

A HISTORY FROM ACROSS THE POND

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I. *HJ (IRAN) v. SECRETARY OF STATE FOR THE HOME DEPARTMENT*¹

In their magisterial analysis, Professor Hathaway and Mr. Pobjoy² have expressed concerns about the wider implications of the recent decision of the United Kingdom Supreme Court in *HJ (Iran)*. Put shortly, the learned authors welcome the confirmation that the United Kingdom’s view of international refugee law extends to the protection of homosexuals coming from countries where homosexuality is the subject of persecution, but consider that dangerously insufficient attention has been given to the extent to which, and the specific threats in the home country against which, that protection can be asserted.

The acceptance by the Supreme Court of homosexuals as a particular social group under article 1A(2) of the Refugee Convention was nothing new: that had already been agreed, without argument, in the English Court of Appeal in 2005 in *Z*

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1. *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31, [2011] 1 A.C. 596 (appeal taken from Eng. & Wales C.A.).

2. James C. Hathaway & Jason Pobjoy, *Queer Cases Make Bad Law*, 44 N.Y.U. J. INT’L L. & POL. 315 (2012).

v. Secretary of State,³ and English judges having at least since the decision in 2002 in *Mendoza v. Ghaidan*⁴ demonstrated their impatience with the discomfort in relation to homosexuality that troubled some of their predecessors. But the determination of the Supreme Court in *HJ (Iran)* to reinforce that position led to an uncritical acceptance of the submissions made in that appeal: submissions that did not respect the basic principles of refugee law. In particular, and as will be described in more detail below, the Court adopted an approach to the “Convention reasons” set out in article 1A(2) that changed the nature of the protection against persecution hitherto understood in asylum law, and undervalued the serious level of feared harm that that law requires before the harm can be made the subject of international protection.

This paper will seek to demonstrate how that surprising outcome came about. That enquiry may cast some light on other issues to which *HJ (Iran)* gives rise; and may also serve as a warning to courts in other jurisdictions that they need to read *HJ (Iran)* very carefully before adopting its approach and conclusions.

II. SOME BASIC PRINCIPLES; AND HEREIN OF “PERSECUTION”

We apologize to an audience that has read Hathaway and Pobjoy for presuming to say anything about the basic principles of asylum law. We do so only to put in context one area of potential uncertainty that has some relevance to *HJ (Iran)*.

To qualify for international protection under the Refugee Convention, the subject must demonstrate that she has a well-founded fear of being persecuted in her home state “for reasons of” one of several characteristics set out in article 1A(2) of the Convention: race, religion, nationality, membership of a particular social group, or political opinion. There must thus be a causal link between the fact that the subject falls into one of the protected categories and the persecution. “Persecution” has most recently been judicially defined as harm that, by reason of its intensity or duration, the person persecuted can-

3. *Z v. Sec’y of State for the Home Dep’t*, [2004] EWCA (Civ) 1578, [2005] Imm. A.R. 75 (appeal taken from Immigr. Appeal Trib.) (U.K.).

4. *Mendoza v. Ghaidan*, [2002] EWCA (Civ) 1533, [2003] Ch. 380, *aff’d sub nom. Ghaidan v. Godin-Mendoza*, [2004] UKHL 30, [2004] 2 A.C. (H.L.) 557.

not reasonably be expected to tolerate.⁵ These are strong words, in the same vein as the approach to Convention persecution required by Lord Bingham of Cornhill in *Sepet v. Home Secretary*.⁶

Its dictionary definitions (save in their emphasis on religious persecution) accord with popular usage: “the infliction of death, torture or penalties for adherence to a religious belief or opinion as such, with a view to the repression or extirpation of it;” “A particular course or period of systematic infliction of punishment directed against the professors of a (religious) belief.”⁷

Lord Bingham went on in that judgment to cite Professor Hathaway: “persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community.”⁸ Lord Bingham did not regard that as a complete definition, but only as valuable guidance to the likely content of persecution. It is also clear that he thought that by reference to the “core entitlements,” Professor Hathaway was referring to the causal link: that persecution in the sense of sustained or systemic failure of state protection must spring from one of the Convention reasons. Later citations of the Hathaway formulation⁹ have, however, not seen it in those comparatively limited terms, but have presented the statement as, in effect, a complete definition of the conditions

5. This is the definition adopted by the High Court of Australia in *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs (S395)* (2003) 216 CLR 473 [40], a case much reverted to in *HJ and HT*.

6. *Sepet v. Sec’y of State for the Home Dep’t*, [2003] UKHL 15, [7], [2003] 1 WLR 856, 862 (Lord Bingham of Cornhill) (appeal taken from Eng. & Wales C.A.).

7. See, in the same sense, the reference by Lord Clyde in *Horvath v. Sec’y of State for the Home Dep’t*, [2001] 1 A.C. 489 (H.L.) 512 (appeal taken from Eng. & Wales C.A.), to the need for the persecutory conduct to be sustained or systemic, but then pointing out that “persecution” itself remained undefined in the Convention, and should be understood in the light of the ordinary uses of that word.

8. *Sepet*, [2003] UKHL 15 [7], [2003] 1 WLR at 862 (quoting JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS*, 112 (1991)).

9. See, e.g., *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31, [13], [2011] 1 AC 596, 621 (Lord Hope of Craighead) (appeal taken from Eng. & Wales C.A.).

for relief under the Refugee Convention. Such an approach would, therefore, tend to suggest that the “core entitlements” are something different from the Convention reasons, and Professor Hathaway has confirmed that that is so, by explaining that his *definition provides that conduct will amount to persecution if it involves “sustained or systemic violation of basic human rights demonstrative of a failure of state protection.”*¹⁰

This concentration on violation of human rights (though of course still requiring the presence of the causal link), rather than on persecutory conduct defined in the general terms adopted in *Appellant 395/2002* and by Lord Bingham and Lord Clyde, should not make a difference in practice, granted that in either case the detrimental effect on the subject has to be serious, sustained or systematic. But when the analysis is misunderstood it can lead to error in two respects: the need for the effect of the persecution on the subject to be intolerable, stressed by the High Court of Australia, may be lost sight of when the principal enquiry is into whether any human rights have been infringed; and as a result the operation and effect of the Convention reasons may be misstated. Both of those errors are apparent in *HJ (Iran)*. There were other reasons why those mistakes were made, but the redefinition of “persecution” meant that the test based on the intolerability of the effect on the subject, adherence to which might have prevented a departure from the previous law, was not in the forefront of the court’s mind.

III. HOW WILL THE SUBJECT BEHAVE IN THE HOME COUNTRY?

In some cases, the details of the subject’s likely behaviour if returned to the home state will not be an issue. For instance, if the subject can show that the authorities of the home state have or may have documented records of her being a member of a minority race, religion, or political party all of the members of which face persecution, then there will be nothing that she can do to avoid that persecution on return to the home state. And especially if all persons possessing an immutable and unconcealable characteristic, for instance circumcision, are persecuted. But less clear-cut cases require

10. Hathaway & Pobjoy, *supra* note 2, at 320 (emphasis added).

closer consideration of the nature and reach of the persecution in the home state and its threatened effect upon the subject. That may be for two different reasons.

First, the persecution may not be directed at members of the threatened group per se, but only at certain types of behaviour by members of that group. To take a familiar example, members of a religious sect may be persecuted if they proselytize, but not if they simply practise their religion without trying to convert others. We may call this *limited range of persecution*. Second, the enforcement practices of the persecuting state may be inefficient or deliberately limited in scope. For instance, members of a particular race or nationality will be persecuted if their presence in the state comes to the attention of the authorities, but there is no policy of identifying them or searching them out. They can, therefore, escape persecution by living a private life and not insisting on their ethnic status. Or members of a particular race or religion that is subject to persecutory sanctions are identifiable by a distinctive form of dress. The authorities do not make active enquiries as to membership of the group, but do take action if a person identifies herself as a member by wearing the form of dress. We may call the possibility of modifying behaviour in order to escape the attention of the authorities, and thus to escape persecution, *behavioural avoidance*.

These two categories will often overlap in practice. For instance, where a state persecutes members of a particular ethnic group by refusing them public employment, a person who does not seek such employment may be seen as benefitting from a limited range of persecution, in that she does not engage in one form of conduct that attracts persecution; but at the same time, she may be engaging in behavioural avoidance, in that she does not attract the attention of the authorities to her membership of the disadvantaged group. However, as analysis of *HJ (Iran)* will demonstrate, where the content of the persecutory behavior is less specific, it will be necessary to categorise clearly the forms of behavior that would enable an applicant to escape persecution.

The implications of a modification of behaviour on return to the home country were first clearly discussed in *Ahmed v.*

Secretary of State.¹¹ Mr. Ahmed was by religion an Ahmadi. The evidence was that it was an obligation of that religion to be active in proselytisation, though many of its adherents did not obey that obligation. When in Pakistan, his home country, Mr. Ahmed had been subject to significant persecution, in terms of direct physical attack, when he attempted to convert other citizens; and he claimed asylum because of a well-founded fear of continuation of that persecution if returned to Pakistan. The Asylum and Immigration Tribunal rejected the claim, considering that it would be reasonable to expect Mr. Ahmed to avoid such persecution by behaving like many other Ahmadis did, and not obeying his religion's obligation to proselytise: in other words, to take advantage of the limited range of the persecution directed at Ahmadis in Pakistan.

The Court of Appeal did not agree:

It is one thing to say . . . that it may well be reasonable to require asylum seekers to refrain from certain political or even religious activities to avoid persecution on return. It is quite another thing to say that, if in fact it appears that the asylum seeker on return would *not* refrain from such activities-if, in other words, it is established that he would in fact act unreasonably-he is not entitled to refugee status . . . in all asylum cases there is ultimately but a single question to be asked: is there a serious risk that on return the applicant would be persecuted for a Convention reason? If there is, then he is entitled to asylum. It matters not whether the risk arises from his own conduct . . . however unreasonable.¹²

IV. PERSECUTION AND SELF-RESTRAINT

This robust assertion of the obligation of the receiving state to respect the imperatives of personal behaviour held by a potentially persecuted subject, while very welcome, left it unclear whether *any* self-restraint could be expected of an applicant for asylum; or whether the receiving state had to accept entirely uncritically the applicant's intended behaviour on his

11. *Sec'y of State for the Home Dep't v. Ahmed*, [1999] EWCA (Civ) 3003, [2000] INLR 1 (appeal taken from Immigr. Appeal Trib.) (U.K.).

12. *Id.* [1999] EWCA (Civ) 3003, [2000] INLR at 7.

return to the home country, and grant asylum if any aspect of that behaviour would expose him to persecution. That problem was not addressed in the next major case dealing with the issue, the judgment of the High Court of Australia in *Appellant S395/2002*, but it was analysed by the English Court of Appeal in two subsequent cases, *Z v. Secretary of State*¹³ and *J v. Secretary of State*.¹⁴

Both cases concerned homosexuals from countries where homosexuality was the subject of persecution. In both of them, at least on the findings of the English tribunals, the subjects had, as in *HJ (Iran)*, lived such lives in their home country as not to attract the attention of the authorities. What was not clear was whether that conduct had been of their own uncoerced preference, and by that choice had happened to benefit from the limited range of persecution operated by the home state, or whether the “choice” had been an exercise in behavioural avoidance, forced on the applicants in order to escape persecution.

In terms of its evidence and argument, *Z* was a very unsatisfactory case, but the judgments nonetheless took the opportunity of setting out the principle to be applied if the case was found to be one of behavioural avoidance:

where avoiding action is forced on the subject, that case only falls under the Refugee Convention if it results in a condition that can properly be called persecutory, in that it imposes on the subject a state of mind or conscience that fits with the definition of persecution given by McHugh and Kirby JJ [in *Appellant S395/2002*] and in line with [*Sepet*]: “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.”¹⁵

In this analysis, the court, without realising that it was doing so, appealed to the distinction between exogenous and en-

13. *Z v. Sec’y of State for the Home Dep’t*, [2004] EWCA (Civ) 1578, [2005] Imm. A.R. 75 (appeal taken from Immigr. Appeal Trib.) (U.K.).

14. *J v. Sec’y of State for the Home Dep’t*, [2006] EWCA (Civ) 1238, [2007] Imm. A.R. 73 (appeal taken from Asylum & Immigr. Trib.) (U.K.).

15. *Z v. Sec’y of State*, [2004] EWCA (Civ) 1578, [15], [2005] Imm. A.R. 75 (Buxton L.J.).

ogenous harm that is stressed by Hathaway and Pobjoy.¹⁶ Whether it is persecutory for an applicant for asylum to be required to have recourse to behavioural avoidance in order to escape exogenous harm (for instance, in the case of homosexuals in Iran, capital punishment) should depend on whether the limitations on her behaviour or exercise of conscience necessary to avoid that punishment would threaten to cause her mental distress—endogenous harm, such as the subject could not reasonably be expected to tolerate.

That analysis was approved in *J*. The Court of Appeal stressed in that case that the first step must be to determine the reason for the subject's self-restraint when in the home country, and the case was remitted to the lower court for that enquiry to be made. If it was found that the self-restraint had been an act of behavioural avoidance the tribunal must then, in the homosexual case before it, ask whether the applicant would be required on return to abandon part of his sexual identity in order to escape external physical persecution; and, if so, whether his total situation, having exercised that personal restraint, would be [endogenously] one of persecution, in the sense that he could not reasonably be expected to tolerate it.¹⁷

V. WERE THE APPLICANTS REQUIRED TO BE DISCREET?

The solution just set out might have been thought to respect the United Kingdom's international obligations to protect applicants from feared persecution, whether exogenous or endogenous, while at the same time refusing asylum in cases where a reasonable adjustment of the applicant's behaviour would achieve the same protection for her as would a grant of asylum. Because the applicant's situation after the adjustment of behaviour had to be tested by the Convention test for persecution, the number of cases in which an adjustment of behaviour would be found to be reasonable would probably be few; but the alternative seemed to be to grant asylum automatically in any case where any adjustment of behaviour would be required in order to avoid [exogenous] persecution.

16. Hathaway & Pobjoy, *supra* note 2, at 333.

17. See the Court of Appeal's directions on remission. *J v. Sec'y of State*, [2006] EWCA (Civ) 1238, [16]–[17], [2007] Imm. A.R. 73.

That was not how the cases just discussed were seen by the Supreme Court in *HJ (Iran)*. Put shortly, it was argued before that court and accepted by it, that the Court of Appeal had imposed a requirement of “discretion” on applicants, with refusal of asylum following in any case where exogenous persecution could be avoided by such discretion. As Lord Hope of Craighead summarised in his reading of *J v. Secretary of State*, “the way the test was expressed in [*J’s case*] suggests that the applicant will be refused asylum if it would be reasonable to expect him to be discreet even if he is unwilling or unable to do this. That is a fundamental error.”¹⁸ Since the Court of Appeal in *J* had specifically ordered that any reliance on the discretion of the applicant had to be tested against the test for Convention persecution,¹⁹ that court plainly did not take the position attributed to it by Lord Hope. The Supreme Court’s own approach, however, sprang not so much from a critical reading of the judgments of the lower courts, as from a fundamentally different analysis from that of the Court of Appeal of the structure of article 1A(2), and hence of the juristic status of the Convention reasons.

VI. ARTICLE 1A(2) AS INTERPRETED IN *HJ (IRAN)*

Hitherto it had been thought, and the wording of article 1A(2) so provides, that the first required question was whether the applicant had a well-founded fear of persecution. That established, the next requirement was to establish the causal link by demonstrating that the persecution would be by reason of race, religion, nationality, membership of a particular social group or political opinion. If the treatment is not for one of those reasons then, however badly the subject will suffer, she will not be entitled to Convention protection.²⁰

HJ (Iran) inverts that analysis. The Convention reasons are approached not as reasons required for Convention-rele-

18. *HJ (Iran) v. Sec’y of State for the Home Dep’t (HJ and HT)*, [2010] UKSC 31, [29], [2011] 1 A.C. at 628 (Lord Hope) (appeal taken from Eng. & Wales C.A.).

19. See *J v. Sec’y of State*, [2006] EWCA (Civ) 1238, [16], [2007] Imm. A.R. 73 (“[The court] will have to ask itself whether ‘discretion’ is something that the appellant can reasonably be expected to tolerate . . .”).

20. This account does no more than track that given in Hathaway & Pobjoy, *supra* note 2, at n.15.

vant persecution, but as an enumeration of groups or categories protected by the Convention. That is most clearly put by Lord Rodger of Earlsferry:

If . . . the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear to the persecution that 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—the right to live freely and openly without fear of persecution.²¹

So the *first* question becomes whether the applicant is a member of a protected group. If she is, *any* interference with the beliefs or practices of that protected group, including changes of belief or practices by the applicant in order to avoid exogenous persecution, will amount to Convention persecution. That is reinforced by two further passages in *HJ (Iran)*. In the first passage, Sir John Dyson criticized the approach in that case of the Asylum and Immigration Tribunal, who had pointed out that “for 16 years HJ had been able to conduct his homosexual activities in Iran without *serious* detriment to his private life and without that causing him to suppress *many* aspects of his sexual identity.”²² Sir John Dyson’s view of those facts as not raising any issue as to whether the applicants had been persecuted indicates clearly that any threatened interference with a homosexual’s conduct of his private life or assertion of his sexual identity will amount to persecution, entitling him to the grant of asylum.

Second, in an already famous passage, the Supreme Court²³ explained that the protection in homosexual cases was not limited to specifically *sexual* behaviour:

21. *HJ and HT*, [2010] UKSC 31, [82], [2011] 1 A.C. at 647 (Lord Rodger of Earlsferry).

22. *Id.* [122], [2011] 1 A.C. at 659 (Sir John Dyson) (emphasis in original).

23. The passage is in the judgment of the late Lord Rodger of Earlsferry, but that judgment was approved in full by Lord Walker of Gestingthorpe, Lord Collins of Mapesbury and Sir John Dyson, and the passage thus carries the authority of the Court.

In short, what is protected is the applicant's right to live freely and openly as a gay man. That involves a wide spectrum of conduct, going well beyond conduct designed to attract sexual partners and maintain relationships with them. To illustrate the point with trivial stereotypical examples from British society: just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates.²⁴

If that passage had been intended simply to demonstrate forms of behavioral avoidance (illegitimately) forced on homosexuals by the exogenous persecution that undoubtedly exists in Iran, then it would not cause concern. But that is not what the passage says. Rather, it asserts that "what is protected" is the whole spectrum of behaviour and beliefs of a member of any one of the classes listed in article 1A(2), and the limitation of any part of that spectrum, however, (in Lord Rodger's words) trivial it may be, will amount to Convention-relevant persecution.

This is the explanation of the dilemma identified by Hathaway and Pobjoy:

In our view, the Australian and British courts were correct to find that the gay claimant who avoids physical or other serious harm by concealing his identity or desisting from particular conduct nonetheless faces a risk of being persecuted. But what the decisions fail to say is that it is the modification of behaviour itself, or the impact that that modification has on the applicant, that is the relevant persecutory harm. These cases present clear examples of the risk of non-physical persecutory harms—which we refer to here as *endogenous* harms—as contrasted with more classic *exogenous* harms.²⁵

24. *HJ and HT*, [2010] UKSC 31, [78], [2011] 1 A.C. at 646 (Lord Rodger).

25. Hathaway & Pobjoy, *supra* note 2, at 333.

But, with respect, what *HJ (Iran)* precisely does say is that it is the modification of behaviour itself that is the persecutory harm. That looks odd from the viewpoint of orthodox asylum law because, as explained above, *HJ (Iran)* assumes that what is protected in asylum law is the condition and all the characteristics of being a gay man, and any forced limitation of the expression of those characteristics is therefore persecutory per se. Once that position is adopted, the second part of what Hathaway and Pobjoy find lacking—any consideration of the impact that that modification has on the personality or conscience of the applicant—is irrelevant. The persecution has already occurred by the modification, and that objective fact cannot be altered by consideration of the subjective effect, if any, that the modification has on the applicant.

That is why the analysis in *HJ (Iran)* does not ask, indeed considers that the courts in *Z* and *J* were plainly wrong to ask, whether the final position of the subject, having made an adjustment, will be one of Convention persecution. The very act of making the adjustment is Convention persecution, and that is the end of the matter.

It has to be said that this analysis, assuming that all manifestations of a particular sexual orientation are protected by the Convention so that interference with any aspect of that manifestation would amount to persecution, came to the Supreme Court from a distinguished source. The invaluable accounts of the arguments in an appeal that are contained in the *Appeal Cases* reports enable us to know that the Supreme Court followed the view of the United Nations High Commissioner for Refugees:

A proper analysis of whether lesbian, gay, bisexual or transgender applicants have a well-founded fear of persecution for the purposes of article 1A(2) of the 1951 Convention has to start from the premise that applicants are entitled to live in society without the need to hide their true identity. There is no place for the question whether “discretion” is something such applicants can reasonably be expected to tolerate, since that is tantamount to asking whether individuals can be expected to avoid persecution by conceal-

ing their sexual orientation which is the status protected by the Convention.²⁶

As authoritatively and confidently as that analysis is set out, it is quite simply wrong. The Convention does not protect the *status* of gay persons, or of anyone else. It protects gay persons from *persecution* because they are gay. That persecution must result in the subject suffering harm that he cannot reasonably be expected to tolerate. Adjustments of behaviour or belief so as to avoid exogenous persecution may often inflict harm of that degree on the applicant because of the damage that the adjustment does to his conscience or personality. But that is the threatened outcome that should have to be demonstrated before the applicant is entitled to Convention protection. To hold without more that any gay person is entitled to maintain the whole spectrum of gay behaviour excludes the question, central to Convention protection, of whether the particular applicant's situation on return to the home country will be intolerable.

VII. THE EXTENT OF HJ (IRAN)

The Supreme Court was, with respect, correct to stress that in terms of Convention protection there is nothing special about homosexuals.²⁷ The jurisprudence will therefore apply generally to all types of applicants for asylum. How this will work out in practice in the British courts is yet to be seen, but it would seem inevitable that, once a person can show that she falls into a category liable to persecution in her home country, no possible action on her part either in terms of taking advantage of limited range of persecution or in terms of behavioural adjustment can be relied on to deny her asylum. Thus, for instance, once it is shown that an applicant who is an adherent

26. *HJ and HT*, [2010] UKSC 31, [2011] 1 A.C. at 611C (statement of intervener U.N. High Comm'r for Refugees (UNHCR)). See also the criticism of the UNHCR intervention, Hathaway & Pobjoy, *supra* note 2, at XX. It may be mentioned in passing that the Appeal Cases set out the oral argument, which plays a large role in English appellate courts, often differing in its terms from the written submissions. Those working in other jurisdictions may be surprised to learn that in *HJ and HT*, counsel addressed the court for some fourteen hours.

27. See *HJ and HT*, [2010] UKSC 31, [3], [2011] 1 A.C. at 619 (Lord Hope) (noting that gays and lesbians must be provided with "no more . . . [and] no less" protection than the Convention entitles them to).

of a particular religion would wish to proselytise, or an applicant who is of a particular ethnic origin would wish openly to display her ethnicity, the question cannot even be raised of whether any modification of behaviour would avoid exogenous persecution; it is the modification itself, whatever its actual effect on the applicant, that would constitute persecution.

The only English case so far to grapple with these difficulties concerned the return of refugees to the regime in Zimbabwe. The evidence was or was assumed to be that persecution was only directed by that regime to persons who when questioned could not demonstrate loyalty to the ruling Zanu-PF party. Persons who had distinctly contrary political views, in particular as members or adherents of the opposition MDC party, had never been expected by the English courts to lie about that fact in order to escape persecution. However, in *RT(Zimbabwe) v. Secretary of State*²⁸ the Court of Appeal had to consider the position of persons who had no decided political views: “the real question is whether the *HJ (Iran)* protection extends to a person who has no firm political views, but might, if stopped by the militia, be willing to express something more positive than political indifference if that were necessary to avoid maltreatment.”²⁹ The court held that in such a case the protected right was the right not to be persecuted for imputed political beliefs. If the reason for lying about the applicant’s beliefs was to escape persecution, the option available to the applicant of lying would not defeat the claim.³⁰ Consistently with *HJ (Iran)*, the question was not asked of whether the need to lie about loyalty to Zanu-PF would so affect the personality or conscience of an applicant who had no firm political views as to place her in a position that was intolerable. The class or category entitled to protection was the politically neutral. Any infringement of that neutrality, whatever its actual effect on the applicant, amounted to Convention-protected persecution.³¹

28. *RT (Zim.) v. Sec’y of State for the Home Dep’t*, [2010] EWCA (Civ) 1285, [2011] Imm. A.R. 259 (appeal taken from Asylum & Immigr. Trib.) (U.K.).

29. *Id.* [31], [2011] Imm. A.R. 259.

30. *Id.* [37], [2011] Imm. A.R. 259.

31. The Supreme Court has granted permission to appeal in *RT (Zim.)*. Unlike the U.S. Supreme Court, the U.K. Supreme Court does not publish petitions for permission to appeal, or the terms in which permission is

There are two further dilemmas about the future application of *HJ (Iran)* to which Hathaway and Pobjoy draw attention.³² We venture some short further comments, because both problems spring from the case's departure from orthodox asylum law.

First, on the assumption, adopted from the submissions of the UNHCR, that article 1A(2) sets out a series of social or personal conditions or "status" that the Convention protects, it is necessary to determine in each case what is the content of that status. As Hathaway and Pobjoy point out, that is particularly difficult in the case of membership of the particular social group of homosexuals. From the answer that the Supreme Court gave to that question in *HJ (Iran)*, it would seem that the characteristics need not be exclusive to the social group, nor definitive of it: the audience at a Kylie concert is not exclusively gay; and, no doubt, there are gays who prefer different forms of entertainment.³³ That would not matter under the orthodox approach to article 1A(2) because the enquiry would start with the nature of the persecution understood in terms of intolerability, and the question would then be whether the subject was in fact gay, and was being persecuted for that reason. How he behaved as a gay person would not affect that question. But now that it is the restriction of "gay" behaviour that constitutes the persecution, the nature and limits of that behaviour become crucial. In due course, the English courts may need to refine their view of characteristic homosexual behaviour.

granted. It is therefore not possible to say how much of the decision in *RT (Zim.)* (which touched on other matters in addition to the issue discussed in the text above) remains vulnerable. It may also be noted that the Court of Appeal rejected the possible nuance that was suggested by Elias L.J. in *TM (Zim.) v. Sec'y of State for the Home Dep't*, [2010] EWCA (Civ) 916 (appeal taken from Asylum & Immigr. Trib.) (U.K.), to which reference is made in Hathaway & Pobjoy, *supra* note 2, at nn.76, 248. See *RT (Zim.)*, [2010] ECWA (Civ) 1285, [35], [2011] Imm. A.R. 259 ("[T]he distinction by Elias L.J. . . . is not valid . . ."). That formulation was based on a misunderstanding of some obiter remarks of Sir John Dyson in paragraph 114 of his judgment in *HJ and HT*, [2010] UKSC 31, [114], [2011] 1 A.C. at 657–58. Subject to its not being one of the issues now under appeal to the Supreme Court, the point can be taken to be closed.

32. See generally section III of Hathaway & Pobjoy, *supra* note 2.

33. See *supra* text accompanying note 23.

Second, as Hathaway and Pobjoy stress, the apparently untrammelled freedom of behaviour on the part of homosexuals urged in *HJ (Iran)* is, in other areas of asylum and human rights law, subject to reasonable limitations. For instance, even in a country where proselytisation is not forbidden in itself there may be limits on active attempts to convert others in order to control harassment, invasion of privacy, or the stifling of competing religious views. Hathaway and Pobjoy draw attention to the warning by Lord Hope in paragraph 17 of his judgment in *HJ (Iran)* that, at least in cases of alleged political or religious persecution, it may be necessary to consider whether the restricting limits in the home country are unreasonable.³⁴ How that is to be judged, and whether by the standards of the home country or by the standards of the forum, remains unclear. And it should be noted that Lord Hope's judgment was not adopted by any other member of the Supreme Court, none of whom envisaged any critical assessment of a home state's limitations on the behaviour of the members of a protected group. That exercise would have had to be undertaken if the enquiry had started from the proper place, by asking whether the limitations on behaviour were persecutory in the sense of being something that the applicant could not be expected to tolerate.

VIII. CONCLUSION

The ways in which the outcome of *HJ (Iran)* appears difficult to reconcile with orthodox principles of asylum law have been set out in full and, with respect, convincing detail by Professor Hathaway and Mr. Pobjoy. That difficulty arises because *HJ (Iran)* does indeed depart from orthodox principle by failing to put at the forefront of the case the question of whether what is feared on return to the home state will be persecution in the sense of being something that the applicant cannot reasonably be expected to tolerate. The new analysis, which sees persecution as being any interference with the beliefs or practices of a protected group, is likely to take British courts down some winding roads in the years to come. Courts in other jurisdictions may be better advised to treat that analysis as a cul-de-sac.

34. See Hathaway & Pobjoy, *supra* note 2, at 378–79.