Trinity Term
[2010] UKSC 31
On appeal from: [2009] EWCA Civ 172

JUDGMENT

HJ (Iran) (FC) (Appellant) *v* Secretary of State for the Home Department (Respondent) and one other action

HT (Cameroon) (FC) (Appellant) *v* Secretary of State for the Home Department (Respondent) and one other action

before

Lord Hope, Deputy President
Lord Rodger
Lord Walker
Lord Collins
Sir John Dyson SCJ

JUDGMENT GIVEN ON

7 July 2010

Heard on 10, 11 and 12 May 2010

Appellant (HJ)
Raza Husain QC
Laura Dubinsky
(Instructed by Paragon Law)

Respondent
Charles Bourne
Jane Collier
(Instructed by Treasury Solicitor)

Appellant (HT)
Monica Carss-Frisk QC
Peter Jorro
(Instructed by Wilson & Co Solicitors)

Respondent
Charles Bourne
Paul Greatorex
(Instructed by Treasury Solicitor)

Interveners in both appeals

Intervener (Equality & Human Rights Commission)
Karon Monaghan QC
Jessica Simor
Helen Law
(Instructed by the Commission)

Intervener (United Nations High Commissioner for Refugees)
Michael Fordham QC
Naina Patel

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LORD HOPE

1. These appeals raise the question as to the test which is to be applied when considering whether a gay person who is claiming asylum under the Convention relating to the Status of Refugees 1951, as applied by the 1967 Protocol ("the Convention") has a well-founded fear of persecution in the country of his or her nationality based on membership of that particular social group.

2. The need for reliable guidance on this issue is growing day by day. Persecution for reasons of homosexuality was not perceived as a problem by the High Contracting Parties when the Convention was being drafted. For many years the risk of persecution in countries where it now exists seemed remote. It was the practice for leaders in these countries simply to insist that homosexuality did not exist. This was manifest nonsense, but at least it avoided the evil of persecution. More recently, fanned by misguided but vigorous religious doctrine, the situation has changed dramatically. The ultra-conservative interpretation of Islamic law that prevails in Iran is one example. The rampant homophobic teaching that right-wing evangelical Christian churches indulge in throughout much of Sub-Saharan Africa is another. The death penalty has just been proposed in Uganda for persons who engage in homosexual practices. Two gay men who had celebrated their relationship in a public engagement ceremony were recently sentenced to 14 years' imprisonment in Malawi. They were later pardoned in response to international pressure by President Mutharika, but he made it clear that he would not otherwise have done this as they had committed a crime against the country's culture, its religion and its laws. Objections to these developments have been greeted locally with derision and disbelief.

3. The fact is that a huge gulf has opened up in attitudes to and understanding of gay persons between societies on either side of the divide. It is one of the most demanding social issues of our time. Our own government has pledged to do what it can to resolve the problem, but it seems likely to grow and to remain with us for many years. In the meantime more and more gays and lesbians are likely to have to seek protection here, as protection is being denied to them by the state in their home countries. It is crucially important that they are provided with the protection that they are entitled to under the Convention – no more, if I may be permitted to coin a well known phrase, but certainly no less.

Background

4. The appellants are both gay men. HJ, who is 40 years old, is an Iranian. He claimed asylum on arrival in the United Kingdom on 17 December 2001. He practised homosexuality in Iran and has continued to do so in the United Kingdom. HT, who is 36 years old, is a citizen of Cameroon. He claimed asylum following his arrest at Gatwick on 19 January 2007. He had presented a false passport while in transit to Montreal. He too is a practising homosexual. Both appellants claim that they have a well-founded fear that they would be persecuted if they were to be returned to their home countries.

5. The Secretary of State for the Home Department ("the respondent") refused asylum in both cases. HJ's appeal against that decision was dismissed by the Asylum and Immigration Tribunal on 15 August 2005. On 26 July 2006 the Court of Appeal remitted his case to the Tribunal for reconsideration: *J v Secretary of State for the Home Department* [2006] EWCA Civ 1238, [2007] Imm AR 73. On 8 May 2008, following reconsideration, his appeal remained dismissed. HT's appeal to the Tribunal was dismissed on 29 October 2007. Reconsideration was ordered on 14 November 2007 on the ground that the Tribunal might have made an error of law in the test to be applied to a gay person seeking asylum. But on 5 June 2008 Senior Immigration Judge Warr held that the earlier determination was not flawed, and he did not proceed to a reconsideration of the evidence.

6. The appellants appealed against these decisions to the Court of Appeal. On 10 March 2009 the Court of Appeal (Pill and Keene LJJ and Sir Paul Kennedy) dismissed both appeals: [2009] EWCA Civ 172. The Secretary of State accepted that practising homosexuals are a particular social group for the purposes of article 1A of the Convention. The issue was how those who had a well-founded fear of persecution could be identified. It was said by counsel for the appellants to be whether it was an answer to a claim for refugee status for the applicant to be required to conceal his sexual identity in order to avoid harm of sufficient severity as to amount to persecution – the proposition being that to impose such a requirement was incompatible with the Convention. For the Secretary of State it was submitted that the issue always was whether the applicant could reasonably be expected to tolerate the need for discretion on return: para 7.

7. The Court of Appeal applied the test stated by Maurice Kay LJ in *J v Secretary of State for the Home Department* [2007] Imm AR 73, para 16, where he said that the tribunal would have to ask itself whether discretion was something that the applicant could reasonably be expected to tolerate, not only in the context of random sexual activity but in relation to matters following from, and relevant to, sexual identity in the wider sense. In HJ's case the Court of Appeal held that the Tribunal were entitled to conclude on the evidence that HJ could reasonably be

expected to tolerate conditions in Iran: [2009] EWCA Civ 172, para 31. In HT's case there was finding that he would be discreet on return to Cameroon. The question whether he could reasonably be expected to tolerate a life involving discretion was not raised. The Court of Appeal held that there were no facts on which a decision on that matter could be based but that the Tribunal were entitled to find that HT had not established that there was a real risk of persecution in the future: paras 44, 45.

8. In this court Mr Bourne for the Secretary of State submitted that the test of whether the appellants should have refugee status was correctly stated by the Court of Appeal in *J v Secretary of State for the Home Department* [2007] Imm AR 73, that it was correctly applied by the Tribunal in both cases and that the Court of Appeal was right to dismiss the appeals. Mr Husain QC for HJ said that the test as stated in *J v Secretary of State for the Home Department* is misconceived. He submitted that it is contrary to the ordinary meaning of the definition of "refugee" in the Convention, and the objects and purposes of the treaty, to deny a refugee's claim on the basis that he was required to suppress or surrender his protected identity to avoid the persecution that would ensue if that identity were to be disclosed. Miss Carss-Frisk QC for HT too disputed the test in *J's* case. She submitted that if the applicant could show that he had a well-founded fear of persecution he was entitled to refugee status. He should not be required to demonstrate that concealment of his identity was something that he could not reasonably be expected to tolerate. She also said that HT ought to succeed on the facts in any event because of what happened to him in Cameroon.

Background

9. Article 1A(2) of the Convention provides that a refugee is a person who

> "…owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country…"

Amongst the benefits that a person who satisfies that definition enjoys under the Convention is the prohibition of expulsion or return. Article 33(1) provides:

> "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion,

> nationality, membership of a particular social group or political opinion."

10. To a large extent the meaning of the definition in article 1A(2) is common ground. It treats membership of a particular social group as being in *pari materia* with the other Convention reasons for persecution: *Fornah v Secretary of State for the Home Department* [2006] UKHL 46, [2007] 1 AC 412, para 20, per Lord Bingham of Cornhill. There is no doubt that gay men and women may be considered to be a particular social group for this purpose: *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629, 643-644, per Lord Steyn. As Lord Rodger points out in para 42, regulation 6(1)(e) of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525) recognises as clearly as can be that a group based on a common characteristic of sexual orientation may be included in a particular social group that is in need of international protection.

11. The group is defined by the immutable characteristic of its members' sexual orientation or sexuality. This is a characteristic that may be revealed, to a greater or lesser degree, by the way the members of this group behave. In that sense, because it manifests itself in behaviour, it is less immediately visible than a person's race. But, unlike a person's religion or political opinion, it is incapable of being changed. To pretend that it does not exist, or that the behaviour by which it manifests itself can be suppressed, is to deny the members of this group their fundamental right to be what they are.

12. The Convention does not define "persecution". But it has been recognised that it is a strong word: *Sepet and Bulbul v Secretary of State for the Home Department* [2003] UKHL 15, [2002] 1 WLR 856, para 7, per Lord Bingham. Referring to the dictionary definitions which accord with common usage, Lord Bingham said 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. Article 9(1)(a) of the EC Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees ("the Qualification Directive") states that acts of persecution must

> "(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights … or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)."

In *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, para 40, McHugh and Kirby JJ said:

> "Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to state sponsored or condoned discrimination in social life and employment. 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."

13. To constitute persecution for the purposes of the Convention the harm must be state sponsored or state condoned. Family or social disapproval in which the state has no part lies outside its protection. As Professor J C Hathaway in *The Law of Refugee Status* (1991), p 112 has explained, "persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community." The Convention provides surrogate protection, which is activated only upon the failure of state protection. The failure of state protection is central to the whole system: *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 495. The question is whether the home state is unable or unwilling to discharge its duty to establish and operate a system for the protection against persecution of its own nationals.

14. The reference in the preamble to the Universal Declaration of Human Rights of 1948 shows that counteracting discrimination was a fundamental purpose of the Convention. Article 2 states:

> "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Lord Steyn emphasised this point in *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629, 639. He also drew attention to the first preamble to the Declaration, which proclaimed the inherent dignity and the equal and inalienable rights of all members of the human family. No mention is made of sexual orientation in the preamble or any of its articles, nor is sexual orientation mentioned in article 1A(2) of the Convention. But coupled with an increasing recognition of the rights of gay people since the early 1960s has come an appreciation of the fundamental importance of their not being discriminated against in any respect that affects their core identity as

homosexuals. They 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.

15. The guarantees in the Universal Declaration are fundamental to a proper understanding of the Convention. But the Convention itself has, as the references in para 12 show, a more limited purpose. It is not enough that members of a particular social group are being discriminated against. The contracting states did not undertake to protect them against discrimination judged according to the standards in their own countries. Persecution apart, the Convention was not directed to reforming the level of rights prevailing in the country of origin. Its purpose is to provide the protection that is not available in the country of nationality where there is a well-founded fear of persecution, not to guarantee to asylum-seekers when they are returned all the freedoms that are available in the country where they seek refuge. It does not guarantee universal human rights. So the conditions that prevail in the country in which asylum is sought have no part to play, as matter of legal obligation binding on all states parties to the Convention, in deciding whether the applicant is entitled to seek asylum in that country: *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426, paras 16, 46. As Laws LJ said in *Amare v Secretary of State for the Home Department* [2005] EWCA Civ 1600, [2006] Imm AR 217 para 31:

> "The Convention is not there to safeguard or protect potentially affected persons from having to live in regimes where pluralist 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."

16. Thus international protection is available only to those members of the particular social group who can show that they have a well-founded fear of being persecuted for reasons of their membership of it who, owing to that fear, are unwilling to avail themselves of the protection of their home country. Those who satisfy this test cannot be returned to the frontiers of a territory where their life or freedom would be threatened on account of their membership of that group: article 33(1). To be accorded this protection, however, the test that article 1A(2) sets out must first be satisfied. As Lord Bingham of Cornhill said in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, para 5, the words "owing to well-founded fear of being persecuted for reasons of … membership of a particular social group" in the definition of "refugee" express a causative condition which governs all that follows.

Well-founded fear: the causative condition

17. In situations such as those presented by these appeals the fact that members of the particular social group are persecuted may not be seriously in issue. In Iran, where the death penalty exists, persons have been hanged simply because they are gay. In Cameroon homosexuality is illegal and the sanctions for it include sentences of up to five years imprisonment. Although prosecutions are rare, homosexuals are liable to be denounced and subjected to acts of violence and harassment against which the state offers no protection. But the situation in the country of origin is only the beginning, not the end, of the inquiry. The Convention directs attention to the state of mind of the individual. It is the fear which that person has that must be examined and shown to be well-founded. In cases where the fear is of persecution for reasons of religion or political opinion, it may be necessary to examine the nature and consequences of any activity that the applicant claims he or she may wish to pursue if returned to the country of nationality. It will not be enough for the person merely to assert that persons who are of that religion or political opinion are liable to be persecuted. The question is, what will the applicant actually do, and does what he or she will in fact do justify the fear that is complained of?

18. In *Ahmed (Iftikhar) v Secretary of State for the Home Department*, [2000] INLR 1, 7-8 Simon Brown LJ said:

> "In all asylum claims there is ultimately a single question to be asked: is there a serious risk that on return the applicant will be persecuted for a Convention reason? … The critical question [is]: if returned, would the asylum seeker in fact act in the way he says he would and thereby suffer persecution? If he would, then, however unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, in my judgment he would be entitled to asylum."

Nobody has suggested that there is anything wrong with these observations, as far as they go, and I would respectfully endorse them. They contain two propositions which the Secretary of State in this case accepts, and which I do not think can be disputed. The first is that attention must be focused on what the applicant will actually do if he is returned to his country of nationality. The second is that the fact that he could take action to avoid persecution does not disentitle him from asylum if in fact he will not act in such a way as to avoid it. That is so even if to fail or to refuse to avoid it would be unreasonable. In *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, para 40, per McHugh and Kirby JJ said that persecution does not cease to be persecution for the purposes of the Convention because the harm can be avoided by taking avoiding action

within the country of origin. I am inclined to think that this proposition, as stated, expresses the point too broadly. But I would accept it as accurate if at the end there were added the words "which the applicant will in fact not take." Of course, I do not mean by this that persecution ceases to be persecution if those at risk of being persecuted can and do eliminate the harm by taking avoiding action. That is a different point, with which their Honours go on to deal later in the same paragraph. How to define the test for its application is the issue in this case: see paras 21 and 22.

19. It has been recognised, of course, that an applicant may be required to live in a place of relocation within his country of origin so long as it would not be unduly harsh for him to be required to do so: *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426. As Lord Bingham explained in para 7, the Convention does not expressly address the situation where, within his country of nationality a person has a well-founded fear of persecution at place A, where he lived, but not at place B, where he could reasonably be expected to relocate. But that situation may reasonably be said to be covered by the causative condition to which he referred in para 5. A person will be excluded from refugee status if under all the circumstances it would be reasonable to expect him to seek refuge in another part of the same country. Persons seeking refuge from the process known as ethnic cleansing, for example, may be refused asylum on the basis that there are other parts of the country of their nationality where they may live without being persecuted: see also *R (Yogathas) v Secretary of State for the Home Department* [2002] UKHL 36, [2003] 1 AC 920, para 40; the UNHCR Handbook, para 91.

20. Mr Bourne suggested that an analogy could be drawn between internal relocation, or internal flight as it is sometimes less happily called: see *R (Yogathas) v Secretary of State for the Home Department* [2003] 1 AC 920, para 6. Mr Husain submitted in his written case that applicants who are gay and who avoid persecution by a modification of their behaviour may be said on return to have taken internal flight within the self to avoid persecution. Mr Bourne submitted that any such analogy supported the respondent. The analogy, as he expressed it in his written case, was put this way. A person to whom geographical internal flight is available is not a refugee unless it would be unduly harsh to take such flight. So 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. Examples were referred to of situations that might demonstrate the logic of this approach. They were said to include situations where the applicant would be discreet, there would be no real risk that he would come to the attention of the authorities and suffer persecution and the consequences of his discretion were objectively reasonable for him to be expected to tolerate. He would have no well-founded fear of persecution and not be a refugee even if the reason why he would be discreet was because, or partly because, he feared persecution.

21. This submission takes me to the core of the issue between the parties and to the question whether the test in para 16 of *J v Secretary of State for the Home Department* [2007] Imm AR 73 stands up to examination. But I think that the suggested analogy with internal relocation can be dismissed at once as incompatible with the principles of the Convention. The objection to it is that it assumes that the applicant will be prepared to lie about and conceal his sexual orientation when he moves to the place of relocation. Unless he does this he will be no better off than he would be if he did not relocate at all. The misconception lies in the idea that he will be willing and able to make a fresh start when he moves to somewhere where he is not known. In *Hysi v Secretary of State for the Home Department* [2005] EWCA Civ 711, [2005] INLR 602 the Court of Appeal held that the tribunal had not assessed the consequences of expecting the applicant to lie and dissemble in the place of relocation about his ethnic origins. He would have to be a party to the long-term deliberate concealment of the truth, living in continuing fear that the truth would be discovered: para 37. There is no place, in countries such as Iran and Cameroon, to which a gay applicant could safely relocate without making fundamental changes to his behaviour which he cannot make simply because he is gay.

22. The submission that it is proper to examine the question whether it would be objectively reasonable for the applicant to be expected to tolerate some element of concealment – I would prefer not to use the word "discretion", as this euphemistic expression does not tell the whole truth – when he is returned to the country of his nationality cannot be dismissed so easily. Behaviour which reveals one's sexual orientation, whether one is gay or straight, varies from individual to individual. It occupies a wide spectrum, from people who are naturally reticent and have no particular desire to establish a sexual relationship with anybody to those who wish, for various reasons, to proclaim in public their sexual identity. Social and family disapproval of overt sexual behaviour of any kind, gay or straight, may weigh more heavily with some people than others. Concealment due to a well-founded fear of persecution is one thing. Concealment in reaction to family or social pressures is another. So one must ask why the applicant will conduct himself in this way. A carefully nuanced approach is called for, to separate out those who are truly in need of surrogate protection from those who are not.

The test in J's case

23. In *J v Secretary of State for the Home Department* [2007] Imm AR 73 the applicant was of Iranian nationality. The Asylum and Immigration Tribunal found that he was a practising homosexual, but that his relationship with his partner in Iran was discreet and that his homosexual practices there had never been such that his own homosexual activity was reasonably likely to result in adverse attention from the authorities. It was held that the tribunal had fallen into error by not asking why the applicant had acted discreetly, especially as the appellant said in his

witness statement that he was forced to hide his relationship and was not able to live openly with his partner as he wanted to do. The case was remitted to the tribunal for further reconsideration. In para 16 Maurice Kay LJ gave the following directions to the tribunal:

> "It will have to address questions that were not considered on the last occasion, including the reason why the appellant opted for 'discretion' before his departure from Iran and, by implication, would do so again on return. *It will have to ask itself whether 'discretion' is something that the appellant can reasonably be expected to tolerate*, not only in the context of random sexual activity but in relation to 'matters following from, and relevant to, sexual identity' in the wider sense recognised by the High Court of Australia (see the judgment of Gummow and Hayne JJ at para 83). This requires consideration of the fact that homosexuals living in a stable relationship will wish, as this appellant says, to live openly with each other and the 'discretion' which they may feel constrained to exercise as the price to pay for the avoidance of condign punishment will require suppression of many aspects of life that 'related to, or informed by, their sexuality' (ibid, para 81). This is not simply generalisation; it is dealt with in the appellant's evidence." [Emphasis added]

Buxton LJ, making the same point, said in para 20 that the applicant might have to abandon part of his sexual identity in circumstances where failure to do so exposed him to the extreme danger that the country guidance indicated:

> "The Tribunal may wish to consider whether the combination of those two circumstances has an effect on their decision as to whether the applicant *can be expected to tolerate* the situation he may find himself in when he returns to Iran." [Emphasis added]

24. The passages which I have italicised lie at the heart of the argument. For the Secretary of State, Mr Bourne submitted that there were two major questions that had to be addressed: (1) what will the situation be on return, and (2) in these circumstances is there a real risk of persecution? The inquiry in regard to the first question was directed to how the applicant will conduct himself and how others will react to this. He accepted that a finding that the applicant will in fact be discreet on return to the country of his nationality is not the end of the inquiry. The question that then had to be asked, he said, 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. As in the case of

internal flight, it was what he could not reasonably be expected to tolerate that amounted to persecution.

25. As the references to it in para 16 of *J v Secretary of State for the Home Department* [2007] Imm AR 73 indicate, the Court of Appeal in that case sought guidance from the decision of the High Court of Australia in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473. Among the passages from that judgment that are quoted is para 40, where (setting out the paragraph in full) McHugh and Kirby JJ said:

> "The purpose of the Convention is to protect the individuals of every country from persecution on the grounds identified in the Convention whenever their governments wish to inflict, or are powerless to prevent, that persecution. Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to state sponsored or condoned discrimination in social life and employment. *Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it.* But persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps – reasonable or otherwise – to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a 'particular social group' if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality." [Emphasis added]

It was the appearance in this paragraph of the sentence which I have italicised that led Maurice Kay LJ to use almost the same words when he was framing his directions in para 16. This can be seen from his quotation of it in para 11 of his judgment, where he said that it had been adopted in *Z v Secretary of State for the Home Department* [2005] Imm AR 75, para 12, *Amare v Secretary of State for the Home Department* [2006] Imm AR 217, para 27 and *RG (Colombia) v Secretary of State for the Home Department* [2006] EWCA Civ 57, [2006] Imm AR 297, para 16.

26. Para 40 of the judgment in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 is not entirely easy to follow. The Convention does not permit, or indeed envisage, applicants being returned to the countries of their nationality "on condition" that they take steps to avoid offending their persecutors. The use of the phrase "a condition of protection" seems to overlook the fact that it is the country in which asylum is sought that is being appealed to for protection, not the country of the applicant's nationality. But the flaw in the sentence in para 16 of *J v Secretary of State for the Home Department* [2007] Imm AR 73 to which the appellants take objection is indicated by the sentence that immediately follows it. It makes the point that persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. In para 50, which the Court of Appeal did not quote in *J's* case, McHugh and Kirby JJ said:

> "In so far as decisions in the Tribunal and the Federal Court contain statements that asylum seekers are required, or can be expected, to take reasonable steps to avoid persecutory harm, they are wrong in principle and should not be followed."

27. The same point was made with perhaps greater force by Gummow and Hayne JJ in para 82, where they said:

> "Saying that an applicant for protection would live 'discreetly' in the country of nationality may be an accurate description of the way in which that person would go about his or her daily life. To say that a decision-maker 'expects' that that person will live discreetly may also be accurate if it is read as a statement of what is thought likely to happen. But to say that an applicant for protection is 'expected' to live discreetly is both wrong and irrelevant to the task to be undertaken by the Tribunal if it is intended as a statement of what the applicant *must* do."

The references in the judgments of Maurice Kay and Buxton LJJ in *J v Secretary of State for the Home Department* [2007] Imm AR 73, paras 16 and 20 to what the applicant could be "expected" to do when he returned do not fit happily with the approach indicated in some parts of the judgment in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 which they said they were following.

28. The explanation for this may perhaps lie in para 10 of the judgment in *J's* case, where Maurice Kay LJ said:

> "In our jurisdiction Buxton LJ demonstrated in *Z v SSHD* [2005] Imm AR 75 that the approach of the High Court of Australia had in turn been influenced by English authority, particularly *Ahmed v SSHD* [2000] INLR 1. Having referred to the judgment of Simon Brown LJ in *Ahmed*, he said at para 16:
>
> > 'It necessarily follows from that analysis that a person cannot be refused asylum on the basis that he could avoid otherwise persecutory conduct by modifying the behaviour that he would otherwise engage in, at least if that modification was sufficiently significant to place him in a situation of persecution.'"

In para 11 Maurice Kay LJ added this comment:

> "That brief extract is particularly helpful because it brings together the principle articulated by the High Court of Australia and the underlying need for an applicant to establish that his case contains 'something significant in itself to place him in a situation of persecution'."

29. The principle which the Court of Appeal should have taken from the judgment of the High Court of Australia is that it would be wrong to say that an applicant for protection was "expected" to live discreetly if it was intended as a statement of what the applicant must do: *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, para 82. The test of whether the situation he may find himself in on return was one that he could reasonably be expected to tolerate was introduced to address the high threshold that has to be crossed between what does and what does not amount to persecution. But the way the test was expressed in para 16 of *J's* case suggests that the applicant will be refused asylum if it would be reasonable to expect him to be discreet even if he is unwilling or unable to do this. That is a fundamental error. It conflicts with Simon Brown LJ's observation in *Ahmed (Iftikhar) v Secretary of State for the Home Department* [2000] INLR 1, 8 that, however unreasonable the applicant might be thought for refusing to accept the necessary restraint on his liberties, he would be entitled to asylum. I would hold that the test in para 16 of *J's* case is not accurately expressed and should no longer be followed. For the reasons that Sir John Dyson gives, I would reject the reasonably tolerable test. As this was the test that the Court of Appeal applied to these appeals, its decision to dismiss them was mistaken and must be set aside.

Comparative jurisprudence

30. The Court was referred to a number of decisions in Australia, New Zealand, South Africa, the United States and Canada. I do not think that they reveal a consistent line of authority that indicates that there is an approach which is universally accepted internationally.

31. The Australian cases that are of interest are those that post-date the decision in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473. They are *NALZ v Minister for Immigration and Multicultural Affairs* [2004] FCAFC 320; *NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 29, (2005) 79 ALJR 1142, and *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40, (2007) 233 CLR 18. In *NALZ* the Federal Court was divided on the question how the principles set out *S395/2002* should be applied. The applicant was an Indian national who was refused refugee status by the tribunal because he could avoid future arrest by not engaging in the activity that would attract persecution. The majority, Emmett and Downes JJ, held that this was not an impermissible approach. Madgwick J thought that the tribunal had fallen into the error identified in *S395/2002* because it had not asked itself what the applicant would in fact do. In *NABD* the High Court was again divided in its identification of the relevant legal principles. It did not reach the question whether a test of what was reasonably tolerable could be applied. It is worth noting however that McHugh J stressed the need for a rigorous and careful examination of the applicant's specific characteristics and circumstances. In *SZATV* the question was whether the tribunal was right to deny asylum on the ground that it would be reasonable for the applicant, a journalist whose fear was of persecution on grounds of political opinion, to relocate to another part of the country of his nationality and do construction work there. The High Court on this occasion was unanimous in holding that the tribunal had failed to address itself to what might reasonably be expected of the applicant with respect to his relocation if he were to be returned. I think that the single most important message to emerge from these cases is the need for a careful and fact-sensitive analysis.

32. The New Zealand case is *Refugee Appeal No 74665/03* [2005] INLR 68, in which the judgment of the New Zealand Refugee Status Appeals Authority was written by Rodger Haines QC. It contains an impressive analysis of the relevant principles, and it is impossible to do full justice here to what it contains. The passages that are of particular interest are to be found from paras 92 and following. The point made by Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6, para 130 that to require an applicant to engage in self-denial was to require him to live in a state of self-induced oppression was approved and adopted: para 114. The decision of the High Court of Australia in *S395/2002* is analysed in paras 116-124. Haines is critical of its approach on the

ground that it concentrates on an evaluation of the risk rather than being, as it is put in para 124, located in the persecution element. The New Zealand approach, it is said, places international human rights standards at the centre of the "being persecuted" analysis in the belief that this provides a principled and disciplined framework for analysis. The significance of this distinction becomes apparent at the end of the judgment when, without any detailed analysis of the causative condition by examining what will actually happen on return, the conclusion is reached in a few sentences that the applicant was at risk of serious harm simply because he was gay: para 132.

33. In *Karouni v Gonzales* (2005) 399 F 3d 1163 the US Court of Appeals upheld an appeal by an applicant who claimed that he had a well-founded fear of persecution on return to Lebanon because he was gay. It applied the principle, which the Secretary of State in this case accepts, that he should not be required to change his sexual identity, as it was a fundamental characteristic and an integral part of human freedom. Several Canadian cases were referred to by Mr Bourne in support of his proposition that the tribunal must look at what the applicant will, rather than could, do if he were to be returned: *Case no 02751 of 9 January 2007* (unreported) 16 February 2007; *Atta Fosu v Canada (Minister of Citizenship and Immigration)* [2008] FC 1135 and *Okoli v Minister of Citizenship and Immigration* [2009] FC 332. In *Atta Fosu*, for example, the Federal Court held that it was impermissible to require a person to deny or hide his sexuality when there was no evidence that he could, or was even prepared to, keep it secret.

34. What is missing from these cases, especially those from Australia and New Zealand, is clear and consistent guidance as to the way the fact-finding tribunals should go about their task. Useful advice is set out in *A Guide to Refugee Law in Australia*, prepared by the Legal Service Section of the Refugee Review Tribunal and the Migration Review Tribunal, pp 10.25-10.26. But it is not authoritative. The test as stated in para 16 of *J v Secretary of State for the Home Department* [2007] Imm AR 73 does not fit well with some of the dicta in these cases, and with the recommendation in the *Guide* that asylum seekers are not required, and cannot be expected, to take reasonable steps to avoid persecutory harm or to live "discreetly" so as to avoid it. But I have already concluded that it should be departed from.

The test

35. This brings me to the test that should be adopted by the fact-finding tribunals in this country. As Lord Walker points out in para 98, this involves what is essentially an individual and fact-specific inquiry. Lord Rodger has described the approach in para 82, but I would like to set it out in my own words. It is necessary to proceed in stages.

(a) The first stage, of course, is to consider whether the applicant is indeed gay. Unless he can establish that he is of that orientation he will not be entitled to be treated as a member of the particular social group. But I would regard this part of the test as having been satisfied if the applicant's case is that he is at risk of persecution because he is suspected of being gay, if his past history shows that this is in fact the case.

(b) The next stage is to examine a group of questions which are directed to what his situation will be on return. This part of the inquiry is directed to what will happen in the future. The Home Office's Country of Origin report will provide the background. There will be little difficulty in holding that in countries such as Iran and Cameroon gays or persons who are believed to be gay are persecuted and that persecution is something that may reasonably be feared. The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does. Those others will include everyone with whom he will come in contact, in private as well as in public. The way he conducts himself may vary from one situation to another, with varying degrees of risk. But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result and that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this inquiry.

(c) On the other hand, 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. As I said earlier (see para 15), the Convention was not directed to reforming the level of rights in the country of origin. So it would be wrong to approach the issue on the basis that the purpose of the Convention is to guarantee to an applicant who is gay that he can live as freely and as openly as a gay person as he would be able to do if he were not returned. It does not guarantee to everyone the human rights standards that are applied by the receiving country within its own territory. The focus throughout must be on what will happen in the country of origin.

(d) The next stage, if it is found that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this will simply be in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, his claim for asylum must be rejected. But if the reason why he will resort to concealment is that he genuinely fears that otherwise he will be persecuted, it will be necessary to consider whether that fear is well founded.

(e) This is the final and conclusive question: does he have a well-founded fear that he will be persecuted? If he has, the causative condition that Lord Bingham referred to in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426, para 5 will have been established. The applicant will be entitled to asylum.

36. It should always be remembered that the purpose of this exercise is to separate out those who are entitled to protection because their fear of persecution is well founded from those who are not. The causative condition is central to the inquiry. This makes it necessary to concentrate on what is actually likely to happen to the applicant. As Lord Walker says in para 88, the inquiry is directed to what will happen in the future if the applicant is returned to his own country. An approach which disregards what is in fact likely to occur there in the case of the particular applicant is wrong and should not be adopted.

The facts of these cases

37. Applying the guidance in *J v Secretary of State for the Home Department* [2007] Imm AR 73 to HJ's case, the Asylum and Immigration Tribunal said that the issue was whether the need for him to live discreetly would itself constitute persecution. The evidence of suppression of aspects of his life in Iran was limited. It concluded that to live a private life discreetly would not cause significant detriment to his right to respect for private life and that it would not involve suppression of many aspects of his sexual identity. Noting that enforcement of the law against homosexuality in Iran is arbitrary, it said that the evidence did not show a real risk of discovery or of adverse action against homosexuals who conduct their homosexual activities discreetly. It found on the evidence that the level of seriousness for international protection had not been reached. HJ could reasonably be expected to tolerate the position in Iran on any return: para 46. In the Court of Appeal Pill LJ said that in his judgment the test stated in para 16 of *J's* case by reference to *S395/2002* complied with the standard required by the Convention and that the findings of the tribunal were findings that they were entitled to make on the evidence: para 31.

38. In HT's case the Tribunal found that he would be discreet on return to Cameroon. In the Court of Appeal Pill LJ said that the groundwork for a further finding that he could not reasonably be required to be discreet in Cameroon or to tolerate a life involving discretion there was not established: para 44. He upheld the Tribunal's decision on the ground that it was entitled to find that the first panel did not err in law in finding that a single attack on HT followed a one-off incident of him being seen by a neighbour kissing another man with whom he had a three year relationship in his garden. Miss Carss-Frisk pointed out that there was no finding that his behaviour with the other man was a one-off incident. He was the victim of a single attack involving serious violence by way of mob "justice"

following the garden incident. Instead of helping him, the police joined in the assault. But he had had two homosexual relationships. The second had lasted for a period of five years. The problem had started when neighbours spotted what he and his partner were doing in the garden. The Tribunal said that he could move to another part of Cameroon where his sexual identity was unknown. But it is plain that to be effective against the risk of persecution, which is present everywhere in that country, he would have to lie about and conceal his sexuality. The Tribunal did not assess the effects on him of suppressing his sexual identity.

Conclusion

39. I am not confident that the tribunals would have come to the same conclusion if they had approached the facts in the way I have suggested in paras 35-36. It was suggested by the appellants that this court should make a reference of a question arising under the Qualification Directive to the Court of Justice of the European Union under article 267 TFEU (formerly article 234 EC). But the point that was said to require a reference was not clearly identified, and I would reject that suggestion. I would allow these appeals and set aside the orders of the Court of Appeal. I would remit both cases to the Tribunal, for further reconsideration in HJ's case and for reconsideration in the case of HT, in the light of the guidance given by this Court.

LORD RODGER

40. A gay man applies for asylum in this country. The Secretary of State is satisfied that, if he returns to his country of nationality and lives openly as a homosexual, the applicant will face a real and continuing prospect of being beaten up, or flogged, or worse. But the Secretary of State is also satisfied that, if he returns, then, 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 of the authorities. Is the applicant a "refugee" for purposes of the United Nations Convention relating to the Status of Refugees 1951 ("the Convention")? The answer is Yes.

41. Article 1A(2) of the Convention declares that a refugee is a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country…."

42. The appellants, HJ, from Iran, and HT, from Cameroon, are gay men who both claim to be outside their country of nationality owing to a well-founded fear of being persecuted for reasons of being gay. At one time there would have been debate as to whether homosexuals constitute a "particular social group" for the purposes of the Convention. But, in more recent years, it has come to be accepted that, at least in societies which discriminate against homosexuals, they are indeed to be regarded as a particular social group. See, for instance, *R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629, 644G-645A, per Lord Steyn, and at p 663, per Lord Millett (dissenting). Indeed regulation 6(1)(e) of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525) really puts the point beyond doubt by providing that, subject to an exception which is not relevant for present purposes, "a particular social group might include a group based on a common characteristic of sexual orientation". The Secretary of State therefore accepts that, in the case of Iran and Cameroon, homosexuals do indeed form a particular social group, of which HJ and HT are members.

The approach in HJ

43. In the case of HJ, the Asylum and Immigration Tribunal observed, at para 9 of its determination, that "It is accepted that for a person to be openly gay in Iran would attract a real risk of persecution (see in particular *RM and BB (Homosexuals) Iran* [2005] UKAIT 00117). The issue therefore is whether the need for the appellant to be discreet about his sexuality on return to Iran would itself constitute persecution within the meaning of the Refugee Convention." The Tribunal went on to hold, at para 25, that "It remains clear, as it was at the time of *RM and BB*, that those who confess to homosexual acts or are convicted by whatever means are at real risk as they face condign punishment." But, in its view, the evidence fell well short of showing that surveillance had reached such levels that Iranian citizens who engaged in homosexual activities in private ran a real risk of discovery. It remained the case, as the Tribunal had concluded in *RM and BB*, at para 124, that, given "the legal context in which homosexuals operate in Iran, it can be expected that they would be likely to conduct themselves discreetly for fear of the obvious repercussions that would follow." The Tribunal in the present case summarised the position at para 44:

> "We acknowledge that the way in which he is able to live as a gay man in the UK is preferable for him and we are satisfied that this informs his view that it is 'impossible' for him to return to Iran. We acknowledge too that the appellant is now much more aware of the legal prohibitions on homosexuals in Iran and the potential punishments for breach of those prohibitions. On any return, to avoid coming to the attention of the authorities because of his

> homosexuality he would necessarily have to act discreetly in relation to it. We are satisfied that as a matter of fact he would behave discreetly. On the evidence he was able to conduct his homosexual activities in Iran without serious detriment to his private life and without that causing him to suppress many aspects of his sexual identity. Whilst he has conducted his homosexual activities in the UK less discreetly, we are not persuaded that his adaptation back to life in Iran would be something he could not reasonably be expected to tolerate. We consider that as a matter of fact he would behave in similar fashion as he did before he left Iran and that in doing so he would, as before, be able to seek out homosexual relationships through work or friends without real risk to his safety or serious detriment to his personal identity and without this involving for him suppression of many aspects of his sexual identity."

Having analysed the evidence in more detail in para 45, the Tribunal referred to the test laid down by Buxton LJ in *J v Secretary of State for the Home Department* [2006] EWCA Civ 1238, [2007] Imm AR 73, at para 20. (The test is set out at para 48 below.) The Tribunal added, at para 46:

> "The circumstances to be tolerated are the inability to live openly as a gay man as the appellant can in the UK. The part of sexuality to be abandoned is on the evidence also the ability to live openly as a gay man in the same way the appellant can do elsewhere. To live a private life discreetly will not cause significant detriment to his right to respect for private life, nor will it involve suppression of many aspects of his sexual identity. Enforcement of the law against homosexuality in Iran is arbitrary but the evidence does not show a real risk of discovery of, or adverse action against, homosexuals who conduct their homosexual activities discreetly. The position has not deteriorated since *RM and BB* [2005] UKAIT 00117. On the evidence we find the appellant can reasonably be expected to tolerate the position on any return."

The approach in HT

44. In the case of HT it is agreed that, following an occasion when he was seen kissing his then (male) partner in the garden of his home, the appellant was attacked by a crowd of people when leaving church. They beat him with sticks and threw stones at him. They pulled off his clothes and tried to cut off his penis with a knife. He attempted to defend himself and was cut just above the penis and on his hand. He was threatened with being killed imminently on the ground that "you

people cannot be changed". Police officers arrived and demanded to know what was going on and why the crowd were assaulting him. They were told it was because he was gay. One of the policemen said to the appellant "How can you go with another man?" and punched him on the mouth. The policemen then kicked him until he passed out. As a result of the injuries which he received he was kept in hospital for two months. After that, he was taken home by a member of his church who told him that he feared for his life and safety if he remained in Cameroon. This man made travel arrangements for HT who flew to the United Kingdom via another European country.

45. In HT's case the Tribunal was of the view that "in some respects the position in Cameroon was not dissimilar from the position in Iran and it was the view of the Tribunal that there might be difficulties for someone openly professing his homosexuality. A homosexual relationship carried on in private, however, was considered by the Tribunal not to create a reasonable degree of likelihood of persecution." (The Tribunal's information about the position in Iran appears to have been taken from the admissibility decision of the European Court of Human Rights in *F v United Kingdom* (Application No 17341/03), 22 June 2004, unreported.) Because people in the area where he lived before leaving Cameroon knew that he was gay, the Tribunal contemplated that, in addition to conducting any relationship in private, HT would move to another part of the country where he would not be known. On reconsideration, the Senior Immigration Judge held, at para 15 of his determination, that "Should the appellant choose to relocate it would be relatively safe for him to practice [sic] his sexual orientation in private and not come to the attention of the authorities."

46. In both cases, therefore, the findings of the Tribunal are to the effect that, if the appellant were to return to his country of origin, he would be at risk of persecution if he were openly homosexual, but he would be unlikely to come to the attention of the authorities or to suffer harm, if he were to conduct any relationship in private.

The test adopted by the Court of Appeal

47. The question, whether in such circumstances an applicant has a well-founded fear of persecution, seems to have been considered by the Court of Appeal for the first time in *Z v Secretary of State for the Home Department* [2004] EWCA Civ 1578, [2005] Imm AR 75. The court had been referred to the decision of the High Court of Australia in *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473. Buxton LJ accepted that the judgments in that case contained a number of statements to the effect that, if an applicant's way of life would be subjected to persecution in his home country, he cannot be denied asylum on the basis of a conclusion that he could avoid that persecution by modifying that way of

life. Having referred to paras 40 and 43 of the judgment of McHugh and Kirby JJ, Buxton LJ continued, at paras 15-16:

> "15. Mr Kovats for the Secretary of State pointed out that where avoiding action is forced on the subject, that case only falls under the Refugee Convention if it results in a condition that can properly be called persecutory, in that imposes on the subject a state of mind or conscience that fits with the definition of persecution given by McHugh and Kirby JJ in paragraph 40 of their judgment, and in line with English authority already quoted:
>
> > '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'.
>
> That no doubt is the level of interference that McHugh and Kirby JJ had in mind when speaking of threats and menaces in the passage cited in para 14 above.
>
> 16. Although *S395* was presented to the court that granted permission in this appeal as a new departure in refugee law, and for that reason justifying the attention of this court, in truth it is no such thing. McHugh and Kirby JJ, at their paragraph 41, specifically relied on English authority, *Ahmed v SSHD* [2000] INLR 1. It has been English law at least since that case, and the case that preceded it, *Danian v SSHD* [1999] INLR 533, that, in the words of the leading judgment of Simon Brown LJ at pp 7G and 8C-D:
>
> > 'in all asylum cases there is ultimately a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason….the critical question: if returned, would the asylum-seeker in fact act in the way he says he would and thereby suffer persecution? If he would, then, however, unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, in my judgment he would be entitled to asylum'.
>
> It necessarily follows from that analysis that a person cannot be refused asylum on the basis that he could avoid otherwise persecutory conduct by modifying the behaviour that he would

> otherwise engage in, at least if that modification was sufficiently significant in itself to place him in a situation of persecution. If the IAT in our case refused Mr Z asylum on the basis that he was required to avoid persecution they did not respect the jurisprudence of *Ahmed*."

48. Buxton LJ's formulation of the position, as he derived it from Simon Brown LJ's statement in *Ahmed v Secretary of State for the Home Department* [2000] INLR 1, 7, was quoted by Maurice Kay LJ in *J v Secretary of State for the Home Department* [2007] Imm AR 73, at para 11. He added that it was particularly helpful "because it brings together the principle articulated by the High Court of Australia and the underlying need for an applicant to establish that his case contains something 'sufficiently significant in itself to place him in a situation of persecution'." Maurice Kay LJ went on to say, at para 16, that the Tribunal

> "will have to address questions that were not considered on the last occasion, including the reason why the appellant opted for 'discretion' before his departure from Iran and, by implication, would do so again on return. It will have to ask itself whether 'discretion' is something that the appellant can reasonably be expected to tolerate, not only in the context of random sexual activity but in relation to 'matters following from, and relevant to, sexual identity' in the wider sense recognised by the High Court of Australia (see the judgment of Gummer and Hayne JJ at para 83). This requires consideration of the fact that homosexuals living in a stable relationship will wish, as this appellant says, to live openly with each other and the 'discretion' which they may feel constrained to exercise as the price to pay for the avoidance of condign punishment will require suppression in respect of many aspects of life that 'related to or informed by their sexuality' (Ibid, para 81)."

Buxton LJ added, at para 20:

> "The question that will be before the AIT on remission will be whether the applicant could reasonably be expected to tolerate whatever circumstances are likely to arise were he to return to Iran. The applicant may have to abandon part of his sexual identity, as referred to in the judgment of Gummow and Hayne JJ in *S*, in circumstances where failure to do that exposes him to the extreme danger that is set out in the country guidance case of *RM and BB*. The Tribunal may wish to consider whether the combination of those two circumstances has an effect on their decision as to whether the

> applicant can be expected to tolerate the situation he may find himself in when he returns to Iran."

49. In his judgment on the present appeals Pill LJ held, at para 31, that the test stated in para 16 of Maurice Kay LJ's judgment in *J v Secretary of State* complies with the standard required by the Refugee Convention. He added that it is "an appropriate and workable test." Pill LJ considered that in the case of HJ the Tribunal had plainly understood the test and that their conclusion that he could reasonably be expected to tolerate conditions in Iran was firmly based on the evidence in the case, considered in the context of the in-country evidence. On that ground he dismissed the appeal. Keene LJ and Sir Paul Kennedy agreed.

50. The appellants take this fairly well established case law of the Court of Appeal head-on. They contend that the Court of Appeal test is incompatible with the definition of "refugee" in article 1A(2) of the Convention and is based on a misunderstanding of the decision of the High Court of Australia in *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473.

51. I would accept both submissions.

The rationale of the Convention

52. For someone to be a refugee within the terms of article 1A(2) of the Convention, he must be outside his country of nationality owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. In effect, 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. Countries which sign up to the Convention recognise, however, that we do not live in an ideal world and that, in fact, there are many countries where persecution for these reasons does indeed take place. In such countries either agents of the state carry out the persecution themselves or, at least, the state does not offer adequate protection against individuals and groups who carry it out. Of course, diplomatic and other pressures may be exerted on states in the hope of improving the situation. But, in the meantime, the signatories to the Convention do not wash their hands of those at risk: in effect, they agree that, by giving the victims asylum, they will afford them the protection from persecution which their country of origin should have afforded them but did not. See, for example, La Forest J in *Canada (Attorney-General) v Ward* [1993] 2 SCR 689, 709:

> "At the outset, it is useful to explore the rationale underlying the international refugee protection regime, for this permeates the interpretation of the various terms requiring examination. International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations."

In *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 495D-G, Lord Hope of Craighead quoted this passage with approval and adopted Professor Hathaway's description of the protection as "surrogate or substitute protection".

53. At the risk of repetition, the importance of this analysis for present purposes is that it proceeds on the basis that, so far from permitting or encouraging its agents to persecute the applicant for one of the protected grounds, the home state should have protected him from any persecution on that ground. The underlying rationale of the Convention is therefore 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. In the absence of any indication to the contrary, the implication is that they must be free to live openly in this way without fear of persecution. By allowing them to live openly and free from that fear, the receiving state affords them protection which is a surrogate for the protection which their home state should have afforded them.

The applicant who would not take steps to avoid persecution

54. The Secretary of State accepts accordingly that an applicant is entitled to the protection of the Convention if he could avoid suffering any actual harm by modifying his behaviour (say, by conducting himself "discreetly") on his return to his home state but would not in fact choose to do so. English authority for this approach in the field of religion is to be found in the judgment of Simon Brown LJ in *Ahmed (Iftikhar)v Secretary of State for the Home Department* [2000] INLR 1. The applicant was an Ahmadi, who, if returned to Pakistan, would still have been vocal in his proclamation of Ahmadi beliefs, for which he would have suffered persecution. Simon Brown LJ observed, at p 7:

> "It is one thing to say … that it may well be reasonable to require asylum seekers to refrain from certain political or even religious activities to avoid persecution on return. It is quite another thing to say that, if in fact it appears that the asylum seeker on return would

> *not* refrain from such activities - if, in other words, it is established that he would in fact act unreasonably - he is not entitled to refugee status."

55. The same point is made, with considerably more elaboration, in the judgment of McHugh and Kirby JJ in *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473. They begin by pointing out, at p 489, para 40, that "… persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality". In the remainder of para 40 they point out that, if the position were otherwise, the Convention would not protect those who chose to exercise their right, say, to express their political opinion openly. Similarly, the Convention would not protect those who chose to live openly as gay men rather than take the option of living discreetly.

56. Their Honours added, 216 CLR 473, 489-490, para 41:

> "History has long shown that persons holding religious beliefs or political opinions, being members of particular social groups or having particular racial or national origins are especially vulnerable to persecution from their national authorities. The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention."

They concluded the paragraph by citing the passage from Simon Brown LJ in *Ahmed v Secretary of State for the Home Department* [2000] INLR 1, 7, which I have quoted at para 54 above.

The applicant who would conduct himself discreetly

57. In *Ahmed* Simon Brown LJ was tackling the case of an applicant who could take steps to avoid persecution on his return, but who would not do so. The present appeals concern a completely different kind of applicant: the applicant who, on his return, would act discreetly to avoid the harm which would come to him if he were to live openly as a gay man.

58. In the passage from *Ahmed* which I cited at para 54 above, Simon Brown LJ appears to have envisaged that it might, in some sense, be reasonable to "require" applicants to refrain from certain political or even religious activities to avoid persecution on return. But, in his conspicuously clear argument on behalf of the Secretary of State in the present case, Mr Bourne accepted that neither the Secretary of State nor a tribunal had any power to "require" a gay applicant to act discreetly on his return to his country of nationality in order to avoid persecution. Both of them might, of course, purport to decide the case *on the assumption* that the applicant would do so. But counsel accepted that neither the Secretary of State nor any tribunal could reject an application for asylum on the basis of an assumption that the gay applicant would act discreetly and so avoid, say, being beaten up or worse. He might or might not. It would be a question of fact, depending on the circumstances of the individual case.

59. Although counsel for the Secretary of State was at pains to draw this distinction between assuming that the applicant would act discreetly to avoid persecution and finding that this is what he would in fact do, the distinction is pretty unrealistic. Unless he were minded to swell the ranks of gay martyrs, when faced with a real threat of persecution, the applicant would have no real choice: he would be compelled to act discreetly. Therefore the question is whether an applicant is to be regarded as a refugee for purposes of the Convention in circumstances where the reality is that, if he were returned to his country of nationality, he would have to act discreetly in order to avoid persecution.

60. The question is not confined to cases where fear of persecution is the only reason why the applicant would act discreetly. In practice, the picture is likely to be more complicated.

61. A fear of persecution is by no means the only reason why an applicant might behave discreetly if he were returned to his country of nationality. For example, he might not wish to upset his parents or his straight friends and colleagues by revealing that he is gay; in particular, he might worry that, if the fact that he was gay were known, he would become isolated from his friends and relatives, be the butt of jokes or unkind comments from colleagues or suffer other discrimination. Indeed, in a society where gay men are persecuted, it is quite likely that the prevailing culture will be such that some of an applicant's friends, relatives and colleagues would react negatively if they discovered that he was gay. In these circumstances it is at least possible that the only real reason for an applicant behaving discreetly would be his perfectly natural wish to avoid harming his relationships with his family, friends and colleagues. The Convention does not afford protection against these social pressures, however, and so an applicant cannot claim asylum in order to avoid them. So if, having considered the facts of any individual case, the Secretary of State or a tribunal concluded that the applicant would choose to behave discreetly on his return simply to avoid these

social pressures, his application for asylum would fall to be rejected. He would not be a refugee within the terms of article 1A(2) of the Convention because, by choosing to behave discreetly in order to avoid these social pressures, the applicant would simultaneously choose to live a life in which he would have no well-founded fear of being persecuted for reasons of his homosexuality. A similar point arose, in the context of religion, in *NABD of 2002 v Minister of Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1142, discussed at para 70 below.

62. Having examined the relevant evidence, the Secretary of State or the tribunal may conclude, however, that the applicant would act discreetly partly to avoid upsetting his parents, partly to avoid trouble with his friends and colleagues, and partly due to a well-founded fear of being persecuted by the state authorities. In other words the need to avoid the threat of persecution would be a material reason, among a number of complementary reasons, why the applicant would act discreetly. Would the existence of these other reasons make a crucial difference? In my view it would not. A Jew would not lose the protection of the Convention because, in addition to suffering state persecution, he might also be subject to casual, social anti-semitism. Similarly, a gay man who was not only persecuted by the state, but also made the butt of casual jokes at work, would not lose the protection of the Convention. It follows that the question can be further refined: is an applicant to be regarded as a refugee for purposes of the Convention in circumstances where the reality is that, if he were returned to his country of nationality, in addition to any other reasons for behaving discreetly, he would have to behave discreetly in order to avoid persecution because of being gay?

63. It is convenient to use a phrase such as "acting" or "behaving" "discreetly" to describe what the applicant would do to avoid persecution. But in truth he could do various things. To take a few examples. At the most extreme, the applicant might live a life of complete celibacy. Alternatively, he might form relationships only within a circle of acquaintances whom he could trust not to reveal to others that he had gay relationships. Or, he might have a gay partner, but never live with him or have him to stay overnight or indulge in any display of affection in public. Or the applicant might have only fleeting anonymous sexual contacts, as a safe opportunity presented itself. The gradations are infinite.

64. Suppose the Secretary of State or the tribunal were satisfied that, if the applicant took some such precautions, he would be unlikely to suffer any actual harm. Would the applicant then have no well-founded fear of persecution by reason of being gay and so be unable to claim asylum under the Convention?

65. Surely not. As already explained in para 53 above, so far as the social group of gay people is concerned, the underlying rationale of the Convention is that they

should be able to live freely and openly as gay men and lesbian women, without fearing that they may suffer harm of the requisite intensity or duration because they are gay or lesbian. Their home state should protect them and so enable them to live in that way. If it does not and they will be threatened with serious harm if they live openly, then most people threatened with persecution will be forced to take what steps they can to avoid it. But the applicant's country of nationality does not meet the standard of protection from persecution which the Convention envisages simply because conditions in the country are such that he would be able to take, and would in fact take, steps to avoid persecution by concealing the fact that he is gay. On the contrary, the fact that he would feel obliged to take these steps to avoid persecution is, prima facie, an indication that there is indeed a threat of persecution to gay people who live openly. His country of nationality is therefore not affording him the necessary level of protection. So the receiving country should.

66. For this reason, in *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473, 493, para 51, McHugh and Kirby JJ emphasise that a tribunal will fall into error if it fails to ask *why* an applicant would act discreetly if he were returned to his home state. That question will be particularly important where the evidence shows that, before leaving his country and applying for asylum, the applicant lived discreetly. Their Honours explained, at p 490, para 43:

> "In cases where the applicant has modified his or her conduct, there is a natural tendency for the tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the *harm* that will be inflicted. In many - perhaps the majority of - cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct."

67. Their Honours went on to apply that approach to the decision of the tribunal in that case, at p 493, paras 51-53:

> "51. Central to the Tribunal's decision was the finding that the appellants had not suffered harm in the past because they had acted discreetly. Because the Tribunal assumed that it is reasonable for a homosexual person in Bangladesh to conform to the laws of

Bangladesh society, the Tribunal failed to determine whether the appellants had acted discreetly only because it was not possible to live openly as a homosexual in Bangladesh. Because of that failure, the Tribunal, unsurprisingly, failed to give proper attention to what might happen to the appellants if they lived openly in the same way as heterosexual people in Bangladesh live.

52. The Tribunal did find, however, that to attempt to live openly as a homosexual in Bangladesh 'would mean to face problems ranging from being disowned by one's family and shunned by friends and neighbours to more serious forms of harm, for example the possibility of being bashed by the police.' That finding appears to be based on an acceptance of the evidence of Mr Khan, the Executive Director of the Naz Foundation. In its reasons, the Tribunal recorded Mr Khan as saying:

> '[T]he consequences of being identified as homosexual vary enormously, from acceptance and tolerance, to harassment, physical abuse or expulsion from the community. Most of the harassment of males who have sex with males takes the form of extortion by local police and hustlers who threaten to expose them to their families if they do not cooperate.'

53. The Tribunal's findings on the attitude of Bangladesh society and the statements of the appellants indicate that they were discreet about their relationship only because they feared that otherwise they would be subjected to the kinds of discrimination of which Mr Khan spoke. If the Tribunal had found that this fear had caused them to be discreet in the past, it would have been necessary for the Tribunal then to consider whether their fear of harm was well-founded and amounted to persecution. That would have required the Tribunal to consider what might happen to the appellants in Bangladesh if they lived openly as a homosexual couple. Would they have suffered physical abuse, discrimination in employment, expulsion from their communities or violence or blackmail at the hands of police and others, as Mr Khan suggested were possibilities? These were the sorts of questions that the Tribunal was bound to consider if it found that the appellants' 'discreet' behaviour in the past was the result of fear of what would happen to them if they lived openly as homosexuals. Because the Tribunal assumed that it is reasonable for a homosexual person in Bangladesh to conform to the laws of Bangladesh society, however, the Tribunal disqualified itself from properly considering the appellants' claims that they had a 'real fear of persecution' if they were returned to Bangladesh."

In short, the fact that the applicants would act discreetly and so not be subjected to violence if returned to Bangladesh did not mean that they did not have a well-founded fear of persecution on their return. Rather, the tribunal had to go on to ask itself *why* they would act discreetly. If it was because they would suffer serious harm if they lived openly as a homosexual couple, then they would have a well-founded fear of persecution – since it is the right to live openly without fear of persecution which the Convention exists to protect.

68. The other justices in the majority, Gummow and Hayne JJ, described the tribunal's error in this way, 216 CLR 473, 503, para 88:

> "The Tribunal did not ask *why* the appellants would live 'discreetly'. It did not ask whether the appellants would live 'discreetly' because that was the way in which they would hope to avoid persecution. That is, the Tribunal was diverted from addressing the fundamental question of whether there was a well-founded fear of persecution by considering whether the appellants were likely to live as a couple in a way that would not attract adverse attention. That the Tribunal was diverted in that way is revealed by considering the three statements in its reasons that are referred to earlier: first, that it is *not* possible to 'live *openly* as a homosexual in Bangladesh'; secondly, that '[t]o attempt to [live openly] would mean to face problems'; and, thirdly, that 'Bangladeshi men can have homosexual affairs or relationships, *provided they are discreet'*. Nowhere did the Tribunal relate the first and second of these statements to the position of the appellants. It did not consider whether the adverse consequences to which it referred sufficed to make the appellants' fears well founded. All that was said was that they would live discreetly."

Again, the point is that the tribunal should have considered why the appellants would live discreetly if they were returned to Bangladesh. In particular, it should have asked whether they would live discreetly because that was the way they would hope to avoid persecution. If so, then the tribunal should have considered whether the adverse consequences sufficed to make the appellants' fears of persecution well founded.

69. The decision of the High Court is accordingly powerful authority, which I would respectfully follow, for the proposition that, if a person has a well-founded fear that he would suffer persecution on being returned to his country of nationality if he were to live openly as a gay man, then he is to be regarded as a refugee for purposes of the Convention, even though, because of the fear of persecution, he would in fact live discreetly and so avoid suffering any actual

harm. The High Court has followed the same line of reasoning in subsequent cases.

Application of the High Court's approach in Appellant S395/2002

70. In *NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 1142 the appellant, who had converted to Christianity, would face persecution if he returned to Iran. He argued that the tribunal had fallen into the same kind of error as the tribunal in *S395/2002 v Minister for Immigration* by attaching significance to a supposed difference between discreet and confrontational behaviour. By a majority (McHugh and Kirby JJ dissenting), the High Court dismissed his appeal. In doing so, they did not reject the approach in *S395/2002 v Minister for Immigration*. Rather, applying that approach, they held that the appeal failed on the facts. As Hayne J (one of the majority in *S395/2002*) and Heydon J explained, at para 168:

> "At no point in its chain of reasoning did the Tribunal divert from inquiring about whether the fears which the appellant had were well founded. It did not ask (as the Tribunal had asked in *Appellant S395/2002*) whether the appellant could *avoid* persecution; it asked what may happen to the appellant if he returned to Iran. Based on the material the Tribunal had, including the material concerning what the appellant had done while in detention, it concluded that were he to practise his faith in the way *he* chose to do so, there was not a real risk of his being persecuted."

71. In *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 the appellant had worked as a journalist in Chernovtsy in Ukraine. Due to his political views he had been subjected to a systematic campaign of harassment, including physical maltreatment. The Refugee Review Tribunal none the less rejected his claim for asylum on the ground that he could return to a different part of Ukraine where he would not be known, and work in the construction industry. He would not then come to the notice of the authorities. Allowing his appeal, at p 28, para 28, Gummow, Hayne and Crennan JJ referred to the analysis in para 40 of the judgment of McHugh and Kirby JJ in *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473, 489, where they had criticised the idea that an applicant would not suffer persecution for his homosexuality if he could avoid it by living discreetly. Similarly, in *SZATV*, the tribunal had gone wrong by approaching the issue on the footing that it would not be unreasonable for the appellant to relocate within Ukraine and obtain work which would not involve the expression to the public of his political opinions. In other words, he would avoid persecution by giving up the very right to express his political opinions without fear of persecution which the Convention is designed to protect. Again, the

decision is consistent with the approach in *Appellant S395/2002 v Minister for Immigration*.

72. The same approach has been followed in New Zealand. In *Refugee Appeal No 74665/03*, [2005] INLR 68 at para 124, the New Zealand Refugee Status Appeals Authority considered that its own approach and the approach of the High Court of Australia in *Appellant S395/2002* converged on the same point, "namely that refugee status cannot be denied by requiring of the claimant that he or she avoid being persecuted by forfeiting a fundamental human right." The difference between the High Court and the Authority – which the Authority considered could be important in certain cases – was that it preferred to use a human rights framework in order to determine the limits of what an individual is entitled to do and not to do. That approach might, for instance, be relevant if an applicant were claiming asylum on the ground that he feared persecution if he took part in a gay rights march. I respectfully see the attractions of that approach. But no such issue arises in the present appeals and I prefer to leave the point for consideration in a case where it might be of practical effect. For present purposes I take the decision of the Authority, based on a particularly full and impressive analysis of the relevant materials, as clear support for the High Court of Australia's approach that an applicant cannot be denied asylum on the basis that he would, in fact, take effective steps, by suppressing his sexual identity, to avoid the harm which would otherwise threaten him.

The Court of Appeal: living discreetly as persecution

73. Under reference to the case law of the Court of Appeal set out above at paras 47-49, the Secretary of State argued, however, that if the applicant would actually live discreetly and avoid the danger, then he would have no real fear of persecution unless he could not reasonably be expected to tolerate that situation, viz, having to conceal his sexual identity, and all the restrictions which that would entail, in circumstances where failure to do so would expose him to extreme danger. In other words the basis for claiming asylum would be a well-founded fear that he would find it intolerable to live discreetly to avoid the danger.

74. Something of the same idea can be seen in the argument which Mosley J considered in *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)* 2004 FC 282, para 29:

> "The meaning of persecution … is generally defined as the serious interference with a basic human right. Concluding that persecution would not exist because a gay woman in Iran could live without punishment by hiding her relationship to another woman may be

erroneous, as expecting an individual to live in such a manner could be a serious interference with a basic human right, and therefore persecution" (internal citations omitted).

75. In my view, the approach adopted by the Court of Appeal is unsound. I leave on one side my reasoning so far and also the obvious point that the Court of Appeal's test seems to require the applicant to establish a form of secondary persecution brought on by his own actions in response to the primary persecution. In my view the core objection to the Court of Appeal's approach is that its starting point is unacceptable: it supposes that at least some applications for asylum can be rejected on the basis that the particular applicant could find it reasonably tolerable to act discreetly and conceal his sexual identity indefinitely to avoid suffering severe harm.

76. The New Zealand Refugee Status Appeals Authority observed in *Re GJ* [1998] (1995) INLR 387, 420 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" (emphasis in the original). So, starting from that position, the Convention offers protection to gay and lesbian people – and, I would add, bisexuals and everyone else on a broad spectrum of sexual behaviour - because they are entitled to have the same freedom from fear of persecution as their straight counterparts. No-one would proceed on the basis that a straight man or woman could find it reasonably tolerable to conceal his or her sexual identity indefinitely to avoid suffering persecution. Nor would anyone proceed on the basis that a man or woman could find it reasonably tolerable to conceal his or her race indefinitely to avoid suffering persecution. Such an assumption about gay men and lesbian women is equally unacceptable. Most significantly, it is unacceptable as being inconsistent with the underlying purpose of the Convention since it involves the applicant denying or hiding precisely the innate characteristic which forms the basis of his claim of persecution: *Atta Fosu v Canada (Minister of Citizenship and Immigration)* 2008 FC 1135, para 17, per Zinn J.

77. At the most basic level, if a male applicant were to live discreetly, he would in practice have to avoid any open expression of affection for another man which went beyond what would be acceptable behaviour on the part of a straight man. He would have to be cautious about the friendships he formed, the circle of friends in which he moved, the places where he socialised. He would have constantly to restrain himself in an area of life where powerful emotions and physical attraction are involved and a straight man could be spontaneous, impulsive even. Not only would he not be able to indulge openly in the mild flirtations which are an enjoyable part of heterosexual life, but he would have to think twice before revealing that he was attracted to another man. Similarly, the small tokens and

gestures of affection which are taken for granted between men and women could well be dangerous. In short, his potential for finding happiness in some sexual relationship would be profoundly affected. It is objectionable to assume that any gay man can be supposed to find even these restrictions on his life and happiness reasonably tolerable.

78. It would be wrong, however, to limit the areas of behaviour that must be protected to the kinds of matters which I have just described – essentially, those which will enable the applicant to attract sexual partners and establish and maintain relationships with them in the same way as happens between persons who are straight. As Gummow and Hayne JJ pointed out in *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473, 500-501, para 81:

> "Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense 'discreetly') may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality"

In short, 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.

79. This is not to give any false or undue prominence to the applicant's sexuality or to say that an individual is defined by his sexuality. It is just to accept that "sexual identity is inherent to one's very identity as a person": *Hernandez-Montiel v Immigration and Naturalisation Service*, 225 F 3d 1084, 1093 (9th Cir 2000), per Tashima J. A E Housman showed many of the hallmarks of genius both as a textual critic and as a poet; Alan Turing was a mathematical genius. Not only may these talents have been at least as significant to their identity as their homosexuality, but the individuals themselves may well have thought so too. That

does not matter in the context of persecution. As the Nazi period showed all too clearly, a secular Jew, who rejected every tenet of the religion and did not even think of himself as Jewish, was ultimately in as much need as any Orthodox rabbi of protection from persecution as a Jew. Similarly, an applicant for asylum does not need to show that his homosexuality plays a particularly prominent part in his life. All that matters is that he has a well-founded fear that he will be persecuted because of that particular characteristic which he either cannot change or cannot be required to change.

80. Another way of pointing to essentially the same basic defect in the approach of the Court of Appeal is to say that 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? How would the tribunal measure the equivalent level for a straight man asked to suppress his sexual identity indefinitely? The answer surely is that there is no relevant standard since it is something which no one should have to endure. In practice, of course, where the evidence showed that an applicant had avoided persecutory harm by living discreetly for a number of years before leaving his home country, the tribunal would be tempted to fall into error. The tribunal would be liable to hold that the evidence showed that this applicant, at least, must have found his predicament reasonably tolerable in the past – and so would find it reasonably tolerable if he were returned to his country of nationality. But, in truth, that evidence would merely show that the applicant had put up with living discreetly for fear of the potentially dire consequences of living openly.

81. I would therefore hold that the tests formulated by Maurice Kay LJ and Buxton LJ in *J v Secretary of State for the Home Department* [2007] Imm AR 73, at paras 16 and 20, and applied by Pill LJ in this case, are wrong in principle, unworkable and inconsistent with the way that article 1A(2) of the Convention has been interpreted and applied in other authorities. As can be seen from the passage from *Z v Secretary of State for the Home Department* [2005] Imm AR 75 quoted at para 47 above, Buxton LJ seems to have thought that he was following the approach of McHugh and Kirby JJ in *Appellant S395/2002 v Minister for Immigration* (2003) 216 CLR 473. That was, quite simply, a misunderstanding. As the cross-heading above para 40 of their judgment showed, at this point in their judgment their Honours were considering the position of a gay person who would live openly. They first explained that persecution could take a variety of forms, and then observed, in the sentence quoted by Buxton LJ, that to count as persecution the harm had to be intolerable. But this is just a general description of what counts as persecution. As I have explained, in paras 55 and 56 above, the remainder of para 40 of their Honours' judgment contains not the slightest hint of

the approach favoured by the Court of Appeal. That approach should not be followed in future.

The approach to be followed by tribunals

82. When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.

If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.

If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".

If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.

If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.

83. The Secretary of State should, of course, apply the same approach when considering applications of this type. Although I have, for the most part,

concentrated on the position of gay men, the Secretary of State and tribunals should approach applications concerning lesbian women in the same way.

These appeals

84. I add a comment on the case of HT. The tribunal rejected his application on the ground that, on his return to Cameroon, he could go to live in another part of the country and live discreetly there. In that event he would have no real fear of persecution. But there appears to have been nothing in the evidence to suggest that there was any area of Cameroon where gay men could live openly without any fear of persecution. So in no sense would the applicant be returning to a part of the country where the state would protect him from persecution. In effect, therefore, the tribunal was simply saying that his application should be rejected because, on return, he could take steps to avoid persecution by conducting himself discreetly. For the reasons which I have given, that approach is inconsistent with the very aims of the Convention. In effect, the tribunal made the same error as the tribunal in *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18, discussed at para 71 above.

85. For these reasons I would allow both appeals and remit matters to the respective tribunals for reconsideration in the light of the approach which I have outlined.

LORD WALKER

86. I agree with the reasoning and conclusions in Lord Rodger's judgment. But in view of the importance of this appeal I will add some observations in my own words.

87. After all the carefully-researched debate that the Court has heard and participated in (we have had 23 bundles of authorities containing 250 different items) there is, as has often been noted, ultimately a single question: does the claimant asylum-seeker have a "well-founded fear of being persecuted", if returned to his own country, for reasons falling within article 1A(2) of the Convention? As it was put by Simon Brown LJ in *Secretary of State for the Home Department v Iftikar Ahmed* [2000] INLR 1, cited by McHugh and Kirby JJ in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 (2003) 216 CLR 473 para 42 :

> "[I]n all asylum cases there is ultimately but a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason? If there is, then he is entitled to asylum."

88. This single question is however complex (McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 256) described it as a "compound conception" which nevertheless needs to be interpreted as a totality). It is not directed at ascertaining past facts (though findings as to events asserted by the claimant to have happened in the past will always be relevant, and often crucial). Instead it is directed at predicting what would or might happen in the future if (contrary to his wishes) the claimant is returned to his own country. Here too his evidence as to his own state of mind (in particular his intentions and his apprehensions in an eventuality which he earnestly hopes to avoid) will always be relevant. But his evidence may have to be treated with caution because of his strong personal interest in the outcome of his claim.

89. Moreover the inquiry is by no means wholly subjective. The need for the claimant's fear to be well-founded introduces a very important objective element. Different jurisdictions have taken different approaches to evaluating what Professor James C Hathaway has called "the threshold of concern" (Hathaway, The Law of Refugee Status (1991) pp 75-80). When that work was published the test approved by the House of Lords in *R v Secretary of State for the Home Department Ex p Sivakumaran* (and conjoined appeals) [1988] AC 958 was that there should be "a reasonable degree of likelihood" (Lord Keith at p 994) or "real and substantial danger" (Lord Templeman at p 996) or a "real and substantial risk" (Lord Goff at p 1000) of persecution for a Convention reason. This remains the test. The editors of *Macdonald, Immigration Law and Practice* 7th ed (2008) prefer the expression "real risk", citing the Court of Appeal in *MH (Iraq) v Secretary of State for the Home Department* [2007] EWCA Civ 852, "a real as opposed to a fanciful risk". "Risk" is in my view the best word because (as explained in the next paragraph) it factors in both the probability of harm and its severity.

90. In understanding the practical implications of the test it is important to note that in *Sivakumaran* Lord Keith quoted Lord Diplock's remarks in *R v Governor of Pentonville Prison, Ex p Fernandez* [1971] 1 WLR 987, 994 (an extradition case) as to "the relative gravity of the consequences of the court's expectation being falsified either in one way or in the other" and Lord Templeman referred to his own similar remarks in *R v Secretary of State for the Home Department Ex p Bugdaycay* [1987] AC 514, 537. Where life or liberty may be threatened, the balance of probabilities is not an appropriate test.

91. As Sedley LJ said in *Batayav v Secretary of State for the Home Department* [2003] EWCA Civ 1489, [2004] INLR 126 para 38:

> "If a type of car has a defect which causes one vehicle in ten to crash, most people would say that it presents a real risk to anyone who drives it, albeit crashes are not generally or consistently happening."

Getting away from metaphor, I suppose that it may be debatable whether a gay man would be at real risk of persecution (in the Convention sense) if, on returning to his own country, he would face a one in ten risk of being prosecuted and made to pay a fine, or sent to prison for a month. But if he would face a one in ten risk of being prosecuted and sentenced to death by public hanging from a crane there could be only one answer.

92. The notion that a gay man could (and so, some might say, should) avoid trouble by adopting a "discreet" lifestyle (or leading an entirely celibate life) is not limited to the context of asylum law. It is the way in which hundreds of thousands of gay men lived in England before the enactment of the Sexual Offences Act 1967. But it has assumed particular importance in asylum law since gays and lesbians have become generally recognised as a particular social group for Convention purposes. Jenni Millbank has described this development (which she terms 'discretion reasoning') in "From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom" (2009) 13 IJHR 391, 393-394 (most references omitted):

> "At its baldest, discretion reasoning entailed a 'reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection', by exercising 'self-restraint' such as avoiding any behaviour that would identify them as gay; never telling anyone they were gay; only expressing their sexuality by having anonymous sex in public places; pretending that their partner is a 'flatmate'; or indeed remaining celibate. This approach subverted the aim of the Refugees Convention – that the receiving state provide a surrogate for protection from the home state – by placing the responsibility of protection upon the applicant: it is he or she who must avoid harm. The discretion approach also varied the scope of protection afforded in relation to each of the five Convention grounds by, for example, protecting the right to be 'openly' religious but not to be openly gay or in an identifiable same-sex relationship. ... The idea of discretion reflects broader social norms concerning the 'proper place' of lesbian and gay sexuality, as something to be hidden and reluctantly tolerated, a

> purely private sexual behaviour rather than an important and integral aspect of identity, or as an apparent relationship status. The discretion approach explicitly posited the principle that human rights protection available to sexual orientation was limited to private consensual sex and did not extend to any other manifestation of sexual identity (which has been variously characterised as 'flaunting' 'displaying' and 'advertising' homosexuality as well as 'inviting' persecution). Thus for example in 2001 the Federal Court of Australia held that the Iranian Penal Code prohibiting homosexuality and imposing a death penalty did 'place limits' on the applicant's behaviour; the applicant had to 'avoid overt and public, or publicly provocative homosexual activity. But having to accept those limits did not amount to persecution'. (*Nezhadian v Minister for Immigration and Multicultural Affairs* [2001] FCA 1415, para 12). On appeal, the full Federal Court endorsed the view that 'public manifestation of homosexuality is not an essential part of being homosexual' (*WABR v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 124, para 23). The discretion approach thus has had wide-reaching ramifications in terms of framing the human rights of lesbians and gay men to family life, freedom of association and freedom of expression as necessarily lesser in scope than those held by heterosexual people."

93. This approach has been brought to an end, for the purposes of Australian asylum law, by the majority decision of the High Court of Australia in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473. The High Court divided by four to three in favour of allowing the appeal and remitting the case (though the tribunal to which the case was remitted decided that S395/2002 and his co-applicant S396/2002 were not gay after all – this fact, recorded by Jenni Millbank in her article, is reflected in its title). The minority (Gleeson CJ and Callinan and Heydon JJ) considered that the tribunal had not erred in law. The majority consisted of McHugh and Kirby JJ who joined in one judgment, and Gummow and Haynes JJ who joined in another.

94. I find the joint judgment of Gummow and Haynes JJ illuminating and compelling. Lord Hope and Lord Rodger have quoted parts of paras 81 and 82 but I think it helpful to set out the whole section (paras 78-83) which appears under the heading "Discretion" and "being discreet":

> "The central question in any particular case is whether there is a well-founded fear of persecution. That requires examination of how *this* applicant may be treated if he or she returns to the country of nationality. Processes of classification may obscure the essentially individual and fact-specific inquiry which must be made.

The dangers of arguing from classifications are particularly acute in matters in which the applicant's sexuality is said to be relevant. Those dangers lie within the notions of 'discretion' and 'being discreet': terms often applied in connection with some aspects of sexual expression. To explain why use of those terms may obscure more than they illuminate, it is useful to begin by considering Convention reasons other than membership of a social group defined in terms of sexual identity.

If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be 'discreet' about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences.

It is important to recognise the breadth of the assertion that is made when, as in the present case, those seeking protection allege fear of persecution for reasons of membership of a social group identified in terms of sexual identity (here, homosexual men in Bangladesh). Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense 'discreetly') may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality.

Saying that an applicant for protection would live 'discreetly' in the country of nationality may be an accurate general description of the way in which that person would go about his or her daily life. To say that a decision-maker 'expects' that that person will live discreetly may also be accurate if it is read as a statement of what is thought likely to happen. But to say that an applicant for protection is 'expected' to live discreetly is both wrong and irrelevant to the task to be undertaken by the Tribunal if it is intended as a statement of

> what the applicant *must* do. The Tribunal has no jurisdiction or power to require anyone to do anything in the country of nationality of an applicant for protection. Moreover, the use of such language will often reveal that consideration of the consequences of sexual identity has wrongly been confined to participation in sexual acts rather than that range of behaviour and activities of life which may be informed or affected by sexual identity. No less importantly, if the Tribunal makes such a requirement, it has failed to address what we have earlier identified as the fundamental question for its consideration, which is to decide whether there is a well-founded fear of persecution. It has asked the wrong question.
>
> Addressing the question of what an individual is *entitled* to do (as distinct from what the individual *will* do) leads on to the consideration of what modifications of behaviour it is reasonable to require that individual to make without entrenching on the right. This type of reasoning, exemplified by the passages from reasons of the Tribunal in other cases, cited by the Federal Court in *Applicant LSLS v Minister for Immigration and Multicultural Affairs*, leads to error. It distracts attention from the fundamental question. It leads to confining the examination undertaken (as it was in *LSLS*) merely 'to considering whether the applicant had a well-founded fear of persecution if he were to pursue a homosexual lifestyle in [the country of nationality], disclosing his sexual orientation to the extent reasonably necessary to identify and attract sexual partners and maintain any relationship established as a result.' That narrow inquiry would be relevant to whether an applicant had a well-founded fear of persecution for a Convention reason only if the description given to what the applicant would do on return was not only comprehensive, but exhaustively described the circumstances relevant to the fear that the applicant alleged. On its face it appears to be an incomplete, and therefore inadequate, description of matters following from, and relevant to, sexual identity. Whether or not that is so, considering what an individual is entitled to do is of little assistance in deciding whether that person has a well-founded fear of persecution."

Lord Rodger, in paras 78 – 80 of his judgment, adds a vivid commentary which illustrates and brings to life the general message conveyed by this part of the judgment of Gummow and Haynes JJ.

95. There is a similar message in the joint judgment of McHugh and Kirby JJ (especially paras 40-43). But I have to say, with great respect to those two very

distinguished judges, that I have difficulty with some of the reasoning in para 43, and in particular the sentence,

> "It is the *threat* of serious harm with its menacing implications that constitutes the persecutory conduct."

I think that this sentence (together with the unexceptionable comment in para 40 that harm is persecution "only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it") have contributed to the Court of Appeal straying into error in *J v Secretary of State for the Home Department* [2006] EWCA Civ 1238, [2007] Imm AR 1 paras 16 and 20, an error which was followed in this case: [2009] EWCA Civ 172, paras 11, 12, 31 and 44.

96. In the present case Pill LJ referred, at para 10 of his judgment, to what counsel had described as the Anne Frank principle. That is of course a reference to the Jewish girl who was hidden in an attic in Amsterdam for more than two years, but ultimately discovered by the Nazis and sent to a concentration camp, where she died. The conditions which she had to endure, confined in an attic away from the normal pleasures of childhood and in constant fear of discovery, were certainly severe enough to be described as persecution. But in the context of a claim to asylum under the Convention this approach may be an unnecessary complication, and lead to confusion. The essential question in these cases is whether the claimant has a well-founded fear of persecution as a gay man if returned to his own country, even if his fear (possibly in conjunction with other reasons such as his family's feelings) would lead him to modify his behaviour so as to reduce the risk.

97. There are some countries in which a gay couple who lived together quite openly, and made no attempt to conceal their affection, even in public places, would be 'inviting persecution' (an expression used in *R v Secretary of State for the Home Department, Ex p Binbasi* [1989] Imm AR 595, p 4). That is an unfortunate expression. Some people who risk martyrdom have complex motivation and appear to others to be stubborn and wrong-headed. (John Donne, who was born a Catholic and knew a lot about persecution from his own family's experiences, wrote a prose work entitled Pseudo-Martyr, published in 1610, deploring the intransigence of some loyal Catholics.) But neither the most courageous nor the most timorous forfeit protection as asylum seekers if, in their different ways, they satisfy the test of a well-founded fear of persecution because of their sexuality.

98. I respectfully concur in para 82 of Lord Rodger's judgment, setting out the approach to be followed by tribunals in cases of this sort. It involves (as Gummow and Heydon JJ put it in *S395*, para 78) an "essentially individual and fact-specific

inquiry". It will often be a difficult task since much of the relevant evidence will come from the claimant, who has a strong personal interest in its outcome.

99. For these reasons, and for the fuller reasons given by Lord Rodger, I would allow both appeals and remit them to the tribunal for reconsideration in the light of Lord Rodger's judgment.

LORD COLLINS

100. I agree that the appeal should be allowed for the reasons given by Lord Rodger and that the approach to be followed by tribunals should be as he proposes in paragraph [82] of his judgment.

101. In the context of cases such as this, the use of the words "discretion" and "discreetly" tends to obscure the point that what is really involved is concealment of sexual orientation. The relevant question is whether the applicant has a "well-founded fear of being persecuted for reasons of … membership of a particular social group…": Refugee Convention, article 1A(2). Persecution is 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: *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 495; *Amare v Home Secretary* [2005] EWCA Civ 1600, [2006] Imm AR 217, [17].

102. The test of reasonable tolerability adopted by Buxton LJ in *Z v Secretary of State for the Home Department* [2004] EWCA Civ 1578, [2005] Imm AR 75 at [17], and applied by Maurice Kay LJ in *J v Secretary of State for the Home Department* [2006] EWCA Civ 1238, [2007] Imm AR 73 at [16], and Pill LJ in the present case at [31] was based on a misunderstanding of the passage in the judgment of McHugh and Kirby JJ in *Appellant S395/2002 v Minister for Immigration* [2003] HCA 71,(2003) 216 CLR 473, at [40], when they said:

> "[40]… Persecution covers many forms of harm ranging from physical harm to the loss of intangibles, from death and torture to state sponsored or condoned discrimination in social life and employment. Whatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it. But persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by

> taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps – reasonable or otherwise to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a 'particular social group' if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution. Similarly, it would often fail to give protection to people who are persecuted for reasons of race or nationality if it was a condition of protection that they should take steps to conceal their race or nationality."

103. The idea of reasonable toleration was plainly being mentioned in the context of what amounts to persecution and not in the context of what they described as "taking avoiding action" or where members of the group "hide their membership or modify some attribute or characteristic of the group" to avoid persecution. If a person would have to conceal his sexual identity because of a well-founded fear of persecution, he does not cease to have that well-founded fear even if the concealment will be successful: see also *NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 29, (2005) 216 ALR 1; *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40, (2007) 233 CLR 18; *Refugee Appeal No 74665/03* [2005] INLR 68 (NZ Refugee Status Appeals Authority, Mr Haines QC).

104. A similar, though not identical, approach has been adopted in Canada and the United States. Thus in *Atta Fosu v Canada (Citizenship and Immigration)* 2008 FC 1135 (Federal Court of Canada, Zinn J) it was held that to say that an internal flight alternative existed if the homosexual refugee claimant lived a "discreet" existence, was to say that it was not an internal flight alternative. The applicant was a Ghanaian citizen who claimed to fear persecution by the police and the family of his former same-sex partner, on the basis of his homosexuality. The immigration board found that the applicant could live as a homosexual, "discreetly", in the city of Accra, and therefore that an internal flight alternative existed for the applicant and therefore held that no determination on his identity as a homosexual needed to be made. The court held that the decision was unreasonable because it required the applicant to deny or hide the innate characteristic which formed the basis of his claim of persecution. See also *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282.

105. In the United States it was said in *Karouni v Gonzales*, 399 F 3d 1163, 1173 (9th Cir 2005) that by arguing that the homosexual applicant could avoid persecution by living a life of celibacy in Lebanon, the Attorney General was

essentially arguing that the law required him to change a fundamental aspect of his human identity. See also, for a full discussion of the suggestion that applicants could hide their religion to avoid persecution, *Kazemzadeh v US Attorney General*, 577 F 3d 1341 (11th Cir 2009), following *Iao v Gonzales*, 400 F 3d 530, 532 (7th Cir 2005), *Zhang v Ashcroft*, 388 F 3d 713, (9th Cir.2004); *Woldemichael v Ashcroft*, 448 F 3d 1000 (8th Cir 2006).

106. These principles also answer the "Anne Frank" question which is discussed in the case-law and which was the subject of argument on this appeal. In *Win v Minister for Immigration and Multicultural Affairs* [2001] FCA 132, a political opinion case, the Minister argued that the Tribunal was only required, under the terms of the Convention, to consider whether the applicants would be punished for their political opinions; and that since the applicants had claimed to have operated clandestinely in the past and gave no indication that they would not do so in the future, it was appropriate for the Tribunal merely to ask what the prospects were that the authorities would discover their activities in the future. Madgwick J said (at [18]):

> "… upon the approach suggested by counsel for the [Minister], Anne Frank, terrified as a Jew and hiding for her life in Nazi-occupied Holland, would not be a refugee: if the Tribunal were satisfied that the possibility of her being discovered by the authorities was remote, she would be sent back to live in the attic. It is inconceivable that the framers of the Convention ever did have, or should be imputed to have had, such a result in contemplation."

107. In this case the Secretary of State argued that had Anne Frank escaped to the United Kingdom, and had it been found (improbably, as the Secretary of State recognised) that on return to Holland she would successfully avoid detection by hiding in the attic, then she would not be at real risk of persecution by the Nazis, and the question would be whether permanent enforced confinement in the attic would itself amount to persecution. Simply to re-state the Secretary of State's argument shows that it is not possible to characterise it as anything other than absurd and unreal. It is plain that it remains the threat to Jews of the concentration camp and the gas chamber which constitutes the persecution.

SIR JOHN DYSON SJC

108. On the findings of the tribunals, HJ and HT would have a well-founded fear of persecution if, on return to Iran and Cameroon respectively, they were to live openly as gay men. Their claims for asylum failed because it was found that on

their return they would conceal their sexual orientation and live "discreet" lives. I agree that these appeals should be allowed for the reasons given by Lord Rodger. In view of the importance of the issues, I would like to add a few words of my own.

109. How can a gay man, who would have a well-founded fear of persecution if he were to live openly as a gay man on return to his home country, be said to have a well-founded fear of persecution if on return he would in fact live discreetly, thereby probably escaping the attention of those who might harm him if they were aware of his sexual orientation? It is well-established that in asylum cases it is necessary for the decision-maker to determine what the asylum-seeker will do on return: see *Ahmad v Secretary of State for the Home Department* [1990] Imm AR 61. Thus, the asylum-seeker who could avoid persecution on his return, but who (however unreasonably) would not do so is in principle a refugee within the meaning of the Convention. At first sight, therefore, it might be thought that this should lead to the conclusion that, if a gay man would live discreetly on return and thereby avoid being harmed or persecuted on account of his sexual orientation, he could not have a well-founded fear of persecution within the meaning of article 1A(2) of the Convention. I shall call this "the *prima facie* interpretation". But none of the parties to this appeal argues for this interpretation, although their reasons for not doing so differ fundamentally.

Reasons why the prima facie interpretation must be rejected

110. The Convention must be construed in the light of its object and purpose, which is to protect a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country". 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. The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he would conceal the fact that he is a gay man *in order to avoid persecution* on return to his home country.

111. A purposive approach to the meaning of "refugee" was adopted by McHugh and Kirby JJ in the *S395/2002* decision (2003) 216 CLR 473, at para 41 where they said:

> "The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention."

112. Like Lord Rodger, I would follow this approach which has been substantially followed in Australia. I do not find it necessary to examine the Australian authorities to which we were referred. It is perhaps sufficient to refer to the paper by Jenni Millbank "*From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom* (2009) 13 (2-3) IJHR 391-414. This paper explores the impact of the *S395/2002* decision on the refugee jurisprudence of Australia and the United Kingdom five years on. It shows that the reasoning of the majority judgments is being generally applied in Australia, but that there has been "a clear shift away from discretion towards disbelief as the major area of contest in decisions since *S395* and *S396*, with a significant increase in decisions where the applicant's claim to actually being gay, lesbian, or bisexual is outright rejected".

113. The somewhat different analysis of the problem adopted in New Zealand also leads to a rejection of the *prima facie* interpretation and to the same overall conclusion that a person's claim to refugee status is not to be denied even if on return he will act discreetly in order to avoid being persecuted. On this analysis, which is expounded very fully in the leading case of *Refugee Appeal No 74665/03* [2005] INLR 68*,* the emphasis is on the fact that refugee status cannot be denied to a person who on return would forfeit a fundamental human right in order to avoid persecution. Like Lord Rodger, I see the attractions of this approach. It gives due weight to the fact that the Convention must be interpreted "in accordance with its broad humanitarian objective and having regard to the principles, expressed in the preamble, that human beings should enjoy fundamental rights and freedoms without discrimination and that refugees should enjoy the widest possible exercise of these rights and freedoms": see per Lord Bingham in *Fornah v Secretary of State for the Home Department* [2007] 1 AC 412 at para 10. An interpretation of article 1A(2) of the Convention which denies refugee status to gay men who can only avoid persecution in their home country by behaving discreetly (and who say that on return this is what they will do) would frustrate the humanitarian objective of the Convention and deny them the enjoyment of their fundamental rights and freedoms without discrimination. The right to dignity underpins the protections afforded by the Refugee Convention: see *Canada (AG) v Ward* [1993] 2 SCR 689, approving Professor Hathaway, *Law of Refugee Status,* 1991, p 108:

> "The dominant view, however, is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard".

114. A particular attraction of the New Zealand approach is that, as was said at [2005] INLR 68, para 120 of the decision delivered by RPG Haines QC, it facilitates a determination of:

> "whether the proposed action by the claimant is at the core of the right or at its margins and whether the prohibition or restriction imposed by the state is lawful in terms of international human rights law. If the proposed action is at the core of the right and the restriction unlawful, we would agree that the claimant has no duty to avoid the harm by being discreet or complying with the wishes of the persecutor. If, however, the proposed activity is at the margin of the protected interest, then persistence in the activity in the face of the threatened harm is not a situation of 'being persecuted' for the purposes of the Refugee Convention. The individual can choose to carry out the intended conduct or to act 'reasonably' or 'discreetly' in order to avoid the threatened serious harm. None of these choices, however, engages the Refugee Convention".

115. It is open to question how far the distinction between harmful action at the core of the right and harmful action at its margin is of relevance in cases of persecution on grounds of immutable characteristics such as race and sexual orientation. But it is a valuable distinction and there may be more scope for its application in relation to cases concerning persecution for reasons of religion or political opinion.

116. There is a yet further analysis that may be adopted which leads to the conclusion that the *prima facie* interpretation should be rejected. This is that, if a person will conceal his true identity and protected status out of a well-founded fear that he will otherwise be persecuted, he will nevertheless continue to have a well-founded fear of persecution even if, by concealing his true identity, he may succeed in avoiding serious harm. As McHugh and Kirby JJ said in *S395/2002* at para 43:

> "In many—perhaps the majority of—cases, however, the applicant has acted in the way that he or she did only because of the *threat* of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful

> conduct, he or she will suffer harm. It is the *threat* of serious harm with its menacing implications that constituted the persecutory conduct."

117. In other words, the threat of serious harm and the fear of it will remain despite the avoiding behaviour. In *Win v Minister for Immigration and Multicultural Attains* (2001) FCA 132, at para 18 Madgwick J said:

> "upon the approach suggested by counsel for the respondent, Anne Frank, terrified as a Jew and hiding for her life in Nazi-occupied Holland would not be a refugee: if the Tribunal were satisfied that the possibility of her being discovered by the authorities was remote, she would be sent back to live in the attic. It is inconceivable that the framers of the Convention ever did have, or should be imputed to have had, such a result in contemplation."

118. Even if it could be imagined that Anne Frank, as an asylum-seeker, would not objectively have been at risk of being discovered in the attic, she would nevertheless have had a well-founded fear of serious harm, a fear not eliminated by her decision to conceal her identity as a Jew and live in the attic.

The Secretary of State's solution: the reasonable tolerability test

119. The Secretary of State recognises that it cannot have been intended that Convention protection should be denied to those who feel compelled to take extreme measures to avoid persecution. She does not, therefore, espouse the *prima facie* interpretation. Her case is that, if the measures that an asylum-seeker would take on return to avoid persecution are not reasonably tolerable, then that of itself would amount to persecution. I cannot accept this.

120. First, 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. But the phrase "being persecuted" does not refer to what the asylum-seeker does in order to *avoid* such persecution. The *response* by the victim to the threat of serious harm is not itself persecution (whether tolerable or not) within the meaning of the article.

121. Secondly, the test of what is reasonably tolerable is vague and difficult to apply. Is it a subjective test? Or does the word "reasonably" import the idea of the reasonable victim? If so, how for example would a decision-maker determine

whether it is reasonably tolerable to a person to conceal his or her sexual orientation or race? These are difficult questions which those who framed the Refugee Convention surely cannot have intended decision-makers to address. On the Secretary of State's test, it would seem that a person who feels compelled to conceal his or her protected status, but does not feel strongly about it and does not find the concealment intolerable is denied the protection of the Convention; whereas the person who does feel strongly about it and finds the concealment intolerable has the benefit of its protection. This differential treatment of the tolerant and the intolerant is unfair. It is an unprincipled and improper basis for deciding whether a person should or should not be accorded refugee status.

122. The decision by the AIT in HJ's case shows just how unsatisfactory the Secretary of State's test is. The AIT comprised three very experienced immigration judges who endeavoured faithfully to apply the reasonable tolerability test prescribed for them by the Court of Appeal. They found at para 44 of their Determination that for 16 years HJ had been able to conduct his homosexual activities in Iran "without *serious* detriment to his private life and without that causing him to suppress *many* aspects of his sexual identity" (my emphasis). They concluded at para 45 that he would behave in the same way on his return to Iran and that it was "difficult to see on the evidence that a return to that way of living can properly be characterised as likely to result in an abandonment of the appellant's sexual identity". They said that he had been able to "express his sexuality albeit in a more limited way than he can do elsewhere". Finally, they said at para 46: "To live a private life discreetly will not cause significant detriment to his right to respect for private life, nor will it involve suppression of many aspects of his sexual identity". I do not understand by what yardstick the AIT measured the tolerability of these limitations and concluded that they were reasonably tolerable. True, HJ had endured them for 16 years, but that did not make them tolerable, let alone reasonably tolerable to him. In short, there was no basis on which the tribunal could properly conclude that the fact that HJ had to conceal his identity as a gay man was reasonably tolerable to him. I wish to make it clear that I am not seeking to criticise the tribunal, but rather to show the nature of the task that they were asked to perform.

123. Thirdly, the Secretary of State seeks to draw a distinction between the decision-maker (i) "requiring" the asylum-seeker to act discreetly on return and (ii) making a finding that the asylum-seeker will in fact act discreetly on return. It is said that the former is impermissible and irrelevant to whether the asylum-seeker has a well-founded fear of persecution, whereas the latter is not only permissible but highly relevant. But as Lord Rodger points out, this is an unrealistic distinction. 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.

124. Fourthly, the Secretary of State's test, as formulated by the Court of Appeal in *Z v Secretary of State for the Home Department* [2004] EWCA Civ 1578, [2005] Imm AR 75 and applied in subsequent decisions of the Court of Appeal is based on a misunderstanding of two authorities. The test is founded entirely on these authorities and is not supported by any independent reasoning.

125. The first misunderstanding is of para 40 of the judgment of McHugh and Kirby JJ in *S395/2002*. The sentence relied on by Buxton LJ is: "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." This sentence comes in a passage which is dealing with persecution generally. The paragraph then goes on to say that persecution "does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality". The sentence relied on by Buxton LJ is saying nothing about the quality or effect of action taken to avoid persecution.

126. The second misunderstanding is of the true effect of what Simon Brown LJ said in *Ahmed v Secretary of State for the Home Department.* What he said at p 7 of his judgment (quoted by Lord Rodger at para 54 above) was that an asylum-seeker would have a well-founded fear of persecution if he could avoid persecution on his return, but would choose not to do so (case A). He did not address either expressly or by implication the question whether an asylum-seeker would have a well-founded fear of persecution if on his return he would act discreetly to avoid the persecution that he would suffer if he lived openly (case B). A conclusion on case A sheds no light on the correct answer to case B.

127. Fifthly, there is no support for the Court of Appeal approach in any other jurisprudence. This is important in view of the implicit rejection of it in a number of other jurisdictions, including at least Australia and New Zealand, and the fact that it is desirable that, so far as possible, there should be international consensus on the meaning of the Convention.

128. For all these reasons, I would reject the reasonable tolerability test. I should add that in his judgment in the present case, Pill LJ said at para 32 that in determining whether suppression was reasonably tolerable for an individual:

> "....a degree of respect for social norms and religious beliefs in other states is in my view appropriate. Both in Muslim Iran and Roman Catholic Cameroon, strong views are genuinely held about homosexual practices. In considering what is reasonably tolerable in

> a particular society, the fact-finding Tribunal is in my view entitled to have regard to the beliefs held there".

129. Even if I had accepted the reasonable tolerability test, I would not have felt able to agree with this passage. It would have been necessary to conduct the assessment by reference to objective human rights standards, and not by reference to the social mores of the home country. As Lord Hoffmann said in *R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629, 655E:

> "The findings of fact as to discrimination have not been challenged. They cannot be ignored merely on the ground that this would imply criticism of the legal or social arrangements in another country. The whole purpose of the Convention is to give protection to certain classes of people who have fled from countries in which their human rights have not been respected."

130. In *Refugee Appeal No 74665/03,* the New Zealand Status Appeals Authority stated at para 112: "We do not accept that the domestic law of the country of origin or cultural relativity can override international human rights norms in the refugee determination context." I agree.

Conclusion

131. It follows that the AIT in HJ's case applied the wrong test, although they are not to be criticised for having done so. His appeal must be allowed and his case remitted to a fresh tribunal. The tribunal in HT's case did not apply the reasonably tolerability test. But they dismissed HT's appeal on the basis that he could relocate to a different part of Cameroon, presumably on the basis that he would act discreetly there. Their conclusion is flawed for the simple reason that they seem to have thought that the mere fact that HT had acted discreetly in the past and would do so in the future was determinative of the issue. That was an error of law. His appeal must also be allowed and his case remitted to a fresh tribunal.

132. As regards guidance for immigration judges in the future, I agree with what Lord Rodger has said at para 82.