



Fiji: Ban on sodomy declared unconstitutional

THE COURT'S DECISION LEADS TO HOMOPHOBIC REACTIONS FROM THE CHURCH AND AN INTENSE PUBLIC DEBATE ON HOMOSEXUALITY

First arrested in early April on the basis of a law passed in 1944 criminalising sex between two males, an Australian tourist and a local Fiji man have been acquitted following a groundbreaking decision by Fiji's courts. In his judgement, Judge Winters also declared that both sections 175 and 177 of the Penal code which criminalise private consensual sex against the course of nature between adults and private consensual sexual conduct of adult males "are inconsistent with the Constitution and that prosecutions engaged on that basis are invalid. We talk to Andrea Coomber, Legal Officer on the Equality Programme at Interights, the NGO that trained Judge Rivers the year before and advised the applicants' lawyer during the Court. Carlos Perera, ILGA representative for the region and activist at the Sexual Minorities Project tells us more on the consequences the judgement had locally.

How did your organisation get involved in this case?

Interights has been working in the the Fiji Islands since 2002. We have held a number of training sessions on international and comparative human rights law for lawyers and judges in the Fiji Islands, with a focus on equality and non-discrimination law. We have also advised local lawyers on international human rights arguments that can be used in their domestic cases. I first met Carlos in August 2003, when Interights staff were in Fiji to train High Court judges on international equality and non-discrimination standards. We were impressed by his commitment and energy in the face of immense marginalization and isolation of LGBT issues in the region. The following year, we invited Carlos to a lawyers' training with a view to connecting him to a lawyer prepared to challenge the criminalization of gay sex. The workshop considered the way in which laws themselves can discriminate against minority groups, and specifically considered the example of prohibitions on gay sex. We highlighted the way in which this issue had been dealt with in South Africa and in other jurisdictions, and encouraged lawyers to replicate such a challenge in Fiji. Lawyers came forward who were prepared to assist Carlos, and we began planning a constitutional challenge, based on the inconsistency of the Penal Code with the equality guarantees in the Fiji Bill of Rights. We were still researching this challenge, when Mr McCoskar and Mr Nandan were arrested and convicted. The case obviously brought forward our plans, and highlighted the impact of the prohibition on gay men's lives. Carlos put me in touch with McCoskar and Nandan's lawyer, Natasha Khan and we provided her with detailed advice on the international and comparative human rights arguments

that might be used in the case, much of which was ultimately picked up in the judgment.

What was the nature of your advice to the applicant's lawyer?

Interights specializes in providing advice to lawyers bringing human rights cases to domestic courts, and to regional and international bodies, on the international and comparative standards and jurisprudence that can be argued before courts. In the case of the criminalization of gay sex, there is a growing body of jurisprudence internationally on the way in which such criminalization violates the equal rights, privacy and dignity of homosexuals. We were keen that this international context and human rights perspective be put to the High Court of Fiji. Quite unusually among common law countries, the Fijian Constitution requires that the Fiji Bill of Rights be interpreted in light of "public international law" and so it was necessary for Judge Winter to call on this body of international standards in deciding the case. The judgment calls very heavily on international standards and the way in which courts in other parts of the world have dealt with these issues.

What do you consider to be the significance of the case?

The case is important on a number of levels. First, it is significant for the two men involved, and for homosexuals in the Fiji Islands who are now legally entitled to express their sexuality. Obviously, the political and social context in Fiji means that the battle has only just begun for equal rights for homosexuals, but the judgment sets down a significant legal marker for policy makers. [Continues page 17 >](#)

From page 14 > It is important to guard both against political backlash – in terms of attacks on the Bill of Rights and role of the judiciary – and the personal backlash against the brave people like Carlos who advocate equal rights for LGBT people in Fiji. Second, the case is significant in that it sets a valuable international precedent that the criminalization of gay sex vio-

Can prescribing a respect for Fijian cultural values be interpreted as supporting a taboo on gay sex?

Well, last week, the High Court said no. As a result, both Mr McCosker and Mr Nandan walked free, and can now not be prosecuted for the crime, even if the case were to go all the way to the country's Supreme Court. And that now appears very likely, with the government vowing to protect the sodomy laws at all costs, even if it has to change the constitution. I think that everyone that has lived in Fiji (...) knows that homosexuality exists in the Fijian community as it does in other communities in Fiji. The debate over what is and isn't culturally acceptable is an important one. It lies at the heart of the constitutional arguments which were presented during the McCosker High Court case. And it raises fundamental questions about the values enshrined in the country's Bill of Rights. [Samson Verma, a Fijian activist now living in France who got asylum last year telling the French Court he would be persecuted if he were forced back to Fiji.](#) From an interview by James Panichi on [www.abc.net.au](#)

lates fundamental human rights. Both the legal principles expressed in the judgment, and much of the language adopted, will provide a useful precedent for lawyers challenging similar prohibitions in other parts of the world. The social context in Fiji is very similar to other countries in which gay sex remains criminalized –there is a very strong anti-gay religious movement and homophobia is common place. The way in which the High Court upheld the fundamental rights of gay men in this context will be instructive to lawyers and judges elsewhere. We are hopeful that this success can be replicated in the many other jurisdictions that criminalize gay sex and hope to support similar challenges in the future. We are very keen to assist lawyers and activists working on these issues.

I was rather doubtful about this case and just kept dialogue going with Ms Khan (Nandan/McCoskar lawyer) to see that she had sufficient material for the court and the outcome was overwhelming. When the Judge read out his decision, it was an emotional moment not only for the defendants but also for members of the gay community who were present. This is a milestone in the history of Human Rights in Fiji and decriminalising consensual adult sex is a stepping-stone to legalising homosexuality. Then came the reactions, Reverend Waqairatu of the Methodist Church and Tahir Munshi, Vice President of the Ahmadiyya Muslim Jamaat of Fiji issued a statement stating that homosexuals should be put to death and destroyed. The Methodist Church is currently lobbying the Government to remove Sexual Orientation from the Anti-Discriminatory section of the Bill of Rights in Fiji's Constitution. Other religious institutions like the Assemblies of God have joined the band wagon. **We are rather horrified at the level of hatred that these churches have for the homosexual community. It is outrageously unspeakable. To add to our disbelief, the Honourable Prime Minister is fully supporting these statements.** As for the Police, its Commissioner has been supportive and has stated publicly that "being gay is not an offence and he will not waste police resources on trying to prosecute adults who engage in consensual sexual activity." But the majority of the current government is made up of Methodists. The State and this church has been working hand in hand and we are quite fearful of this. Our human rights stance is strong and we have the support of the NGO Coalition on Human Rights, Fiji Human Rights Commission, other Human Rights Defenders as well as our international contacts that will be putting pressure on the government to follow the rule of law and the fundamental principles of Democracy. We will be issuing an action alert as soon as the government makes a decision on the issue and will call on Human Rights Defenders all over the globe to start taking the stand to stopping further marginalisation and continuous derogative statement that fuel hate related crimes."

Carlos Perera, ILGA representative for the region and activist at the Sexual Minorities Project.