IN THE SUPREME COURT OF THE UNITED KINGDOM **Case No. 2011/0011**

ON APPEAL
FROM HER MAJESTY'S COURT OF APPEAL
CIVIL DIVISION (ENGLAND)

B E T W E E N:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

AND

(1) RT (ZIMBABWE)
(2) SM (ZIMBABWE)
(3) AM (ZIMBABWE)

Respondents

AND

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

CASE FOR THE INTERVENER

A. INTRODUCTION

1. UNHCR is well known to this Court. It has supervisory responsibility in respect of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol ("the 1951 Convention"). Under the 1950 Statute of the Office of the UNHCR (annexed to UN General Assembly Resolution 428(V) of 14 December 1950), UNHCR has been entrusted with the responsibility for providing international protection to refugees and others of concern, and together with governments, for seeking permanent solutions for their problems. As set out in the Statute (§8(a)), UNHCR fulfils its mandate inter alia by, "*[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.*" UNHCR's supervisory responsibility is also reflected in Article 35 of the 1951 Convention and Article II of the 1967 Protocol,

obliging State Parties to cooperate with UNHCR in the exercise of its functions, including in particular, to facilitate UNHCR's duty of supervising the application of these instruments. The supervisory responsibility is exercised in part by the issuance of interpretative guidelines, including in (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.

2. In domestic United Kingdom law, UNHCR has a statutory right to intervene before the First Tier and Upper Tribunals (Immigration and Asylum Chamber).[1] In this Court UNHCR seeks, in appropriate cases, permission to intervene to assist through submissions on issues of law related to its mandate with respect to refugee protection and the 1951 Convention. Such permission when sought, including the ability to attend the hearing and make brief oral submissions, has always been granted by the House of Lords and Supreme Court. So too in these cases, for which UNHCR is very grateful.

3. UNHCR does not make submissions on the facts of individual cases or on evidentiary matters, but is concerned with the interpretation and application of the 1951 Convention as a matter of law. Accordingly at the outset, UNHCR invites particular attention to the following UNHCR materials: (1) *UNHCR Handbook* ; (2) Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees (April 2001) ("*Memorandum 2001*"); (3) Guidelines on International Protection: Membership of Particular Social Group (May 2002) ("*PSG Guidelines 2002*"); (4) Guidelines on International Protection: Gender-Related Persecution (May 2002) ("*GRP Guidelines 2002*"); (5) Guidelines on International Protection:

[1] Rule 49 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 and rule 9(5) of the Amended Tribunal Procedure (Upper Tribunal) Rules 2008, in force since 15 February 2010.

Internal Flight or Relocation Alternative (July 2003) ("*IFRA Guidelines 2003*"); (6) Guidelines on International Protection: Religion-Based Refugee Claims ("*RRC Guidelines 2004*"); (7) UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity (November 2008) ("*Guidance Note 2008*"); (8) Statement on Religious Persecution: Article 9(1) of the Qualification Directive ("*RP Statement 2011*") and (9) UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs (31 March 2010) ("*VOG Guidance 2010*") . Such materials can assist in identifying the relevant principles which can be used to illustrate the principled approach in this case.

4. The 1951 Convention provides international protection to people who have a well-founded fear of being persecuted by reference to five protected grounds/statuses, namely "*race, religion, nationality, membership of a particular social group or political opinion*". In *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31 [2011] 1 AC 596 (in which UNHCR also intervened), the persecution was the ill-treatment of gay men; and the protected ground/status was membership of a particular social group (based on their sexual orientation). In the present cases the persecution at issue is the treatment of those who do not display political allegiance to an oppressive regime; and the protected ground/status is political opinion. Both sets of asylum-applicants could and would avoid the ill-treatment: in *HJ (Iran)*, by needing to avoid living openly as gay men; here, by needing to display public political allegiance to the persecuting State.

B. THE HJ IRAN CASE

5. As to what *HJ (Iran)* decided and why, see the attached Annex. It is common ground that *HJ (Iran)* was properly decided. No party is asking the Court to

depart from it, nor does any party argue that its reasoning was flawed. In short, this Court recognised as a refugee (see Lord Rodger at §40) this person:

> ***A gay man [who] …, if he returns to his country of nationality and lives openly as a homosexual … will face a real and continuing prospect of being beaten up, or flogged, or worse…***
>
> ***But …, because of these dangers of living openly, he will actually carry on any homosexual relationships "discreetly" and so not come to the notice of any thugs or the authorities.***

6. As explained in the Annex, there were five key reasons in the Court's analysis. (1) The treatment in the country of nationality of those who lived openly as homosexuals constituted persecution. (2) Sexual orientation was a protected characteristic, within the category *"membership of a particular social group"*. (3) The underlying rationale of the 1951 Convention is to allow persons to live their lives free from fear of persecution because of their race, religion, nationality, membership of a particular social group, or political opinion. (4) The necessary modification (to *"carry on any homosexual relationships 'discreetly'"*), to avoid the risk of persecution, ran contrary to that underlying rationale. (5) The modification was a response to the feared persecution: *"because of these dangers of living openly"* (Lord Rodger at §40).

7. The Supreme Court rejected three key points, advanced by the Secretary of State, holding as follows. (1) It was not necessary or appropriate, for an individual to be a refugee, to be able to characterise the experienced-modification (living discreetly) as being itself *"persecution"* and so needing to be beyond what was reasonably tolerable. (2) It was not helpful or appropriate to see the experienced-modification as being akin to *"internal flight"* (or internal relocation), and so

needing to be *"unduly harsh"* to be expected. (3) The question was not whether the experienced-modification was or was not *"reasonably-tolerable"*.

C. THESE CASES

8. UNHCR would begin by inviting attention to the following points:

(1) In principle, there should be consistency between the protected grounds/statuses in the 1951 Convention. There is no hierarchy. While they should be treated in *pari materia* (*HJ(Iran)* (at §10)) they are nonetheless stand-alone grounds/statuses. It is wrong simply to import tests from one ground to another, especially where to do so would place additional burdens on applicants not envisaged in the 1951 Convention.

(2) As UNHCR has said in the context of sexual orientation: *"sexual orientation is a fundamental part of human identity, as are those five characteristics of human identity that form the basis of the refugee definition: race, religion, nationality, membership of a particular social group and political opinion." (Guidance Note 2008, §8)*. And in the context of religious belief: *"applying the same standard as for other Convention grounds, religious belief, identity, or way of life can be seen as so fundamental to human identity that one should not be compelled to hide, change or renounce this in order to avoid persecution"* (*RRC Guidelines 2004,* §13).

(3) Political opinion is not an *"immutable characteristic"*; nor even a *"characteristic"*. It is the 1951 Convention ground/status commonly associated with refugee status, and should therefore be relatively straightforward in its analysis. See *UNHCR Handbook §§80-83*. As UNHCR explains (*Handbook §83*): *"the test of well-founded fear would be based on an assessment of the consequences that an applicant having certain political dispositions would have to face if returned"*.

(4) Political opinion *"should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of the State, government, society, or policy may be engaged"* (*GRP Guidelines 2002*, §32 citing Goodwin Gill and McAdam, The Refugee in International Law (2007), p87, itself endorsed in *Canada (Attorney General) v Ward* [1992] 2 SCR 689, p.74, all reflecting HRC General Comment No. 34, 21 July 2011 (§9) on the scope of Article 19 ICCPR). It is not necessary that there be political activity (*UNHCR Handbook*, §80; *GRP Guidelines 2002*, §32; and Hathaway, *The Law of Refugee Status* at pp.149-150).

(5) Just as expressions (and non-expressions) of various affirmative political opinions are protected, so political neutrality can form the basis of a refugee claim on imputed or perceived grounds (*Memorandum 2001,* §25). See *VOG Guidance 2010 at* §50. As UNHCR has stated in the context of religion, "*belief*" includes "*non-belief*" and "*should be interpreted so as to include theistic, non-theistic and atheistic beliefs*" (*RRC Guidelines 2004,* §6 and *RP Statement 2011,* §4.2.1, reflecting the UN Human Rights Committee ("HRC") General Comment No. 22, 30 July 1993 (§24) on the scope of Article 18, International Covenant on Civil and Political Rights ("ICCPR").

(6) Importantly, the protection extends to imputed political opinion. UNHCR has stated that "*political opinion …. would also include non-conformist behaviour which leads the persecutor to impute a political opinion to him or her. In this sense, there is not as such an inherently political or an inherently non-political activity, but the context of the case should determine its nature*" (*GRP Guidelines 2002*, §32, reflecting HRC General Comment No. 34, 21 July 2011, §9). This also mirrors the position in relation to religious belief (*RRC Guidelines 2004,* §9). See too *VOG Guidance 2010 at* §51. As such, not holding a political opinion is protected by the 1951 Convention

if it is perceived or imputed to be a political opinion within the context of a specific case.

9. Turning to the analysis of the present cases, a sound starting-point is that a person holding political beliefs should not be expected to modify his beliefs or their manifestations in order to avoid persecution. It could not be expected of an individual that, in order to avoid persecution, they *"should not express opposition to a governing political regime"* (see *HJ (Iran)* UNHCR (at §29(3)).

10. As to an individual with no particular political allegiance, the assessment will be context-specific and will raise evidentiary questions relating to persecution and its well-foundedness. While political opinion includes affirmative political opinions, political neutrality or not holding any political opinion when imputed to the asylum-seeker, for those without such beliefs or views the question will turn on whether their fear of persecution is well-founded. UNHCR submits that such an individual can be a refugee depending on the presence of elements such as the following:

(1) The individual would face a well-founded fear of being persecuted on return, unless he adopts a political allegiance that he does not hold.

(2) He would adopt such a political allegiance, on return, but would do so as a response to the well-founded fear of being persecuted.

(3) The persecution would be for a Convention reason, namely imputed political opinion, because the failure to adopt the political allegiance which he does not hold would be imputed to be an adverse political allegiance.

(4) The adoption of the political allegiance that he does not hold would in fact involve being untruthful to State officials.

(5) The adoption of the political allegiance that he does not hold would involve expressing allegiance to an oppressive (persecutory) regime.

11. UNHCR submits that no principle or concept – including the notions of "*core*" and "*marginal*" aspects of rights or freedom – can serve to undermine such a conclusion in such a case.

12. UNHCR would add the following points:

(1) In terms of the consequences, of persecution for imputed political opinion, Carnwath LJ was right to emphasise (at §36) that "*there is nothing 'marginal' about the right of being stopped by militia and persecuted because of that*".

(2) As has been affirmed by the UN Human Rights Committee: "*any form of effort to coerce the holding or not holding of any opinion is prohibited*" (HRC General Comment No. 34, 21 July 2011, §10).

(3) In terms of immutable and non-immutable grounds/statuses, as has been explained (§9(1) above), the 1951 Convention grounds have equal protected status. There is no 'two-tiered system' of protection, depending on whether a ground/status is (a) immutable (i.e. race, gender, age) and (b) non-immutable (e. g. political opinion).

(4) Non-immutable statuses "*though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights*" (*PSG Guidelines 2002* §12, endorsed by Lord Bingham in *K v Secretary of State for the Home Department* [2006] UKHL 5; [2007] 1 AC 426 at §15). See further *In re Acosta* (1985) 19 I & N 211, endorsed by the Supreme Court of Canada in

Ward, p.68-69, the House of Lords in *R v Immigration Appeal Tribunal ex parte Shah* [1999] 2 AC 629 at 658E-F, and Article 10 of the Charter of Fundamental Rights of the European Union (2000/C3644/01).

(5) Conversely, even an 'immutable' characteristic may be behavioural in nature: see Lord Hope in *HJ (Iran)* at §11, when he explained that "*sexual orientation or sexuality … is a characteristic that may be revealed, to a greater or lesser degree, by the way the members of this group behave*". He added that, albeit that sexual orientation "*manifests itself in behaviour*", the members of the group have the "*fundamental right to be what they are … to do simple, everyday things with others of the same orientation such as living or spending time together or expressing affection for each other in public*". Lord Rodger (at §76) explained, by reference to authority, that sexual orientation had been regarded as "*either an innate or unchangeable characteristic or a characteristic so fundamental to identity or human dignity that it ought not to be required to be changed*". As UNHCR has put it: "*sexual orientation can be viewed as either an innate and unchangeable characteristic, or as a characteristic that is so fundamental to human identity that the person should not be compelled to forsake it*" (*Guidance Note 2008*, §32). See further *PSG Guidelines 2002*, §12; and *GRP Guidelines 2002*, §30).

(6) The question whether political opinion is immutable or not is not a relevant question for determining whether the ground is established in the individual case and whether the well-founded fear of being persecuted was on account of that ground.

(7) There are passages set out in the Secretary of State's printed case (at §§64-65) which describe the threshold for persecution, it being argued (§66) that it is "*entirely inconsistent with [those] definitions and thresholds*" for a person to be a refugee when all that is required is to avoid the risk by the "*expression of insincere views*". Elsewhere, there is the invocation by the Secretary of State (§69(ii)) of the internal flight test (unduly harsh). It is to

be recalled that each of these reflects an approach which was rejected in *HJ (Iran)*: see §7 above and Annex §§A8-A9.

(8) It is not a question of an individual being entitled to expect to do everything in a country of nationality that they would be entitled to do in a country of refuge. As Lord Hope said in *HJ (Iran)* at §35: "*the fact that the applicant will not be able to do in the country of his nationality everything that he can do openly in the country whose protection he seeks is not the test*". So, for example: "*violent, aggressive or persistently unconsensual conduct is not covered*" (*NABD v Minister for Immigration and Multicultural Affairs* [2005] HCA 29, §113).

(9) It is appropriate to guard against introducing fine and difficult distinctions, for which there is no 'standard' or yardstick. What, it may fairly be asked, is the 'standard' by which: (a) it is unacceptably at the 'core' of a protected right for one individual to be forced to disavow who he is; but (b) it is acceptably within the 'margin' of a protected right for another individual to be forced to avow who he is not? What, similarly, is the 'standard' by which: (a) one person cannot be expected to renounce their political opposition to avoid persecution; but (b) another can be expected to announce their political support in order to do so? How, it may be asked, is a line to be drawn between an individual (a) concealing who he is and (b) parading who he is not?

(10) It is unsurprising that the Court of Appeal were unpersuaded that the Secretary of State's suggested "*marked differences in seriousness*" were "*a material distinction in this context*" (Carnwath LJ at §36).

13. Returning to a context-specific approach (§11 above), it is a striking idea that the reason for denying international protection is the insistence on an individual publicly being untruthful to the officials of his or her State. It is an even more striking response to return such a person on the basis that they are to be

expected, under the threat of persecution, publicly to state an insincere political allegiance to an oppressive regime. For international refugee law to proceed on the basis that individuals would be expected to return to pledge a public allegiance, which they do not and would not hold, to, for example, an oppressive regime, under a well-founded fear of persecution if they do not do so, is surely precisely the opposite message and purpose to that envisaged by the 1951 Convention.

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ANNEX: HJ (IRAN)

What the Court accepted

A1. In *HJ (Iran)*, this Court recognised as a refugee a person whom Lord Rodger described as follows at §40 (Lord Walker agreed with Lord Rodger at §86, as did Lord Collins at §100 and Sir John Dyson JSC at §108):

> ***A gay man [who] …, if he returns to his country of nationality and lives openly as a homosexual … will face a real and continuing prospect of being beaten up, or flogged, or worse… But …, because of these dangers of living openly, he will actually carry on any homosexual relationships "discreetly" and so not come to the notice of any thugs or the authorities.***

A2. There were five key reasons in the Court's analysis, which combined to make this person a refugee. First, because the treatment in the country of nationality of those who lived openly as homosexuals constituted persecution. This was the "*real and continuing prospect of being beaten up, or flogged, or worse*", for a person who "*live[d] openly as a homosexual*" (Lord Rodger at §40). Lord Hope discussed the meaning of "*persecution*" (at §12). He referred to Lord Bingham's description (*Sepet v Secretary of State for the Home Department* [2003] 1 WLR 856 at §7) that "*it indicates the infliction of death, torture or penalties for adherence to a belief or opinion, with a view to the repression or extirpation of it*". Lord Hope also referred to Article 9(1)(a) of the Qualification Directive 2004/83/EC (acts "*sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights … or … an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner*"); and to McHugh and Kirby JJ's description of "*harm*" which "*by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate*" (*S395/2002 v Minister of Immigration and Multicultural Affairs* (2003) 216 CLR 473 at §40). As Lord Hope put it (at §13), persecution "*must be state sponsored or state condoned*". Lord Collins described persecution (at §101) as: "*sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community, or an affront to internationally accepted human rights norms, and in particular the core values of privacy, equality and dignity*". Lord Rodger referred (at §53) to "*harm of the requisite intensity or duration*". For its part, UNHCR in its printed case in *HJ (Iran)* had said this (at §21): "*Persecution comprises human rights abuses or other serious harm, often, but not always with a systematic or repetitive element (Memorandum 2001, §17 referring also to the UNHCR Handbook, §§51-53 and*

Guidance Note, §10)"; and *"as to the threshold, "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" (S395/2002, §40)"* (at §22).

A3. Secondly, because sexual orientation was a protected characteristic, within the category *"membership of a particular social group"*. The position of *"a gay man"* was protected, alongside *"race, religion, nationality [and] political opinion"*. Lord Rodger explained (at §42) that *"at least in societies which discriminate against homosexuals, they are … to be regarded as a particular social group"*. Lord Hope explained (at §10) that the Refugee Convention *"treats membership of a particular social group as being in pari materia with the other Convention reasons"* and that there was *"no doubt that gay men and women may be considered to be a particular social group for this purpose"*. As UNHCR, for its part, had put it (at §20): *"sexual orientation is protected in pari materia with other protected statuses"*: see *K v Secretary of State for the Home Department* [2006] UKHL 46; [2007] 1 AC 412 at §§20-21.

A4. Thirdly, because the underlying rationale of the 1951 Convention is to allow persons to live their lives free from fear of persecution because of their race, religion, nationality, membership of a particular social group, or political opinion. In the case of sexual orientation, this was to be able to *"live[] openly as a homosexual"* without *"fac[ing] a real and continuing prospect of being beaten up, or flogged or worse"*. Lord Rodger (with whom Lord Walker, Lord Collins and Sir John Dyson agreed) said (at §52) *"the Convention proceeds on the basis 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"*. So: *"The underlying rationale of the Convention is … that people should be able to live freely, without fearing that they may suffer harm of the requisite intensity or duration because they are, say, black, or the descendants of some former dictator, or gay"* (§53); *"they must be free to live openly in this way without fear of persecution"* (§53); *"they should be able to live freely and openly as gay men and lesbian women"* (§65); *"it is the right to live openly without fear of persecution which the Convention exists to protect"* (§67, end); *"what is protected is the applicant's right to live freely and openly as a gay man"* (§78); *"gay men are to be as free as their straight equivalents in the society concerned to live their lives in the way that is natural to them as gay men, without the fear of persecution"* (§78). As UNHCR had put it: *"Any proper analysis as to whether LGBT applicants have a 'well-founded fear of being persecuted' under Article 1A(2) of the 1951 Convention must start from the premise that applicants are entitled to live in society as who they are, and need not hide who they are"* (§8(1)); and *"The starting point is … the premise that on return the applicant is entitled to live freely in society as who he or she is"* (§37).

A5. Fourthly, because the necessary modification (to *"carry on any homosexual relationships 'discreetly'"*), to avoid the risk of persecution, ran contrary to that underlying rationale. It involved surrendering the person's right to live freely and openly in society as who they are, in terms of the protected characteristic, which was the Convention's basic underlying rationale. So, explained Lord Rodger (§§75-76), it was *"unacceptable"* to rely on the ability of the individual to *"act discreetly and conceal his sexual identity indefinitely to avoid suffering persecution"*, because *"it involves the applicant denying or hiding precisely the innate characteristic which forms the basis of his claim for persecution"*. It was *"to deny the members of this group their fundamental right to be what they are"* (Lord Hope at §11). It meant being *"required to surrender the very protection that the Convention is intended to secure for him"* (Lord Collins at §110). As UNHCR had put it: *"there is no basis for requiring an applicant to disavow a core aspect of their identity in order to avoid persecution"* (§31); *"it would be requiring an applicant to conceal the very status that should be protected"* (§32).

A6. Fifthly, because the modification was a response to the feared persecution: *"because of these dangers of living openly"* (Lord Rodger at §40). There was a difference between a case where the individual would *"live discreetly"* because of *"social pressures"* (§61), and the situation where *"a material reason"* is that *"he would have to behave discreetly in order to avoid persecution because of being gay"* (§62). Only the latter would be a refugee. This is why it was so important to ask *"why"* an individual would act discreetly (§66). See too Lord Hope at §22. As UNHCR had put it (§39): *"if the applicant would be discreet, one must ask why, as the discretion may itself be in response to a well-founded fear of persecution"*.

What the Court rejected

A7. As to what the Supreme Court rejected, there were three points in particular, each of which related to the experienced-modification in behaviour by the individual: ie. *"carry on any homosexual relationships 'discreetly'"* rather than to *"live[] openly as a homosexual"*.

A8. First, the Court rejected the argument that it was necessary and appropriate, for an individual to be a refugee, to be able to characterise the experienced-modification (living discreetly) as being itself *"persecution"* and so needing to be beyond what was reasonably tolerable. Lord Hope summarised this argument as follows (at §24): *"The question that … had to be asked … was whether opting for discretion itself amounted to persecution. The threshold between what was and was not persecution was marked by what he could reasonably be expected to tolerate"*. But to introduce this *"high threshold"* was a *"fundamental error"* (Lord Hope at §29). Lord Rodger thought it could not be right *"to require the applicant to establish a form of*

secondary persecution brought on by his own actions in response to the primary persecution" (§75). Lord Collins thought it *"absurd and unreal"* to focus on whether Ann Frank's confinement *"would itself amount to persecution"* since it was *"the threat to Jews of the concentration camp and the gas chamber which constitute[d] the persecution"* (§107); and Lord Walker referred to the attempt to introduce *"an unnecessary complication"* which may *"lead to confusion"* (at §96). Sir John Dyson JSC explained that the persecution was the underlying *"threat of serious harm"* and not *"what the asylum seeker does in order to avoid such persecution"* (at §120). UNHCR had put it this way (§21): *"Being compelled to forsake or conceal one's sexual orientation and gender identity where this is instigated or condoned by the State may itself also constitute persecution (Guidance Note 2008, §12)";* but *"The essence of persecutory conduct is the harm feared, irrespective of whether the applicant is discreet about his or her sexual orientation"* (§25). So (at §39): *"There is no separate question of whether the modification is itself persecution"*.

A9. Secondly, the Court rejected the argument that it was helpful and appropriate to see the experienced-modification as being akin to *"internal flight"* (or internal relocation), and so needing to be *"unduly harsh"* to be expected. Lord Hope summarised the argument (at §20): that *"a person who will, if necessary, take the metaphorical 'flight' of hiding his sexuality is not a refugee unless it would be intolerable for him to do so"*. As Lord Hope explained, *"the suggested analogy with internal relocation can be dismissed at once as incompatible with the principles of the Convention"* (§21). No other member of the Court thought it relevant or helpful. Each dismissed the suggested test of whether modification (living discreetly) would be reasonably tolerable (or not unduly harsh). As UNHCR had explained (§45), internal flight *"relates to the reasonableness of relocation and not to the disavowal of the protected status. In other words, it is relocation to [a] place where a person can live in society as who they are"*.

A10. Thirdly, the Court rejected the argument that the question was whether the experienced-modification was or was not *"reasonably-tolerable"*. This was the test which the Court of Appeal had framed and applied: see Lord Rodger at §§47-49. The Court found that much was wrong with this approach. For one thing, it was an inappropriate attempt to focus on 'secondary' persecution: see §7(1) above. For another, it involved attempting to draw an inapt parallel with 'internal flight': see §7(2) above. It was fundamentally unsound, because it ignored the underlying rationale of the Convention (§6(3) above): it being unacceptable in principle to deny international protection on the basis of the individual denying or surrendering the very protected characteristic in relation to which they were to be able to live freely and openly without facing persecution: see §6(4)-(5) above.

A11. In relation to this point, there was a yet further vice. The Court was unpersuaded that there was an identifiable "standard". There was no ready "yardstick", but a suggested approach which was vague and necessarily difficult to apply. Lord Rodger said (at §80): *"a tribunal has no legitimate way of deciding whether an applicant could reasonably be expected to tolerate living discreetly and concealing his homosexuality indefinitely for fear of persecution. Where would the tribunal find the yardstick to measure the level of suffering which a gay man – far less, the particular applicant – would find reasonably tolerable?"*. Sir John Dyson agreed (at §122): *"I do not understand by what yardstick the AIT measured the tolerability of these limitations [of living discreetly] and concluded that they were reasonably tolerable"*.