‘Put Your Hands Up (If You Feel Love)’

S Chelvan

Yes, this is the title to the third track of Kylie’s 2010 Aphrodite album. Yes, my favourite cocktail *du jour* at Balans, in Old Compton Street, is the Porn Star Martini (martini flavoured with vanilla and passion fruit juice served with a shot of champagne). And, yes, I do have my coterie of female friends (aka ‘Fag Hags’) who are assembled to discuss the joys (and faults) of the male of the species. So, on the afternoon of 7 July 2010, with 100 other activists at the University of Greenwich’s conference on Lesbian, Gay, Bisexual, Trans and Intersex (“LGBTI”) asylum, entitled LGBTI Asylum: A Double Jeopardy?, I laughed with joy, as did everyone else, when I shared with the delegates Lord Rodger’s comments on gay men being entitled to go to a Kylie concert, drink exotically coloured cocktails, and discuss ‘boys’ with their straight female mates. The inability of a straight man to ‘indulge openly in the mild flirtations which are an enjoyable part of heterosexual life’ [§ 77], provided the comparator, and an illustration of why the jurisprudence surrounding the ‘reasonably tolerable’ discretion test, which resulted in LGB asylum seekers being returned to their home countries to live a life of perpetual lies was so fundamentally flawed [§ 78]:

‘What is protected is the applicant’s right to live freely and openly as a gay man. That involves a wide spectrum of conduct, going well beyond conduct designed to attract sexual partners and maintain relationships with them. To illustrate the point with trivial stereotypical examples from British society: just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates. Mutatis mutandis – and in many cases the adaptations would obviously be great – the same must apply to other societies. In other words, 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.’

As US lawyers must have felt in the Summer of 2003, when their Supreme Court struck down anti-sodomy laws in Lawrence and Grant v Texas, our Supreme Court’s decision in *Hj (Iran)* and...
HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31,⁵ marked a phenomenal day, not just for LGBTI asylum law, but also for asylum law, LGBTI rights, and British justice! This article provides firstly, an insight into the legal history behind the Supreme Court’s decision, secondly, an analysis of the decision, and finally, forecasts the effect of the reasoning for the next few months, if not years, to come.

Since the 1999 decision of the House of Lords in Shah and Islam,⁷ the UK has recognised that ‘homosexuals’ form a Particular Social Group, and therefore come under the protection of the 1951 Refugee Convention. This corrected a historical wrong, for gay men were sent to the same gas chambers which exterminated the Jews. However, the framers of the Convention did not envisage homosexuals to be protected by this Treaty⁸. The fact that the Convention is regarded as a ‘living instrument’ is so vital, as it corrects what is so obviously wrong, and protects our most vulnerable.

Following Shah, the 1999 Court of Appeal in Jain⁹ constructed a continuum on which claims based on homosexuality could be determined. At the ‘free’ end, a homosexual could live freely without fear of harm and therefore was not a refugee (for example Victor in Vancouver).¹⁰ At the ‘persecutory’ end there was evidence of arrest, detention, and possibly execution (Tahir in Tehran), and therefore an individual was definitely a refugee. The role of the UK Courts is to assess the background country material, in light of the evidence of the individual, and place the individual nearer either the ‘persecutory’ or the ‘free’ end to determine whether they are a refugee. The effect of Jain was that the court’s understanding of the lives of gay men resulted in a purely ‘conduct driven approach’ reducing their lives to the engagement of the sexual act (referred to by some as ‘buggery’) in the so-called ‘privacy’ of the bedroom. Lesbians were not even referred to, as the analysis drew upon earlier Strasbourg jurisprudence, which was purely based on criminalisation of (male) same-sex conduct.¹¹ Having been involved in such claims for nearly a decade, I have witnessed some horrifyingly ignorant decision-making which has reflected a purely conduct driven enquiry regarding what is expected in a ‘civilised society’. This results in a complete lack of engagement with expression of identity, outside the bedroom, and outside the home.

In 2003, the High Court of Australia, in the appeals of 2 Bangladeshi gay men (Appellants S395 and S396/2002),¹² castigated the lower Refugee Review Tribunal, who on examining the country background evidence which did show risk, held that the two men could go back and be (voluntarily) discrete. The majority of the Court held that this ignored why the two men

---

5  [2010] 3 WLR 386.
6  Whilst the Supreme Court did not address asylum claims based on gender identity, it would be inconceivable that the guidelines would not also apply to Trans or Intersex claims. The Tribunal was expected in 2011 to substantively consider guidelines for gender identity asylum claims (AB (Pakistan)), however, after 3 years of litigation, the Secretary of State granted AB, a trans man from Pakistan, refugee status on 22 February 2011. There are only two reported cases on gender identity asylum claims: AK (Iran) v Secretary of State for the Home Department [2008] EWCA Civ 941 and Rahimi v. Secretary of State for the Home Department [2006] EWCA Civ 267. Both Court of Appeal cases reveal a lack of understanding of gender identity (use of male pro-noun for a self-identified trans woman in AK (Iran) and failure to appreciate that state provision of surgical procedures did not, in itself, indicate the absence of persecution”.
7  Islam v SSHD and R v IAT ex p Shah [1999] 2 A.C. 629; 2 WLR 1015 (as per Lord Steyn).
8  Lord Hope at § 2 of HJ and HT refers to the ‘manifest nonsense’ of leaders of the High Contracting Parties believing that homosexuality ‘did not exist’.  
9  Jain v SSHD [2000] Imm AR 76 (Judgment 6 October 1999).
10  Lesbians are invisible at this stage, hence my deliberate use of the male gender in the examples.
would be discrete on return. In the passage, which would later form the development of UK jurisprudence on the point, Justices Kirby and McHugh reasoned [§ 40]:

‘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.’

In November 2004, the Court of Appeal in Z\(^1\) provided guidance to the domestic Courts on the effect of S395, the Australian case, on asylum claims based on sexual identity. Drawing on earlier cases which involved expression of political opinion (Danian)\(^14\) and religious proselytizing (Iftikhar Ahmed)\(^15\) the Court expressly ruled out forcing an individual to modify their behaviour. This would not respect the Court’s guidance in Ahmed that even conduct based on bad-faith results in refugee status where it can be shown that such conduct will lead to a real risk of persecution on return. An earlier lower court decision by Nolan J in Jonah\(^16\) (trade union activist from Ghana) applauded Counsel (Mr Blake as he then was)\(^17\) for not advancing a submission made by a Mr Drabu before the lower Tribunal, that an inability to express a political opinion to avoid persecution should entitle an individual to asylum. Z failed in his appeal, for there was no evidence on why he had previously been discreet in Zimbabwe. In November 2005, when addressing the claim of a lesbian from Ethiopia (Amare)\(^18\) the Court of Appeal disapproved of a ‘core right’ to be gay, warning that such an approach went beyond what the signatory countries to the Convention had consented to. In January 2006, in RG (Colombia)\(^19\), the Court of Appeal dismissed the claim of a gay man from Colombia, on the basis that his 13 years of discretion in the past resulted in an ability to evade the (accepted) real risk from vigilante death squads. RG had not established that his fear of the death squads was the primary fear, and even though there was psychiatric evidence that he would suffer a mental breakdown on return due to concealment, did not mean that the Tribunal had erred in law.\(^20\)

The Court of Appeal, in July 2006, in J\(^21\), held that the legal test was whether expected (voluntary) discretion was ‘reasonably tolerable’, drawing on the reasoning of Justices Gummow and Hayne in S395 with respect to matters ‘related to, or informed by their sexuality’. Maurice Kay LJ held that this was something ‘the Tribunal must ask themselves’. The effect of the ‘reasonably tolerable’ test was that the burden was on the individual to show that such discretion was not “reasonably” tolerable. In XY (Iran)\(^22\) (2008) Counsel referred to an inability to have sex out of the confines of the public bathhouses in Iran. Unsurprisingly, the Court of Appeal did not accept that this would constitute a life which would not be reasonably

---

17 The Hon Mr Justice Blake, President of the Upper Tribunal (Immigration and Asylum Chamber).
19 RG (Colombia) v SSHD [2006] EWCA Civ 57; [2006] Imm AR 297. Currently before Upper Tribunal following successful fresh claim litigation.
20 It is important to note that in the skeleton arguments to the Supreme Court, Counsel for HJ (Iran) referred to the Court of Appeal’s reasoning in RG (Colombia) to indicate ‘a troubling case’ § 61 (skeleton argument dated 12 April 2010).
21 J v SSHD [2006] EWCA Civ 1238; [2007] Imm AR 73.
22 XY (Iran) v SSHD [2008] EWCA Civ 911.
tolerable. In *HT (Cameroon)*, the Court of Appeal in March 2009, found that even though *HT* had been persecuted in the past, with the mob beating and kicking him, and trying to cut off his penis with a knife (the police when called on joined in on the beating leaving *HT* hospitalised for two months), he had not provided evidence on why discretion on relocation would not be reasonably tolerable. This lacuna in his evidence meant he was considered able to return to Cameroon. *HJ (Iran)* conjoined with *HT* in the Court of Appeal, had been found by the Tribunal to have held barbeques with his boyfriend in his back garden in Tehran, without difficulties. His ability to form relationships through work colleagues was another indicator that his ‘life’ in Iran, some seven years earlier, had not entailed harm (bar earlier problems when at school), and therefore return, even in the knowledge of the risk, would be ‘reasonably tolerable’. The March 2009 Court of Appeal also introduced ‘cultural relativism’ to the ‘discretion’ test, whereby the social and religious norms of a country should also be considered when determining whether discretion was ‘reasonably tolerable’ (see § 32). These ‘special tests’ for lesbian and gay asylum seekers resulted in the UK Lesbian and Gay Immigration Group, in their April 2010 report ‘Failing the Grade’, finding a higher refusal rate by the Home Office for lesbian and gay men, 98 to 99%, compared to 73% for other claims. Stonewall, in May 2010, referred to the implementation of such tests in the asylum system as leading to ‘systematic ignorance’, raising ‘deeply uncomfortable questions about our own society’.

It was painfully obvious to the Supreme Court in *HJ and HT* that the test of whether discretion is ‘reasonably tolerable’ is intrinsically difficult to measure, and fundamentally flawed. No straight person would accept such discretion, which was in effect, for a lifetime. Lord Rodger held that such a test undermines the very rationale of the Convention which protects an ability to live ‘openly and freely’, and to form relationships, without fear of persecution. Where the home state does not protect, then the international community steps in to provide surrogate protection (*Horvath* applied). The Secretary of State’s submission that even Anne Frank would not be a refugee, if she presented herself to a UK court, and having escaped the confines of the attic, failed to establish that her life in the attic had reached the high threshold of persecution, was held by the Court to be ‘absurd and unreal’.

23 *HT (Cameroon) v SSHD* [2009] EWCA Civ 172; [2009] Imm AR 600. See also *HT (Cameroon) v SSHD* [2008] EWCA Civ 1288 (permission granted on merits, even though application is 3 months out-of-time) and *HT (Cameroon) v SSHD* [2008] EWCA Civ 1508 (jurisdiction point, First Tribunal hearing in Glasgow, Reconsideration hearing by video-link, Senior Immigration Judge sitting in Field House in London, whilst his lawyers made submissions in Scotland, ‘appeal’ pursuant to s 103B (5) of the Nationality, Immigration and Asylum Act 2002 (as amended) results in a right of appeal to the Court of Appeal in England and Wales *DK (Serbia) and ors v SSHD* [2006] EWCA Civ 1747; [2008] 1 WLR 1246 applied).

24 On appeal from *HJ (homosexuality: Reasonably tolerating living discreetly) Iran* [2008] UKAIT 00044. Maurice Kay LJ, who in his lead judgment in *J* provided the ‘reasonable tolerability’ test held, in granting permission in September 2008, that the ‘Tribunal had misapplied the test. He also gave permission in *AM (Syria)* on the papers on the same point, finding that conduct was influenced by his “respect for the law” where the evidence showed criminal sanctions for consensual adult same-sex conduct. The appeal was consented out by the SSHD within 14 days of the Court of Appeal litigation. *AM* appeal on asylum/article 3 grounds allowed on remittal to Tribunal (May 2010).


27 §§ 75 to 76.

28 § 53.

29 *Horvath v SSHD* [2001] 1 AC 489.

30 § 107.

31 § 75.
Additionally, internal relocation will not reduce harm, as it negates a recognition that an individual may not be prepared to conceal (to lie) about who she or he is.\textsuperscript{32} This drew upon the 2005 Court of Appeal decision in \textit{Hysi}\textsuperscript{33} (mixed Roma-Albanian man from Kosovo) where it was found that being required to lie about an individual’s racial origins, was not acceptable. The lower court’s ‘cultural relativism’ test, if ‘reasonably tolerable’ discretion had survived, was held by Sir John Dyson SC to be wrong, as the standards to be applied are are ‘objective human rights standards’, and not the ‘social mores of the home country’, as expressed the Court of Appeal.\textsuperscript{34}

The Court expressed in clear language, that the correct test (see guidelines at § 82) involves firstly making a finding that an individual is gay, lesbian or bisexual, or will be perceived to be. This importantly recognises the risk to those who do not live what I term a ‘heterosexual narrative’, ie living, or being perceived to live, a straight life, by engaging in a socially expected heterosexual gender sex role.\textsuperscript{35} Secondly, an assessment will be required of what would occur to a gay, lesbian, or bisexual person, if they lived ‘openly and freely’ in the country of origin. If, as a result of living openly, there would be persecution, then the fear is well-founded. Thirdly, if it is found that they will live ‘openly’ and consequently be subjected to a real risk of serious harm, then they are entitled to refugee status. Nevertheless, if, on the other hand, they are discrete, due to this fear of persecution, then they are also a refugee. The court realised that the number of gay martyrs will be small, and the human condition results in the majority being discrete due to such fear. If the \textit{only} reason for being discrete is family or social disapproval, then the individual is not entitled to refugee status. This does not ignore the many cases of honour killing as a result of family disapproval, for that in itself will also result in a fear of persecution. The Court importantly recognises that there can be a multitude of reasons for fearing return, but unlike \textit{RG (Colombia)}, fear of persecution does not have to be the ‘primary’ fear. Persecution requires attainment of a ‘high threshold’, and, contrary to a Migration Watch statement that anyone from a country where homosexuality is criminalised will be able to claim asylum,\textsuperscript{36} the Court of Appeal told this Counsel in November 2009, that (un-enforced) criminal legislation was not enough (\textit{JM (Uganda) and OO (Sudan)}).\textsuperscript{37}

The effect of \textit{HJ} and \textit{HT} will be a shift away from discretion onto establishing that an individual is (or is perceived to be) lesbian, gay or bisexual (LGB). Contrary to the argument advanced by the UK Presenting Officer in an unreported 2007 determination on a gay man from Iran in which I was instructed, this cannot be proved by medical evidence.\textsuperscript{38} The days of the ‘virginity’ tests to South Asian brides are fortunately past. No ‘medical examination’ can

\begin{enumerate}
\item \textsuperscript{32} § 21.
\item \textsuperscript{33} \textit{Hysi v SSHD} [2005] EWCA Civ 711; [2005] INLR 602.
\item \textsuperscript{34} § 129.
\item \textsuperscript{35} See for further analysis on this point ‘\textit{SB (Uganda)} – Case comment’ (2010) Vol 24, No 2 IANL 191–198.
\item \textsuperscript{36} See ‘Harry Mitchell QC: Briefing Paper 8.41: Homosexuals, Asylum and the Supreme Court’ (10 July 2010) http://www.migrationwatchuk.org/dynPdf/briefingPaper_8.41_193_20100711.pdf (last accessed 13 February 2011). The paper ignores the need to establish persecution, and therefore the analysis that where a ‘country’s political and social system falls short of the degree of openness enjoyed by the population of the United Kingdom, then he is entitled to asylum here’, where a gay man refuses to live discreetly, is plainly wrong.
\item \textsuperscript{37} \textit{JM (Uganda) and OO (Sudan) v SSHD} [2009] EWCA Civ 1432; [2010] All ER (D) 17 (Jun).
\item \textsuperscript{38} In this hearing the appellant gave evidence that he was passive in his sex role, to which the Presenting Officer questioned why there was no medical evidence to prove this, ie a rectal examination report. The Immigration Judge in Newport, Wales, held that the question was admissible.
\end{enumerate}
prove sexual identity.39 Sexual identity is ‘current’ identity (NR (Jamaica) (2009)), 40 and that there are episodes of heterosexuality does not determine that an individual is not LGB. To ignore this is to ignore the ‘double lives’ which even some of our own politicians have had to shed to be their true selves. What is common to the ‘narrative’ of LGB asylum seekers is the core narrative of ‘difference’. No-one wakes up gay or lesbian, and the journey undertaken will be specific to the individual.

There will also be an analysis of whether the fear is actually of persecution, or merely discrimination. Professor Nicole LaViolette, from the University of Ottawa, highlighted the barriers to LGB asylum seekers in Canada to the delegates at the July 2010 Greenwich conference. This provided new dangers for which we must all be prepared.

Language is vitally important, and the fact that the Court referred to ‘gay men’, ‘lesbians’ and for the first-time in a higher court decision ‘bisexuals’,41 was reflected in HT’s legal team expressing in written submissions that the term ‘homosexual’ was no longer acceptable.42 The use of these positive identity terms marks a clear shift in correcting a historical wrong where lesbian43 and bisexual claimants were invisible, in addition to the consignment of gay men to a purely sexual deviant role. This should, at last, end references to ‘buggery’ and ‘sodomy’, in connection with ‘(male) homosexuals’, and associated with the ‘conduct’ approach. The fact that a 2000 Tribunal referred in a reported decision to ‘sodomites’,44 and a 2010 Tribunal refers to the act of ‘buggery’ (unreported), should be seen as vulgar, completely wrong, and furthermore, unlawful. Further, and more importantly, some 40 years after the Stonewall riots in July 1969, which marked the birth of the modern Gay and Lesbian Liberation Movement, the proper language transports the decision maker out of the bedroom, and into the ‘outside world’, a sphere which straight people inhabit without having to lie to everyone they meet due to fear and recognises the need, if not a core right, to be who one is as a human being and to express this in ways which are not confined to the sexual act. In fact, the Supreme Court did not rule out a ‘core entitlement/human rights’ approach (flowing from jurisprudence from New Zealand), but left this to another day.45 This questions the continued applicability of the 2005 reasoning in Amare,46 where Laws LJ rejected a human rights approach to persecution, as going beyond what is agreed through current international consensus of the contracting parties to the Refugee Convention. Since Amare, the Strasbourg Court in Schalk and Kopf v Austria on

---

39 Other examples of cruel, inhuman or degrading forms of fact-finding, which would breach article 3 of the European Convention on Human Rights, include phallometry, a method used by the Czech authorities in attaching electrodes to the penis to measure sexual arousal in those claiming to be gay men (decision of the German administrative court, 7 September 2009). Refusal to comply with such testing resulted in refusal of asylum by the Czech authorities. Vaginal photoplethysmography is the method used to test lesbian asylum seekers. See for critique of such procedures in refugee determination of gay and lesbian asylum seekers ‘Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum and Refugee Status Proceedings’ (ORAM – Organisation for Refugee, Asylum & Migration, February 2011) http://www.oraminternational.org/images/stories/PDFs/testing_sexual_orientation_feb_2011_download.pdf (last accessed 8 March 2011).


41 § 76.

42 Inserted in footnote 1 of the skeleton argument filed on behalf of HT was the following ‘The word “gay” is preferred to the word “homosexual” for much the same reasons as the word “black” is preferred to the word “negro” for descriptive purposes of a particular sexual orientation as for a particular race or ethnicity.’ (skeleton argument dated 24 March 2010).

43 See November 2008 ‘UNHCR Guidance Note on Claims For Refugee Status Under the 1951 Convention Relating To Sexual Orientation and Gender Identity’. Following a roundtable discussion at the UNHCR Headquarters in Geneva from 30 September to 1 October 2010, it was agreed that the Guidance Note will be updated.

44 Z v SSHD (01TH02634) (8 November 2001).

45 § 72.

46 Amare v SSHD [2005] EWCA Civ 1600; [2006] Imm AR 217.
24 June 2010, have accepted that same-sex relationships at last come under the protection of article 8 (family life), if not article 12 (right to marry), recognising an international shift and applying the plain simple notion of ‘equality’, step by step. The Supreme Court has taken this process a stage further in terms of the international refugee jurisprudence. Professor Jenni Millbank, from University of Technology Sydney, cited with approval by Lord Walker in HJ and HT [§ 92], sees our court’s decision as being ‘streets ahead’ of S395. The author agrees with this view. The case corrected the earlier domestic interpretation of paragraph 40 of S395’s reference to ‘reasonable tolerability’, by applying it to what does, or does not amount to persecution, rather than the intensity or duration linked to the avoidance of such harm [Lord Hope § 29]. It also went beyond S395, as highlighted by the difference in the Supreme Court’s use of language (gay, lesbian and bisexual), unanimity (compared to a 4:3 majority) and wider application to refugee law. The Supreme Court at § 10 of the judgment accepted that all Convention reasons have equal parity (as per Fornah). Consequently, the Court’s reasoning must have equal applicability to all asylum claims. The Court of Appeal on 30 July 2010, in TM (Zimbabwe) and ors, referred to HJ and HT in an asylum claim based on having to profess a political opinion which was not an individual’s own (demonstrating ZANU-PF loyalty to the militia), to evade persecution. Elias LJ held, on a reading of Sir John Dyson’s reasoning in HJ [§ 115], that there was a distinction between claims based on immutable characteristics such as sexual identity and race and claims based on political opinion or religious grounds, where the activity involved is only marginal and does not strike at the core of their identity (ie having to lie about a political affiliation where the individual has no political affiliation only involves a ‘marginal’ act) [§ 39 to 42]. The reasoning in TM ignores the findings of both Lord Rodger and Sir John Dyson SC in HJ that the ‘core rights’ approach, enunciated by Rodger Haines QC in New Zealand Refugee Authority decision in Refugee Appeal No 74665/03, provided authority that a LGB person cannot be denied asylum on the basis that they can take effective steps ‘by suppressing his sexual identity, to avoid the harm which would otherwise threaten him’ [§ 72 as per Lord Rodger]. Lord Rodger’s reference to activities which are marginal, such as taking part in a gay rights parade did not apply to the cases before the Supreme Court. Consequently, the Court’s application in TM of the ‘core rights approach’ was fundamentally flawed, as this did not follow the Supreme Court’s ultimate guidance on how their reasoning, expressed in Lord Rodger’s guidelines at paragraph 82, was independent from that approach.

Revisiting this point, the Court of Appeal in RT (Zimbabwe) and ors, in November 2010, adopted a different approach and accepted that [§ 37 as per Carnworth LJ]:

48 ‘Great result in HJ – and amazing to see the lords say not only “gay” but “straight” too. Could have done without the Kylie reference but all in all such a good judgment, streets ahead of s395.’ E-mail communication with Jenni Millbank, 14 July 2010. On remittal to the Australian Refugee Review Tribunal, the Tribunal refused to accept that Appellants S395 and S396 were in fact gay, as one of the appellants refused to answer whether he and his partner used a lubricant when having sex in the morning. The question by the Tribunal member was prefaced with ‘Now, you may not wish to give the answer to this question …’. The Federal Court of Australia held that the decision of the Tribunal was not made in good faith and remitted the appeal to a fourth hearing (NAOX v Minister for Immigration and Citizenship [2009] FCA 1056 (18 September 2009) Spender J)). This accords with Millbank’s analysis of the shift in the case law in the Australian context (see From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom (2009) Vol 13, Nos 2–3, The International Journal of Human Rights 391–414).
50 TM (Zimbabwe) and ors v SSHD [2010] EWCA Civ 916. The reasoning is obiter (non-binding) and related to the core rights approach which is part of the New Zealand model which was not determined by the Supreme Court.
51 [2005] INLR 68.
52 [2010] EWCA Civ 1285. The SSHD is currently seeking leave to appeal through petitioning the Supreme Court.
‘The “core” of the protected right is the right not to be persecuted for holding political views which they do not have. There is nothing “marginal” about the risk of being stopped by militia and persecuted because of that. If they are forced to lie about their absence of political beliefs, solely in order to avoid persecution, that seems to us to be covered by the HJ(Iran) principle, and does not defeat their claims to asylum.’

The appeals in RT were either allowed, remitted back to the Upper Tribunal to re-determine in light of HJ, or due to evidence which showed an ability to demonstrate Zanu-PF loyalty which was not influenced by persecution, dismissed.\(^{53}\) RT clearly extends the scope of HJ to political opinion asylum claims.

In R (on the application of EP)\(^{54}\) the extension of the scope to a claim based on Christian conversion was rejected, on the basis that the claimant had primarily failed to prove genuine conversion in circumstances which included joining a church and being baptized within 3 weeks following the rejection of their mother’s asylum appeal [§ 21]. The SSHD’s reliance on a difference between risk to ‘open’ and clandestine converts was not tested due to this evidential difficulty. The extension of the reasoning in HJ to religion, nationality and race,\(^{55}\) will therefore have to wait for another day.

In the arena of LGBTI rights, this decision marks an important shift from the earlier differently constituted House of Lords decision in M v SSWP (2006),\(^{56}\) which recognised a cautious legislative approach in the light of developing social attitudes. The language in HJ and HT illustrates how quickly the Justices recognize that British society has ‘caught up’. Lord Hope highlighted the pledge of British government to resolve ‘one of the most demanding social issues of our time’ [§ 3].\(^{57}\) Such hope should not be misplaced. The final day of the substantive hearing on 12 May coincided with the start of the Conservative-Liberal Democrat coalition. The coalition’s Equalities Manifesto\(^{58}\) committed the new government to stop deportation where there is a ‘proven risk of imprisonment, torture, or execution’. This pre-HJ commitment reflected nothing more than what had been established 11 years earlier in Shah and then Jain, but does indicate a pro-active approach.\(^{59}\) The Home Secretary’s announcement on the day of the handing down of the judgment that she welcomed the Supreme Court’s decision is to be applauded. Following this announcement, internal guidance was provided to UKBA in order to deal with applying the HJ guidelines, where it was no longer acceptable to

---

53 See also JM (Zimbabwe) v SSHD [2010] EWCA Civ 1555 (3 December 2010) (application for permission granted on similar terms).
55 It is arguable that the Supreme Court’s reference at § 21 to Hysi v SSHD [2005] EWCA Civ 711; [2005] INLR 602 (mixed Roma-Albanian from Kosovo with no physical characteristics which would reveal mixed ethnicity) would strengthen the submission that there is existing jurisprudence to apply HJ to asylum claims based on race. On remittal, the 2006 Tribunal held ‘there is the real risk that he will become suspected and almost inevitably found out that he is mixed ethnicity’ (Immigration Judge Davey) (determination promulgated on 4 April 2006 – E-mail communication with Alison Hunter, Hysi’s solicitor, Wesley Gryk Solicitors LLP, 20 January 2009).
57 This has led to negative tabloid comment, see Quentin Letts ‘Bowler Hats Ready! FO’s on the March’ Daily Mail, 4 March 2011.
58 20 May 2010.
59 No ‘new approach’ to sexual identity asylum claims was communicated to the Supreme Court, by the SSHD, between the last day of the hearing and the handing down of the judgment, even in light of representations being made following the publication of the Equalities Manifesto.
tell LGB individuals that discretion would be reasonably tolerable. On 6 October 2010, a new Asylum Instruction on ‘Sexual Orientation and Gender Identity in the Asylum Claim’ was published. In my view, this guidance, rightly heralded as a long-awaited breakthrough in establishing a free-standing LGBT UKBA guidance note, is only a first step. The UK Lesbian and Gay Immigration Group is one organization which has been at the centre of assisting UKBA in developing and delivering training to its staff. Immigration Judges are also receiving training on how to apply the guidelines to asylum claims based on all Convention reasons.

The Immigration Law Practitioners’ Association challenged the lack of pro-active approach by UKBA in identifying potential claims. Baroness Neville-Jones’ earlier undertaking to Lord Avebury, in July 2010, that all non-exhausted appeals will be reviewed, did not address individuals who were about to be removed, or had their appeal rights exhausted but were not aware of the new guidance. In a clear example of her commitment to compliance with the judgment, the Home Secretary, in a letter to ILPA on 21 December 2010, undertook to ‘communicate through its key corporate partners, through partners in the communities most affected, and through the Agency’s website’ in order to address potential claims where the Supreme Court’s guidance would result in a grant of leave.

The new hurdles will include, but not be limited to (i) proving sexual identity; (ii) showing that what is feared objectively is persecution, and not merely discrimination, (iii) proving that an individual will live openly and be persecuted; or (iv) establishing that an individual will be voluntarily discreet and a reason for discretion is fear of persecution.

As Millbank (2009) records, after S395 in Australia, there was a significant increase in the proportion of asylum claims where claimed sexual identity was doubted or disbelieved. This trend is likely to be repeated in the UK following HJ and HT. With respect to the fourth hurdle, as Dauvergne and Millbank (2003) state, even an individual who wishes to hide, ‘who desperately wishes – and takes all possible steps – to remain closeted does, in fact, become increasingly “visible” with the passage of time’. The Upper Tribunal in SW (Jamaica) has been asked to address what I have previously referred to as the ‘perception test’, which addresses the lacuna in the fourth limb of Lord Rodger’s guidelines, that even where (voluntary) discretion is not due to a fear of well-founded persecution, the fact that an individual is not living a straight life, will identify them as “different” leading to LGB identification.
Following the judgment, HT was rightly granted refugee status in November 2010 by the Secretary of State, without the need for a further Tribunal hearing.\(^68\) HJ was granted Indefinite Leave to Remain in January 2010, prior to the May 2010 hearing, but is still waiting for the UKBA to review their decision to refuse asylum, whilst proceedings are stayed in the Upper Tribunal.\(^69\)

HJ and HT has not only advanced the debate but has set a standard for the future not only domestically but internationally. The gauntlet, testing the force of this judgment, has already been thrown at a European level. The European Court of Justice was charged with addressing the discretion/concealment point, as part of a reference for a preliminary ruling by the German Oberverwaltungsgericht (Upper Administrative Court). The scope of art 10(1)(d) of the 2004 Refugee Minimum Standards Directive\(^70\) definition of ‘reason for persecution’ and refugee protection of ‘homosexual activity’ was the first question.\(^71\) The Luxembourg Court was being asked as a second question whether ‘a homosexual person be told to live with his or her sexual orientation in his or her home country in secret and not allow it to become known to others?’ The third, and final question, surprisingly asked, taking into consideration it is posed by a German court, a ‘cultural relativism point’. The court asked when interpreting art 10(1)(d) ‘should homosexual activity be protected in the same way as for heterosexual activity’ in light of ‘specific prohibitions for the protection of public order and morals?’ I am of the firm view, following our Supreme Court’s reasoning, that it would have been difficult for the ECJ to give an answer which could be interpreted as pandering to silence, or discriminating against, LGB asylum seekers. In any event, any ECJ ruling on this point would not have eroded our Supreme Court’s judgment, as the UK is able to provide a ‘more favourable provision’ with respect to the interpretation of the Convention,\(^72\) and as the German authorities have now granted asylum to Mr Khavand,\(^73\) any reference is nullified. In DBN v the United Kingdom,\(^74\) the Strasbourg Court, has invited the United Kingdom to submit written observations by 24 March 2011, on the admissibility and merits of an application by a lesbian from Zimbabwe. The 2009 Tribunal accepted that DBN has been subjected to ill-treatment, which included curative rape and assaults on the basis of her sexual identity, but as these were acts by non-state agents, and such incidents were localised, the Immigration Judge held that she could relocate. The Statement of Facts and Questions cites HJ/HT, and asks the United Kingdom, whether there are substantial grounds for believing that the applicant, if returned to Zimbabwe, will face death or ill-

\(^{68}\) E-mail communication with Russell Blakely, HT’s solicitor, Wilson Solicitors LLP, 22 November 2010.

\(^{69}\) E-mail communication with Deirdre Sheahan, HJ’s solicitor, Paragon Law, 24 January 2011 – ‘23 December – response from T Sol stating UKBA rep not back until January but has been asked to provide a written response to my letter chasing the further decision’ (position unchanged as of 8 March).


\(^{71}\) Kashayar Khavand v Federal Republic of Germany (Case C-563/10) Reference for a preliminary ruling from the Oberverwaltungsgericht für das Land Nordhein-Westfalen (Germany) lodged on 1 December 2010.

\(^{72}\) § 8 of the preamble to Council Directive 2004/83/EC.

\(^{73}\) E-mail correspondence with Joël Le Deroff, Policy & Programmes officer, ILGA-Europe, 11 February 2011.

\(^{74}\) Application No 26550/10, submitted 10 May 2010. Notification communicated to DBN’s solicitor, Ana Gonzáles of Wilson Solicitors LLP, on 27 January 2011. The only reported decision by the Strasbourg Court is F v the United Kingdom (Application no 17341/03) (unreported) (Court admissibility decision, 22 June 2004), which found no systematic ill-treatment of gay men in Iran.
treatment, in breach of articles 2 and/or 3 of the ECHR? I am of the view that in applying Lord Rodger’s guidelines, where the country background material shows systematic ill-treatment of lesbians in Zimbabwe, and the applicant had been identified and subjected to ill-treatment, there can be no continued defence of the earlier Tribunal determination.

Juss (2011), refers to HJ as providing a ‘fundamental shift’ in asylum law. My view is that the Supreme Court has corrected a historical wrong. What appears to be a ‘levelling-up’ of sexual identity asylum claims to other Convention reasons grounds, reflects a recognition that the framers of the Refugee Convention were wrong to erase, and silence, those who were exterminated in the gas chambers and wore the Pink Triangle, rather than the Star of David, as their badge of identity. As the Justices recognised during the May 2010 hearing, their decision will be referred to internationally, and looked to for guidance. However, HJ/HT should not be seen as a white, Global North miracle. The Delhi High Court decision in Naz Foundation, which struck down s 377 of the Indian Penal Code’s anti-sodomy provision in July 2009, signals what Shah (2010) reflects as a celebration of the ‘inclusiveness and equality’ LGBTIs should enjoy. So from Newport to Nairobi, Sheldon Court to Sydney, may every straight, lesbian, gay, bisexual, trans or intersex person, asylum seeker or not, raise our hands up, for we all feel love!

S Chelvan
Barrister, No5 Chambers
PhD Candidate in Law, King’s College London.

---

75 It could be argued that there is a difference between a Refugee Convention approach to ‘threat of harm’, compared to an ECHR breach. In light of the applicant’s past narrative of actual harm, such a discussion would be, in the view of the author, academic. The risk to those who cannot demonstrate loyalty to Zanu-PF is also raised (applying the UK Country Guidance determination RN (Returnees) Zimbabwe CG [2008] UKAIT 00083). There is additionally a second question relating to a flagrant breach of the applicant’s right to an art 8 ECHR private life, in light of EM(Lebanon) v Secretary of State for the Home Department [2008] UKHL 64; [2009] 1 AC 1198.

76 Professor Satvinder Juss ‘Implications for refugee law of the HJ (Iran) judgment on homosexuality as a ground for international protection’ (International Refugee Law lecture series, Institute of Advanced Legal Studies, 18 January 2011).

77 Naz Foundation v Government of NCT of Delhi and ors (WP(C) No 7455/2001) (Judgment 2 July 2009). Decision currently on appeal to the Supreme Court of India – hearing scheduled for 2 days from 19 April 2011. See also Supreme Court of Nepal judgment (Writ No 917 of the year 2064 BS (2007 AD) (Judgment 21 December 2007)) ‘The Blue Diamond Society case’.