

HJ (IRAN): A FUNDAMENTAL SHIFT IN ASYLUM LAW



Background

HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31 represents a fundamental shift in UK asylum law. The magnitude of this case is highlighted by the fact that both the Equality and Human Rights Commissioner of the UK and the UN High Commissioner for Refugees intervened to state their opinions. Its implications are far more wide reaching than the sole issue of the persecution of gays and lesbians in their country of origin. It has the potential for a much broader application in the context of refugee law generally.

Previously, the '*reasonable tolerability*' test was used to establish whether gay or lesbian asylum seekers were entitled to refugee status ie: whether they can *reasonably* be expected to *tolerate* being discreet about their sexual identity in order to avoid persecution. This was unanimously held by the Supreme Court as incompatible with the purposes of the Refugee Convention ('the Convention') and as unworkable in practice.

In ***HJ (Iran)***, Lord Rogers provided guidance: '*the underlying rationale of the Convention is that they should be able to live freely and openly as gay men and lesbian women, without fearing that they may suffer harm of the requisite intensity or duration because they are gay or lesbian.*'

Lord Hope adds, '*The Convention does not permit, nor indeed envisage, applicants being returned to the countries of their nationality 'on condition' that they take steps to avoid offending their persecutors.*'

The Supreme Court now says that even if an asylum seeker will not act in a way which invites persecution, preferring to avoid persecution by concealing fundamental parts of her/his identity and personality, then s/he is equally entitled to asylum.

In this case, both appellants were 'practising homosexuals' in their home countries and both said they had suffered persecution as a result.

HJ, a 38 year old Iranian national, only revealed his sexual orientation to his family and a small number of like minded people. He had come to the adverse attention of the authorities in Iran owing to his homosexuality and fled to the UK in December 2001, where he immediately claimed asylum.

At present, Iran is one of only seven countries worldwide that retain the death penalty for consensual same-sex acts.

HT, a 35 year old man from Cameroon, claimed asylum in 2007. He stated that he was spotted kissing another man in his garden and was subsequently attacked. Before this incident, he had always been discreet about his relationships.

Homosexuality is currently illegal in Cameroon and individuals known or perceived to be gay or lesbian risk attacks and arrests.

Both men had sexual relationships while resident in the UK and both relied on the Convention for protection as refugees.

1951 Convention and the status of refugees

Article 1A(2) of the Convention states that a person is a refugee if, *'owing to 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, owing to such fear, is unwilling to avail himself of the protection of that country'*.

It is well established case law that, for this purpose, lesbians and gays are a particular social group.

A refugee's right to be protected against forcible return, or *refoulement*, is set out in Article 33(1) of the same Convention:

'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social or political opinion'

The decision of the Court of Appeal, (which the Supreme Court overruled), had concluded that neither appellants had shown a well-founded fear of persecution by virtue of the Convention. They had lived discreetly and had not stated that it was difficult for them to do so.

However, the question of whether they would need to live discreetly upon return to their country of origin was raised before the Asylum and Immigration. The question before the Court was about *future* persecution and what the appellants would have to do in order to avoid this.

The Supreme Court borrowed important principles from international jurisprudence, namely, from an Australian decision, **Appellant S395/2002 v Minister for Immigration (2003)**. Lord Rodger, who gave the leading judgment, set out a new approach to be followed by the Immigration Tribunal. The main points of the judgement are set out below:

- The 'reasonable tolerability' test applied by the Court of Appeal must accordingly be rejected.
- Lesbians and gays are protected by the Convention, membership of the relevant social group being defined by the immutable characteristic of its members' sexuality.
- To compel people to pretend that their sexuality does not exist, or that the behaviour by which it manifests itself can be suppressed, is to deny them their fundamental right to be who they are.
- The Convention confers the right to asylum in order to prevent individuals suffering persecution, which must be either sponsored or condoned by the home country in order to implicate the Convention.
- Simple discriminatory treatment on grounds of sexual orientation does not give rise to protection under the Convention. Nor does the risk of family or societal disapproval, even trenchantly expressed.

-
- There may be cases where the fear of persecution is not the only reason that an applicant would hide her/his sexual orientation. S/he may also be concerned about the adverse reaction of family, friends or colleagues. In such cases, the applicant will be entitled to protection if the fear of persecution can be said to be a *material* reason for the concealment.
 - The Convention does not permit applicants being returned to their home country 'on condition' that they take steps to avoid offending their persecutors.

Lord Hope dismissed internal relocation as incompatible with the principles of the Convention, stating, '*it assumes that the applicant will be prepared to lie about and conceal his orientation when he moves to the place of relocation*'. This would equally apply to the religious or political activist who would be expected to relocate but remain inactive and sacrifice her/his beliefs.

This fundamental shift in thinking has led to a new approach to asylum cases; not just in relation to homosexuality but equally to cases involving, for example, religious or political opinion.

The case of **TM (Zimbabwe) [2010] EWCA Civ 916**, which followed **HJ Iran**, reinforces this new approach and stresses that it '*is not limited just to sexual orientation cases but will apply to all grounds covered by the Convention.*'

SM, AM, RT, DM (Zimbabwe) v SSHD EWCA Civ 1285; [2010] set a further precedent and held that, in considering *imputed* political opinion, the issue of whether political activity was of central or marginal importance to the lives of the asylum seekers was beside the point. The core of the protected right was the right not to be persecuted for being *perceived* as holding political views, irrespective of whether a person actually holds them or not. In this case, the Court of Appeal held that if asylum seekers are forced to lie about their absence of political beliefs solely to avoid persecution, the principle in **HJ (Iran)** must be applied and such actions cannot defeat the person's claim to asylum. This judgment shows how the decision of the Lords in **HJ (Iran)** has been extended and applied to an applicant for protection under the Convention which is completely unrelated to a person's sexuality.

It is expected that future asylum cases will follow this paradigm. While the shift towards a more liberal approach is welcome, we can only hope that **HJ (Iran)** will continue to engender many positive outcomes for asylum claimants in the UK and abroad.

Copyright Law Centre (NI) March 2011

Immigration Advice: Mon to Fri 9.30am to 12 noon, 9024 4401 and 7126 2433

For more information about the Law Centre: www.lawcentreni.org



Law Centre®



INVESTOR IN PEOPLE