

Chapter 2

Sexual Orientation as a Human Right

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ABSTRACT

In this chapter, the authors examine the matter of sexual orientation as a human right. Human rights violations take many forms, from denials of the rights to life to discrimination in accessing economic, social, and cultural rights. More than 80 countries still maintain laws that make same-sex consensual relations between adults a criminal offence. Those seeking to peaceably affirm diverse sexual orientations or gender identities have also experienced violence and discrimination. A gay man was entitled to live freely and openly in accordance with his sexual identity under the Refugee Convention (“the Convention”) and it was no answer to the claim for asylum that he would conceal his sexual identity in order to avoid the persecution that would follow if he did not do so. The Supreme Court of the United Kingdom had to solve this complex problem as many issues were raised in the hearing.

1. FACTS OF THE CASE

Is it an answer to a refugee claim by an individual who has no political views and who therefore does not support the persecutory regime in his home country to say that the individual would lie and feign loyalty to that regime in order to avoid the persecution to which he would otherwise be subjected? This is the question which arises in these appeals, which form a sequel to this court’s decision in *HJ (Iran) v Secretary of State for the Home Department* in which it was held that a gay man was entitled to live freely and openly in accordance with his sexual identity and it was no answer to the claim for asylum that he would conceal his sexual identity in order to avoid the persecution that would follow if he did not do so (“the *HJ (Iran)* principle”). The first appeal concerns RT, SM and AM. The Court of Appeal allowed the appeals of RT, SM and AM on the basis that if individuals are forced to lie about their absence of political beliefs, solely in order to avoid persecution, that is covered by the *HJ (Iran)* principle and does not defeat their claims for asylum. The second appeal concerns KM. His claim was refused, while his son had been granted asylum in the UK. In the Court of Appeal, although the Secretary of

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State accepted that the appeal should be allowed because it was arguable that adequate consideration had not been given to the assessment of risk, there was an issue between the parties as to whether the case should be allowed outright or sent back to the Tribunal. The Court of Appeal allowed the appeal and sent the case back for further decision.

The Supreme Court unanimously dismisses the Home Secretary's appeals in the cases of RT, SM and AM and allows KM's appeal. The HJ (Iran) principle applies to applicants who claim asylum on the grounds of a well-founded fear of persecution for reasons of lack of political belief. Lord Dyson gives the leading judgment with which Lord Hope, Lady Hale, Lord Kerr, Lord Clarke, Lord Wilson and Lord Reed agree. Lord Kerr also gives a short concurring judgment.

2. RIGHT TO SEXUAL ORIENTATION

Sexual orientation is traditionally defined as including heterosexuality, bisexuality, and homosexuality, while asexuality is considered the fourth category of sexual orientation by some researchers and has been defined as the absence of a traditional sexual orientation (Bogaert, 2004, p. 281). An asexual has little to no sexual attraction to males or females. It may be considered a lack of a sexual orientation, and there is significant debate over whether or not it is a sexual orientation (Melby, 2005, pp. 1, 4–5) (Marshall, 2009, pp. 82–83).

Most definitions of sexual orientation include a psychological component, such as the direction of an individual's erotic desires, or a behavioral component, which focuses on the sex of the individual's sexual partner/s. Some people prefer simply to follow an individual's self-definition or identity. Scientific and professional understanding is that "the core attractions that form the basis for adult sexual orientation typically emerge between middle childhood and early adolescence". Sexual orientation differs from sexual identity in that it encompasses relationships with others, while sexual identity is a concept of self.

The American Psychological Association states that "[s]exual orientation refers to an enduring pattern of emotional, romantic, and/or sexual attractions to men, women, or both sexes" and that "[t]his range of behaviors and attractions has been described in various cultures and nations throughout the world. Many cultures use identity labels to describe people who express these attractions. In the United States, the most frequent labels are lesbians (women attracted to women), gay men (men attracted to men), and bisexual people (men or women attracted to both sexes). However, some people may use different labels or none at all". They additionally state that sexual orientation "is distinct from other components of sex and gender, including biological sex (the anatomical, physiological, and genetic characteristics associated with being male or female), gender identity (the psychological sense of being male or female), and social gender role (the cultural norms that define feminine and masculine behavior)".

Furthermore, sexual identity and sexual behavior are closely related to sexual orientation, but they are distinguished, with sexual identity referring to an individual's conception of themselves, behavior referring to actual sexual acts performed by the individual, and orientation referring to "fantasies, attachments and longings." Individuals may or may not express their sexual orientation in their behaviors. People who have a homosexual sexual orientation that does not align with their sexual identity are sometimes referred to as 'closeted'. The term may, however, reflect a certain cultural context and particular stage of transition in societies which are gradually dealing with integrating sexual minorities. In studies related to sexual orientation, when dealing with the degree to which a person's sexual attractions, behaviors and identity match, scientists usually use the terms concordance or discordance. Thus, a woman who is

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