other women that may develop into a sexual relationship akin to marriage. Such relationships are no more 'flamboyant' than most heterosexual relationships..., she will no more 'flaunt' her sexuality than do most heterosexuals.[33]

The terms flaunting and flamboyancy essentialise lesbians and gay men.[34] Furthermore, the court's comparison of heterosexual and homosexual 'flaunting' is a misnomer. The court's use of heterosexuality as a comparator group indicating appropriate behaviour within heteronormative society shows an absolute failure to consider the culturally specific ramifications of sexuality. Additionally what becomes entrenched and is further perpetuated is the view that the

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[30] Kendall notes the Canadian case of *Sabaratnam Thavakaran* in the judgment of Mahoney J.A.: ''To find that one can remove one's fear of persecution by successfully hiding is perverse ...it puts the onus for removing the fear of persecution on the victim, rather than on the perpetrator'' (Kendall 2003, p. 739).

[31] *Supra* n. 24.

[32] [2005] E.W.C.A. Civ. 1600.

[33] *Ibid.*, para. 6. A.I.T. in the judgment of Laws L.J.

[34] *Ibid.*

maintenance of the public/private divide where sexuality can be masked and unmasked provides a sphere of protection within which lesbians and gay men can safely form relationships. What the maintenance of the public/private divide actually does is exacerbate the discriminatory atmosphere within which lesbians and gay men live, invisibilize non-heterosexual relationships and propagate cultural miscommunication of what it means to live as a lesbian or gay man in a homophobic society, relying on an understanding that the closeting of sexuality is a permissible limit on the expression of identity.

H.I.V. Status: the Problem of Numbers

In *R.G.* the court refers to his H.I.V. status, this reference is not couched in terms of the significance to his health if he is returned to his home state. The court uses R.G.'s H.I.V. as evidence that his claim of persecution as a gay man is a sham. Lord Justice Buxton relies on the findings of the A.I.T. adjudicator when he states:

> the reason that he [R.G.] left Colombia was not because of the persecution due to his homosexuality but because he was unable to pay for treatment and heard that such treatment was available free of charge under the National Health Service. That strongly militates against his being in a situation of persecution in Colombia or that he would be in such a situation if he returned there.[35]

The claiming of refugee status due to H.I.V. infection usually results in a negative determination by the adjudicator. Recent case law indicates that unless the sufferer is very close to death, there is little likelihood that refugee status will be granted.[36] The refugee claimant must ensure that removal to the home state would constitute torture or inhuman and degrading treatment under Article 3 of the European Convention on Human Rights. Inhuman treatment is considered with reference to the seriousness of the consequences of the withdrawal of medical treatment; such consequences include a painful and distressing death. There is a necessity for asylum seekers with A.I.D.S. to be at the end stage of their illness with little or no hope of recovery,

[35] *Supra* n. 1, para. 15 (*per* Buxton L.J.).

[36] See *N. v. S.S.H.D.* [2005] U.K.H.L. 31; *S.N. v. S.S.H.D.* [2005] E.W.C.A. Civ. 168; *D v. United Kingdom* (1997) 24 E.H.R.R. 423; for an overview of the recent case law see Palmer (2005). For a discussion of the medical response to the treatment of refugees see Silove (2001); Neilson (2004).

without facilities or family members which could assist with their illness in the home country.[37]

Finally, it is worth noting Lord Brown's comments in the 2005 case of *N. v. S.S.H.D.*, "there are an estimated 25 million people living with H.I.V. in sub-Saharan Africa and many more millions A.I.D.S. sufferers the world over".[38] Although *N. v. S.S.H.D.* is not directly referred to in *R.G.*, the sentiment expressed regarding the sheer volume of those with H.I.V./A.I.D.S. and the imagined strain that this would place on national health services may be an important indication of judicial thinking around the issue of health care provision and thus the reasoning behind the scepticism with which R.G.'s claim was met, resulting in the subsequent negative determination. The U.K. courts are obviously concerned that making a positive determination on the part of H.I.V./A.I.D.S. sufferers would provide a precedent for future claims. Such a precedent may be interpreted as problematic due to concerns that this would open the 'floodgates' to more refugee claims based on this particular ground.

Conclusion

Throughout the judgment of *R.G.* the terms 'flaunting' and 'discretion' were placed in opposition to one another, the former denoting the 'bad' gay man, the latter the 'good'. The heteronormative base through which the judiciary approached this case and many others like it where the refugee claimant is gay highlights a lack of awareness and understanding as to the difficulty of concealing and denying one's sexuality. Negative decisions positively endorse the discrimination that the claimant has experienced in their home state, perpetuating homophobia through the law's own violent repression of non-normative sexuality.

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[37] *N. v. S.S.H.D.* [2005] 2 W.L.R. 1127.

[38] *Ibid.,* para. 72 (*per* Brown L.J.).

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