

## **UK - LC (Albania) v The Secretary of State for the Home Department and The United Nations High Commissioner for Refugees, 9 May 2017**

**Country of Decision:**

United Kingdom

**Country of Applicant:**

Albania

**Date of Decision:**

09-05-2017

**Citation:**

[2017] EWCA Civ 351

**Additional Citation:**

Case No: C5/2014/2641

**Court Name:**

The Court of Appeal (Civil Division)

**Keywords:**

Assessment of facts and circumstances

Persecution Grounds/Reasons

Refugee Status

Sexual orientation

Unaccompanied minor

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**Relevant Legislative Provisions:**International Law > [1951 Refugee Convention](#) [1]European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [2]Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [3] > [Article 8](#) [4]European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [5]

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**Headnote:**

This case dealt with the issue of whether the Supreme Court's four-stage test for the determination of sexual orientation asylum claims, set out in HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department (‘HJ (Iran)’), still held good, specifically the third and fourth stages which draw the distinction between those who would conceal their sexual orientation and whether the material reason for that is fear of persecution or for other reasons.

### **Facts:**

The Applicant arrived in the UK from Albania aged 16, having had a relationship with another adolescent man in Tirana for about a year and having been thrown out by his father. He had not had any other sexual relations either in Albania or since arriving in the UK.

The Applicant claimed asylum on the ground that he was gay, which was rejected on behalf of the Secretary of State. On appeal it was accepted that the Appellant was gay, but his appeal failed on the grounds that he would not be at risk in Albania as:

- With regard to the country guidance, he did not fall within the categories of homosexual people set out in MK (Albania) case and
- applying the HJ (Iran) test, the evidence of his conduct in the UK was that he would wish to live discreetly, rather than openly, as a gay man in Albania, as a matter of voluntary choice motivated by social pressure rather than because of fear of persecution.

It was now contended for the Appellant that:

- the HJ Iran (test) was not compatible with the 2004 Qualification Directive, as subsequently explained by the CJEU in the two cases of Y and Z and X, Y and Z and applied in MSM UT.
- if the Appellant was gay, and if openly gay people have a well-founded fear of persecution in the country of origin, then that was sufficient to constitute refugee status without considering the third and fourth stages of the HJ (Iran) test, ie whether or not the Appellant would live openly or discreetly, and what the reasons for that might be.

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### **Decision & Reasoning:**

The HJ (Iran) four stage test had been formulated by the Supreme Court in rejecting the ‘reasonable tolerability’ test. To reject an asylum application based on sexual orientation on the ground that the applicant could avoid the persecution by living discreetly would be to defeat the very right which the Refugee Convention exists to protect. However the Supreme Court had considered that a crucial element for refugee protection to be granted was that the applicant's behaviour must be modified in order to avoid persecution not for some other reason.

The Court held that the subsequent CJEU and Upper Tribunal authorities cited by the Appellant did not evidence any inconsistency with HJ (Iran). The Court therefore continued to be bound by HJ (Iran) and the four stage test set out there. The Court also made clear that it concurred with the Supreme Court's legal analysis, that it was principled and clearly right, and compliant with the Qualification Directive.

The focus must be on the particular individual himself and as the Convention does not afford protection against social pressures there must be a distinction between those who conceal their sexual orientation in response to such pressures and those who do so because of fear of persecution. In this case whilst the Appellant's behaviour whilst in the United Kingdom was not on

its own determinative, considerable weight was given to this, particularly as the constraints on such behaviour in the UK were acknowledged to be less than those in Albania.

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**Outcome:**

The Appellant's appeal was dismissed.

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**Subsequent Proceedings :**

Permission to appeal was refused by the Supreme Court; the judgment is now final.

**Observations/Comments:**

The MK (Albania) country guidance given in respect of the return of homosexual men and women in Albania was not considered by the Court, as the Respondent conceded that that guidance had been set aside by the Court in October 2011 and therefore the Tribunals had been mistaken in relying upon that as a country guidance case since then. For many commentators, because of the potential consequences of this concession for other cases, this was the most newsworthy element of this case, rather than the actual outcome of the appeal.

The Court considered the 2004 Qualification Directive and not the 2011 Recast Qualification Directive as the UK opted in to the former but not the latter. The Court did not consider the scope of the Qualification Directive to be any different from the Refugee Convention in the matter at issue in this case.

UNHCR intervened in the case, on the basis that whilst HJ (Iran) was correctly decided there should be a rebuttable presumption that fear is a material reason for any concealment of sexual orientation. The Court did not consider it helpful to speak in terms of a presumption, but did accept that the evaluation of specific facts and circumstances of such cases had to be carried out with particular vigilance and care.

Both the Appellant's counsel and UNHCR did receive some criticism from the Court regarding whether all of their submissions were within the scope of the permission that had been granted to appeal. The Court commented that the UNHCR's submissions (although often helpful to the court in other cases) had in this case strayed outside the bounds of the limited grounds of the appeal which were whether the HJ (Iran) case was correctly decided. The Court warned that interventions beyond the scope may discourage the granting in future of permission to intervene.

This case summary was written by Jonathan Thomas, LL.M student at Queen Mary University, London.

**Attachment(s):**



[LC Albania SOGI 9 May 2017 CoA.docx](#)[6]

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**National / Other Legislative Provisions:**

[UK - Refugee or Person in Need of International Protection \(Qualification\) Regulations 2006 \(SI 2006 No 2525\)](#) [7]

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**Links:**

[1] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention>

[2] <https://www.asylumlawdatabase.eu/node/453>

[3] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>

[4] [https://www.asylumlawdatabase.eu/node/195#toc\\_46](https://www.asylumlawdatabase.eu/node/195#toc_46)

[5] <http://www.asylumlawdatabase.eu/en/content/qualification-directive>

[6]

<https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/LC%20Albania%20SOGI%209%20May%202020>

[7] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/uk-refugee-or-person-need-international-protection-qualification>