In 2010 the United Kingdom Supreme Court passed an important judgment for refugee law doctrine. The case of *HJ and HT* concerned two gay men, from Iran and Cameroon respectively, who claimed asylum based on their sexual orientation. The intention of the judgment was to settle a doctrinal dispute that had been lingering for many years: the question of ‘discretion’ reasoning. The Court had to decide whether claims to international protection could be denied on the basis that claimants could reasonably be required to behave ‘discreetly’ upon return to their country of origin in order to avoid persecution. The UK Supreme Court ruled that any such behaviour modification cannot be required, reasonably or otherwise, of a claimant. The unanimous decision also purported to provide clear guidance to judges and decision-makers on how the claimant’s future behaviour should be assessed in refugee status determinations.¹

But rather than providing a final answer, the UK Supreme Court’s judgment inspired a fierce debate among refugee law scholars on the role of a claimant’s acts, identity and rights.² James Hathaway and Jason Pobjoy prominently and severely criticised the judgment in *HJ (Iran) and HT (Cameroon)* as well as the previous Australian High Court judgment in *S395*,³ upon which the UK Supreme Court

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¹ *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010.


Introduction

built, for departing ‘in critical ways from accepted refugee law doctrine’,\(^4\) causing ‘collateral damage for applicants claiming status on grounds of religion and political opinion engendered by the confusing reasoning in these decisions’ and thus risking ‘doctrinal distortion’.\(^5\) Instead, they proposed an alternative approach. While receiving praise and support from some,\(^6\) this reaction was in turn met with strong criticism and described as ‘both wrong in principle and dangerous in practice’,\(^7\) and ‘on its own steam ... weaken[ing] the normative consensus that supposedly holds the regime together’\(^8\) – or, more mildly, ‘a rather curious response ... which will hardly have done protection much good’.\(^9\) The tone of the debate indicates that the stakes are high: the role of the claimant’s behaviour concerns a wider legal principle of profound significance\(^10\) – and it is one where very different approaches clash.

1.1 THE DISPUTE

This book will show that, in many ways, the judgment in HJ (Iran) and HT (Cameroon)\(^11\) and the reaction to it by Hathaway and Pobjoy\(^12\) crystallise a broader dispute concerning ‘discretion’ reasoning in refugee law. This dispute centres on the following questions: what will the claimant do if returned to their country of origin? And does the question of how they will behave matter for whether they are entitled to refugee protection? If so, in what way?


\(^{5}\) Ibid.


\(^{11}\) HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department, note 1.

\(^{12}\) Hathaway and Pobjoy, note 4, 315–389.
These discussions take place in the context of the refugee definition of the United Nations Convention Relating to the Status of Refugees (‘Refugee Convention’) from 1951. According to Article 1(A)2 of the Refugee Convention,

the term ‘refugee’ shall apply to any person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

The reasons for persecution (the ‘Convention grounds’) are not necessarily immediately visible. Political opinion, religion and ethnicity in some cases need to be expressed in one way or another to become discernible to the persecutor. This also goes for certain ‘particular social groups’, and has been vigorously discussed for sexual orientation. Any person, therefore, has at least some discretion regarding what others know about such characteristics. This creates a dilemma: refugee status determination is based on a future-focused analysis, but claimants can influence that future to some extent. Does this mean that claimants can be expected to hide their persecuted characteristics? If not, can claimants at the very least be required to exercise some restraint?

Judges and refugee lawyers have grappled with these questions for many years. In the United Kingdom asylum judgments have been cyclically returning to struggle with the role of the claimant’s behaviour roughly every decade: the 1989 judgment of the Court of Appeal in Mendis expressly left the question open, the 1999 Court

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36 Mendis v. Immigration Appeal Tribunal and Secretary of State for the Home Department, [1989] Imm AR 6, United Kingdom: Court of Appeal (England and Wales), 17 June 1988. The case concerned a Sri Lankan man claiming asylum on the grounds of political opinion, because of his engagement in the Tamil cause while in the United Kingdom. The judges were split on the issue: Neill LJ preferred to leave the matter open for future argument, to establish ‘whether there may not be cases where a man of settled conviction may be able to claim refugee status because it would be quite unrealistic to expect him, if he were returned to a foreign country, to refrain from expressing his political views forever’, whereas Balcombe LJ rejected the proposition on the basis that in his judgment ‘a person is not at risk of being persecuted for his political opinions, if no events which would attract such persecution have yet taken place’ as that ‘is
of Appeal judgment in Danian was puzzled, finding that the ‘learned commentaries, to the extent that they have addressed the issue, do not speak with one voice’, and that ‘such case-law as exists, both in this jurisdiction and abroad ... again does not point in a single direction’.17 This had not changed much by 2010, when the UK Supreme Court noted in its judgment in HJ (Iran) and HT (Cameroon) that the cases reviewed revealed ‘no consistent line of authority that indicates that there is an approach which is universally accepted internationally’.18 Courts and scholars have been struggling to come to terms with the role of the claimant’s potential ‘discretion’ for decades. The latest controversy is but the culmination of this longstanding struggle.

1.1.1 Living Discreetly: The UK Supreme Court’s 2010 Judgment

The controversy was triggered by the UK Supreme Court judgment in HJ (Iran) and HT (Cameroon).19 The case focused on the so-called discretion requirement. It involved two gay men, HJ from Iran and HT from Cameroon, whose asylum claims had been rejected by the lower courts on the basis that they could reasonably be expected to exercise a measure of self-restraint in order to avoid coming to the attention of persecutors. The ‘discretion requirement’ had been widely used in decisions related to asylum claims based on sexual orientation, particularly in Australia20 and the United Kingdom.21 It consists of a ‘reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection’.22 The Supreme Court unanimously ruled that the ‘reasonably tolerable test’ was contrary to the Convention and should not be followed in the future. Instead, the judges developed a new test to be applied by lower courts and tribunals when dealing with sexuality-based claims. According to the new test, while a claimant
cannot be ‘reasonably expected’ to behave in one way or another, it is relevant to assess what the applicant would ‘in fact’ do.23 The enquiry moved from a normative requirement to a factual assessment of future behaviour. In that sense, the refugee status determination procedure remains constructed around a classification of future conduct, distinguishing between ‘living openly’ and ‘living discreetly’. According to the Court, those who will ‘in fact live openly’ cannot be required to change their behaviour to avoid persecution. Where the decision-maker is satisfied that applicants will in fact conceal their sexual orientation, it is necessary to enquire into the motives for such concealment. Claimants are only entitled to protection if their concealment is due to fear of persecution. If the motives for their ‘discreet’ behaviour are other than fear of persecution, such as personal choice or social pressures, they are not entitled to international protection.24 As such, the analysis is dependent on the assumed future conduct of the applicant – and hinges on the motives for that conduct.

The rejection of the ‘reasonable requirement’ standard brought sexuality-based claims in line with claims based on other persecution grounds.25 In fact, the approach advanced by the UK Supreme Court was explicitly distilled from previous UK and also Australian case law concerning religion and political opinion. This line of cases reveals that the claimants’ conduct and their capacity for ‘discretion’ has been dealt with for decades, in ever more refined and more differentiated ways. In

23 ‘The tribunal must … consider what the individual applicant would do if he were returned to [his] 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.’ HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department, note 1, per Lord Rodger at 82; emphasis added.

24 ‘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 the very right which the Convention exists to protect, and his application a surrogate for the protection from persecution which his country of nationality should have afforded him.’ Ibid.

25 See e.g. Millbank, note 7, 497–527, 500.
the first notable pair of judgments, Mendis26 and Ahmad and Others27 from 1988 and 1989 respectively, there was uncertainty as to whether it was acceptable to require a claimant to abstain from certain political or religious acts, with considerable disagreement amongst judges. It took ten years before the Court of Appeal was again faced with the issue, in a pair of decisions in 1999 in which it basically developed the standard that was subsequently adopted and transferred to sexuality-based claims by the UK Supreme Court in the 2010 judgment. The political opinion case of Danian established that fear of harm arising from past behaviour does not forfeit a claim to protection, even if that behaviour was engaged in order to enhance prospects for asylum (‘bad faith’), if it led in fact to a genuine fear of persecution.28 Here, the claimant’s motives explicitly do not matter. Just a few weeks after the decision in Danian, the Court of Appeal developed this approach further, extending it also to future behaviour (i.e. what the claimant ‘will in fact do’) in the context of the religion-based case of Ifikhar Ahmed. The Court here for the first time distinguished between a reasonable requirement to behave in a certain way on the one hand and a factual assessment that a claimant would act in such a way (however unreasonable that would appear to be) on the other, finding that the latter situation would warrant protection if it led to a well-founded fear of persecution.29

26 Mendis v. Immigration Appeal Tribunal and Secretary of State for the Home Department, note 16.
27 Ahmad v. Secretary of State for the Home Department, [1990] Imm AR 61, United Kingdom: Court of Appeal (England and Wales), 6 October 1989.
28 The judgment concerned a Nigerian man whose claim was based on political opinion, specifically his opposition to the military regime in Nigeria. The claimant was accused of ‘bad faith’, as he had engaged in visible political activities in the course of his asylum application, which brought him to the attention of the Nigerian authorities. The lower court had found that his ‘conduct had been wholly unreasonable and contrary to the spirit of the Geneva Convention’, and was described as ‘insincere’, a ‘charade’, ‘invented’ and a ‘sham’. The issue for the Court of Appeal was then, whether those who voluntarily ‘invited persecution’ and ‘engaged in activity in the UK in bad faith but who nonetheless genuinely feared what would happen to [them] as a result of that activity’ were protected under the 1951 Refugee Convention. The Court unanimously decided that there was no ‘bad faith’ exception to the Convention protection and that a fear of persecution may be well-founded irrespective of whether it followed from voluntary activity: ‘[T]he essential factual issue in the case [is] whether at the time of the tribunal’s assessment Mr Danian, having taken the steps referred to, was then at risk of persecution, whether by reason of those steps or otherwise.’ Danian v. Secretary of State for the Home Department (Appeal), note 17.
29 The case involved a Pakistani national of Ahmadi faith, who had been persecuted in his local area for proselytising his faith. The secretary of state argued that he could relocate and avoid further persecution since it was ‘not unreasonable for him to make some allowances for the situation in Pakistan and the sensitivities of others and to exercise a measure of discretion in his conduct and in the profession of his faith’. Writing for the court, Lord Justice Simon Brown concluded that ‘[e]ven assuming, therefore, that it would be unreasonable for this appellant on return to Pakistan to carry on where he left off . . . that still does not defeat his claim to asylum’. Ahmed (Ifikhar) v. Secretary of State for the Home Department, [2000] INLR 1, United Kingdom: Court of Appeal (England and Wales), 5 November 1999.
But the situation the UK Supreme Court faced in *HJ (Iran) and HT (Cameroon)* differed in that a factual assumption was made that the claimants would in fact not live ‘openly’. None of the previous British asylum judgments had addressed this scenario. On this issue, the UK Supreme Court judges sought guidance from the 2003 High Court of Australia decision in *Appellant S395/2002*, a sexuality-based claim,\(^30\) and, in particular, the subsequent decision in *NABD*, concerning a claim based on religion.\(^31\) The judgment in S395, involving a gay couple from Bangladesh, which was decided by a narrow 4:3 majority, had established that in the case of a determination that a claimant would *in fact* behave ‘discreetly’, it was necessary to enquire into why they would do so.\(^32\) Here, the claimant’s motives regain relevance. That is, it was not sufficient to make a finding that a person would behave ‘discreetly’, and stop the analysis at that, assuming that there was therefore no risk of persecution and that their ‘discretion’ was uninfluenced by fear. This ‘why question’ acquired the quality of a test in the subsequent judgment in *NABD*, which applied S395 to a case concerning a Christian man from Iran.\(^33\) Here, the High Court of Australia established two alternatives in response to the ‘why question’: if the change of conduct was due to the fear of harm that would otherwise accrue, it would warrant protection, whereas if the changed conduct was due to personal choice, that would not warrant protection. The latter applied to the applicant in *NABD*, for whom the Court concluded that the restraint in the expression of his faith, which did not put him at risk, was freely chosen.\(^34\) That is, while the sexuality-based case of S395 introduced the ‘why question’, the religion-based case of *NABD* developed the answers to that question.

The UK Supreme Court’s judgment in *HJ (Iran) and HT (Cameroon)* is clearly derived from and in line with these previous UK and Australian judgments concerning a claimant’s future behaviour in cases of religion and political opinion. As a unanimous judgment, it sent a strong signal and reinforced the ‘why test’ that the High Court of Australia had struggled to develop: it is entirely based on what can be termed a factual assessment of the claimant’s future behaviour. Though it does not prescribe certain types of conduct as protected and others as not, the assessment

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\(^{32}\) *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, note 3, per McHugh and Kirby JJ at 51 and per Gummow and Hayne JJ at 88; see also, equally deploring the failure to ask why: Millbank, note 14, 391–444, 392 and 395–396.


\(^{34}\) Ibid., per Hayne and Heydon JJ at 168.
depends on the classification of behaviour as ‘open’ or ‘discreet’ – in some de facto ‘discreet’ situations, refugee status is granted, in others it is not.\textsuperscript{35}

1.1.2 Protective Limits and Protected Acts: Hathaway and Pobjoy’s Response

Hathaway and Pobjoy take issue with the UK Supreme Court judgment for failing to provide a standard to determine or delimit protected acts, such that any type of conduct could lead to protection. They argue that the decision ignores the ‘protective limits built into the nexus clause of the Refugee Convention’\textsuperscript{36} by taking an ‘all-embracing formulation’ to action-based risks.\textsuperscript{37} According to them, such an ‘essentially boundless’\textsuperscript{38} concept is unsustainable and there must be limits on the claimant’s activities. Their concern is essentially that, on the basis of the Supreme Court’s ruling, claimants could invite persecution with what they consider relatively trivial things, such as dressing a certain way or attending particular kinds of social event. In their view, the approach put forward by the UK Supreme Court in \textit{HJ (Iran) and HT (Cameroon)} – as well as by the High Court of Australia in its 2003 decision in \textit{S395} – is overinclusive in suggesting that there are no limits to the range of ‘activity-based risks’ associated with sexual orientation. In their understanding, this would come down to the Refugee Convention protecting the full range of available freedoms rather than protecting from persecution. In order to avoid this, according to the authors, ‘there [is] a duty on the courts to grapple with the scope of activities properly understood to be inherent in, and an integral part of [the protected] status’.\textsuperscript{39} They call for a kind of external or objective standard to distinguish between ‘protected activities that are fairly deemed to be required to express the identity and unprotected activities, which are trivial or marginal to the identity. To carry out this exercise of reintroducing normativity into the assessment, they advocate an approach based on the core and margins of rights. They suggest that only those acts that are reasonably necessary to reveal the sexual orientation will lead to protection. Thus, they explicitly argue in favour of restraint based on an external standard. This is in line with Hathaway’s earlier work, in which he has proposed and defended the position that not all future activities might be protected by the Convention, but rather that a line should be drawn in order to define the core and the margins of the ‘protected interest’. For example, Hathaway and colleagues claim that where the relevant right encompasses no public dimension, the denial of public exercise is unlikely to be within the ambit of a fear of ‘being persecuted’.\textsuperscript{40}

\textsuperscript{35} Wessels, note 14, 815–839.
\textsuperscript{36} Hathaway and Pobjoy, note 4, 315–389, 339.
\textsuperscript{37} Ibid., 374.
\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid., 335.
\textsuperscript{40} Rodger Haines, James Hathaway and Michelle Foster (2003) ‘Claims to Refugee Status Based on Voluntary but Protected Actions – Discussion Paper No. 1, Advanced Refugee Law
The core/margins approach put forth by Hathaway and Pobjoy bears many parallels with that developed by the New Zealand Refugee Status Appeals Authority, most notably in its 2004 decision in Refugee Appeal No. 74665/03 on sexual orientation.\(^4\) In this judgment, in which he explicitly refers to Hathaway’s work, Haines QC grapples with the application of the ‘human rights approach to “being persecuted”’ to ‘voluntary but legally protected action’.\(^5\) Haines criticises the judgment of the High Court of Australia in S395 for failing to offer a principled explanation as to why behaviour should not have to be modified or hidden,\(^6\) and argues that the focus must be on the minimum core entitlement conferred by the relevant right: ‘Under this approach, where the risk is only that activity at the margin of a protected interest is prohibited, it is not logically encompassed by the notion of “being persecuted.”’\(^7\)

At the heart of both Hathaway and Pobjoy’s view, as well as the New Zealand Refugee Status Appeals Authority’s approach, lies the concern not to protect trivial things, such as drinking cocktails or wearing tight jeans. The risk they see in the United Kingdom and Australian approaches is that they would provide protection to claimants whose situation was actually not that serious. The idea of ‘refugees by choice’ has overshadowed discussions on ‘discretion’ since the beginning,\(^8\) and ‘bad faith’ considerations often underlie other arguments.

The reactions amongst scholars to Hathaway and Pobjoy’s critique of HJ (Iran) and HT (Cameroon) were remarkably split, in particular on the aspect of future behaviour – whilst receiving wholehearted support from some, they were faced with severe criticism from others.\(^9\) Some scholars, such as Guglielmo Verdirame\(^4\) and

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\(^1\) The Concealment Controversy

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\(^4\) refugees by choice

\(^5\) Ibid., at 81-91.

\(^6\) Ibid., at 116.

\(^7\) Ibid., at 90.

\(^8\) In Mendis, Balcombe LJ was of the view that granting refugee status based on future conduct ‘is tantamount to saying that a person who says he proposes to invite persecution is entitled to claim refugee status’ and ‘could become a refugee as a matter of his own choice’. Note that Staughton LJ in contrast thought that in certain cases such a person would qualify for refugee status, because if they had such strong convictions that they would inevitably speak out, ‘it could be questioned whether the future conduct would be voluntary in any real sense’, Mendis v. Immigration Appeal Tribunal and Secretary of State for the Home Department, note 16.

\(^9\) See in particular the contributions to the 2012 special issue in the NYU Journal of International Law and Politics, addressing questions around the scope of protection and human rights. David John Frank’s contribution is neither critical nor supportive of the approach, but rather a broader comment on the evolving nature of LGBT rights: David John Frank (2012) ‘Making Sense of LGBT Asylum Claim: Change and Variation in Institutional Contexts’, 44(2) New York University Journal of International Law and Politics 485-495.

\(^{41}\) Refugees by choice

\(^{42}\) Ibid., at 559-572, 572 (‘Hathaway and Pobjoy in their article (and, to a far lesser extent, I, in my comment) have tried to show that it is possible to draw these boundaries in a principled and coherent way that accords with the legal framework of refugee law’).
Richard Buxton, but also Deborah Anker and Sabi Ardalan in more general terms, explicitly support their analysis and conclusions. Supportive reactions generally centre on the triviality concern. According to Richard Buxton, formerly Lord Justice of Appeal at the Court of Appeal of England and Wales, the UK Supreme Court adopted an approach to the Convention reasons 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’. Buxton agrees with Hathaway and Pobjoy that a ‘critical assessment of a home state’s limitations on the behaviour of the members of a protected group’ must be undertaken ‘if the enquiry [starts] 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’. Similarly, Verdirame, too, conflates the feared harm with the reason that triggers it when he argues that the inability to openly express affection for another man involves ‘no harm-inducing or authenticity-threatening modifications or social conduct, but reasonably tolerable inconveniences’.

More critical scholars take issue in particular with the construction of core and marginal acts. Jenni Millbank argues that ‘acts and identities in the context of sexual orientation refugee claims cannot be separated and categorized in that way’. She sees a ‘very real danger’ that this ‘call to circumscription’ would ‘end up as another version of discretion’. Her criticism is echoed by Ryan Goodman, who considers the distinction between protected and unprotected activities to be vague, lacking legal foundations and overlooking social realities. John Tobin critically engages with the capacity of human rights law to provide clarity on the issue of protected and unprotected activities in refugee law. Most importantly, human rights law knows no test to rank the seriousness of breaches, such that, despite their explicit intention and call to frame refugee law in terms of human rights, the test proposed by

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48 Buxton, note 6, 391–406, 406 (‘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’).
50 Richard Buxton was involved in the litigation of HJ as judge at the Court of Appeal – his judgment was overturned by the Supreme Court.
51 Buxton, note 6, 391–406, 392.
52 Ibid., 406.
53 Verdirame, note 6, 539–572, 572.
55 Ibid., 517.
56 Goodman, note 8, 407–446, 437, 442.