

Comparison of decisions in asylum procedures in relation with LGBTI persons on EDAL

Prepared by Judith Ruderstaller, EDAL National Expert for Austria

and presented at the EDAL Conference 2014

1. Remark

This report is not an exclusive analysis of the complete practice of the member states concerning LGBTI-asylum claims and is solely based on the case summaries available on European Database of Asylum Law (EDAL)¹ at the time of writing or decisions mentioned in these case summaries.

By the end of 2013, EDAL contained 16 cases of applicants who left their respective country of origin because of persecution based on their sexual orientation or gender identity. Two further cases are mentioned within these case summaries so that 18 case summaries are the basis of this short analysis.

These case summaries are from Austria, Belgium, Finland, France, Germany, Ireland, Italy, Poland, Spain and the United Kingdom as well as one decision from the CJEU. The countries of origin of the applicants are Algeria, Benin, Cameroon, Congo, Egypt, Guinea, Iran, Mongolia, Nigeria, Senegal, Sierra Leone and Uganda. The applicants in these cases are mostly gay men; only one case summary deals with a lesbian woman and two case summaries deal with trans-women.

For further information and a deeper analysis of EU Member States' practice in this area, the report [Fleeing Homophobia - Seeking Safety in Europe \(2010\)](#) is recommended.

2. Sexual orientation and gender identity as part of a particular social group

It seems to be a more or less undisputed fact across the EU that LGBTI-persons are part of a particular social group. With the CJEU's preliminary ruling in [Joined Cases C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel](#)² (hereafter, 'X,Y & Z') delivered on the 7th November 2013, this legal question is finally answered. As the court stated:

"Article 10(1)(d) of Council Directive 2004/83/EC 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 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."

¹ EDAL can be accessed at www.asylumlawdatabase.eu.

² For a detailed discussion of this decision, see EDAL Journal article, ['The Court of Justice of the European Union delivers judgment in the joined cases of C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel'](#), M. Fraser, December 2013.

The national jurisprudence represented on EDAL concerning membership of a particular social group differs slightly in some aspects. It is prudent to note of course that given the recent vintage of the decision of the CJEU, all such national decisions pre-date the direction given by the Court in Luxembourg.

France states that the particular social group is not only defined by the persons within this social group or their objective attributes, but also by other persons', the societies' or institutions' view on the group ([Conseil d'Etat, 27.07.2012, n° 349824, M.B.](#)). Furthermore the particular situation in the country of origin must be evaluated to allow a verdict about the various elements of the "particularity" of a social group (*Conseil d'Etat 27.07.2012, n° 34552³*).

The *United Kingdom* states that homosexuals are members of a particular social group being defined by the immutable characteristic of their sexuality. This does not only relate solely to sexual acts but also forms a main part of a person's identity ([Supreme Court, 7 July 2010, HJ \(Iran\) v Secretary of State for the Home Department \[2010\] UKSC 31](#)).

Poland states that the 1951 Convention relating to the Status of Refugees contains a finite list of grounds on which refugee status may be recognized and does not include victims of war, natural disasters, famine, family situation, unemployment, lack of educational opportunities, or poverty. The assessment of whether the foreigner's fear of persecution is justified must therefore be performed considering the specific situation in each individual case and in the light of the general social, legal, political, and economic situation of the country of origin of the foreigner applying for refugee status. The conclusion is thus reached that homosexuals are part of a particular social group ([Regional Administrative Court in Warsaw, 1 October 2012, V SA/Wa 873/12](#)).

Germany finally took into account the Qualification Directive to change the former practice requiring an "irreversibility" and "inescapable fateful fixation on homosexual behaviour or urge fulfilment" of the sexual orientation, making it impossible not to engage in same sex behaviour, which had to be separated from a "mere inclination". This tradition was based on a landmark decision of the Federal Administrative Court (Bundesverwaltungsgericht) in 1988.⁴ The latest decisions state that the Qualification Directive does not require "irreversibility" of the sexual orientation. Sexual orientation does not only constitute an unchangeable trait, but is such a fundamental element of the identity of a person that he/she should not be forced to denounce it ([Administrative Court Frankfurt / Oder, 11 November 2010, VG 4 K 772/10.A](#)).

3. Acts of persecution

Generally speaking Art 9(2)(c) Qualification Directive includes under acts of persecution "*prosecution or punishment which is disproportionate or discriminatory*".

The CJEU's preliminary ruling in [X, Y & Z](#) from 7th November 2013 interpreted the legal situation concerning the relevance of criminalisation in an asylum claim by stating that:

³ See reference in ([Conseil d'Etat, 27.07.2012, n° 349824, M.B.](#)).

⁴ [Fleeing Homophobia - Seeking Safety in Europe \(2010\)](#), page 50.

"Article 9(1) of Directive 2004/83, read together with Article 9(2)(c) thereof, must be interpreted as meaning that 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 discriminatory and thus constitutes an act of persecution.

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."

Art 6 Qualification Directive states that *actors of persecution or serious harm* include non-State actors, if it can be demonstrated that the State or parties or organisations controlling the State or a substantial part of the territory of the State, including international organisations, are unable or unwilling to provide protection against persecution or serious harm. Art 7(2) requires that this State protection (including quasi-State protection) must be *"effective and of a non-temporary nature."* This is generally provided if the state takes *"reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection."*

Discrimination may happen in different ways and is partly seen as a basis to grant asylum. In general persecution as defined in Art 9 Qualification Directive requires treatment *"sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights"* or to *"be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual"* to one single act that violates human rights. The main question in national jurisprudence is to what extent discrimination has to occur to cross the line of Art 9 Qualification Directive. In many cases discrimination goes hand in hand with criminalisation so an isolated view is hardly ever possible.

Austria states in the case of a Egyptian trans-woman that discrimination within society as well as by the police, arbitrary violence against her, the refusal (and the legal impossibility) to issue a passport with new personal data after a sex change operation did reach the intensity of persecution ([AsyIGH 24.02.2011, A4 213.316-0/2008](#)). In the case of a trans-woman from Pakistan the court stated that discrimination by society to an extent that the only possibility to earn a living is prostitution violates Art 3 ECHR and therefore is persecution because it is directly connected with the membership in a particular social group ([AsyIGH 29th January 2013, E1 432.053-1/2013](#)).

Germany stated that the punishment the applicant, a gay man from Cameroon, would face for homosexual acts in case of return does not simply constitute criminal prosecution, but is persecution under the terms of the Refugee Convention ([Administrative Court Frankfurt / Oder, 11 November 2010, VG 4 K 772/10.A](#)).

Germany also recognised a gay applicant from Guinea as a refugee because he was threatened with death by his family after they learned he was homosexual thus violating their understanding of honour. There is no internal relocation alternative as Guinea's authorities are not willing to protect

him. The COI provided for this application provided a lot of evidence citing high numbers of killings of children and siblings for reasons of “family honour” and noting that in Islamic families such forbidden behaviour of a family member is not always concealed. In interpreting the Koran, many conservative representatives of Islam demand the punishment of sex acts by people of the same sex, including by the death penalty. Against this background, it may be the case that a traditional Islamic family does not conceal the homosexuality of a family member, but condemns it publicly. The applicant’s statement, that he was excluded by his family, physically hurt and threatened with death, therefore, is not *a priori* unrealistic and implausible ([Administrative Court Köln, 15 September 2011, 18 K 6103/10.A](#)).

Finland stated that even though the applicant has been unable to offer any credible account of the death penalty allegedly imposed on him due to his homosexuality, it must nevertheless be assessed if he has grounds to fear persecution or is in real danger of suffering serious harm in his home country due to his sexual orientation ([Supreme Administrative Court, 13 January 2012, KHO:2012:1](#)).

France recognised an Algerian gay applicant as a refugee because, although homosexuality is tolerated by society to some extent, as long as it is not explicitly expressed by behaviour or clothes, individuals who openly show their homosexuality may nevertheless be subject to intimidation in their social environment. Algeria legislation punishes homosexuals by a prison sentence and a fine and therefore recognised the gay applicant as a refugee ([Conseil d’Etat, 27.07.2012, n° 349824, M.B.](#)).

Italy also stated that national legislation penalising homosexuals qualifies as acts of persecution and recognised a gay applicant from Benin as a refugee. Furthermore discrimination by intimidation, loss of employment, humiliation, personal injury inflicted for reasons of sexual orientation were qualified as acts of persecution ([Trieste Court of First Instance, 8 September 2009, RG 1012/2009](#)).

Contrary to those positions, *Belgium* stated in case of a gay applicant from Senegal that the degree of discrimination of gay men by criminalisation, stigmatisation, homophobic acts by non-state actors connected with the unwillingness of the authorities to protect the victims adequately does not constitute persecution as required by Belgium asylum law because severity, recurrence and numbers do not reach the level required ([Council for Alien Law Litigation, 24 April 2013, No. 101488](#)).

Spain recognised a gay applicant from Cameroon as a refugee, who was sentenced to eight years imprisonment for openly practicing his sexual orientation. In addition to the explicit persecution by the authorities, the claimant was kidnapped and, after being threatened and assaulted, he paid a ransom and was freed ([High National Court Judgment, 27 December 2012, 5349/2012](#)).

4. Discretion requirement

The requirement of discretion to avoid further persecution still occurred in some Member States’ rulings: Austria (mostly for bisexuals), Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Hungary, Ireland, Malta, the Netherlands (despite the policy guidelines), Poland, Romania, and Spain. Norway and Switzerland also use the discretion argument.⁵

⁵[Fleeing Homophobia - Seeking Safety in Europe \(2010\)](#), page 33.

Meanwhile the CJEU finally decided on this legal interpretation in the preliminary ruling in [X, Y & Z](#) from 7th November 2013:

"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."

Similarly in the past, the Courts of a number of Member States had issued interesting decisions concerning the inadmissibility of discretion requirements.

Germany stated in 2010 that sexual orientation is so fundamental to the identity of a person that he/she should not be forced to denounce it ([Administrative Court Frankfurt / Oder, 11 November 2010, VG 4 K 772/10.A](#)).

United Kingdom also stated in 2010 that asylum should not be refused to a homosexual person on the basis that it could be considered reasonably tolerable, if returned to their home country, for him or her to deny their identity and conceal their sexuality in order to avoid being persecuted. However, the Court held that there may be cases where an applicant would hide his sexuality not only because of his fear of persecution but also for other reasons, such as adverse reaction of family, friends or colleagues. In such cases if the fear of persecution is a "material reason" for the concealment, then he would be entitled to receive protection ([Supreme Court, 7 July 2010, HJ \(Iran\) v Secretary of State for the Home Department \[2010\] UKSC 31](#)).

Finland stated that although an individual asylum seeker's past persecution was not credible, the general threat for a homosexual person in Iran to be sentenced to death must be considered, leading to an evaluation of the severity of the fact that he must hide his homosexuality to avoid this kind of threat ([Supreme Administrative Court, 13 January 2012, KHO:2012:1](#)).

5. Proof of sexual orientation - credibility assessment

Proving sexual orientation for the purpose of claiming asylum is difficult and there are some discussions within the jurisprudence as to which methods to apply.

In *Poland* the court held that a report by a doctor does not prove the sexual orientation of the applicant. A one-line report indicates that the expert opinion was not based on any extensive examination to identify the applicant's sexual orientation. As many different factors determine human sexual orientation, there are no objective medical procedures capable of determining the orientation of a given person beyond doubt. The opinions of doctors or psychiatrists were seen as "an inadequate and inappropriate method". This question should be resolved based on the testimony of the applicant, which should be assessed in the context of his general credibility during the course of the proceedings. If he is generally found unreliable in the proceedings, this will have an effect on the assessment of his stated sexual orientation as the basis for applying for protection ([Polish Council for Refugees, 12 March 2012, RdU-495-2/S/11](#)).

In *Austria* the Constitutional Court stated that for the assessment of credibility all available evidence, in this case the possible questioning of the applicant's long-term partner, have to be considered (VfGH 05.03.2012, U1776/11).

In a case in *Spain* the gay applicant showed as proof for his conviction to a prison sentence for "openly practicing homosexuality" three national search and arrest warrants, two police summons from Cameroonian police force, a search order, and an arrest order arising from the eight year prison sentence, all driven by his openly practiced homosexuality. The asylum application was at first and argued on a failure of proof of personal and individual persecution. The documents supplied "are easily manipulated photocopies that are therefore highly questionable". In terms of the main issue, that is, the probative value of the evidence supplied by the claimant, the High National Court maintained that in the matter of asylum – in contrast to other procedures – *prima facie* or circumstantial evidence is acceptable. The rulings stated that the documents are "easily manipulated photocopies" but the Court felt that there should be some justification for the instant rejection of this evidence. The Court observed that the State had "sufficient technical means" to check the veracity of the documents. The High National Court concluded that having met all the requirements for the asylum application to considered, namely, a coherent, plausible and credible narrative, with an allegation of a well-known fact (the persecution of homosexuals in Cameroon), all accompanied by verifiable (at least circumstantially) documents, "a minimum of administrative activity" would have been required to reject the credibility of the arguments on which the persecution is based ([High National Court Judgment, 27.12.2012, 5349/2012](#)).

6. Late disclosure und Res Judicata

Late disclosure is a problem for many LGBTI-persons: Persons fleeing from homophobia/transphobia and persecution based on their sexual orientation or gender identity are often unable to verbalize that face-to-face to the competent officers in charge because they feel ashamed, stigmatized, are afraid or are simply in an early stage of their personal coming out procedure.⁶

Member States mostly have a very strict practice of *res judicata* that hinders the competent asylum authorities from taking the sexual orientation or gender identity into account if this is not declared at an early stage of the asylum procedure.

In *Ireland*, an applicant was not permitted to raise a new ground of claim based on her asserted homosexuality as she had had numerous opportunities to raise this ground of claim earlier. She was however granted leave to apply for judicial review, upon the Judge noting a factual error that had tainted the State's earlier credibility assessment ([High Court, 13 December, J.K. \(Uganda\) v Minister for Justice and Equality, \[2011\] IEHC 473](#)).

In *Austria*, the principle of *res judicata* was rigorously relied on in cases of late disclosure up to the latest case of a gay Nigerian man who revealed his sexual orientation in his second asylum procedure for the first time. In a leading judgment delivered in 2012, the Constitutional Court stated that for the assessment of credibility in a *res judicata* procedure all new evidence has to be taken into consideration - even if the sexual orientation was not disclosed in the first asylum procedure (VfGH

⁶ [Fleeing Homophobia - Seeking Safety in Europe \(2010\)](#), page 35; [UNHCR Guidelines on Refugee Claims Relating to Sexual Orientation and Gender Identity, 2012](#).

05.03.2012, U1776/11). In a second decision concerning the same applicant the Constitutional Court furthermore stated that in the case of late disclosure (in a second application) the asylum authorities are obliged to investigate into reasons irrespective of the question if the grounds are covered by the Geneva Convention or the ECHR (VfGH 16.09.2013, U1268/2013). However, these decisions are not yet significantly reflected by the Asylum Court.

Overview of LGBTI-decisions on EDAL

Country of decision	applicant	Citation	definition	discretion requirement	criminalisation	discrimination	non-state persecution	proof	res judicata
CJEU	Senegal, Sierra Leone, Uganda	Joined Cases C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel	x	x	x				
Austria	Egypt	AsylGH 24.02.2011, A4 213.316-0/2008	x			x	x		
Austria	Pakistan	AsylGH 29th January 2013, E1 432.053-1/2013	x			x			
Austria*	Nigeria	VfGH 05.03.2012, U1776/11						x	x
Austria	Nigeria	VfGH 16.09.2013, U1268/2013						x	x
Belgium	Senegal	Council for Alien Law Litigation, 24 April 2013, No. 101488				x			
Finland	Iran	Supreme Administrative Court, 13 January 2012, KHO:2012:1		x	x				
France	Congo	Conseil d'Etat, 27th July 2012, n° 349824, M.B.	x						
France*	Mongolia	Conseil d'Etat 27 th July 2012, n° 34552	x						
France	Algeria	CNDA, 23 December 2010, Mr. K., n°08014099			x	x			
Germany	Cameroon	Administrative Court Frankfurt / Oder, 11 November 2010, VG 4 K 772/10.A	x	x	x				
Germany	Guinea	Administrative Court Köln, 15 September 2011, 18 K 6103/10.A					x		
Ireland	Uganda	High Court, 13 December, J.K. (Uganda) v Minister for Justice and Equality, [2011] IEHC 473							x
Italy	Benin	Trieste Court of First Instance, 8 September 2009, RG 1012/2009			x	x			
Poland	Uganda	Regional Administrative Court in Warsaw, 1 October 2012, V SA/Wa	x						

		873/12							
Poland	Uganda	Polish Council for Refugees, 12 March 2012, RdU-495-2/S/11						x	
Spain	Cameroon	Supreme Court Judgment, 17.07.2013, Nº 3186/2013,	x				x		
Spain	Cameroon	High National Court Judgment, 2712.2012, 5349/2012			x		x	x	
UK	Iran, Cameroon	Supreme Court, 7 July 2010, HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31	x	x	x				

*included as a reference in another EDAL case summary