Case No: C5/2014/2641

Neutral Citation Number: [2017] EWCA Civ 351
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/17

Before :

LORD JUSTICE BEATSON
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE HICKINBOTTOM

- -

Between :

LC (ALBANIA)

Appellant

- and -

THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Respondent

- and -

THE UNITED NATIONS
HIGH COMMISSIONER FOR REFUGEES

Intervener

- -
- -

S Chelvan and **Jessica Smeaton** (instructed by **Duncan Lewis & Co Solicitors**)
for the **Appellant**
Rory Dunlop (instructed by **Government Legal Department**) for the **Respondent**
Laura Dubinsky and **Jana Sadler-Forster** (instructed by Baker & McKenzie LLP)
for the **Intervener** by written submissions only

Hearing date: 5 April 2017

- -

Judgment

Lord Justice Hickinbottom:

Introduction

1. This appeal gives rise to the following point of principle: does the guidance upon the correct approach to sexual orientation asylum claims given by the Supreme Court in HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31; [2011] 1 AC 592 ("HJ (Iran)") still hold good?

2. Where an asylum applicant claims that, if returned to his home country, he will be persecuted because he is gay, the Supreme Court mandated a sequential four-stage test, requiring the decision-maker to adopt the following route to determine the claim.

   (i) Is the applicant gay, or someone who would be treated as gay by potential persecutors in his country of origin? If no, the claim should be refused. If yes:

   (ii) Do openly gay people have a well-founded fear of persecution in the country of origin? If no, the claim should be refused. If yes:

   (iii) In respect of his sexual orientation, on his return, will the applicant be open? If yes, he is a refugee and his claim should be allowed. If no:

   (iv) If he would not be open, but rather live discreetly, is a material reason for living discreetly that he fears persecution? If yes, he is a refugee and his claim should be allowed. If no, then his claim should be refused.

3. With Ms Smeaton, Mr Chelvan for the Appellant submits that this guidance does not comply with EC 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 ("the Qualification Directive"), as explained by the Court of Justice of the European Union ("the CJEU") in post-HJ (Iran) authorities, notably Germany v Y and Z (Joined Cases C-71/11 and C-99/11) [2013] 1 CMLR 5 ("Y and Z") and Minister voor Immigratie en Asiel v X, Y and Z (Joined Cases C-199/12 to C-201/12) [2014] QB 1111 ("X, Y and Z"), as applied by the Upper Tribunal (Immigration and Asylum Chamber) in MSM (journalists; political opinion; risk) Somalia [2015] UKUT 413 (IAC) ("MSM (UT)"). He contends that the Qualification Directive, properly construed, requires the Supreme Court guidance to be amended, such that, if the answer to questions (i) and (ii) is "Yes", then the applicant is in any event a refugee and should be granted asylum: there is no need, and it is wrong, to proceed to consider questions (iii) and (iv).

4. Mr Rory Dunlop for the Secretary of State submits that the Supreme Court guidance is compliant with the Directive; and has been left unaltered by these later authorities.

5. In addition to Mr Chelvan and Mr Dunlop, this court has also received written submissions by Ms Laura Dubinsky and Ms Jana Sadler-Forster, acting pro bono for the United Nations High Commissioner for Refugees.

6. This case concerns a gay man – and this judgment will focus on gay men – but the principles apply equally to both genders and to all asylum claims based upon sexual orientation.

The Factual Background

7. The Appellant is an Albanian national, born on 6 November 1995. Until 2012, he lived with his family in Tirana.

8. He arrived in the United Kingdom on 4 October 2012, aged 16. He claimed asylum on the ground that he was gay. He said that he had been in a relationship with another adolescent man in Tirana for about a year when, in September 2012, his father discovered the relationship when he read texts on the Appellant's phone. The Appellant said that he was unable to contact his boyfriend, because his father kept his phone and he did not know his surname. His father threw him out of the house, and the Appellant slept rough for about a week before getting onto a lorry bound for the United Kingdom. He did not seek the help of the police in Albania, because he thought that they would not help him, and indeed would beat him up because he was gay. He said that he had not met any other gay men, either in Albania or after he had arrived in the United Kingdom, because he had had no opportunity to do so.

9. In line with the Secretary of State's published policy in respect of unaccompanied asylum-seeking children, as there were no reception facilities for children in Albania, the Appellant was granted discretionary leave to remain until he was 17 years 6 months old (i.e. until 6 May 2013). However, by a decision-letter dated 7 April 2013, his claim for asylum was refused. The decision-maker on behalf of the Secretary of State considered the Appellant's account was vague and inconsistent, and was not persuaded that he was gay. In any event, he found that, if the Appellant were returned to Albania, it would be possible for him to live openly as a gay man, and the state would be willing and able to protect him from anti-homosexual acts. The Appellant's claim under article 8 of the European Convention on Human Rights ("the ECHR") was also rejected.

10. The Appellant's appeal was heard by First-tier Tribunal Judge Woolley on 2 January 2014, at a hearing at which the Appellant was not represented. In a determination promulgated on 13 January 2014, the judge expressly adopted the approach advocated in HJ (Iran), as follows:

    (i) He accepted that the Appellant was gay (paragraph 30); although he did not accept the Appellant's account of his experiences in Albania with regard to his discovery and flight, and did not accept that he would be at risk from family members if he were to return (paragraph 40).

    (ii) Following the country guidance case MK (lesbians) Albania CG [2009] UKAIT 36 ("MK (Albania)"), he found that, as the Appellant did not fall within any of the categories of homosexual people found in that case to be at risk in Albania (i.e. those who were members of a gay association, those who cruised certain areas of Tirana, and individuals who faced risk of harm from members of their own family), he would not be at risk of persecution on return "even though there may be a background of societal disapproval" (paragraph 34).

    (iii) & (iv) In any event, he found that the Appellant's behaviour in Albania and the United Kingdom had been the same. The Appellant had never been tempted to visit the gay cruising areas in the centre of Tirana, and he had not encountered any other gay men, either in Albania or the United Kingdom. The judge concluded that "in

whatever country he is that he will live discreetly" (paragraph 42); and, the reason for so doing, was that "that is how he himself would choose to live, rather than to live discreetly because of fear of persecution…. The whole pattern of his life while in the United Kingdom is a strong and indeed conclusive indicator that… he would wish to live discreetly in Albania as a matter of voluntary choice motivated by social pressure" (paragraph 44). The judge found that the Appellant, by living discreetly in Albania, would avoid the risk of persecution (paragraphs 42 and 44). He also found that it would not be unduly harsh for the Appellant to relocate within Albania, and indeed within Tirana itself (paragraph 52).

11. On 12 February 2014, First-tier Tribunal Judge Wellesley-Cole gave permission to appeal, on the basis that it was arguable that the judge may have misapplied HJ (Iran). However, on 2 May 2014, the appeal was dismissed by the Upper Tribunal (Upper Tribunal Judge Grubb and Deputy Upper Tribunal Judge J F W Phillips). The core reasons were set out in paragraph 9 of the determination in which, after referring to the relevant authorities (including HJ (Iran)), the tribunal continued:

> "… The Judge recites the Appellant's evidence, records the fact that he assisted the unrepresented Appellant to give his evidence in accordance with Practice Directions (paragraph 10), and clearly follows those Directions. Having done so the Judge draws conclusions upon the evidence finding that the Appellant is gay but that his evidence of events in Albania is not true. The Judge in reaching his decision takes account of the Appellant's age and vulnerability and in our judgment reaches conclusions that he was fully entitled to draw. The Judge analyses the general position of gay people in Albania and he considers the Appellant's account of events. The Judge reaches conclusions as to the manner in which the Appellant will live in Albania and, finding that he will live and choose to live as a matter of personal preference discreetly, gives details and clear reasons for making that finding. The Judge was entitled to reach this finding based upon the Appellant's past behaviour and in the light of his rejection of the Appellant's evidence of his previous experiences. There is in our judgment no misapplication of the relevant case law, to the contrary the Judge considers and applies the case law, in particular HJ (Iran), in a demonstrably clear manner. In our judgment the decision of the First-tier Tribunal discloses no error of law material to the decision to dismiss the appeal."

The tribunal thus dismissed the appeal.

12. The Upper Tribunal (Upper Tribunal Judge McGeachy) and, on the papers, this court (Elias LJ) refused permission to appeal further. However, in his Amended Advocate's Statement on renewal of the application for permission to appeal, Mr Chelvan submitted that:

> "Since the refusal of permission, the Upper Tribunal in [MSM (UT)] have held that limbs (iii) and (iv) of HJ (Iran) regarding

discretion, no longer should be followed, following the September 2012 CJEU case law in Y and Z…".

13. During the course of several adjournments of the renewed permission application (some granted to enable the appeal to this court in MSM to run its course), on 26 November 2015 Lindblom LJ directed that an application to amend the grounds of challenge be made. Regrettably, although the Appellant filed a skeleton argument which alleged various procedural errors, no amended grounds were ever properly formulated or lodged.

14. However, at a hearing on 20 October 2016, permission to appeal was granted by Lindblom LJ (now reported as [2016] EWCA Civ 1312); and the two grounds upon which the Appellant obtained permission (which did not replicate the alleged errors identified earlier) are effectively set out in Lindblom LJ's judgment, at [13] and [16], as follows.

Ground 1 (MK (Albania)): In MK (Albania), country guidance was given in respect of the return of homosexual men and women to Albania. However, that decision was appealed, and, by consent, in October 2011 this court set aside the order of the Upper Tribunal, without qualification. Consequently, the tribunals below erred in law in relying on MK (Albania) as an appropriate country guidance case.

Ground 2 (HJ (Iran)): As a result of subsequent European Court cases, the guidance in HJ (Iran) has been demonstrated to be inconsistent with the Qualification Directive and thus not to be good law.

No discrete claim based on article 8 of the ECHR – or, indeed, any other ground of appeal – survives.

15. In respect of Ground 1, Mr Dunlop concedes that the tribunals erred in relying upon MK (Albania) as a country guidance case. However, he submits that, if Ground 2 succeeds, then the appeal will succeed in any event, and, if Ground 2 fails, then the appeal will necessarily fail because the First-tier Tribunal's factual finding that the Appellant will voluntarily conceal his sexual orientation will be determinative of the asylum claim which will inevitably be refused. Therefore, the error identified in Ground 1 is not material; and it is Ground 2 that will be determinative of this appeal. I agree with that analysis.

16. In respect of Ground 2, Mr Dunlop submitted that it was never argued at either tribunal level below that stages (iii) and (iv) of Lord Rodger's guidance was contrary to the Qualification Directive, or that HJ (Iran) was otherwise wrongly decided; and, therefore, this court should be reluctant to consider this entirely new point on appeal. He argued that that the tribunal below cannot be said to have erred in law by not having regard to an issue not raised before it that was not an "obvious" point of the kind referred to in R v Secretary of State for the Home Department ex parte Robinson [1998] QB 929 at pages 945G-946D.

17. However, although I see the force of that contention, in my view, this court should, in its discretion, entertain the merits of the ground, for which, of course, permission to appeal has already been given. In coming to that conclusion, I have particularly taken into account the fact that, as Mr Chelvan emphasised in responding to this issue, the

ground raises a pure point of law. As he accepted, if the HJ (Iran) guidance remains sound, it is not within the scope of the appeal to argue that the tribunals below misapplied it, or, having properly applied it, came to a conclusion that was legally perverse or otherwise unlawful. The appeal is therefore in respect of a discrete legal issue, and one which is potentially of some importance.

18. With regard to the merits of Ground 2, Mr Dunlop submitted that the guidance as to the approach in asylum claims based on sexual orientation set out in HJ (Iran) is consistent with the Qualification Directive, has not been changed by subsequent European Court cases, and remains good law. Neither the First-tier Tribunal nor the Upper Tribunal erred in adopting that approach; and, indeed, would have erred if they had departed from it.

The Law

19. The Convention relating to the Status of Refugees signed in Geneva on 28 July 1951 ("the Geneva Convention") provides the foundation for the international legal regime for the protection of refugees. Article 1(A)(2) defines "refugee" for these purposes as any person 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… or, owing to such fear, unwilling to return to it."

20. The legislative framework in the European Union, based on the Geneva Convention, is found in the Qualification Directive, the purpose of which "is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees…" (article 1). The definition of "refugee" in article 2(c) is in substance the same as the definition in article 1(A)(2) of the Geneva Convention:

> "'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…".

21. Article 13 of the Qualification Directive 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. For the purposes of this appeal, the key provisions are articles 9 and 10, which deal with "acts of persecution" and "the grounds or reasons for persecution" respectively. So far as relevant to this appeal, they provide as follows:

> "Article 9
>
> 1. In order to be regarded as an act of persecution within the meaning of article 1(A) of the Geneva Convention, an act must:

(a) be sufficiently serious by its 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 [ECHR]; or

(b) be an accumulation of various measures, including violation of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

2. Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of:

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

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

(c) prosecution or punishment which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in article 12(2);

(f) acts of gender-specific or child-specific nature.

3. In accordance with article 2(c), there must be a connection between the reasons mentioned in article 10 and the acts of persecution as qualified in paragraph 1.

Article 10

1. Member States shall take the following elements into account when assessing the reasons for persecution:

…

(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

…

(d) a group shall be considered to form a particular social group where in particular

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation….

…

2. 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."

For the purposes of this appeal, in the context of article 10(1)(d), it is uncontroversial that gay men in Albania form part of a relevant social group, being perceived by the surrounding society as being different as a result of their sexual orientation.

22. Recital (10) to the Directive states:

> "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union ["the Charter"]. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum for applicants for asylum and their accompanying family members."

Article 7 of the Charter provides: "Everyone has the right to respect for his or her private and family life, home and communications". Article 21 prohibits discrimination on grounds of, inter alia, sexual orientation. Article 52(3) states that those rights should be interpreted consistently with corresponding rights guaranteed by the ECHR. Corresponding rights are set out in articles 8 and 14 of the ECHR respectively, article 8 protecting the right to respect for a person's private and family life and article 14 guaranteeing that the rights and freedoms set out in the ECHR are to be secured without discrimination on grounds including, under "other status", sexual orientation.

23. Most of the relevant parts of the Qualification Directive are implemented in the United Kingdom by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006 No 2525) ("the 2006 Regulations"). Notably, "refugee" is defined as "a person who falls within article 1(A) of the Geneva Convention…" (regulation 2); and, reflecting article 10(1)(d) of the Directive, regulation 6(1)(e) recognises that a group based on a common characteristic of sexual orientation may be a particular social group that is in need of international protection.

HJ (Iran)

24. It is well-established that a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it, a proposition supported by article 10(1)(d) of the Qualification Directive, quoted in paragraph 21 above (see, e.g., X, Y and Z at [46]).

25. However, sexual orientation is only made evident to potential persecutors by the behaviour of the relevant person. Without behaviour from which others recognise or perceive a particular sexual orientation, there can be no well-founded fear on the part of that individual of being persecuted for reasons of membership of a social group with the characteristic of that orientation. That behaviour, of course, is not restricted to acts which overtly indicate or suggest a particular sexual orientation: and it may include negative behaviour. For example, in some societies, young women may be perceived as lesbian, and consequently persecuted, unless they positively establish a heterosexual narrative (see, by way of example, SW (lesbians; HJ and HT applied) Jamaica CG [2011] UKUT 251 (IAC) ("SW (Jamaica)"), at [95]).

26. In HJ (Iran), the Supreme Court considered two linked appeals by gay men who arrived in the United Kingdom from Iran and Cameroon respectively and claimed asylum on the basis that, as members of a social group defined by the shared characteristic of their sexual orientation, they each had a well-founded fear of persecution if returned to his country of origin. The Upper Tribunal and Court of Appeal had applied the test established by Court of Appeal authority, and dismissed the appeal of each man on the basis that, if returned, he could reasonably be expected to behave with discretion and thereby eliminate any real risk of discovery or persecution.

27. The Supreme Court unanimously rejected this "reasonable tolerability" test. In [81], the leading judgment of Lord Rodger of Earlsferry JSC made clear that the approach adopted by the Court of Appeal should not be followed in the future. At [82], under the heading "The approach to be followed by tribunals", he then set out practical guidance for all decision-makers when faced with an application for asylum based upon grounds of sexual orientation, as follows:

> "When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

> If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.
>
> If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.
>
> If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution – even if he could avoid the risk by living 'discreetly'.
>
> If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.
>
> If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g., not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.
>
> If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

Lord Walker of Gestingthorpe, Lord Collins of Mapesbury and Sir John Dyson JJSC agreed, Lord Hope of Craighead DPSC putting essentially the same substance in his own words at [35]. Sub-paragraphs (i)-(iv) of paragraph 2 above are intended to do no more and no less than summarise Lord Rodger's guidance.

28. In the context of this appeal, two points arising from this guidance are particularly worthy of note.

29. First, I respectfully agree with Lord Hope (at [22]) and Lord Collins (at [101]) in HJ (Iran): caution must be adopted when using phrases such as "behaving with discretion" and "living discreetly" in this context. So far as relevant in this appeal, "refugee" is defined in article 1(A) of the Geneva Convention and article 2(c) of the Qualification Directive in terms of an individual with a "well-founded fear of being persecuted for reasons of… membership of a particular social group…", i.e. in this case, a group of men with the characteristic of being gay. As exemplified by SW (Jamaica) (see paragraph 25 above), "behaving with discretion" or "living discreetly" on return does not mean simply avoiding certain overt behaviour by which the characteristic which defines the relevant social group might be recognised, or wishing and/or trying to live in such a way as not to be identified or perceived as having that characteristic. Rather, it involves the individual behaving in such a way that he will not in fact be so identified or perceived. Similarly, "living openly" is not restricted to circumstances in which the relevant person exhibits overt behaviour from which it is likely that he will be identified as being gay: it involves the individual behaving in such a way that there is in fact a real risk that he will be identified or perceived as having that characteristic.

30. Second, this guidance emphasises that, where an asylum claim is based on sexual orientation, there must be a focus upon the hypothetical question of how the individual would behave if he were returned to his country of origin; but it also acknowledges that, in considering whether an individual is a refugee, that may not be the only determinative question. If he would live discreetly, in the sense that I have explained, it is necessary to go on to ask why, being gay, he would behave in such a way as to conceal his sexual orientation. That is because the Supreme Court judges were unanimous in concluding that, where a material reason for a person living discreetly on return to his country is to avoid persecution, he is a refugee as a result of a well-founded fear of persecution. As Sir John Dyson put it at [110]:

> "The [Geneva] Convention must be construed in the light of its object and purpose…. 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 social group or political opinion, then he is being required to surrender the very protection that the [Geneva] 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 in the original).

31. A number of overlapping legal themes were advanced in support of that conclusion, including (i) where an individual fears that, unless he modifies his behaviour, he will suffer serious harm by way of persecutory conduct, then the threat of serious harm itself constitutes persecutory conduct (see [66]-[68] per Lord Rodger, and [112] per Sir John Dyson); (ii) where a person will conceal his true identity and protected status out of a well-founded fear that he will otherwise be persecuted, he will nevertheless continue to have a well-founded fear of persecution even if, by concealing his true identity, he may succeed in avoiding serious harm (see [116]-[118] per Sir John Dyson); and (iii) refugee status cannot be denied to a person who in return would be

required to forfeit a fundamental human right to avoid persecution (see [113] per Sir John Dyson). However, whatever precise jurisprudential analysis is preferred, in identifying those who, on return, would in fact modify their behaviour so that their sexual orientation would not be disclosed but would nevertheless fall within the definition of "refugee" for the purposes of the Geneva Convention and the Qualification Directive, the Supreme Court considered that a crucial element is that the behaviour is modified *in order to avoid persecution*, i.e. the avoidance of persecution is a material reason for the modification of behaviour.

32. It is as a result of this substantive legal analysis – indeed, to put this analysis into practice – that Lord Rodger's guidance requires that, where a gay man seeks asylum on the basis of his sexual orientation, but does not satisfy the decision-maker that he would in fact be at risk of harm from direct persecutory conduct on return because he would live discreetly, then a further inquiry has to be made as to *why* he would live discreetly. If he would do so in order to avoid the risk of suffering harm from persecution, then he will be a refugee. If the avoidance of that risk is not a material factor in determining the manner in which he behaves, then he will not be a refugee.

33. It is here, Mr Chelvan contends, that Lord Rodger went wrong. He submits that, where a gay man would conceal his sexual orientation on return, then, under the Qualification Directive he is a refugee, *whatever the reason or reasons might be for that concealment*; as explained, he says, in the CJEU's post-HJ Iran authorities.

34. It is to those cases that I now turn.

Later Authorities

35. Mr Chelvan submitted that the guidance in HJ (Iran) is inconsistent with the Qualification Directive, because the guidance differentiates between an individual whose modification of behaviour is "forced" by reason of his fear of persecution (who, HJ (Iran) holds, should be granted refugee status) and an individual whose modification of behaviour is "voluntary" (who, it holds, should not). He submitted that, as explained in X and Y and X, Y and Z, as applied by the Upper Tribunal in MSM (UT), modification of behaviour per se – whether forced or voluntary – is contrary to the protection afforded by the Directive. Therefore, whether an individual is open or not (and, if not, the reasons for his discretion), upon which Lord Rodger's guidance at (iii) and (iv) focuses, are immaterial to the disposal of an asylum claim. Mr Chelvan went so far as submitting that, in MSM (UT), following X and Y and X,Y and Z, the Upper Tribunal held that the third and fourth limbs of Lord Rodger's guidance should no longer be followed.

36. I will deal with that final, bold submission first. In MSM, the applicant was a Somali national, who had earlier worked as both a teacher and a journalist in Somalia. He came to the United Kingdom and claimed asylum on the basis that, if he returned to Somalia, he would have a well-founded fear of persecution on account of his political views, which would be expressed as he pursued his career in journalism in Somalia. The Secretary of State refused the application, and the First-tier Tribunal refused his appeal. The Upper Tribunal allowed MSM's appeal, on the basis that the First-tier Tribunal had not properly addressed the question of whether he would continue his career as a journalist in Somalia. It then proceeded to re-determine the application, by finding that, upon return, the applicant would likely pursue his career in journalism,

and that would involve the expression of political opinion that would then give rise to a well-founded fear of persecution. The Court of Appeal ([2016] EWCA Civ 715 ("MSM (CA)") considered those findings were determinative of the appeal.

37. Before us, Mr Chelvan, rightly, did not focus upon anything in MSM (CA): the court did not consider any issue as to whether there was any incongruity between HJ (Iran) on the one hand, and X and Y and X, Y and Z on the other. However, he did rely upon observations of the Upper Tribunal in MSM (UT) in that regard. He submits that the tribunal found there to be inconsistency between the Supreme Court guidance and the CJEU cases; and, approving the latter, held that decision-makers and tribunals should in the future ignore steps (iii) and (iv) of Lord Rodger's guidance, i.e. consider that refugee status ought to be granted to any applicant who could satisfy the Secretary of State or tribunal that he was gay and that openly gay men have a well-founded fear of persecution in the relevant country of nationality. In particular, he relies upon [46] of the Upper Tribunal's determination, in which it said this:

> "In our judgement, the only issue on which there is a possible element of dissonance between the decisions of the Supreme Court and those of the CJEU is whether it is permissible to take into account the avoidance or modification of conduct on the part of the person concerned which is voluntary. This emerges particularly from the analytical exercise contained in [82] of the opinion of Lord Rodger in HJ (Iran). It may be said that the approach espoused by Lord Hope in [35] is in substance the same. Lord Walker, at [98], concurred with [82] of Lord Rodger's judgment. So too did Lord Collins, at [100] and Lord Dyson, at [132] while, simultaneously, observing in [123] that, in reality, there will be 'no real choice'."

38. However, it is clear that the Upper Tribunal – by which, of course, this court would not in any event be bound – made no finding to the effect that there was inconsistency between the Supreme Court and CJEU authorities, nor did it conclude that the third and fourth limbs of Lord Rodger's guidance should no longer be followed, as Mr Chelvan suggested. Indeed, the tribunal expressly stated that they considered that the CJEU's judgment in X and Y was "entirely consistent" with HJ (Iran) (see [42]), and that there was alignment between the Supreme Court and CJEU cases (see [47]); and, in any event, it expressly stated that any issue was moot because they considered that the Appellant succeeded on either basis (see [48]). At most the Upper Tribunal identified a possible issue and left it open. I do not consider that MSM assists this court in respect of the issue it has to determine. It certainly does not give any support to the Appellant's case on that issue.

39. Mr Chelvan relied substantively upon the two CJEU cases, Y and Z and X, Y and Z.

40. In Y and Z, the appellants were members of an Islamic reformist community of Ahmadiyya Muslims from Pakistan, who applied for asylum in Germany, claiming that they had been mistreated and imprisoned in Pakistan as a result of their faith, and would be persecuted on any return. It was found by the domestic court in Germany that they were each deeply committed to their faith, and considered that public practice of it was essential in order for them to preserve their religious identity. Therefore, if returned, it followed that the appellants would in fact follow religious

practices that would expose them to the risk of persecution. It was held that the fact that they could avoid that risk by abstaining from those practices was, as a matter of principle, irrelevant; and the German authorities could not reasonably expect the appellant to abstain from those practices (see, e.g., [79]).

41. In my view, this case is entirely consistent with HJ (Iran). The main issue, resolved in favour of the appellants, was whether there could be an act of persecution as a result of interference with the external manifestation of freedom of religion. It seems from the report that the appellants were determined to engage in their religious practices, wherever they were, and that was the basis upon which the case was determined, the court rejecting any "reasonable tolerability" argument. But, in any event, if they did not engage with those practices on their return to Pakistan, the only reason for that restraint would have been the fear of persecution as a result of their religion. The case says nothing as to the position where, if returned, an asylum-seeker would not behave in a way that would result in persecution, as a result of something other than the fear of persecution.

42. Therefore, in my view, Y and Z gives no substantial support to the Appellant's case here.

43. X, Y and Z were gay men. They claimed asylum in the Netherlands on the basis of a fear of persecution as a result of their sexual orientation, if they were to be returned to Sierra Leone, Uganda and Senegal respectively. The CJEU held that, it having been established that on return to his country of nationality each appellant would be exposed to the genuine risk of persecution as a result of his sexual orientation, the fact that he could avoid that risk by exercising greater restraint than (e.g.) a heterosexual man was something that was irrelevant. It held, at [71], that:

> "… [A]n applicant cannot be expected to conceal his homosexuality in his country of origin *in order to avoid persecution*." (emphasis added).

The CJEU thus emphasised that the Qualification Directive did not allow refugee status to be refused where a person modifies his behaviour to conceal that he is gay, but only where that concealment is "in order to avoid persecution".

44. This was again, in substance, a rejection of the "reasonable tolerability" argument, that was equally dismissed in HJ (Iran), on the basis that, where someone would in fact be at risk on return, it is no answer that that person could theoretically avoid that risk by reasonably modifying his behaviour. The CJEU, referring to some of the analytical themes in HJ (Iran) to which I have referred (see paragraph 31 above), firmly confirmed the now well-settled jurisprudence in this regard (see [71]-[75]).

45. Again, I do not consider that this case is either inconsistent with HJ (Iran), or supportive of the Appellant's case in this appeal.

HJ (Iran) and the Qualification Directive

46. Mr Chelvan's core submission is that the guidance in paragraph 82 of HJ (Iran) is based on a false premise, because Lord Rodger either did not have the Qualification Directive in mind or he simply misunderstood its requirements.

47. With regard to the former, Mr Chelvan relied upon the fact that, in the judgment of Lord Rodger there is no reference to the Qualification Directive at all and only one reference, at the beginning of his judgment at [42], to the transposing 2006 Regulations, that reference being to merely the recognition in regulation 6(1)(e) that a group based on a common characteristic of sexual orientation may be a particular social group that is in need of international protection (see paragraph 23 above). There is no indication that Lord Rodger had the Directive in mind when he set out his guidance in [82]. The point is reinforced, Mr Chelvan submits, because there are only three other references to either the Directive or the 2006 Regulations in any of the other judgments of the court, namely in [10], [12] and [39] of the judgment of Lord Hope; and none of those suggests that the Directive was in mind in the context of his formulation of the guidance at [35].

48. In my view, the proposition that, when drafting the guidance in [82], Lord Rodger – and the other members of the court, who agreed with him or, in the case of Lord Hope, put the same substantive guidance into his own words – simply failed to have in mind the requirements of the Qualification Directive is not only inherently unlikely and beyond even bold, it lacks any foundation.

49. The guidance in [82] was not given by Lord Rodger in a legal vacuum, but rather on the basis of the legal analysis of the scope of "refugee" that he had adopted (see paragraphs 30-31 above). As the court itself made clear (see, e.g., Lord Hope at [1]), the central issue before the court was the test which is to be applied when considering whether an asylum-seeking gay man is a "refugee", i.e. has a well-founded fear of persecution in the country of his nationality based on membership of that particular social group. It is inconceivable that any of the judges approached that issue without full appreciation that it involved a consideration of the definition of "refugee" in the context of the Geneva Convention, which defines the term for international purposes; but, unsurprisingly, Lord Rodger (at [40]) expressly states that that is the context in which he is considering and analysing the issue, as did the only other judge who gave practical guidance (Lord Hope at [1]). The definition of "refugee" in the Qualification Directive is materially the same as that in the Geneva Convention, upon which the Directive is based (see paragraphs 18 and 19 above).

50. The proposition that Lord Rodger's guidance was given *per incuriam* thus, in my judgment, has no arguable force.

51. Mr Chelvan submitted that, if, as I have found, Lord Rodger had the Qualification Directive in mind, he misconstrued its requirements: in respect of the scope of "refugee", the guidance proceeded on the basis that voluntary modification of conduct could not found a good claim for refugee status, whereas, as is apparent from Y and Z and X, Y & Z, it can.

52. However:

    i) For the reasons I have given, there is no inconsistency between Y and Z and X, Y & Z on the one hand, and HJ (Iran) on the other. The CJEU cases were not concerned with the possible circumstances with which step (iv) of Lord Rodger's guidance in HJ (Iran) is concerned, i.e. that, upon return, a person would behave in such a way as to conceal the relevant characteristic, not in order to avoid persecution, but for unrelated reasons. Had the legal analysis

and guidance in HJ (Iran) been as misconceived as Mr Chelvan submits, one would have expected the CJEU to have said so in one or both of these case, particularly as HJ (Iran) was clearly before the court in Y and Z: it is referred to in footnote 30 of the opinion of Advocate General Bot, without any adverse comment.

ii) Given that there is no such inconsistency, this court is bound by the legal analysis of the Supreme Court in HJ (Iran), upon which the guidance of Lord Rodger is based. That is sufficient to dispose of this appeal, by dismissing it.

iii) However, for the following reasons, I am also firmly of the view that that legal analysis is right.

iv) Where an individual, on return to his home country, would conceal that he is gay, the foundation of his right to protection is that he modifies his behaviour so as to conceal his sexual orientation to avoid persecution. As a preliminary point, where an individual would behave in the same way wherever he was living and irrespective of the regime so far as protecting his right to a particular sexual orientation is concerned, it seems to me to be a distortion of language to say that he would "modify" his behaviour on return. Whether a person who would hypothetically wish to reveal his sexual orientation might be required to modify his behaviour to avoid persecution is not to the point. The focus must be on the particular individual himself. If, wherever he lived, an individual would in any event keep his sexual orientation concealed, it is not right to say that, to conceal his sexual orientation, he would modify his behaviour on return.

v) As I understand the submissions of Ms Dubinsky and Ms Sadler-Forster, the Intervener accepts that the legal analysis and guidance of the Supreme Court in HJ (Iran) are correct, but maintains the approach of the tribunal erred. It was contended on behalf of the Intervener that, where the answer to steps (i) and (ii) of Lord Rodger's guidance is "Yes" (i.e. the applicant shows that he is gay, and, in his country of nationality, men who are identified or perceived as being gay have a well-founded fear of persecution), there is or should be a rebuttable presumption that fear is a material reason for any concealment of his sexual orientation. This, it was argued, is because (as recognised by the Supreme Court in HJ (Iran): see [54] and [59] per Lord Rodger, and [123] per Sir John Dyson) he has no real choice.

vi) Those submissions strayed outside the bounds of the limited grounds of this appeal. It suffices to say that I do not consider it is helpful to speak in terms of a presumption; although I accept the submission made on behalf of the Intervener that the assessment of extent of risk is an exercise involving the evaluation of the specific facts and circumstances of the particular case, that must be carried out with particular vigilance and care (see Abdulla v Germany (Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08) [2011] QB 46 at [90], as reinforced in Y and Z at [77] and X, Y and Z at [73]).

vii) To an extent, Mr Chelvan went further than the Intervener. He submitted that, in drawing a distinction between forced and voluntary modification, the fourth limb of the guidance is misconceived, because being discreet about his sexual

orientation can never in practice protect a gay man from persecution because of what he described as "the silence fallacy" in sexual orientation cases, i.e. an assumption that, in a homophobic homeland, an individual will be safe as long as he is silent about his actual sexual orientation. For that proposition, he relied upon a number of authorities, including SW (Jamaica) (see paragraph 23 above) and other Jamaican cases to the same effect; and Hysi v Secretary of State for the Home Department [2005] EWCA Civ 711; [2005] INLR 60, in which this court found that it would be unrealistic for the appellant to lie about the relevant characteristic in that case, namely his ethnicity. However, in my view, a submission that Albania is a country where it is impossible for a gay man to avoid being perceived as gay without engaging in some form of positive behaviour, as Mr Chelvan suggests, would require some evidential basis. There is no such basis here. It is also noteworthy that neither Hysi (decided pre-HJ (Iran)) nor the Jamaican cases (post-HJ Iran) suggest that the fourth limb of the HJ Iran guidance is wrong: indeed, at [106] of SW (Jamaica), the Upper Tribunal expressly applied that guidance, emphasising that "those who are naturally discreet for reasons other than fear [of persecution] do not require international protection".

viii) Nor do I find persuasive Mr Chelvan's submission that the Appellant's concealment of his sexual orientation in Albania would not be voluntary, as the First-tier Tribunal found that his choice to be discreet on return was not a purely internal choice, but was "motivated by social pressure" (see [44] of the determination). In passing, I note the tribunal's finding that, on return, the Appellant would not be at risk from his family (see [40]); but the submission is conclusively answered by the judgments in HJ (Iran) which draw a clear distinction between concealment of sexual orientation "in response to social pressures or for cultural or religious reasons of his own choosing" and concealment because of a fear of persecution, because "the Convention does not afford protection against these social pressures… and so an applicant cannot claim asylum in order to avoid them" (see [36] per Lord Hope, and [61] per Lord Rodger). With respect to the submission of Mr Chelvan to the contrary, that must be right; because, whilst no doubt varying in nature and extent, such social pressures are present in all countries, including the United Kingdom. I specifically reject Mr Chelvan's submission that, in some (unspecified) way, the scope of the Qualification Directive is different from that of the Geneva Convention in this regard.

ix) In essentially a discrete point, Mr Chelvan also submitted that the First-tier Tribunal erred in proceeding on the basis that the Appellant's conduct in the United Kingdom – where he has lived concealing that he is gay – was a "conclusive indicator" that he would be discreet out of choice if he returned to Albania. That was, he submits, a clear misdirection as to the law; because what is in issue is how the Appellant would conduct himself if returned to Albania, and not how he has in the past conducted himself here (see HJ (Iran) at [88] per Lord Walker), history being a guide not a determinant (see Appellant S395/2002 v Minister for Immigration and Multicultural Affairs 2016 CLR 473; [2004] INLR 233 at [58] per McHugh and Kirby JJ). However, leaving aside the fact that this issue falls outside the scope of the permission to appeal granted to the Appellant, I do not consider it has any

force. When read in its full context, Judge Woolley in the First-tier Tribunal clearly took into account all factors relevant to the issue of how the Appellant would behave in the future, if returned to Albania (including such matters as his age); and, in concluding that he would live discreetly wherever he lived (see [42]), he was entitled to give considerable weight to how he had behaved in the United Kingdom, where the constraints on behaviour are different from those in Albania. The judge clearly did not consider or treat the Appellant's past behaviour in the United Kingdom, alone, as determinative of the question of how he would behave in Albania if returned.

53. In my judgment, the legal analysis of Lord Rodger, which was the foundation of his guidance, is fully in line with the Geneva Convention and the Qualification Directive. Where a gay man would have a well-founded fear of persecution if returned to his country of nationality, because he would not in fact keep concealed that he was gay from those who would be his persecutors, he is entitled to protection as a refugee; as are those who, if returned, would keep that characteristic concealed where a material reason for doing so is the fear of harm from those potential persecutors. However, those who would keep that characteristic concealed for reasons entirely other than the fear of persecution, insofar as they can be said to have modified their behaviour at all, their choice of behaviour is such that it cannot rationally give rise to such protection. In my respectful view, the legal analysis of the Supreme Court, which draws a distinction between those who, if returned, would conceal their sexual orientation for fear of persecution and those who would conceal that aspect of their identity for entirely unrelated reasons, is principled and clearly right; the practical guidance of Lord Rodger in HJ (Iran) at [82] is in line with that analysis and is compliant with the Qualification Directive and otherwise lawful; and the tribunals below did not err in adopting that guidance.

54. For those reasons, in my judgment, this ground is not made good; and, the appeal turning on this ground, I would dismiss it.

55. Finally, I have had the opportunity of reading the judgment of my Lord, Beatson LJ, and fully concur with the additional observations he makes.

Lord Justice David Richards :

56. I agree with both judgments.

Lord Justice Beatson :

57. I agree that this appeal should be dismissed for the reasons given so clearly by Hickinbottom LJ. The guidance given by the Supreme Court in HJ (Iran) has not been undermined by the decisions of the Court of Justice of the European Union.

58. My Lord (see especially [52(v) (vi) and (ix)]) has stated that in various ways the submissions on behalf of the Appellant and the written submissions on behalf of the UNHCR fell outside the scope of the permission to appeal granted to the Appellant. I make two observations on this.

59. The first concerns Mr Chelvan's submissions on behalf of the Appellant. It may be that one reason his submissions went beyond the scope of the permission was because

amended grounds were neither formulated nor lodged (see [13]-[14]). I therefore underline the importance, when limited permission is given on grounds other than those in those in the notice of appeal, of formulating and lodging such grounds. The court, the respondent and any interveners are entitled to expect an appellant to do this well before the hearing rather than leaving them to work it out from the reasons given by the judge granting permission.

60. Secondly, possibly as a result of the absence of amended grounds of appeal, the submissions of the Intervener were not only in part outside the scope of the appeal but in substance sought to revisit the facts. Since the Intervener accepted that the legal analysis and guidance of the Supreme Court in HJ (Iran) is correct, the points were not relevant to the ground of appeal that was before the court and should not, in my judgment, have been made. In my experience, interventions by bodies such as the UNHCR usually give valuable assistance to the court in dealing with the matters before it. But, interveners should not make submissions beyond the scope of an appeal unless at the time of the application to intervene or at any rate before the intervention is filed, the intervener has applied to do so, so that the court can consider whether it has jurisdiction to consider a matter beyond the scope of the permission granted and, if so, whether it is appropriate to do so in the particular circumstances of the case. If interventions beyond the scope of the permission granted are made without the sanction of the court in this way, that may in time discourage the granting of permission to intervene. Such interventions place a burden on the party potentially adversely affected (in this case, the Respondent) who may consider it has to deal with issues which are not before the court. They also place a burden on the court which, in my judgment, should not generally deal with them.

Case No: C5/2014/2641

IN COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IAC)

B E T W E E N:

LC (ALBANIA)

Appellant

- and –

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

THE UNITED NATIONS
HIGH COMMISSIONER FOR REFUGEES

Interested Party

ORDER

UPON HEARING Mr S Chelvan and Ms Jessica Smeaton, counsel for the Appellant, and Mr Rory Dunlop, counsel for the Respondent

AND UPON handing down judgment

IT IS ORDERED THAT

1. The Appellant's appeal is dismissed.

2. The Appellant's application for permission to appeal to the Supreme Court is refused.

3. The Appellant do pay the Secretary of State's costs of the appeal subject to Section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012;

4. The Appellant being a party in receipt of services funded by the Legal Aid Agency, the sums to be paid, if any, in accordance with paragraph 3 are to be determined by a Costs Judge (under section 26(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the Civil Legal Aid (Costs) Regulations 2013).

5. The Respondent may make a request, within three months of the date of this Order, for a costs order against the Legal Aid Agency in respect of her costs in the appeal, in accordance with Sections 10 and 16 of the Civil Legal Aid (Costs) Regulations 2013).

6. Subject to the Secretary of State making a request for a hearing to determine the amount of the costs, if any, payable to her by the Legal Aid Agency in relation to her

costs in the appeal, then an assessment of that amount pursuant to the Civil Legal Aid (Costs) Regulations 2013 shall be made by a Costs Judge in the event that the Secretary of State and the Legal Aid Agency are unable to agree those costs.

7. There be a detailed assessment of the publicly funded costs of the Appellant in accordance with the Civil Legal Aid (Costs) Regulations 2013.

DATED this 9th day of May 2017