Case Summary

Country of Decision/Jurisdiction	**United Kingdom**
Case Name/Title	HJ (Iran) v Secretary of State for the Home Department
Court Name *(Both in English and in the original language)*	The Supreme Court
Neutral Citation Number	[2010] UKSC 31
Other Citation Number	
Date Decision Delivered	07 July 2010
Country of Applicant/Claimant	Iran and Cameroon
Keywords	Persecution
Head Note (Summary of Summary)	It is unlawful to deny protection under the Convention to practising homosexuals on the basis that they could reasonably be expected to, or would, exercise discretion in regards to their sexuality so as to avoid persecution.
Case Summary (150-500)	The appellants are both gay men. HJ, who is 40 years old, is an Iranian. He claimed asylum on arrival in the United Kingdom on 17 December 2001. He practised homosexuality in Iran and has continued to do so in the United Kingdom. HT, who is 36 years old, is a citizen of Cameroon. He claimed asylum following his arrest at Gatwick on 19 January 2007. He had presented a false passport while in transit to Montreal. He too is a practising homosexual. Both appellants claim that they have a well-founded fear that they would be persecuted if they were to be returned to their home countries.
Facts	Asylum had been refused by the Secretary of State in both cases. HJ's appeal against that decision was dismissed by the Asylum and Immigration Tribunal on 15 August 2005. The Tribunal found that he had been a practising homosexual in Iran, but his account of being detained by the authorities for that reason, and escaping, was not believed. The Tribunal concluded that, *'We find that the appellant's homosexual practices in Iran have never been such that his own homosexual activity is reasonably likely to result in adverse attention from the authorities in Iran … '* Permission to appeal that decison was granted by the Court of Appeal on the basis that, *"There is no single decision … which answers this straightforward question does it amount to persecution according to these broad tests if the clandestine character of the homosexual activity which there has been in the past and will be on return in the future is itself the product of fear engendered by discriminatory legislation or policing which itself violates the individual's human rights?"*

	On 26 July 2006 the Court of Appeal remitted his case to the Tribunal for reconsideration: *J v Secretary of State for the Home Department*[2006] EWCA Civ 1238. The Court of Appeal cited with approval passages from the decision of the High Court of Australia in S395/2002 [2003] HCA 71. First, from 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."* And at paragraph 43: *"The notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality. This is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her religious beliefs, political opinions, racial origins, country of nationality or membership of a particular social group. In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the harm that will be inflicted. In many - perhaps the majority of - cases, however, the applicant has acted in the way that he or she did only because of the threat of harm. In such cases, the well-founded fear of persecution held by the applicant is 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 that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly".* The Court of Appeal remitted the case to the Tribunal 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". On 8 May 2008, following reconsideration, his appeal was again dismissed. The Tribunal found that he would be able to live in Iran as a homosexual in the same way that he had in the past, without undue difficulty, and would not suffer harm amounting to persecution for having to limit the expression of his sexuality to the extent that would maintain his safety. HT's appeal to the Tribunal was dismissed on 29 October 2007. Reconsideration was ordered on 14 November 2007 on the ground that the Tribunal might have made an error of law in the test to be applied to a gay person seeking asylum. But on 5 June 2008 Senior Immigration Judge Warr held that the earlier determination was not flawed, and he did not proceed to a reconsideration of the evidence. He found, *"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 indiscretion was a one-off incident that would not happen again and, in any case, internal relocation was available. The appellants appealed against these decisions to the Court of Appeal. On 10 March 2009 the Court of Appeal (Pill and Keene LJJ and Sir Paul Kennedy) dismissed both appeals: [2009] EWCA Civ 172. The issue as put by the Appellants was *'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'*. The Secretary of State contended however that *' the issue is always whether the applicant can reasonably be expected to tolerate the need for discretion on return'*. The Court upheld the decisions of the Tribunal, finding in favour of the Secretary of State formulation and answering on the facts that these appellant could, as they had done in the past, reasonably be expected to tolerate the need for discretion on return.
Decision & Reasoning	Each of their Lordships gave a judgement in this case. They all agreed that the appellants were entitled to be recognised as refugees, though not entirely agreeing in their reasons for doing so. The court looked at a wide range of international and domestic authorities - particularly favouring the approach of the Australian High Court in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 - and agreed that the correct approach in determining the asylum claim of an asylum seeker fearing persecution for reason of his sexuality was;

	'The approach to be followed by tribunals, *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.* *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.* *83. The Secretary of State should, of course, apply the same approach when considering applications of this type. Although I have, for the most part, concentrated on the position of gay men, the Secretary of State and tribunals should approach applications concerning lesbian women in the same way'.* The Supreme Court unanimously rejected the 'reasonable tolerability' test as incompatible with the purposes of the Refugee Convention - which is to provide surrogate international protection from persecution for those persons who are at real risk of being persecuted in their own countries for reasons of

	inter alia membership of a particular social group - and as unworkable in practice. Although *HJ* deals with those claiming asylum on the basis of their sexuality, it is clear from the judgement, and subsequent decisions of the UK courts, that the same approach would apply to cases involving any of the Convention reasons.
Outcome	The appeal was allowed. The appellants were found to be entitled to refugee status in the UK.