In The Supreme Court of the United Kingdom

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL

CIVIL DIVISION (ENGLAND)

B E T W E E N:

HJ (IRAN) and HT (CAMEROON)

Appellants

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

AND

(1) THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
(2) THE EQUALITY AND HUMAN RIGHTS COMMISSION

Interveners

CASE FOR THE FIRST INTERVENER

A. INTRODUCTION

1. The correct approach to this case can be encapsulated in the following quotes:

> *"…we find it wrong to approach cases of this kind on the basis that a homosexual is not entitled to refugee status just because he could avoid persecution by conducting his sexual activities discreetly, for example 'behind the veil of decency'"* (*MN (Findings on Sexuality) Kenya* [2005] UKIAT 00021, United Kingdom Asylum and Immigration Tribunal at §16).

> *"In the case of gays, history and experience teach us that the scarring comes not from poverty or powerlessness, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group"* (*National Coalition of Gay and*

Lesbian Equality [1998] 3 LRC 648, Supreme Court of South Africa at §127).

"*…there is no duty to avoid the anticipated harm by not exercising the right, or by being 'discreet' or 'reasonable' as to its exercise*" (*Refugee Appeal No. 74665/03* at §82, New Zealand Refugee Status Appeals Authority).

"*There is no postulate in the…Convention that, in the exercise of the fundamental freedoms mentioned…, applicants for protection must act quietly, maintain a low profile*" (*NABD v Minister for Immigration and Multicultural Affairs* [2005] HCA 29 at §113, High Court of Australia).

2. The United Nations High Commissioner of Refugees ("UNHCR") intervenes, with the Court's permission, in light of its supervisory responsibility in respect of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol ("the 1951 Convention"). Under the 1950 Statute of the Office of the UNHCR, annexed to UN General Assembly Resolution 428(V) of 14.12.50, the UNHCR has been entrusted with the responsibility for providing international protection to refugees and others of concern, and together with governments, for seeking permanent solutions for their problems.[1] As set forth in its Statute, UNHCR fulfils its mandate inter alia by, "*[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.*"[2] UNHCR's supervisory responsibility under its Statute is also reflected in Article 35 of the 1951 Convention and Article II of the 1967 Protocol, obliging States Parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising the application of these instruments.[3] In domestic United Kingdom law, the UNHCR has a statutory right to intervene before the First Tier and Upper Tribunals (Immigration and Asylum Chamber).[4] In this Court, the UNHCR seeks, in appropriate cases,

[1] Statute of the Office of the United Nations High Commissioner for Refugees ('UNHCR Statute'), GA Res. 428(v), Annex, UN Doc A/1775, at [1] (1950) .
[2] Id., paragraph 8(a).
[3] UNTS No. 2545, Vol. 189, p. 137 and UNTS No. 8791, Vol. 606, p. 267.
[4] Section 49 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and section 9(5) of the Amended Tribunal Procedure (Upper Tribunal) Rules 2008, in force since 15 February 2010.

permission to intervene to assist through submissions of principle; as here, permission has always been granted.

3. This case raises issues of law of general public importance as regards the test to be applied in determining whether lesbian, gay, bisexual and transgender ("LGBT") applicants, claiming asylum on the basis of their sexual orientation, have a *"well-founded fear of being persecuted"* under Article 1A(2) of the 1951 Convention. At the heart of the case the Court will be considering whether and to what extent such applicants for asylum can reasonably be expected to avoid persecution by hiding or denying the characteristics and identity for which they fear persecution (see §§26-40 below).

4. It is also appropriate to consider (1) whether it is permissible to apply a "culturally relativist" approach to the question of how far asylum applicants should be expected to deny their identity or modify their behaviour (§§41-43 below), and (2) whether applicants can be expected to relocate internally in their countries of origin by denying their characteristics and identity (§§44-47 below).

5. UNHCR does not make submissions on the facts of individual cases, but is concerned with the interpretation and application of the 1951 Convention as a matter of law and principle. The question of how the *"well-founded fear of persecution"* test should be applied is to be answered by reference to three bodies of principle: (1) the principles of treaty interpretation; (2) UNHCR statements of principle regarding the application of Article 1A(2); and, given the interest in uniformity of interpretation, (3) interpretations of Article 1A(2) by national courts. Accordingly at the outset, UNHCR invites particular attention to the following:

(1) The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1979, reissued January 1992) (*"the Handbook"*);

(2) Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees (April 2001) (*"Memorandum 2001")*;

(3) Guidelines on International Protection: Gender-Related Persecution (May 2002) (*"GRP Guidelines 2002"*);

(4) Guidelines on International Protection: Membership of Particular Social Group (May 2002) *("PSG Guidelines 2002"*);

(5) Guidelines on International Protection: Internal Flight or Relocation Alternative (July 2003) (*"IFRA Guidelines 2003"*); and

(6) UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity (November 2008) (*"Guidance Note 2008"*).

6. The interpretative context is set out clearly in the *Guidance Note 2008*. As UNHCR notes, LGBT individuals may be subjected by State authorities, their families or communities to physical, sexual and verbal abuse and discrimination, because of who they are or who they are perceived to be (*Guidance Note 2008*, §3).[5] For example:

[5] The claims of these individuals will of course be varied, but the question of whether *"discretion"* is something they can reasonably be expected to tolerate is relevant to them all, as UNHCR recognises: see §7 below.

(1) Discrimination in accessing economic, social and cultural rights is widely documented, and involves the denial of employment, employment related benefits, housing, education and healthcare;[6]

(2) Some 80 countries (including Cameroon) still maintained laws that make same-sex consensual relations between adults a criminal offence as of May 2009;[7] and

(3) At least seven countries maintained the death penalty for consensual same-sex practices as of the same date. Those countries were Iran, Mauritania, Saudi Arabia, Sudan, the United Arab Emirates, Yemen and Nigeria.[8]

7. Treatment of this kind may singly or cumulatively amount to persecution. Such treatment might be because of prevailing cultural and social norms, which result in intolerance and prejudice, or it might be because of national laws, which reflect these attitudes (*Guidance Note 2008*, §3). Accordingly, a common element in the experience of many LGBT applicants is having to keep aspects, and sometimes large parts of their lives, secret (*Guidance Note 2008*, §4); this is often the response to the persecution rather than part of the assessment of whether there is a well-founded fear of being persecuted in the first place.

8. Against this context, UNHCR submits that the proper approach to the issues raised in this case is as follows:

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[6] O'Flaherty and Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles,* HRLR 8:2 (2008), 207-248, 211.

[7] See Ottosson, *State-sponsored Homophobia A world survey of laws prohibiting same sex activity between consenting adults*, May 2009, International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) at http://ilga.org/statehomophobia/ILGA_State_Sponsored_Homophobia_2009.pdf

[8] Ibid, see also International Lesbian and Gay Association, *World Day against Death Penalty: 7 Countries Still Put People to Death for Same-Sex Acts,* Press Release, 10 October 2007, also cited in O'Flaherty and Fisher at 208.

(1) Any proper analysis as to whether LGBT applicants have a "*well-founded fear of being persecuted*" under Article 1A(2) of the 1951 Convention must start from the premise that applicants are entitled to live in society as who they are, and need not hide who they are. There is therefore no place for the question posed by the Court of Appeal, namely, whether "*discretion*" is something that such applicants can reasonably be expected to tolerate, as this is tantamount to asking whether individuals can be expected to avoid persecution by concealing their sexual orientation, the very status protected by the 1951 Convention.

(2) Since there is no space for any expectation of "*discretion*", there is no space for cultural relativism in setting the standard of what level of "*discretion*" can be reasonably expected. The persecution itself might be because of prevailing cultural and social norms, which result in intolerance and prejudice, or because of national laws, which reflect these attitudes (*Guidance Note 2008*, §3). This is precisely the harm against which the 1951 Convention seeks to protect. "*The potential complicity of the refugee decision-maker in the refugee claimant's predicament of "being persecuted" in the country of origin must [therefore] be confronted*" (*Refugee Appeal No. 74665/03*, §114).

(3) Nor is there any place for expecting that applicants internally relocate if, by doing so and by denying the characteristics and identity for which they fear persecution they may avoid persecution. The question of reasonableness here relates to relocation rather than the disavowal of the protected status. To conflate the two is to undercut the very status which the 1951 Convention seeks to protect.

9. The submissions which follow set out the 1951 Convention framework before demonstrating how these conclusions follow naturally from a proper interpretation of the concepts therein: the 1951 Convention purpose of providing so called *"surrogate"* protection, the nature of the statuses protected by the 1951 Convention, and the circumstances of persecution in which that protection is offered.

B. THE 1951 CONVENTION FRAMEWORK

(1) The Purpose of the 1951 Convention

10. The *"well-founded fear of persecution"* test is set out in Article 1A(2) of the 1951 Convention, which (so far as relevant) defines as a refugee any person who:

> *"owing to a 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".*

11. The 1951 Convention is an international treaty. Accordingly, its provisions are to be interpreted in accordance with Article 31 of the Vienna Convention on the Law of Treaties 1969, as has been expressly recognised by both UNHCR (*Memorandum 2001*, §2) and a range of courts: see, for example, in the UK, *R v Asfaw (United Nations High Commissioner for Refugees intervening)* [2008] UKHL 31; [2008] 1 AC 1061 at §85, §125 and §140; *K v Secretary of State for the Home Department* [2006] UKHL 46; [2007] 1 AC 412 at §10; *Januzi v Secretary of State for the Home Department* [2006] UKHL 5; [2006] 2 AC 426 at §4; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport and Another (United Nations High Commissioner for Refugees intervening)* [2005] 2 AC 1 at §18; and *R (Hoxha) v Special Adjudicator* [2005] UKHL 19; [2005] 1 WLR 1063 at §9.

12. Article 31(1) of the Vienna Convention emphasises the ordinary meaning of terms in their context, in light of a treaty's object and purpose. So, it has been said that *"the best guide to the meaning of words used in the Convention is likely to be found by giving them a broad meaning in light of the purposes which the Convention was designed to serve"* (Horvath v Secretary of State for the Home Department [2001] AC 489, 495B). The critical purpose is *"to enable a person who no longer has protection against persecution for a Convention reason in his or her own country to turn for protection to the international community"* (Horvath, 495C) i.e. to provide *"surrogate"* protection to applicants of any of the statuses protected by the 1951 Convention.

13. Article 31(2) of the Vienna Convention expressly recognises the preamble as part of the context for the purpose of the interpretation of a treaty. The preamble to the 1951 Convention states:

> *"Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination".*

14. As Lord Steyn observed in R v Immigration Appeal Tribunal ex parte Shah [1999] 2 AC 629 at 639 (and see also 650-651, 656E, 658H; Horvath, 508; Canada (Attorney General) v Ward [1993] 2 SCR 689, p.70; Refugee Appeal No. 74665/03, §§56-57, 64-65, 111):

> *"The relevance of the preambles is twofold. Firstly, they expressly show that a premise of the Convention was that all human beings shall enjoy fundamental rights and freedoms. Secondly, and more pertinently, they show that counteracting discrimination, which is referred to in the first preamble, was a fundamental purpose of the Convention. That is reinforced by the reference in the first preamble to the Universal Declaration of Human Rights of 1948 which proclaimed the equality of all human beings and specifically provided that the entitlement to equality means equality 'without distinction of any kind, such as race, colour, sex, language, religion, political or other*

opinion, national or social origin, property, birth or other status:' see articles 1 and 2."

See also *the Handbook*, §60; *Memorandum 2001* at §5 and §17; Ex Com Conclusions No. 95 (LIV) – 2003 and No. 103 (LVI) – 2005 and *K*, §10. Thus, the surrogate protection offered by the 1951 Convention and the identity of those to whom it is offered are to be informed by international human rights, in particular non-discrimination. The right to non-discrimination is a well established principle of international law, as affirmed by a number of international and regional courts and committees.

(2) The Protected Statuses

15. The influence of human rights law, and the principle of non-discrimination is evident from the characterisation of the statuses protected by Article 1A(2) of the 1951 Convention. These are "*race, religion, nationality, membership of a particular social group or political opinion*", several of which are clearly reflected in the non-discrimination provisions of the key international human rights treaties (*the Handbook*, §69, §71; UDHR, Article 2; ICCPR, Articles 2 and 26; ICESCR, Article 2; ECHR, Article 14). So, too, "*the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms*" (*PSG Guidelines 2002*, §3).

16. As to what this means in practice, the *PSG Guidelines 2002* recognise (at §11) that:

> "*A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group in society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights*".

17. There is a distinction, then, between innate and therefore unchangeable characteristics, such as race, and voluntarily assumed characteristics such as religion and political opinion. But the reason both sets of characteristics are protected is because the first cannot be changed and the second, "*though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights*" (*PSG Guidelines 2002*, §12, endorsed by Lord Bingham in K at §15). See also *In re Acosta* (1985) 19 I & N 211, endorsed by the Supreme Court of Canada in *Canada v Ward*, 642-644.

18. "*Sexual orientation*" is defined by the 2006 Yogyakarta Principles as:

> "*each person's capacity for profound emotional, affectional and sexual attraction to, and intimate sexual relations with, individuals of a different gender or the same gender or more than one gender*".

It is therefore far more than sexual conduct or a series of sexual acts, but rather is fundamental to a person's identity, who they are, how they live in society as who they are and how they express who they are: *Guidance Note 2008*, §5, 26; *Refugee Appeal No. 74665/03*, §27, §129; *Karouni v Alberto Gonzales*, 399 F.3d 1163 (2005), §6; and *S395/2002 v Minister for Immigration and Multicultural Affairs* [2004] INLR 233, §81.

19. As sexual orientation also defines "*membership of a particular social group*", it is a status protected by the 1951 Convention, as accepted by UNHCR, courts around the world and the Secretary of State in this case. UNHCR has noted that "*sexual orientation is a fundamental part of human identity, as are those five characteristics of human identity that form the basis of the refugee definition: race, religion, nationality, membership of a particular social group and political opinion*" (*Guidance Note 2008*, §8). See also *PSG Guidelines 2002*, §20; *GRP Guidelines*

2002, §30; *Guidance Note 2008*, §32; *In re Toboso-Alfonso*, BIA Interim Decision 3222, 12 March 1990; *Re Inaudi* [1992] CRDD No 47 QL (T 91-04459), 9 April 1992 p.4; endorsed in *In re Tenorio*, Immigration Court Decision, 26 July 1993; all cited in *Re GJ* [1998] INLR 387, and see there the discussion of case law and practice more generally in Germany, the Netherlands, Sweden, Denmark, Canada, Australia and the USA (pp.412-421), as endorsed by *R v Immigration Appeal Tribunal ex parte Shah*, 643E; and the decision of the Court of Appeal, at §7. This is so whether one's sexual orientation is viewed as innate and unchangeable or an orientation which is voluntarily assumed: *HS (Homosexuals: Minors, Risk on Return) Iran* [2005] UKAIT 00120, §146; *MN (Findings on Sexuality) Kenya* [2005] UKAIT 00021, §15.

20. Finally, sexual orientation is protected *in pari materia* with other protected statuses: see *K* at §§20-21. This reflects the fact that the refugee definition applies to all persons without distinction as to sex, age, sexual orientation, gender identity, marital or family status, or any other status or characteristics (*Guidance Note 2008*, §7, echoing the language of Article 2 of the UDHR).

(3) Persecution

21. Persecution comprises human rights abuses or other serious harm, often, but not always, with a systematic or repetitive element (*Memorandum 2001*, §17 referring also to *the Handbook*, §§51-53, *Guidance Note 2008,* §10). Being compelled to forsake or conceal one's sexual orientation and gender identity where this is instigated or condoned by the State may itself constitute persecution (*Guidance Note 2008*, §12).[9]

22. As to the threshold, "*whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot*

[9] Respondent's Skeleton Argument before the Court of Appeal, §22.

reasonably be expected to tolerate it" (S395/2002, §40). A persistent pattern of consistent discrimination will usually, on cumulative grounds, amount to persecution (*Memorandum 2001*, §17 citing *the Handbook*, §55). Moreover, persecution is to be assessed in light of the opinions, feelings and psychological make-up of the applicant (*Guidance Note 2008*, §10, citing HS (Homosexuals: Minors, Risk on Return) Iran [2005] UKAIT 00120).

23. The 1951 Convention is concerned with *"persecution which is based on discrimination, the making of distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being"* (K, §13). The discrimination element is often central to claims made by LGBT persons, although they also frequently reveal experiences of serious physical harm and, in particular, sexual violence (*Guidance Note 2008*, §10).

24. Examples of the persecution of LGBT persons are set out in the *Guidance Note 2008*, and include:

(1) Being denied access to employment or normally available services such as education, welfare, healthcare and justice, in the workplace or elsewhere (§11). See, for example, the claim of economic persecution in Kadri v Mukasey 543 F.3d 16, 21-22 (1st Cir. 2008) where a gay applicant was unable to earn a living as a medical doctor in Indonesia for fear of persecution.

(2) Living in a society where same-sex consensual relations between adults are criminalised and penalised with harsh punishments, such as flogging or the death penalty, which do not conform to international human rights standards (§§17-19). Consider, for example, the position of gay men in Iran as discussed in *Re GJ*, Refugee Appeal No. 74665/03 and in Nigeria, as discussed in Refugee Appeal No. 75250/05 and 76150/08.

(3) Being exposed to physical and sexual violence, extended periods of detention, medical abuse, threat of execution and honour killing (§14). So, Mr Karouni feared arrest and detention, Mr Razkane had been attacked by a neighbour (*Razkane v Holder* (10th Cir, 21 April 2009) and Mr Maldonado had been beaten by the police (*Maldonado v Attorney General* (3rd Cir, 14 July 2006).

25. The essence of persecutory conduct is the harm feared, irrespective of whether the applicant is discreet about his or her sexual orientation. The assessment of the existence of a well-founded fear of persecution in LGBT cases should thus be made without reference to whether or not the applicants would be discreet about their sexual orientation.

C. SUBMISSIONS

(1) Discretion

26. As UNHCR has noted, "*persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action*": *Guidance Note 2008*, §25 citing *S395/2002*, §39. A person is not to be expected or required by the State to change or conceal his or her identity in order to avoid persecution (*Guidance Note 2008*, §25). So, a woman is not to be expected to live as a man to avoid female genital mutilation; a Jew is not to be expected to hide in an attic to avoid the gas chamber and a Communist is not expected to preach capitalism to avoid the Gulag. Perhaps all three would do so, but that is not the point.

27. This is an uncontroversial proposition, given the purpose of the 1951 Convention. As observed by McHugh and Kirby JJ in *S395/2002*, §41:

> *"The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention".*

28. It is also a proposition which has its roots in UK law,[10] where it is well-established that where an individual will in fact act in a way which will attract persecutory ill-treatment for a 1951 Convention reason, they are entitled to refugee protection even if they would be acting "*unreasonably*": see the treatment of the Ghanaian trade unionist in *R v Immigration Appeal Tribunal ex parte Jonah* [1985] Imm AR, p.12-13; the proselytising Ahmadi in *Iftikhar Ahmed v Secretary of State for the Home Department* [2000] INLR 1, p.7-8 (expressly cited in *S395/2002* at §§40-41); the *"Westernised"* Algerian woman in *Noune v Secretary of State for the Home Department* [2001] INLR 526, §28(4). And see the endorsement of this line of authority in the context of gay applicants for asylum: *Z v Secretary of State for the Home Department* [2005] Imm AR 75, §16; *MN (Findings on Sexuality) Kenya v Secretary of State for the Home Department* [2005] UKAIT 00021, §12; and *DW (Homosexual Men – Persecution – Sufficiency of Protection)* [2005] UKAIT 000168, §78. None of these applicants are to be penalised because they would act "*unreasonably*", let alone unnecessarily.

29. Moreover, it is a proposition clearly endorsed by comparative case law concerning claims based on other protected statuses, as UNHCR recognises (*Guidance Note 2008*, §25). See, by analogy, claims based on:

[10] Note also that gay men were first held to be a particular social group in the United Kingdom in the IAT decision of *Vraciu*, 26 October 1994. There, Chairman Jackson expressly rejected the Secretary of State's argument that a sexual preference only revealed in private could not be an identifying characteristic of a group: *"it is not the publicity of the characteristic which creates a group but its existence*" (p.15).

(1) Race: no one would suggest a racial minority should bleach their skin to avoid the threat of serious harm, or otherwise hide their ethnic origins by ceasing contact with loved ones and denying their language and history (*Hysi v Secretary of State for the Home Department* [2005] EWCA Civ 711, §§33-34).

(2) Religion: no one would suggest that a member of a religious minority should avoid worship to avoid persecution. So, an Iranian who had renounced Islam for Christianity in the United States was not expected to practise in private (*Bastanipour v Immigration and Naturalisation Service* 980 F 2d 1129 (7th Circuit, 7 December 1992);[11] a Ghanaian Jehovah's witness was not to be restricted to praying or studying the Bible privately (*Fosu v Canada (Minister of Employment & Immigration* [1994] 90 FTR 182);[12] a Protestant Christian was not to be denied the right to practise his faith at an unregistered church in China (*Wang v Minister for Immigration and Multicultural Affairs* [2000] FCA 1599);[13] and a Shiite Muslim was not to be expected to cease going to mosque in Sunni-dominated Iraq (*Husseini v Canada (Minister of Citizenship and Immigration)* 2002 FCT 177, [2002] 3 FC D-15).

(3) Political opinion: nor would anyone suggest that an individual should not express opposition to a governing political regime for fear of persecution. So, a Somali poet who was critical of the clan system was not expected to desist from speaking out (*Omar v Minister for Immigration and Multicultural Affairs* [2000] FCA 1430); and a Burmese husband and wife were not expected to refrain from expressing their opposition to the military

[11] See, more recently, the applicant in *Kazemzadeh v Attorney General* (11th Circuit, 6 August 2009); also applicants in Australia (*NABD v Minister for Immigration and Multicultural Affairs* [2005] HCA 29) and Canada (*Golesorkhi v Canada* [2008] FC 511).
[12] See also the treatment of a similar application in the United States in *Muhur v Ashcroft* 355 F 3d 958, 960-61.
[13] See also the treatment of a similar application in Canada in *Zhou v Canada (Minister of Citizenship and Immigration* [2009] FC 1210, citing *Fosu* at §29.

regime (*Win v Minister for Immigration and Multicultural Affairs* [2001] FCA 132).

30. This is not to say that applicants have *"carte blanche"* to express their sexual orientation, any more than they do their racial, religious or political beliefs: *"violent, aggressive or persistently unconsensual conduct is not covered"* (*NABD v Minister for Immigration and Multicultural Affairs* [2005] HCA 29, §113).

31. Just as there is no basis for requiring an applicant to disavow a core aspect of their identity in order to avoid persecution, and the more so given that there is no superimposed duty to exercise rights and freedoms *"reasonably"* (*Wang* at §87), so too it is unhelpful and potentially misleading to speak of whether *"discretion"* is something that he or she can reasonably be expected to tolerate. *"There is no duty to be "discreet" or to take steps to avoid persecution, such as living a life of isolation, or refraining from having intimate relationships"* (*Guidance Note 2008*, §26).

32. Any other result would be contrary to the whole purpose of the 1951 Convention: it would be requiring an applicant to conceal the very status that should be protected. And *"a hidden right is not a right"* at all (*Decision VA5-02751*). UNHCR has commented it is *"well established that sexual orientation can be viewed as either an innate and unchangeable characteristic, or as a characteristic that is so fundamental to human dignity that the person should not be compelled to forsake it"* (*Guidance Note 2008*, §32). A *"discretion"* requirement would compel precisely this.

33. Moreover, once this principle is recognised in relation to other protected statuses, it must follow naturally in LGBT cases also. For to introduce an additional discretion requirement for LGBT cases would be to discriminate between the statuses protected by the 1951 Convention in the circumstances

in which protection will be provided, both as between LGBT cases and cases based on race, religion, nationality or political opinion, and as between LGBT cases and cases based on membership of other particular social groups.[14]

(2) International Human Rights Law

34. This position is consistent with key case law and statements of principle from key international human rights bodies, the relevance of which was recognised in *Refugee Appeal No. 74665/03* at §§73-74. There is clear affirmation of the prohibition of discrimination on account of a person's sexual orientation, a protected status, as well as the view that interference with this sphere constitutes a violation of an applicant's right to establish relationships with other human beings and to personal development, or his or her right to privacy:[15]

(1) The United Nations system: the Human Rights Committee has unanimously endorsed the protection of an individual's rights from laws criminalising sexual relations between consenting adult males under Articles 17(1) (privacy) and 2(1) (non-distinction) of the ICCPR (*Toonen v Australia*, Communication No. 488/1992;[16] see also *Young v Australia*, Communication No. 941/2000[17] and *X v Colombia*, Communication No. 1361/2005[18] in relation to the denial of benefits). The Committee on Economic, Social and Cultural Rights has stated that discrimination in access to water and healthcare is prohibited.[19] The Committee Against

[14] It would also be to introduce an unworkable distinction, in cases where claims might be made on grounds of both sexual orientation and political opinion *(Pitcherskaia v Immigration Naturalisation Service* 118 F.3d 641, 645 (9th Cir. 1997)) or religious belief (*Amanfi v Ashcroft* 328 F3d 719, (3rd Cir. 2003).
[15] See, for example, *Niemietz v Germany* (1992) 16 EHRR 97, §29; *Pretty v United Kingdom* (2002) 35 EHRR 1), §61; and *Coeriel and Aurik v Netherlands,* Communication No. 453/1991, §10,2.
[16] CCPR/C/50/D/488/1992, 4 April 1994, §§8.2-8.7.
[17] CCPR/C/78/D/941/2000, 18 September 2003, §10.4.
[18] CCPR/C/89/D/1361/2005, 14 May 2007.
[19] *General Comment No.18: the right to work,* §12; *General Comment No. 15: the right to water*, §13; and *General Comment No. 14: the right to the highest attainable standard of health* (Article 12), §13.

Torture has also recognised sexual orientation as one of the prohibited grounds included in the principle of non-discrimination;[20] so too, the Committee on the Rights of the Child.[21]

(2) The Council of Europe and the European Union: the European Court of Human Rights has struck down laws prohibiting acts of a sexual nature between consenting adult males as violations of the right to privacy enshrined in Article 8 of the ECHR (*Dudgeon v United Kingdom* (1982) 4 EHRR 149, §§39-63)[22]; laws that excluded gays and lesbians from the British military as being contrary to Article 8 (*Smith and Grady v United Kingdom* (1999) 29 EHRR 493, §§71-112);[23] and the decision of a Portuguese court which dispossessed a gay father of his custody rights (*Salgueiro da Silva Mouta v Portugal* (1999) 31 EHRR 1055). The Commission has held that differences in the age of consent for homosexuals and heterosexuals violate both Article 8 and 14 ECHR (*Sutherland v United Kingdom* (1998) EHRLR 117, §§35-67).[24] These are just a few examples.[25] Both the Parliamentary Assembly of the Council of Europe[26] and the European Parliament[27] have adopted resolutions

[20] *General Comment No.2: Implementation of Article 2 by States parties*, §§21-22.
[21] *General Comment No. 4: Adolescent Health*, §6 and *General Comment No.3: HIV/AIDS and the rights of the child*, §8.
[22] See also *Norris v Ireland* (1988) 13 EHRR 186, §§38-47; and *Modinos v Cyprus* (1993) 16 EHRR 485, §§20-26).
[23] See also subsequent cases against the British Ministry of Defence.
[24] See also the ECtHR in *SL v Austria* (2003) 37 EHRR 39, §§28-46 and subsequent cases relating to convictions under the same provisions of the Austrian Criminal Code.
[25] See also *Goodwin v United Kingdom* (2002) 35 EHRR 18, §§71-93 (violations of Articles 8 and 12 ECHR in the context of the legal status of transsexuals in the United Kingdom, with particular respect to employment, social security, pensions and marriage; *Van Kuck v Germany* (2003) 37 EHRR 51, §§69-86 (violation of Article 8 ECHR in the context of reimbursement for gender reassignment surgery); and *Karner v Austria* (2003) 38 EHRR 528, §§32-43 (violation of Articles 8 and 14 ECHR in relation to the rules on tenancy succession).
[26] For example, Recommendation 924 (1981) on discrimination against homosexuals; Recommendation 1470 (2000) on situation of gays and lesbians and their partners in respect of asylum and immigration in the member States of the Council of Europe; Recommendation 1474 (2000) on the situation of lesbians and gays in Council of Europe member States; and Recommendation 1635 (2003) on lesbians and gays in sport.
[27] Resolution on discrimination against transsexuals, Official Journal 256, 9 October 1989, p.33; Resolution on respect for human rights in the European Union, Official Journal C 320, 28 October 1996. p.36; Resolution on equal rights for gays and lesbians in the European Community, Official Journal C 313, 12

addressing discrimination on grounds of sexual orientation and gender identity, while the Council of Europe's Committee of Ministers has recently also adopted a Recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity, which includes a section on the right to seek asylum.[28] Article 21(1) of the Charter of Fundamental Rights of the European Union now expressly prohibits non-discrimination on grounds of sexual orientation.[29]

(3) The Inter-American System: the General Assembly of the Organisation of American States has adopted a resolution on Human Rights, Sexual Orientation and Gender Identity.[30] The Inter-American Commission on Human Rights has stated that *"under no circumstances shall persons deprived of liberty be discriminated against for reasons of…sexual orientation"*.[31] The Commission has also expressly recognised the interrelationship between sexual orientation and private life (Article 11(2) of the American Convention on Human Rights) in a case concerning a lesbian's right to intimate visits from her partner at a women's prison (*Marta Lucia Alvarez Giraldo v Colombia*, Case number 11.656, Report No. 71/99 (Admissibility) of 4 May 1999, §21); as well as having granted precautionary measures in respect of members of a number of LGBT organisations (*Precautionary Measures, Mejia (Honduras)*, 4 September 2003 and *Precautionary Measures, Robles and members of OASIS (Guatemala)*, 3 February 2006).[32]

October 1998, p.186; Resolution on homophobia in Europe, Official Journal C 74E, 20 March 2008, p.776; and Resolution on the case of Iranian citizen Sayyed Medhi Kazemi, Official Journal C 66E, 20 March 2009, p.73.

[28] Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted by the Committee of Ministers on 31 March 2010,

[29] As signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000.

[30] Resolution AG/RES. 2435 (XXXVII-O/08) of 3 June 2008.

[31] *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, March 2008, Principle II, Equality and Non-discrimination.

[32] See Annual of the Inter-American Commission on Human Rights 2003, OEA/Ser.L/V/II.118, Doc,70 rev.2, 29 December 2003 and Annual Report of the Inter-American Commission on Human Rights 2006, OEA/Ser.L/V/II.127, Doc.4 rev.1, 3 March 2007, respectively.

35. Accordingly, the Yogyakarta Principles, which reflect the application of international human rights law to issues of sexual orientation and gender identity, protect the full enjoyment of all human rights (Principle 1), without discrimination on the basis of sexual orientation (Principle 2), the right to privacy (Principle 6), the right to freedom of opinion and expression (Principle 19), to participate in public life (Principle 25) and significantly, the right to seek asylum (Principle 23). At their core is an idea of positive rather than negative freedom (*National Coalition of Gay and Lesbian Equality* [1998] 3 LRC 648 at §116); the idea that one's public and private lives are inextricably bound up with one another and that respecting human rights requires the affirmation of an entire being, not the denial of part of oneself (at §132). So, the chilling effect of the *"constant need for vigilance, discretion and secrecy…with colleagues, friends and acquaintances"* (*Smith & Grady*, §127) can impact on applicants' ability to form meaningful relationships of any kind (*Guidance Note,* §13).

(3) Guidance from Comparative Jurisprudence

36. This position is consistent with important jurisprudence from other 1951 Convention signatories around the world:

(1) Germany: as early as 1983, in an enlightened decision, the Administrative Court in Weisbaden recognised that telling a gay man that he could avoid persecution by being careful to live a hidden, inconspicuous life was as unacceptable as suggesting that someone deny and hide his religions beliefs or try to change his skin colour (*No. IV/I E 06244/81*, Verwaltungsgericht Wiesbaden, 26 April 1983, discussed in Fullerton, *Persecution due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany* (1990) 4

Georgetown Immigration Law Journal 381, 408 and *Re GJ*, 412-413). See also the discussion in *Re GJ* of decisions of the Federal Administrative Court (Bundesverwaltungsgericht) (1988) and the Higher Administrative Court (1993), both emphasising the immutability of the sexual orientation of the applicants, at 414.

(2) USA: gay men have been recognised as a particular social group in the USA since *In re Toboso-Alfonso*, where the BIA focused on the applicant's status rather than any specific activity; see also *In re Tenorio* and *Hernandez-Montiel v Immigration and Naturalisation Service* 225 F 3d 1034 (9th Circuit), 2000. Subsequently, in *Karouni*, the Court of Appeals for the Ninth Circuit rejected the Attorney General's suggestion that the applicant could avoid persecution by abstaining from future acts of a sexual nature with other men on return to Lebanon, viewing it as tantamount to a requirement that he change a fundamental aspect of his identity (at §6). The case has been endorsed since: see, for example, *Razkane* and *Maldonado*.

(3) Canada: the phrase "*membership of a particular social group*" has been held to include gay men in Canada since *Re Inaudi* [1992] CRDD No 47 QL (T 91-04459) (9 April 1992), discussed in *Re GJ*, 417. The imposition of a "*discretion*" requirement has since been expressly rejected in *VA5-02751*, January 2007; *Sadeghi-Pari v Canada* [2004] FC 282, §29.

(4) Australia: the Refugee Review Tribunal of Australia has acknowledged gay men as forming part of a particular social group since its decisions in *N93/00593*, 25 January 1994 and *N93/2240*, 21 February 1994, cited in *Re GJ*, 421. In *N93/00846*, 8 March 1994, the Tribunal expressly referred to the right to privacy enshrined in Article 17, ICCPR, and the denial of that right as an interference with the core

of an applicant's dignity (p.12). The most comprehensive treatment of "*discretion*" has been in the impressive majority judgments of the High Court of Australia in *S395/2002 v Minister for Immigration and Multicultural Affairs*[2004] INLR 233, which concerned a gay couple from Bangladesh, and which has been cited from at length. There, both a "*discretion*" requirement and any expectation of reasonableness were vociferously and convincingly rejected. Since then, see decisions of the Refugee Review Tribunal such as *071818233* [2008] RRTA 62, 15 February 2008.

(5) New Zealand: here, the Refugee Status Appeals Authority produced an impressive overview of the case law of gay men as a particular social group in *Re GJ*. Subsequently, the same Authority gave a similarly considered judgment in *Refugee Appeal No. 74665/03*, 7 July 2004, in which it allowed the appeal of a 25 year old gay Iranian. The Authority expressly endorsed the conclusions of the majority in *S395/2002*, albeit gave a more prominent role to international human rights standards in its analysis (§§116-124). Since then, see decisions of the Authority in cases such as *Refugee Appeal No 75576/06*, 21 December 2006, where the applicant was found to be unable to act discreetly (§§82-83), and *Refugee Appeal No 76152/08*, 8 January 2008, where the applicant had feigned heterosexuality to the point of entering marriage and fathering two children for fear of persecution (§§30-39, 49-52).

(4) Living Openly as Who You Are

37. The starting point is therefore the premise that on return the applicant is entitled to live freely in society as who he or she is, if that is in accordance with their wishes, i.e. consistent with the purposes of the 1951 Convention. It

is not whether it is reasonable to expect the applicant to tolerate living discreetly, which he may or may not do freely.

38. In conducting the analysis, it is important not to fall into the mistake of stereotyping, as observed in MN (Findings on Sexuality) Kenya at §25:

> *"Some homosexuals will want to be discreet about their homosexuality. They will regard it as a private matter and not something they want to share with the world at large. For other people it will only be part of their sexual experience and not something they want to assert or make known generally. For others expressing their homosexuality will be at the centre of how they live as people".*[33]

39. If the applicant would choose to live in society in a manner which is discreet and thereby be safe from any threat of harm, then he or she will not be a refugee: see, for example Z, §17; Amare v Secretary of State for the Home Department [2005] EWCA Civ 1600, §11; and RG (Colombia) v Secretary of State for the Home Department [2006] EWCA Civ 57, §§11-13. But the crucial word is "*freely*". Thus, if the applicant would be discreet, one must ask why, as the discretion may itself be in response to a well-founded fear of persecution. And "*to determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly*" (S395/2002 at §43;[34] see also MN (Findings on Sexuality) Kenya at §32). There is no separate question of whether the modification is itself persecution (cf. Z at §16; Amare at §27; and RG (Colombia), §16, all discussed in J at §11). Moreover, an applicant should not have to show past persecution to succeed in demonstrating a well-founded fear of future persecution (*Guidance Note 2008*, §24 and *the Handbook*, §45).

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[33] See also Jain v Secretary of State for the Home Department [2000] Imm AR 76. And see Razkane v Holder (10th Cir, 21 April 2009) on the dangers of stereotyping.

[34] Applied, for example, in the context of other claims in Minister for Immigration and Multicultural and Indigenous Affairs v VWBA [2005] FCAFC175 (religion); MZWDG v Minister for Immigration and Multicultural and Indigenous Affairs [2006] FCA 497and SZHBP v Minister for Immigration and Citizenship [2007] FCA 1226 (political opinion).

40. This is entirely consistent with the subjective and objective elements that already inhere in the concept of a *"well-founded fear of being persecuted"*. As to subjectivity, psychological reactions of different individuals may not be the same in identical conditions. Some may have strong political or religious convictions, the disregard of which would make their life intolerable; others may have no such strong convictions (*the Handbook*, §40; §52). So too, with expressions of sexual orientation. But this is not to say that the disregard of these feelings or convictions is to be expected. As to objectivity, context, whether geographical, historical, ethnological, legal or political, is all relevant to the assessment of harm, and whether or not it is serious, including whether measures of discrimination amount to persecution (*the Handbook*, §53-55).

(5) "Cultural Relativism"

41. UNHCR's approach considers the subjectivity of individual behaviour and the objectivity of particular country conditions, but it does not endorse cultural relativism through a *"reasonableness"* analysis. By removing any possible expectation that discretion might be *"reasonably tolerable"* for particular individuals in particular contexts, there is no scope for tempering expectations regarding the exercise of legitimate rights by reference to different cultures. Whether the harm threatened is sufficiently serious to be described as persecution must be measured against the human rights entitlements recognized by the international community.[35]

42. There is nothing new in this. The purpose of the 1951 Convention is to provide a baseline of international protection to individual asylum applicants

[35] See further, Roger Haines, "Gender-related persecution" in Refugee Protection in International Law, 2003, pp. 333 and 334.

wherever they may be in the world.[36] That protection is premised on basic rights, including that of non-discrimination. Indeed, persecution "*cannot be ignored merely on the ground that this would imply criticism of the legal or social arrangements in another country. The whole purpose of the Convention is to give protection to certain classes of people who have fled from countries in which their human rights have not been respected*": *R v Immigration Appeal Tribunal ex parte Shah* [1999] 2 AC 629 at 655F. There is, then, no good reason why domestic law in the country of origin or cultural relativity should override international human rights norms in the refugee determination context (*Refugee Appeal No. 74665/03*, §§72; 112 citing *Refugee Appeal No. 2039/93* at pp.19-28. and *Refugee Appeal 71427/99* [2000] INLR 608 at 52). Indeed, for it to do so could give rise to discrimination on grounds of nationality and/or racial origin.

43. So, in this context, UNHCR has stated that "*an applicant's sexual orientation can be relevant to a refugee claim where he or she fears persecutory harm on account of his or her actual or perceived sexual orientation, which does not, or is not seen to, conform to prevailing political, cultural or social norms*" (*Guidance Note 2008*, §7; see also *GRP Guidelines 2003*, §§16-17 and UNHCR Advisory Opinion to the Tokyo Bar, §4).

(6) Internal Relocation

44. Nor should a "*discretion*" requirement be applied when assessing possible internal relocation. UNHCR has stated that "*the concept of internal flight or relocation alternative should…not be invoked in a manner that would undermine important human rights tenets underlying the international protection regime, namely the right to leave one's country, the right to seek asylum and protection against refoulement*" (*IFRA Guidelines 2003*, §4 and *Januzi* at §48).

[36] See, for example, UNHCR Handbook for the Protection of Women and Girls, January 2008, available at http://www.unhcr.org/refworld/docid/47cfc2962.html are pp. 28 and 29.

45. The "*reasonableness*" analysis which forms part of whether or not there is a relocation possibility considers:

> "*whether or not, in all the circumstances, the particular claimant could reasonably be expected to move to the proposed area to overcome his or her well-founded fear of being persecuted. It is not an analysis based on what a hypothetical 'reasonable person' should be expected to do. The question is what is reasonable, both subjectively and objectively, given the individual claimant and the conditions in the proposed internal flight or relocation alternative*" (IFRA Guidelines, §23).

Thus, reasonableness is relevant to whether a person can be expected to relocate to overcome a "*well-founded fear of being persecuted*": it relates to the reasonableness of relocation and not to the disavowal of the protected status. In other words, it is relocation to a place where a person can live in society as who they are.

46. As UNHCR has also observed, "*where respect for basic human rights standards…is clearly problematic*" and "*rights that will not be respected or protected are fundamental to the individual… the deprivation of those rights would be sufficiently harmful to render the area an unreasonable alternative*" (*IFRA Guidelines*, §28).

47. Thus, to say an internal flight or relocation alternative exists if the LGBT refugee claimant lives a discreet existence is to say that it is not an internal flight alternative (*Guidance Note*, §34, citing *Fosu v Minister of Citizenship and Immigration* [2008] FC 1135, §1; also *Okoli v Minister of Citizenship and Immigration* [2009] FC 332, 31 March 2009, §36). Indeed, this follows by analogy with claims based on race (*SKFB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFA 142 at §§12-13); political opinion (*NALZ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 320, §46; *SZATV v Minister for Immigration and*

Citizenship [2007] HCA 40, §§28-32, 83-94); and religion (*SZDPB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 110, §§25-27). In the LGBT context, therefore, internal relocation will often be unreasonable, given the nature of the persecution in question (*Guidance Note*, §33). See, for example, the treatment of nationwide risks of persecution in Mongolia (*061020474* [2007] RRTA 25, 7 February 2007); Vietnam (*071862642* [2008] RRTA 40, 19 February 2008); Mexico (*VA0-01624*, 14 May 2001; *MA6-015680*, 12 January, 2007); Ghana, (*Fosu*, §17) and Nigeria (*Okoli*, §37).

D. CONCLUSION

48. UNHCR submits that in principle, an LGBT individual who has fled his or her country and has a well-founded fear of being persecuted if he or she lived in society as LGBT, is a refugee. Any other approach risks leading to an incorrect determination of refugee claims based on sexual orientation, thereby threatening the lives and human rights of LGBT applicants. In particular, any requirement of "*discretion*" is tantamount to asking an applicant to face a "*Hobson's choice*" of facing persecution (*Karouni*, §6) or living in a state of "*induced self-oppression*" (*National Coalition*, §130). This is not the sort of protection which the 1951 Convention envisaged.

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