

THE HIGH COURT

JUDICIAL REVIEW

[2008 No. 1445 J.R.]

IN THE MATTER OF THE IMMIGRATION ACT 1999, THE REFUGEE ACT 1996, AND SECTION 5 OF THE ILLEGAL IMMIGRANTS
(TRAFFICKING) ACT 2000

BETWEEN

S. Q.

APPLICANT

AND

MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND REFUGEE APPEALS TRIBUNAL (TRIBUNAL MEMBER DENIS LINEHAN)

RESPONDENTS

JUDGMENT of Mr. Justice Paul McDermott delivered on the 28th day of February, 2013

1. This is an application for leave to apply for judicial review in which the applicant seeks an order of *certiorari* quashing the decision of the first named respondent as notified by letter of 18th November, 2008, refusing the applicant's application for refugee status and the recommendation of the tribunal member of the 10th November, 2008. The applicant also seeks a declaration that the first named respondent's decision of 18th November, 2008, and the recommendation of the tribunal member of 10th November, 2008, are *ultra vires* and made in breach of the applicant's rights to fair procedures and natural and constitutional justice and in breach of S.I. No. 518 of 2006 and/or EU Directive 2004/83.

2. A number of grounds were set out in the statement of grounds seeking leave to apply for judicial review at paras. 5A to H inclusive. The argument was confined at the hearing to grounds which the court summarises as follows:-

(1) The tribunal member failed to consider the applicant's fear of persecution as a homosexual in Syria with particular reference to societal and non-state agent discrimination against him and denial to him because of his homosexuality of basic and fundamental rights and that he would as a homosexual be obliged to conceal his true sexual orientation.

(2) The tribunal member in the assessment and in the adjudication process erred in law and acted *ultra vires* s. 2 and s. 16 of the Refugee Act 1996, and in breach of the Refugee Act (Appeals) Regulations (S.I. 424 of 2003) and in breach of the applicant's right to fair procedures and natural and constitutional justice in that (*inter alia*):-

(i) the decision contained errors of fact and inaccuracies with respect to what occurred at the hearing with particular reference to the position adopted by the Commissioner (presenting officer at the hearing) and with respect to the observations, submissions and representations made by the Commissioner at the appeal hearing;

(ii) The tribunal member failed to have regard for and/or consider the position adopted by the Commissioner and the representations and observations made by the Commissioner at the hearing;

(iii) the conclusions of the tribunal member concerning the applicant's credibility were unreasonable, irrational and contrary to the material and information that was before the tribunal member.

(3) The tribunal member failed to consider in any proper and meaningful way a number of previous decisions of the tribunal which had been submitted in support of the applicant's case. It thereby disregarded the principle of equality of treatment and the requirement for consistency in the decision making process.

(4) The tribunal member erred in law and acted *ultra vires* s. 2 and s. 16 of the Refugee Act 1996, in that he failed to address or determine the issue of the applicant's fear of persecution as a homosexual refouled following a failed asylum application to Syria.

3. These grounds were formulated in the following circumstances.

Background

4. The applicant is a Syrian national born on 27th March, 1976, who arrived in the State on 7th November, 2006. He had previously resided in Damascus and had been educated to third level, graduating in 1999 with a degree in economics from the University of Damascus. He was employed between 2000 and 2006 as an administrative worker in a Syrian company. He is single and resided for most of his life in the family home with his father and mother. He had two younger siblings. Following his arrival in Ireland he made an application for refugee status on 8th November, 2006. He completed and filed an ASY1 form and questionnaire on 13th November, 2006. His claim for refugee status was based on his claim of a fear of persecution as a member of a particular social group comprising homosexuals and further, he claimed that if refused asylum, he would be subject to persecution on his return to Syria if refouled, particularly, having regard to his status as a homosexual and potentially as a member of an identifiable social group of failed asylum seekers. He claimed that homosexuals are subject to significant levels of discrimination, stigma and denial of human rights as a result of the State's laws, rules and practice concerning homosexuals and that they are also subject to significant levels of social discrimination from non-state agents by reason of religious and social attitudes within Syrian society. He feared that he would be ill-treated, tortured and/or suffer degrading treatment and incommunicado detention if returned to Syria.

5. In the course of his application to ORAC, the applicant submitted various documents verifying his identity and personal history, namely his driving licence and university examination results and an article regarding attitudes to homosexuality in Syria.

6. He stated that he discovered he was homosexual when he was about fifteen or sixteen years of age. He believed that his father suspected his orientation for a number of years. In his mid to late teen years he started to change his mode of dress and the manner in which he spoke to people. His family started to pressurise him to change his attitude and alter his dress to conform to what they regarded as the norm. He had stopped shaving his beard: his father asked him to stop. His father asked him to attend mosque on a daily basis and to take religious instruction from the mosque "sheikh". He did so for a time. At the mosque he was informed that the punishment for homosexuality was very harsh and that the killing by stoning of homosexuals was legal and in accordance with religious law. He felt greatly pressurised and felt himself to be a source of shame and disgrace to his family and was regarded in that way by neighbours in the area. It should be noted that under Article 520 of the Syrian Penal Code of 1949 "carnal knowledge against the code of nature" is prohibited and carries a potential term of imprisonment of three years upon conviction. In that regard the applicant explained his fear that if imprisoned "I would be stoned to death in prison by the state". He described how his father attempted to pressurise him into marriage with a girl from a neighbouring district. The family believed that if he were married his sexual behaviour would change and would become 'normal'. He refused believing it would be unfair to the girl thereby giving rise to further family tension.

7. The applicant's situation became even more acute following an episode in August, 2006 when he was discovered by his father and mother sitting on a bed with his boyfriend in his bedroom semi clothed and kissing him. His father became very angry and beat them both. He procured his gun. The applicant and his boyfriend fled the house, but as they were doing so his father discharged a number of shots at them. He hid in a nearby village with friends for a period. His father sought him out and he believes sought to kill him believing it was religiously justified to do so. He also sought him at his workplace and at his friends' addresses. His father enlisted the help of the local police with whom he was on good terms. While he does not believe that he is sought nationally by the police or even officially, he is aware that the local police assisted his father in seeking him out and believes that if a complaint were made by his father to the police on his return he could be imprisoned and/or killed. He is in fear from other members of his family including his brother and uncles, because of the shame which his behaviour has brought on the family. Prior to his departure he lived for three months with a friend near Damascus. He was not at any stage arrested by the police. He could not continue with his job. He stated that he fled Syria because he wants to live in the future with dignity and safety and not with a life "full of misery, death, fear and scandal" in which he was "insulted, (a) loser and an unwanted human being". He claims the Syrian state would not offer him protection, and that he would be subject to persecution as a homosexual if he returned. He also fears that he would be persecuted on his return if the authorities were aware that he was a failed asylum seeker. In that regard, there was ample country of origin information to indicate that suspected political asylum seekers are routinely detained, imprisoned and tortured on their return.

8. By letter dated 5th February, 2007, the applicant was notified of ORAC's decision to recommend that he not be granted refugee status and was furnished with a copy of the s. 13 report concerning his case. The s. 13 report stated that there were a number of issues which served to undermine the credibility of the applicant's claim. It was not considered credible that the applicant would have carried out homosexual activities in an apartment shared with his family given the risk of being discovered. The applicant said that he could not be relocated within Syria as he could have been discovered. However, he had spent three months living in Syria after he fled the family home without difficulty and he only feared the local police in his father's area, not because they would arrest him but because they would tell his father of his location. It was, therefore, concluded that relocation was available to him and that his credibility in that regard was undermined. It was concluded that the "alleged persecution was not sufficiently serious by its nature or repetition as to constitute a severe violation of his basic human rights. It has been concluded that the applicant's evidence as a whole lacks credibility".

9. An appeal was lodged against this recommendation on 26th February, 2007. By letter dated 13th June, 2008, the applicant's solicitor made further submissions on his behalf and forwarded a number of documents containing country of origin information. An oral hearing was held by the Refugee Appeals Tribunal on 16th June, 2008. By letter dated 18th November, 2008, the applicant was notified of the rejection of that appeal and furnished with the recommendation of the tribunal member. There was a somewhat unusual development during the course of the oral hearing.

The Hearing.

10. In an affidavit sworn on 18th November, 2008, which is unchallenged, the applicant outlined what occurred at the oral hearing before the Tribunal on 16th June, 2009. He said:-

"I say that the presenting officer asked me a number of questions by way of cross examination after I had answered all the questions put to me by my solicitor. I answered all questions and queries that were put to me in a clear and candid fashion. I say and am advised by my solicitor that there was very little, if any, intervention from the tribunal member by way of questions put to me at the hearing or otherwise. After the completion of evidence and when submissions were made by the presenting officer, he told the tribunal that he could not stand over the s. 13 report and that he considered that I had given full answers to all questions and that he considered that the tribunal had heard the truth. He did not resubmit the s. 13 report. Indeed he was not standing over it, nor did he make a submission to the effect that I had not established that I was persecuted. The presenting officer, having put forward this position as above outlined, then asked what the position would be if I was discreet and posed the question - "where do we go from there?". My solicitor who had already made submissions, made a further submission in light of the presenting officer's position and comments and pointed out in particular to the tribunal that my credibility had been fully accepted and not challenged."

In the body of the Tribunal's determination the following appears:-

"Submissions made on behalf of the Commissioner

It was submitted on behalf of the Commissioner that this man had failed to establish that he was persecuted in Syria. The Commissioner wished to resubmit the s. 13 report."

At para. 7 of the Tribunal's determination it stated the following conclusion:-

"The Tribunal has considered all relevant documentation in connection with his appeal including the notice of appeal, country of origin information, the applicant's asylum questionnaire and the replies given in response to questions by or on behalf of the Commissioner on the report made pursuant to s. 13 of the Act."

The Tribunal affirmed the decision of the Refugee Applications Commissioner made in accordance with s. 13 of the Act.

11. The applicant's solicitor, Mr. Conor Ó'Briain, in an affidavit sworn on 29th November, 2012, gave the following account of the hearing before the Tribunal:-

"I say that at the hearing of the applicant's appeal he was subjected to cross examination by the presenting officer and answered all questions candidly, with little intervention, if any, by the tribunal member. Following the applicant's evidence to the Tribunal the presenting officer adopted the position that he could not stand over the s. 13 report and told the Tribunal this, and stated that he felt that the applicant had given a very full account to all questions, and also stated that he was going out on a limb and that he felt that the Tribunal had been getting the truth from the applicant. The presenting officer then referred to what the situation would be if the applicant was discreet, and in that context posed the question – where do we go from here?"

12. Counsel for the applicant submits that the Tribunal has erred in fact with respect to the observations and representations made and the position adopted by the presenting officer at the hearing. In addition, it is submitted that s. 16(c) and (d) of the Refugee Act 1996, obliged the Tribunal to consider any representations made at an oral hearing including any observations made to it by the Commissioner. The presenting officer on this evidence was not prepared to stand over the s. 13 report or to submit it to the Tribunal. Consequently, the Tribunal was in error in suggesting that the report was submitted. Further, the presenting officer who had cross examined the applicant stated that he could not stand over the s. 13 report and that the applicant had given a very full account and answers to all questions and further, that he would "go out on a limb" to submit to the Tribunal that the applicant had been telling the truth. In this regard it should be noted that the notice of appeal dated 26th February, 2007, challenges the adverse conclusions reached as to the credibility of the applicant by the Refugee Applications Commissioner and in particular the finding that it was not considered credible that the appellant would have carried out his activities in the apartment he shared with his family where he would be at the risk of discovery. (See appeals submission paras. 3(iii) and (iv)).

13. On the basis of the uncontradicted evidence available to the court, the Refugee Appeals Tribunal has arguably made a fundamental error of fact in its assessment of whether the s. 13 report had been submitted by the presenting officer and failed to have any regard to the submissions said to have been made by the presenting officer in the course of the hearing following the conclusion of the evidence. It then proceeded to base the decision on a consideration of the testimony given by the applicant but also the report which had not been submitted and without any reference to the somewhat unusual submissions by the presenting officer affirming the credibility to the Tribunal of the applicant who had just given testimony.

14. Therefore, the court is satisfied to grant leave to apply for judicial review to the applicant in respect of the grounds set out at para. 2(2)(i)(ii) and (iii) of this judgment as the applicant has demonstrated that these grounds are substantial in accordance with the provisions of s. 5(2)(b) of the Illegal Immigrants (Trafficking) Act 2000.

Well Founded Fear of Persecution

15. The Tribunal measured the account given by the applicant against the general treatment of homosexuals in Syria and stated that "the well-foundedness of the applicant's claim must be assessed together with the general credibility of the claim in question". It noted that Article 520 of the Penal Code in Syria prohibited carnal knowledge as against the code of nature with a penalty of up to three years imprisonment. It noted that the Commissioner had not challenged that homosexuality was regarded as illegal in Syria. However, it considered the applicant's "fear of being persecuted or being subjected to censure because of Article 520 must be assessed in the overall context of the applicant's claim". The Tribunal questioned the credibility and well-foundedness of this claim for the following reasons:-

(1) The Tribunal considered the applicant's account of how he became aware that he was homosexual and his father's suspicion that he was. The Tribunal concluded that if his father had any suspicions in 1997 that the applicant was homosexual, he would have taken more pro-active steps in determining the truth or otherwise of his suspicions. The fact that his father did nothing at that time raised a question over the overall credibility of the applicant's claim and also as to whether the rather serious incident in August, 2006 involving the shooting, ever took place. The court notes that this was regarded only as a minor item of credibility on the part of the Tribunal and does not appear to address the extensive history given by the applicant concerning his relationship with his father and his father's attempts to get his son to conform to his perceived norm.

(2) The Tribunal was not satisfied of involvement on the part of the state or the police in seeking to investigate or prosecute any offence under Article 520 of the Penal Code 1949. The Tribunal stated:-

"I am of the view that the only alleged involvement of the police in this matter is that this man's father might be using the police to locate him. I think that it is significant that this man does not know whether his father has made an official complaint or not. If, in fact, this man's father had made an official complaint then I feel that the authorities might be somewhat more pro-active in trying to locate this man during the three month period that he spent in Syria after August, 2006. I make this comment in the context of the fact that homosexuality appears to be regarded as a relatively serious crime in Syria and the fact that this man was able to live in Syria for a period of three months after August, 2006 indicates to me that, in fact, no official complaint has been made, and for that reason I do not think that this man should have any fear of the police authorities as outlined by him."

It was also concluded that the only alleged harm that came to him was when he was shot at in 2006 by his father and beaten when found with his companion. The Tribunal did not equate the alleged treatment afforded to the applicant with the known definitions of persecution which he took as "the sustained or systematic failure of state protection in relation to one of the core entitlements which has been recognised by the international community".

16. The applicant claims that the Tribunal failed to properly and adequately assess the essential element of the claim which was a fear of persecution arising by reason of the applicant's status as a homosexual. This claim was not confined to past ill-treatment at the hands of his family but was based also on the fact that he was, as a homosexual, at risk of persecution having regard to the criminalisation of, and social stigma attached to homosexuality in Syria. It was submitted that no assessment was properly conducted in relation to this aspect of the claim. It was also submitted that the Tribunal had failed to assess the ill-treatment and severe discrimination that the applicant fears if refouled to Syria and to have regard to legal, administrative, police and/or judicial measures which are discriminatory or which may be implemented in a discriminatory manner including the prosecution or punishment of the applicant by the state and its agents in accordance with Syrian law regarding homosexuals. In particular, reliance was placed on the decision of *H.J. (Iran) v. SSHD* [2012] UKSC 31.

17. The respondent contended that there was no evidence that the applicant would face prosecution on return to Syria. It was

submitted that the Tribunal had considered the country of origin information submitted with the applicant's claim which stated "those individuals wishing to practice homosexuality in Syria must do so in secrecy or face possible punishment, although charges are 'rarely' laid". It was submitted that the scarcity of information on ill-treatment of homosexuality in Syria was indicative that the applicant's fear is not well-founded and that the applicant's account alone is insufficient to establish a real risk that he would be persecuted if returned to Syria.

18. The applicant also contended that he had a fear of persecution by reason of his status as a failed asylum seeker if he were returned to Syria. It was submitted that this had not been determined by the Tribunal in its decision. The applicant claimed that the Tribunal simply noted that a submission had been made referring it to country of origin information concerning failed asylum seekers. It was submitted that once the claim was made, the applicant was entitled to have the Tribunal consider and determine it in accordance with the relevant legal principles (see *S.I. v. RAT & Anor* (Unreported, High Court, Finlay Geoghegan J., 11th May, 2007)). The respondent contends that this matter was implicitly determined given the Tribunal's conclusion as to the applicant's fear of persecution by the Syrian authorities which by implication included a fear of persecution as a failed asylum seeker and that the applicant did not have "any fear of the police authorities as outlined by him". It was submitted that this was a conclusion that was reasonably open to the tribunal member since the country of origin information specifically indicated that a mere unsuccessful application for asylum abroad would not lead *per se* to prosecution or other forms of persecution in Syria, and that if the individual's claim for asylum remains confidential then he or she may avoid further complications with the local law enforcement agencies and judicial authorities. The court observes that much of the country of origin information indicates that returned asylum seekers are arrested, detained, interrogated and some disappear. It is not clear how the applicant would be returned to Syria, but if he were to arrive at an airport the evidence would suggest that he would be subjected to some form of inquiry as to where he had been and why. One has to have regard to the reality revealed in the country of origin information concerning those returning to Syria. If he chose to lie about his sexual orientation and the reason for his exile he might get through immigration. If it were known that he was an asylum seeker who had failed in his application it is likely he would be initially detained so that the reason could be explored. To avoid further police investigation and/or prosecution he might have to lie about his sexual orientation in that context. This dilemma is one which is related to the fact that to continue to live his life without interference in Syria he would have to live it "discreetly".

19. In *Norris v. Attorney General* [1988] ECHR 22, the Irish government asked the European Court of Human Rights to determine that a claim was inadmissible because the applicant had not been prosecuted or subjected to any criminal investigation. The court held that:-

"Mr. Norris is in substantially the same position as the applicant in the Dudgeon case (*Dudgeon v. United Kingdom* (1982) 4 EHRR 149) in that:-

"Either [he] respects the law and refrains from engaging – even in private and with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution."

Even though there had been no prosecutions under the Irish legislation in question during the period save when minors were involved or acts were committed in public and, that at the time of the case the risk of prosecution in the applicant's case was minimal, the court noted that there was no stated policy on the part of prosecuting authorities not to enforce the law in that respect. The court determined that the applicant ran the risk of being directly affected, a conclusion supported by the High Court's judgment in that case in which McWilliam J. had stated that:-

"One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease."

20. In addition, the applicant relied upon the decision of the United Kingdom Supreme Court in *H.J. (Iran)* (cited above) concerning the test to be applied when considering whether a gay person could be afforded protection under the UK equivalent of the Refugee Act 1996. In that case a submission was made by the authorities that:-

"A person who will, if necessary, take the metaphorical "flight" of hiding his sexuality is not a refugee unless it would be intolerable for him to do so. 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 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."

The issue was summarised in the following way by Lord Hope:-

"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 was 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 I 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."

21. Lord Hope set out a staged test to be applied to such cases in this way (at para. 35):-

(a) The first stage is to consider whether the applicant is indeed gay:

(b) The next stage is to examine a group of questions which are directed to what his situation would be on return. "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 have 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) The fact that the applicant will not be able to do in the country of his nationality everything that he wants to do openly in the country whose protection he seeks is not the test. It is 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 openly as a gay person as he would be able to do if he were not returned. The focus throughout must be on what will happen in the country of origin:

(d) The next stage if it is determined that the applicant will in fact conceal aspects of his sexual orientation if returned, is to consider why he will do so. If this is simply in response to social pressures or for cultural or religious reasons of his own choosing and not because of a fear of persecution, the 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”.

22. Lord Rodger stated in this regard:-

“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 would be such that some of the 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 reason for an applicant to behave indiscreetly would be his perfectly natural wish to avoid harming his relationships with his family, friends and colleagues. The Convention does not afford protection against those 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.”

23. However, Lord Rodger did not accept the proposition that if the applicant took some precautions he would be unlikely to suffer any harm and would consequently have no well-founded fear of persecution. He said:-

“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 feeling 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 was not and they would 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.”

24. Lord Rodger went on to consider the approach that should be adopted by Immigration Tribunals in the United Kingdom. He summed up the approach to be followed in the following way:-

“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 own 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, a 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.”

The judgments of the United Kingdom Supreme Court in *H.J. (Iran)* though not binding on this Court offer a detailed, nuanced and

persuasive statement on the appropriate test to be applied in cases such as this.

25. It is clear in this case that it is the applicant's claimed desire to express his sexual orientation and to live his life in accordance with it that has given rise to adverse consequences in his family and social relationships, in his employment and in his standing with the authorities. He claims that the police have been engaged by his father to some degree in seeking his whereabouts. The police operate under a Penal Code which exposes him to a risk of three years imprisonment on conviction. Local police were looking for him because they were being used by his father to do so. To that extent, on the applicant's account, the agents of the state are willing to work with his father who has already assaulted him and attempted to shoot him by reason of his sexual orientation and desire to live the life of a gay person. These are matters which the applicant contends should be taken into account and assessed in the context of the test advanced in the case of *H.J. (Iran)*.

26. The court is satisfied that the applicant has also established substantial grounds under s. 5 to challenge the Tribunal's decision on the basis of the grounds set out at paras. 2(1) and 2(4) of this judgment. The court is not satisfied that the ground set out at para. 2(3) is substantial and does not grant leave on that ground. The court will, therefore, grant leave to apply for an order of *certiorari* by way of judicial review quashing the decision of the first named respondent as notified by letter dated 18th November, 2008, refusing the applicant's application for refugee status and the recommendation of the tribunal member of 10th November, 2008. It is unnecessary to grant leave in respect of the declaration sought. The leave to apply for judicial review by way of *certiorari* will be limited to the following grounds:-

(1) The tribunal member failed to consider the applicant's fear of persecution as a homosexual in Syria with particular reference to societal and non-state agent discrimination against him and denial to him because of his homosexuality of basic and fundamental rights and that he would as a homosexual be obliged to conceal his true sexual orientation.

(2) The tribunal member in the assessment and adjudication process erred in law and acted *ultra vires* s. 2 and s. 16 of the Refugee Act 1996, and in breach of the Refugee Act (Appeals) Regulations (S.I. 424 of 2003) and in breach of the applicant's right to fair procedures and natural and constitutional justice in that (*inter alia*):-

(i) the decision contained errors of fact and inaccuracies with respect to what occurred at the hearing with particular reference to the position adopted by the Commissioner (presenting officer at the hearing) and with respect to the observations, submissions and representations made by the Commissioner at the appeal hearing;

(ii) the tribunal member failed to have regard for and/or consider the position adopted by the Commissioner and the representations and observations made by the Commissioner at the hearing;

(iii) the conclusions of the tribunal member concerning the applicant's credibility were unreasonable, irrational and contrary to the material and information that was before the tribunal member.

(3) The tribunal member erred in law and acted *ultra vires* s. 2 and s. 16 of the Refugee Act 1996, in that he failed to address or determine the issue of the applicant's fear of persecution as a homosexual refouled following a failed asylum application to Syria.