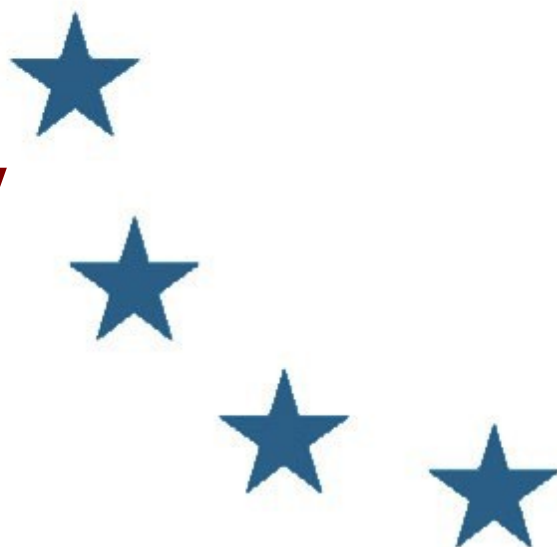


European asylum policy And sexual orientation: Interpretive and applicative issues

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EUROPEAN ASYLUM POLICY AND SEXUAL ORIENTATION: INTERPRETIVE AND APPLICATIVE ISSUES

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PREAMBLE

The European asylum policy is currently considered a very controversial topic.

In this context, a vexed issue concerns specifically the minimum standards relating to the conditions to be met by third country nationals or stateless persons for granting refugee status or subsidiary protection status within the European Union.

According to European legislation, any person claiming to have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, who 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 may claim refugee status.

In this context, protection may be granted to homosexual applicants for asylum constituting a particular social group who may be persecuted on account of their sexual orientation.

The Court of Justice has recently ruled on third country nationals seeking refugee status.

The applicants claimed to have a well-founded fear of being persecuted in their countries of origin by reason of their sexual orientation.

In this frame, the Court of Justice ruled that homosexual people must be granted refugee status in the Netherlands, clearing the way for other gay and lesbian people to seek asylum in nations within the European Union.

European Court of Justice also declared that sexual orientation is a fundamental characteristic for which many people in nations around the world are persecuted, and can now seek asylum in the European Union.

In its judgment the Court of Justice analysed the circumstances to be verified for the qualification and status as refugees of homosexual applicants relying on the existence in their countries of origin of legislation criminalising homosexual acts.

The European legislation on this point seems to be not completely clear and opened to substantial interpretative variances.

In this context, the Court clarified that not all violations of the fundamental rights of a homosexual applicant for asylum can be considered sufficiently serious to meet the conditions for the European refugee protection and, therefore, that with reference to each single case it is necessary to undertake an examination of the relevant facts concerning the specific country of origin, including its law and

regulation and the manner in which they are actually applied.

This verification should be carry out on impartial and justified grounds, based on objectively criteria which should be established in details by the law, otherwise it may entail serious detriments and discriminatory consequences in practise.

1. **The judgment of the Court of Justice dated 7 November 2013 in joined cases C-199/12, C-200/12, C-201/12**

1.1 **The general topics**

The Court of Justice had been recently asked by the Netherlands Raad van State (Council of State, Netherlands), which was hearing the relevant cases at final instance, about the assessment of applications for refugee status under the provisions of Chapter III of Council Directive 2004/83/EC (the “**Directive**”)¹.

In detail, the national Court asked the Court of Justice whether third country nationals who are homosexuals may be regarded as forming a “particular social group” within the meaning of the Directive.

The national Court also wanted to know how the national authorities should assess what constitutes an act of persecution against homosexual activities in that context, and whether the criminalisation of those activities in the applicant’s country of origin, which may lead to imprisonment, amounts to persecution.

In the relevant judgment of the Court of Justice (Fourth Chamber) dated 7 November 2013, in joined cases C-199/12, C-200/12, C-201/12, among X, Y and Z, on one side, and *Minister voor Immigratie en Asiel*, on the other side, and *Hoog Commissariaat van de Verenigde Naties voor de Vluchtelingen*, as intervening party (the “**Judgment**”), the Court of Justice ruled, first of all, that it is common ground that a person’s sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it.

In this frame, the Court recognised that the existence of criminal laws specifically targeting homosexuals supported a finding that those persons form a separate group which is perceived by the surrounding society as being different.

However, in order for a violation of fundamental rights to constitute persecution within the meaning of the Convention relating to the Status of Refugees

¹ Directive of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

(the “**Geneva Convention**”),² it must be sufficiently serious, and not all violations of the fundamental rights of a homosexual applicant for asylum will necessarily reach this level of seriousness.

In that context, the mere existence of legislation criminalising homosexual acts could be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of the European Law and a term of imprisonment which accompanies a legislative provision which punishes homosexual acts may constitute an act of persecution per se, provided that it is actually applied.

Where an applicant for asylum relies on the existence in his country of origin of legislation criminalising homosexual acts, it is for the national authorities to undertake an examination of all the relevant facts concerning that country of origin, including its laws and regulations and the manner in which they are applied.

To this aim, the national authorities must determine whether, in the applicant’s country of origin, the term of imprisonment provided for by such legislation is applied in practice.

Furthermore, the Court ruled that it is not reasonable to expect that in order to avoid persecution an asylum seeker should conceal his homosexuality in his country of origin or exercise restraint in expressing it.

The Court considered that requiring members of a social group sharing the same sexual orientation to conceal it is incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot be required to renounce it, so that an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution.

1.2 The relevant facts and procedures relating to the Judgment

1.2.1 The national proceedings

² Signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)), which entered into force on 22 April 1954. It was supplemented and amended by the Protocol Relating to the Status of Refugees, signed in New York on 31 January 1967, which entered into force on 4 October 1967. The two instruments are together referred to as ‘the Geneva Convention’.

The applicants in the main proceedings are nationals of Sierra Leone, Uganda and Senegal.

Homosexual acts are criminal offences in Sierra Leone under Section 61 of the Offences against the Person Act of 1861, and are subject to a minimum term of imprisonment of 10 years up to a maximum of life.

In Uganda under Section 145 of the Penal Code Act 1950 a person found guilty of an offence described as “carnal knowledge against the order of nature” is subject to a term of imprisonment. The maximum penalty is life.

Also the Senegalese authorities criminalise homosexual acts. Under Article 319(3) of the Code Pénal (Penal Code) a person convicted of committing certain homosexual acts is to be sentenced to a term of imprisonment of between one and five years and a fine of between XOF

In all three cases the national authorities refused the initial applications for a residence permit (refugee status) under the national law.

Each applicant then lodged an appeal against those decisions.

The national Court (Raad van State) asked the Court for a preliminary ruling.

In all three cases the homosexual orientation of the applicant was not disputed.

1.2.2 The main questions referred to the Court of Justice

The Raad van State referred the following questions to the Court of Justice:

- (i) do foreign nationals with a homosexual orientation form a particular social group as referred to in Article 10(1)(d) of [the Directive]?
- (ii) If the answer to the first question is yes: which homosexual activities fall within the scope of the Directive and, in the case of acts of persecution in respect of those activities and if the other requirements are met, can that lead to the granting of refugee status? That question encompasses the following sub-questions:

- (a) Can foreign nationals with a homosexual orientation be expected to conceal their orientation from everyone in their country of origin in order to avoid persecution?
 - (b) If the answer to question (ii)(a) is no, can foreign nationals with a homosexual orientation be expected to exercise restraint, and if so, to what extent, when giving expression to that orientation in their country of origin, in order to avoid persecution? Moreover, can greater restraint be expected of homosexuals than of heterosexuals?
 - (c) If, in that regard, a distinction can be made between forms of expression which relate to the core area of the orientation and forms of expression which do not, what should be understood to constitute the core area of a homosexual orientation and in what way can it be determined?
- (iii) Do the criminalisation of homosexual activities and the threat of imprisonment in relation thereto, as set out in [the Offences against the Person Act 1861 of Sierra Leone, the Penal Code Act of Uganda and the Code Pénale of Senegal] constitute an act of persecution within the meaning of Article 9(1)(a), read in conjunction with Article 9(2)(c) of the Directive? If not, under what circumstances would that be the case?’

1.3 The legal framework

1.3.1 The Geneva Convention

The first subparagraph of Article 1(A)(2) of the Geneva Convention provides that the term “refugee” is to 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it»*.

1.3.2 European Union law

1.3.2.1 The Charter of Fundamental Rights

Article 7 of the Charter of Fundamental Rights of the European Union (the “**Charter**”),³ provides that «[e]veryone has the right to respect for his or her private and family life, home and communications».

Article 21 of the Charter prohibits discrimination on grounds of, inter alia, sexual orientation. Article 52(3) of the Charter states that those rights should be interpreted consistently with corresponding rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms (the “**ECHR**”)⁴.

1.3.2.2 The Directive

The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.

The Directive is one of several measures aimed at achieving a Common European Asylum System.

The common policy on asylum, including a Common European Asylum System, *«is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community»*.⁵

The Geneva Convention provides the cornerstone of the international legal regime for the protection of refugees.

The main objective of the Directive is, on the one hand, to ensure that Member

³ OJ 2010 C 83, p. 389.

⁴ Corresponding rights are set out in Articles 8 and 14 ECHR respectively. Article 8 protects the right to respect for a person's private and family life. Article 14 guarantees that the rights and freedoms set out in the ECHR are to be secured without discrimination on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

⁵ Recital 1 of the Directive.

States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.

Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.

Recitals 7 of the Directive provides that *«The approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movements of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks»*.

According to Article 2(c) of the Directive the term “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 a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it.

The Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, seeking to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.

Member States may introduce more favourable rules for determining who qualifies as a refugee provided such rules are compatible with the Directive.

Article 4 sets out the rules governing the assessment of applications for international protection.

Article 4(3) of the Directive states that the assessment of an application for international protection is to be carried out on an individual basis. An illustrative list of ‘actors of persecution’ including the State and non-State actors is contained in

Article 6.

According to Article 9 of the Directive, *«an act of persecution within the meaning of article 1 of the Geneva Convention must:*

- (a) be sufficiently serious by their 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 ECHR; or*
- (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)».*

As provided under Article 9(2) of the Directive, *«acts of persecution as qualified in paragraph 1, can, inter alia, take the form of [...] (c) prosecution or punishment, which is disproportionate or discriminatory».*

According to Art. 9(3) of the Directive, in accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.

The meaning of “reason of persecution” is clarified under Art. 11 of the Directive, according to which *«a group shall be considered to form a particular social group where in particular, [•] members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society».*

1.3.3 National law

The Vreemdelingenwet 2000 (Law on Foreign Nationals) (the “**Vw 2000**”) empowers the relevant Minister (the “**Minister**”)⁶ to accept, to refuse or not to

⁶ At the time the applications were made the relevant Minister was the ‘Minister voor Immigratie en

consider an application for a residence permit for a fixed period (refugee status).

A residence permit for a fixed period may be granted to a foreign national who is a refugee under the terms of the Geneva Convention.

The Vreemdelingen­circulaire 2000 (Guidelines on the Implementation of the Law on Foreign Nationals (the “**Guidelines**”)) contains the policy rules laid down by the Minister to implement the Vw 2000.

The Guidelines state that it is established policy and settled case-law that persecution on account of membership of a social group as referred to in Article 1(A) of the Geneva Convention is also understood to mean persecution on account of sexual orientation.⁷

Claims for refugee status based on such a ground are assessed with particular regard to the position of an applicant in his country of origin. Where being homosexual or expressing sexual orientation is subject to criminal sanctions in an applicant’s country of origin the penalty applicable must be of a certain level of severity.

A single fine would generally be insufficient to lead to the conclusion that refugee status should automatically be granted. It does not follow from the fact that homosexuality or homosexual acts are criminalised in an applicant’s country of origin that refugee status should automatically be granted. The applicant must make a plausible case that he personally has a well-founded fear of persecution.

Homosexual applicants are not expected to conceal their sexual orientation on their return to their country of origin.⁸

1.4 The Judgment of the Court of Justice

1.4.1 The first issue: being members of a particular social group

In each of the cases in the main proceedings, the referring court asked whether

Asiel’. His title has since changed to ‘Minister voor Immigratie, Integratie en Asiel’.

⁷ See the Opinion of Advocate General Sharpston delivered on 11 July 2013, pag. 4.

⁸ See the Opinion of Advocate General Sharpston delivered on 11 July 2013, pag. 4.

Article 10(1)(d) of the Directive must be interpreted as meaning that, for the assessment of the grounds of persecution which are relied on in support of an application for refugee status, homosexuals may be regarded as being members of a particular social group.⁹

The third-country national concerned must therefore, on account of circumstances existing in his country of origin and the conduct of actors of persecution, have a well-founded fear that he personally will be subject to persecution for at least one of the five reasons listed in the Directive and the Geneva Convention, one such reason being “membership of a particular social group”.¹⁰

A group is regarded as a “particular social group” where, *inter alia*, two conditions are met.

First, members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it.

Second, that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.¹¹

The Court pointed out that *«As far as concerns the first of those conditions, it is common ground that a person’s sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it. That interpretation is supported by the second subparagraph of Article 10(1)(d) of the Directive, from which it appears that, according to the conditions prevailing in the country of origin, a specific social group may be a group whose members have sexual orientation as the shared characteristic»*.¹²

With reference to the second condition, it assumes that, in the country of

⁹ As mentioned, the term “refugee” refers, in particular, to a third-country national who is outside the country of his nationality owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group and is unable or, owing to such fear, unwilling to avail himself of the protection of that country.

¹⁰ See Paragraph 43 of the Judgment.

¹¹ Article 10(1) of the Directive.

¹² See Paragraph 46 of the Judgment.

origin concerned, the group whose members share the same sexual orientation has a distinct identity because it is perceived by the surrounding society as being different.

In this frame, the Court ruled that *«it should be acknowledged that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports a finding that those persons form a separate group which is perceived by the surrounding society as being different.*

*Therefore, the answer to the first question referred in each of the cases in the main proceedings is that Article 10(1)(d) of the Directive must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group».*¹³

1.4.2 The second issue: the expression of the sexual orientation

The referring court asked essentially whether, if a homosexual applicant were to be regarded as being a member of a particular social group for the purposes of Article 10(1)(d) of the Directive, a distinction must be made between homosexual acts which fall within the scope of the directive and those which do not and therefore cannot lead to the grant of refugee status.

The Court pointed out that it is important to state that requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it.

Therefore, an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution.

Furthermore, for the purpose of determining, specifically, which acts may be regarded as constituting persecution within the meaning of Article 9(1) of the Directive, it is unnecessary to distinguish acts that interfere with the core areas of the expression of sexual orientation, even assuming it were possible to identify them,

¹³ See Paragraph 48 and Paragraph 49 of the Judgment.

from acts which do not affect those purported core areas .

1.4.3 The third issue: act of persecution

The referring Court asked whether the mere fact that homosexual acts are criminalised and accompanying that criminalisation with a term of imprisonment is an act of persecution. If the answer is negative, that Court wished to know in what circumstances an act is to be classified as an act of persecution.

In that regard, Article 9(1)(a) of the Directive, to which the national court refers, states that the relevant acts must be ‘sufficiently serious’ by their nature or repetition as to constitute a “severe violation of basic human rights”.

In those circumstances, the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive.

The court therefore ruled that the criminalisation of homosexual acts alone does not, in itself, constitute persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.

1.4.4 Summary of the Judgment

In the Judgment the Court ruled that *«the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group»*.¹⁴

Furthermore, *«the criminalisation of homosexual acts per se does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or*

¹⁴ See Article 10(1)(d) of Directive.

discriminatory and thus constitutes an act of persecution».

Moreover, the Court pointed out that *«Article 10(1)(d) of Directive 2004/83, read together with Article 2(c) thereof, must be interpreted as meaning that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope. When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation».*

2. Substantive remarks

2.1 The general context

An applicant's sexual orientation *«can be relevant to a refugee claim where he or she fears persecutory harm on account of his or her actual or perceived sexual orientation, which does not, or is seen not to, conform to prevailing political, cultural or social norms.¹⁵ The refugee definition applies to all persons without distinction as to sex, age, sexual orientation, gender identity, marital or family status, or any other status or characteristics. Some States have chosen to include specific references to sexual orientation in the refugee definition in domestic legislation.¹⁶»¹⁷*

The five characteristics of human identity that form the basis of the refugee definition are race, religion, nationality, membership of a particular social group and political opinion.

Claims relating to sexual orientation and gender identity are primarily recognized under the Geneva Convention ground of membership of a particular social group, but may also be linked to other grounds, notably political opinion and religion,

¹⁵ See United Nations High Commissioner For Refugees („**UNHCR**”), *Guidelines on Gender-Related Persecution*, paras. 6–7. See also UNHCR, *Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation*, 3 September 2004, para. 3, available at <http://www.unhcr.org/refworld/docid/4551c0d04.html>.

¹⁶ See, for instance, Sweden, *Aliens Act (SFS 2005:716)*, Chapter 4, Section 1, available at <http://www.unhcr.org/refworld/docid/3ae6b50a1c.html>. See also Migrationsverket (Swedish Migration Board), *Guidelines for Investigation and Evaluation of Asylum Cases in which Persecution Based on Given Sexual Orientation is Cited as a Ground*, 28 January 2002, available at <http://www.unhcr.org/refworld/docid/3f8c1af44.html>.

¹⁷ UNHCR, Protection Policy and Legal Advice Section Division of International Protection Services Geneva, *Unhcr Guidance Note On Refugee Claims Relating To Sexual Orientation And Gender Identity*, Geneva, 2008, 6 (the „**Guidance Note**”)

depending on the circumstances.

Although freedom of sexual orientation is not explicitly recognized as an international human right, it is now well established that LGBT persons are entitled to all human rights on an equal basis with others.

The Preamble to the Geneva Convention points out the principle that “human beings shall enjoy fundamental rights and freedoms without discrimination”.

The principle of non-discrimination is also enshrined in Articles 2(1) and 26 of the *International Covenant on Civil and Political Rights* (“ICCPR”), and in Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”).¹⁸

As mentioned, the Geneva Convention states that 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 to, or owing to such fear, is unwilling to avail himself of the protection of that country»*.

The five grounds on which refugee recognition can be based, in the frame of the Geneva Convention, do not include a reference to sexual orientation.

However, *«persecution on account of sexual orientation is considered a relatively unknown, but nonetheless frequent, reason for which people flee their home countries. Over 80 countries currently have sodomy laws or other legal provisions criminalizing homosexuality; in 2007, nine countries maintained the death penalty as*

¹⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, available at <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>, and UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, available at <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>. The non-discrimination provisions on account of “sex” or “other status” in the ICCPR and ICESCR, as well as in Article 2 of the *Convention on the Rights of the Child* (available at <http://www.unhcr.org/refworld/docid/3ae6b38f0.html>), are to be taken as including sexual orientation, as affirmed by the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child. The same interpretation has been adopted by the European Court of Human Rights (ECtHR) in relation to Article 14 (Prohibition of discrimination) of the ECHR (available at <http://www.unhcr.org/refworld/docid/3ae6b3b04.html>). See also, *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 30 June 1993 (Supreme Court of Canada), available at <http://www.unhcr.org/refworld/docid/3ae6b673c.html>, drawing on the Preamble to the 1951 Convention; *Islam (A.P.) v. Secretary of State for the Home Department; R. v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)* [1999] UKHL 20, 25 March 1999 (United Kingdom House of Lords), available at <http://www.unhcr.org/refworld/docid/3dec8abe4.html>

*the maximum penalty for homosexual acts. Persecution may not only be state-sponsored but also socially accepted such that many of the afflicted see no choice other than fleeing their home countries».*¹⁹

The “Guidance Notes on Refugee Claims Relating to Sexual Orientation and Gender Identity”²⁰ recognise that lesbian, gay, bisexual and transgender (LGBT) refugees have encountered a specific set of problems in the application of the refugee definition to their claims.

It has been pointed out that *«LGBT individuals may be subjected by State authorities, their families or communities to physical, sexual and verbal abuse and discrimination, because of who they are or who they are perceived to be. This might be because of prevailing cultural and social norms, which result in intolerance and prejudice, or because of national laws, which reflect these attitudes. Where such acts of abuse and discrimination go unpunished and/or where LGBT orientation is criminalized,²¹ such individuals may, if they seek asylum on these grounds, fall within the refugee definition»* of the Geneva Convention.²²

Refugee claims relating to sexual orientation started to emerge at the beginning of the 1990s.

Although especially in early cases such claims were based on political opinion or religion, sexual orientation was accepted as the basis for a particular social group claim in most major refugee-receiving nations by the mid-1990s.²³

¹⁹ Refugee Studies Centre, *Sexual orientation in Refugee Status Determination, Working paper series no. 73*, Oxford, 2011, 8.

²⁰ Guidance Notes, page 4. The Guidance Note should be read in conjunction with UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/01, 7 May 2002, available at <http://www.unhcr.org/refworld/docid/3d36f1c64.html>.

²¹ For an overview of jurisprudence and doctrine relating to the rights of LGBT persons, including human rights violations on grounds of sexual orientation, see International Commission of Jurists (ICJ), *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the United Nations Human Rights System*, 3rd updated edition, 2007, available at http://www.icj.org/IMG/UN_References.pdf; ICJ, *Sexual Orientation and Gender Identity in Human Rights Law: Jurisprudential, Legislative and Doctrinal References from the Council of Europe and the European Union*, October 2007, available at http://www.icj.org/IMG/European_Compilation-web.pdf; and ICJ, *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the Inter-American System*, July 2007, available at http://www.icj.org/IMG/Inter-American_References.pdf, as cited by the Guidance Note, page 3.

²² Guidance Note, page 4.

²³ In spite of this general acceptance, *«the question of whether gay people constitute a particular social group under the 1951 Convention still gives rise to discussion today (MK (Lesbians) Albania v.*

2.2 Fear of persecution and avoiding the risk of persecution

A person cannot be expected or required by the State to change or conceal his or her identity in order to avoid persecution.

As affirmed by numerous jurisdictions, persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action.

Just as a claim based on political opinion or nationality would not be dismissed on grounds that the applicant could avoid the anticipated harm by changing or concealing his or her beliefs or identity, applications based on sexual orientation and gender identity should not be rejected merely on such grounds.²⁴

The question to be considered is whether the applicant has a well-founded fear of being persecuted, rather than whether he or she could live in the country of origin without attracting adverse consequences.

It is interesting, on this issue, to take into consideration the evolution of the UK Courts on homosexual asylum seeker.

The UK asylum system is considered quite strict.

Until 2010, in UK, asylum seekers who claimed persecution on sexual orientation or gender identity grounds were forced to pass tests with (sometimes) arbitrary results.

Asylum seekers who claimed persecution on the grounds of their sexual orientation had to prove that concealing their orientation in their country of origin, if it meant evading persecution, was “unreasonable” in their case.

Only in cases where this concealment was unreasonable would the state authorities grant asylum.

Secretary of State for the Home Department, CG [2009] UKAIT 00036, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 9 September 2009», as in the recent case of *MK v Secretary of State for the Home Department*. In this decision, the decision-makers avoided a finding on the social group, arguing it was not constructive as they had found a lack of a well-founded fear of serious harm on the part of lesbians in Albania», 2011, 9.

²⁴ Guidance Note, page 12.

The approach of the UK Home Office and the courts – which has relied on gay and lesbian asylum seekers hiding details of their sexuality to avoid persecution in countries where homosexuality is illegal or likely to lead to attacks – has been one of the most controversial aspects of UK asylum policy.

Lawyers have claimed that the approach is guilty of an assessment described by some as the Anne Frank principle.

«It would have been no defence to a claim that Anne Frank faced well-founded fear of persecution in 1942 to say that she was safe in a comfortable attic,» Lord Justice Pill agreed in the court of appeal last year. *«Refugee status cannot be denied by expecting a person to conceal aspects of identity or suppress behaviour the person should be allowed to express»* he added.²⁵

All that changed in 2010, when the UK's Supreme Court struck down that test.

With the mentioned decision²⁶, the UK Court, *«overturned the so-called “Anne Frank” policy – and the current test being implemented by the lower courts – which provided that LGBT persons seeking refugee status in the UK because they feared persecution on the basis of their sexuality should they return to their home country ought to be refused asylum if they could be reasonably expected to tolerate the task of ensuring their safety by concealing their sexuality from the authorities»*.²⁷

The case, decided by the Supreme Court of the United Kingdom concerned two men, from Iran and Cameroon respectively, claiming asylum in the United Kingdom on the grounds of their homosexuality.

The men's claims had previously been turned down on the basis they would not face persecution in their own countries if they would conceal their sexuality.

The appeal therefore focused on the question as to whether the men on their return could reasonably be expected to tolerate this requirement of discretion; the so-

²⁵ The test was therefore dubbed by many the “[Anne Frank principle](#)” – i.e. in which circumstances would it have been reasonable or unreasonable to require that Anne Frank hide in an attic to avoid persecution?

²⁶ *HJ (Iran) v Secretary of State for the Home Department; HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; at para. [78] per Lord Rodger.

²⁷ Burn K., The UK's demand for LGBT refugees to hide in the closet: a critique, available on <https://kiburn.wordpress.com/2013/03/19/lgbtrefugees/>.

called 'discretion' or 'reasonable tolerability' test. Interventions were made by the Equality and Human Rights Commission and the United Nations High Commissioner for Refugees.

The case was heard on 10–12 May 2010 with a judgement delivered on 7 July 2010, in which the UK Court ruled unanimously that the men could not be expected to conceal their sexuality in this way, and that it was wrong to apply the so-called 'discretion test' to such claims.

In the ruling it was therefore determined that asylum seekers should not be obligated to hide their sexual orientation in order to evade persecution. The UK Court also ruled that an asylum application should not be rejected even if the applicant, upon being deported, could be expected to avoid persecution through living “discretely.”

The cases were then both remitted to be reconsidered according to the advice contained in the judgement.

The ruling significantly improved the lots of those seeking asylum on sexual orientation or gender identity grounds, and neutralized the idea that a person who can avoid persecution through concealment should do so, and isn't eligible for asylum.

This interpretation is in line with the position of the Court in the Judgment.

Considering the issue of concealment, the Court reasons by analogy with *Y and Z Joined Cases C-71/11 and C-99/11*,²⁸ where the Court ruled that the possibility open to the Applicants of avoiding the risk of persecution by abstaining from religious practice is not to be taken into account in determining the risk of persecution. The same applies analogously to cases of sexual orientation persecution.

The EU Court stated that ‘requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the

²⁸Court of Justice, 5 September 2012, joined Cases C-71/11 and C-99/11, Bundesrepublik Deutschland, Y (C-71/11), Z (C-99/11), and, as intervening parties, Vertreter des Bundesinteresses beim Bundesverwaltungsgericht and Bundesbeauftragter für Asylangelegenheiten beim Bundesamt für Migration und Flüchtlinge,

recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it.

In addition, the fact that the Applicant could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account.

2.3 Particular social group ground

Claims relating to sexual orientation have most often been considered within the "membership of a particular social group" ground.

Many jurisdictions have recognized that homosexuals (gays and lesbians) may constitute a particular social group.²⁹

While claims relating to bisexuals and transgender people have been less common, such groups may also constitute a particular social group.³⁰

The UK jurisprudence is also interesting with reference to the interpretation of the term "social group" mentioned in the Geneva Convention.

The UK Home Office argued in a 2005 case that absent evidence of persecution, gay people cannot constitute a social group because they are not a "cohesive group".³¹

²⁹ See, for instance, *Matter of Toboso-Alfonso*, 20 I& N. Dec 819, 12 March 1990 (US Board of Immigration Appeals), available at <http://www.unhcr.org/refworld/docid/3ae6b6b84.html>; Toboso was designated "as precedent in all proceedings involving the same issue or issues", Attorney General's Order No. 1895-94, 19 June 1994. *Canada (Attorney General) v. Ward*; *Re GJ, Refugee Appeal No. 1312/93*, 30 August 1995 (New Zealand RSAA), available at <http://www.unhcr.org/refworld/docid/3ae6b6938.html>; *Islam v. Secretary of State for the Home Department*; *R v. Immigration Appeal Tribunal and Another, Ex Parte Shah*, *Singh v. Minister for Immigration and Multicultural Affairs* [2001] FCA 1653, 27 November 2001 (Federal Court of Australia), available at <http://www.unhcr.org/refworld/docid/47fdb33d.html>; *HS (Homosexuals: Minors, Risk on Return) Iran*, as cited in the Guidance Note, page 15.

³⁰ See *Decision Ourbih No. 269875*, 15 May 1998 (CRR, France), finding that transsexuals may constitute a particular social group. This position was affirmed in *Decision M. MB, No. 496775*, 15 February 2004 (CRR, France). See further, *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, 225 F.3d 1084 (9th Cir. 2000), 24 August 2000 (US Court of Appeals, Ninth Circuit), available at <http://www.unhcr.org/refworld/docid/3ba9c1119.html>, where the Court recognized that "gay men with female sexual identities" constituted a particular social group as cited in the Guidance Note, page 15.

³¹ *In Re Struk* [2005] ScotsCS SCOH 30 (18 Feb 2005), cited in Millbank, J. (2009b), "The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations', *International Journal of Refugee Law* 21(1), 15.

Such inconsistency in the interpretation of the Convention ground “particular social group” in relation to gay refugees, as described above, is partly due to the fact that “membership of a particular social group” is the least clear of the five Convention grounds for refugee status.³²

In this context, the Court, in the Judgment, has clarified that a group is regarded as a “particular social group” where, inter alia, two conditions are met.

First, members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it.

Second, that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.

With reference to those conditions, it seems useful to remind that according to the 2007 *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (“Yogyakarta Principles”),³³ “sexual orientation” refers to a person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender, or more than one gender.³⁴

³² It has been pointed out that «*Sexual orientation jurisprudence, however, was “rather confused” and has given rise to various differing interpretations, especially in the early cases. Several outstanding cases have mainly contributed to the current understanding of “membership of a particular social group”, namely Canada (Attorney-General) v. Ward, Applicant A v. Minister for Immigration and Ethnic Affairs, and Islam and Shah. This case law has brought forth two different approaches to interpret the Convention particular social group. The Canadian case Canada (Attorney-General) v. Ward (1993) established the protected characteristics approach, which builds on Matter of Acosta and suggests three categories of particular social groups: «(1) groups defined by an innate, unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence»*: See Refugee Studies Centre, *Sexual orientation in Refugee Status Determination, Working paper series no. 73*, Oxford, 2011, 9 (Refugee Studies Centre, *Sexual orientation in Refugee Status Determination, Working paper series no. 73*, Oxford, 2011, 9.

³³ *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, March 2007, available at http://www.yogyakartaprinciples.org/principles_en.pdf (hereafter: “Yogyakarta Principles”). The Principles were developed by the ICJ and the International Service for Human Rights, and were unanimously adopted during an expert meeting in Yogyakarta, Indonesia, 6–9 November 2006.

³⁴ “Gender identity” refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body, and other expressions of gender, including dress, speech and mannerisms (see Preamble, and Recitals 4 and 5 of the Yogyakarta Principles). Courts in various jurisdictions have likewise affirmed that sexual orientation relates not just to conduct or a series of sexual acts, but equally to a person’s identity

2.4 Conclusive remarks

International and national developments in sexual orientation case law clearly show that LGBT persons may be recognized as a “particular social group” and, as such, are entitled to protection under the Directive and the Geneva Convention.

These developments, however, also indicate that it is essential that assessments of claims based on sexual orientation and/or gender identity be conducted in a sensitive and appropriate manner by decision-makers specifically trained on these issues.

This is a very important condition in order to grant an harmonized interpretation and application of the asylum policy European legislation all around the relevant countries.

It is known, in fact, that there are substantial differences in the rate of asylum applications across European countries and, in this respect, it is very important that the European Court of Justice, by means of its decisions, try to effectively improve to get harmonization across national practices.

Harmonized interpretation and application of the law, in this field, it is essential also to ensure an equal and fair treatment of all the asylum seekers, so that the declaration to be a LGBT persons could not be used to obtain more easily the relevant status by persons applying, instead, only for economic and social reasons.

We hope the decision-makers shall be able to improve the relevant law in order to ensure a correct interpretation of the mentioned provisions, granting the asylum seekers the application of the fundamental rights provided by the Directive, the Geneva Convention and all the relevant provisions.

and how he or she seeks to express it. It has been pointed out that associated with the status. If harsh punishment is attracted by the latter, it is scarcely possible that homosexuals are otherwise treated with dignity and respect; see, *Refugee Appeal No. 74665*, 7 July 2004 (New Zealand Refugee Status Appeals Authority, (RSAA)), paras. 27, 129, available at <http://www.unhcr.org/refworld/docid/42234ca54.html>. See also *Nasser Mustapha Karouni v. Alberto Gonzales, Attorney General*, No. 02-72651, 399 F.3d 1163 (2005), 7 March 2005 (US Court of Appeals, Ninth Circuit), at III[6], available at <http://www.unhcr.org/refworld/docid/4721b5c32.html>; *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*; *Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* [2003] HCA 71, 9 December 2003 (High Court of Australia), para. 81, available at <http://www.unhcr.org/refworld/docid/3fd9eca84.html>», as cited in the Guidance Note, page 5.

Furthermore, on an overall basis, it seems important also to mention that, at the same time, the European Institutions should try to implement a more structured and efficient European foreign policy aimed at taking on specific actions directed to prevent, challenge and oppose any persecution and any form of discrimination conducted by any relevant single country.