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

SUBMISSIONS ON BEHALF OF UNHCR

INTRODUCTION

1. UNHCR is participating in these proceedings pursuant to Rule 9(6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

2. The Upper Tribunal will be aware that 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), UNHCR has been 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 (§8(a)), 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"*. 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]

4. By letter dated 14 October 2014, UNHCR gave the Upper Tribunal notice pursuant to Rule 9(5) that it intended to participate in these proceedings in order (i) to make submissions of law in relation to the matters raised by the appeal, and (ii) to participate in the discussion on whether the Upper Tribunal should make a reference to the Court of Justice of the European Union ("CJEU") for a preliminary ruling under Article 267 of the TFEU.

5. These written submissions are made pursuant to the Upper Tribunal's Order of 15 October 2014 which directed UNHCR to address the two issues identified above. UNHCR is grateful for this opportunity to address the Upper Tribunal.

---

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.

CONTEXT

6. This matter is before the Upper Tribunal following an error of law determination made by Upper Tribunal Judge Dawson on 16 June 2014 ("the Decision") setting aside the decision of the First Tier Tribunal of 18 March 2014 ("the FTT's Decision").

7. The Appellant is a national of Somalia. The facts established by the FTT (and upheld by the Upper Tribunal in its Decision) include the following:

    a. The Appellant arrived in the United Kingdom on 4 October 2013 when he claimed asylum;

    b. Having previously worked as a teacher, the Appellant took up activities as a journalist in May 2011, working for an independent radio station in Mogadishu;

    c. The Secretary of State for the Home Department conceded that journalists are "generally at risk" in Somalia and that there is no evidence of effective state protection.

8. The FTT's Decision found at para. 15 that:

> "It is an established principle of Refugee Law that protection is to be refused if it is shown that the person seeking asylum can reasonably be expected to take measures to avoid the threat of persecution upon his return to his country of origin. This principle finds expression, for example, in the requirement for an applicant to demonstrate that it would not be reasonable, or that it would be unduly harsh to expect him to relocate to an area where he would not face the real likelihood of persecution."

9. At para. 17, the FTT went on to find that, even if the Appellant "could show that the only reason that would compel him to change profession, would be a fear of persecution", he would not be entitled to protection as a refugee. In particular, the FTT held at para. 19 that the principles in *HJ(Iran) v Secretary of State for the Home Department* [2010] UKSC 31, did not apply because:

"...the appellant's change of his profession by returning to teaching would not involve a violation of or a denial of a right enshrined in the Convention. The right to practise one's profession does not enjoy protected status under the Convention."

10. This led the FTT to conclude, at para. 20 of the FTT's Decision, that:

"In the circumstances I find that to the extent that this appellant would be at risk merely on account of his continuing to practise as a journalist in Mogadishu, it would be reasonable to expect him to revert to teaching as a means of earning an income, and hence, avoid any risk that would befall him as a journalist at the hands of Al-Shabab."

11. In setting aside the FTT's Decision, the Upper Tribunal held that the FTT had failed to make any finding that the Appellant would practise as a journalist on return. The Upper Tribunal stated, at para. 18 of the Decision, that:

"If it is found that the appellant will resume his occupation as a journalist on return, the issue will be whether it would be reasonable to expect him to change his career and to resume his earlier or another occupation."

12. Accordingly, the Upper Tribunal held that it would remake the FTT's decision after hearing evidence on:

"(i) the appellant's intentions so far as a career is concerned on return;

(ii) whether former journalists who are no longer pursuing their occupation would nevertheless be in need of protection having regard to the Secretary of State's concession and the current situation in Somalia."

13. A hearing was held before the Upper Tribunal on 15 October 2014 at which the Appellant sought a reference to the CJEU under Article 267 TFEU for a preliminary ruling on the following questions:

a. Where a Member State accepts a real risk of persecution due to imputed or actual political opinion, or religious beliefs, connected to an asylum applicant's profession, in light of Article 10(2) of the

Directive, can that applicant for asylum be expected to change their profession in their country of origin to avoid persecution on return?

b. If the first question is answered in the negative, if the individual voluntarily changes their profession, are they still a refugee in line with Article 2(c) of the Directive, where modification is based on the well-founded fear of persecution?

14. At the same hearing, the Secretary of State's representative indicated that she was considering whether to withdraw the concession recorded at para. 7(c) above.

15. By its Order, the Upper Tribunal directed the Secretary of State to file written submission in relation to this question, including the basis on which the Secretary of State would be entitled to withdraw the concession.

SUBMISSIONS

Whether it is reasonable to expect an asylum applicant for refugee status to change profession to avoid persecution

16. This is the question set out at para. 18 of the Upper Tribunal's Decision and arises if it is established on the facts that the Appellant would continue to practise as a journalist if he were returned to Somalia.

17. UNHCR contends that it is impermissible to deny an asylum applicant refugee status on the basis that they could be expected to conceal (or exercise discretion or restraint in relation to) one of the core grounds/ statuses protected by the 1951 Convention, i.e. race, religion, nationality, membership of a particular social group or political opinion, in order to avoid persecution. Requiring an asylum applicant to change profession such as in the circumstances in this case would be tantamount to requiring him to exercise restraint in relation to a core ground/ status, namely political opinion.

18. Contrary to the FTT's findings at para. 15, requiring a person to change profession so as to avoid persecution on grounds of political opinion is not analogous to reasonably requiring a person to relocate to a different area as

part of the assessment of internal flight or relocation alternative. Relocation to a different area so as to avoid persecution could only ever be reasonable if the applicant is permitted to live in society as who they are; it cannot be reasonable if they have to take steps to disavow the status protected by the 1951 Convention.

19. The principle that it is impermissible to deny an applicant refugee status on the basis that they could be expected to exercise discretion in relation to one of the core grounds/ statuses is well-established in the case law of both the UK Supreme Court and the Court of Justice of the European Union.

20. Thus, in *HJ (Iran) v Secretary of State for the Home Department*, the Supreme Court recognised as a refugee a gay man who, if he returned to his country of nationality and lived openly as a 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 paras. 75-76, *per* Lord Hope at para. 11, and per Lord Dyson at para. 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."

21. As is clear from the passage cited above, whilst the facts of *HJ (Iran)* concerned an asylum applicant who feared persecution on grounds of his membership of a particular social group (gay men), the ratio of the decision applies equally to the other protected grounds/ statuses.

22. Thus, in *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38, the Supreme Court reached the same conclusion in the context of political opinion, holding that the *HJ (Iran)* principle applies to an individual who has no political beliefs and who is obliged to support a political regime in order to avoid the persecution that he would suffer if his political neutrality were disclosed.

23. This is consistent with the principle that there should be consistency between the protected grounds/ statuses in the 1951 Convention and that there are no hierarchies amongst those grounds/ statuses: see *RT (Zimbabwe)* at para. 25.[4]

24. At EU level, the CJEU has considered the issue both in the context of religion and in the context of membership of a particular social group (gay men).

25. In Joined Cases C-71/11 and C-99/11 *Y and Z*, judgment of 5 September 2012, 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 para. 79 of its judgment:

> "It follows that, 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."

26. This 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 para. 75 of its judgment:

4 While the grounds should be treated in *pari materia* (HJ(Iran) (at §10)) they are nonetheless stand-alone grounds/statuses. It would be wrong to import tests or interpretations, for example, from one ground to another, especially where to do so would place additional burdens on applicants not envisaged in the 1951 Convention. Likewise, any exceptions to the grounds being treated in *pari materia* would need to be justified.

"It follows that the 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 restrain than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect."

27. Precisely the same principles apply in the present case. UNHCR advances two submissions in this regard.

28. First, the First Tier Tribunal was wrong to conclude that the principle in *HJ (Iran)* does not apply to the Appellant and the Upper Tribunal should not repeat that error. The basis for the First Tier Tribunal's conclusion was that, what is contemplated is that the Appellant should cease to practise his profession and the *"right to practise one's profession does not enjoy protected status under the convention"*: see para. 19 of the FTT Decision.

29. Although the practice of a particular profession is not protected per se by the 1951 Convention, political opinion / imputed political opinion is a protected ground. The *HJ (Iran)* principle does therefore apply here because requiring the Appellant to change profession, such profession being indissociable from the actual or imputed political opinion, would directly undermine the protection afforded by the Convention to actual and imputed political opinion.

30. Second, it appears on the facts that it is as a result of imputed rather than actual political opinion that the Appellant would be at risk if returned. This does not affect the application of the *HJ (Iran)* principle.[5]

31. In particular, the protection afforded by the 1951 Convention to political opinion extends to imputed political opinion. This is expressly confirmed by Article 10(2) of Directive 2011/95/EU ("the Qualification Directive") which provides:

5 UNHCR notes that the case of *Minister for Immigration and Border Protection v SZSCA [2013] FCAFC 155*, which squarely raises the question of whether it is reasonable to require an asylum applicant to change profession in order to avoid imputed political opinion giving rise to a well-founded fear of persecution is currently pending before the Australian High Court (case number S109/2014 before the Australian High Court). The case history can be accessed on the Australian High Court website using the following link: http://www.hcourt.gov.au/cases/case_s109-2014

"When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution."

32. For its part, UNHCR has stated that "*political opinion... would also include non-conformist behaviour which leads the persecutor to impute a political opinion to him or her. In this sense, 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), 2002, para. 32, reflecting HRC General Comment No 34, 21 July 2009, para. 9)[6].

33. Requiring someone to change profession, such profession being indissociable from imputed persecution, on the basis that this would avoid the risk of persecution on grounds of imputed political opinion would therefore undermine the protection conferred by the 1951 Convention in relation to political opinion.

34. Further, distinguishing between actual and imputed political opinion in this context would be inconsistent with the reasoning of the Supreme Court in *RT (Zimababwe)*. An important basis on which the Supreme Court held that the *HJ (Iran)* principle applies to an asylum seeker who holds no political opinion was that (para. 44):

"The idea that 'if you are not with us, you are against us' pervades the thinking of dictators. From their perspective there is no real difference between neutrality and opposition".

35. In other words, the Supreme Court recognised the risk that a failure to adopt a political opinion could be imputed to be an adverse political allegiance. Its application of the *HJ (Iran)* principle therefore recognised the protection granted by the 1951 Convention to imputed political opinion. Indeed, Lord

6 UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, available at: http://www.refworld.org/docid/3d36f1c64.html

Dyson expressly held at para. 61 of his judgment that he would also have reached the same conclusion on the basis of imputed opinion.

36. Similarly, Lord Kerr made clear that his reasoning would also apply to imputed political opinion, stating at para. 74:

> "If an apolitical individual fails to demonstrate plausibly that he or she is a sufficiently fervent supporter of Zanu-PF, he or she will be deemed to be a political opponent, irrespective of how greatly he or she cherishes the right not to hold a particular view. The status of deemed political opponent, whether it is the product of imputation of political opposition or merely the arbitrary decision of those testing the degree of conviction or fervour with which support for Zanu-PF is expressed, is the gateway to persecution and that cannot be dependent on whether lack of political opinion is due to a consciously held conviction or merely due to indifference. That is why the emphasis must be not on the disposition of the individual liable to be the victim of persecution but on the mind of the persecutor." [emphasis added]

37. With the *HJ (Iran)* principle accepted, the question to be considered in assessing whether an asylum applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of origin; it is not, could the applicant live in that country without attracting adverse consequences. (*Y and Z*, para. 80, *X, Y and Z*, para. 76, *(HJ(Iran)*, para. 26; Gummow and Hayne JJ in Appellant S395/2002, para. 80[7]; *UNHCR Guidelines on International Protection: Sexual Orientation and/or Gender Identity*, para. 32)[8]. This question as to risk is the same whether the political opinion is actual or imputed.

Reference to the CJEU

7 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 at http://www.refworld.org/docid/3fd9eca84.html

8 UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, available at: http://www.refworld.org/docid/50348afc2.html

38. UNHCR contends that the position set out in this submission is a correct interpretation of the 1951 Convention, and can be applied to the Appellant's case. Should the Upper Tribunal nonetheless 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.

39. First, a decision on questions of interpretation of the Qualification Directive is necessary in order for the Upper Tribunal to give judgment in this case. The Upper Tribunal therefore has the power to make a reference under Article 267 TFEU.

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

    a. In light of the 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;
    b. The point arising in this case is an important one, which would benefit from a judgment from the CJEU with a view to providing an interpretation enabling the Qualification Directive to be applied uniformly across the Member States.

MARIE DEMETRIOU QC

Brick Court Chambers

Acting pro bono

Baker & McKenzie LLP

Acting pro bono

5 November 2014