Neutral Citation Number: [2009] EWCA Civ 172

Case Nos: C5/2008/2468 & C5/2008/1708

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM & IMMIGRATION TRIBUNAL
MR JUSTICE HODGE, PRESIDENT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/03/2009

Before :

LORD JUSTICE PILL
LORD JUSTICE KEENE
and
SIR PAUL KENNEDY

- -

Between :

HJ (Iran)	**First Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**
HT (Cameroon)	**Second Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

Raza Husain and Laura Dubinsky (instructed by Paragon Law) for the First Appellant
Jane Collier (instructed by The Treasury Solicitors) for the Respondent

Raza Husain and Mr S Chelvan (instructed by **Messrs Wilson & Co**) for the Second Appellant
Paul Greatorex (instructed by The Treasury Solicitors) for the Respondent

Hearing dates : 4 & 5 February 2009

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Approved Judgment

Lord Justice Pill :

1. These cases require a decision as to what test to apply when considering whether a homosexual is entitled to refugee status and whether the test has been correctly applied by the Asylum and Immigration Tribunal ("the Tribunal"). Each appellant, HJ (Iran) and HT (Cameroon), claims to be a refugee in the United Kingdom by reason of the safeguard provided by article 1A(2) of the 1951 Convention Relating to the Status of Refugees ("the Convention"). It is submitted that each of them has a well-founded fear of persecution if returned.

Facts

2. HJ is 38 years old. He is Iranian and claimed asylum on arrival in the United Kingdom on 17 December 2001. He is a homosexual who practised homosexuality in Iran and has continued to do so since his arrival in the United Kingdom.

3. HJ had brief relationships with other men while performing his military service in Iran. Later, he had one relationship with a market trader and another, lasting 9 months, with his employer. He concealed his sexual orientation from all but a small number of likeminded people. His mother and brother had also found out about it. He claims to have become subject to the adverse interest of the authorities in Iran. In the United Kingdom, HJ has had a long-standing homosexual relationship which he has conducted openly.

4. HJ's asylum claim has a lengthy history. The present appeal is against the dismissal by the Tribunal on 8 May 2008 of an appeal against the refusal of the Secretary of State for the Home Department ("the Secretary of State") to grant asylum. That appeal was heard by Hodge J, President of the Tribunal, accompanied by two Senior Immigration Judges. It came before the Tribunal on remittal by the Court of Appeal (*J v Secretary of State for the Home Department* [2006] EWCA Civ 1238) for further reconsideration.

5. HT is 35 years old and a citizen of Cameroon. On 19 January 2007, he arrived at Gatwick to check in for a flight to Montreal and presented a false passport. On arrest, he revealed his true identity and claimed asylum. On 4 April 2007, he was convicted of possession of a false instrument and sentenced to 12 months imprisonment. In August 2007, the Secretary of State decided to refuse the asylum application. HT's appeal to the Tribunal on asylum and other grounds was dismissed on 29 October 2007. Reconsideration was ordered on 14 November 2007 on the ground that the Tribunal may have made an error of law in the test applied to a homosexual person from Cameroon seeking asylum. On 5 June 2008, the Tribunal (Senior Immigration Judge Warr) held that the earlier determination was not materially flawed in law and should stand. He did not therefore proceed to a reconsideration of the evidence.

6. HT said that he had had two homosexual relationships in Cameroon. The first was in 1997 and lasted two months. The second ended after 3 years in November 2005 when he and the other man were together in his garden, began kissing and were seen by a neighbour. They then went their own ways. Later HT was attacked. Prior to the occasion in the garden, HT had been discreet. He claimed that he would be persecuted on return to Cameroon.

The issue

7. The Secretary of State accepts that practising homosexuals are a particular social group for the purposes of article 1A of the Convention. The issue, described by Mr Raza Husain for both appellants, as a "narrow point", is said by him to be whether it is an answer to a claim for refugee status that the applicant be required to, or otherwise would conceal, his sexual identity in order to avoid harm of sufficient severity as to amount to persecution. Mr Raza Husain puts the issue too narrowly in my view and a fuller analysis of the cases is necessary. In joint written submissions, Miss Collier, for the Secretary of State in HJ, and Mr Greatorex, for the Secretary of State in HT, submit that the question on that issue is always whether the applicant can reasonably be expected to tolerate the need for discretion on return.

Authorities

8. Giving the leading judgment in *J* (as the case was then known), with which Sir Martin Nourse agreed, Maurice Kay LJ referred, at paragraph 11, to the underlying need for an applicant to establish that his case contained something "sufficiently significant in itself to place him in a situation of persecution". Maurice Kay LJ cited the words of Lord Bingham of Cornhill in *Sepet and Bulbul* [2003] 1 WLR 856, at paragraph 7; persecution was "a strong word" requiring a high threshold. Maurice Kay LJ cited the joint opinion of McHugh and Kirby JJ who were part of the majority in the High Court of Australia in *S395/2002 v Minister for Immigration and Multi-Cultural Affairs* (2004 INLR 233). They stated, at paragraph 40:

> "Persecution covers many forms of harm … Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it. But persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps - reasonable or otherwise - to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a 'particular social group' if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution."

They added, at paragraph 43, that the well-founded fear of persecution may be the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm: "It is the *threat* of serious harm with its menacing implications which constitutes the persecutory conduct". (Emphasis in original)

9. In their joint judgment, Gummow and Hayne JJ, also part of the majority, stated, at paragraph 81:

> "It is important to recognise the breadth of the assertion that is made when, as in the present case, those seeking protection

> allege fear of persecution for reasons of membership of a social group identified in terms of sexual identity … Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense 'discreetly') may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality."

10. That illustrates what Mr Raza Husain has described as the Anne Frank principle, the validity of which is not disputed in this appeal. It would have been no defence to a claim that Anne Frank faced well-founded fear of persecution in 1942 to say that she was safe in a comfortable attic. Had she left the attic, a human activity she could reasonably be expected to enjoy, her Jewish identity would have led to her persecution. Refugee status cannot be denied by expecting a person to conceal aspects of identity or suppress behaviour the person should be allowed to express.

11. Having considered *S* 395/2002, Maurice Kay LJ stated, at paragraph 16 in *J*:

> "In the present circumstances, the further reconsideration should be by a differently constituted Tribunal. It will have to address questions that were not considered on the last occasion, including the reason why the appellant opted for "discretion" before his departure from Iran and, by implication, would do so again on return. It will have to ask itself whether "discretion" is something that the appellant can reasonably be expected to tolerate, not only in the context of random sexual activity but in relation to "matters following from, and relevant to, sexual identity" in the wider sense recognised by the High Court of Australia (see the judgment of Gummer and Hayne JJ at paragraph 83). This requires consideration of the fact that homosexuals living in a stable relationship will wish, as this appellant says, to live openly with each other and the "discretion" which they may feel constrained to exercise as the price to pay for the avoidance of condign punishment will require suppression in respect of many aspects of life that "related to or informed by their sexuality" (Ibid, paragraph 81). This is not simply generalisation; it is dealt with in the appellant's evidence."

12. Also agreeing that the appeal should be allowed, Buxton LJ stated, at paragraph 20:

> "I would only venture to add one point. The question that will be before the AIT on remission will be whether the applicant could reasonably be expected to tolerate whatever circumstances are likely to arise were he to return to Iran. The applicant may have to abandon part of his sexual identity, as referred to in the judgment of Gummow and Hayne JJ in *S*, in circumstances where failure to do that exposes him to the

> extreme danger that is set out in the country guidance case of *RN* and *BB*. The Tribunal may wish to consider whether the combination of those two circumstances has an effect on their decision as to whether the applicant can be expected to tolerate the situation he may find himself in when he returns to Iran."

HJ: The Tribunal decision

13. On remittal following that decision, the Tribunal in HJ carefully considered the in-country evidence on the risk to homosexuals in Iran, including the country guidance case of *RM* and *BB (Homosexuals) Iran CG* [2005] UKAIT 00117 and the evidence of Ms Enayat, who also gave evidence in *RM* and *BB*. She stated that it was difficult to determine whether there had been a deterioration in the position of homosexuals over the past 2 or 3 years. Ms Enayat did refer to deterioration in certain respects but the Tribunal, at paragraph 46, as a specialist tribunal familiar with the assessment of in-country evidence, made a finding of fact that "the position has not deteriorated since *RM* and *BB*". At paragraph 45, the Tribunal held that "the conclusions in *RM* and *BB* as to risk remain the same". It was, however, accepted, at paragraph 9, by reference to *RM* and *BB* "that for a person to be openly gay in Iran would attract a real risk of persecution".

14. The Tribunal referred to aspects of the situation in Iran which throw light on whether the extent of the discretion which HJ had exercised in the past and, on the Tribunal's finding, would do so again in the future was "something that the appellant can reasonably be expected to tolerate", the expression used by Maurice Kay LJ at paragraph 16 having adopted it from the judgment of McHugh and Kirby JJ in *S*393/2002 at paragraph 40. The Tribunal accepted the evidence of Ms Enayat that severe penalties may be imposed for sodomy and other homosexual acts. At paragraph 24, they noted her evidence "that men can kiss and hug when greeting and walk arm in arm. Men can socialise in public, they can go shopping and go to dinner together . . ." She accepted that it was possible for men to meet through work and social relationships and as a consequence form homosexual relationships. While homosexuality was one of the moral crimes subject to increased surveillance (paragraph 25), "the evidence before us falls well short of showing that this surveillance has reached such levels that Iranian citizens who engage in homosexual activities in private run a real risk of discovery".

15. The Tribunal referred to the appellant's evidence:

> "31. In evidence to us we were told by the appellant that his mother and brother knew he was gay and he did not have to pretend to his mother and brother. He confirmed his relationship with "A" had lasted nine months and he told a few friends about this so he was open with them. He spent many nights with "A" and a lot of time with him. They went out in public, but did not do anything together. They went to city gardens and parks. He agreed it was possible to have gay relationships whilst he hid his sexuality from all but a few people. He had told people in Iran in response to questions that he did not want to get married and he

> agreed he did not have to answer any questions that were put to him about why he was not married from friends and colleagues, but he only told a handful of people and his family.
>
> 32. The appellant agreed he was not living a lie with his family and a handful of friends who knew he was gay. He agreed he was not completely isolated because of "A" and his friends and the man at the market. He agreed he was able to admit to a handful of people that he wanted to live with and have a life with a man. He got to know people with whom he might have gay relationships through work and they exchanged confidences once they got to know each other. He did not go to an internet chatroom or to the park, as he said the latter would "take your life away". He denied he could now go to Iran and form relationships with people he could meet in the ordinary course of life. He described that as "extremely hard now".
>
> 33. It was put to him that he was not constantly scared and afraid in Iran, but he said that he was. He said that he did not know that the penalties would be so harsh. He accepted that he did not leave Iran until he was thirty one. When asked why he did not try to leave earlier, he said that nothing had happened to him. He was asked if he had been able to tolerate life and he said that it was extremely hard. He agreed he had been able to discuss his sexual identity with "A" and with two or three friends. They could host barbeques in a private garden. It was put to him that he could go back to Iran but he did not wish to do so. He replied that he could not live openly in Iran. He said it was not possible to go back as "everybody knows about it now", referring to his homosexuality and apparently relying on the story that had been disbelieved i.e. that he had come to the attention of the authorities."

16. HJ contrasted his life in the United Kingdom where he could go to pubs, clubs, parks and friends' homes on a regular basis. He found it extremely liberating to be able to discuss sexual identity with other people with the same sexual identity and to perform such acts as holding hands in public.

17. At paragraph 39, the Tribunal posed the question which they considered arose from the decision of this court in J*:*

> "However, we take from the way in which the Court of Appeal has formulated its questions that in examining how such a person will behave we have to examine whether that will entail for him having to live a life which he cannot reasonably be

> expected to tolerate because to do so would entail suppression of many aspects of his sexual identity."

The Tribunal noted, at paragraph 40, that "from the age of 15 to the age of 31 when he left Iran [the appellant] identified himself as homosexual". They referred to his friendships with homosexuals and to the knowledge his mother, brother and some friends had of his homosexuality. Some social life was open to him.

18. The Tribunal concluded:

> "It was clearly possible for the appellant to live in Iran, from the age of fifteen to his leaving at the age of thirty one, as a gay man without discovery or adverse consequences. In our judgment the appellant was able to conduct his homosexual activities in Iran in the way that he wanted to and without any serious detriment to his own private and social life. The evidence does not indicate that he experienced the constraints Iranian society placed on homosexual activity as oppressive or as constraints that he could not reasonably be expected to tolerate."

19. Having referred to the appellant's life in the United Kingdom, the Tribunal recorded his evidence that:

> "His life here is the only one he wants and the only one that is acceptable or tolerable to him."

The Tribunal considered, at paragraph 44, the appellant's position on any return to Iran:

> "We are satisfied that as a matter of fact he would behave discreetly. On the evidence he was able to conduct his homosexual activities in Iran without serious detriment to his private life and without that causing him to suppress many aspects of his sexual identity. Whilst he has conducted his homosexual activities in the UK less discreetly, we are not persuaded that his adaptation back to life in Iran would be something he could not reasonably be expected to tolerate. We consider that as a matter of fact he would behave in similar fashion as he did before he left Iran and that in doing so he would, as before, be able to seek out homosexual relationships through work or friends without real risk to his safety or serious detriment to his personal identity and without this involving for him suppression of many aspects of his sexual identity."

20. That conclusion was fully reasoned at paragraph 45:

> "The evidence of suppression of aspects of the appellant's life in Iran in comparison to his life in the UK is limited. In Iran he could not go to gay clubs as he can in the UK. Public displays of affection to a homosexual partner may lead to a risk of being

> reported to the authorities which is not so in the UK. The appellant's ability to be open about his sexuality as has been the case in the UK was not possible for him throughout his thirteen adult years in Iran and three years as a minor. But he did have friends who knew of his sexuality, he was able to socialise with them and he was able to tell his family. If a wish to avoid persecution was ever a reason why he acted discreetly in Iran it was not, on the evidence, the sole or main reason. It is difficult to see on the evidence that a return to that way of living can properly be characterised as likely to result in an abandonment of the appellant's sexual identity. To live as the appellant did for thirteen years did not expose him to danger. The appellant may well live in fear on return to Iran now he is aware of the penalties which might be arbitrarily imposed were he to be discovered. The question as to whether such fear reaches so substantial a level of seriousness as to require international protection has to be considered objectively and in the light of the evidence as we have found it to be. Homosexuals may wish to, but cannot, live openly in Iran as is the case in many countries. The conclusions in *RM and BB* as to risk remain the same. This appellant was able to live in Iran during his adult life until he left in a way which meant he was able to express his sexuality albeit in a more limited way than he can do elsewhere. In particular we have regard to the fact that the evidence as found shows that the appellant's sexuality was not known to the authorities when he left Iran. Objectively we cannot see that the level of seriousness required for international protection is in this case reached."

21. The Tribunal referred to the test stated by Buxton LJ in *J*, and added, at paragraph 46:

> "The circumstances to be tolerated are the inability to live openly as a gay man as the appellant can in the UK. The part of sexuality to be abandoned is on the evidence only the ability to live openly as a gay man in the same way the appellant can do elsewhere. To live a private life discreetly will not cause significant detriment to his right to respect for private life, nor will it involve suppression of many aspects of his sexual identity. Enforcement of the law against homosexuality in Iran is arbitrary but the evidence does not show a real risk of discovery of, or adverse action against, homosexuals in Iran who conduct their homosexual activities discreetly. The position has not deteriorated since *RM and BB.* On the evidence we find the appellant can reasonably be expected to tolerate the position on any return."

Other authorities

22. In *Hysi v Secretary of State* [2005] EWCA Civ 711, the applicant was a 15 year old Albanian from Kosovo whose mother was a Romany gypsy and his father Albanian. He claimed asylum on the ground that, as a person of mixed ethnicity, he feared

persecution in Kosovo and that it would be impossible for him to hide or lie about his origin. The applicant's appeal against the refusal of refugee status was allowed in this court on the basis that the Tribunal did not properly or sufficiently address the reasonableness or otherwise, or the extent of the harshness, that would follow relocation in Kosovo.

23. The case was remitted to the Tribunal for further consideration. Giving the judgment of the court, Judge LJ stated, at paragraph 33:

> "He [the applicant] would simply have to continue to lie and conceal his origins, while simultaneously living with the risk that the truth would be suspected or discovered, and the fear of the consequent unpleasantness, fear based on the harsh realities of what he had seen his parents endure."

He added, at paragraph 37:

> "The true extent of the consequent problems, and his ability to respond to them, were not examined whether they would arise from the fact that he would have to be a party to the long-term deliberate concealment of the truth about his ethnicity, but also from the understandable, continuing fear that the truth would be discovered."

On remittal, the Tribunal found that the applicant was entitled to refugee status.

24. I refer now to the decision of this court in *XY (Iran) v Secretary of State* [2008] EWCA 911 Civ which followed *J* in time and is relevant to consideration of the Tribunal's decision in HT. The appellant was a national of Iran and his asylum claim was based on his homosexuality. Other facts were disputed but it was accepted that he was homosexual and had had a 7 year homosexual relationship with a friend. In a judgment with which Moore-Bick LJ and Lewison J agreed, Stanley Burnton LJ cited the country guidance decision of the Tribunal in *RM and BB* and the decision of this court in *J*. The decision of the Tribunal in *HJ*, the subject of the present appeal, was cited at length. The court then cited the decision of the Tribunal in *XY*. The Tribunal had stated:

> "The appellant does not simply abandon his sexual identity if he is required to carry on his sexual activities with the same sex partner with some degree of discretion. All persons, of whatever sex, involved in intimate relationships conduct themselves with some care and discretion. It is clear from the appellant's own evidence that he conducted his own sexual relationship with M with some care and discretion as he was fully aware of the likely result of such activity coming to the attention of the Iranian authorities. It is therefore not reasonably likely that he would be careless or indiscreet regarding his sexual activities, if they resumed upon his return to Iran."

25. A ground of appeal to this court was that the Tribunal had not expressly considered the question posed by this court in *J*. Stanley Burnton LJ, concluded, at paragraph 14:

> ". . . However, it is clear from his findings that for a number of years the Appellant carried on an active sexual relationship with A. The reason he left Iran was not stated by him to be his intolerable situation as a clandestine homosexual, but his fear of arrest and punishment because of the detection of his relationship and the arrest of A. He was disbelieved on the basis for his alleged fear. It was for him to establish that he could not reasonably be expected to tolerate his condition if he were returned to Iran. He did not establish, or even assert, facts on which such a finding could be based. Mr Nicholson stressed his situation as a young man living with his family, unable to carry on his sexual activity at home and having to resort to public baths. However, there is no finding that on return he would resume his relationship with A, and no finding that if he did they could not resume their sexual life in the same manner as before. Mr Nicholson's contentions involved speculation for which the groundwork had not been established before the Immigration Judge."

Submissions

26. Mr Raza Husain submits that a person has a right to the normal incidents of sexual identity. In the case of a homosexual, he accepts that it may not include a right to proselytise or a right to go, for example, on gay rights marches. It does involve a right, in HJ, to associate and live openly with the partner of his choice, not having to lie repeatedly about a core aspect of his identity and, when single, openly seeking out the partner of his choice. These are matters 'related to, or informed by their sexuality' in the words of Gummow and Hayne JJ in 395/2002, adopted by Maurice Kay LJ in *J*. Refugee status cannot be avoided by requiring the threatened person to appease his persecutors.

27. Basic human rights, including the right to a sexual identity, are protected by international human rights law, Mr Raza Husain submits. Both appellants are on the evidence entitled to the protection conferred by refugee status under the Convention.

28. Mr Raza Husain submits that the test of what is "reasonably tolerable" is not country sensitive. What is reasonably tolerable does not depend on whether an applicant for asylum is from Iran or from a Western or more Westernised country. He relies on *Hysi*, translated from the context of ethnicity to that of sexual identity, to demonstrate the unacceptability of a long-term need to conceal the truth.

29. I say at this stage that *Hysi* is not, in my judgment, inconsistent with *J*. At the earlier hearing in *Hysi*, the Tribunal had not properly or sufficiently addressed the reasonableness or otherwise of what the applicant was required to do on return. On remittal, the Tribunal held that *Hysi* should not reasonably have been required to do it, on those facts. That is not inconsistent with the assessment required by *J* of what an applicant from a particular state can reasonably be expected to tolerate in that state.

The Tribunal in the present case has assessed the evidence in a way the earlier Tribunal in *Hysi* had not.

30. Counsel also submits that the Tribunal's findings at paragraph 42 in HJ are perverse. Mr Raza Husain relies on the statement of HJ made in his witness statement of 10 October 2007:

> "Having to live a lie every day of my life and having to live with the fear of what would happen to me if I was caught was an intolerable way for me to live in Iran."

Conclusion in HJ

31. In my judgment the test stated in paragraph 16 of the judgment of Maurice Kay LJ in *J*, by reference to S395/2002, complies with the standard required by the Refugee Convention. We are, in any event, bound by it. It is an appropriate and workable test. It was sufficiently stated by the Tribunal at paragraph 39, recited at paragraph 17 above. In reaching their conclusions, the Tribunal in HJ plainly understood the test. They considered the evidence with great care and in detail. They applied the test to the evidence and the facts as they found them to be. I cannot accept the submission that the findings at paragraph 42 were perverse. They were findings the Tribunal were entitled to make on the evidence. Their conclusion that HJ could reasonably be expected to tolerate conditions in Iran was firmly based on the evidence in the case, considered in the context of the in-country evidence.

32. I would dismiss the appeal of HJ on that ground but add comment on the relevance in cases such as this of the views about homosexuality and its practice held and emerging from the in-country evidence in a particular state. The need to protect fundamental human rights transcends national boundaries but, in assessing whether there has been a breach of such rights, a degree of respect for social norms and religious beliefs in other states is in my view appropriate. Both in Muslim Iran and Roman Catholic Cameroon, strong views are genuinely held about homosexual practices. In considering what is reasonably tolerable in a particular society, the fact-finding Tribunal is in my view entitled to have regard to the beliefs held there. A judgment as to what is reasonably tolerable is made in the context of the particular society. Analysis of in-country evidence is necessary in deciding what an applicant can expect on return and cannot, in my view, be ignored when considering that issue.

33. In *Amare v Secretary of State* [2005] EWCA Civ 1600 Laws LJ, with whom Mummery LJ and Wall LJ agreed, stated, at paragraph 31:

> "The Convention is not there to safeguard or protect potentially affected persons from having to live in regimes where purists' 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. While, as I certainly accept, the sense to be accorded to persecution might shift and stretch as the International consensus develops, the Convention's guarantees remain limited by the two conditions I have described."

Laws LJ's second condition, which he had set out at paragraph 27, was that "the violation, or rather prospective or apprehended violation, must attain a substantial level of seriousness if it is to amount to persecution". That echoes Lord Bingham's finding that persecution is a "strong word" requiring a high threshold (*Sepet and Bulbul*) and requiring a degree of "intensity" (S395/2002). Citing other authorities, Buxton LJ, in *RG (Colombia) v Secretary of State* [2006] EWCA Civ 57, referred, at paragraph 16, to the high level of distress that must be reached before a denial of freedom can be said to be persecutory.

34. Refugee appeal No. 74665/03 decided by the Refugee Status Appeals Authority, New Zealand (2005 INLR 68) was cited to the court. The applicant was a homosexual from Iran and was held to be entitled to asylum. Mr RPG Haines QC, giving the judgment of the Authority, referred in detail to the UN Human Rights Committee decision in *Toonen v Australia* (Comm No 488/1992, UN Doc CC PR/C/75/902/1999, 4 April 1994). It was held in *Toonen* that the prohibition by law of consensual homosexual acts in private offended a core human rights obligation. Mr Haines stated, at paragraph 112:

> "But the approach taken by the Human Rights Committee in *Toonen* has left open the argument that in a similar case involving the domestic law of a Muslim state that applies Islamic law, consideration must be given to the public sensibility and morality obtaining within Muslim societies, conceding to that state a margin of appreciation."

35. Mr Haines also cited the judgment of Sachs J in the Constitutional Court of South Africa in *National Coalition for Gay & Lesbian Equality v Minister of Justice* [1999] ICHRL 161 when considering the limits of the concept of privacy in the context of sexual practices. Having rejected "blatant libertarian permission" for any private sexual act, Sachs J stated, at paragraph 119:

> "The choice is accordingly not an all-or-nothing one between maintaining a Spartan normality, at the one extreme, or entering what has been called the post-modern supermarket of satisfactions at the other. Respect for personal privacy does not require disrespect for social standards. The law may continue to proscribe what is acceptable and what is unacceptable even in relation to sexual expression and even in the sanctum of the home, and may, within justifiable limits, penalise what is harmful and regulate what is offensive . . ."

As the Tribunal stated in *XY*, a degree of discretion can be required in all sexual relationships, heterosexual as well as homosexual.

36. Having said what I have, I recognise, of course, that there are limits, if a contracting state is to fulfil its obligation to uphold fundamental human rights, to what can be tolerated, when considering an asylum application, by way of restrictions in the receiving state. Whether a requirement to respect social standards has the effect of violating a fundamental human right is a matter of judgment for the Tribunal.

HT

37. In HT, the Tribunal which dismissed the application for asylum on 29 October 2007 accepted, at paragraph 18, that HT was a homosexual who had had homosexual relationships in his home country. They stated, at paragraph 23:

> "The appellant himself said that he had been able to carry on two homosexual relationships within his home country and it appears that the second of these was carried on for a period of three years and only ended after the appellant and his partner were seen kissing in the garden by a neighbour."

They posed the question whether the appellant would be at real risk on return (paragraph 21). They summarised in-country material. They stated, at paragraph 19, that they did not consider that two men kissing in a garden (paragraph 7 above) could necessarily be described as discreet. They concluded, at paragraph 25:

> "It is the finding of the Tribunal that the appellant's case taken as a whole shows that homosexual relationships can be carried on in Cameroon, notwithstanding that a certain amount of discretion may be required. It might be said that the pursuit of a homosexual lifestyle is in some ways similar to the pursuit of a political activity or even the pursuit of proselytes to a particular religious faith. In short, should someone be expected to be discreet about a matter of this kind? The Council of Europe, European Court of Human Rights decision in the case of *F* was placed before the Tribunal. This indicated that homosexuality was a common phenomenon in Iran and was tolerated as long as it did not disturb public order and remained in private. The Adjudicator concluded that it was extremely unlikely that homosexual activity conducted in private would result in ill-treatment or harassment. The court in the case of *F* said that the materials examined by the domestic authorities and submitted by the applicant in their case did not disclose a situation of active prosecution by the authorities of adults involved in consensual and private homosexual relationships. It was the view of the Tribunal that in some respects the position in Cameroon was not dissimilar from the position in Iran and it was the view of the Tribunal that there might be difficulties for someone openly professing his homosexuality. A homosexual relationship carried on in private, however, was considered by the Tribunal not to create a reasonable degree of likelihood of persecution."

The Tribunal also found that HT would be able to relocate in Cameroon.

38. On the reconsideration, the Tribunal rightly stated that it could only interfere with the decision "if it was flawed by a material error of law". (Paragraph 12) Reference was made to *J* and to the Tribunal decision in HJ. The Tribunal referred to the submission on behalf of the Secretary of State:

> "The appellant had had two homosexual relationships over a period of several years and had simply been indiscreet on one occasion when he was observed kissing in public. He had been discreet prior to this incident. It was not unreasonable to expect him to be discreet on return."

The submission on behalf of HT was also recorded:

> "In the case of *J* the appellant had lived discreetly in the past. There was every likelihood that the appellant would come to the attention of the authorities in the future."

39. The Tribunal concluded, at paragraph 16:

> "In my view the panel was entitled to conclude in the light of the material before it that on the facts the appellant could properly be returned to Cameroon and that the incident in the garden was a one-off incident. The appellant had on the whole been discreet and it does not appear that the requirement to be careful in future would breach his rights to practise his orientation in all the circumstances of this case. As I have observed, questions of this nature are very much questions of fact and I do not find that the panel misdirected itself. Further the question of relocation was not the subject of challenge."

40. Mr Raza Husain submits that the original panel had failed to address the question whether HT would in fact be discreet on return and whether, if he was not discreet, he was at risk of persecution. They had failed to consider whether such discretion was something HT could reasonably be expected to tolerate.

41. The decision in *J* had not been considered in the earlier determination and it is accepted by the respondent that the test in *J* was not expressly stated. For HT, it is accepted that the application for reconsideration had not challenged the finding on internal relocation but it is submitted that the discretion issue was inevitably relevant to that issue and should have been considered.

42. For the Secretary of State, Mr Greatorex submits that, on the evidence, the second panel had correctly analysed the evidence before the first panel when finding that the incident in the garden was a one-off incident in a context in which HT had been able to carry on two homosexual relationships and had been leading a discreet life. The first panel had been entitled to conclude that HT would be discreet and that there was no real risk of persecution.

43. Mr Greatorex relies on the decision of this court in *XY*, upholding the Tribunal conclusion in that case. The applicant's credibility was in question on other issues in *XY* but the applicant's circumstances were similar to HT's.

Conclusion in HT

44. There was a finding that HT would be discreet on return to Cameroon. As in *XY*, the groundwork for a further finding that HT should not reasonably be required to be

discreet in Cameroon was not established before the Tribunal. As in *XY*, HT had not established, or even asserted before the Tribunal, facts on which a finding that he could not reasonably be expected to tolerate a life involving discretion, if he returned to Cameroon, could be based.

45. The absence of any specific reference to *J*, or the test in *J*, does not, in the circumstances, give rise to an error of law. Whereas in HJ the question whether the applicant could reasonably be expected to tolerate discretion had been raised and analysed, the need for a finding on that issue had not arisen in HT. The first panel in HT had considered the case put before them, made findings of fact, including that HT practised discretion, and reached a conclusion on those findings. They were entitled to find that in all the circumstances, a single attack on HT following a one-off incident did not establish a real risk of persecution in the future. On remittal, the finding that the first panel had not erred in law was justified.

46. For the reasons given, I would dismiss the appeals in both cases.

Lord Justice Keene :

47. I agree.

Sir Paul Kennedy :

48. I also agree.