

THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 345
Record No. 2021/275 JR

**IN THE MATTER OF SECTION 5 OF
THE ILLEGAL IMMIGRANTS (TRAFFICKING) ACT 2000, AS AMENDED**

Between:

M. Y.

Applicant

-and-

**THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL and
THE MINISTER FOR JUSTICE**

Respondents

JUDGMENT of Mr Justice Cian Ferriter delivered this 13th day of May 2022

Introduction

1. In these judicial review proceedings, the applicant seeks an order of *certiorari* quashing the decision of the first respondent (“the Tribunal”) of 5th March 2021 which affirmed the recommendation of the International Protection Office (“IPO”) that the applicant should not be granted international protection. The proceedings raise a potentially important point about the application of the principles in the UK Supreme Court decision of *HJ (Iran) v. SSHD* [2011] 1 AC 596 (“*HJ (Iran)*”) to a case where an applicant believes he may have to conceal his political opinions for fear of persecution if returned to his country of origin.
2. While he was granted leave to challenge the decision on some 5 grounds, at the hearing of this judicial review, the applicant confined his case to three grounds of challenge to the decision, as follows:

- (i) That the Tribunal erred in law and acted unreasonably and irrationally in expecting and/or requiring the applicant to hide his political beliefs and to take no part in the Berber separatist movement in Algeria for the rest of his life, to avoid persecution and serious harm in Algeria (“*the HJ (Iran) issue*”)
- (ii) That the Tribunal’s decision was contrary to s.28(6) of the International Protection Act 2015 (“the 2015 Act”), in circumstances where it appears to have been accepted that the applicant experienced persecution and/or serious harm in Algeria in the past, and in circumstances where there was no good reason to find that such persecution and/or serious harm would not be repeated (“the s.28(6) issue”)
- (iii) That the Tribunal’s decision was contrary to s.28(4) of the 2015 Act and/or in breach of the *audi alteram partem* principle in failing to take into consideration the applicant’s solicitor’s written submissions on country of origin information (“COI”) dated 15th December 2020, which are not listed as having been considered by it in the impugned decision (“the COI fair procedures issue”).

3. Before turning to a consideration of these issues, it is necessary to set out the background facts.

Background

- 4. The applicant was born in 1983 in the Bejaia Province in the Kabylia region of Algeria and is an Algerian citizen. The Kabyle people are one of the several Berber (Amazigh) groups indigenous to North Africa, and mainly present in Libya, Algeria and Morocco. The applicant is a member of the Berber Amazigh people who are a large ethnic minority group in Algeria.
- 5. The applicant supports the ideals of the Berber separatist MAK movement (“MAK”), which is the main political body representing Kabyle interests, and seeks independence for the Berber-majority province of Kabylia in Algeria.
- 6. On three occasions in May 2008 (two on the same day, and a third occasion later in the same week), when a member of MAK, the applicant was attacked by racist anti-Berber groups by reason of his involvement in pro-Berber separatist activities organised by MAK on a

university campus in Blida.

7. He left the MAK in 2009 because he feared for his life at the hands of the Algerian authorities if he remained an activist.
8. Having left MAK, the applicant worked as a computer sales agent from 2011 to 2013, while living at home with his father. In 2013 he applied for a visa to move to the United Kingdom. This was granted and he moved to the UK on 25th June 2013. The visa was valid until November 2013, and he stayed on in the United Kingdom illegally after it expired. The applicant travelled to Ireland *via* Belfast on 25th September 2018 and applied for international protection in the State on the following day. The applicant indicated that he feared returning to Algeria, both because of his race and politics and because of serious allergies he had for which he could not receive proper treatment in Algeria.
9. The applicant completed his Application for International Protection Questionnaire (AIPQ) in November 2018 and was interviewed by the IPO on 17th October 2019. In a Section 39 Report dated 18th February 2020, the IPO accepted that the applicant was Algerian, his ethnicity Berber and his tribe Berber Amazigh. It also accepted that his medical condition was as claimed by him but held that it could be treated in Algeria. It also found that his claim that *“he was a member of MAK from May 2005 until December 2008, and has since 2009, not been a member of MAK”* was credible. However, it found *“on the balance of probabilities that claim that he had been threatened and attacked in Algeria”* was not credible (p.119). It recommended that the applicant not be given a refugee status or subsidiary protection declaration, and in a Section 49 Report dated the 25th February 2020, the IPO further recommended that he not be granted permission to remain.
10. The applicant lodged an appeal to the Tribunal, and his solicitors made written submissions to it on his behalf on 10th December 2020. Case law and COI was referred to which supported the view that the authorities did not tolerate MAK whose activists were regularly harassed, arrested and detained and that the Berber community from the Kabylia region had *“long suffered marginalisation;”* it also referred to the 2017 Human Rights Watch Report which outlined that, during 2016, *“Algerian authorities routinely violate the right to freedom of assembly,”* with organizing or participating in an unauthorized demonstration attracting up to one year in prison.

11. Submissions were made that the ill-treatment of activists in Algeria met the definition of persecution/serious harm. Issue was also taken with the manner in which the IPO had concluded that the applicant had never been threatened or attacked in Algeria.
12. The applicant's appeal hearing took place before the Tribunal on 15th December 2020, and on that date his solicitors submitted, by email, a written submission containing extracts from further COI and enclosed the full COI reports referred to, which essentially updated and confirmed the position outlined in the earlier COI already lodged
13. In the Tribunal's decision dated 5th March 2020 (the "decision"), the Tribunal rejected the appeal and affirmed the IPO recommendation that the applicant not be given refugee status or a subsidiary protection declaration. This judicial review concerned the lawfulness of the decision.

Consideration of Issues

14. While counsel for the applicant presented her argument on the issues in the order set out at paragraph 2 above, for reasons which will become apparent, I propose to address the s.28(6) issue first, before addressing the COI fair procedures issue and the *HJ (Iran)* issue.

Failure to apply s.28(6)

15. The applicant formulated this ground in his statement of grounds as follows:

"That the Tribunal's decision was contrary to section 28(6) of the International Protection Act 2015 ("the 2015 Act"), in circumstances where it appears to have been accepted that the applicant experienced persecution and/or serious harm in Algeria in the past, and in circumstances where there was no good reason to find that such persecution and/or serious harm would not be repeated"

16. S.28(6) provides as follows:

“(6) The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such serious harm, is a serious indication of the applicant’s well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.”

17. The applicant advanced his case on this point in his written submissions as follows:

“While [the Respondents] are correct that no formal finding was made to that effect [i.e. no formal finding of past persecution or serious harm], it is nonetheless the case that at paragraph [4.22] of the decision, the Tribunal states “the Tribunal accepts as credible, on the balance of probabilities, the Appellant’s claim that, while participating in a MAK protest in university, he was subjected to violent attacks by a group hostile to Berber political aspirations”. It is submitted that this amounts to a finding that past persecution occurred, the violence in question having had a Convention nexus in that it related to the Applicant’s political beliefs. At paragraphs [4.7] and [4.8], the Tribunal had noted the Applicant’s evidence of being subjected to “violent attacks”, verbal abuse and assaults and, as noted above, had accepted at paragraph [4.44], that while at university he had been involved in three violent incidents “related to his political activities,” during which he had been stabbed with an iron bar. It is submitted that, given that these incidents were accepted as credible and were clearly related to political beliefs, and given that the country of origin information which was before the Tribunal shows that state protection would not have been available in such circumstances, the incidents de facto amounted to past persecution.”

18. The respondents objected to the premise of this ground of challenge on the basis that there was no express finding in the Tribunal’s decision to the effect that the Tribunal had accepted that the applicant had experienced persecution or serious harm in Algeria in the past. However, in discussion with counsel for the respondents at the hearing before me it was fairly accepted that the Tribunal had in substance accepted that the applicant had been subjected to persecution or serious harm on account of his political beliefs and the focus of the respondents’ submissions at the hearing was on the fact that s.28(6) had been addressed in substance as the Tribunal had identified good reasons as to why such serious harm or persecution would not be repeated.

19. In my view, the Tribunal in substance did accept that the applicant had been subjected to persecution or serious harm on account of his political beliefs. He was violently attacked for expressing his political opinions as an MAK activist in a State which, on the COI evidence accepted by the Tribunal, did not provide adequate protection for such activists. The fact that state actors were not involved in those attacks does not mean that persecution was not made out where the COI accepted by the Tribunal showed that there was inadequate protection for those expressing their political opinion through Berber separatist activism. It follows that s.28(6) was engaged on the facts of the case.
20. It is clear that the presumption in s.28(6), if available, is a significant one in an applicant's favour. In the absence of such presumption being available to an applicant, the applicant is required to discharge the ordinary burden of proof of establishing facts on the balance of probabilities, with the benefit of the doubt being afforded to the applicant, that there is a reasonable degree of likelihood that the applicant will be subject to future acts of persecution if returned to his country of origin: see decision of O'Regan J. in *ON v RAT* [2017] IEHC 13. In contrast, if the applicant is entitled to the benefit of s.28(6), he/she starts with a presumption, based on the fact that the applicant has already been subject to persecution or serious harm, or to direct threats of same, that the applicant has a well-founded fear of persecution or real risk of suffering serious harm; as s.28(6) provides, such past persecution or serious harm "is a serious indication of the applicants well-founded fear of persecution". In those circumstances, the onus shifts to the assessing authority to rebut the presumption by demonstrating "good reasons to consider that such persecution or serious harm would not be repeated."
21. In *IL v IPAT* [2021] IEHC 106 ("*IL*"), Burns J. held that once a finding had been made by the tribunal in that case (whether expressly or impliedly) that an applicant had been subject to threats of serious harm, there was an obligation on the tribunal to thereafter engage in analysis of the rebuttable presumption contained in s.28 (6). Burns J. held (at paragraph 13) that the fact that there was no reference whatsoever by the tribunal in its decision s.28(6) was an error on the part of the tribunal. Burns J held as follows (at paragraphs 13 and 14):

"13. There was an obligation on the First Respondent [the Tribunal] to engage in an analysis of this rebuttable presumption which it failed to do. Indeed, there is no

reference whatsoever by the First Respondent to s. 28(6). This is an error on the part of the First Respondent. Section 28(6) provides a significant evidential presumption to an applicant which can be rebutted by good reason. However, it should be unambiguous from the First Respondent's decision that such a significant evidential presumption was considered by the First Respondent and the good reasons which rebutted the presumption should be stated. In NS (South Africa) v. Refugee Appeals Tribunal [2018] IEHC 243, Humphreys J stated:-

'If it is accepted that there was past persecution, the decision-maker needs to consider positively whether there is good reason to consider that there would be no future risk.'

14. The Respondent argues that good reasons did exist to rebut the presumption and that they are set out and apparent in the decision, although s.28(6) is not specifically analysed. This is not sufficient to deal with this issue. As already stated, s.28(6) is a significant evidential benefit which an applicant, who has been found to have been subjected to threats of serious harm, has. It is not appropriate that assumptions and inferences be made as to whether this issue had been considered by the First Respondent, and if so, what the good reasons were for determining that the presumption, which the Applicant is entitled to, has been rebutted."

22. In the recent decision of *NU v IPAT* [2022] IEHC 87, Phelan J. endorsed that analysis of Burns J. in *IL*. In applying that analysis to the facts before her, Phelan J. held (at paragraph 40):

*"Section 28(6) applies in this case to give a significant evidential benefit to the applicant but there is no evidence in the terms of the impugned decision that the Tribunal identified and considered good reasons for determining that the presumption of a future indicator of a risk of persecution had been rebutted (see *IL v. IPAT & Anor* [2021] IEHC 106, Burns J. at para. 14). I accept the applicant's submission that having found a fear of persecution to be established, there was an obligation on the first respondent to engage in an analysis of this rebuttable presumption under s. 28(6) and to explain the reasons why the Tribunal was satisfied that there was good reason that there would be no future risk, if this is indeed the Tribunal's Decision. No such*

analysis is carried out by the Tribunal in deciding that state protection would be available.”

23. Counsel for the respondents submitted that Phelan J. had made clear, in a different part of her judgment (at paragraph 38), that *“while it is certainly good practice to do so, it is accepted by me that it is not necessary to identify the applicable statutory provisions which guide the discharge of the statutory decision-making function in the text of the decision itself in order for that decision to be capable of being subject to a thorough review. It is possible for a court to be satisfied that the correct legal test has been applied by the Tribunal through the record of the assessment carried out and the Decision arrived at as demonstrated in the reasoning employed. Where the Tribunal fails to clearly identify the relevant statutory provisions in the decision, however, a court in judicial review proceedings must be vigilant to ensure that the Tribunal had identified and applied the correct test.”*
24. I accept that the general principle espoused by Phelan J. in this paragraph could equally apply to the question of whether the Tribunal had properly applied itself to the application of the rebuttable presumption in s.28(6); it is not necessarily fatal that there is no express reference to the terms of s.28(6) once it is clear that s.28(6) is being applied and properly engaged with. I do not see that the analysis of Burns J. in *IL* as inconsistent with such an approach.
25. Counsel for the respondents said that it was clear from the terms of the Tribunal’s decision that, in substance, it was satisfied that “good reasons” existed within the meaning of s.28(6) to rebut the presumption. She relied in this regard on the contents of paragraphs [5.10] and [5.16] of the Tribunal’s decision. These paragraphs provided as follows:

“[5.10] As the Appellant played a minor part in MAK while at university, gave up all political activity in 2009, and subsequently remained at the same address, graduated from university, obtained employment, successfully applied for a UK visa and was allowed to leave the country without any steps being taken by the authorities to arrest him, the Tribunal finds that, if he returns to his country of origin, there is no reasonable chance that he would face a well-founded fear of persecution on the basis of his political opinion”.

[5.16] As it is clear from the COI referred to above that, overall, Berbers are well integrated in the social, political and economic life of Algeria and that attacks on Berbers by the security forces or other ethnic groups occur in the context of protests or ostentatious displays of religious or political dissent, and, as indicated in paragraph [5.10] above, the Appellant gave up all political activity in 2009, the Tribunal finds that there is no reasonable chance that, if returned to Algeria, he would face persecution on the basis of his race or religion.”

26. In my view, the contents of these paragraphs involve the application of the standard forward-looking test where the onus is placed on the applicant to demonstrate on the balance of probabilities (coupled, where appropriate, with the benefit of the doubt) that he was likely to face persecution or serious harm on the basis of his political opinion if returned to Algeria. Apart from the obvious absence of any express reference to s.28(6), there is no reference in the decision to the core elements of s.28(6): there is no reference to the fact of past persecution/serious harm, the fact that this gave rise to a rebuttable presumption as to well-founded fear of future persecution/serious harm, or to the good reasons considered by the Tribunal for taking the view that persecution/serious harm would not be repeated. In my view, the Tribunal did not properly apply the provisions of s.28(6) notwithstanding the substance of its findings that the applicant had suffered from past persecution or serious harm within s.28(6). This was an error of law.
27. In light of the gravity of the decision being taken by the Tribunal where past persecution/serious harm has been made out, the applicant was entitled to a decision and decision-making process which properly and clearly respected the benefit of the rebuttable presumption contained in s.28(6). In my view, the Tribunal fell into error in not affording the applicant the benefit of the rebuttable presumption, and in not engaging in a proper analysis of the application of the terms of s.28(6) to the facts of his case. Accordingly, I propose to quash the Tribunal’s decision and remit the matter for proper consideration by a different Tribunal.
28. In so ruling, I am not to be taken as holding that the new Tribunal on a fresh assessment must find that the presumption in s.28(6) has not been rebutted. The outcome of a proper application of s.28(6) to the facts is entirely a matter for the new Tribunal.

Breach of fair procedures by failing to consider all submitted COI documentation

29. In relation to this ground of challenge, the applicant contends that the terms of the Tribunal's decision (at paragraph [2.21]) make clear that the Tribunal only had regard to those documents (including COI documents) tendered by the applicant which were specifically listed in that paragraph of the decision. This list does not include additional written submissions, and accompanying additional COI documents, lodged with the Tribunal on the date of the hearing of the applicant's appeal (15 December 2020). Accordingly, the applicant contends that there has been a breach of his right to fair procedures by a failure by the Tribunal to consider relevant material, such that the decision should be quashed.
30. The applicant accepted that the well-established test in *GK v. Minister for Justice* [2002] 2 IR 418 applied. In that case, Hardiman J. stated: "*A person claiming that a decision making authority has, contrary to its express statement, ignored representations which it had received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case.*"
31. The applicant contends that it is evident from the express terms of the Tribunal's decision, that the Tribunal's statements as to the documents it had considered were confined to the list of documents expressly set out in the relevant parts of the Tribunal's decision. As it was accepted that the applicant had lodged written submissions and a separate set of COI with the Tribunal, and none of that material was listed by the Tribunal in its decision as having been considered by the Tribunal, the applicant submits that there is direct evidence before the Court that the Tribunal had in fact ignored relevant representations and documentation.
32. In my view, an objective reading of the contents of the decision bears out the fact that the Tribunal member sought to conclusively list all documentation considered by him, including each piece of COI considered by him. This did not include the supplemental submissions and COI documents handed into the Tribunal at the hearing on 15th December 2020. The respondents rely on the fact that the Tribunal member stated at the end of the list of documents said by him to be relied on by the appellant that "all of the documentation provided has been fully considered." In my view, this sentence was clearly a reference to the list of documents appearing immediately before it and not to any additional documentation. This is borne out by the fact that at paragraph [4.17] of the decision, the Tribunal member

refers to “COI quoted extensively and submissions submitted by the appellant himself (see paragraph [2.21] above) as well as two reports by the Immigration and Refugee Board of Canada submitted by IPO (see paragraph [2.22] above)...”

33. It clearly would have been more appropriate if the Tribunal member had considered and had regard to the supplemental COI material furnished to him at the hearing on 15th December 2020. However, in my view there is force in the submission made by counsel for the respondents that ultimately there was no substantive breach of the applicant’s right to a fair hearing in the circumstances where the supplemental COI was consistent, as regards the persecution faced by Berber protesters at the hands of the Algerian authorities, with the other COI which was considered by the Tribunal and, importantly, which was accepted by the Tribunal in its decision as bearing out the persecution faced by Berber protesters and activists in Algeria.
34. Accordingly, if this were the only ground of challenge, I would not have been minded to quash the decision. However, given that I propose to quash the decision on the basis of an error of law as regards the application of s.28(6), the matter is now going to be assessed by a different Tribunal in any event. I would observe that if a tribunal is going to take the step of listing each and every document that it has considered, it would be good practice to ensure that all such documents are in fact listed to avoid any doubt as to whether all relevant material has been considered.

Error of law by failing to apply principles in *HJ (Iran)*

Introduction

35. This ground of challenge to the decision raises an issue of potential importance beyond the facts of this case. In light of the decision which I have arrived at in relation to the s.28(6) issue, it is not strictly necessary for me to rule on this issue. However, in deference to the arguments made by the parties before me, and in light of the fact that the matter is going to be remitted for determination after a fresh hearing before a different Tribunal, I propose to set out my views on the arguments raised, at least at the level of principle.

36. That said, I should note at the outset of my consideration of this issue that I am curtailed in offering an ultimate view as to whether the Tribunal fell into error on this issue by the fact that the issue was not argued before the Tribunal. I do not believe it is fair to either the Tribunal or the parties for me to seek to offer such an ultimate view in circumstances where the Tribunal did not have an opportunity to rule on the issue. I propose nonetheless to address the arguments raised at the level of principle given that a view on those arguments may be of assistance to the new tribunal dealing with the matter on remittal. However, my analysis should strictly speaking be regarded as *obiter* in the circumstances.

Overview

37. In his statement of grounds, the applicant articulates this ground of challenge as follows:

“The Tribunal erred in law and acted unreasonably and irrationally in expecting and/or requiring the applicant to hide his political beliefs and to take no part in the Berber separatist movement in Algeria for the rest of his life, to avoid persecution and serious harm in Algeria.”

38. The respondents object to the premise of this ground of challenge as they say that there was no finding by the Tribunal that the applicant was required to hide his political beliefs and to take no part in the Berber Separatist movement in Algeria for the rest of his life in order to avoid persecution or serious harm. The respondents plead in their statement of opposition that the Tribunal’s findings are based on the fact that the applicant had, *“of his own volition and long before leaving Algeria, giving up his political activities and continued living in Algeria for a time and was not at risk during that time”* in this regard. They rely on paragraphs 5.10 and 5.16 of the decision as set out at paragraph 25 above.
39. The applicant counters that objection by saying that the gravamen of the analysis conducted by the Tribunal was to the effect that the applicant would have to hide his political beliefs as a supporter of the Berber Separatist movement in order to avoid persecution. The applicant submits that an objective reading of the Tribunal’s decision makes clear that the Tribunal wrongly presumed that the applicant would and should be obliged to hide his political beliefs for the rest of his life in Algeria. The applicant contends, in the circumstances, that the facts of his case engage with the principles set out by the UK Supreme Court in *HJ (Iran)* to the

effect that a well-founded fear of persecution may be made out where a party must avoid engaging in Convention-protected activity (in this case, the holding or expression of an opinion support of the Berber separatist cause in Algeria) in order to avoid persecution in the country of origin. While, as we shall see, *HJ (Iran)* involved applicants who were gay, and who believed they would be required to conceal their sexual orientation for fear of persecution if returned to their countries of origin, the applicant contends that the principles set out in *HJ (Iran)* are equally applicable to other Convention-protected grounds including that of political opinion.

The Law

40. In *HJ (Iran)*, the UK Supreme Court considered the question of whether a gay applicant should be required to live “*discreetly*” in order to avoid persecution in his country of origin.
41. The approach to such a question set out by Lord Hope (at paragraph 35 of his judgment) was expressly adopted and applied by McDermott J. in the case of *CC v. RAT* [2014] IEHC 491 (at paragraphs 13 and 14):

“13. Lord Hope set out a staged test to be applied to such cases at para. 35 as follows:-

(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..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....

(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'. (See also Lord Rodger at paras. 61 and 82)

14. The court is satisfied that a finding that the applicant is credible in his claim that he is a homosexual must be followed by an assessment which is in accordance with the approach set out in H.J. (Iran), by taking into account whether the applicant lived openly as a gay man or intends to in the future, or felt obliged to live "discretely" by reason of the violence and threats of others and the failure of the state to offer any state protection to the gay community and/or to encourage discrimination against him on the basis of the criminalisation of sexual relations between men. These are important issues which require to be addressed once a clear finding as to the sexual orientation of the applicant is made...."

42. Lord Rodger took a similar approach where he held (at paragraph 82) that:-

"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 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, the 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.”

43. It would appear that the approach of Lord Rodger represents the *ratio* of the decision of the UK Supreme Court, as his analysis in paragraph 82 as set out above is expressly agreed with by Lord Walker (at paragraph 28); Lord Collins (at paragraph 100) and Lord Dyson (at paragraphs 108 and 132).
44. The essence of the test set down in *HJ (Iran)* is that, if the material reason the applicant will in fact conceal aspects of his or her sexual orientation if returned to the country of origin is that he or she fears persecution in the absence of such concealment, the Tribunal should then go on to consider whether that fear was well founded.
45. The principles in *HJ (Iran)* have also been applied in a series of other Irish High Court cases in relation to gay applicants, as set out in the decision of McDermott J. in *CC v. RAT* at paragraph 13.

46. The respondents made the point that the principles in *HJ (Iran)* had not been applied in Ireland other than in the context of gay applicants for international protection. Counsel for the respondents submitted that there is arguably a distinction between sexual orientation (which is innate and inherent to one's personality) and the holding of a particular political opinion (which it was said is not).
47. The applicant pointed in response to this submission to the fact that the UK Upper Tribunal (Asylum and Immigration Chamber) in the case of *MSM (Journalists; Political Opinion; Risk)* [2015] UKUT 413 (IAC) ("*MSM*") applied the *HJ (Iran)* principles in the context of an apprehended persecution on the Convention ground of political opinion and that there is no basis in principle to apply the *HJ (Iran)* approach to one Convention ground of persecution (being membership of a social group based on sexual orientation) but not to another (political opinion). The Upper Tribunal there noted that the right to protection from persecution on the grounds of political opinion was rooted in the long-established right to freedom of expression.
48. The applicant also relied on the CJEU decision in joined cases *C-71/11* and *C-99/11 Y and Z* (CJEU Grand Chamber, 5th September, 2012) ("*Y and Z*") which related to a claim of well-founded fear of persecution on the grounds of religion based on a concern that if the applicants practiced their religion publicly in their country of origin (Pakistan) they would be subject to persecution. The Court in *Y and Z* found (at paragraph 63) that "*Acts which may constitute a 'severe violation' within the meaning of Article 9(1)(a) of the [Qualification Directive] include serious acts which interfere with the applicant's freedom not only to practice his faith in private circles but also to live that faith publicly*".
49. The CJEU in *Y and Z*, in answer to a question as to whether article 2(c) of the Qualification Directive (which contains the definition of "refugee" found in the Geneva Convention and in the 2015 Act and which references "*a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group*"), also held (at paragraphs 78 and 79) that:

"78. None of those rules states that, in assessing the extent of the risk of actual acts of persecution in a particular situation, it is necessary to take account of the possibility

open to the applicant of avoiding the risk of persecution by abstaining from the religious practice in question and, consequently, renouncing the protection which the Directive is intended to afford the applicant by conferring refugee status.

79. It follows that, where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status, in accordance with Article 13 of the Directive. The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.”

50. The Upper Tribunal in *MSM* noted that the CJEU decision in *Y and Z* (having quoted paragraph 79 of the decision as set out above) that “*this decision seems to us entirely consonant with HJ (Iran)*” (at paragraph 43).
51. It seems to me that a close reading of the various judgments in *HJ (Iran)* demonstrates that the UK Supreme Court believed that the principles they were espousing could equally apply to other Convention grounds. In particular, the judgments make reference, with approval, to *dicta* in Australian case law to the effect that the principle that concealment to avoid persecution may amount to well-founded fear of persecution would also apply to political opinion. Thus, Lord Hope (at paragraph 25) cited from the joint judgment of McHugh and Kirby J.J. in the Australian High Court case of *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* 216 CLR 473 where those judges stated:

“But persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality. The Convention would give no protection from persecution for reasons of religion or political opinion if it was a condition of protection that the person affected must take steps—reasonable or otherwise—to avoid offending the wishes of the persecutors. Nor would it give protection to membership of many a ‘particular social group’ if it were a condition of protection that its members hide their membership or modify some attribute or characteristic of the group to avoid persecution.”

52. Lord Rodger in his judgment (at paragraph 56) also cited from paragraph 41 of the judgment in that Australian case:

“History has long shown that persons holding religious beliefs or political opinions, being members of particular social groups or having particular racial or national origins are especially vulnerable to persecution from their national authorities. The object of the signatories to the Convention was to protect the holding of such beliefs, opinions, membership and origins by giving the persons concerned refuge in the signatory countries when their country of nationality would not protect them. It would undermine the object of the Convention if the signatory countries required them to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention.”

53. Lord Rodger (at paragraph 71) also referred in that context to the separate Australian case of *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18. In that case the appellant had worked as a journalist in Ukraine. Due to his political views he had been subjected to a systematic campaign of harassment, including physical maltreatment. The Australian High Court applied the analysis in paragraph 40 of the judgment of McHugh and Kirby J.J. in *Appellant S395/2002 v Minister for Immigration* (the case referred to at paragraphs 51 and 52 above) where they had criticised the idea that an applicant would not suffer persecution for his homosexuality if he could avoid it by living discreetly. Lord Rodger noted:

“Similarly, in SZATV 233 CLR 18, the tribunal had gone wrong by approaching the issue on the footing that it would not be unreasonable for the appellant to relocate within Ukraine and obtain work which would not involve the expression to the public of his political opinions. In other words, he would avoid persecution by giving up the very right to express his political opinions without fear of persecution which the Convention is designed to protect. Again, the decision is consistent with the approach in Appellant S395/2002 v Minister for Immigration 216 CLR 473.”

54. Accordingly, it seems to me that the principles in *HJ (Iran)* are equally applicable to other Convention grounds such as the holding of a political opinion.

55. It is important to note that the fact-sensitive nature of the application of the principles was highlighted in *HJ (Iran)* and such fact sensitivity is likely to apply with particular force in the context of fear of persecution said to arise from the holding of a political opinion.

56. Lord Hope, having reviewed case law in other jurisdictions on the issue, concluded (at paragraph 31) that “*the single most important message to emerge from these cases is the need for a careful and fact-sensitive analysis.*” Lord Dyson, having cited the approach of the New Zealand courts, which sought to draw a distinction, in the context of establishing a well-founded fear of persecution, between harmful action at the core of the right and harmful action at its margin, stated at paragraph 115 that:

“It is open to question how far the distinction between harmful action at the core of the right and harmful action at its margin is of relevance in cases of persecution on grounds of immutable characteristics such as race and sexual orientation. But it is a valuable distinction and there may be more scope for its application in relation to cases concerning persecution for reasons of religion or political opinion.”

57. This underscores the need for a tribunal faced with arguments based on *HJ (Iran)* to conduct a careful analysis of the facts before applying the relevant principles.

Arguments as to application of legal principles to facts of this case

58. The Tribunal, while describing the applicant’s involvement in MAK as “*low level*”, did accept that the applicant had been involved in both recruitment and publicity for the MAK, although that he was not a “*prominent activist or leading light in MAK*”. The Tribunal also accepted that the applicant suffered serious harm while an MAK activist on account of his political beliefs and that he gave up political activism as he feared for his life at the hands of the authorities. The applicant relies on the acceptance by the Tribunal of his evidence that he had left MAK after the politically motivated violent incidents he suffered while a member of MAK in May 2008 “*as he feared for his life because the authorities have no mercy*” (decision, paragraph 4.23).

59. The applicant lays particular emphasis on the Tribunal's acceptance of his evidence, in answer to a question from his legal representative as to whether he left MAK solely on account of the May 2008 assaults or for any other reasons, that:- *"He stated that he feared for his five younger siblings and stated that, if anything happened to them, he would blame himself. He stated that he reduced his political activity but that, in his heart, he still wants to do something."* (decision, paragraph 4.24). He also submits that his evidence to the Tribunal on the latter point is consistent with the evidence he gave in his s.35 interview to the IPO where, when asked whether he was still a member of MAK, he replied: *"Yes. In my heart, and until when I die."*
60. The applicant's fundamental contention in this regard is that the Tribunal wrongly failed to ask itself *why* the applicant had decided to cease his involvement with MAK and, effectively, keep his political opinions private notwithstanding that he remained fervently committed to the beliefs of the Berber separatist cause. The applicant submits that, if the answer to the question as to why he ceased such outward expression of his political beliefs was for a ground related to persecution (in this case, apprehended persecution for his political beliefs as a supporter of Berber separatism in Algeria), as a matter of law, he was entitled to refugee status on the basis that he had made out a well-founded fear of persecution if returned to Algeria.
61. The respondents answer to this ground of challenge is that there was no evidence accepted by the Tribunal to the effect that the applicant actively intended to get back involved in Berber separatist political action on his return to Algeria such that the test in *HJ (Iran)*, even if applicable in principle to those asserting a fear of persecution on the grounds of political belief, was not available to the applicant on the facts i.e. the test is simply not engaged in this case.
62. In addition to his claims as to being the subject of violent attack while a MAK activist in May 2008 (accepted by the Tribunal) and his evidence that he gave up activism because he feared for his life but that he remained an activist "in his heart", the applicant made a series of other claims in his evidence which were rejected by the Tribunal. These included claims:
- that following his discontinuance of his political activities in January 2009 for his own safety and his family, he continued *"to be targeted by the authorities, who regarded him*

as a terrorist. He also suffered abusive and threatening verbal attacks by people who followed him on the street. A lieutenant at a checkpoint told him he would be killed” (decision, paragraph 4.1).

- that he fled Algeria in 2013 to escape from the authorities who wanted to kill him
- that, after he left Algeria in 2013, a member of the security forces told his father that the applicant would be killed if he returned.
- that he was a wanted traitor or terrorist who evaded arrest by the authorities by keeping a low profile and taking taxis to work
- that he was subjected to constant threats, abuse and harassment because of his involvement with MAK even after he left the organisation (decision, paragraph 4.41).

63. The Tribunal did not accept these claims as credible. These adverse credibility findings were not challenged in these proceedings and the applicant accepts that he cannot look behind those findings. However, he maintains that the proper application of the *HJ (Iran)* principles to those parts of his evidence which were accepted by the Tribunal should have led the Tribunal to ask itself the question why it was that he had given up political activism and would be unlikely to resume same if returned to Algeria. He submits that the answer to that question would be a fear of persecution, and that such fear of persecution is objectively borne out by the COI accepted by the Tribunal in relation to the persecution faced by those who are activist in relation to the Berber Separatist cause.

64. Accordingly, the applicant submits that the Tribunal fell into legal error in determining that there was no reasonable chance that he would face prosecution if returned to Algeria on the basis that he “*gave up all political activity in 2009*” and that the COI demonstrated that attacks on Berbers by the security forces or other ethnic groups occurred in the context of protests or ostentatious displays of religious or political dissent. The applicant contends that the Tribunal’s findings relied on the assumption that the applicant would not openly support Berber Separatism if he returned to Algeria without asking itself why this was so and in particular whether this was for a Convention ground, and that this was in breach of the principles in *HJ (Iran)*.

65. The respondents contended that there was no evidence from the applicant that he wished to re-engage in Berber Separatist activism if returned to Algeria but would not do so for fear of persecution if he did so return. They submitted that the evidence demonstrated that the

applicant had ceased his involvement in MAK in early 2009, and, importantly, lived for some 4 years in Algeria without persecution before voluntarily leaving Algeria, having obtained a visa without objection or obstruction from the Algerian authorities. Effectively, he was a former activist who had ceased activism some 13 years ago, had not suffered persecution since and had moved on with his life. They submit that *HJ (Iran)* is simply not engaged in the circumstances: there was nothing to be concealed by the applicant in the event of his return to Algeria and therefore no “why?” question on this issue to be asked by the Tribunal.

Should the Tribunal have applied HJ (Iran) to the facts here?

66. As already noted the principles in *HJ (Iran)* were not argued before the Tribunal in terms, as very fairly brought to my attention by counsel for the applicant at the hearing before me.
67. An application of the principles to the facts here is undoubtedly complicated by the fact that the COI evidence demonstrates that the risk of persecution in Algeria only exists in respect of those who are outwardly activist as to their political opinions on Berber Separatism. Accordingly, while it might be unpopular for a person in the applicant’s position to hold or even express a political opinion sympathetic to Berber Separatism, the COI suggests that he or she is not likely to be persecuted for same. However, in the event that the holder of such political opinion wishes to express same through outward activism (such as membership of MAK, participation in separatist public protests and the like), the COI suggests that there is a risk of persecution for same.
68. As highlighted by the UK Supreme Court in *HJ (Iran)*, a careful assessment of the facts is critical to an assessment of whether a well-founded fear of persecution can be made by reference to the need to conceal behaviours protected by a Convention ground. The applicant was, on the evidence accepted by the Tribunal, undoubtedly a Berber Separatist activist in the past. His evidence was also that he ceased being such an activist for fear of the persecution involved. However, he had not been active for many years and he did not give express evidence that he wished to resume such activism but believed he would not or could not for fear of persecution. As the question of the test in *HJ (Iran)* was not before the Tribunal and his evidence was not led with that test in mind, it is difficult to form a view as to the extent to which his evidence was or might have been such as to satisfy the test.

69. In my view, when a different Tribunal is freshly assessing the matter following remittal, it would be appropriate for the Tribunal to proceed on the basis that *HJ (Iran)* applies in principle and to seek to apply the principles set out by Lord Hope and Lord Rodger in *HJ (Iran)* in so far as the Tribunal considers them applicable to the facts.
70. I should emphasise in so saying that I am not holding that the applicant will be entitled to a declaration of refugee status in light of his evidence. Rather, the Tribunal should address its mind to the stages of the *HJ (Iran)* test and in particular, if the Tribunal takes the view that the applicant will be not be engaging in activism as regards his Berber Separatist views to ask itself the question of why that is so and whether it is for a reason or reasons which the law would regard as being based on a well-founded fear of persecution.

Conclusion

71. For the reasons out lined above, I will quash the decision of the Tribunal and remit the matter for fresh determination by a different tribunal member.