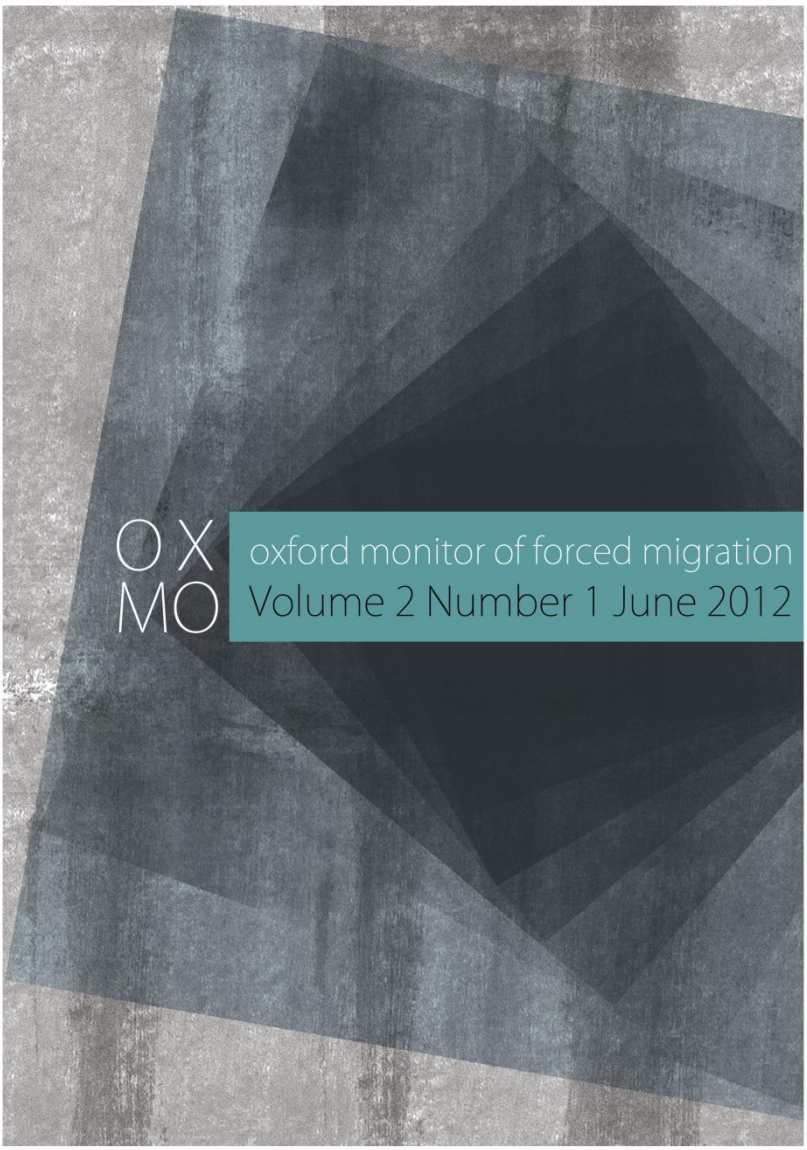

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A Question of Discretion: A Critical Analysis of New Legal and Evidentiary Hurdles for Lesbian, Gay and Bisexual (LGB) Asylum Seekers in the United Kingdom

By Kate Ogg

Many Lesbian, Gay and Bisexual (LGB) asylum seekers in the United Kingdom (and other jurisdictions such as Australia) have had their claims rejected on the grounds that, if returned to their country of origin, they could avoid persecution by remaining discreet about their sexuality.[1] Discretion could be achieved by, for instance, choosing to be celibate, referring to an intimate partner as merely 'a friend', refraining from being publicly affectionate with a same-sex partner or choosing not to tell friends and family about their sexual orientation.

This approach was rejected by the High Court of Australia in *Appellant S395/2002 v MIMA* (2003) 203 ALR 112 (hereinafter *S395/2002 v MIMA*) and this decision was recently followed by the United Kingdom Supreme Court (UKSC) in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 (hereinafter *HJ and HT*). However, the precedent established by *HJ and HT* still provides for the rejection of asylum claims if the applicant would, on return to their country of origin, voluntarily choose to remain discreet about their sexuality for reasons other than persecution within the meaning of the 1951 Convention Relating to the Status of Refugees (the Convention) such as the fear of social pressure from family and friends. This test was followed by the recent decision of *SW (lesbians) Jamaica CG* [2011] UKUT 00251 (hereinafter *SW (lesbians) Jamaica CG)*. There has been little examination as to whether the conclusion reached in *HJ and HT* and *SW (lesbians) Jamaica CG* is consistent with the objectives and language of the Convention. This article argues that the test fails to properly consider the meaning of 'persecution' and is inconsistent with international jurisprudence on the meaning of 'well-founded fear'. Moreover, the test places an additional evidentiary burden on LGB asylum seekers that may be difficult to discharge.

The case of *HJ and HT* concerns two gay asylum seekers, one from Iran and the other from Cameroon. HJ's asylum claim was rejected by the Court of Appeal on the ground that he could reasonably be expected to tolerate being discreet about his sexuality if returned to Iran. *HT*'s asylum claim was unsuccessful because the Court of Appeal found that he would remain discreet about his sexuality if returned to Cameroon. Both men appealed against these decisions to the UKSC. The UKSC agreed that it is inconsistent with the objectives of the Convention to require an LGB asylum seeker to avoid persecution by concealing his or her sexuality. Lord Hope and Lord Roger, in their separate judgements, reasoned that if an LGB asylum seeker intended to be open about their sexuality upon return to their home country, and would suffer persecution as a result, he or she has a well-founded fear of persecution and is entitled to asylum pursuant to the Convention (*HJ and HT* per Lord Hope at 29 and per Lord Roger at 54-56). Both judgements also considered the position of an asylum seeker who intended to be discreet about his or her sexuality upon return. Drawing on the joint judgement of Justice McHugh and Justice Kirby in *S395/2002 v MIMA*, their Lordships held that an asylum seeker would be entitled to protection if the material reason they would be discreet is due to the persecution they may suffer if their sexuality was discovered (*HJ and HT* per Lord Hope at 35(d) and per Lord Roger at 69). However, if an asylum seeker would choose to remain discreet for reasons other than persecution (such as wishing to avoid family disapproval or social ostracism) his or her claim

[1] For example, see *LSLS v Minister for Immigration and Multicultural Affairs* (2000); *T v Special Immigration Adjudicator* (2000); and *WABR v Minister for Immigration and Multicultural Affairs* (2002).

must be rejected on the grounds that these 'social pressures' do not amount to persecution within the meaning of the Convention (*HJ and HT* per Lord Hope at 35(d) and per Lord Roger at 61). This conclusion would be reached even in cases where the applicant is returning to a country where homosexuality is punished by execution or significant prison sentences or people of LGB orientation are subject to social punishment such as so-called 'corrective rape'. This approach to discretion in LGB asylum cases was followed by the United Kingdom Immigration and Asylum Tribunal (UK IAT) in *SW (lesbians) Jamaica CG*.

The decision of the UKSC in *HJ and HT* has been lauded by refugee advocates and LGB groups. It was the first time that a United Kingdom court directly addressed the jurisprudence regarding discretion outlined in *S395/2002 v MIMA* (the first decision in which an ultimate appellate court heard an LGB asylum claim) (Millbank 2009). The removal of the 'reasonably tolerable' test is certainly a positive move that brings United Kingdom jurisprudence in line with other states such as Australia (see *S395/2002 v MIMA*), Canada (see *Re XMU* [1995]) and New Zealand (see *Re GJ* [1995]). It also means that LGB asylum claims will be judged in a similar manner to claims based on religion, political opinion and race: no court has, for example, required a person to be discreet about their religion or political opinion to avoid persecution (Millbank 2009). However, there has been little discussion of the legal and evidentiary implications of the UKSC's ruling that those who intend to remain discreet for reasons other than persecution, such as social pressures, are not entitled to protection. It is this aspect of the judgement that is the focus of this article.

Was the UKSC Right to Hold that 'Social Pressures' Such as Community Disapproval Cannot Amount to Persecution Within the Meaning of the Convention?

To answer the above question, one must begin by unpacking the term 'persecution' which is neither defined in the Convention nor interpreted uniformly across jurisdictions. In the United States of America, persecution has been defined as 'a threat to life or freedom, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive' (*Matter of Acosta* 1985). Alternatively, persecution has been interpreted by Australian courts to mean 'serious harm' such as a penalty, serious detriment or disadvantage or denial of fundamental human rights (*Chan v MIEA* 1989 per Mason CJ at 388). Contrastingly, courts in New Zealand have adopted a 'core human rights approach' (*Refugee Appeal No. 74665/03* 2004). The New Zealand position is that the purpose of the Convention is to provide protection to those whose fundamental human rights are not protected by the state. To determine if an asylum seeker has a well-founded fear of persecution, the first step is to determine the nature of the human right in question and whether it is deemed 'fundamental'. The New Zealand courts have refrained from stipulating a hierarchy of rights and instead provide that fundamental human rights must be understood in the context of the situation and developing human rights norms. If a fundamental right is violated, the next step is to consider how serious the harm is (the position being that the Convention protects against serious violations of core human rights – it does not protect against minor restrictions of periphery human rights). The New Zealand 'core human rights' approach is arguably closest to UNHCR's definition of persecution as 'all serious violations of human rights' (UNHCR 1995: 3).

Pursuant to the above jurisprudence, some social pressures, such as taunting or disapproval by family members, may not amount to persecution within the meaning of the Convention (Hathaway 2005). However, what the UKSC failed to articulate is that, if the social pressures inflicted on the asylum applicant render him or her unable to access work, education or healthcare, this may be serious violation of fundamental human rights amounting to persecution (see *N98/22948* 2000; *N03/46534* 2003; Foster 2007). Social pressures, such as community ostracism or being disowned by family members, are often classified as 'discrimination' (Dowd 2011). In refugee law, the term 'discrimination' has been used by courts to describe forms of

harm that do not meet the threshold of persecution (Dowd 2011). However, the position that such discrimination can amount to persecution in certain circumstances is supported by case law as well as UNHCR. The UNHCR *Handbook of Procedures and Criteria for Determining Refugee Status* (1992) provides that those who face discrimination are not always victims of persecution. However, if the discrimination leads to 'consequences of a substantially prejudicial nature' such as 'serious restrictions on his right to earn his livelihood' or 'access to normally available educational facilities', it may be considered persecution (UNHCR 1992: 54). In New Zealand, it has been held that discrimination can amount to persecution 'if of sufficient severity and of a sustained or systematic nature' (*Refugee Appeal No. 71404/99* 1999 at 30-33).

Similarly, the UK IAT has held that 'an inability to earn a living or to find anywhere to live can result in destitution and at least potential damage to health and even life. If discrimination against which the state cannot or will not provide protection produces such a result, the Convention can be engaged' (*Secretary of State for the Home Department v Sijakovic* 2001 at 16). Therefore, it appears that social pressures such as harassment or ostracism can to amount to persecution if they are systematic, ongoing and lead to a violation of fundamental human rights. To determine if discrimination amounts to persecution, consideration must be given, on a case by case basis, to factors such as the nature of the freedom or right threatened by the discrimination and how severely that freedom or right will be restricted (Goodwin-Gill and McAdam 2007).

This analysis suggests that the UKSC's distinction between 'persecution' and 'social pressure' is misguided. If, as a consequence of community disapproval or discrimination, LGB asylum seekers cannot meaningfully access essential services such as employment, housing, education and medical assistance, this may lead to serious violations of fundamental rights such as access to shelter, food, education and healthcare. For example, in some countries an LGB asylum seeker may not be able to gain employment or rented accommodation due to social disapproval of same-sex relations. The arbitrary distinction between 'persecution' and 'social pressure' is demonstrated in *SW (lesbians) Jamaica CG* in which the UK IAT acknowledged that 'perceived lesbians also risk social exclusion (loss of employment or being driven from their homes)'. Despite this, the court nevertheless upheld the precedent in *HJ and HT* that social pressure does not amount to persecution within the meaning of the Convention (*SW (lesbians) Jamaica CG* at 107(5)).

It is respectfully suggested that an alternative approach that is more in line with the Convention is the 'core human rights' approach adopted in New Zealand. Such an approach eliminates the need for a distinction between 'social pressures' and 'persecution' by focusing instead on the human right threatened, the nature of the right and the seriousness of the violations of the right in question. Pursuant to this approach, social pressure can *amount to* persecution if it leads to a serious and systematic violation of a fundamental human right against which the state cannot or will not provide protection.

Voluntary Discretion and the Test for 'Well-founded Fear'

The decisions of *HJ and HT* and *SW (lesbians) Jamaica CG* can also be critiqued on the ground that they conflate an asylum seeker's motivations for voluntary discretion with his or her well-founded fear of persecution. As outlined above, these cases hold that, if an asylum seeker chooses to remain discreet about his or her sexuality due to the social pressures it may attract, as opposed to the persecution they may suffer, they do not have a well-founded fear of persecution (*HJ and HT* per Lord Hope at 35(d) and per Lord Roger at 61; *SW (lesbians) Jamaica CG* at 11(b)(i)). The following analysis of the meaning of 'well-founded fear' will demonstrate that this position is untenable.

The meaning of 'well-founded fear' has been interpreted and applied differently across jurisdictions.[2] In the United Kingdom the test is whether there is a 'reasonable degree of likelihood' (*Regina v Home Secretary, ex parte Sivakumaran* [1988] per Lord Keith of Kinkel) or a 'real and substantial danger of persecution' (*Regina v Home Secretary, ex parte Sivakumaran* [1988] per Lord Templeman and per Lord Goff), whereas UNCHR describes the test as simply a 'reasonable degree of likelihood' that a person will be subject to persecution (UNHCR 1992: 42). There is also continued debate about whether 'well-founded fear' requires only an objective finding of the risk of persecution or also an assessment of the applicant's subjective state of mind. While the UNCHR advocates for a combined subjective and objective approach (UNHCR 1992), many domestic courts, for example in the United Kingdom and Australia, adopt an objective approach (*Adan v Secretary for the Home Department* [1999]; *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* [1997]).

Pursuant to the test for 'well-founded fear' adopted in the United Kingdom, there is an objective reasonable degree of likelihood that an LGB asylum seeker will be subject to persecution even if he or she decides to conceal his or her identity in order to avoid the type of social pressure that may *not* amount to persecution within the meaning of the Convention. This is because, despite his or her best efforts and intentions, there is always a reasonable degree of likelihood that an asylum seeker's sexuality will be discovered. For example, he or she may be ousted by a former same-sex partner, potential partner or confidant. The asylum seeker may be caught engaging in same-sex activities which he or she assumed to be private. If the asylum seeker refuses to marry or have children they may be accused of being homosexual. The above possibilities were not considered in *HJ and HT* or *SW (lesbians) Jamaica CG*. Such occurrences are not fanciful, especially in societies where homosexuality is illegal and a social taboo. This analysis demonstrates that, by adopting an objective approach to the test for 'well-founded fear', it is arguable that there is a reasonable degree of likelihood that an LGB asylum seeker will face persecution even if they choose to remain discreet on account of social pressures.

Contrastingly, the test formulated in *HJ and HT* adopts a subjective focus and deems that those who voluntarily remain discreet due to social pressures do not have a well-founded fear of persecution. Such a position is not in line with previous jurisprudence in the United Kingdom that insists on an objective approach and also fails to consider the consequences for the asylum seeker's sexuality being inadvertently discovered despite efforts to remain discrete.

Additional Evidentiary Burdens for LGB Asylum Seekers

The voluntary discretion test laid town in *HJ and HT* also places an additional evidentiary burden on LGB asylum seekers. The new test requires LGB asylum seekers to provide evidence that their decision to be discreet is motivated by fear of persecution as opposed to other reasons such as fear of family disapproval. The asylum seeker will therefore bear the burden of proof to evidence his or her motivations for discretion. The only evidence that will be available in most cases is the asylum seeker's testimony which will be scrutinised by the decision-maker and is often dismissed on the grounds of 'lack of credibility' (Kagan 2002-2003; Souter 2011) especially if the evidence does not match 'western notions of gayness' (Millbank 2009: 392). For example, in *HJ and HT*, Lord Roger emphasised that 'male homosexuals are to be free to enjoy themselves

[2] In Australia, to prove a 'well-founded fear of persecution', the applicant must establish that there is a real chance that they will be persecuted (see *Chan v Minister for Immigration and Ethnic Affairs* [1989] 169 CLR 379). In America, the balance of probabilities approach has been rejected for the more liberal test of reasonable possibilities (see *I.N.S. v Cardoza-Fonseca* 46 U.S. 407 [1987]). Canada has also rejected the balance of probabilities approach and has defined 'well-founded fear of persecution' to mean that there is a reasonable chance of persecution or a 'serious possibility as opposed to a mere possibility' (see *Joseph Adjei v Minister of Employment and Immigration* [1989] 7 Imm. L. R. (2d) 169 (F.C.A.) at 72).

going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female friends' (*HJ and HT* per Lord Roger at 78). While his Lordship acknowledged that these descriptions were 'trivial stereotypical examples from British society' (*HJ and HT* per Lord Roger at 78), it demonstrates that LGB asylum seekers may have difficulty establishing a well-founded fear of persecution on the grounds of sexuality if their narrative does not mirror what the decision-maker understands to be 'typical' LGB behaviours. In addition, in a refugee status determination interview it may be difficult for an LGB asylum applicant make the distinction between being discreet due to 'persecution' as opposed to 'social pressures', especially when LGB asylum seekers 'often have feelings of shame and self-hating or internalised homophobia' (Millbank 2009: 403) and are discreet about their sexuality due to 'oppressive social forces rather than by choice' (Millbank 2009: 392).

Conclusion

This article has provided a critical legal examination of the new approach to assessing claims for asylum on the basis of sexuality in the United Kingdom; a legal development that has attracted little academic critical analysis perhaps due to the initial euphoria resulting from the removal of the 'reasonably tolerable' test. Continued critical legal analysis of developing jurisprudence regarding asylum claims based on sexuality is needed to address the issue of claims being refused on the grounds of discretion. Refusal of claims on the basis that LGB asylum seekers can conceal their sexuality is derived from a belief that such relationships should be hidden from public view (Millbank 2002). This position has been compared to expecting Anne Frank to remain in the attic to avoid her persecutors (*Appellant S395 of 2002 v MIMA S395/2002* [2003]) and is inconsistent with *The Preamble* of Convention which affirms 'the principle that all human beings shall enjoy fundamental rights and freedoms without discrimination'.

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