Case No: C5/2011/0926

Neutral Citation Number: [2012] EWCA Civ 834
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
[APPEAL NO: AA/01323/2011]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 8th May 2012

Before:

MASTER OF THE ROLLS
LORD JUSTICE LAWS
and
LORD JUSTICE RICHARDS

- -

Between:

HL (MALAYSIA)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

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Mr Clive Sheldon QC (instructed by Messrs Dotcom) appeared on behalf of the **Appellant**.
The **Respondent** did not appear and was not represented.

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Judgment

Lord Justice Laws:

1. This is an appeal with permission granted by Longmore LJ on 7 December 2011 against the decision of the Upper Tribunal (Senior Immigration Judge Jordan) of 2 March 2011 upholding the determination of the First-Tier Tribunal (Immigration Judge Turquet) promulgated on 9 February 2011. The FTT had dismissed the appellant's appeal against the decision of the Secretary of State made on 31 January 2011 to refuse him asylum and set removal directions for his removal to Malaysia.

2. The appellant is a Malaysian national born on 4 July 1984. He is an ethnic Chinese and a Christian. He first came to the United Kingdom in June 2005 but returned to Malaysia the following month. He came back to the United Kingdom on 15 August 2005 with a student visa valid until 30 April 2006, which was extended to 22 February 2007. He went back again to Malaysia in August 2008 and returned here in February 2009 with a working holiday visa valid until 7 January 2011. He went back to Malaysia again in November 2010, returned here on 1 December 2010. He claimed asylum on 7 January 2011, the day his visa expired.

3. His case was and is that he fears persecution if he is returned to Malaysia because of his gay orientation. Senior Immigration Judge Jordan summarised his factual claim as follows:

> "4. ...The basis of the appellant's claim was that since puberty he realised he was gay but, out of a sense of awkwardness, did not discuss this with anyone and suppressed his feelings. Whilst he was at school he had a year-long relationship with a friend called Bernard Lee. The appellant was 18 and Bernard was 16, although they had met about a year before that. Neither the appellant's nor Bernard's family knew of the relationship. It ended after an incident when the appellant was targeted by three unidentified assailants in what was clearly a homophobic attack.
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> 5. Since his arrival in the United Kingdom in 2005, the appellant claimed that he had sexual relations with a number of men but has only had a more substantial relationship with a single individual. Whilst in the United Kingdom, the appellant has visited a number of places frequented by members of the gay community.
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> 6. The appellant has a cousin and a few friends in Malaysia who are aware of his sexuality."

4. The principal issue in the case is whether the First-Tier Tribunal misapplied the Supreme Court authority of HJ (Iran) and HT (Cameroon) v SSHD.

1 AC 596 concerning the conditions in which a gay person should be granted asylum pursuant to the 1951 Refugee Convention on the grounds that he fears persecution if returned to his country of origin on account of his sexual orientation. The appellant submits that there is an inconsistency between the guidance given by Lord Hope in that case at paragraph 35 and that given by Lord Rodger at paragraph 82. Three of the other Justices agreed with Lord Rodger and his guidance accordingly constitutes part of the *ratio decidendi* of the case. But, says Mr Sheldon QC for the appellant, the FTT and indeed the Upper Tribunal in the present case wrongly followed Lord Hope's guidance. The Secretary of State's case is that there was no inconsistency between Lord Hope and Lord Rodger; but it is clear in any event that the Upper Tribunal at any rate had regard to both and that neither tribunal perpetrated any error of law.

5. Central to the case on the facts is the question of how the appellant would conduct himself if he were returned to Malaysia. It is convenient to look at the tribunal's findings which relate to this before turning to the judgments in HJ (Iraq). Immigration Judge Turquet said this, at paragraphs 33 to 36 of her determination:

> "33. Having carefully considered the background evidence and the Appellant's own evidence that he knew of no one who had been persecuted in Malaysia and Mr Briddock's account of finding no cases since 2000, I am not satisfied that gay people would be subject to persecution in Malaysia. Homosexuality is not a criminal offence and the law under Section 377 that criminalised sexual acts has only been used 7 times in 70 years and 4 of these occasions were against the ex-Prime Minister, Anwar Ibrahim. As a Christian the Appellant will not be subject to Sharia Law, I accept that some reports refer to not being private but it is evidence from the information about clubs, venues, spas etc and information for gay visitors and the report that gay life was blossoming in Malaysia that gay people are able to live openly in Malaysia without fear of persecution.
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> 34. In the event that the above finding was flawed, I have considered how this Appellant would live on return. This is an Appellant who has returned to Malaysia, having lived in in the United Kingdom for some time. He was there for 6 months in 2008-2009 and recently went back for a wedding. He has described visiting gay clubs in London and having physical contact in a sauna. Such gay venues exist in this country but he has not visited them and did not know of them and said that he did no research on them via the internet ... The Appellant said in

> interview and confirmed in evidence that he had not told his parents about his sexuality to spare them heartache. He has said that he will only tell people he is gay if they ask. I find that it is in the nature of this Appellant to be discreet. He is someone who is sensitive to his family's feelings.
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> 35. I find that as an unflamboyant discreet homosexual, the Appellant would be unlikely to bring himself to the attention of ordinary citizens and even less likely to attract the attention of the authorities. As stated in Paragraph 82 of **HJ,** 'If the Tribunal concludes that the applicant would choose to live discreetly because that was how he himself would choose to live or because of social pressure, then his application should be rejected.' Having considered the Appellant's case I conclude that the Appellant would choose to live because that was how he would choose to live. If he were to have a relationship and a partner, I do not find that the background evidence demonstrates that this would cause him to be at risk of persecution.
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> 36. I note that the Appellant did not claim asylum, when he returned to the United Kingdom in 2009 after a six month stay in Malaysia and chose to return there in November last year. Although he stated that his actions implied that he was gay and people have always been told that he has a feminine side, he has not come to the adverse attention of the authorities and I find that his recent visit is an indication that he does not perceive himself to be at risk of persecution from the authorities. The only person he could name who had been charged was the ex-Prime Minister. He did not claim on his arrival back here in December. I find his behaviour in not claiming asylum until January this year shortly before the expiry of his visa is behaviour falling under Section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 and his credibility is damaged. I find his claim at this stage is an attempt to prolong his stay here and not because of a well founded fear of persecution in Malaysia."

6. Senior Immigration Judge Jordan's determination in the Upper Tribunal is, I have to say, very discursive. He offers copious citations of the evidence. I propose only to set out these short passages from his conclusions:

> "29. On my assessment of the background material, the level of discrimination against gays in Malaysia may well be greater than in the United Kingdom but the background material does not address the impact of discrimination upon the provision of services, employment prospects, the availability of accommodation or access to health care, education, leisure pursuits or social organisations. In other words, whilst many Malay Muslims may disapprove of the appellant's lifestyle, there is no evidence that the effect will go beyond disapproval and result in concrete repercussions leading to the appellant being refused access to the services and opportunities that every person is entitled to receive.
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> 30. The conclusion that I have reached is that the consequences that the appellant will experience on return will not result in persecution masquerading as a prosecution under Malaysian morality laws, nor will it result in the imposition of sanctions imposed by Sharia law nor is there a reasonable likelihood of individual police officers targeting the appellant as a member of the gay community in circumstances where he will suffer serious harm nor a real likelihood that vigilantism place him at similar risk."

The Senior Immigration Judge then proceeds to discuss at some length the terms of Immigration Judge Turquet's determination. I need not, with respect, take time to set out those passages.

7. In HJ (Iran) Lord Hope said this at paragraph 35:

> 35. This brings me to the test that should be adopted by the fact-finding tribunals in this country. As Lord Walker points out in para 98, this involves what is essentially an individual and fact-specific inquiry. Lord Rodger has described the approach in para 82, but I would like to set it out in my own words. It is necessary to proceed in stages.
>
> (a) The first stage, of course, is to consider whether the applicant is indeed gay. Unless he can establish that he is of that orientation he will not be entitled to be treated as a member of the particular social group. But I would regard this part of the test as having been satisfied if the applicant's case is that he is at risk of persecution because he is suspected of being gay, if his past history shows that this is in fact the case.

(b) The next stage is to examine a group of questions which are directed to what his situation will be on return. This part of the inquiry is directed to what will happen in the future. The Home Office's Country of Origin report will provide the background. There will be little difficulty in holding that in countries such as Iran and Cameroon gays or persons who are believed to be gay are persecuted and that persecution is something that may reasonably be feared. The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does. Those others will include everyone with whom he will come in contact, in private as well as in public. The way he conducts himself may vary from one situation to another, with varying degrees of risk. But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result and that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this inquiry.

(c) On the other hand, the fact that the applicant will not be able to do in the country of his nationality everything that he can do openly in the country whose protection he seeks is not the test. As I said earlier (see para 15), the Convention was not directed to reforming the level of rights in the country of origin. So it would be wrong to approach the issue on the basis that the purpose of the Convention is to guarantee to an applicant who is gay that he can live as freely and as openly as a gay person as he would be able to do if he were not returned. It does not guarantee to everyone the human rights standards that are applied by the receiving country within its own territory. The focus throughout must be on what will happen in the country of origin.

(d) The next stage, if it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he

> will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well founded.
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> (e) This is the final and conclusive question: does he have a well-founded fear that he will be persecuted? If he has, the causative condition that Lord Bingham referred to in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, para 5 will have been established. The applicant will be entitled to asylum."

I should also cite this passage at paragraph 15 of Lord Hope's judgment:

> "The guarantees in the Universal Declaration are fundamental to a proper understanding of the Convention. But the Convention itself has, as the references in para 12 show, a more limited purpose. It is not enough that members of a particular social group are being discriminated against. The contracting states did not undertake to protect them against discrimination judged according to the standards in their own countries. Persecution apart, the Convention was not directed to reforming the level of rights prevailing in the country of origin. Its purpose is to provide the protection that is not available in the country of nationality where there is a well-founded fear of persecution, not to guarantee to asylum-seekers when they are returned all the freedoms that are available in the country where they seek refuge. It does not guarantee universal human rights."

8. Lord Hope set out in the same paragraph an observation of mine in Amare v SSHD [2006] Imm. AR 217 at paragraph 31, which perhaps I may venture to cite:

> "The Convention is not there to safeguard or protect potentially affected persons from having to live in regimes where pluralist liberal values are less respected, even much less respected, than they are

here. It is there to secure international protection to the extent agreed by the contracting states."

9. At paragraph 82 in HJ Lord Rodger said this:

> "82. 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.
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> 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.
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> If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.
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> 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.
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> 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.
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> 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."

10. Earlier at paragraph 78, after citing Appellant S395/2002 v The Minister for Immigration 216 CLR 473 (paragraph 81) in the High Court of Australia, Lord Rodger said this:

> "In short, what is protected is the applicant's right to live freely and openly as a gay man. That involves a wide spectrum of conduct going well beyond conduct designed to attract sexual partners and maintain relationships with them."

Mr Sheldon submits in essence that Lord Hope's statement that "the fact that the appellant will not be able to do in the country of his nationality everything that he can do openly in the country whose protection he seeks is not the test" conflicts with Lord Rodger's declaration that the Convention protects "his right to live freely and openly as a gay man".

11. In the course of his submissions this morning Mr Sheldon submitted that this latter proposition is very much the focus of Lord Rodger's approach. For my part I do not consider that there is any inconsistency between the observations of Lord Hope and those of Lord Rodger. First, it is important to notice that both of their Lordships insist that an asylum applicant cannot be required to conceal or dissemble or be discreet out of a fear of persecution because of his sexual orientation. It is plain to me that Lord Hope puts this proposition quite as strongly as does Lord Rodger. For emphasis I repeat this sentence from paragraph 35 in Lord Hope's judgment:

> "But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it."

12. Next, Lord Rodger's insistence that the Convention protects the right to live freely and openly as a gay man is in my view entirely consistent with Lord Hope's reminder that the Convention does not guarantee universal human rights. Both these propositions are, with respect, true and important. "To live freely and openly as a gay man" means what it says, no more, no less. It does not necessarily require all the congenial cultural encouragement of a liberal and tolerant society.

13. Thirdly, I should emphasise that, even if in a particular country a gay person might not live freely and openly as such, an applicant will not be entitled to refugee status if he would behave discreetly for reasons quite other than a fear

of persecution. In such a case there is no nexus between the possible persecution of overt gays and the applicant's conduct. In my judgment Immigration Judge Turquet was quite right to say at paragraph 28:

> "It should always be remembered that the purpose of the exercise to separate out those who are entitled to protection because their fear of persecution is well-founded from those who are not. The causative condition is central to the inquiry. This makes it necessary to concentrate on what is actually likely to happen to the applicant."

14. It seems to me that the structured approach in Lord Rodger's guidance at paragraph 82, though of course important, was not, with respect, intended as a straitjacket in these cases. Lord Rodger himself recognises the importance of the question why a person who is gay might act discreetly in his country of origin if returned there. I should note two short passages which I have not so far set out. In his judgment at paragraph 75 Lord Rodger says this:

> "75. In my view the core objection to the Court of Appeal's approach is that its starting point is unacceptable: it supposes that at least some applications for asylum can be rejected on the basis that the particular applicant could find it reasonably tolerable to act discreetly and conceal his sexual identity indefinitely to avoid suffering severe harm."

I emphasise the last words. Likewise at paragraph 76:

> "No-one would proceed on the basis that a straight man or woman could find it reasonably tolerable to conceal his or her sexual identity indefinitely to avoid suffering persecution. Nor would anyone proceed on the basis that a man or woman could find it reasonably tolerable to conceal his or her race indefinitely to avoid suffering persecution."

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Throughout, as it seems to me, the focus and emphasis is upon the fear of persecution in the particular case.

15. As for this particular case, in my judgment Immigration Judge Turquet was wholly entitled to make the findings at paragraphs 33 to 36 which I have set out. Given the absence of any internal inconsistency in HJ (Iran) those findings conclude the case against the appellant. Indeed for my part I consider that Immigration Judge Turquet's conclusions stand as a proper application of Lord Rodger's approach *simpliciter*. In short there was no error of law in the determination of the First-tier Tribunal made by Immigration Judge Turquet. It follows that the Upper Tribunal were right to dismiss the appeal to it and, for the reasons I have given, I would dismiss the appeal in this court.

Lord Justice Richards:

16. I agree

Lord Neuberger:

17. I also agree but should like to add a few words on the approach we have taken to the hearing of this appeal. The appeal was listed for hearing today in the usual way. This morning, the Court of Appeal Office received an email stating that counsel instructed by the respondent Secretary of State was suffering from food poisoning and would be unable to appear.
18. Our initial reaction was that the hearing of the appeal should be inevitably adjourned. However, having discussed the matter further, Laws LJ, Richards LJ and I concluded that the hearing should proceed albeit on a contingent basis. This was because, with the benefit of the written determinations of the First-Tier Tribunal and the Upper Tribunal, and the full and clear skeleton arguments provided on behalf of the appellants and the respondent, we had each independently formed the preliminary view that the appeal should be dismissed.

19. In these circumstances, as we explained when the appeal was called on, it seemed appropriate to proceed to hear Sheldon QC's oral submissions on behalf of the appellant on the following basis. If, as sadly for the appellant transpired to be the case, we adhered to our provisional view, the time and cost of the parties and their representatives, and of the court, would not have been wasted by a pointless adjournment.

20. If, on the other hand, we had been persuaded away from our initial view, or were in a state of doubt as to the outcome of the appeal, or indeed for any other reason we thought it appropriate to hear the respondent's oral argument, we would have then adjourned the hearing and refixed it for a time when both parties could be represented.

21. If that alternative course had proved appropriate, it would not have involved a significant increase in costs or time over an above simply adjourning the hearing, not least because of the effective and concise and clear way in which Mr Sheldon developed his oral argument.

22. As it is, the appeal is dismissed.

Order: Appeal dismissed