Case No: C5/2015/3380

Neutral Citation Number: [2016] EWCA Civ 715

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
[2015] UKUT 00413 (IAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2016

Before:

LORD JUSTICE MOORE-BICK, VICE PRESIDENT OF THE COURT OF APPEAL CIVIL DIVISION
LORD JUSTICE TOMLINSON
and
LORD JUSTICE BEATSON

- -

Between:

Secretary of State for the Home Department	**Appellant**
- and -	
MSM (Somalia)	**Respondent**
- and -	
United Nations High Commissioner for Refugees	**Intervener**

- -

Deok Joo Rhee (instructed by **Government Legal Department**) for the **Appellant**
Christopher Jacobs and Guy Goodwin-Gill (instructed by **Duncan Lewis Solicitors**) for the **Respondent**
Marie Demetriou QC and Tom Pascoe (instructed by **Baker and McKenzie LLP)** for the **Intervener**

Hearing date: 15 June 2016

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Judgmen

tLord Justice Beatson:

1. **I. Introduction**

2.This is an appeal by the Secretary of State for the Home Department against the decision of the Upper Tribunal (McCloskey J and UTJ Dawson) reported as *MSM (Journalists; Political Opinion; Risk) (Somalia)* [2015] UKUT 00413 (IAC). For the purposes of these proceedings the respondent is to be known as MSM. He had worked as a journalist for a radio station in Somalia between May 2011 and September 2013. On his arrival in this country in October 2013, he unsuccessfully applied for refugee status on the ground that, given prevailing conditions in Somalia, as a journalist, he is at risk of persecution if returned. The Upper Tribunal's decision allowing his appeal was promulgated on 3 July 2015.

3.The Secretary of State submits that the Upper Tribunal erred in law in concluding that the respondent has a well-founded fear of persecution in Somalia and is not to be denied refugee status on the ground that it would be open to him to seek to engage in employment other than in the journalistic or media sector in which he had worked before leaving Somalia. Two issues arise. The first is whether the tribunal found that the underlying ground of persecution is actual political opinion and, if so, whether that decision is sustainable. It is submitted on behalf of the Secretary of State that it is not.

4.The second issue is whether the Upper Tribunal erred in failing properly to distinguish between actual and imputed political opinion. Ms Deok Joo Rhee, on behalf of the Secretary of State, maintained that this is the central issue in this appeal. She described it as relating to the proper approach to the determination of refugee status where the underlying ground of persecution is imputed as opposed to actual political opinion, and where it is open to an applicant to take avoiding action, in the present case to change his profession, so as to avoid the imputation to him of the political opinion which gives rise to the identified risk of persecution. She accepted that, in cases of actual political opinion, applicants for asylum cannot be denied refugee status on the ground that it would open to them to modify their behaviour so as effectively to hide that political opinion because such an approach would be tantamount to denying the protection which the Refugee Convention affords: see the decisions of the Supreme Court in *HJ (Iran) v Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 AC 596 and *RT (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38, [2013] 1 AC 152. But she submitted that the same does not follow in the case of an imputed political opinion.

5.The Secretary of State's case is that in some cases of imputed political opinion an applicant can be expected to modify his or her behaviour so as to avoid the imputation to him or her of the political opinion which gives rise to the identified risk of persecution. Ms Rhee submitted that whether this is so turns on whether the modification of behaviour would involve the denial of a fundamental right. It is, however, clear that her submission is in fact narrower. In particular, the Secretary of State's case is that only what were described as "core" and "non-derogable" fundamental rights, those in Articles 9(2) and 10 of Directive 2004/83/EC of 29 April 2004, the "Qualification Directive", qualify.

6.I am grateful for the submissions of Ms Rhee, and for those of Mr Christopher Jacobs and Mr Guy Goodwin-Gill, on behalf of MSM. I am particularly grateful for the written and oral submissions of Ms Marie Demetriou QC and Mr Tom Pascoe on behalf of the intervener, the United Nations High Commissioner for Refugees ("UNHCR"). I should add that this case originally came before the court on 3 February 2016, but was adjourned owing to the indisposition of counsel. The case was relisted for hearing on 15 June but, although two of the three members of the February constitution were sitting, the third member of that constitution was not. Accordingly, the hearing in June was an entirely new hearing rather than a continuation of the earlier hearing.

7.For the reasons I give at [32] – [34] below, I have concluded that the Secretary of State's appeal should be dismissed because the tribunal in fact made a finding that MSM's pursuit of a career in journalism involving the expression of political opinion is "at least partially driven by political conviction relating to conditions prevailing in Somalia". In short, this is not a case of imputed political opinion. It is therefore not necessary to reach a decision as to whether the tribunal erred in its approach to the determination of refugee status where the underlying ground of persecution is imputed, as opposed to actual, political opinion and it is open to the applicant to take avoiding action. In my judgment, since it is not necessary to deal with this issue to dispose of this appeal, the court should tread warily before making statements that will not be binding and which may not be of assistance when the broader question falls for decision in a concrete factual context. Nevertheless, given the extent of the arguments on this point and the request by all counsel before the court that we deal with it, in the Secretary of State's case because of what was said to be the precedential force of the Upper Tribunal's decision, at [36] – [47] below, I explain why I consider that the arguments submitted on behalf of the respondent and the UNHCR are powerful and why, had it been necessary to decide this question, I would have been inclined to accept the submissions of Mr Jacobs and Ms Demetriou.

8. **II. The legal framework**

9.The legislative framework is to be found in Directive 2004/83/EC, *Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection*, commonly referred to as the "Qualification Directive". The Directive is based on the 1951 United Nations Convention Relating to the Status of Refugees ("the Geneva Convention"), as supplemented by the 1967 New York Protocol.

10.The definition of "refugee" in Article 2(c) of the Qualification Directive is in substance the same as the definition in the first paragraph of Article 1(A)(2) of the Geneva Convention. By Article 2(c), "a 'refugee' means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country … or, owing to such fear, unwilling to return to it" and is not excluded from being a refugee by Article 12.

11.The key provisions of the Directive for this appeal are Articles 9 and 10. Article 9 deals with acts of persecution. It provides:

> "1. In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:
>
> (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> (b) be an accumulation of various measures, including violation of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).
>
> 2. Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of:
>
> (a) acts of physical or mental violence, including acts of sexual violence;
>
> (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
>
> (c) prosecution or punishment which is disproportionate or discriminatory;
>
> (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
>
> (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2);
>
> (f) acts of gender-specific or child-specific nature.
>
> 3. In accordance with point (d) of Article 2, there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1 of this Article or the absence of protection against such acts."

12. Article 10 deals with the grounds or reasons for persecution. So far as material for present purposes, it provides:

> "1. Member States shall take the following elements into account when assessing the reasons for persecution:
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> …
>
> (b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the

> participation in, or abstention, or abstention from, formal worship in private or public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;
>
> …
>
> (e) the concept of political opinion shall, in particular, include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.
>
> 2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution."

13. Article 13 of the Directive requires a Member State to grant refugee status to a third country national who meets the conditions set out in Chapters II and III of the Directive. The remaining provisions of Chapters II and III are not in dispute in these proceedings. In view of the reliance by the Secretary of State on the analogy of the position in relation to internal relocation, it is also appropriate to set out part of Article 8. This provides that "Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country". In considering this question, Article 8(2) directs Member States to have regard to the general circumstances prevailing in that part of the country and the personal circumstances of the applicant.

14. In the submissions, reliance was also placed on Recitals (10) and (16) – (18) to the Directive. These state:

> "(10) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum for applicants for asylum and their accompanying family members.
>
> …
>
> (16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

> (17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.
>
> (18) In particular, it is necessary to introduce common concepts of protection needs arising *sur place*; sources of harm and protection; internal protection; and persecution; including the reasons for persecution."

15. **III. The factual background**

16. MSM, born on 10 October 1985, is now aged 30. Between 2008 and 2011, he worked as a teacher, teaching mathematics and the Somali language. Between May 2011 and September 2013, he worked as a journalist for a radio station in Somalia. He arrived in the United Kingdom on 4 October 2013 using a false passport, and claimed asylum on arrival. He claimed to have a well-founded fear of persecution if he is returned to Somalia for reasons of political opinion and, in particular, because of his profession as a journalist. He claimed that at the end of 2012 he began receiving threatening text messages from Al-Shabaab demanding that he quit journalism, and that he continued to receive these messages although he changed his mobile telephone number on two occasions. He claimed that he showed the messages to his manager at work, who reported them to the police. He stated that, in September 2013, the threats escalated and became death threats, and that his uncle paid for him to leave Somalia and he left. He did not produce the phone, SIM card or copies of the threats, stating that he had left the phone with his wife in Somalia and changed handsets with her.

17. On 2 January 2014, the Secretary of State refused MSM's application for asylum. In her decision letter it is stated that she considers it inconsistent that Al-Shabaab was able to obtain MSM's new mobile number without any apparent difficulty but was unable to obtain details of his address, and that it made three to five threats a week for over nine months without taking any action against MSM. The letter also stated that it was not credible that MSM would have left his phone behind in Somalia when he knew it contained evidence central to his claim. His statement that his wife had told him that he was still receiving threatening messages from Al-Shabaab on the SIM card but that Al-Shabaab were now questioning whether he was still alive was stated to contradict his claim that Al-Shabaab had observed him and were consistently aware of his whereabouts.

18. **IV. The First-tier Tribunal's decision**

19. MSM appealed against the Secretary of State's decision. His appeal was dismissed by First-tier Tribunal Judge Devittie in a determination promulgated on 18 March 2014. The FtT judge (at [13]) found that MSM worked as a journalist for the radio station, but that his evidence about coming to the adverse attention of Al-Shabaab and receiving threats on his mobile phone from them was "a total fabrication". It was not accepted that his wife relocated to a place of safety. As to whether he would be at risk in Mogadishu because he had previously worked as a journalist there, because of the finding that he had not been the subject of adverse attention by Al-Shabaab, the FtT judge found (at [14]) that it was not likely that Al-Shabaab would suddenly take an adverse interest in him.

20. On what Ms Rhee characterised as the central issue raised by this appeal, the FtT judge stated (at [15]) that "it is an established principle of Refugee Law that protection is to be refused if it is shown that the person seeking asylum can reasonably be expected to take measures to avoid the threat of persecution upon his return to his country of origin", a principle which finds expression "for example" in the requirement for an applicant to demonstrate that it would not be reasonable or that it would be unduly harsh to expect him to relocate to an area where he would not face the real likelihood of persecution. At [16] the FtT judge stated that he did not accept MSM's evidence that his dedication to his profession of journalism is such that he would have no option but to continue to practise if he returned to Mogadishu. He also stated that MSM "indicated in his interview, that he chose to become a journalist in order to increase his income" and "it has not been a part of his evidence that his decision to train as a journalist was motivated by a conviction he held and that this was his vocation".

21. The FtT judge's conclusion (at [17]) was that, even if MSM showed that the only reason that would compel him to change profession would be a fear of persecution, he would not be entitled to international protection. The principles enunciated in the case of *HJ (Iran)* do not apply to the circumstances of his case because (see FtT, [18]) that case applies where, because of the fear of persecution, a returnee would be compelled to deny himself a fundamental right recognised under the Convention, such as the right to that person's innate sexual orientation. The position was different in a case such as MSM's, where (see FtT, [19]) his change of profession by returning to teaching "would not involve a violation of or a denial of a right enshrined in the Convention" because "the right to practise one's profession does not enjoy protected status under the Convention". It would therefore be reasonable to expect MSM to revert to teaching as a means of earning an income and hence avoid any risk that would befall him as a journalist at the hands of Al-Shabaab.

22. **V. The Upper Tribunal's decision**

23. MSM successfully appealed against the FtT's determination. In a determination dated 16 June 2014 following an error of law hearing, UTJ Dawson held that the First-tier Tribunal had erred in law because it had not adequately addressed the question whether MSM would continue as a journalist on return and it was unclear whether the FtT judge concluded that he would practise as a journalist on his return. UTJ Dawson preserved the findings of fact rejecting MSM's claims as to being threatened before he left Somalia. He stated that "if it is found that the appellant will resume his occupation as a journalist on return, the issue will be whether it would be reasonable to expect him to change his career and to resume his earlier or another occupation".

24. The preserved findings of fact in the FtT's determination were summarised as follows in the determination of the Upper Tribunal that is the subject of this appeal at [5]:

> "(i) The Appellant worked as a journalist for Radio 'X' in Somalia.
>
> (ii) He did not at any stage come to the adverse attention of AS: his evidence to the contrary was a total fabrication.

> (iii) He did not receive any threats on his mobile phone from AS.
>
> (iv) None of his colleagues at the radio station was targeted or harmed before the Appellant left Mogadishu.
>
> (v) The Appellant's wife had not relocated to a place of safety.
>
> (vi) The Appellant's sister was aware of his intention to travel to the United Kingdom, confounding his claim to the contrary.
>
> (vii) Little weight could be attributed to the documentary evidence on which the Appellant relied in support of his assertion that AS had threatened him.
>
> (viii) Increased income was his initial motivation in training to become a journalist."

25. The hearing of the Upper Tribunal to remake the decision commenced on 24 March 2015. On that occasion, the tribunal heard evidence about MSM's likely future employment in the event of returning to Mogadishu, and considered applications by both parties for the admission of fresh evidence. It promulgated its findings in relation to future employment in the event of returning to Mogadishu in a preliminary ruling dated 31 March 2015. This is Appendix II to its substantive decision. At [26] – [27] of the Appendix it is stated that it was "reasonably likely that [MSM] will seek to work with broadcasters or the information media on return and, further, will secure employment in this sector". It also stated that "following a careful reflection on the factors adverse to [MSM's] veracity, we consider it unlikely that he will seek to resume his pre-journalism career as a teacher". It considered that his activities would "include a creative role in terms of research and writing for broadcasts" and "to this extent, there will be a journalistic element". At that stage, the tribunal did not consider whether he would be seen or perceived as a person who may attract adverse attention amounting to persecution.

26. In the decision under appeal, the Upper Tribunal (at [18]) accepted MSM's claim that "the pursuit of his chosen career in journalism will involve the expression of political opinions and [it is] at least partially driven by political conviction related to conditions prevailing in Somalia". It found (at [19]) that MSM had established that, following his return to Mogadishu, he will foreseeably engage in journalistic activities and "it is clear that there are media organisations which are, or are perceived to be, either pro Al-Shabaab or anti Al-Shabaab, pro-government and anti-government". It stated:

> " … He will not refrain from doing so, whether voluntarily or involuntarily. In addition, we find that pro-government or anti-AS opinions, both of which are probably in substance indistinguishable, are <u>attributed</u> to all those who work for media organisations, irrespective of their specific role or activities. Such opinions are inherently political in nature. We consider that this broad assessment applies to all media organisations in all areas of Somalia. Accordingly, the

> Appellant's case overcomes the threshold of falling within the ambit of the Refugee Convention."

27. The tribunal (at [21]) made the following findings:

> "(b) Journalists working for Radio Mogadishu are at real risk of being targeted by [Al-Shabaab] and killed or seriously injured in consequence.
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> …
>
> (f) Those who work for media organisations other than Radio Mogadishu which publish anti-AS material or have an imputed anti–AS stance or inclination are also at risk of being targeted by AS and killed or seriously injured in consequence.
>
> (g) All of the attacks upon and murders of both journalists and "*media workers*" … documented in the reports digested above have been motivated by the occupation of the victims. The expression of political opinions is an intrinsic feature of the daily lot of most of those who work in the media sector. Furthermore, we find that the aggressors impute political opinions to all such workers in any event. We consider that there is a direct nexus between the espousal and/or expression of political opinions, actual or imputed, by the victims and their death or injury. There is no other identifiable motive or ground and none was suggested on behalf of the Secretary of State.
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> …
>
> (i) We find that there is nothing selective about the attacks on the members of the endangered group. In particular, we find no sustainable basis for confining those at risk to persons who work for media organisations perceived to be either pro-government or anti – [Al-Shabaab] (insofar there is any distinction between the two). In this sense, the attacks which have been perpetrated and which, predictably, will continue are indiscriminate. We reject the Secretary of State's argument to the contrary.
>
> (j) Thus the risk is generated by membership of the endangered group without more.
>
> (k) We find no basis for any sustainable distinction between Mogadishu and other areas of Somalia."

28. The tribunal concluded (at [28]) that, in the event of returning to Mogadishu, Somalia, "there is a real risk that by virtue of [MSM's] predicted employment in the media sector he will be persecuted for the Refugee Convention reason of political opinion and/or that a breach of his rights under Articles 2 and 3 ECHR will occur".

29. I turn to the Upper Tribunal's treatment of the modification of conduct question; that is whether it would be reasonable for MSM to avoid risk by not engaging in his chosen career of journalism but to return to teaching. It referred to the decisions relied on by MSM's representatives, in particular *HJ (Iran)*'s case, *Minister for Immigration and Border Migration v Szsca* [2013] FCAFC 155 (Federal Court of Australia), and Joined Cases C71/11 and C99/11 *Germany v Y* [2013] 1 CMLR 5 and All ER (EC) 1144, which I consider later in this judgment. It then turned to Directive 2004/83/EC, the Qualification Directive. It stated that the words of Article 10(1)(e), which provides that "the concept of political opinion shall … include the holding of an opinion … on a matter related to the potential actors of persecution mentioned in Article 6 … whether or not that opinion, thought or belief has been acted upon by the applicant", embrace what the tribunal described as "the twin concepts of actual and imputed political opinion" and that both are protected: see [33]. It continued (at [34]) that "in Somalia, journalists … have been embroiled in the continuing conflict. They have been sucked into it by reason of their occupation. Their occupation is the stimulus for the imputation to them of political opinions". It considered "that each is tarred with the same brush".

30. Ms Rhee had relied on [113] – [115] of Lord Dyson's judgment in *HJ (Iran)*, which the Upper Tribunal (at [49]) described as the narrow ratio of *HJ (Iran)*. She had submitted that a compulsory adjustment of a person's behaviour in order to avoid persecution will not constitute persecution unless it entails the forfeiture of a fundamental human right – by which she meant, as she did before us, a right recognised in the Refugee Convention, or what she described as a core or non-derogable fundamental right. After considering *Secretary of State for the Home Department v Ahmed* [1999] EWCA Civ 3003, [2000] INLR 1 and *HJ (Iran)*, the tribunal rejected this submission.

31. As to *RT (Zimbabwe)*, the Upper Tribunal considered Lord Dyson's rejection of the argument that the *HJ (Iran)* principle does not apply to the Convention ground of political opinion in the case of a person to whom the relevant interference would affect the margin rather than the core of the protected right and would not cause him to forfeit a fundamental human right. It also considered Lord Dyson's statement in that case that the right not to hold any particular religious or political belief is as important as the freedom to hold and express such beliefs as a person does hold.

32. After analysing the decisions of the High Court of Australia in *Szatv v Minister for Immigration and Citizenship* (2007) 233 CLR 18 and *Appellant S 395/2002 v Minister for Immigration* [2007] HCA 40, (2007] 216 CLR 473, and the cases of *Germany v Y and another*, *Ahmed*, and *HJ (Iran)*, to which I have referred, the tribunal concluded (at [45]) that "the possibility of conduct entailing the avoidance or modification of certain types of behaviour related directly to the right engaged is irrelevant" and that "this possibility must be disregarded". Referring (at [50]) to the Secretary of State's argument that the Refugee Convention does not protect a right to pursue a profession of one's choice, the tribunal stated that "this is a case of risk arising out of imputed political opinion" and that "the fact that the imputation of the political opinion arises in the context of the appellant's chosen profession is immaterial and incidental" so that the Secretary of State's argument has "no merit".

33. The core of the analysis on this point is at [51]. The tribunal stated:

> "51. The second main element of the Secretary of State's case is that the modification of behaviour under scrutiny will not involve the forfeiture of a fundamental human right. We have analysed in some detail the passages in HJ (Iran) invoked in support of this contention. We would add the following. As our assessment above indicates, the espousal or expression of political opinion, or the imputation thereof, engages freedom of expression, which is a fundamental right. Insofar as Ms Rhee's submission involves the suggestion that there are different degrees in the exercise of the right to espouse and express political opinions, her argument invites a quantitative assessment which, in our opinion, is not merely impracticable but is not harmonious with the nature of the right in question. We consider that interference with this particular right is not to be measured by reference to the extent to which the exercise of one right is adversely affected by the conduct, threatened or actual, of the persecutor. This approach, in our view, neglects the intrinsic nature of the right, which permits and protects the unconstrained expression of a political opinion at any time, at the choice of the individual, as frequently or infrequently as may be desired, subject only to limitations which do not arise in this appeal. This is the quintessence of the underlying right, namely freedom of expression. Moreover, to accede to this argument would be tantamount to reinstating the discredited concept of marginal versus core. Finally, it suffers from the further infirmity that its operation would be utterly impracticable in cases of imputed political opinion.
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> …
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> 53. We consider that the Secretary of State's "outright forfeiture" argument must be rejected as the further basis of its impermissible shift of focus from the persecutors to the victim."

34. The tribunal's "omnibus conclusion" (at [54]) was that the enforced return of MSM to Mogadishu will expose MSM to a real risk of persecution "for the Refugee Convention reason of his political opinion, imputed, and/or a breach of his rights under Article 2 and 3 ECHR" and, as stated at [1] above, that he is "not to be denied refugee status on the ground that it would be open to him to seek to engage in employment other than in the journalistic or media sector".

35. **VI. The grounds of appeal**

36. Four inter-related grounds of appeal are relied on by the Secretary of State. Ground 1 is that the Upper Tribunal impermissibly elided actual and imputed political opinion. Ground 2 is that it erred in failing to make a finding as to risk based on actual political opinion. The third and fourth grounds are that, because of the errors giving rise to grounds 1 and 2, the tribunal erroneously relied on *HJ (Iran)* and *RT (Zimbabwe)* in concluding that it is irrelevant to inquire whether the posited act of persecution would require the applicant to modify his or her behaviour. It is submitted that those cases

only apply to an immutable characteristic, for instance sexual orientation in *HJ (Iran)*'s case, or actual political opinion or the right to maintain political neutrality as opposed to imputed political opinion, as in *RT (Zimbabwe)*'s case.

37. **VII. Analysis**

38. There is force in Ms Rhee's criticism that the way the Upper Tribunal dealt with political opinions as a whole, whether actual or imputed, appeared at times to elide the two categories. For instance, in [21(g)] the language of "espousal and/or expression" of political opinions is perfectly understandable in relation to actual political opinions. However, it is much less straightforward to see how "imputed" political opinions can be accommodated within it. At [50], it is stated that "this is a case of risk arising out of imputed political opinion" and (at [54(i)]) that the enforced return of MSM to Somalia would expose him to a real risk of persecution by reason "of his political opinion, imputed, … ", with no reference or explanation as to how the finding at [18], set out at [21] above and which I deal with at [34] below, fits into it. Similarly, at [51], it is stated that "the espousal or expression of political opinion, or the imputation thereof, engages freedom of expression, which is a fundamental right". As Tomlinson LJ observed during the hearing, it is difficult to understand how "imputation" of a political opinion engages freedom of expression. Finally, at [30], it is stated that MSM's chosen profession of journalism "is indissociable from his actual or imputed political opinion", and (at [33]) the tribunal refers to actual and imputed political opinion as "twin concepts".

39. Although Ms Rhee focused on grounds 1, 3 and 4, it is both logical and convenient to start with ground 2, that the tribunal failed to make a finding as to risk based on actual political opinion. I reject this submission. The Secretary of State did not challenge the Upper Tribunal's finding in [18] which I set out at [21] above. Despite this, she did not abandon this ground. She submitted that the appeal should succeed on this ground because the Upper Tribunal did not say that MSM's political convictions were a determinative factor in his choice of profession. She also criticised it for not approaching the position by reference to a fact-sensitive enquiry but relying on the irrelevance of whether he could avoid persecution by changing his profession. Using the analogy of internal relocation and the decision in *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426, Ms Rhee submitted that because the right to engage in the profession of one's choice was not one of the fundamental rights protected by the Refugee Convention and the cause of persecution was only imputed political opinion, the appeal should be allowed.

40. In my judgment, Ms Rhee's submission inappropriately minimised the significance of the Upper Tribunal's finding at [18], in particular that MSM's career in journalism "is at least partly driven by political conviction". That is not the language of imputed political opinion. Quite apart from this, her submission that the political convictions must be a determinative factor in the choice of profession is inconsistent with two statements made by Lord Dyson in *RT (Zimbabwe)*. The context of that case was the right not to hold a political belief. Lord Dyson stated at [42] that "a focus on how important the right not to hold a political or religious belief is to the applicant is wrong in principle". At [51], he stated that "nothing that was said … by us in the *HJ (Iran)* case supports the idea that it is relevant to determine how important the right is to the individual".

41. The Upper Tribunal found (at [18] and [28]) that MSM would be persecuted for the Refugee Convention reason of political conviction and that his journalism is at least partly driven by political conviction related to conditions prevailing in Somalia. I accept Mr Jacobs' submission that the tribunal clearly made a finding as to risk based on MSM's actual political opinion. It also found that Al-Shabaab, the non-state actors of persecution in this case, would not distinguish between actual and imputed political opinion.

42. In my judgment, this suffices to dispose of this appeal. Ms Rhee, however, pressed us to consider the tribunal's treatment of imputed political opinion which, as I have stated, she considered was the central issue in this case. Her submissions and those of Mr Jacobs and Mr Goodwin-Gill, and Ms Demetriou on behalf of the intervener, show that this is not a straightforward question. I have explained why I consider that the court should tread warily in these circumstances and my reasons for exceptionally making what can only be *obiter dicta* in explaining why I consider that the arguments submitted on behalf of the respondent and the UNHCR are powerful.

43. My starting point is the language of the Geneva Convention and the Qualification Directive. That expressly protects those persecuted because of the characteristics listed in Articles 2(c) and 10(1) of the Directive whether or not they actually have the characteristic, provided (see Article 10(2)) it is "attributed to the applicant [for refugee status] by the actor of persecution". In the case of political opinion, Article 10(1)(e) expressly protects those persecuted because they have a political opinion, whether or not they have acted upon that opinion.

44. In short the text of the Directive and Convention contemplates two questions. The first is whether the applicant for refugee status faces a well-founded fear of persecution. The second is the reason for that persecution. I agree with Ms Demetriou and Mr Jacobs that, if the answer to the first question is "yes" and the reason for persecution is within Articles 2(c) and 10, the language of the Directive leaves little room for examination of the steps the applicant might take to avoid persecution. There is a single test for refugee status and, save for Article 8 of the Directive in respect of internal protection and internal relocation, there is no separate test for those who do not in fact have the protected characteristic but to whom that characteristic is imputed by the actor of persecution.

45. The Geneva Convention did not expressly address the situation where a person has a well-founded fear of persecution at place A within the country of his nationality where he lived, but not at place B, but in *Januzi v Secretary of State for the Home Department* [2006] UKHL 5 at [7], Lord Bingham stated the situation might fairly be said to be covered by the causative condition in the Convention. The Secretary of State's argument is that a similar approach can be taken in respect of other changes of conduct by an applicant for refugee status. Had it been necessary to decide this question, I would have regarded the absence of any provision in the Convention or the Directive dealing with the possibility of avoiding action, together with the express exemption in Article 8(1) from the basic approach in cases where there is no real risk of persecution in part of the applicant's country of origin, as pointing against the implication for which Ms Rhee contends.

46. There is, moreover, some support for regarding the language of the Directive (and of the Convention) as requiring an imputed political opinion to be treated as the political

opinion of the applicant. Thus, in *Gomez (Non State Actors: Acero-Garces Disapproved) (Colombia)* [2000] UKIAT 00007, the Immigration Appeal Tribunal stated (at [30]) that the "political opinion" ground needs to be construed broadly and (at [36]) referred to the decision of the US Federal District Court in *Sanga v INS* 103 F 3d 1482 at 1487 (9th Cir. 1997). The 9th Circuit stated that, while in establishing an imputed political opinion the focus of inquiry turns away from the views of the victims to the views of the persecutor, what is relevant are the views the persecutor attributes to the victims. Significantly, it also stated that "if the persecutor attributed a political opinion to the victim, and acted upon the attribution, this imputed becomes the applicant's political opinion as required under this Act".

47. This definitional approach can also be seen, albeit in the context of an actual rather than an imputed belief, in the decision of the Grand Chamber of the CJEU in Joined Cases C/71/11 and C/99/11 *Germany v Y and another.* The court stated (at [78]) that none of the provisions in the Directive "states that, in assessing the extent of the risk of actual risks 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". Although this statement was made in the context of a religious belief in fact held by the applicant, the language of the judgment concerns the structure of the Directive.

48. There is similar recognition in decisions of this court that nothing in the Directive authorises a refusal of refugee status on the basis that the applicant could but would not in fact take reasonable steps to avoid persecution. *Ahmed v Secretary of State for the Home Department* [2000] INLR 1 concerned actual religious belief, but I consider the judgment to be of assistance. Simon Brown LJ (at 7 – 9) stated that the earlier decision in *Danian v Secretary of State for the Home Department* [1999] INLR decided that, in all asylum cases, the ultimate single question is whether there is a serious risk that on return the applicant would be persecuted for a Convention reason. Simon Brown LJ stated, if there is, then the applicant is entitled to asylum, and:

> "It matters not whether the risk arises from his own conduct in this country, however unreasonable. It does not even matter whether he has cynically sought to enhance his prospects of asylum by creating the very risk on which he then relies – cases sometimes characterised as involving bad faith."

49. Simon Brown LJ also stated that if, when returned, the asylum seeker would in fact act in the way he says he would and thereby suffer persecution, "however unreasonable he might be thought for refusing to accept the necessary restraint on his liberties, in my judgment he would be entitled to asylum". Simon Brown LJ's approach was endorsed by Lord Hope in *HJ (Iran)*'s case at [18], where his Lordship stated that "the fact [an applicant for asylum] could take action to avoid persecution does not disentitle him from asylum if in fact he will not act in such a way as to avoid it. That is so even if to fail or to refuse to avoid it would be unreasonable". See also Lord Dyson at [109].

50. The arguments advanced in *Ahmed*'s case on behalf of the Secretary of State are similar to those advanced by Ms Rhee in this case. The language of Simon Brown LJ's judgment in *Ahmed*'s case shows that he had sympathy for those arguments. He

nevertheless concluded that, even assuming it would be unreasonable for an applicant returned to his home country to carry on where he left off, that did not defeat his claim to asylum. He considered that, although this is the position if a person establishes a well-founded fear of persecution, the fact that the conduct that it is claimed would be engaged in is unreasonable or in bad faith is "highly relevant when it comes to evaluating the claim on its merits" and in "determining whether in truth the applicant is at risk of persecution". This, he stated, is because "an applicant who has behaved in this way may not be readily believed as to his future fears".

51. As to the submission that the requirement to take reasonable steps to avoid persecution is part of the test for determining whether a person will face persecution within the meaning of Article 9, that was expressly rejected by Lord Dyson in *HJ (Iran)* at [120]. His Lordship stated that "the phrase 'being persecuted' does not refer to what the asylum seeker does in order to avoid such persecution".

52. I do not consider that [113] – [115] of Lord Dyson's judgment in *HJ (Iran)*'s case can bear the weight that Ms Rhee placed on it. She submitted that Lord Dyson's acceptance that there may be scope for the application of the distinction between "core" and "marginal" interferences with rights in political opinion cases supports the proposition that in cases of imputed political opinion it is appropriate to look at the reasonableness of avoiding action that is possible, and to consider whether that avoiding action can be taken without engaging a fundamental right protected by the Refugee Convention.

53. There are three difficulties with this submission. First, Lord Dyson only stated that there "*may* be scope" (emphasis added) for the application of the distinction and only regarded it as an alternative way of looking at the position. Secondly, his approach was not adopted by the other members of the Supreme Court. Thirdly, in *RT (Zimbabwe)*'s case, Lord Dyson stated (at [50]) that the parts of his judgment on which Ms Rhee relied said no more than "a determination of whether the applicant's proposed or intended action lay at the core of the right or at its margins was useful in deciding whether or not the prohibition of it amounted to persecution". As Ms Demetriou observed, that is essentially a restatement of Article 9(1)(a) of the Directive, which is concerned with whether the persecution is sufficiently serious to be a severe violation of basic human rights. In this case, the Upper Tribunal's finding is that MSM faces the risk of death or violence if he returns to Somalia as a journalist, and that clearly falls within the meaning of persecution under Article 9 of the Directive.

54. I have acknowledged that the cases I have referred to so far concerned actual rather than imputed protected characteristics. The decision of the Federal Court of Australia in *Minister for Immigration and Border Protection v Szsca* [2013] FCAFC 115 does not. It is, in my judgment, on all fours with the present case. The case concerned a citizen of Afghanistan who applied for asylum in Australia on the ground that the Taliban had imputed pro-government or pro-western opinions to him because he had worked as a lorry driver transporting construction materials in Afghanistan. He had previously worked as a jeweller. In the tribunal, it was successfully argued that because the imputation of political opinion arose solely because of the Taliban's perception of the applicant's truck driving activities, he could avoid persecution if he were to change his occupation and work as a jeweller in Kabul. An appeal by the applicant to the Federal Court of Australia was allowed.

55. The majority of the Federal Court decided (see [62] – [66]) that the tribunal had erred in embarking on a chain of reasoning that the applicant for refugee status could avoid persecution if he were to change his occupation. It stated (at [63]) that the tribunal had erred in looking at what the individual "could do rather than what he would do if returned" to Afghanistan. The High Court of Australia dismissed the Minister's appeal, but did so on the ground that the tribunal had failed to address whether the applicant could reasonably be expected to remain and work as a truck driver in Kabul. That is an internal relocation analysis. Ms Rhee invited us to follow the dissenting judgment of Flick J in the Federal Court. In terms of precedent, this decision provides no assistance to her case and directly supports those of the respondent and the position taken by the UNHCR. The argument accepted by the majority of the Federal Court is also essentially the argument which, for the reasons I have given, I would have been inclined to accept in the present case had it been necessary to decide the wider question.

56. For these reasons, I would dismiss this appeal.

57. **Lord Justice Tomlinson:**

58. I agree with Beatson LJ that the Upper Tribunal's finding of fact at [18] is dispositive of this appeal. In the light of the Upper Tribunal's unsatisfactory elision of the concepts of actual and imputed opinion, as chronicled by Beatson LJ at [31] above, that may be thought a fragile finding. In the light of the expressly preserved findings of fact contained in the determination of the FtT, and the additional finding of the FtT at [16] that it had not been a part of MSM's evidence that his decision to train as a journalist was motivated by a conviction he held, it may also be thought a surprising finding. It is however unchallenged, and even if it were challenged the circumstances in which this court would think it appropriate to interfere are of course very limited. The Upper Tribunal heard evidence from MSM concerning his career intentions on return to Somalia, should that be ordered, and having had the advantage which we have not enjoyed of assessing his demeanour it accepted that pursuit of his chosen career would be at least in part driven by political conviction. On that short ground the appeal must fail for the reasons given by Beatson LJ at [32] – [34] above.

59. I also agree with what both Beatson LJ and Moore-Bick LJ say in relation to the broader question of the extent to which refugee status may be available where the risk of persecution attaching to an imputed characteristic may be dispelled by the taking of reasonable steps falling short of renouncing the protection which the Directive is intended to afford. A principle which is apparently dependent upon the exercise of choice which is not seriously inhibited may not command that universal approbation which ought to be the hallmark of the principles which determine the availability of refugee status.

60. **Lord Justice Moore-Bick:**

61. I agree that the appeal should be dismissed for the reasons given by Beatson LJ. I also agree that we should refrain from expressing a concluded view on the broader question to which he refers, given that whatever we say will not form part of the reasons for our decision. It may seem strange at first sight that a person who would be at risk of persecution in his own country only by reason of an imputed characteristic whose existence he could dispel by taking reasonable steps short of compromising his

fundamental rights should be entitled to claim asylum. However, I agree with Beatson LJ that both the language of the Qualification Directive and the decisions to which he refers point to that conclusion.

62.