

**B E T W E E N:**

**LC (ALBANIA)**

**Appellant**

**- AND -**

**SECRETARY OF STATE FOR THE  
HOME DEPARTMENT**

**Respondent**

**-AND-**

**THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES**

**Intervener**

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**CASE FOR THE INTERVENER**

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*References to [X/1] indicate the tab/page number of the Appellant's consolidated hearing bundle.*

**I. Introduction**

1. The United Nations High Commissioner for Refugees ('UNHCR') is grateful for the Court's grant of permission to intervene. This appeal raises key questions of principle and practice concerning the position of individuals who, if they gave expression to their protected identity<sup>1</sup>, would be persecuted in their home state. Is it an answer to a refugee claim made by such a person that possession of the protected identity will be concealed? If so, in what circumstances may it be said that the concealment will be entirely unrelated to the objective reality that if their protected identity became known, the individual would be persecuted? To amplify Lord Rodger's example in *HJ (Iran) v Secretary of State for the Home Department*<sup>2</sup>, under Nazi-occupied Europe could it have been an answer to a refugee claim, and if so in what circumstances, to say that a Jewish claimant who concealed their protected Jewish identity was not a refugee because the concealment had nothing to do with the threat of the gas chamber?

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<sup>1</sup> Aspects of human identity which the 1951 Convention protects because they are so fundamental that they cannot be changed or an individual should not be required to change them. See §§6-7 below.

<sup>2</sup> [2011] 1 AC 596, §62.

2. In this case, the Appellant (a) was a child at the time of most of the ‘past conduct’ under consideration in the appeal; and (b) was accepted by the First tier Tribunal (‘FtT’) to be a ‘vulnerable adult’ owing to his ‘very young age’ and accepted sexual orientation<sup>3</sup>. This case, therefore, also raises important questions concerning the approach to be taken under Article 1A(2) of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (‘the 1951 Convention’); or under Articles 2 (c), 9 and 10 of Council Directive 2004/83/EC (‘the Qualification Directive’)<sup>4</sup> to young asylum applicants, particularly in cases concerning concealment of sexual orientation or gender identity<sup>5</sup>. If future concealment of the protected identity is ever a permissible answer to a refugee claim, do the evaluation of (a) whether such concealment will successfully be maintained; (b) the motivations for any such concealment; and (c) what constitutes persecution, differ for young asylum applicants?
3. The Appellant and Respondent have defined two principal issues in the appeal: Issue One concerns the materiality of the FtT’s error in relying upon country guidance concerning Albania already set aside; Issue Two concerns the FtT’s approach to the questions of whether and if so why the Appellant would conceal his sexual orientation if returned. UNHCR’s intervention is directed to the latter. UNHCR considers that Issue Two may be usefully reduced to the following constituent parts:
  - (1) Where a State persecutes lesbian, gay, bisexual, transgender or intersex (‘LGBTI’) people, is that sufficient to constitute an LGBTI person from that state as a refugee (even if the individual’s status as an LGBTI person would be concealed on return)? Or is it necessary in addition to ask why that protected identity would be concealed?

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<sup>3</sup> FtT §30 [C/18].

<sup>4</sup> *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 has been recast by Council Directive 2011/95/EU. The UK has opted out of the recast Qualification Directive and remains bound by the 2004 Qualification Directive.

<sup>5</sup> According to the 2007 *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (‘the Yogyakarta Principles’) ‘sexual orientation’ refers to ‘each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender’ and ‘gender identity’ refers to ‘each person’s deeply felt internal and individual experience of gender, which may or may not correspond to the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms’. These are the definitions adopted by UNHCR in its *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, (‘SOGI Guidelines’), at §9.

If an enquiry into such concealment and motivation is required,

- (2) What is the proper approach to the assessment of prospects of future concealment (and what is the relevance of a history of past concealment)?
- (3) What is the proper approach to the assessment of an individual's motives for any such concealment? Specifically, what is the relevance of past concealment in the state of refuge?
- (4) Should any different approach be taken to questions (2) and (3) above where, as here, the asylum applicant was a child at the time that part or all of the past concealment occurred?
- (5) How does the assessment of the threshold for persecution differ for vulnerable asylum applicants?

## II. UNHCR's mandate and expertise

4. UNHCR is entrusted by the UN General Assembly with responsibility for providing international protection for refugees, and, in cooperation with governments, for seeking permanent solutions for the problem of refugees<sup>6</sup>. UNHCR's mandate includes 'supervising the application' of 'international conventions for the protection of refugees'<sup>7</sup>. UNHCR's supervisory responsibility and the respect and cooperation owed by signatory states to that function are reflected in Article 35(1) of the 1951 Convention<sup>8</sup> and in Article II of its 1967 Protocol. UNHCR's supervisory role is also reflected in European Union law<sup>9</sup>. Thus as the Supreme Court observed in *IA (Iran) v Secretary of State for the Home Department*<sup>10</sup>:

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<sup>6</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V) at Chapter 1, §1.

<sup>7</sup> *Ibid* at Chapter 2, §8(a).

<sup>8</sup> 'The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention'.

<sup>9</sup> Declaration 17 to the Treaty of Amsterdam provides that 'Consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy' (Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, 2 September 1997, Declaration on Article 73k of the Treaty establishing the European Community, OJ C 340, 10.11.1997, p. 134). See also secondary European Union legislation: e.g., Recital 22 of the Qualification Directive and Article 21(1) of *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*.

<sup>10</sup> [2014] 1 WLR 384 per Lord Kerr JSC at §40.

*‘Quite apart from its own role in the determination of refugee status of claimants, UNHCR has a supervisory function in monitoring the procedures and criteria applied by states engaged in the same exercise of determining claims for asylum...’*

5. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines, including (a) UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reissued January 1992 and December 2011) (‘UNHCR Handbook’) and (b) UNHCR’s subsequent Guidelines on International Protection<sup>11</sup>, certain of which are cited in this intervention. Lord Bingham said in *R v Asfaw*<sup>12</sup> that: *‘The opinion of the Office of the UNHCR ... is a matter of some significance, since by article 35 of the Convention member states undertake to co-operate with the office in the exercise of its functions, and are bound to facilitate its duty of supervising the application of the provisions of the Convention.’* In *R v Uxbridge MC ex p Adimi*<sup>13</sup> Simon Brown LJ, as he then was, stated that the UNHCR Handbook *‘should be accorded considerable weight’*.

### **III. The rationale of the 1951 Convention**

6. The rationale of the 1951 Convention is that *‘people should be allowed to live their lives free from the fear of serious harm coming to them because of their race, religion, nationality, membership of a particular social group or political opinion.’*<sup>14</sup> Thus *‘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 Convention is intended to secure for him’*<sup>15</sup>. Such a person is still *‘being persecuted’* because *‘the threat of serious harm and the fear of it will remain despite the avoiding behaviour’*<sup>16</sup>.

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<sup>11</sup> UNHCR issues ‘Guidelines on International Protection’ pursuant to its mandate, as contained in its Statute, in conjunction with Article 35 of the 1951 Convention. The Guidelines complement the UNHCR Handbook and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

<sup>12</sup> [2008] 1 AC 1061 §13.

<sup>13</sup> [2001] QB 667 p.678§H.

<sup>14</sup> *HJ (Iran)* Lord Rodger JSC at §52.

<sup>15</sup> *Ibid* Sir John Dyson JSC at §110. See also, CJEU decision in *Minister voor Immigratie en Asiel v X, Y and Z* (Joined Cases C-199/12 to C-201/12), [2014] QB 1111 at §70; and in relation to political opinion *NACM v Minister for Immigration and Multicultural and Indigenous Affairs*, [2003] FCA 1554 at §57.

<sup>16</sup> *Ibid* Sir John Dyson JSC at §117.

7. Sexual orientation and gender identity are fundamental aspects of human identity which cannot be changed or which an individual should not be forced to change<sup>17</sup>; so that LGBTI asylum applicants are members of a particular social group<sup>18</sup>. It is inconsistent with the protective purpose of the 1951 Convention and with the surrogacy principle<sup>19</sup> to deny refugee status on the basis that a person *could* (but will not) conceal<sup>20</sup> a protected characteristic such as sexual orientation or gender identity<sup>21</sup>; or to refuse it on grounds that a person in fact *would* conceal the protected characteristic for fear of serious harm<sup>22</sup>.

#### IV. The Four Limb Test in *HJ (Iran)*

8. In *HJ (Iran)*, Lord Rodger gave guidance for decision-makers<sup>23</sup>, endorsed by Sir John Dyson<sup>24</sup> and reiterated, in his own words, by Lord Hope<sup>25</sup>. The four-limb test requires the decision-maker to address the questions of (1) whether the asylum applicant is LGBTI or at risk of that sexual orientation or sexual identity being imputed to him; and if so (2) whether the country conditions demonstrate that living openly would expose him to persecution; (3) how the asylum applicant would in fact behave upon return; and (4) if he would not live openly on return, why.

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<sup>17</sup> *HJ (Iran)* Lord Rodger JSC at §§76, 79. Lord Rodger (at §76) cited with approval the observation of the New Zealand Refugee Status Appeal Authority in *Re GJ* [1998] INLR 387, that ‘sexual orientation is **either** an innate **or** unchangeable characteristic **or** a characteristic so fundamental to identity or human dignity that it ought not be required to be changed’ [original emphasis]; see also SOGI Guidelines at §12: ‘sexual orientation and/or gender are fundamental aspects of human identity that are either innate or immutable, or that a person should not be required to give up’; and 2007 *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*: Principle 3: ‘Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.’. See also discussion in *RT (Zimbabwe) v Secretary of State for the Home Department* [2013] 1 AC 152 at §25.

<sup>18</sup> Under Article 1(A)(2) 1951 Convention, and Articles 2 (c) and 10 (1)(d) Qualification Directive. *Minister voor Immigratie en Asiel v X, Y and Z* at §49. See SOGI Guidelines at §44ff. See also *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at p.739.

<sup>19</sup> *The Law of Refugee Status*, Hathaway and Foster, Cambridge University Press, 2nd Edition, 2014, p.288; see also *R v Immigration Appeal Tribunal ex p Shah and Islam* [1999] 2 AC 629, Lord Hoffmann at p.653§§E-F; *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, Lord Hope at p.495§C.

<sup>20</sup> As Lord Hope JSC said in *HJ (Iran)* (at §22) of the alternative term ‘discretion’ ‘this euphemistic expression does not tell the whole truth’; and see Lord Collins JSC at §101 ‘the use of words such as “discretion” and “discreetly” tends to obscure the point that what is really involved is concealment of sexual orientation’.

<sup>21</sup> *HJ (Iran)* e.g. Lord Hope JSC at §18, Lord Rodger JSC §54; *Minister voor Immigratie en Asiel v X, Y and Z* at §75; *Germany v Y and Z* (Joined Cases C-71/11 and C-99/11) [2013] 1 CMLR 5 at §§78-79; *MSM (Somalia) v Secretary of State for the Home Department* [2016] EWCA Civ 715, Lord Justice Beatson at §44.

<sup>22</sup> *HJ (Iran)*, Lord Rodger JSC at §69. See also SOGI Guidelines at §31.

<sup>23</sup> §82.

<sup>24</sup> §132.

<sup>25</sup> §35.

## V. Submissions

### (1) *The correct test*

9. Serious problems have arisen in decision-makers' construction and application of the third and fourth limbs of Lord Rodger's test. It is an error to treat these aspects of the test as difficult hurdles to be surmounted by LGBTI asylum applicants. The third and fourth limbs are, rather, protective in purpose.

9.1 The third limb of the *HJ (Iran)* test reflects the centrality in the refugee status determination under Article 1A(2) of the 1951 Convention and Article 2 (c) of the Qualification Directive of the question of *what will in fact happen* in the event of return. It is no answer to an asylum claim that the asylum applicant could (but will not) conceal his protected characteristics on return<sup>26</sup>. Thus,

9.1.1 It is irrelevant that the future conduct which would place the asylum applicant at risk might be considered unreasonable<sup>27</sup>.

9.1.2 Nor is it relevant whether the conduct which would place the asylum applicant at risk on return is at the 'core' or margin of the protected rights, as the CJEU stated in *Germany v Y and Z*<sup>28</sup> and in *Minister voor Immigratie en Asiel v X, Y and Z*<sup>29</sup>. Thus the Fourth Chamber affirmed in *X, Y and Z*, that '*The fact that [the asylum applicant] could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account*'<sup>30</sup> and<sup>31</sup> '*it is unnecessary to distinguish acts that interfere with the core areas of the expression of sexual orientation even assuming it were possible to identify them, from acts which do not affect those purported core areas*'<sup>32</sup>.

9.1.3 Nor, for similar reasons, is the importance to the individual of the right forfeited relevant, as the Supreme Court held in *RT (Zimbabwe)*<sup>33</sup>. Thus in *MSM (Somalia)*

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<sup>26</sup> See for example *Germany v Y and Z* in relation to religion at §79.

<sup>27</sup> *Ifkhar Ahmed v Secretary of State for the Home Department* [2000] INLR 1, Simon Brown LJ at pp. 6 - 7.

<sup>28</sup> *Germany v Y and Z* at §62.

<sup>29</sup> *Minister voor Immigratie en Asiel v X, Y and Z* at §78.

<sup>30</sup> At §75.

<sup>31</sup> Although it was not necessary there to answer the referred question concerning acts at the core of protected right.

<sup>32</sup> At §78.

<sup>33</sup> *RT (Zimbabwe) v Secretary of State for the Home Department*, per Sir John Dyson JSC §§ 42-52, with whom Lord Hope DPSC, Baroness Hale, Lord Clarke, Lord Wilson and Lord Reed JJSC agreed.

(in *obiter dicta*<sup>34</sup>) the Court of Appeal indicated that had it been necessary to decide the point, it would have adopted the position of the appellant MSM and UNHCR that there was no room for consideration of avoiding steps that an applicant could (but would not in fact) take even in a case of imputed political opinion<sup>35</sup>.

9.2 The fourth limb ‘why’ question has a similarly protective purpose. Its genesis was in the leading cases of *S395/2002 v Minister of Immigration*<sup>36</sup> and *HJ (Iran)*. There, the lower courts had erred by failing to ask why the asylum applicant had previously concealed his sexual identity in his country of origin and why he would do so if returned. Indeed, *HJ (Iran)* overturned a line of cases in which the Court of Appeal had held that a factual finding that an asylum applicant would on return conceal his or her protected characteristics was an answer to a refugee claim, unless it could be shown that concealment was so unbearable for the applicant that it could not reasonably be tolerated (*Z v SSHD*<sup>37</sup>; *J v SSHD*<sup>38</sup>; *RG (Colombia)*<sup>39</sup>; and *HJ (Iran)*<sup>40</sup> in the Court of Appeal). As McHugh and Kirby JJ stated in *S395/2002*, in comments then adopted by Lord Rodger in *HJ (Iran)*, ‘*the fallacy underlying this approach [was] the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor*’<sup>41</sup>. The two landmark cases established that if the asylum applicant would conceal his or her protected characteristic at least in part because of fear of serious harm which would otherwise ensue, he or she is a refugee. In short, the ‘why’ question allowed asylum applicants who would conceal their protected characteristics on return to establish the well-foundedness of the fear ‘*since it is the right to live openly without fear of persecution which the Convention exists to protect*’<sup>42</sup>.

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<sup>34</sup> The Court of Appeal concluded that the case was one of actual rather than imputed political opinion, at §34.

<sup>35</sup> At §§35-48 per Beatson LJ, §52 per Moore-Bick LJ.

<sup>36</sup> *S395/2002 v Minister of Immigration*, [2003] HCA 71.

<sup>37</sup> *Z v Secretary of State for the Home Department*, [2005] Imm AR 75, Buxton LJ at §16.

<sup>38</sup> *J v Secretary of State for the Home Department*, [2007] Imm AR 73, Maurice Kay LJ at §16, Buxton LJ at §20.

<sup>39</sup> *RG (Columbia) v Secretary of State for the Home Department*, [2006] Imm AR 297, Buxton LJ at §§11,14.

<sup>40</sup> *HJ (Iran) v Secretary of State for the Home Department*, [2009] Imm AR 600, Pill LJ at §§32-36.

<sup>41</sup> §43 per McHugh and Kirby JJ; cited by Lord Rodger in *HJ (Iran)* at §66.

<sup>42</sup> *HJ (Iran)* Lord Rodger at §67.

**(2) *The proper approach to the third limb; the enquiry into what will happen (including any concealment)***

10. UNHCR emphasises four points in relation to the way in which the ‘third limb’ should be approached by decision-makers.

10.1. First, an individual’s prospects of *successful* future concealment should be approached very cautiously. The question of whether an individual would, if returned, attempt concealment does not answer the further question of whether the individual will be successful in the attempt. Concealment entails the suppression of a fundamental aspect of a person’s identity<sup>43</sup> and may be impossible for the individual to tolerate and sustain<sup>44</sup>. Perfect concealment is near impossible in any event<sup>45</sup>, the risk of disclosure being frequently beyond the control of the asylum applicant<sup>46</sup>.

10.2. Second, a mechanistic extrapolation from past to future ‘successful’ concealment is inconsistent with the lower standard of proof (‘real risk’) in refugee status determinations<sup>47</sup> and with the established position that there is no requirement to show past persecution:<sup>48</sup> *‘History is a guide, not a determinant’*<sup>49</sup>.

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<sup>43</sup> See fn. 17 *supra*.

<sup>44</sup> See, for example, the UNHCR Handbook, §82, which refers, analogously, to political opinion: *‘There may [...] be situations where the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities’*.

<sup>45</sup> See for example Dauvergne, Catherine, Millbank, Jenni, *‘Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh’* (2003) 25(1) Sydney Law Review 97 *‘Moreover, the discretion requirement is also, in many contexts, impossible in fact. The question of being ‘out’ is never answered once and for all, it is a decision made over and over, each day and in each new social situation. ...Many lesbian and gay asylum seekers from countries as varied as Malaysia, India, Bangladesh and Iran, testify that to remain unmarried through adulthood would in and of itself be interpreted as evidence that they were homosexual and expose them to risk. It is arguable that in such cultures even an applicant who desperately wishes — and takes all possible steps — to remain closeted does, in fact, become increasingly ‘visible’ with the passage of time’* [emphasis added].

<sup>46</sup> See S395/2002 where *‘the perils faced by the appellants were not necessarily confined to their own conduct, discreet or otherwise’* per McHugh and Kirby JJ at §56. See also the SOGI Guidelines at §32: *‘It is important to recognize that even if LGBTI individuals conceal their sexual orientation or gender identity they may still be at risk of exposure and related harm for not following expected social norms (for example, getting married and having children, for example [sic]). The absence of certain expected activities and behaviour identifies a difference between them and other people and may place them at risk of harm.’* §32 refers also to the possibility of discovery against the person’s will, *‘including by accident, rumours or growing suspicion’*.

<sup>47</sup> See *HJ (Iran)* Lord Walker at §89, referring to the ‘real and substantial risk’ test set out in *R v Secretary of State for the Home Department, ex p Sivakumaran* [1988] AC 958 (for example at p.1000§A) and at §90: *‘Where life or liberty may be threatened, the balance of probabilities is not an appropriate test.’*

<sup>48</sup> *Re C, Refugee Appeal No. 70366/97* at §136: Article 1A(2) *‘require[s] a forward-looking or anticipatory, objective assessment of risk, not an examination of past persecution with a view to determining, whether on humanitarian grounds, a person who has suffered atrocious persecution in the past (but who no longer faces a risk of persecution) should be required to return to the country origin.’*; *Karanakaran v Secretary of State for*



10.3. Third, the fact that an applicant has always previously concealed their sexual orientation or identity may be of no more than limited relevance to whether he or she will even attempt to conceal sexual orientation in the future. An individual's expression of sexual orientation or gender identity changes over time<sup>50</sup>; so too, the ways in which the individual may be expected in the country of origin to 'prove' conformity to heterosexuality may become more onerous (such as marrying and having children)<sup>51</sup>.

10.4. Fourth, the assessment of whether an individual will in fact successfully conceal his or her sexual orientation or gender identity on return must be undertaken in the light of what is known of country conditions and the particular context to which the asylum applicant would return. UNHCR commends, for example, the careful analysis in *SW (Lesbians – HJ and HT applied) Jamaica v Secretary of State for Home Department*<sup>52</sup>.

***(3) The proper approach to the fourth limb; assessing the motives for any concealment***

11. Where a person would conceal his sexual orientation or gender identity, he is a refugee if a well-founded fear of persecution is 'a material reason' for the concealment. The fear need not be the sole or principal reason (*HJ (Iran)*)<sup>53</sup>.

12. UNHCR submits that where a person would be at real risk of persecution on being open concerning their sexual orientation and gender identity, courts should (rebuttably) presume the fear to be a 'material reason' for any concealment. That is because, as Lord

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*the Home Department* [2000] 3 All ER 449, per Sedley LJ at p.477§C: 'What matters throughout is that the applicant's autobiographical account is only part of the picture. People who have not yet suffered actual persecution (one thinks of many Jews who fled Nazi Germany just in time) may have a very well-founded fear of persecution should they remain'. The Qualification Directive (Article 4 (4)) provides that the fact that someone has been persecuted in the past will be regarded as a serious indication of the applicant's well-founded fear but requires no such evidence. Rather, the asylum application must be carried out on an individual basis, taking into account, *inter alia*, 'all relevant facts as they relate to the country of origin at the time of taking a decision on the application' (Qualification Directive, Article 4 (3)(a)).

<sup>49</sup> McHugh and Kirby JJ in *S395/2002* at §58.

<sup>50</sup> SOGI Guidelines at §32.

<sup>51</sup> See *SW (Lesbians – HJ and HT applied) Jamaica v Secretary of State for Home Department* [2011] UKUT 00251(IAC) for example at §§95, 107(4). See likewise SOGI Guidelines at §10.

<sup>52</sup> See, for example, §104, referring to the importance in Jamaica of presenting a 'heterosexual narrative' in order for a woman to live safely; and §107(5) referring to the problem that 'newcomers in rural communities will be the subject of speculative conclusions, derived both by asking them questions and by observing their lifestyle and unless they can show a heterosexual narrative, they risk being identified as lesbians'. The Tribunal referred also to the difficulties that the appellant would face in concealing her sexual identity and orientation as a result of: the fact that concealment is more difficult for older women (§110); the fact that she would no longer be able to present the heterosexual narrative that she had previously, since her grandfather had died and her ex-boyfriend had emigrated (§§110, 116); the fact that she has no children and does not wish to have any (§116).

<sup>53</sup> *HJ (Iran)* §§62 and 82 per Lord Rodger JSC.

Rodger observed and Sir John Dyson reiterated in *HJ (Iran)*<sup>54</sup> there is ‘*no real choice*’ for a person who ‘*would have to act discreetly in order to avoid persecution*’, ‘*unless he were minded to swell the ranks of gay martyrs*’ (Lord Rodger at §59); ‘*Most asylum-seekers will opt for the life of discretion in preference to persecution. This is no real choice. If they are returned, they will, in effect, be required to act discreetly.*’ (Sir John Dyson at §123<sup>55</sup>). In addition, decision-makers should be vigilant concerning the difficulties in isolating different motivations, and to the risks that what might appear to be ‘natural discretion’ or a focus on family honour or disapproval in fact marks the internalisation of a pervasive climate of stigma and fear in the country of origin<sup>56</sup>. It will be an exceptional case in which exposure of the asylum applicant’s sexual orientation would give rise to a real risk of serious harm, yet the fear is not a material reason for concealment. Such a finding would require cogent reasons from the decision-maker, including identification of the alternative cause of concealment and an explanation of why fear was immaterial to this individual.

13. Specifically, the fact that the asylum applicant is not open about sexual orientation or gender identity in the country of refuge may be of limited relevance to the question of the motivations for any concealment on return. That is because:

13.1. The fear of persecution in the country of origin may still be an operative cause of behaviour here (e.g. if the asylum applicant socialises with, or even lives with, co-nationals<sup>57</sup> and fears that news will travel);

13.2. The existence of a distinct reason for ‘concealment’ in the UK (e.g. the internalisation of stigma and adoption of an ‘ashamed’ mindset or homophobic abuse from other

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<sup>54</sup> *HJ (Iran)* §§59, 123 respectively.

<sup>55</sup> Lord Rodger and Sir John Dyson JJSC were addressing the question of whether there was a real distinction between the error identified in *Ifthikhar Ahmed v Secretary of State for the Home Department* - refusing refugee status to a person who would not in fact conceal his protected characteristics on the basis that he hypothetically could - and the error identified in *HJ (Iran)* of refusing refugee status to a person who would conceal his protected characteristic through fear.

<sup>56</sup> See SOGI Guidelines at §§3 and 33, concerning the internalisation of homophobia.

<sup>57</sup> Asylum seekers often live in state-provided accommodation with other asylum seekers, and frequently have no choice over those with whom they share accommodation. They will generally have very limited financial resources to travel far afield or to socialise. The report ‘*Over not Out: The housing and homelessness issues specific to lesbian, gay, bisexual and transgender asylum seekers.*’ (published by Refugee Support and Metropolitan Support Trust, 2009) observed that ‘*evidence of participation in the commercial gay scene is often required of asylum claimants, yet the cost of such participation and the lack of welcome to asylum seekers in the commercial gay scene may militate against such participation.*’ (p.67).

asylum seekers<sup>58</sup> or a lack of resources to travel or socialise) is consistent with having an additional reason, (the fear) on return for concealment; and

13.3. A person may have completely divergent reasons for concealment in the UK (e.g. feelings of isolation and deracination, fear of the unknown, insufficient stability to seek out new relationships) and in the country of origin on return (a well-founded fear of persecution).

#### ***(4) Child and young adult asylum applicants***

14. All of the above applies *a fortiori* where the asylum applicant is a child, or where, as here, the past behaviour which is being used to predict future conduct and motivations occurred principally or entirely while the asylum applicant was a child.

14.1 First, sexual identity evolves and an individual's sexual and gender expression may vary with age (as well as with other social and cultural determinants)<sup>59</sup>. That is true not only for young children but for adolescents whose identity is in flux<sup>60</sup>. The conduct of a child is not, therefore, a reliable indicator of the future conduct of an adult. The fact that a child conceals his sexuality is not an answer, without more, to the question of how the young adult will behave.

14.2 Second, the acts of concealment required are likely to be different for an adult than for a child (which bears also upon different motivations for concealment). Concealment for a child may entail very little in a society where children (heterosexual or not) are not expected to be sexually active; concealment for an adult may require active subterfuge to meet and maintain relations with same-sex partners or to conform to social mores, including getting married and having children<sup>61</sup>.

14.3 Third, the reasons for any concealment of sexual orientation and gender identity are particularly likely to vary from childhood to adulthood. The reasons of the child (for

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<sup>58</sup> See 'Over not Out': §3.4.2 'Most [interviewees] found it difficult to be open about their LGBT identity with the people they currently lived with and to find accommodation generally where they could be open about their sexuality and gender identity.' See also §.3.4.3, 'Fear of discrimination in turn affected respondents' decisions about how and to whom they disclosed their sexuality and gender identities'. See also SOGI Guidelines, §33.

<sup>59</sup> SOGI Guidelines, §9.

<sup>60</sup> Committee on the Rights of the Child, General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence.

<sup>61</sup> SOGI Guidelines at §§10, 32.

example, fear of parental disapproval or schoolyard bullying in the country of origin; or deracination and isolation or practical difficulties such as sharing a room with another child in the country of refuge; or shyness in either) are not a reliable proxy or even indicator for those of the adult (who may be more conscious of worldly risks).

14.4 Fourth, children and young adult applicants<sup>62</sup> may have particular difficulty in identifying<sup>63</sup> or expressing the material reasons for their actions. As the UNHCR 2009 Guidelines on International Protection No. 8 Child Asylum Claims ('Child Asylum Guidelines'<sup>64</sup>) state, '*Immaturity, vulnerability, undeveloped coping mechanisms and dependency as well as the differing stages of development and hindered capacities may be directly related to how a child experiences or fears harm*'<sup>65</sup>.

**(5) The threshold of persecution for vulnerable asylum applicants**

15. A person who would face a real risk of persecution if their sexual orientation or identity were known and conceals it, in part, for fear of the persecution is a refugee: no question of the reasonable tolerability of the concealment arises<sup>66</sup>.
16. However, that does not displace the requirement to consider the impact of the harm caused for the particular individual:

*'the phrase "being persecuted" in article 1A(2) refers to the harm caused by the acts of the state authorities or those for whom they are responsible. The impact of those acts on the asylum-seeker is only relevant to the question whether they are sufficiently harmful to amount to persecution' (HJ (Iran) §120 per Sir John Dyson JSC [emphasis added])*

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<sup>62</sup> No bright line divides children from young adults. See for example UNHCR '*The Heart of the Matter - Assessing Credibility when Children Apply for Asylum in the European Union*', December 2014, p.21: '*In developmental terms, there is no clear-cut line between childhood and adulthood, and a number of disciplines – child welfare, juvenile justice and economics, among others – speak about a period of 'transition' between these two life phases.*'

<sup>63</sup> *Re S (A minor) (Independent Representation)* [1993] Fam 263, Sir Thomas Bingham MR at 280§A: '*The reason why the law is particularly solicitous in protecting the interests of children is because they are liable to be vulnerable and impressionable, lacking the maturity to weigh the longer term against the shorter, lacking the insight to know how they will react and the imagination to know how others will react in certain situations, lacking the experience to measure the probable against the possible.*'

<sup>64</sup> UNHCR *Guidelines on International Protection No. 8: Child Asylum Claims under Article 1(A)(2) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees.*

<sup>65</sup> §15.

<sup>66</sup> *HJ (Iran)* §§82, 96, 107, 128.

17. Persecution was defined by Lord Hoffmann as ‘*Persecution = Serious Harm + the Failure of State Protection*’<sup>67</sup>. The seriousness of the harm depends in part on the constitution of the individual. The place in refugee status determinations for consideration of the degree of harm caused to the particular individual and of any particular individual frailties is well established: see Hathaway, *The Law of Refugee Status*<sup>68</sup>; *Minister for Immigration and Border Protection v WZAPN and WZARV v Minister for Immigration and Border Protection*<sup>69</sup>, ‘*an approach which is concerned with the effects of actions upon individuals, in terms of harm to them*’<sup>70</sup>; and the analogue principle in the Article 3 ECHR jurisprudence, e.g. *Ireland v United Kingdom*<sup>71</sup>. Article 4 (3)(c) Qualification Directive also reflects the requirement to enquire into the impact on the individual of the objective conditions:

*‘The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account...*

*‘the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant’s personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm’.*  
[Emphasis added]

18. There is also strong support for the proposition that the requisite ‘serious harm’ may be psychological: see the US authorities *Fisher v INS*<sup>72</sup> and *Kone v Holder*<sup>73</sup>; and domestically Lady Hale’s dicta in *R v Special Adjudicator (Hoxha)*<sup>74</sup> and Schieman LJ in *Katrinak v Secretary of State for the Home Department*<sup>75</sup>. See also UNHCR’s Guidelines on International Protection, Claims to Refugee Status based on Sexual Orientation and/or Gender Identity (‘SOGI Guidelines’)<sup>76</sup>. This is consistent also with the Qualification Directive. Article 9 (1)(b) specifies that persecution may ‘*be an accumulation of various*

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<sup>67</sup> Lord Hoffmann, *R v Immigration Appeal Tribunal ex p Shah and Islam*, at p.653§F, adopting the formulation in the Gender Guidelines for the Determination of Asylum Claims in the UK (published by the Refugee Women’s Legal Group in July 1998).

<sup>68</sup> 2<sup>nd</sup> ed p.198.

<sup>69</sup> [2015] HCA 22 (17 June 2015) High Court of Australia §§65-67, 71.

<sup>70</sup> *Ibid* at §71.

<sup>71</sup> *Ireland v United Kingdom*, Application No. 5310/71, (1979-80) 2 EHRR 25, for example at §162.

<sup>72</sup> *Fisher v INS* 37 F.3d 1371 (9<sup>th</sup> Cir. 1994) §§39, 41, 43.

<sup>73</sup> *Kone v Holder* 496 F.3d 141 (2d Cir. 2010).

<sup>74</sup> *R v Special Adjudicator (Hoxha)* [2005] 1 WLR 1063, §87.

<sup>75</sup> *Katrinak v Secretary of State for the Home Department* [2001] INLR 499 §§21-23.

<sup>76</sup> At §33: ‘*Discriminatory and disapproving attitudes, norms and values may have a serious effect on the mental and physical health of LGBTI individuals and could in particular cases lead to an intolerable predicament amounting to persecution*’.

*measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)*<sup>77</sup>; Article 9 (2)(a) specifies that an act of persecution may be ‘*an act of mental violence*’.

19. This focus on the impact on the individual is particularly important for children and very young people because:

19.1. Their threshold of resistance is likely to be lower (UNHCR Handbook<sup>78</sup>; UNHCR’s Child Asylum Guidelines<sup>79</sup>; SOGI Guidelines<sup>80</sup>; *E v Chief Constable of the Royal Constabulary*<sup>81</sup>).

19.2. The refugee status determination for a child is informed by the UN Convention on the Rights of the Child (‘UNCRC’): see in particular the duty on State Parties under Art. 19(1) UNCRC to take measures to protect children ‘*from all forms of physical or mental violence*’.

## **VI. Conclusion**

20. For all those reasons, UNHCR submits that it is an error of law for a decision-maker to:

20.1. Treat past concealment as dispositive of future concealment, *a fortiori* where the asylum applicant is a child. That was the error that the FtT fell into in this case<sup>82</sup>. Indeed, past concealment may be only marginally relevant to the prospects of future successful concealment.

20.2. Treat the asylum applicant’s concealment of sexual orientation or gender identity in the state of refuge as dispositive of future motivation for any concealment, *a fortiori* where the asylum applicant is a child (or where the past concealment was principally by a child). Again, that was exactly what the FtT did in this case<sup>83</sup>. Indeed, past concealment may be only marginally relevant to the motives for future concealment.

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<sup>77</sup> See in addition UNHCR Handbook on cumulative discrimination, §§54-55.

<sup>78</sup> §§51-53.

<sup>79</sup> §§13; 15-16.

<sup>80</sup> §3.

<sup>81</sup> *E v Chief Constable of the Royal Constabulary* [2009] 1 AC 536, Lady Hale §§8-9.

<sup>82</sup> At §§41-42 [C/22-23].

<sup>83</sup> At §44 ‘*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*’ [C/23-24].

20.3. Fail to address the impact of objective conditions upon the individual asylum applicant, *a fortiori* where the asylum applicant is accepted to be vulnerable.

***A potentially simple answer to the appeal (link to Issue One)***

21. Finally, UNHCR observes that there is a potentially simple answer to this appeal arising from the need to assess concealment and any motivation for concealment against the background country evidence, rather than in a vacuum. If:

(a) there was a material error of law in the FtT's assessment of country conditions in Albania ('Issue One'); then

(b) the FtT's findings as to the Appellant's future conduct in Albania ('Issue Two', whether the Appellant will conceal himself and if so why) cannot stand.

22. That is because an error in the evaluation of country conditions is inevitably material to assessments of whether a person will conceal his protected characteristics on return and if so why.

22 March 2017

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