

## PERSECUTION DUE TO SEXUAL ORIENTATION AS A REASON FOR ASYLUM IN THE JURISPRUDENCE OF THE CJEU

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### ABSTRACT

*Sexual orientation is both normal expression of human sexuality and immutable, is generally not chosen and highly resistant to change and represents each person's capacity for profound emotional, affectional and sexual attraction to individuals of a different gender or the same gender or more than one gender.*

*Against the backdrop of a historical, even biblical, criminalisation that continues even today in 65 countries around the world, those with a homo- or bisexual orientation, or those who more recently identify themselves as members of the lesbian, gay, bisexual and transgender (LGBT) community, cannot feel safe and secure in their countries of origin that penalise such sexual acts criminally or even with capital punishment.*

*Discrimination on grounds of sexual orientation was first recognised by the European Court of Human Rights only in 1981; today, no European state criminalises homosexual acts or behaviour.*

*In the last two decades, in the framework of the common asylum policy promoted by the European Union, sexual orientation has started to be invoked as a ground for asylum by refugees from countries that criminalise so-called 'unnatural sex'.*

*The current study seeks to capture the opinion of the Court of Justice of the European Union expressed in this area through three preliminary rulings adopted between 2013 and 2018 in order to formulate some useful conclusions for both scholars and practitioners in the field of asylum procedures.*

### KEYWORDS

*'unnatural sex'*

*Qualification Directive*

*Asylum Procedures Directive*

*'questioning based solely on stereotyped notions of homosexuals'*

*to infringe human dignity*

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*phallometric testing*  
*culture of disbelief*  
*sexual attraction as persecution reason*  
*'refugee receiving nations'*

## 1. Introduction

In addition to the references about Sodom and Gomorrah found in Genesis in the Bible, the first written references to the criminalisation of homosexual relations come from English law and date back to 1290 and are expressed in Fleta, xxxviii.3, which states that: 'Those who have dealings with Jews or Jewesses, those who commit bestiality, and sodomists, are to be buried alive after legal proof that they were taken in the act, and public conviction'<sup>2</sup>. Subsequently, over the centuries, most penal codes in Europe and around the world have criminalised sexual acts between people of the same sex. The decriminalisation of such acts began with the implementation of the 1924 Peruvian Penal Code which decriminalised private, consensual sexual activity between people of the same sex. Published in the UK in 1957, the Wolfenden Report was another important step, which, disregarding the conventional ideas of the time, not only established that it was not the role of the law to interfere in the private lives of citizens, but also rejected the *idea that homosexuality was a disease*<sup>3</sup>.

However, the 1950s and 1960s was an era in which being gay was viewed as so indubitably wrong that not even a justiciable human rights claim was seen to be involved, because such applications to the European Court of Human Rights (ECtHR) did not even pass the preliminary procedure of the European Commission of Human Rights<sup>4</sup>.

In 1981, a landmark ECtHR decision in this area was reached in *Dudgeon v. United Kingdom*<sup>5</sup> with six separate opinions. The Court recognised the legitimate need in a democratic society for some degree of control over homosexual behaviour, in particular to provide safeguards against exploitation and corruption of those who are particularly vulnerable. However, the Court held that setting other age limits for sexual relations for homosexuals than for heterosexuals constituted an unjustified interference with the right to respect for private life and thus a violation of Art. 8 ECtHR. The UN bodies are not lacking in this line of favourable rulings<sup>6</sup>.

2 | Hartn, 1955, p. 145.

3 | The Report of the Departmental Committee on Homosexual Offences and Prostitution (better known as the Wolfenden report, after Sir John Wolfenden, the chairman of the committee) was published in the United Kingdom on 4 December 1957.

4 | Millbank, 2004, p. 201.

5 | Case of *Dudgeon v. The United Kingdom (Application no. 7525/76)*, Judgement from 22 October 1981.

6 | Case of *Toonen v. Australia*, HUMAN RIGHTS COMMITTEE, Communication No. 488/1992, 31 March 1994, CCPR/C/50/D/488/1992.

In the field of decriminalising homosexual acts, some Eastern European countries, such as Poland (1932), the Czech Republic (1961), Slovakia (1962), Hungary (1962), Bulgaria (1968), Croatia (1977), Montenegro (1977), and Slovenia (1977), acted at the same time as the countries of the 'Western world' while others acted only after the fall of the Iron Curtain<sup>7</sup>.

However, the fact that 65 states still criminalise private, consensual, same-sex sexual activity and the majority of these jurisdictions explicitly criminalise sex between men via 'sodomy', 'buggery', and 'unnatural offences' laws should be noted. Of these states, 31 are in Africa, 22 in Asia, six in the Caribbean and South America and six in the Pacific. A total of 41 countries criminalise private, consensual sexual activity between women using laws against 'lesbianism', 'sexual relations with a person of the same sex', and 'gross indecency'. A total of 14 countries criminalise the gender identity and/or expression of transgender people, using so-called 'cross-dressing', 'impersonation', and 'disguise' laws. A total of 12 countries have jurisdictions in which the death penalty is imposed or at least a possibility for private, consensual same-sex sexual activity. At least six of these implement the death penalty, Iran, Northern Nigeria, Saudi Arabia, Somalia, and Yemen, and such punishment is a legal possibility in Afghanistan, Brunei, Mauritania, Pakistan<sup>8</sup>, Qatar, UAE, and Uganda<sup>9</sup>. Finally, the fact that so-called 'anti-sodomy' laws were introduced in many of these countries centuries ago by colonial powers, which criminalised 'carnal intercourse against the order of nature'<sup>10</sup>, should also be noted.

In the European Union, amidst the huge progress made in terms of non-discrimination, no state has criminalised LGBT (lesbian, gay, bisexual, and transgender) people for at least three decades, which is both a guarantee and a magnet for people who want to express their sexual orientation and who live in the 65 states mentioned above, that is, in the third of the world that has not been able to overcome the 'criminalisation of sodomisation'. Moreover, 22 EU Member States explicitly consider sexual orientation as a ground for asylum, and even the United Nations High Commissioner for Refugees (UNHCR) specifically addresses this ground for asylum<sup>11</sup>.

This is not to say that new and emerging issues in the case-law of the Court of Justice of the European Union (CJEU) do not arise in the area of equality treatment claimed by LGBT people<sup>12</sup>.

7 | Lithuania (1993), Estonia (1992), Romania (1996), Serbia (1994), Ukraine (1991), Albania (1995), Latvia (1992), North Macedonia (1996), Moldova (1995), Russia (1993), Bosnia and Herzegovina (1998-2001), Georgia (2000), Armenia (2003), Azerbaijan (2000), Kazakhstan (1998).

8 | Millbank, 2004, p. 218.

9 | Map of Jurisdictions that Criminalise LGBT People. Available at: <https://www.humannignitytrust.org/lgbt-the-law/map-of-criminalisation/> (Accessed: 27 November 2023).

10 | Aldrich, 2003; Gupta, 2008.

11 | UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Art. 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/12/09, 23.10.2012, Paras. 40-50.

12 | Jeney, 2010.

In this context, the question arises as to whether sexual orientation can constitute a ground of persecution justifying a claim to refugee, asylum seeker, beneficiary of subsidiary protection, or beneficiary of a removal order status under EU asylum law. If we consider the prospect of capital punishment for homosexual acts in some countries, the answer tends to be affirmative and with empathy; however, the legal answer is much more nuanced and has been facilitated by the preliminary rulings of the CJEU in Luxembourg over the last two decades.

As presented in the literature, according to the jurisprudence of the US Supreme Court<sup>13</sup> sexual orientation is both a normal expression of human sexuality and immutable, generally not chosen, and highly resistant to change<sup>14</sup>.

However, the literature increasingly uses the definition from the preamble to the Yogyakarta Principles<sup>15</sup> that:

Understanding 'sexual orientation' to refer to each 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; Understanding 'gender identity' to refer 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 (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

## 2. Relevant case law

### | 2.1. *Minister voor Immigratie en Asiel v. X, Y, Z case*

The issue of sexual orientation as a ground of persecution justifying refugee protection was first raised in the *Minister voor Immigratie en Asiel v. X, Y, Z case*<sup>16</sup>. In this case, three citizens of Sierra Leone, Uganda, and Senegal invoked their homosexual orientation to obtain asylum in the Netherlands.

According to Art. 1(A)(2), first subparagraph, of the Geneva Convention<sup>17</sup>, the term 'refugee' applies 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

13 | *Obergefell vs Hodges*, 135 S Cr. 2584, 2595 (2015).

14 | Ziegler, 2018, pp. 105–106.

15 | The Yogyakarta Principles.

16 | C-199 to 201/2012 X, Y, Z Judgment of 7 November 2013, ECLI:EU:C:2013:720.

17 | The Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951 (United Nations Treaty Series, vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954 and was supplemented by the Protocol relating to the Status of Refugees, concluded at New York on 31 January 1967, which entered into force on 4 October 1967 (hereinafter referred to as the 'Geneva Convention').

the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return.

From a simple reading of this text, we can deduce that sexual orientation cannot be attributed to a race, religion, nationality, or group with certain political views. Therefore, sexual orientation as a ground for persecution is legally tenable only if it can be demonstrated that those with such sexual practices belong to a certain social group.

The Geneva Convention was the inspiration for EU Directive 2004/38/EC<sup>18</sup> on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or those who otherwise need international protection and the content of the protection granted (hereafter Qualification Directive or QD).

From the perspective of sexual orientation as a ground for asylum, the following provisions of the Qualification Directive are relevant:

(a) Art. 4 of the Directive, which defines the conditions for the assessment of facts and circumstances and provides in Para. 3:)

The assessment of an application for international protection must be carried out individually, taking into account the following elements:

(a) all the relevant facts concerning the country of origin at the time of taking a decision on the application, including the laws, regulations and administrative provisions of the country of origin and the manner in which they are applied;

(b) the relevant information and documents submitted by the applicant, including information enabling it to determine whether the applicant has been or may be subject to persecution [...].

(c) the individual status and personal circumstances of the applicant, including factors such as the applicant's background, gender and age, in order to determine whether, taking into account the applicant's personal circumstances, the acts to which the applicant has been or risks being exposed could be considered persecution [...].

Additionally, under Art. 4(4) of the Directive, the fact that the applicant has already been persecuted or the subject of direct threats of such persecution is a 'serious indication of the applicant's well-founded fear of being persecuted', unless there are substantial grounds for believing that such persecution will not recur.

(b) Paras. 1 and 2 of Art. 9 of the Directive define acts of persecution as follows:

(1) Acts considered to be persecution within the meaning of Art. [1 Sec. A] of the Geneva Convention shall:

(a) be sufficiently serious by their nature or repetition as to constitute a serious violation of fundamental human rights, in

18 | Council Directive 2004/83/EC of 29 April 2004 was published in OJ 2004 L 304, p. 12, with corrigendum in OJ 2005 L 2004, p. 24, Special Edition 19/vol. 7, p. 52 – was in force from 30.09.2004 until 21.12.2013.

particular those rights from which no derogation is possible under Art. 15(2) of the [ECHR], or

(b) be an accumulation of various measures, including violations of human rights, which is sufficiently serious to affect an individual in a manner comparable to those referred to in point (a).

(2) Acts of persecution within the meaning of Para. 1 may in particular take the following forms:

[...] (c) prosecution or sanctions that are disproportionate or discriminatory; [...]

(c) Art. 10 of the Directive, entitled ‘Grounds for persecution’, which provides that:

(1) When assessing the reasons for persecution, Member States shall take the following elements: [...]

- (d) a group shall be regarded as a particular social group in particular where:
- its members share an innate characteristic or a common history which cannot be changed or a characteristic or belief so fundamental to identity or conscience that a person should not be required to renounce it, and
  - that group has its own identity in the country concerned because it is perceived as different from the surrounding society.

Depending on the prevailing conditions in the country of origin, a specific social group may be one whose members share a common characteristic of sexual orientation.

X, Y, and Z, born in 1987, 1990, and 1982 respectively, came from countries that sanction ‘unnatural sex’, namely Sierra Leone<sup>19</sup>, Uganda<sup>20</sup> and Senegal<sup>21</sup>. The Dutch authorities rejected their application for asylum on the basis of their sexual orientation on the grounds that the three had not adequately proved the facts and circumstances invoked and had therefore not demonstrated that, once back in their respective countries of origin, they had a well-founded fear of persecution on account of their membership of a particular social group, namely that they should not necessarily be free to express their orientation publicly in the same way as they might do in the Netherlands.

In response to questions raised by the Raad van State in the Netherlands in 2013, its interpretation of Art. 10 Para. 1 lit. d and Art. 9 Para. 1 of the Qualifications Directive, the CJEU stated, that:

19 | Under Sec. 61 of the Offences against the Person Act 1861, acts of homosexuality in Sierra Leone are punishable by imprisonment for 10 years to life.

20 | In Uganda, according to Sec. 145 of the Penal Code Act 1950, a person convicted of an offence described as a ‘sexual act against nature’ is punishable by imprisonment with a maximum of life imprisonment.

21 | In Senegal, according to Art. 319.3 of the Penal Code, the penalty for committing acts of homosexuality is imprisonment for 1 to 5 years and a fine.

1. The existence of criminal legislation in a third State such as that at issue, which specifically targets homosexual persons, allows a finding that such persons must be regarded as forming a particular social group.

2. The mere criminalisation of acts of homosexuality does not, in itself, constitute an act of persecution; on the other hand, a custodial penalty which punishes acts of homosexuality and is effectively enforced in the country of origin which has adopted such legislation must be regarded as a disproportionate or discriminatory penalty and therefore constitutes such an act.

3. when assessing an application for refugee status, the competent authorities may not reasonably require the asylum seeker to conceal his homosexuality in his country of origin or to be reserved in expressing his sexual orientation to avoid the risk of persecution. Specifically, a 'discretion order' has no legal basis<sup>22</sup>. Moreover, in its previous case-law in the field of religious persecution as a ground for asylum, the CJEU has stated that 'in the individual assessment of an application for refugee status, the authorities concerned cannot reasonably expect the applicant, on his return to his country of origin, to renounce those religious acts which expose him to a real risk of persecution'<sup>23</sup>. The fact that the person concerned could avoid the risk by renouncing certain religious acts is in principle irrelevant<sup>24</sup>.

Maarten den Heijer best captures the essence of this ruling in three key points:

First, persecution for reason of sexual orientation can be brought within the refugee definition. Second, mere criminalization of homosexual activity does not amount to persecution, but the actual application of penal sanctions does. And third, it cannot reasonably be expected that an asylum applicant conceals his homosexuality in his country of origin in order to avoid the risk of persecution<sup>25</sup>.

The same author considered that:

The ruling in X, Y and Z is important for its confirmation that persecution for sexual orientation is a ground for refugee status and that it may not simply be assumed that a homosexual can avoid persecution by concealing his sexual identity<sup>26</sup>.

## 2.2. A, B, C v. *Staatsecretaris van Veiligheid en Justitie* case

However, this judgement could not provide an answer to all the legal problems that may arise in asylum procedures based on sexual orientation and in Cases A, B, C v. *Staatsecretaris van Veiligheid en Justitie*<sup>27</sup> in 2014, the very question of the

22 | However, in their rulings, some courts in Germany or Austria have imposed an obligation on some asylum seekers to behave discreetly in Braun, Dörr, and Träbert, 2020, pp. 81–84.

23 | Judgment of 5 September 2012, Y and Z (C-71/11 and C-99/11) ECLI:EU:C:2012:518.

24 | *Ibid.*, p. 79.

25 | Den Heijer, 2014, p. 1217.

26 | *Ibid.*, p. 1233.

27 | C-148/13 to C-150/13, A, B, C, Judgment of 2 December 2014, ECLI:EU:C:2014:2406.

provability/credible establishment of sexual orientation was raised in the light of the provisions of Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereafter the Asylum Procedures Directive – APD)<sup>28</sup>.

The Dutch authorities rejected the asylum applications of A, B, and C as not credible:

1. In the case of A, on the ground that although he indicated that he agreed to undergo a ‘test’ that would prove his homosexuality or to perform a homosexual act to prove the reality of his declared sexual orientation, he did not contest a first refusal decision and made a second application for asylum on the same ground.

2. In the case of B, on the grounds that his statements on his homosexuality were vague, summary, and lacking in credibility, as he could not provide details of his feelings and inner process regarding his sexual orientation.

3. In the case of C, on the ground that although he had submitted a video recording of intimate acts with a person of the same sex to the authorities, he only remembered that he was homosexual after an asylum application had been rejected on another ground without contesting that decision. Furthermore, he did not contest that first decision and submitted a second asylum application, this time based on the fear of persecution in his country of origin on account of his homosexuality. The authorities also noted that C did not clearly explain how he became aware of his homosexuality and could not answer questions about Dutch gay rights organisations.

With regard to assessing the credibility of the allegations of sexual orientation, note that in *I.K. v. Switzerland*<sup>29</sup> the ECtHR held, for example, that the asylum seeker’s claims regarding his sexual orientation were not credible, even though in Sierra Leone, the applicant’s country of origin, homosexual acts are criminalised under criminal law. During the trial, it came to light that he had submitted false documents attesting that he had been arrested for homosexual acts, and the gay rights organisation in which the applicant claimed to have been active in his country did not exist; therefore, the accumulated inadequacies and inconsistencies undermined the credibility of his claims. In the relevant literature<sup>30</sup>, in this context, the negative concept of ‘heteronormative praxis’ has emerged and should be avoided by those conducting asylum interviews. Heteronormativity is seen as a conception of values that accepts only female and male gender and does not accept ‘non-binary’ or ‘enby’ people or those who identify as ‘trans’ or ‘inter’, whom it considers ‘othering’, that is, ‘abnormal’.

28 | Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13, corrigendum in OJ 2006 L 236, p. 36).

The above Directive was repealed by Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L 180, 29.6.2013, pp. 60–95.

29 | Case No 21417/2017 ECHR, Judgement of 19 December 2017.

30 | *Fluchtgrund sexuelle Orientierung und Geschlechtsidentität*, 2021.



In response to questions raised by the Raad van State of the Netherlands in 2014, in interpreting Art. 4 Para. 3 lit. c and Art. 9 Para. 1 of the Qualifications Directive and Art. 13 Para. 3 lit. a of the Procedural Directive, the CJEU stated, that:

1. In the examination by the competent national authorities, acting under the control of the court, of the facts and circumstances relating to the declared sexual orientation of an asylum seeker whose application is based on a fear of persecution on account of such orientation, the statements of that applicant and the written or other evidence submitted in support of his application may not be assessed by those authorities by means of questioning based solely on stereotyped notions of homosexuals.

2. In the context of this examination, the competent national authorities must not conduct detailed questioning on the sexual practices of an asylum seeker, as these are contrary to the fundamental rights guaranteed by the Charter and in particular the right to respect for private and family life as enshrined in Art. 7 thereof; that is, subjecting them to possible 'tests' to establish their homosexuality or even the presentation by the applicants in question of evidence such as video recordings of their intimate acts, in addition to not necessarily having probative value, would be likely to infringe human dignity, respect for which is guaranteed in Art. 1 of the Charter<sup>31</sup>.

3. In the same examination, the competent national authorities must not conclude that the statements of the asylum seeker in question are not credible for the sole reason that the applicant's stated sexual orientation was not invoked by the applicant when first given the opportunity to present the grounds of persecution. The Court highlighted that the applicant is under an obligation to submit all the necessary elements in support of his application for international protection 'as soon as possible', thereby leaving the timing to his discretion<sup>32</sup>.

The doctrine condemns intrusive methods of establishing sexual orientation such as physical demonstrations, consummation of sexual acts or phallographic testing, consisting of testing the physical reaction to heterosexual pornographic material<sup>33</sup>. Otherwise, the question as to whether physical impotence could lead to the disappearance of the invocability of sexual orientation as a ground for persecution may even arise.

### 2.3. *F v. Bevándorlási és Állampolgársági Hivatal case*

In the case of *F v. Bevándorlási és Állampolgársági Hivatal* (Citizenship and Immigration Office)<sup>34</sup>, following the clarifications made by the judgement in joined cases A, B, and C on the credibility assessment, a court was curious to know whether scientific methods could be used in the procedure for establishing/evaluating sexual orientation.

31 | Paras. 64 and 65 of the Judgement in the Case A, B, C.

32 | Para. 68 of the Judgement in the Case A, B, C.

33 | European Union Agency for Fundamental Rights (FRA), 2010, pp. 58–60.

34 | C-473/2016, Judgement of 25 January 2018, F (C-473/16) ECLI:EU:C:2018:

More specifically, in April 2015, F submitted an asylum application to the Hungarian authorities, documenting, since the first interview held by the authorities, that he had reasons to fear that he would be persecuted in his country of origin because of his homosexuality, but the application was rejected as lacking credibility on the basis of an expert opinion by a psychologist<sup>35</sup>. Although he was neither physically examined nor forced to view pornographic photographs or films, F claimed that the psychological tests he was subjected to seriously infringed his fundamental rights and did not allow his sexual orientation to be assessed with certainty. At the request of a judge, the Hungarian Institute of Judicial Experts and Investigators produced an expert report which indicated that the methods used during the asylum examination procedure do not violate human dignity and can, together with 'proper exploration', provide insight into a person's sexual orientation.

To questions raised by the Szegedi Közigazgatási és Munkaügyi Bíróság (Szeged Administrative and Labour Court) of Hungary in 2018, in interpreting Art. 4 of Directive No 2011/95/EU (hereinafter the New Qualification Directive)<sup>36</sup>, the CJEU stated, that:

1. The authority responsible for examining applications for international protection or the courts notified, where appropriate, of an action against a decision of that authority may order an expert opinion to be carried out in the context of the assessment of the facts and circumstances relating to an applicant's stated sexual orientation, provided that the modalities of such an expert opinion are in accordance with the fundamental rights guaranteed by the Charter, and provided that that authority and those courts do not base their decision solely on the conclusions of the expert opinion and that they are not bound by those conclusions when assessing the applicant's statements concerning his or her sexual orientation;

2. Art. 4 of Directive 2011/95, read in the light of Art. 7 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding the carrying out and use of a psychological experts report for the purpose of assessing the true nature of the declared sexual orientation of an applicant for international protection, such as that at issue in the main proceedings, the purpose of which is to provide, on the basis of prospective personality tests, a picture of that applicant's sexual orientation.

In the recent past, it was revealed that in the Czech Republic and Slovakia in 2010-12, sexual arousal tests (also called penile plethysmography and vaginal photoplethysmography) were a practice used to test whether alleged homosexual

35 | This included an exploratory examination, a personality examination, and several personality tests, namely a test based on a drawing of a person in the rain, as well as Rorschach and Szondi tests, and concluded that it was not possible to confirm F's claim about his sexual orientation.

36 | Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

asylum seekers were indeed homosexual. Developed in the 20th century (developed in the 1950s by Kurt Freund) as a diagnostic tool to aid in aversion therapies to cure homosexuality and as an objective method of proving sexual deviance or paraphilia, Czech immigration officials hooked gay and lesbian asylum seekers up to machines that determined levels of sexual arousal by measuring the asylum seekers' physical reactions while exposed to gay and heterosexual pornography<sup>37</sup>.

In the grounds of its judgement, the CJEU discouraged the carrying out of such expert opinions in the future, stating that

the performance and use of a psychological expert opinion such as that at issue in the main proceedings constitute an interference with that person's right to respect for his or her private life, since even where the psychological tests on which an expert opinion is based are carried out, such as that at issue in the main proceedings, is formally conditional on the expression of the consent of the person concerned, it must be held that that consent is not necessarily free, being de facto imposed under the pressure of the circumstances in which applicants for international protection find themselves<sup>38</sup>.

Moreover, such expertise cannot be considered indispensable to confirm an applicant's statement for international protection concerning his sexual orientation for the purpose of deciding on an application for such protection based on a fear of persecution on account of that orientation<sup>39</sup>, since it appears disproportionate to the objective pursued<sup>40</sup>. Such expertise may help to identify the sexual orientation of the person concerned with some reliability, but it could only provide a picture of that sexual orientation and is therefore of limited interest in assessing an applicant's statements for international protection, particularly if those statements are free of contradictions<sup>41</sup>.

The extraordinary interest surrounding these three cases is reflected in the large number of Member States which 'intervened' as participants in these cases: Belgium in one case, the Czech Republic in one case, France in three cases, Germany in two cases, Greece in two cases, the Netherlands in three cases, Hungary in one case, and the European Commission in one case in each of the cases mentioned above. Finally, the UNHCR also participated in two cases<sup>42</sup>. In conclusion, those entities for which the issue of immigration on grounds of sexual orientation is a central theme of their activity or policy participated.

37 | Jansen, 2014, cited in Gartner, 2015, pp. 39–66.

38 | See by analogy Judgement of 2 December 2014, *A and Others*, C 148/13-C 150/13, EU:C:2014:2406, para. 66.

39 | Para. 65 of Case F.

40 | Para. 59 of Case F.

41 | Para. 69 of Case F.

42 | Joined cases A, B, C and joined cases X, Y, Z. See in this respect UNHCR Observations in the cases of *Minister voor Immigratie en Asiel v. X, Y and Z* (C-199/12, C-200/12, C-201/12) regarding claims for refugee status based on sexual orientation and the interpretation of Arts. 9 and 10 of the EU Qualification Directive. Available at: <https://www.refworld.org/pdfid/5065c0bd2.pdf> (Accessed: 27 January 2024).

### 3. Conclusions

1. Both the CJEU and the ECHR have consistently held that sexual orientation is a fundamental aspect of a person's identity and conscience, from which it follows that such a person cannot be required to express/live their sexuality in secret. On the contrary, we must not forget that although a person's other identities such as ethnicity, language, or culture can be changed voluntarily, real sexual orientation is acquired by birth, is immutable, and resistant/reliable to change.

2. Sexual orientation in itself is not automatically a ground for persecution, but a causal link between the two must be proven. Basically, the three 'court decisions' have unlocked that 'culture of disbelief' focused strictly on 'assessing the true sexual orientation of the applicant' and reoriented it towards effective control of perceived or potential persecution.

3. The prospect of criminal sanctions for sexual orientation does not automatically constitute a ground for persecution if these provisions are not applied by the State authorities. On the contrary, a custodial penalty which penalises acts of homosexuality and which is actually applied in the country of origin that has adopted such legislation must be regarded as a disproportionate or discriminatory penalty and therefore constitutes an act of persecution.

4. The danger of persecution based on sexual orientation may come not only from state authorities, but also from private actors<sup>43</sup>; for example, in the form of blackmail from non-homosexual entourage or in the form of violent reaction from family members. In this regard, the fact that fundamental rights specifically linked to sexual orientation, such as the right to respect for private and family life, which is protected by Art. 8 of the ECHR, to which Art. 7 of the Charter corresponds, in conjunction, where appropriate, with Art. 14 of the ECHR, from which Art. 21(1) of the Charter draws its inspiration, are not among the fundamental human rights from which no derogation is possible should be noted from the outset<sup>44</sup>. In this context, that the fact that LGBT asylum seekers are exposed to 'hate crimes' even in the EU after receiving refugee status should be remembered<sup>45</sup>.

5. The burden of proof of sexual orientation lies primarily with the asylum seeker, and verification of their credibility is the obligation of the State in which the asylum application was lodged, but the former's statements can nevertheless only constitute the starting point in the process of examining the facts and circumstances given the particular context of asylum applications<sup>46</sup>. Thus, the burden of 'probatio diabolica' has been divided between the applicant and the authorities who will check its admissibility.

43 | Homosexueller Mann aus Sierra Leone darf weggewiesen werden, 30.01.2018. Available at: <https://www.humanrights.ch/de/ipf/rechtsprechung-empfehlungen/europ-gerichtshof-fuer-menschenrechte-egmr/erlaeuterte-schweizer-faelle/egmr-artikel-3-emrk-ik-v-schweiz> (Accessed: 29 December 2023).

44 | Para. 54 of the Judgement in the Case X, Y, Z.

45 | FRA – European Union Agency for Fundamental Rights, 2017, p. 13.

46 | Para. 49 of the Judgement in the Case A, B, C.

6. Given that, according to the case-law of the CJEU, the provisions of the Qualification Directive must be interpreted in the light of its general structure and purpose, in compliance with the Geneva Convention and the other treaties in this field<sup>47</sup>, and in compliance with the rights recognised by the EU Charter of Fundamental Rights<sup>48</sup>, when applying national law transposing the Directive, national courts will have to apply a principle of double middle ground, since they will have to take not only the purpose and spirit of the Directive, but also the content of the Geneva Convention into account.

7. When determining sexual orientation, asylum seekers must be given the ‘benefit of the doubt’/‘in dubio pro reo’ presumption. Furthermore, in view of the sensitive nature of questions relating to a person’s personal sphere, and in particular their sexuality, such questions must be of a subsidiary, supplementary, or complementary nature, without being decisive. Given the problem of distinguishing between ‘bona fide’ and ‘false claims’, with queer identities being hard to prove, a fear of ‘fraudulent’ applications is not unjustified<sup>49</sup>.

8. Invoking sexual orientation is the surest way to obtain asylum protection because: it does not have to be proven; it does not have to and cannot be tested on grounds of human dignity; its credibility cannot be questioned.

9. The only way to stop the misuse of this ground remains to prove the insufficiency of the seriousness of the criminal persecution in the country of origin, but this is undermined by the waiver of the ‘discretion order’. However, given the strict and discriminatory regime applied to women in most Muslim countries, from the perspective of ‘European standards of freedom’, all female persons from these countries who apply for asylum in Europe would qualify.

10. The pan-European solution to this kind of asylum could be the political-economic pressure exerted on the 65 ‘non-LGBTQ friendly’ states by the EU institutions and those EU Member States that are notorious for their hyperactivity in this area and are ‘refugee receiving nations’. The individual/paleactive solution would be to verify the reality of sexual orientation after granting refugee status along the lines of tracing and annulling marriages of interest/appearance entered into for the fraudulent acquisition of citizenship, with the aim of tracing those who invoke their sexuality solely to fabricate a right of residence. Cases of post-operative transgender applicants would constitute an exception.

Based on a study titled ‘Fleeing Homophobia’ which addressed this topic, some authors<sup>50</sup> have estimated that 8000-9000 asylum claims based on sexual persecution are filed annually in Europe<sup>51</sup>. Over 175 million queer individuals worldwide are estimated to live under persecutory environments<sup>52</sup>.

47 | Para. 40 of the Judgement in the Case X, Y, Z.

48 | Para. 43 of the Judgement of 19 December 2012 in the Case C 364/11 *Abed El Karem El Kott and Others*.

49 | Gartner, 2015, pp. 39–66.

50 | Ruppacher, 2014/2015, p. 7.

51 | Jansen, 2011.

52 | Gartner, 2015.

At the end of this attempt to investigate the issue of sexual orientation as a reason for persecution justifying the granting of asylum as objectively and detached as possible, this study offers the following hypothesis for consideration: will Europe, and in particular the EU Member States, from now on grant asylum to all those persons who in their own countries may commit acts or adopt attitudes that fall under the scope of local criminal law, but which are no longer considered crimes on the European continent?

If the answer is yes, then it means that the court rulings discussed above have opened a Pandora's box or a vicious circle from which the real way out is not in the 'safe country' Europe.

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