AA/00387/2014

IN THE UPPER TRIBUNAL

B E T W E E N : -

MSM (SOMALIA)

Appellant

- v -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

-and-

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

FURTHER SUBMISSIONS ON BEHALF OF UNHCR

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1. These submissions are made further to the Tribunal's Direction of 21 May 2015 inviting the parties to make further submissions on the question of whether there is any conflict between the decisions in *HJ(Iran) v SSHD* [2011] 1 AC 596 and Joined Cases C-71/11 and C-99/11 *Germany v Y and Z* [2013] 1 CMLR 5 and, if so, how any such conflict should be resolved, bearing in mind the supremacy of EU law over national law.

Y and Z

2. In *Y and Z*, 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 or she could avoid

persecution in his or her country of origin by abstaining from certain religious practices. The Court held that the fact the applicant could avoid the risk of persecution was *"in principle, irrelevant"*: see para. 79. The only question for the national authorities was whether the applicant would in fact face a real risk of persecution on Convention grounds.

3. In reaching this conclusion, the Court held as follows:

    a. The assessment of the extent of the risk of persecution must be based solely on a specific evaluation of the facts and circumstances in accordance with the rules laid down in Article 4 of the Directive: para. 77 of the judgment.

    b. None of the rules laid down in Article 4 states that, in assessing the extent of the risk of actual acts of persecution, it is necessary to take account of the possibility open to the applicant of avoiding the risk of persecution by abstaining from the religious practice in question: para. 78.

4. In other words, the Qualification Directive does not permit a national authority to conclude that an applicant is not a refugee on the basis that they could take steps to avoid a risk of persecution on Convention grounds. The determination is instead *"based solely on a specific evaluation of the facts and circumstances"* of the case and what the authorities find the applicant will face on return to the country of origin. [1] The CJEU has been clear that it is not relevant to consider the possibilities open to an applicant, such as changing his or her behaviour or concealing a protected characteristic. Rather, the court must assess the applicant's situation in light of his or her freedom to live as who he or she chooses.

5. The CJEU adopted precisely the same approach in *X, Y and Z* when it determined that it is not permissible for national authorities to expect an applicant to exercise restraint in relation to his or her sexuality on return to his or her country of origin.[2]

[1] Para. 77 of *Y and Z*.
[2] *X, Y, Z v Minister voor Immigratie en Asiel*, C-199/12-C-201/12, CJEU, 7 November 2013

HJ (Iran)

6. In *HJ (Iran)*, the Supreme Court addressed the question also raised in *Y and Z* and in *X, Y and Z* of whether or not an applicant should be expected to conceal or be discreet regarding aspects of his or her sexual orientation in order to avoid a risk of persecution.

7. The Supreme Court held that the Convention requires a concrete assessment of what the applicant will actually do upon return. As Lord Dyson explained at para. 109:[3]

> "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."

8. Similarly, Lord Hope stated at para. 36:

> "It should always be remembered that the purpose of this exercise is to separate out those who are entitled to protection because their fear of persecution is well founded from those who are not. The causative condition is central to the inquiry. This makes it necessary to concentrate on what is actually likely to happen to the applicant....An approach which disregards what is in fact likely to occur there in the case of the particular applicant is wrong and should not be adopted."

9. Furthermore, the Supreme Court held that, in determining whether or not an applicant is a refugee, it is impermissible to take account of the fact that he or she might take steps to conceal or exercise discretion in relation to his or her sexuality in order to avoid persecution. The Court held that the same applies in relation to each of the Convention grounds. As Lord Dyson held at para. 110:[4]

[3] See also *per* Lord Hope at paras. 17-18, and Lord Roger at paras. 54-55.

[4] See also *per* Lord Hope at para. 11; Lord Rodger at paras. 75-76.

"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."

10. The conclusions reached by the Supreme Court in rejecting the relevance of concealment are consistent with the judgment of the CJEU in *Y and Z*: see para. 79 of that judgment.

11. The Secretary of State, however, interprets the Supreme Court's judgment in *HJ (Iran)* as limiting the circumstances in which it is impermissible to take account of the fact that an applicant might choose to take action so as to avoid the risk of persecution that they would otherwise face. In particular, the Secretary of State submits that *"having to alter behaviour in order to avoid being persecuted will not by itself amount to persecution unless to do so would involve forfeiting a fundamental human right"*.[5] It is on this basis that the Secretary of State contends that the *HJ (Iran)* principle does not apply in cases where the risk of persecution arises because of imputed political opinion.

12. If that were the *ratio* of *HJ (Iran)*, then there would be an inconsistency between the Supreme Court's judgment and that of the CJEU in *Y and Z*. In particular, *Y and Z* contains no such limiting principle. The CJEU held at para. 79 of its judgment that the fact the applicant could avoid the risk of persecution was *"in principle, irrelevant"*.[6] It did not confine this finding to cases in which the modification of behaviour would involve forfeiting a fundamental right.

13. However, UNHCR submits that the limitation contended for by the Secretary of State does not form part of the *ratio* of *HJ (Iran)* and so there is no inconsistency between that case and *Y and Z*. In particular:

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5 Para. 58 of the Secretary of State's submissions.

6 See also Joined Cases 199-201/12 *X, Y and Z*, 7 November 2013, paras. 73-76 which is to the same effect.

a. The observations made by Lord Dyson in *HJ (Iran)* which are relied upon by the Secretary of State were *obiter* given that the Court did not have to consider the position where an applicant could take avoiding action which did not entail a forfeiture of fundamental rights. Had the Supreme Court been intending to lay down the limitation suggested by the Secretary of State, it would have had to address the question whether such a limitation could be reconciled with the clear terms of the Qualification Directive.

b. In any event, the Supreme Court considered *HJ (Iran)* in its later judgment in *RT (Zimbabwe)*. At paragraph 18 of its judgment in *RT (Zimbabwe)*, the Supreme Court accepted UNHCR's exposition of the reasons for the Court's conclusion in *HJ (Iran)*. Those reasons did not root the conclusion in a need to avoid forfeiting fundamental rights; instead the Court's focus was on whether or not a person would surrender the right to *"live freely and openly in society as who they are, in terms of the protected characteristic."*

c. Moreover, the Court expressly rejected a fundamental rights based analysis of whether a person could be expected to avoid persecution by changing their behaviour. Lord Dyson said that such an analysis was *"unworkable in practice"* (para 46) and was *"based on a misunderstanding of what we said in the HJ (Iran) case"* (para 50). His Lordship clarified that fundamental rights are only relevant to the question of whether a person will face consequences that are so severe that they amount to 'persecution'. They are not relevant to the question whether it is permissible to expect a person to change his or her behaviour.

14. In the event of any inconsistency between the two judgments, the reasoning of the CJEU must prevail as a consequence of the supremacy of EU law.

Conclusion

15. In conclusion, UNHCR contends that there is no inconsistency between *HJ (Iran)* and *Y and Z*. On the main point under consideration in this case, namely whether national authorities are precluded from taking account of the fact that an applicant could take avoiding action when assessing whether

he or she has a well-founded fear of persecution on Convention grounds, the judgments are *ad idem*.

16. In the event that (contrary to UNHCR's submissions), the Tribunal discerns any inconsistency between the two judgments, then it must apply the reasoning of the CJEU.

17. Further, if the Tribunal has any doubts as to whether the reasoning of the CJEU applies to the case at hand (i.e. a case where the fear of persecution arises because of imputed political opinion) then UNHCR contends that the appropriate course would be to make a reference to the CJEU in order to clarify that issue.

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