Queer Judgments

Edited by

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To queer people around the globe who deserve better justice.

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Contents

PART 2: PRIVACY AND DISCRIMINATION

PART 3: FAMILY AND PARENTHOOD

PART 4: HEALTH AND REPRODUCTION

PART 5: ASYLUM AND MIGRATION

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Queerword to the first edition

As a young kid in suburban England in the early 1970s, I remember my dolls' house. It was a hand-me-down from much older cousins and was very much a thing of the 1960s. For a start it was a single floor construction, somewhat sprawling and with no roof. I could look down on its rooms, its tiny 1960s chairs and Formica worksurfaces. Its strange mix of slightly post-war taste in wall pictures and paper, combined with the Austin Powers-esque modernism of its day. It was a little run-down, to be sure. Here and there the wallpaper was torn: perhaps a sign of the 1970s recession on its way for my poor 1960s little dolls, stranded innocently in their own groovy era.

I also remember the visit paid to them by 'Action Man,' who I introduced to this scene of domesticity, even though he towered over the other dolls. People often criticise, say, Barbie for her range of career options, but poor Action Man—we must recall—never got anything other than a uniform. Maybe a diver's wetsuit. Not for him the role of mermaid. Nonetheless, I like to think that I had made some sort of childhood inroad into queering that mini-household space and expanding the social horizons of my plastic playmates by bringing them together, at least until in the end I dismembered the lot of them, a fate not unusual for even the best behaved of doll figures.

About 25 years later, and with no limb-ripping involved, I found myself standing up in court for the first time having come out as what we then called 'transsexual' (a strangely terrifying, stigmatizing yet powerful word perhaps ripe for reclaiming). I was now an advocate arguing my client's case in public and in a peculiar way feeling either like Action Man in my dolls' house, or alternatively like my dolls if they had been dropped behind enemy lines into bloody combat. Whilst I had always been clear from my earliest days as to my gender as female, flying in the face of the evidence of my body and the beliefs and behaviour of adults, this new transition to the distinctly non-queer zone of the court and the judge, the wig and the robes, left me feeling 'liminal,' in-between, *transforming* but not *transformed*. I was between worlds rather than firmly in one or the other. That changed only slowly, and traces of my memory of that organic journey are artefacts of my own personal history which I will cherish forever and which I hope have informed my outlook in my more recent years, as a judge.

What this book—this wonderful collection of highly diverse work—does is to embark on an important journey in which we re-examine mental spaces, the literal or metaphorical dolls' house of orthodoxy, and introduce into it a new eye, a new mode of expression, a re-interpretation which challenges us to consider the queered perspective, which may be one which challenges and reverses assumptions, or which moves our thinking into the sort of liminal space in which I found myself when starting out as (what is now called) trans openly in the world.

This book—which I hope is only the beginning of more work to come—could not emerge at a more significant time. Both in the UK and elsewhere, notably in the USA, the apparently accepting society which some had thought was built between the late 1990s and the early 2000s, is challenged in 2024 by the rise of more absolutist, distinctly de-queering ideologies sometimes rooted in religion, sometimes rooted in

aspects of fascistic thinking, sometimes simply born of fear fuelled by falsehood and a distaste for all things not-understood.

The narrative of the 'queer' as abusive, as dangerous, as 'foreign' and as sick, is simple and easily swallowed by some, and feeds proposals to row back basic civil liberties. To the trans community, for example, proposals to restrict access to medical wards or to alter the legal sex of some against their will by statutory change are threats of immense structural violence and brings back memories—for those old enough to recall being trans in the 1990s—of proposals such as requirements for reproductive sterility of trans people in exchange for civil rights. Moves today to restrict diversity networks in some workplaces likewise feel like pending erasure and silencing of the voices of many. Little wonder then that human rights lawyer Victor Madrigal-Borloz said this after a visit to the UK in 2023 to examine the rights situation there in relation to LGBT+ people:

> I am deeply concerned about increased bias-motivated incidents of harassment, threats, and violence against LGBT people, including a rampant surge in hate crimes in the UK … All of this is attributed—by a wide range of stakeholders—to the toxic nature of the public debate surrounding sexual orientation and gender identity.[1]

Leaving aside being an antidote to the 'anti-queer' or 'de-queering' movements in the public marketplace of ideas, this book also achieves a more subtle outcome. It advances our discussion of the changing notion of norms and of the antinormative simply by its approach of re-writing or re-telling existing narratives through the compound lenses of queerness. It marks one point in time in this field of thought, within an inevitable evolution of ideas. It is the kind of evolution one can see if I quote my trans-sister Christine Jorgensen in 1952:

> Nature made a mistake, which I have corrected,[2]

to which now I would say in 2024 instead:

> Nature made no mistake, but gave me a path to grow.

It is in works of pioneering critical scholarship such as this collection that 'queerness' can find its ongoing survival and expression, because it invites us to revisit examples of public discourse and thought and to see how 'the queer' can still find its place 'in court ,' whether literally or in the court of public opinion. The publishers and editors of this collection should feel immensely proud—as should all the chapter authors—of the academic contribution which they have made here.

Victoria McCloud, January 2024

1. UN Human Rights Office of the High Commissioner, 'UK: Keep calm and respect diversity, says UN expert,' 11 May 2023, accessed 22 January 2024, https://www.ohchr.org/en/press-releases/2023/05/uk-keep-calm-and-respect-diversity-says-un-expert.
2. Jorgensen, Christine (1952) reported in the Daily News, apparently in a leaked letter: Francine Uenuma, 'A gender-affirming surgery gripped America in 1952: "I am your daughter",' 12 June 2023, accessed 22 January 2024, https://www.washingtonpost.com/history/2023/06/12/first-transgender-surgery-christine-jorgensen/.

25

HJ (Iran) & HT (Cameroon) (United Kingdom):

Queer Reflections on a Landmark Case on the Rights of LGBT+ Refugees

Alex Powell

HJ (Iran) & HT (Cameroon) in Context

HJ (Iran) & HT (Cameroon) has generally been regarded as a major step forward in the protection of refugees of who are sexually diverse[1] in the UK.[2] For example, Rainbow Migration heralded the decision as a 'key factor in the improvement of first decisions.'[3] Much early critique of the decision centred on its failure to draw distinctions between incidental and core aspects of sexuality.[4] Later critique has also focused on the failure of the decision to offer concrete guidance for decision makers who are tasked with determining whether a particular claimant is a sexually diverse person,[5] and for retaining the role of discretion reasoning by asking decision makers to make judgments regarding future behaviour.[6] Despite these criticisms, the judgment has generally been regarded as a positive step towards greater protection for sexually diverse refugees.

1. While it would be more common to use terminology such as LGBT+ or SOGIE (Sexual Orientation and Gender Identity and Expression), I deploy this terminology in order to avoid the overly identitarian frameworks associated with sexuality. I have expanded on my reasons for this more fully elsewhere. See: Alex Powell, '"Sexuality" Through the Kaleidoscope: Sexual orientation, Identity and Behaviour in Asylum Claims in the United Kingdom,' *Laws* 10 (2021), 90.
2. *HJ (Iran) & HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31.
3. UK Lesbian and Gay Immigration Group (UKLGIG), Missing the Mark: Decision Making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims (UKLGIG, 2013), accessed on 7 September 2023, https://www.rainbowmigration.org.uk/publications/missing-the-mark/.
4. See, for example, James C. Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law,' *New York University Journal of International Law and Politics* 44(2) (Winter 2012), 315–390.
5. Satvinder Juss, 'Sexual Orientation and the Sexualisation of Refugee Law,' *International Journal on Minority and Group Rights* 22 (2015), 128–53.
6. Jana Wessels, 'The Art of Drawing Lines: Future Behaviour and Refugee Status,' in *Research Handbook on International Refugee Law*, ed. Satvinder Juss (Edward Elgar, 2019); Jana Wessels, '*HJ (Iran) and HT (Cameroon)* – Reflections on a New Test for Sexuality-Based Asylum Claims in Britain,' 24 *International Journal of Refugee Law* 24 (2012), 815.

As I have made clear elsewhere, this is not a position I disagree with.[7] The decision in *HJ (Iran) & HT (Cameroon)* addressed a substantial deficiency with regard to how the Refugee Convention definition of a refugee was being applied to cases concerning sexuality or sexual diversity in the UK. However, as Adler has argued, even progressive movements, moments, and legal processes carry trade-offs.[8] It is in this register, linking to a history of queer critical analysis, that I seek to offer a queer re-writing of the judgment. This re-writing seeks to retain the progressive consequences of the decision, reaching substantially the same outcome as that reached by the Supreme Court. However, my judgment seeks to pay greater critical attention to the forms of knowledge regarding the nature, constitution, and ontological basis of sexual diversity that are promoted—both implicitly and explicitly—within the judgment. In particular, I seek to limit or restrain the movement from discretion to disbelief within the adjudication of refugee status that has generally been associated with both this decision and similar decisions in other jurisdictions.[9]

As such, my judgment seeks to avoid the homonormative,[10] homonationalist,[11] and overly fixed ways of conceptualizing sexual diversity displayed in the original judgment.[12] Otherwise put, I seek to offer a counter-judgment that is more attentive to the forms of essentialism, strategic or otherwise, at play when the law attempts to grasp at concepts such as sexuality.[13] The phrase strategic essentialism was coined by Spivak. She utilised this term to refer to the way social groups mobilize based on a shared characteristic and, in so doing, erase or ignore differences between members of those groups.[14] Through being attentive to these patterns, I seek to offer an 'ethical reimagining' that is more aligned with the experiences,[15] desires, and self-conceptions of sexually diverse refugees.

In offering this judgment, I share many of the concerns regarding the compatibility of queer theory with the practice of judgment writing, as expressed by Sharpe[16]

7. Powell, '"Sexuality" Through the Kaleidoscope'; Alex Powell, *Queering Refugee Law: A Study of Sexual Diversity in Asylum Policy and Practice in the United Kingdom* (PhD Thesis, City University of London, 2021).

8. Libby Adler, 'Life at the Corner of Poverty and Sexual Abjection: Lewdness, Indecency, and LGBTQ Youth,' in *Research Handbook on Gender, Sexuality and the Law,* ed. Chris Ashford and Alexander Maine (London: Edward Elgar, 2020).

9. Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom,' *International Journal of Human Rights* 13:2–3 (2009), 391–414.

10. Lisa Duggan, 'The New Homonormativity: The Sexual Politics of Neoliberalism,' in *Materializing Democracy: Towards a Revitalized Cultural Politic,* ed. Russ Castronovo and Dana Nelson (New York: Duke University Press, 2002).

11. Jasbir Puar, 'Mapping US Homonormativities,' *Gender, Place and Culture* 13:1 (2006), 67–88; Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (New York: Duke University Press, 2012).

12. See, for discussion, Alex Powell, '"Sexuality" Through the Kaleidoscope.'

13. Gayatri Spivak, 'Criticism, Feminism and the Institution,' *Thesis Eleven*, 10-11(1) (1985), 175.

14. Spivak, 'Criticism, Feminism and the Institution,' 175–187.

15. Alex Sharpe, 'Queering Judgment: The Case of Gender Identity Fraud,' *The Journal of Criminal Law* 81 (2017), 417.

16. Sharpe, 'Queering Judgment,' 420–425.

and the Feminist Judgments Project.[17] These concerns were also discussed in further depth in the introduction to this volume. However, one area of distinction between this particular judgment and those projects is that my aim is not 'to demonstrate that, at the time a case was decided, it could, and should, have been decided differently.'[18] On the contrary, I agree with the final decision reached in *HJ (Iran) & HT (Cameroon)*. However, I want to challenge the particular epistemology of sexual diversity promoted within the case. That is to say that I wish to 'challenge the majority's story [on sexuality] and weaken its hold on our collective imagination.'[19] This is consistent with what Sharpe, herself drawing on the work of Valdes,[20] identifies as the core principles of queer legal theory, namely 'challenging dominant and binary understandings of the categories of sex, gender and sexuality, deconstructing ideas of normalcy and deviance, [and] defending desire.'[21] As such, while the judgment reached in *HJ (Iran) & HT (Cameroon)* is agreeable to me, the forms of truth cemented regarding the form and shape of sexual diversity demand a queer critical challenge.

The Counter and the Anti-Normative

In offering this counter judgment, I wish to make a direct interjection into the debate regarding the ability of queer theory to make and sustain normative claims. As Zanghellini has argued, queer theory is often seen as somewhat aloof and removed.[22] Indeed, at times, queer theory is framed as being anti-normative, a brand of critical theory that, while able to problematize existing schemas and systems of thought, fails to offer any suggestions regarding how things could be different.[23]

Zanghellini has posited that, instead of being viewed as anti-normative, queer theory can be understood as counter-normative.[24] Counter-normativity involves the deployment of queer theory's insights, attention to the socially disavowed, and awareness of power-relations, to put forward reform proposals that serve fundamentally humanistic aims.[25] In this sense, Zanghellini is proposing an approach through which queer theory can instead serve as a platform to critically evaluate, reassess, and reformulate our commitments to allow difference to be more genuinely valued within our societies.

Deployed in the manner proposed by Zanghellini, queer theory can offer practical solutions to social problems. It is in this sense that the judgment here is offered,

17. Rosemary Hunter, Clare McGlynn and Erika Rackley, eds., *Feminist Judgments: From Theory to Practice* (London: Hart Publishing, 2010).
18. Sharpe, 'Queering Judgment,' 417.
19. Erika Rackley, 'An Account of Feminist Judging,' in *Feminist Judgments: From Theory to Practice*, ed. Rosemary Hunter, Claire McGlynn and Erika Rackley (London: Hart Publishing, 2010), 33.
20. Francisco Valdes, 'Afterward and Prologue: Queer Legal Theory,' *Cardozo Law Review* 83 (1995), 344.
21. Sharpe, 'Queering Judgment,' 421.
22. Aleardo Zanghellini, 'Antihumanism in Queer Theory,' *Sexualities* 34 (2020), 530, 540.
23. See, for example, Martha Nussbaum, 'The Professor of Parody: The Hip Defeatism of Judith Butler,' The New Republic, 22 February 1999, accessed 20 December 2022, https://newrepublic.com/article/150687/professor-parody.
24. Aleardo Zanghellini, 'Queer, Antinormativity, Counter-Normativity and Abjection,' *Griffith Law Review* 18 (2009), 1.
25. Zanghellini, 'Queer, Antinormativity, Counter-Normativity and Abjection,' 4.

with a view to addressing the overreliance on identity politics within the asylum claims of people of diverse sexualities and promoting a more constructivist and relativist conception of sexual diversity.

As such, a part of the purpose of this counter-judgment lies in attempting to prove the clear, articulable, and fundamentally pragmatic implications that can flow from queer theory. This, alongside other judgments in this volume, speaks to the value of queer theory as a critical tool with which both lawyers and judges should be encouraged to engage.

The Original Judgment

HJ (Iran) and HT (Cameroon) is a set of combined appeals heard in the Supreme Court by a panel consisting of Lord Hope, Lord Rodger, Lord Walker, Lord Collins, and Sir John Dyson. The appeal concerned the issue of whether the 'reasonable tolerability' test, on the question of whether a claimant could be required to 'be discreet' regarding their sexual diversity in order to avoid persecution in their country of origin, was compatible with the Refugee Convention. Under the test as set down by the Court of Appeal in *J*, the question a decision maker should ask is whether discretion within the country of origin was a condition which the claimant could reasonably be expected to tolerate.[26] However, the Supreme Court in *HJ (Iran) and HT (Cameroon)* held that requiring discretion was incompatible with the Refugee Convention.

In the immediate case, both appellants were gay men who claimed a fear of persecution on the basis of sexual orientation, behaviour, or identity. HJ was, at the time of the Supreme Court decision, a 40-year-old Iranian man who had claimed asylum on his arrival in the UK in December 2001. HT was a 36-year-old Cameroonian man who had claimed asylum in January 2007, after being arrested at Gatwick airport for using a false passport. In the original judgment, both are described as 'practicing homosexuals,' which is presumably a sanitised way of saying both actively pursued sexual, social, and romantic relationships with other men [4].

In 2009, the case reached the Court of Appeal, with the claimants appealing against the test used to determine whether they had a well-founded fear under Article 1(A)2 of the Refugee Convention 1951. Their appeals were dismissed.[27] All parties to the hearing agreed that 'homosexuals' could constitute a particular social group for the purposes of the Convention. However, the issue in the case was whether a claimant should be expected to tolerate needing to be discreet in order to avoid persecution [6]. The Secretary of State argued that the question was always whether or not discretion upon return to the country of origin was something the claimant could reasonably be expected to tolerate. However, the appellants contended that such a proposition was not compatible with the UK's obligations under the Refugee Convention.

26. *J v Secretary of State for the Home Department* [2007] Imm AR 73.
27. [2009] EWCA Civ 172.

Queering *HJ and HT*

One of the fundamental issues when offering a queer judgment is an attempt to show that the decision—or logics employed therein—could have been different within the existing framework of the law. As such, my focus here is on putting forward a judgment consistent with the law as it was in 2010 which shows how the judges could have reached their decision without resorting to the essentialised forms of identity politics deployed within the judgment. As such, note should be taken that subsequent matters such as the Nationality and Borders Act 2022 or the Illegal Migration Act 2023 are not considered in this decision. Given the above focus, I reach conclusions that are highly similar to those reached in the original judgment. Namely, I agree that the test employed prior to the case reaching the Supreme Court was incompatible with the Refugee Convention. However, I depart from the original judgment in regard to the conceptions of sexual and gender diversity that inform my reasoning. In particular, I employ more relativist conceptions of sexual diversity—conceptions that are less moored to identity politics. As a result of this, my judgment also demonstrates a departure from the test which the Supreme Court established for decision makers reaching determinations regarding membership of a particular social group. I instead advance a test which devotes critical attention to the inter-relations between the construction of the particular social group and the way in which claimants demonstrate membership of that group.

A few key areas of difference are to be stressed. Firstly, the substantive decision rests entirely on law and scholarship prior to the 2010 decision. However, I utilise the terminology of 'sexual diversity' as outlined in my 2021 paper.[28] This terminology 'capture[s] anyone who engages in sexual activity with, is attracted to, or who identifies with, a culture founded around a non-normative sexual practice or partner.'[29] The point here is that something in regard to the sexual lives of the persons in question marks them out as different to the surrounding society, or as otherwise non-normative. In setting out this, I note that Dustin and Ferreira have been critical of this deployment of 'diverse' in the sense that it can be seen to reify the perceived distinction between heterosexuality and non-heterosexuality.[30] However, my use of the phrase is not intended to explicitly exclude those who are heterosexual, but rather to move us away from a focus on identities and instead to focus on the characteristics which lead people to be the targets of persecution. As such, I argue this conceptual shift moves us towards a more relativist and less fixed conception of sexual difference. In stating this, I note that alternative terminologies such as 'sexual orientation and gender identity and expression' (SOGIE) have also become increasingly utilised within refugee and migration literature.[31] More broadly, terms such as queer can be used to signify

28. Powell, '"Sexuality" Through the Kaleidoscope.'
29. Powell, *Queering Refugee Law*.
30. Moira Dustin and Nuno Ferreira, 'Canada's Guideline 9: Improving SOGIE claims assessment?' *Forced Migration Review* 56 (2017), 80.
31. See, for example, Nick J Mulé, 'Safe Haven Questioned: Proof of Identity Over Persecution of SOGIE Asylum Seekers and Refugee Claimants in Canada,' *Journal of Immigrant and Refugee Studies* 18 (2020),

the same characteristics without carrying implications of identity. However, I argue that a focus on sexual diversities provides the conceptual space to consider claimants' own frameworks for understanding their sexual lives without the conceptual baggage carried by ideas such as identity and orientation and without the theoretical baggage carried by queer theory. Secondly, the test I present requires decision makers to formulate a wider particular social group along the lines of sexually diverse people; this is to avoid the simplistic resort to identity as the framework through which sexual diversity is understood.

207; Nuno Ferreira, 'Utterly Unbelievable: The Discourse of Fake SOGI Asylum Claims as a form of Epistemic Injustice,' *International Journal of Refugee Law* 34 (2022), 303.

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.

Alex Powell SCJ

Judgment Given on
7th July 2010
Heard on 10, 11 and 12 May 2010

[1] These appeals raise the question of which test should be applied when considering whether a sexually diverse person, or person who will be perceived as sexually diverse, who is claiming asylum under the Convention Relating to the Status of Refugees 1951, and its 1967 protocol, has a well-founded fear of persecution on the basis of that sexual diversity.

[2] Neither sexual orientation, nor sexual identity, was considered a ground for asylum by the High Contracting Parties at the time when the Convention was being drafted. However, precedent from *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, Ex p Shah [1999] 2 AC 629* onwards has firmly established that people with diversities of gender and sexuality can be recognised as members of particular social groups for the purposes of the Convention and its protocol.

[3] Moreover, social divides have emerged with some recognizing sexual diversity as a part of the fabric of human existence deserving of social and legal protections and others either denying the existence of people who are sexually diverse or engaging in persecutory responses to their existence. Two such examples are relevant in the immediate case. Firstly, there is HJ, who is 40 years old and Iranian. He claimed asylum on his arrival in the United Kingdom in December 2001. In Iran, Article 233 of the Islamic Penal Code sets out that in a consensual relation the active (penetrating partner) shall receive 100 lashes while the passive partner shall be sentenced to death. HT, who is 36 years old, is from Cameroon. In Cameroon, Article 347 of the Penal Code provides for up to 5 years imprisonment for sexual relations with people of the same sex. Social discrimination is also rife in the country. HT arrived in the UK in January 2007.

[4] The remainder of the relevant facts, as well as the procedural history of the cases, can be found in the judgment of my learned friend, Lord Hope.

[5] In this Court, the Secretary of State submitted that the test of whether the appellants should be granted refugee status was correctly set out by the Court of Appeal in *J v Secretary of State for the Home Department* [2007] Imm AR 73. Namely, that the relevant test was whether or not discretion on return to the country of origin would be reasonably tolerable to the claimant. HJ, however, argued that the test as stated in *J v Secretary of State for the Home Department* was misconceived. He submitted that the test was not compatible with the definition of a refugee in Article 1A(2) of the Convention. This was argued on the basis that, in requiring the claimant to suppress their protected ground so as to avoid the potential persecution they may face if it were to become known, the very status to which the Convention protection attaches was denied. HT also contested the test utilised in the *J* case. He submitted that any applicant who was able to show a well-founded fear of persecution was entitled to refugee status and, thus, that a claimant should not be expected to demonstrate that concealment of their protected characteristic was something they could not be reasonably expected to tolerate.

[6] As per Article 1A(2) of the Convention, 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.

[7] The meaning of Article 1A(2) is largely settled ground. There is no doubt that people who are sexually diverse, such as gay men, can constitute particular social groups. This was established in *Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629, 643-644. Further, regulation 6(1)(e) of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525) clearly identifies that sexual orientation can form the basis of a particular social group.

[8] As established by the Supreme Court of Canada in *Ward* [1993] 2 SCR 689, 709, the fundamental requirement for a particular social group to be said to exist is that the members of that group have a characteristic that either cannot be changed, or where changing it would be an affront to the human dignity of the members of the group. This point is further confirmed by the United Nations High Commissioner for Refugees (UNHCR) Guidance note on Refugee Claims Relating to Sexual Orientation (2008). As such, it is easy to see that sexual diversity can constitute a basis for the existence of a particular social group. This is so whether that sexual diversity registers as a form of identity, orientation, or behaviour.

[9] In this regard, note should be taken that the purpose of the Convention, its underlying rationale, is to provide a means for people to live their lives free from the prospect

of suffering serious harm as a result of their race, religion, nationality, membership of a particular social group, or political opinion. It seeks to do this by requiring signatories to provide surrogate protection where the country of origin, or previous habitual residence, from which someone comes is unable or unwilling to do so. As it was put by La Forest J in *Ward*:

> 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 national. It was meant to come into play only in situations when that protection is unavailable.

As such, we should start from the premise that signing the Refugee Convention binds states to offer surrogate protection to individuals from states who permit, facilitate, or engage in harm arising to such an intensity that it constitutes persecution. In this regard, at least at a general level, protection is an entitlement regardless of what action a given claimant might themselves be able to take to prevent such harm accruing.

[10] Furthermore, note should be taken that, as identified above, the very foundation of sexual diversity as a matter protected by the Convention is based on the fact that sexual diversity is widely socially recognised as something that distinguishes people from surrounding society. As identified in the (UNHCR) Guidance note on Refugee Claims Relating to Sexual Orientation (2008), this social recognition is adequate to show the existence of a particular social group. Having confirmed this, the only question is whether the claimant would have a well-founded fear on return. To make protection contingent on the behaviour of the claimant would undermine the very human dignity which the Convention sets out to protect.

Well-founded fear: The causal link

[11] In the immediate appeals, the fact that sexual diversity can provide a relevant particular social group for the purposes of the Refugee Convention is not at issue. However, the issue of refugee status does not end with the existence of a relevant particular social group. The Convention requires the claimant to have a "well-founded fear" of persecution for a Convention reason. This was well put by Simon Brown LJ in *Ahmed (Iftikhar) v Secretary of State for the Home Department* [2000] INLR 1, 7–8: '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?'

[12] I would endorse this as the appropriate question. The question makes clear that the pertinent issue is whether or not the claimant faces a well-founded fear of persecution, not whether such a fear will actually arise. Put another way, the fact that a claimant could avoid certain actions and, in so doing, avoid having a well-founded fear of persecution is not a relevant factor in deciding whether or not they are a refugee. This follows the reasoning in the Australian case *S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, where McHugh and Kirkby JJ

said that persecution does not cease to be persecution just because it would be possible for it to be avoided by some action on the part of the defendant.

[13] Before this Court, Mr Bourne has argued that discretion regarding the claimant's sexual diversity could be treated by analogy to the use of internal relocation. This is to say that, as with a claimant who is asked to internally relocate to avoid the threat of persecution, the appropriate question to ask with regard to whether or not a claimant might be asked to be 'discreet' or otherwise to conceal their sexual diversity is whether or not it would be reasonably tolerable for them to do so. This submission raises the core matter before this Court, namely whether the test outlined in paragraph 16 of *J* should be upheld.

[14] With regard to the analogy with internal relocation, I would endorse the views of Lord Hope, namely that the analogy can be dismissed because, in order for it to hold up, the Court would need to presume that the claimant would be both willing and able conceal their sexual diversity from those around them on return. As such, there should be no prospect of internal relocation and concomitant concealment in cases concerning sexual diversity because there is no way in which the claimant could make a new life for themselves without negating the very group membership protected by the Convention.

The Test in the *J* Case

[15] At paragraph 16 of *J*, Maurice K LJ provided a new test for the application of discretion. This test called on the decision maker 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".'

[16] This sets up a situation where the question before the decision-maker, with regard to discretion, is effectively whether or not the application of discretion itself constitutes persecution in the terms set out in the Convention. Otherwise put, discretion which is tolerable to the claimant will mean that they do not have a well-founded fear of persecution. However, discretion which is not reasonably tolerable will itself constitute persecution.

[17] The test as it was articulated in *J* expanded on the Australian authority *S395/2002 v Minister of State for Immigration and Multicultural Affairs* (2003) 216 CLR 473. At paragraph 40 of that judgment, McHugh and Kirby JJ said that:

> 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 many intangibles, from death and torture to state sponsored or condoned discrimination in social life or 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 condition of protection that the person affected must take steps—reasonably 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. (emphasis added)

The sentence regarding intensity, duration and reasonable toleration has, by the Court of Appeal in *J*, been interpreted as the core principle arising from the *S395/2002* decision. In giving his own judgment, Maurice J, identified that this standard had been adopted in *Z v Secretary of State for the Home Department* [2005] Imm AR 75, *Amare v Secretary of State for the Home Department* [2006] Imm Ar 217, and *RG (Colombia) v Secretary of State for the Home Department* [2006] EWCA Civ 57.

[18] However, as the above quote makes clear, paragraph 40 presents a relatively dense statement that contains complications which have led the Court of Appeal in *J* to err in their interpretation. Specifically, the judgment seems to miss the point that persecution does not cease to be persecution because there were actions that the claimant might take to avoid the risk of persecution. This is made even clearer in paragraph 50 of *S395/2002*, where McHugh and Kirby JJ stated that:

> In so far as decisions in the Tribunal and 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.

[19] As such, the Court of Appeal's reliance on some sections of *S395/2002* does not sit at all comfortably with the overall thrust of the decision. Rather, the principle which the Court of Appeal should have taken was that a decision-maker cannot require a claimant to behave in any particular way. To require a claimant to behave in a given way in order to avoid having a well-founded fear of persecution is an unprincipled denial of the very protection which the Refugee Convention is intended to provide. As this was the test applied by the Court of Appeal, the decision of the Court of Appeal to dismiss these appeals was an error of law and must be set aside.

The test to be applied

[20] Having established that the test applied in the Court of Appeal was not correct, I now turn to considerations of what test is to be applied when a decision-maker is faced with having to determine whether or not a claimant is eligible for protection on a ground relating to their sexual diversity. In identifying this test, there are a range of relevant authorities from comparative jurisdictions. These are well explored by Lord Hope

at paragraphs [30 to 34][32] of his judgment[33] and I do not think anything needs be added to his interpretation at this time.

[21] In setting out this test, I depart from my fellow Judges Lord Rodger and Lord Hope, who set out their own tests at paragraphs [82] and [35][34] respectively. I do, however, concur with Lord Walker who points out at paragraph [98][35] that a decision-maker seeking to adjudicate an asylum claim relating to sexually diverse people is tasked with rendering an individual and fact-specific inquiry.

[22] While the jurisprudence regarding the possibility of people who are sexually diverse constituting a particular social group for the purposes of the Convention is settled, as addressed above at paragraphs 7 and 8, it is important to briefly revisit this. This is because the formulation of the particular social group inherently impacts both who can be a member of that group and how membership of that group might be determined. For example, the initial decision in this case recognised 'practicing homosexuals' as a particular social group. To determine if a given claimant is a member of a group such as 'practicing homosexuals' involves a far more conduct-driven group construction—and therefore analysis from decision makers—than a more identity-centred group such as gay men or lesbians. For this reason, it is necessary to carefully consider the exact group that is being claimed. In this regard, I take note of the extensive academic literature detailing the cultural specificity of sexually diverse identities. For example, Ratna Kapur, in her Book 'Erotic Justice: Law and the New Politics of Postcolonialism (Glass House Press 2005), pinpoints the problems that arise in attempts to universalize the approach to LGBTIQA+ rights adopted in the US or UK. As such, decision-makers should be mindful that while the Convention certainly does offer protection to sexually diverse people, this protection is not contingent on them presenting in a particular manner that corresponds to the ways in which sexual diversities and conceptualised in the UK.

[23] Given the above, I would construct the particular social group for both of the claimants in the immediate case as being 'sexually diverse people.' This is to say that the group is defined by social and sexual behaviour that marks them out as being different from surrounding society. In their Guidelines on International Protection No 3, the UNHCR identifies that a social group can be found to exist on the basis of one of two tests, namely, the 'protected characteristics' test or the 'social perception test.' Put another way, a particular social group can be found to exist either because they have a characteristic that is either innate or fundamental to human dignity or because there is a social perception that such a group exists.

32. Original Judgment.
33. For the purposes of clarity, references to the original judgment have been placed into square brackets.
34. Both Original Judgment.
35. Original Judgment.

[24] Generally speaking, sexuality claims are construed as falling under the first of these tests for a particular social group. This is to say that an identity such as gay is envisaged as being an innate or unchangeable characteristic, or as fundamental to human dignity. If one focuses on the 'innate or unchangeable characteristic' element, the result is that the particular social group is formed around elements of an identity that is assumed to be fixed. Here, I take note of scholarship establishing the difficult evidential burden that results for claimants from this fixed construction of a particular social group. However, it is noted that a particular social group does not require an innate protected characteristic at all. As the UNHCR clearly identifies, a particular social group can be founded either on such a characteristic *or* on the basis of a social perception that such a group exists. As such, given the extensive scholarship which calls into question the 'innateness' or 'unchangeability' of sexual diversity, a decision-maker can, and should, instead focus on the question of whether such a group is socially perceived as existing.

[25] This idea of social perception does not require widespread visibility or a framework of identity. Indeed, the social perception of a group could be show by the insertion of insidious or restrictive norms around a particular form of conduct. These norms are themselves a form of evidence that there is a social perception that breaching them marks one out as different. The key here is that social perception relates to particular activities, identities, or orientations that may, if they were to become know, mark one as somehow other when compared to the society around them.

[26] When the particular social group is founded on social perception, there is scope, for example, for such a group to be formed around a culturally specific behaviour. Further, there is scope for the group to be formed around a form of sexual difference that is not the same as the ones we may see every day. Rather, a group constructed around the sexual diversity of its members can be viewed as a group whose members, or perceived members, are viewed as different by the society around them. This view of them as different does not relate to what they do, who they spend time with, or the places they go. Instead, it may be a wholly passive association drawn from the perception of non-compliance with the sexual and social scripts of the society around them.

[27] In accordance with the above, decision-makers should be aware that there is no requirement for the claimant to understand their sexual diversity as an identity. They may not even understand their sexual diversity as being something that is significant. This would not stop them from being a potential target for persecution. As Lord Roger articulates at paragraph [79][36] of his own judgment in this matter, the Nazi period shows all too clearly that one's own views of the importance of a given characteristic is of little relevance if a persecutor has decided that they are defined by that characteristic. As such, even where the particular social group is articulated in the same terms as we have in the UK, decision-makers should harbour no expectations that they will be met with identities like those in the UK.

36. Original Judgment.

[28] As the above suggests, decision-makers should be careful when formulating particular social groups associated to sexual difference, so that they do not rely on the everyday examples of sexual difference they see in the UK. Instead, they should adopt particular social group formulations which do not overly constrain them when they turn to the issue of determining membership of the group.

[29] Once the appropriate particular social group has been selected, the next stage of the test for decision makers is to confirm that the claimant is a member of that group. Taking notice of the extensive academic literature detailing the complexities and difficulties of demonstrating membership of a particular social group relating to sexual diversity, I wish to impress upon decision-makers that they should be open minded with regard to the kinds of evidence received. This evidence can take a number of forms. While it would never be appropriate for a decision-maker to require or accept sexually explicit evidence, they should also not expect claimants to provide developed emotional accounts nor identifications with discrete identities or social groups. This much has been made clear by the European Court of Justice in their decision in the case of *A, B and C* in joined cases C148/13 to C150/13, where they identified that Council Directive 2005/85/EC prohibits enquiries premised on both sexually explicit evidence and stereotypes.

[30] In applying this identification stage of the test, decision-makers should also be mindful that human sexuality is rarely fixed in nature. This has, once again, been extensively demonstrated across academic scholarship. As such, it would be an unprincipled denial of protection for a decision-maker to seek to rely on the sexual history of a claimant to deny their claim. For example, the fact that a claimant may have been in a heterosexual marriage should not be regarded as determinative. Indeed, decision-makers should maintain an awareness that heterosexual marriage may be a natural course of action for any person seeking to avoid persecution linked to their sexual diversity. Given that refugee countries of origin may be more socially conservative than the UK, it is particularly incumbent upon decision-makers to avoid overly simplistic reasoning such as any suggestion that previous relationships show that a currently claimed status is not credible. Indeed, decision-makers should also be aware that, given sexual diversity is not fixed over a lifetime, it may simply be the case that a claimant's sexual and social identities, orientations and behaviours have not remained fixed across their life. As such, decision-makers should approach the issue of identifying group membership in a nuanced way. The exact vicissitudes of how this is to be done are doubtlessly a proper matter for Home Office policy. However, given the present dangers of elements of claimants' narratives being misinterpreted by decision-makers, significant scrutiny should be applied to group categorisation and how the claimant's membership thereof is evidenced.

[31] When addressing the issue of whether or not a given claimant is a member of the particular social group, decision-makers should also give appropriate weighting to self-identification as, for example, a lesbian or gay man. In the absence of reasons

to doubt the credibility of the claimant, self-identification should be taken as strong evidence that the person fits within the category with which they have identified themselves. In this regard, and as addressed further below, decision-makers should be mindful that where a claimant has self-identified with a particular group, there is a greater likelihood that—even if the decision-maker is not fully satisfied as to the validity of their self-identification—the claimant will be imputed to be a sexually diverse person by those within their country of origin.

[32] Finally, decision-makers should also be aware that it is not just group membership, but also imputed group membership that can satisfy the Convention ground. As such, if a claimant is able to show that they are at risk of persecution because they are suspected of being sexually diverse, including (but not exclusively) by showing a past history of such suspicions, then this would be sufficient to dispense with the identification stage of the test.

[33] Turning to the risk of persecution, it is important here to note that decision-makers are required to look to the situation within the country of origin with regard to the specific particular social group they have identified the claimant as being part of. As such, decision-makers should avoid any expectation that sexual diversity will either have manifested, or been suppressed, in ways similar to the UK. The pertinent issue is whether the claimant would be at risk of persecution due to their sexual diversity upon return. In answering this question, the decision-maker need not consider whether the claimant could keep aspects of their sexual diversity secret to avoid persecution. The protection of the Convention is from a fear of persecution for a Convention ground and that protection would be fatally undermined if it were subject to substitution for the claimant's capacity to hide their difference from surrounding society. In some cases, such as the situations in Iran and Cameroon, this may be easy to detect through the existence of enforced laws against certain behaviours. However, decision-makers should be aware that it is not necessary for criminal norms affecting sexually diverse people to exist and that an absence of information regarding the forms of sexual diversity within a refugee country of origin may well itself suggest the existence of persecution. This is because silence may be a strong indicator of intolerance towards sexual diversity. This is obvious from the history of the UK, where 'lesbianism' was never criminalised. Yet, this cannot be seen as a tolerant approach, but rather as part of a particular framing of women's sexuality that itself led to numerous forms of ill-treatment that we would now rightly regard as persecutory. Simply put, a sentence to non-existence can itself be said to be indicative of persecution.

[34] This second stage of the inquiry is necessarily future oriented. The question is whether the environment within the claimant's country of origin is one that could be regarded as persecutory at the point at which they are returned. If the answer is yes, then the core elements of refugee status have been found. In determining this, it is right that decision-makers should have reference to the Home Office Country Policy and Information Notes. However, as addressed above, when reviewing evidence of this kind,

note should be taken that an absence of mention of sexual diversity may well suggest a persecutory environment.

[35] Given that Home Office Country Policy and Information Notes frequently do not provide information on the treatment of sexual and gender diverse people, it is important to add that the determination of how sexually diverse people are treated should be undertaken on the basis of suitable evidence. This includes taking strong note of the fact that the experiences of tourists or visitors with a different cultural background and greater degrees of socio-economic capital and protection relative to the broader population in refugee countries of origin cannot be taken as representative. It is entirely possible that a country would be a safe place for those from the UK to visit and yet permit persecution to those who call that country home. As such, no weight should be placed on tourism sites or other forms of evidence that do not focus on the situation for permanent residents. Where suitable evidence does not exist, decision-makers should have reference to country experts. Decision-makers should also ensure that, where there are no reasons to doubt the personal credibility of the claimant, appropriate consideration is given to the principle of the benefit of the doubt.

[36] In looking at the future, it is important that decision-makers recognise that behaviour is often highly situational. Irrespective of the decision-makers' views on the claimant's future conduct, they should be clear that it is incompatible with the Refugee Convention to require the claimant to conceal their sexual, social, romantic, or identity-based positionality with regard to sexual diversity in any way. The enquiry must be squarely and exclusively focused on the situation facing sexually diverse people within the claimant's country of origin. When making this enquiry, decision-makers should also be mindful that claimants who are socialised in different contexts may not behave in an entirely predictable manner. As such, determinations regarding how the claimant might behave should be based on solid evidential foundations. Just as it would be contrary to the Refugee Convention to require the claimant to behave in a discreet manner, it would also be contrary to the Refugee Convention to deny international protection simply because the claimant would act discreetly because their behaviour is socially unacceptable in their country of origin.

[37] I have partly set out this test at such length as a response to issues in other jurisdictions, where moves away from discretion have concomitantly led to increased doubt being cast on whether a claimant is a sexually diverse person. Specifically, in other jurisdictions such as Australia, scholarship has noted that there has been a shift from discretion to disbelief, whereby claims are denied on the basis that the claimant is not a sexually diverse person (see Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom,' *International Journal of Human Rights* 13:2–3 (2009), 391–414). In particular, I have sought to stress the importance that decision-makers do not mistake the social and cultural associations that often attach to LGBTIQA+ identities in the UK as an innate property that will be expressed by all people

who are sexually diverse. Otherwise put, the issue with the decision of the Court of Appeal in the immediate case is that, amongst other things, it conceives of sexual diversity in physical terms relating to participation in a sexual act and little more, and thus ignores the range of demands which being 'discreet' places upon an asylum claimant. However, this should not mean that decision-makers must adjudicate cases against a wider conception of identity such as that seen in the UK. While such identity is the most common way for sexual diversity to present in the UK—at least in a public facing manner—this is a result of a particular history. Decision-makers should not expect all claimants, who will have very different experiences, to understand or express their own experiences in similar terms.

[38] The embrace of a wider form of identity-based reasoning may, if done uncritically, lead to more cases being refused on the basis that the claimant has not been able to provide sufficient evidence that they are, or would be perceived as, sexually diverse in accordance with the particular social group outlined. It is for this reason that I have sought to be so clear and direct in warning decision-makers of the level of caution which should be exercised when formulating their own particular social groups.

The matters at hand

[39] At their core, both of these cases concern discretion reasoning. Specifically, they concern a conception of the law which saw claimants being denied because, for reasons entirely related to their fear of persecution, they would act in way that meant that potential persecutors would most likely not be aware of their sexual diversity. For the reasons addressed above, this conception of the law is to be rejected. Instead, the tests set out in this judgment should be applied.

[40] For the reasons given, I set aside the decisions of the Court of Appeal in both matters. These judgments were an error of law and the test set out by the Court of Appeal should not be used moving forward. Instead, the test which I have set out at paragraphs 20-35 should be used. Accordingly, this matter is remitted to the Tribunal for a reconsideration under the test set out here.