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## **UK - Supreme Court, 7 July 2010, HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31**

**Country of Decision:**

United Kingdom

**Country of Applicant:**

Cameroon

Iran

**Date of Decision:**

07-07-2010

**Citation:**

[2010] UKSC 31

**Additional Citation:**

[2011] 1 AC 596, [2010] 3 WLR 386

**Court Name:**

The Supreme Court

**Keywords:**

Persecution Grounds/Reasons

Membership of a particular social group

Discrimination

Non-state actors/agents of persecution

Persecution (acts of)

Sexual orientation

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**Relevant Legislative Provisions:**

International Law > [1951 Refugee Convention](#) [1] > [Art 1A \(2\)](#) [2]

International Law > [1951 Refugee Convention](#) [1] > [Art 33](#) [3]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [4] > [Art 9](#) [5] > [Art 9.1 \(a\)](#) [5]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [4] > [Art 10](#) [6]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [4] > [Art 10](#) [6] > [Art 10.1 \(d\)](#) [6]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [4] > [Art 9](#)

**Headnote:**

Homosexuals are members of a particular social group being defined by the immutable characteristic of their sexuality.

Asylum should not be refused to a homosexual person on the basis that it could be considered reasonably tolerable, if returned to their home country, for him or her to deny their identity and conceal their sexuality in order to avoid being persecuted.

**Facts:**

The applicants were homosexual men from Iran and Cameroon respectively. They had claimed asylum on the basis that they would face persecution in Iran and Cameroon because of their sexual orientation. In both countries consenting adults engaging in homosexual conduct was a criminal offence that could be punished by imprisonment or, in the case of Iran, execution. However, the Court of Appeal had found that both applicants would hide their sexual orientation if returned. The Iranian appellant would not come to the attention of the authorities and it would be reasonable for the Cameroonian applicant to internally relocate to avoid discovery and a repetition of the assault he had suffered. The Court of Appeal found that, taking into account the situation in the country of origin, it would be 'reasonably tolerable' for both applicants to conceal their sexual identity.

The applicants appealed to the Supreme Court.

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**Decision & Reasoning:**

The Supreme Court allowed the appeal on the basis that, firstly, it was not in dispute that homosexuals are members of a particular social group being defined by the immutable characteristic of their sexuality. Further, to compel a homosexual person to pretend that their sexuality does not exist, or that the behaviour by which it manifests itself can be suppressed, is to deny the fundamental right to be who he or she is. Persecution includes death, torture or imprisonment. The 1951 Convention would not provide protection to those who faced discrimination on the grounds of sexual orientation or who face disapproval from their family or society. However, one of the purposes of the Convention is to counteract discrimination and it does not permit or envisage applicants being returned to their country 'on condition' that they take steps to avoid offending their persecutors. Persecution does not cease to be persecution if the person persecuted can eliminate the harm by taking avoiding action. Therefore, the Court of Appeal's test of 'reasonable tolerability' was incorrect.

The Court held that there may be cases where an applicant would hide his sexuality not only because of his fear of persecution but also for other reasons, such as adverse reaction of family, friends or colleagues. In such cases if the fear of persecution is a 'material reason' for the concealment, then he would be entitled to protection.

Detailed guidance was given to tribunals on the approach that they should adopt in such cases (see paragraphs 35 and 82 of the decision).

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**Outcome:**

Appeal allowed; order of the Court of Appeal set aside, both cases remitted to the Tribunal for

further reconsideration in the light of the guidance given.

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**Observations/Comments:**

The Court refused to make a reference of a question arising under the Qualification Directive to the Court of Justice of the European Union on the basis that the question to be referred was not clearly identified.

**Attachment(s):**

 [Judgment.pdf](#)[7]

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**Other sources cited:**

Hathaway, J. *The Law of Refugee Status* Butterworths (1991), p 112.

Macdonald, *Immigration Law and Practice* 7th ed (2008).

A Guide to Refugee Law in Australia, prepared by the Legal Service Section of the Refugee Review Tribunal and the Migration Review Tribunal.

Millbank, J, 'From discretion to disbelief: recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom?' (2009) 13 *IJHR* 391.

**National / Other Legislative Provisions:**

[Universal Declaration of Human Rights](#) [8]

[Universal Declaration of Human Rights - Art 2](#) [9]

[TFEU](#) [10]

[TFEU - Art 267](#) [11]

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**Links:**

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

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

[3] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention#33>

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

[5] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%209%20QD>

[6] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%2010%20QD>

[7] <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Judgment.pdf>

[8] <https://www.asylumlawdatabase.eu/en/taxonomy/term/1284>

[9] <https://www.asylumlawdatabase.eu/en/taxonomy/term/1285>

[10] <https://www.asylumlawdatabase.eu/en/taxonomy/term/402>

[11] <https://www.asylumlawdatabase.eu/en/taxonomy/term/403>