

Neutral Citation Number: [2011] EWCA Civ 1654
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
[APPEAL No: AA/01323/2011]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date : Wednesday, 7th December 2011

Before:

LORD JUSTICE LONGMORE

Between:

HL (MALAYSIA)

Appellant

- and -

**SECRETARY OF STATE FOR THE
HOME DEPARTMENT**

Respondent

(DAR Transcript of
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Official Shorthand Writers to the Court)

Mr Clive Sheldon QC (instructed by Messrs Dotcom) appeared on behalf of the **Appellant**.

The **Respondent** did not appear and was not represented.

Judgment

Lord Justice Longmore:

1. This is an application for permission to appeal by a gentleman from Malaysia of Chinese origin, Mr HL, on the basis that the Secretary of State should grant him asylum because he as a homosexual will be at risk of persecution if returned to Malaysia.
2. He was born on 4 July 1984. He came to this country first in 2006 as a student and returned to Malaysia. He came later as a holiday maker and again returned to Malaysia. I think he actually went back to Malaysia three times but on the last occasion that he returned on 1 December 2010 he shortly afterwards claimed asylum on the 7 December 2010. The Home Secretary refused his application on 31 January 2011 and appeals to the Immigration Judge and to the Upper Tribunal have both failed.
3. Mr Sheldon QC on his behalf this morning therefore has a formidable task in showing why it is fit for a second appeal despite the refusal on the papers by Sir Richard Buxton. Mr Sheldon has persuaded me that it is arguable that Immigration Judge Turquet made an error of law, undetected by Senior Immigration Judge Jordan, in following the judgment of Lord Hope in HJ (Iran) [2011] 1 AC 596 rather than the approach of Lord Rodger in that case and certainly the way Immigration Judge Turquet has set about her task seems to show that she gave equal weight to the judgment of Lord Hope and Lord Rodger. Mr Sheldon submits that that is wrong and it does seem to me that it does raise a point of principle, namely whether the ratio of HJ (Iran) is to be taken as set out at paragraph 82 of Lord Rodgers' judgment and whether it is not right that a tribunal should now proceed to determine the question of a homosexual's right to asylum on the basis of that paragraph.
4. That of course is not enough to get Mr Sheldon home because Sir Richard Buxton, while acknowledging that there may be what he calls a tension between the judgments of Lord Hope and Lord Rodger, decided to refuse permission on the papers because in paragraph 35 of her determination Immigration Judge Turquet, after quoting paragraph 82 of HJ, says this:

"Having considered the Appellant's case I conclude that the appellant would choose to live discreetly because that was how he would choose to live. If he were to have a relationship with a partner, I do not find that the background evidence demonstrates that this would cause him to be at risk of persecution."

5. Mr Sheldon submits that that is infected by the citation from Lord Hope's judgment in the previous paragraph which Immigration Judge Turquet summarises in this way:

"If he fears persecution as a result and that fear is well-founded then he will be entitled to asylum however unreasonable his refusal to resort concealment may be. The

fact that the applicant will not be able to do in the country of nationality everything he can openly do in the country where he seeks protection is not the test."

6. Mr Sheldon submits that Lord Rodger says effectively in paragraphs 78 to 80 that it is the test and he submits that on the evidence here, where gay people cannot live as openly in Malaysia as they do here, that on Lord Rogers' view the question of fear of persecution and whether the applicant would live discreetly would be determined in the applicant's favour. Sir Richard clearly thought that paragraph 35 of Immigration Judge Turquet would determine the matter in any event but it may be (and it seems to me to be arguable) that the citation from Lord Hope in the previous paragraph may have infected her approach and if that is the wrong approach then it is arguable that this applicant would then be entitled to asylum. It is rather distressing to find the law has become unclear as a result of different speeches being given in the HJ (Iran) case and as far as I am aware (and I think Mr Sheldon is aware) there is not yet any Court of Appeal guidance on how this matter should be approached and for that reason I will give leave for this case to go forward to appeal.

Order: Application granted