BAKER & MCKENZIE

Baker & McKenzie LLP

100 New Bridge Street
London EC4V 6JA
United Kingdom

Tel: +44 (0)20 7919 1000
Fax: +44 (0)20 7919 1999
DX: 233 Chancery Lane
www.bakermckenzie.com

18 January 2016

Civil Appeals Office
Room E307
Royal Courts of Justice
Strand
London WC2A 2LL

Our ref: AXXB/AJS
tel: 020 7919 1439
e: Amy.Smith@bakermckenzie.com

By hand

Dear Sirs,

MSM (Somalia) C5/2015/3380 - UNHCR SUBMISSIONS

Please find enclosed the submissions of the UNHCR.

Yours faithfully,

Baker & McKenzie

Baker & McKenzie LLP

Encl

Appeal No. C5/2015/3380

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

BETWEEN : -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

- and -

MM (SOMALIA)

Respondent

-and-

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

SKELETON ARGUMENT OF UNHCR

INTRODUCTION

1. UNHCR was granted permission to intervene in this appeal by way of written and oral submissions pursuant to an order made by Beatson LJ on 9 December 2015. It is grateful for this opportunity to address the Court.

2. UNHCR has supervisory responsibility in respect of the 1951 Convention relating to the Status of Refugees ("the 1951 Convention") and its 1967 Protocol. Under the 1950 Statute of the Office of the UNHCR (annexed to UN General Assembly Resolution 428(V) of 14 December 1950) ("the Statute"), UNHCR is entrusted with the responsibility for providing international protection to refugees, and together with governments, for seeking permanent solutions to their problems. As set out in the Statute, UNHCR fulfils its mandate inter alia

by, *"promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto"* (§8(a)). UNHCR's supervisory responsibility is also reflected in the Preamble and Article 35 of the 1951 Convention and Article II of the 1967 Protocol, obliging State Parties to cooperate with UNHCR in the exercise of its functions, including in particular, to facilitate UNHCR's duty of supervising the application of these instruments.

3. UNHCR's supervisory responsibility and the intention of the EU Member States to give full effect to the 1951 Convention within the European Union is reflected in EU law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union ("TFEU"),[1] in Declaration 17 to the Treaty of Amsterdam, which provides that "consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy",[2] as well as references in the relevant Council directive at issue in this case.[3]

BACKGROUND

4. UNHCR participated in these proceedings before the Upper Tribunal ("UT") pursuant to its statutory right to intervene under Rule 9(6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

5. The UT made (or preserved) the following findings of fact:

---

[1] European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, available at: http://www.refworld.org/docid/4b17a07e2.html

[2] European Union: Council of the European Union, Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, 10 November 1997, available at: http://www.refworld.org/docid/51c009ec4.html

[3] See, Recitals 2 and 15 of the European Union: Council of the European Union, Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC, available at: http://www.refworld.org/docid/4157e75e4.html

a. MM arrived in the United Kingdom on 4 October 2013 when he claimed asylum;[4]

b. Prior to his arrival in the United Kingdom, MM worked as a teacher and then as a journalist in Mogadishu, Somalia;[5]

c. Journalists and media workers in Somalia are at risk of death or injury perpetrated by Al-Shabaab, a terrorist organisation;[6]

d. Journalists and media workers are targeted by Al-Shabaab because of their actual or imputed political opinions;[7]

e. If MM were returned to Somalia he would, as a matter of probability, resume employment in the broadcasting and media sector;[8] and

f. Such employment would be partially motivated by political belief and would involve the expression of political opinions.[9]

6. At paragraph 28 of its determination, the UT concluded:

> ... the Appellant has discharged the burden of establishing that in the event of returning to Mogadishu, Somalia, there is a real risk that by virtue of his predicted employment in the media sector he will be persecuted for the Refugee Convention reason of political opinion.

7. The UT rejected the Secretary of State's argument that MM should be refused refugee status because he could take steps to avoid persecution by returning to his profession as a teacher. At paragraph 45 it held:

> In short, the possibility of conduct entailing the avoidance of modification of certain types of behaviour related directly to the

[4] UT determination, §8.
[5] UT determination, §8.
[6] UT determination, §21(f), (h) and (i).
[7] UT determination, §21(g).
[8] UT determination, §6.
[9] UT determination, §18.

right engaged is irrelevant. Thus this possibility must be disregarded.

8. The UT therefore concluded that MM satisfied the conditions for being granted refugee status, and allowed his appeal (paragraph 54).

SUBMISSIONS

9. UNHCR contends that the UT was correct to hold that the possibility of MM changing his profession was *"irrelevant"* for the purposes of his asylum application, because:

   a. MM would not, in fact, change his profession upon return to Somalia; and

   b. In any event, requiring MM to take steps to avoid the imputation of a political opinion would deny him the very right to hold or not to hold a political opinion which the Convention is intended to protect.

10. Accordingly, the UT was correct to hold that MM had a well-founded fear of persecution for reasons of imputed (and/or actual) political opinion, which entitled him to refugee status under the Qualification Directive.

i) The Qualification Directive

11. As the UT accepted, the starting point for determining whether an individual qualifies for refugee status is Directive 2004/83/EC ("the Qualification Directive").[10]

12. The Directive, which is based upon the 1951 Convention and its 1967 Protocol, lays down minimum standards for the qualification of third country nationals as refugees (Recital 2 and Article 1).

[10] UT determination, §32.

13. Article 2(c) of the Directive provides the following definition of 'refugee':

> 'refugee' means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country

14. There are thus, for relevant purposes, only two stages of inquiry for determining whether an individual is a refugee under Article 2(c):

    a. First, does the applicant have a well-founded fear of persecution?; and

    b. Second, what is the reason for the persecution?

15. These two stages of inquiry are reflected in Articles 9 and 10 of the Directive, which the UT recognised were the *"most important"* provisions for the purposes of the present case.[11] Article 9 provides:

> **Article 9 – Acts of Persecution**
>
> (1) Acts of persecution within the meaning of article 1A of the Geneva Convention must:
>
> > (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
> >
> > (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).
>
> (2) Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:

[11] UT determination, §33.

(a) acts of physical or mental violence, including acts of sexual violence ...

16. Article 10(1) then provides guidance on each of the protected grounds.[12] As regards political opinion, it provides:

> **Article 10 - Reasons for persecution**
>
> (1) Member States shall take the following elements into account when assessing the reasons for persecution:
>
> (e) the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

17. Article 10(2) provides protection under the Directive to individuals who have a well-founded fear of persecution for reasons of imputed political opinion.

18. Article 13 requires a Member State to grant refugee status to a third country national who meets the conditions set out in Chapters II and III of the Directive.[13]

ii) Cases where the applicant will not take steps to avoid persecution

19. Nothing in the Directive authorises a refusal of refugee status on the basis that the applicant could (but would not in fact) take reasonable steps to avoid persecution.[14]

20. This was recognised in Ahmed v Secretary of State for the Home Department [2000] INLR 1, where Simon Brown LJ said:

---

[12] There are no equivalents to Articles 9 and 10 in the 1951 Convention or its 1967 Protocol. These provisions are intended to guide the national authorities of Member States on the definition of 'refugee status' in their application of the Convention (Recital (16) of the Directive).

[13] The remaining provisions of Chapters II and III are not in dispute in these proceedings.

[14] The only exception is where the applicant could relocate within his country of origin, which is expressly catered for under Article 8 of the Directive. It would not in any event be reasonable to require an individual to relocate if that would involve taking steps to surrender the very protection granted under the 1951 Convention.

> [I]n all asylum cases there is ultimately but a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason? If there is, then he is entitled to asylum. It matters not whether the risk arises from his own conduct in this country, however unreasonable.
>
> ... the critical question [is] if returned, would the asylum-seeker in fact act in the way he says he would and thereby suffer persecution? If he would, then, however unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, in my judgment he would be entitled to asylum (pp.7-8)

21. This passage was endorsed by Lord Hope in HJ (Iran) v Secretary of State for the Home Department [2011] 1 AC 596 at [18], where he said:

> Nobody has suggested that there is anything wrong with these observations [in *Ahmed*], as far as they go, and I would respectfully endorse them. They contain two propositions which the Secretary of State in this case accepts, and which I do not think can be disputed. The first is that attention must be focused on what the applicant will actually do if he is returned to his country of nationality. The second is that the fact that he could take action to avoid persecution does not disentitle him from asylum if in fact he will not act in such a way as to avoid it. That is so even if to fail or to refuse to avoid it would be unreasonable (emphasis added).

22. In the same case, Lord Dyson said:

> It is well-established that in asylum cases it is necessary for the decision-maker to determine what the asylum-seeker will do on return: see *Ahmad v Secretary of State for the Home Department* [1990] Imm AR 61. Thus, the asylum-seeker who could avoid persecution on his return, but who (however unreasonably) would not do so is in principle a refugee within the meaning of the Convention ([109]).

23. Lord Dyson labelled such cases as category 'A' cases ([126]). These are to be contrasted with category 'B' cases where the applicant will, in fact, take steps to avoid persecution upon return (ibid).

24. In the present case the UT found that MM *"will seek to work with broadcasters or the information media on return and, further, will secure employment in this sector"*.[15] Further, such employment will, in fact, expose him to a well-founded fear of persecution.[16]

25. The UT repeated these findings at [36]:

> It is appropriate to highlight at this juncture the key finding which we have made: the Appellant will, as a matter of probability, work in the media sector upon return to Mogadishu. In his case, the relevant "avoiding action" on which the spotlight is placed is that of engaging in an alternative occupation. We have found that the Appellant will not take this avoiding action [emphasis in original].

26. Accordingly, in line with Ahmed and HJ (Iran), the UT was correct to hold that it was *"irrelevant"* to ask whether MM could take steps to avoid persecution ([45]). Once MM established that he would, in fact, carry on a profession that would give rise to a well-founded fear of persecution by reason of imputed political opinion, that was sufficient to bring him within the meaning of 'refugee' under Article 2(c) of the Directive.

27. The Secretary of State contends that the requirement to take reasonable steps to avoid persecution is part of the test for determining whether the applicant will face 'persecution' within the meaning of Article 9 of the Directive [SS Skeleton §§13; 30(b)]. However, this argument was expressly rejected by Lord Dyson in HJ (Iran):

> [T]he phrase "being persecuted" in article 1A(2) [of the Convention] refers to the harm caused by the acts of the state authorities or those for whom they are responsible. The impact of those acts on the asylum-seeker is only relevant to the question whether they are sufficiently harmful to amount to persecution. But the phrase "being persecuted" does not refer to what the asylum-seeker does in order to avoid such persecution.

[15] UT determination, Annex 2 §26.
[16] UT determination §21.

> The response by the victim to the threat of serious harm is not itself persecution (whether tolerable or not) within the meaning of the article ([120], emphasis added).

28. The meaning of 'persecution' under Article 9 of the Directive is thus directed to the harm caused by the perpetrator, not any steps which the victim may take to avoid the persecution.[17]

29. Applying this analysis to the present case, the 'persecution' faced by MM is violence and/or death perpetrated by Al-Shabaab.[18] It is not, as the Secretary of State submits, merely the loss of his chosen profession. Such an argument is directly contrary to Lord Dyson's reasoning in HJ (Iran) at [120].

30. In summary, UNHCR contends that the UT was correct to find that refugee status may not be refused on the ground that the applicant could (but would not in fact) take steps to avoid persecution. This is sufficient to dispose of the appeal.

iii) Applicant cannot be required to take steps to avoid imputation of political opinion

31. Further, and in any event, UNHCR submits that an asylum seeker may not be denied refugee status on the basis that he or she could conceal (or exercise discretion in relation to) one of the grounds protected by the 1951 Convention, i.e. race, religion, nationality, membership of a particular social ground or political opinion (actual or imputed).[19]

32. The principle that an individual cannot be expected to conceal a protected ground is well established in the case law of both the Supreme Court and the Court of Justice of the European Union ("CJEU").

33. Thus in HJ (Iran) the Supreme Court recognised as a refugee a gay man who, if he returned to his country of nationality and lived openly as a

[17] This was accepted by the UT at §53 of its judgment.
[18] UT determination, §21(f).
[19] UT determination, §§45-50.

homosexual, would have a well-founded fear of persecution for reasons of his sexual orientation, and who, in order to avoid this risk, would carry on any homosexual relationships 'discreetly'. The Court held that the modification of behaviour required to avoid persecution (i.e. conducting any relationships discreetly) would undermine the rationale of the Convention because it would involve a person surrendering his right to live freely and openly in society as they are, in terms of the protected ground/status (the 'HJ (Iran) principle'): see *per* Lord Rodger at [75]-[76], *per* Lord Hope at [11], and per Lord Dyson at [110], which states:

> If the price that a person must pay in order to avoid persecution is that he must conceal his race, religion, nationality, membership of a particular social group or political opinion, then he is being required to surrender the very protection that the Convention is intended to secure for him. The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he would conceal the fact that he is a gay man in order to avoid persecution on return to his home country [emphasis added].

34. This is consistent with Joined Cases C-71/11 and C-99/11 Y and Z, judgment of 5 September 2012, where the CJEU considered whether Article 2(c) of the Qualification Directive must be interpreted as meaning that an applicant's fear of being persecuted is well-founded in circumstances where he could avoid exposure to persecution in his country of origin by abstaining from certain religious practices. The Court held none of the rules contained in the Directive concerning the assessment of the risk of persecution provided for the possibility of the applicant avoiding risk by abstaining from religious practice to be taken into account. Consequently, the Court concluded at [79]:

> ... where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status, in accordance with Article 13 of the

> Directive. The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.

35. The principle was reaffirmed by the CJEU in Joined Cases C-199-201/12 X, Y and Z, judgment of 7 November 2013, in the context of asylum applicants who had a well-founded fear of persecution by virtue of their sexual orientation. The Court held at [75]:

> [A] person ... must be granted refugee status, in accordance with Article 13 of the Directive where it is established that on return to his country of origin his homosexuality would expose him to a genuine risk of persecution within the meaning of Article 9(1) thereof. The fact that he could avoid that risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect.

36. As the UT accepted, the dominant principle in each of these cases is that an individual cannot be required to take steps which would deprive him or her of the very protection that the Convention is intended to secure ([47]; [49]).

37. In RT (Zimbabwe) v Secretary of State for the Home Department [2013] 1 AC 152 the Supreme Court applied the HJ (Iran) principle in the context of imputed political opinion. That was a case about four Zimbabwean nationals who faced persecution if they failed to prove their support for the ruling Zanu-PF party. The Secretary of State refused their applications for asylum on the ground that they could avoid persecution by dissembling support for the party. She sought to distinguish HJ (Iran) on the basis that the applicants were politically inactive. The steps that they were expected to take therefore did not involve denial of a core right protected by the Convention ([41]). The Supreme Court rejected that argument. Lord Dyson held:

> Freedom to hold and express political beliefs is a core or fundamental right. As Mr Husain says, it would be anomalous, given that the purpose of the Convention inter alia is to ensure to refugees the widest possible exercise of their fundamental

> rights and freedoms, for the right of the "unconcerned" to be protected under human rights law, but not as a religious or political opinion under the Convention ([40]).

38. In support of this conclusion, he said:

> [I]t is the badge of a truly democratic society that individuals should be free not to hold opinions. They should not be required to hold any particular religious or political beliefs. This is as important as the freedom to hold and (within certain defined limits) to express such beliefs as they do hold. One of the hallmarks of totalitarian regimes is their insistence on controlling people's thoughts as well as their behaviour ... The idea that 'if you are not with us you are against us' pervades the thinking of dictators ([43]-[44]).

39. It follows from RT (Zimbabwe) that the right not to hold a political opinion enjoys the same level of protection under the Convention as the right to hold a political opinion. This is consistent with the principle that there is no hierarchy between the protected grounds: RT (Zimbabwe) at [25].

40. Finally, the Australian Federal Court decided in Minister for Immigration and Border Protection v SZSCA [2013] FCAFC 155 (10 December 2013), in line with the cases set out above, that an individual cannot be required to change his or her profession in order to avoid persecution by reason of imputed political opinion.[20] This follows clear Australian High Court authority confirming the general principle that applicants cannot be required to take steps to avoid persecution on political opinion grounds.[21]

41. In SZSCA, the applicant worked as a lorry driver transporting construction materials in Afghanistan. He had previously worked as a jeweller. The Taliban imputed pro-government/pro-Western opinions to

---

[20] Available at: http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCAFC/2013/155.html?stem=0&synonyms=0&query=title(szsca%20)

[21] Appellant S395/2002 v Minister for Immigration and Multicultural Affairs [2003] HCA 71, 216 CLR 473 [40] and [80]

construction lorry drivers. The applicant was told that he would be harmed or killed if he did not give up his work. The Minister rejected the applicant's asylum application on the ground that he could avoid persecution by returning to his previous occupation as a jeweller. At paragraph 66 of their judgment, Robertson and Griffiths JJ addressed the question which arises in this appeal head-on:

> In our view, the distinction between the "core" as opposed to the "margins" of a fundamental human right has limited if any relevance to an imputed political opinion of the sort which the Tribunal found arose here and where a generalised threat had crystallised into a specific threat to kill the respondent. In the circumstances where the imputation arose solely because of the Taliban's perception of the respondent's particular truck driving activities as indicating that he was a supporter of the Afghan government and/or foreign aid agencies and where for that reason the Taliban had informed the local council people "to take firm action as soon as possible to get rid of this apostate, criminal person", we consider that the primary judge was correct to find ... that, given the Tribunal's specific finding ... that those particular activities gave rise to the Refugees Convention's protection of an imputed political opinion, there was no room to expect or require the respondent to change those activities ... This is all the more so in circumstances where the respondent said that, if he were returned to Afghanistan, he would resume those very same activities in order to support his family and thereby expose himself to the real chance of persecution which the Tribunal had accepted ... confronted him by reason of an imputed political opinion [emphasis added].

42. Robertson and Griffiths JJ went on to reject the *"central importance"* placed in the Minister's submissions on the imputed, rather than actual, nature of the political opinion ([64]).[22]

43. In the present case, the Secretary of State accepts that the HJ (Iran) principle applies to cases where an individual faces persecution on grounds of actual political opinion [SS Skeleton §4]. However, she

[22] The Australian High Court dismissed an appeal against the Federal Court's decision in Minister for Immigration and Border Protection v SZSCA [2014] HCA 45 (12 November 2014). The High Court's reasoning is cursory. However, it appeared to agree with Robertson and Griffiths JJ that the Tribunal had failed to apply the correct test ([31])

contends that the principle does not apply where the reason for the feared persecution is imputed political opinion. In such cases, she argues that a gloss should be applied to the test for refugee status, such that an applicant may be required to take steps to avoid persecution if that does not involve *"denial of a fundamental right"* [SS Skeleton §5].

44. In UNHCR's submission, this argument is flawed for three reasons.

45. First, there is no textual basis for applying a *"fundamental rights"* test under the Directive (or the Convention) where the applicant will not, in fact, take avoiding measures. As set out at paragraphs 13-16 above, there are only two questions for determining refugee status under Article 2(c): (i) does the applicant have a well-founded fear of persecution; and (ii) what is the reason for the persecution? Further, for the reasons set out at paragraphs 27-28 above, 'persecution' refers to the acts of the persecutor, not the victim's response. As the UT accepted, the Secretary of State's fundamental rights analysis would thus amount to an *"impermissible shift of focus from the persecutors to the victim"*.[23]

46. Second, in any event, requiring an individual to give up his or her profession to avoid persecution on grounds of imputed political opinion interferes with the very right to hold or not to hold a political opinion that the Convention is intended to protect. As Lord Dyson held in RT (Zimbabwe), the Convention protects the right to go about one's life without being forced to express any particular opinion, or indeed any opinion at all (see paragraphs 36-39 above). This is reflected in the UT's determination at paragraph 51:

> [The right to espouse or express political opinions] permits and protects the unconstrained expression of a political opinion at any time, at the choice of the individual, as frequently or infrequently as may be desired.

[23] UT determination, §53.

47. This right would be hollowed out almost completely if MM were required to give up his profession as a journalist, which is the very source of his imputed political opinion.

48. Further, as the UNHCR has stated in one of its Guidelines, *"there is not as such an inherently political or an inherently non-political activity, but the context of the case should determine its nature"* (UNHCR Guidelines on International Protection: Gender-Related Persecution (May 2002), paragraph 32).[24] An important piece of context is the political situation in an applicant's country of origin. As Zimmerman and Mahler have observed:[25]

> ... in some circumstances it might be difficult to evaluate whether a claimant's opinion or activity is indeed of a political nature, an issue that has been highlighted in case law which, in general, adopted a context-based approach. Indeed, what may be non-political in the State of refuge may have been perceived as being highly political in the claimant's State of origin, considering the different political situation there. Neutrality and withholding support from a government in civil war, for instance has accordingly been qualified as constituting a political opinion.

49. In this case, the UT found that the entire profession of journalists and media workers in Somalia has been politicised.[26] In that context, requiring MM to give up his profession would be tantamount to requiring him to give up his right under the Convention to hold or not to hold political opinions. That is because his profession is inherently political, in the sense that it cannot be prised apart from the expression of actual political opinions, or the imputation thereof by Al-Shabaab. Consequently, there is no safe way for MM to practise as a journalist in Somalia. If he does not express support for Al-Shabaab he will be at risk

---

[24] Available at: http://www.refworld.org/docid/4f33c8d92.html

[25] Zimmerman and Mahler, 'Definition of the Term 'Refugee'/Definition du Terme Refugie' (pp.200-404) in Zimmerman (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, A Commentary* (OUP 2011), paragraph 422.

[26] UT determination, §21.

from that group, and if he does express support for Al-Shabaab he will be at risk from pro-government groups.

50. Third, the UT found that if MM were returned to Somalia, his work as a journalist would involve the expression of actual political opinions [see Respondent's Skeleton §§8-9; 40]. This finding is sufficient to bring MM within the protection afforded by the Convention.

51. In summary, UNHCR therefore submits that:

    a. There is no *"fundamental rights"* gloss on the test for refugee status under the Qualification Directive/1951 Convention; and

    b. In any event, requiring MM to give up his profession as a journalist would deny him the very right not to hold or express political opinions that the Convention is intended to protect.

iv) No distinction between 'core' and 'marginal' interferences with rights

52. The Secretary of State further submits that a distinction is to be drawn between 'core' and 'marginal' interferences with rights under the Convention [SS Skeleton §45]. She relies in this respect on Lord Dyson's speech in HJ (Iran), where he said that there *"may be scope"* for the application of this distinction in political opinion cases ([115]).

53. However, Lord Dyson's comments in HJ (Iran) must be read in the context of his later analysis in RT (Zimbabwe), where he said:

> At paras 114 and 115 of my judgment [in HJ (Iran)] ... I was saying no more than that a determination of whether the applicant's proposed or intended action lay at the core of the right or at its margins was useful in deciding whether or not the prohibition of it amounted to persecution. I remain of that view. The distinction is valuable because it focuses attention on the important point that persecution is more than a breach of human rights ([50], emphasis added).

54. This is essentially a restatement of Article 9(1)(a) of the Directive, which provides that *"Acts of persecution within the meaning of article 1 A of the Geneva Convention must be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights"*. Thus, Lord Dyson gave examples of a homosexual not being permitted to adopt a child, or attend a gay rights march. In both of these cases, the applicant could not be said to suffer 'persecution' within the meaning of Article 9 ([49]-[50]).

55. By contrast, MM faces the risk of death or violence if he returns to Somalia as a journalist. This clearly falls within the meaning of 'persecution' under Article 9 of the Directive. The purported core/marginal distinction therefore does not take the Secretary of State's case any further.

REFERENCE TO THE CJEU

56. UNHCR contends that the position set out in this skeleton argument is a correct interpretation of the 1951 Convention and the Qualification Directive. Should the Court of Appeal nevertheless take the view that the position is not clear as a matter of EU law, then UNHCR would propose that a reference be made to the CJEU for two reasons.

57. First, the questions raised in this case depend on the proper interpretation of the Qualification Directive. The Court therefore has the power to make a reference under Article 267 TFEU.

58. Second, a reference would be plainly desirable because:

    a. The Secretary of State's argument raises an important question about the proper interpretation of the Qualification Directive which would benefit from a CJEU judgment to ensure the uniform application of the Directive across Member States;

b. In light of the EU case law referred to above (Y, Z and X, Y, Z), it cannot be said to be clear as a matter of EU law that it is permissible to take account of the reasonableness of the applicant changing his profession on return to Somalia; and

c. There is no clear textual support in the Directive nor, is there any other authority which directly supports the *"fundamental rights"* argument raised by the Secretary of State [SS Skeleton §6].

SUMMARY

59. In summary, UNHCR submits that:

a. An individual may not be denied refugee status on the ground that he or she could (but would not in fact) take steps to avoid persecution; and

b. In any event, requiring an individual to take steps to avoid the imputation of a political opinion would deny him or her the very right to hold or not to hold political opinion which the Convention is intended to protect.

MARIE DEMETRIOU QC

TOM PASCOE

Brick Court Chambers

Acting pro bono

18 January 2016

Baker & McKenzie LLP

Acting pro bono