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Homosexuals, Asylum and the Supreme Court

On 7 July 2010 the Supreme Court delivered judgments in a case with momentous implications for asylum law. The case reference is *HJ (Iran)* and *HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31. The importance of the case is reflected by the fact that both the Equality and Human Rights Commission of the United Kingdom and the United Nations High Commissioner for Refugees intervened to state their respective views. The judgments reversed the decisions of the Court of Appeal in the same case, reported at [2009] EWCA 172.

2 Both appellants in the case were homosexuals and sought asylum in the United Kingdom on the ground that they would face a risk of persecution because of their sexual orientation if they were returned to their home countries. In both Iran and Cameroon it is a criminal offence punishable by imprisonment and in the case of Iran by the death penalty for consenting adults to engage in homosexual acts. Entitlement to asylum is governed by the 1951 United Nations Convention on the Status of Refugees (the Asylum Convention), to which the United Kingdom is party. Persons applying for asylum must show a well-founded fear of persecution for one or other of several specified reasons, including "membership of a particular social group". It is now well established by case law that for this purpose homosexuals are a particular social group. This is further confirmed by a statutory instrument, The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006, No. 2525). Paragraph 6(d) of that instrument defines a social group in general terms and Paragraph 6(e) states:

(e) a particular social group might include a group based on a common characteristic of sexual orientation..."

3 The cases of both appellants started in the normal way in that their applications for asylum were considered and after examination refused by officials of the UK Border Agency. Appeals to the Asylum and Immigration Tribunal (AIT) (now replaced by the First Tier and Upper Tier Tribunals in the unified tribunal structure) were dismissed. Reconsideration of the appeal by a bench of three senior immigration judges resulted in a further dismissal. From the AIT there was an appeal to the Court of Appeal, which in March 2009 dismissed the appeal. The final appeal to the Supreme Court was heard in May 2010 by a bench of the Deputy President of the Supreme Court, Lord Hope, and four other justices. After rejection of their initial applications and dismissals of three successive appeals, the appellants succeeded at this final stage.

4 The Court of Appeal found that if the two appellants were returned to their respective home countries they would conceal their sexual orientation to avoid the risk of coming to the attention of the State authorities and thus of being persecuted. Neither of them had a well-founded fear of persecution and they were therefore not entitled to asylum. The Court interpreted the obligations

of the United Kingdom under the 1951 Convention as meaning that if a homosexual would conceal his orientation when returned to his home country, in order to avoid being persecuted, his situation could be regarded as reasonably tolerable and asylum should be refused.

5 In allowing the appeals the Supreme Court took a radically different view of the rights of homosexuals under the Asylum Convention. The following is taken from the Press summary issued by the Supreme Court and succinctly summarises the views on this fundamental aspect of the case as expressed by Lord Hope and Lord Rodger, who delivered the two main judgments:

"To compel a homosexual person to pretend that their sexuality does not exist, or that the behaviour by which it manifests itself can be suppressed, is to deny him his fundamental right to be who he is. Homosexuals are as much entitled to freedom of association with others of the same sexual orientation, and to freedom of self-expression in matters that affect their sexuality, as people who are straight."

This is put in colourful and inappropriately whimsical language in the judgment of Lord Rodger at paragraph 78:

"[W]hat is protected is the applicant's right to live freely and openly as a gay man. This 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,"

The facts

6 The Iranian, HJ, is 38, a practising homosexual in Iran and in the UK. He claimed asylum on arrival in December 2001. He had brief relationships with other men during military service. Later he had two other relationships during a 9 months period. He concealed his sexual orientation from all but his mother and brother and a small number of like minded people. He claimed to have become subject to the adverse attentions of the authorities in Iran.

7 HT, the appellant from Cameroon, is 35. In January 2007 he arrived at Gatwick to check in for a flight for Montreal and presented a false passport. On arrest he revealed his true identity and claimed asylum. In April 2007 he was convicted of possession of a false instrument and was sentenced to 12 months' imprisonment. In support of his asylum application HT said that he had had two homosexual relationships in Cameroon. The first was in 1997 and lasted two months. The second lasted three years from 2002 to 2005, when he and another man were seen by a neighbour kissing in his garden. Later HT was attacked on account of his homosexuality. Before the incident in the garden he had been discreet about his sexual orientation.

8 An asylum seeker is required to show that if he is returned to his own country there is a reasonable degree of likelihood that he will face persecution for one or other of the reasons listed in the Asylum Convention, in this case homosexuality as evidence of his being a member of a particular social group. The leading authority for this proposition is the House of Lords case of **Sivakumaran** [1988] AC 958. It is not sufficient to show e.g. that sexual relations between consenting adults of the same sex are a criminal offence in the country concerned. There needs also to be some evidence of the extent and degree of rigour with which the particular provision of the criminal law is enforced. Would the person in question have good ground to fear the possibility of arrest and prosecution for taking part in homosexual activity in his home country, or is there in practice no real danger provided that he behaves with discretion and does not seek to draw attention to the fact that he is a homosexual?

9 In the case of HJ there is ample material in evidence summarised by the AIT and quoted in the judgments of the Court of Appeal to support the conclusion that the test as set out in paragraph 8 was not met. He had lived in Iran as a gay man from age fifteen to age thirty one without being discovered and without suffering any adverse consequences or any serious detriment to his private and social life. In the course of proceedings he was asked why he had not left Iran earlier if he was worried about persecution and admitted that this was because nothing had happened to him. The AIT found that his sexual orientation was not known to the authorities when he left Iran and concluded: "Objectively we cannot see that the level of seriousness required for international protection is in this case reached." (Quoted in Court of Appeal judgment paragraph 20.)

10 HT was also a mature man when he arrived in the United Kingdom in 2007 at the age of 33. There is not so much material about his history as a homosexual as there is in the case of HJ, but it is apparent that he was a practising homosexual in Cameroon for some years and did not have any problems until he was seen kissing another man in his garden - but even then he did not have a problem with the authorities. The AIT concluded that a homosexual relationship carried on in private, as his had been, did not create a reasonable degree of likelihood of persecution. (Quoted in Court of Appeal judgments paragraph 37.)

11 It is apparent that in both these cases the conclusion of the UK Border Agency, the AIT and the Court of Appeal, in all cases after careful consideration of the evidence, was that the appellants had failed to show a well-founded fear of persecution. They had lived in their respective countries and practised as homosexuals for years without coming to the attention of the authorities. They had not flaunted their sexual orientation and had not stated in their evidence, so far as the record shows, that they had any desire to do so. In both cases they had lived discreetly and had not stated that it was frustrating for them so to live. It would have been possible to dismiss their appeals without considering the question whether they would need to live discreetly if returned to their respective home countries. However, that question was raised before the AIT and the Court of Appeal and had to be dealt with. But the Supreme Court turned what was in essence a subsidiary issue, not essential to the main decision needed, to the main issue of its judgments. The purpose of the Asylum Convention was and is to protect individuals against persecution by state authorities or by other bodies whose acts of persecution the state is unwilling or unable to prevent. But what the Supreme Court's decision protects is, in the words of Lord Rodger in the passage from his judgment quoted in paragraph 5 above, "the applicant's right to live freely and openly as a gay man". This is certainly very far from what the framers of the Asylum Convention ever intended.

12 Within living memory the commission of homosexual acts between consenting male adults

was a criminal offence in the United Kingdom and continued to be an offence for both sexes serving in the armed forces for some years after the offence was abolished by Parliament for the rest of society. To this day the question of whether homosexuals should be appointed as bishops remains a controversial issue for the Church of England. This is an aspect of our recent history to be borne in mind while appreciating that there is nowadays in society generally a welcome degree of openness and freedom about homosexuality. Politicians, journalists and others in public life can openly admit to being gay and need not fear any adverse consequences. But many if not most countries in the world are a long way from achieving a comparably happy state of affairs. It is understood that in some 80 countries the commission of homosexual acts is still a criminal offence. But the underlying assumption of the Supreme Court's judgment seems to be that if an asylum seeker professes himself unwilling to live discreetly as a homosexual in his home country and the evidence shows that that 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.

13 In paragraph 33 of the judgment of the Court of Appeal, the following quotation appears from the judgment of Lord Justice Laws, a highly respected authority on the law of immigration and asylum, in the case of ***Amare v. Secretary of State for the Home Department*** [2005] EWCA 1600:

"The Convention is not there to safeguard or protect potentially affected persons from having to live in regimes where purists' liberal values are less respected, even much less respected, than they are here. It is there to secure international protection to the extent agreed by the contracting states."

This important caveat as to the scope of the Convention has been ignored by the Supreme Court.

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