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New Asylum Chance for Gay Egyptian

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New Asylum Chance for Gay Egyptian

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Federal court orders Immigration board to consider torture evidence, but denies outright relief.

By: ARTHUR S. LEONARD | A unanimous three-judge panel of the U.S. 3rd Circuit Court of Appeals, based in Philadelphia, ruled on December 20 that a gay Egyptian man should receive a further hearing from the Board of Immigration Appeals (BIA), which earlier rejected his bid to stay in the US.

The man, referred to in the opinion as John Doe, argued that he met the standard for remaining here under both the Immigration and Nationality Act and the international Convention Against Torture.

Writing for the court, Circuit Judge Dolores Sloviter rejected the petitioner's argument that the BIA's decision should be reversed and he be granted his petition to stay. Instead, wrote Sloviter, the case should go back to the Appeals board, which is part of the Department of Justice, for reconsideration of significant uncontested evidence about torture in Egypt that it did not address in its earlier opinion.

Doe is a native and citizen of Egypt who left that country in 1989 after suffering two beatings because he is gay – one at the hands of his high school gym instructor and the other by a police officer “who saw Doe holding hands with, kissing, and hugging his boyfriend” in a public park. Doe moved to Qatar, but claims he suffered additional beatings and threats after “a former Egyptian classmate began to spread rumors that he is gay.”

The man has briefly visited Egypt a few times to see family members, but claims he suffered harassment on those occasions as well, and that his family has since written to him warning that the police were looking for him.

Doe came to the US on a tourist visa in 2001, overstayed his visa, and in 2003 applied for asylum, an alternative procedure known as withholding of removal, and protection under the international Convention Against Torture.

In 2004, an Immigration Judge rejected his asylum petition because it was filed after the one-year deadline from the time of his arrival in the US. The judge also questioned whether he is really gay, found that the incidents he described fell short of harassment, and, despite hearing uncontested expert testimony about the desperate situation facing gay men in Egypt, concluded that Doe had failed to prove he was likely to suffer persecution or torture if deported to that country.

The Appeals Board rejected the judge's ruling on Doe's sexual orientation, finding “enough evidence” that he is gay. But the Board also held that “isolated incidents” of harassment in Egypt do not amount to persecution. However, the Board's decision did not make any findings based on the expert testimony about the torture of

gay men in Egyptian prisons and the “crackdown” by the government against gay men, as evidenced by the infamous 2001 Queen Boat raid on the Nile in Cairo and other incidents.

The Justice Department attorneys representing the government in Doe’s appeal to the federal courts evidently realized that the Board’s decision was indefensible, and filed a motion that the case be sent back to the BIA “so that the BIA may address Doe’s claim that the conditions for homosexual men in Egypt have deteriorated since Doe’s departure from that country.”

Doe opposed this motion, arguing that the uncontested evidence would justify the court in reversing the Board and awarding him the right to stay in the United States as a refugee.

The court abstained from ruling on the motion, instead hearing argument from both sides on December 10. It then acted quickly, though, issuing its opinion only ten days later. Ultimately, the court granted the government’s motion.

Acknowledging that “it is uncontested that the record contains evidence of deteriorating conditions for homosexuals in Egypt,” Sloviter continued, “Even if we could reverse, we cannot meaningfully review the BIA’s decision where it failed to address key evidence or adequately explain the basis of its decision.”

The record was simply not there, she found, to grant Doe’s request for reversal.

The court did instruct the BIA to consider all of Doe’s objections to its prior ruling, including one key point—that his claim for protection under the Convention Against Torture be based on an objective assessment of whether the Egyptian government tortures gay men, not on the more subjective question, improperly used, of whether he has a reasonable fear of personally being persecuted or tortured.

Doe asked that the appeals court specifically instruct the BIA on the proper standard for considering this claim. Rejecting this request, Sloviter wrote, “We do not presume that the BIA will make legal errors upon its reconsideration of Doe’s claims, and anything we would say in that connection would be a purely advisory opinion.”

In light of the news reports from Egypt about the treatment of gay men there, it seems absurd that there would be any question that somebody known to the Egyptian police as gay should be entitled to refuge in the United States, but the dysfunctional asylum procedures as administered by the Homeland Security Department – and perhaps diplomatic concerns about alienating a significant U.S. ally in the Middle East – reduce the surprise this case occasions.

Perhaps judicial review and public exposure of the absurd decision may ultimately produce an appropriate outcome.