Queer Judgments

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To queer people around the globe who deserve better justice.

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X, Y and Z (European Union):

Who is Protected as Queer Refugee by the Court of Justice of the European Union?

Carmelo Danisi (Commentary) and Nuno Ferreira (Re-written decision)

Introduction

The decision of the Court of Justice of the European Union (CJEU) in the joined cases of *X, Y and Z v Minister voor Immigratie en Asiel*,[1] in 2013, marked a turning point in EU asylum law concerning sexual minorities.[2] It clarified the (minimum) standard of protection which sexual minorities are entitled to under the Common European Asylum System (CEAS),[3] especially in relation to the key terms of the definition of refugee, and has become the point of reference for subsequent CJEU decisions concerning other substantive and procedural aspects of asylum claims based on sexual orientation.[4] It originated from three separate Dutch proceedings involving men fleeing, respectively, Sierra Leone (X), Uganda (Y) and Senegal (Z), and concerned their asylum claims submitted on the grounds of a fear of persecution for membership of a sexual minority. Before reaching its decision on these cases, the Council of State of the Netherlands (Raad van State) deemed it appropriate to submit a preliminary reference request to the CJEU to clarify how the Qualification Directive (QD) should

1. Joined Cases C-199/12, C-200/12 and C-201/12, 7 November 2013, ECLI:EU:C:2013:720. The number of commentaries dedicated to this judgment confirm its significance: e.g. Maarten Den Heijer, 'Persecution for Reason of Sexual Orientation: X, Y and Z,' *Common Market Law Review* (2014), 1217–1234. The commentary has been written thanks also to the support of the GenDJus project, which is funded by the NextGenerationEU through the Call PRIN 2022 PNRR DD No. 1409 of 14 September 2022, project proposal code P2022FNH9B – CUP J53D23017230001.
2. The expression 'sexual minorities' is used here in an encompassing way, as to include anyone who does not identify as heterosexual.
3. Nuno Ferreira, 'Reforming the Common European Asylum System: Enough Rainbow for Queer Asylum Seekers?' *GenIUS 2* (2018), 25–42.
4. Joined Cases C-148/13 to C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*, 2 December 2014, ECLI:EU:C:2014:2406; Case C-473/16, *F. v Bevándorlási és Állampolgársági Hivatal*, 25 January 2018, ECLI:EU:C:2018:36; Case C-18/20, *XY v Bundesamt für Fremdenwesen und Asyl*, 9 September 2021, ECLI:EU:C:2021:710.

be applied when sexual orientation is the reason for seeking international protection in an EU Member State.[5]

In laying the groundwork for a queer rewriting of the judgment, this commentary identifies the good, the bad and the ugly aspects of the CJEU's decision when analysed through the prism of international refugee and human rights law protecting the rights of queer people.[6] Indeed, EU asylum law is deeply informed by a combination of these legal frameworks: while the Geneva Convention on the Status of Refugees[7] is the cornerstone on which the CEAS is based, human rights standards as established by the EU Charter of Fundamental Rights (EU Charter)[8] and the European Convention on Human Rights (ECHR)[9] should be always applied when EU law is at stake.[10]

The *X, Y and Z* judgment provides a clear example of the Court's competence to interpret EU law to make sure that it is applied consistently across the entire Union. The CJEU is not entitled to recognize or reject refugee status or other forms of international protection in relation to non-EU nationals; it can, however, be called upon by courts of EU Member States to decide how the legislative acts forming the CEAS should be interpreted and applied across the EU. In the exercise of this competence, the CJEU's rulings are based on the questions formulated by national judges and, despite the option being available, the CJEU does not usually expand on its answers to offer broader (queer) considerations than those strictly required to clarify the correct interpretation of the specific EU law issues raised by the referring court. As we will see in the following sections, this is an important facet of the *X, Y and Z* case. The *X, Y and Z* judgment concerned the interpretation of the first Qualification Directive (QD), adopted in 2004, which was later replaced by the 2011 version, which also sought to embed in EU legislation the principles that had emerged in the CJEU case law on asylum in the meantime.[11]

Given these premises, the following sections discuss the three key points emerging from the *X, Y and Z* case: discretion reasoning as a basis for rejecting refugee status (section 'The Good'); identification of a Particular Social Group (PSG) as one of the grounds on the basis of which refugee status can be granted (section 'The Bad'); and the role

5. 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, OJ L 304, 30.9.2004, p. 12–23. It was replaced by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011, OJ L 337, 20.12.2011, p. 9–26. All references to QD in this contribution refer to the 2004 Directive.

6. 'Queer' is here understood as relating to anyone whose sexual orientation, gender identity or expression, or sex characteristics are non-normative in the broader social context.

7. UN General Assembly, Convention Relating to the Status of Refugees, 31 July 1951, UNTS vol. 189, p. 137, as complemented by the Protocol adopted on 31 January 1967, UNTS vol. 606, p. 267.

8. European Union, *Charter of Fundamental Rights of the European Union*, OJ C 326, 26.10.2012, p. 391–407.

9. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Rights*, 4 November 1950.

10. In accordance with Article 51 of the EU Charter and Article 6(3) of the Treaty on European Union (TEU). This obligation was also preliminarily acknowledged by the CJEU in *X, Y and Z*, paras. 39–40.

11. It also added gender identity as a relevant factor for the purposes of determining a Particular Social Group (PSG): see the recast version of Article 10(1)(d). For an overview of the QD and the CEAS, see Daniel Thym, *European Migration Law* (Oxford: OUP, 2023).

of criminalisation in the context of the notion of persecution (section 'The Ugly'). Drawing on this analysis, the re-written judgment that follows advances queerly framed solutions to these points.

Testing *X, Y and Z* as a Queer Judgment

When the Dutch Council of State requested a preliminary ruling on the correct interpretation of the QD, it formulated three main questions in a precise order: first, whether people 'with a homosexual orientation' form a PSG (para. 37); second, if such people can be expected to conceal their orientation to avoid persecution in their country of origin; and, third, whether the 'criminalisation of homosexual activities' (sic) amounts to an act of persecution. For the reasons that are discussed below, the CJEU decided to provide its answers in a different order. After confirming that sexual minorities did form a PSG in the countries of origin of the applicants in the domestic proceedings, the CJEU anticipated its answer on the issue of criminalisation before rejecting any sort of discretion reasoning under EU law. Given the significance of the rationale followed by the CJEU in its last answer, which is fully in line with the human rights-based approach to refugee law adopted in this commentary, we start our analysis of the judgment in *X, Y and Z* by looking at this very last point. After setting out the 'good' of the CJEU decision, we move on to an examination of the 'bad' aspect of the judgment, which deals with the notion of PSG, and finally we look at what appears to be the 'ugly' part of the *X, Y and Z* case: the rejection of criminalisation *per se* as persecution.

The Good: Castigating the Inhumanity of Discretion Reasoning

In what emerged as the most significant achievement of the *X, Y and Z* case for sexual minorities fleeing persecution, the CJEU highlighted that sexual orientation is a characteristic 'so fundamental to a person's identity that the persons concerned cannot be required to renounce it,' even in the form of concealment to escape persecution in their country of origin (paras. 62–63). It would be therefore unreasonable to expect sexual minorities to exercise any sort of restraint in expressing themselves.[12] Second, in answering the question on the possible distinction between 'core' and marginal areas of one's sexual orientation, the CJEU rejected the existence of 'non-core' aspects of sexual minorities' lives that may be deserving of less or no protection under EU asylum law. In doing so, the Court referred to the QD itself, where, when stating that a PSG can be formed by people having the same sexual orientation as the shared characteristic (Article 10(1)(d)), no limits are set out on how such people should live their identity or how they should behave both in private and public spaces. This understanding echoed the previous *Y and Z* case,[13] which concerned asylum claims submitted by religious minorities. According to the CJEU's findings in *Y and Z*, no distinction can be made

12. Janna Wessels, *The Concealment Controversy: Sexual Orientation, Discretion Reasoning and the Scope of Refugee Protection* (Cambridge: CUP, 2021).
13. Joined Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z*, 5 September 2012, ECLI:EU:C:2012:518.

between expressing one's faith in public or in private for the purpose of granting refugee status, with the clear consequence of rejecting any expectation of concealment or restraint in the expression of one's religion or belief as a valid reason for denying international protection.

This interpretation of the QD on the concealment issue is in line with the UNHCR's reading of international refugee law enshrined in its 2012 SOGI Guidelines No. 9, despite the fact that these received no mention by the CJEU in *X, Y and Z*. In dealing with the persistence of the discretion reasoning in the evaluation of sexual minorities' asylum claims, these Guidelines state that the only question to be evaluated by decision makers is how a member of a sexual minority group would be treated if returned to their country of origin and if this amounts to persecution.[14] Moreover, the Guidelines highlight that being discreet does not guarantee avoiding persecution, as circumstances may change over time. Not only can a person's sexual orientation be discovered irrespective of their conduct, but also, and perhaps most importantly, it only needs to be imputed to them, for example for not complying with social traditional gender roles and expectations. Although the CJEU did not go that far in its conclusion, it certainly did not entertain possible reasons why a person claiming asylum should be discreet in their home country, as the re-written judgment specifies in stronger terms.

In any case, the broad understanding of sexual orientation and the findings on discretion are also compliant with consolidated human rights standards, at least from two different standpoints. First, they ensure that each person's dignity, inherently embedded in one's identity without distinction of any kind, is equally worth of protection as provided for by Article 1 of the EU Charter. Second, owing to the lack of a distinction between core and non-core areas of sexual orientation identity and behaviour, the Court avoided any inappropriate distinction within human rights when these are applied to sexual minorities. The 'good' of the *X, Y and Z* judgment indeed had the potential to prevent the emergence of a hierarchy of harms in the mistaken belief that sexual orientation is only attached to specific human rights and not to their whole spectrum. Yet, as we note below, such a risk was not entirely avoided owing to the contradictory interpretation of the QD that emerged in other parts of the judgment.

The Bad: A Cumulative Approach to Tests for Defining a PSG

Being based on the definition of refugee included in the Geneva Convention, Article 2(c) of the QD lists five grounds on the basis of which the fear of persecution of people seeking asylum should be well-founded: race, religion, nationality, political opinion or membership of a PSG. It is well-known that, although other grounds like religion or political opinion can be relevant for sexual minorities' asylum claims, membership of a PSG remains 'the' basis for most of these requests. Yet, unlike the Geneva Convention, where a definition of PSG is absent, the QD offers some indications

14. UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and /or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, UNHCR (2012), para. 32 (hereinafter 'UNHCR SOGI Guidelines No. 9').

to identify a PSG for the purposes of granting refugee status. According to Article 10(1)(d), a group can be qualified as a PSG when 'in particular' two conditions are satisfied: the group shares a protected characteristic, be it innate, unchangeable or fundamental to one's identity (commonly known as the fundamental characteristic test), 'and' is perceived as having a distinct identity by the home country's society (commonly known as the social recognition test). Already at the time of the adoption of the QD, the UNHCR recommended that Member States adopt an alternative, rather than a cumulative, approach to these two different tests for finding a PSG.[15] In its authoritative guidance, the UNHCR has always supported such an alternative approach to these tests,[16] and the EU legislator could have followed this interpretation more clearly. Yet, the same QD's provision also specifies that, 'depending on the circumstances in the country of origin,' a PSG might include a group sharing a common sexual orientation (see Article 10(1)(d), second subparagraph).

In the *X, Y and Z* case, despite such a clear reference to sexual orientation, the CJEU replied to the question on whether 'foreign nationals with a homosexual orientation' form a PSG by adopting an overall literal and restrictive approach to the interpretation of the QD. Instead of simply using the QD's reference to PSGs based on sexual orientation, thus avoiding any rigid stance on the debate on the cumulative v alternative approach to the PSG tests, the CJEU decided to verify itself whether 'homosexuals' could qualify as a PSG. In doing so, the Court opted for applying the tests cumulatively, given that these are linked in the QD through the conjunction 'and' (paras. 45–48). This is so even though the tests are introduced with the expression 'in particular' (see above), which allowed for a more flexible interpretation of this provision, including each test sufficing for a finding of a PSG. Despite the final positive conclusion reached in this case by the CJEU, its approach required two separate tests: first, it was necessary to qualify sexual orientation as a protected fundamental characteristic ('fundamental characteristic test'), *and*, secondly, to verify the existence of a separate group formed by 'homosexuals' in the countries of origin of X, Y and Z ('social recognition test'). While the first test was unproblematic to be met and the CJEU's finding had positive implications for the interpretation of other parts of the QD when sexual minorities are involved (see section 'The Good'), the assessment of a distinct social visibility was connected to 'the existence of criminal laws [that] specifically target homosexuals' (para. 49) because of the way the questions had been framed by the national court. It follows that, beyond setting a mandatory cumulative approach to tests (including when sexual orientation is the basis for claiming asylum), the CJEU left the door open to restrictive interpretations of the social visibility test with respect to countries where no criminal laws target sexual minorities.[17]

15. UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004* (UNHCR, 2005), 23.

16. UNHCR, *Guidelines on International Protection No. 2: 'Membership of a Particular Social Group' within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (UNHCR, 2002), para. 2.

17. International Commission of Jurists, *Refugee Status Claims based on Sexual Orientation and Gender Identity: A Practitioner's Guide* (ICJ, 2016), 201.

To address this criticism, the re-written judgment below adopts the more flexible interpretation of Article 10(1)(d) that was suggested above, thus showing that the alternative approach to PSG tests recommended in the UNHCR 2012 Guidelines No. 9 is actually supported by the same QD. In doing so, it avoids the reiteration of linear and fixed understandings of personal identities. Indeed, requiring individuals to also demonstrate a distinct identity from the rest of society leads to the risk of exclusion from protection of those members of sexual minorities who do not fall into clearly established categories.[18] Such a lack of understanding of queer realities is even more visible in the way the CJEU assessed the question on criminalisation, to which we finally turn.

The Ugly: Denying Criminalisation per se as a Form of Persecution

Despite the positive elements in the *X, Y and Z* judgment discussed above, the definition of persecution when sexual minorities claim international protection remains problematic under EU asylum law. The question asked by the Dutch Council of State specifically referred to the 'criminalisation of homosexual activities and the threat of imprisonment' (para. 34) and whether these could constitute an act of persecution. It took as its point of reference Article 9(1)(a) of the QD, read in conjunction with Article 9(2)(c). According to the CJEU, the mere criminalisation of homosexual acts does not amount to persecution, unless the criminal sanctions in question are applied in practice. In fact, it is only when criminalisation leads to a punishment that, if such punishment is disproportionate or discriminatory, it may amount to persecution (para. 61). In providing such an answer, the CJEU adopted a very conservative approach, one that reiterates the disputable definition of persecution included in the QD. In fact, the CJEU did not enquire into the appropriateness of the QD definition of persecution in terms of the Geneva Convention. The CJEU took for granted that persecution 'within the meaning of Article 1(A) of the Geneva Convention *must* 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 [ECHR]' (Article 9(1)(a) of the QD, emphasis added). However, the Geneva Convention does not specify what persecution is and, most importantly, does not establish a mandatory connection between the definition of refugee and human rights violations, whether absolute or otherwise. It supports, instead, a case-specific evaluation of the well-founded fear in the context in which the persecution occurred or would take place in case of return. As the UNHCR put it, persecution needs to be a 'flexible' and 'adaptable' concept, one that is 'sufficiently open to accommodate its changing forms' and 'cannot and should not be defined solely on the basis of serious or severe human rights violations.'[19] By contrast, irrespective of the recognition that the QD must be interpreted in a manner consistent with the Geneva Convention (para. 40) and the Directive's own wording ('in particular,' above), the CJEU read the QD in such

18. Carmelo Danisi, Moira Dustin, Nuno Ferreira and Nina Held, *Queering Asylum in Europe: Legal and Social Experiences of Seeking International Protection on grounds of Sexual Orientation and Gender Identity* (Cham: Springer, 2021), ch. 3 and 267–269.
19. UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004*, 20.

a way that restricts persecution only to those acts that amount to severe violations of non-derogable rights. In other words, where sexual minorities are involved, the CJEU transformed what in the QD was meant as an example of persecution into the *only* acts amounting to persecution. Yet, the consequence of this reasoning is worse than the reasoning itself. In a clear contradiction to the previous recognition of sexual orientation as a fundamental characteristic that, as such, finds expression in every facet of a person's life (see section 'The Good') and is protected by the indivisible spectrum of human rights, the CJEU affirmed that sexual orientation is 'specifically' connected with the right to private and family life (Arts. 8 ECHR and 7 EU Charter) (para. 54). Given that criminalisation in itself entails a violation of such a derogable right, in the Court's view it cannot be so severe as to constitute persecution.

We can find some support for the CJEU's interpretation in the UNHCR's position that persecution needs to concern the individual claiming asylum and, where taken in abstract terms, a general measure cannot have effect until it is applied to a specific person.[20] However, such an understanding contradicts the recognition that international and EU refugee law protects sexual minorities, who in such countries cannot express themselves freely due to the risk of being criminally sanctioned. In this sense, requiring a person to have been or risk being severely punished in order to satisfy the requirement of persecution seems to re-introduce discretion reasoning in other, more subtle, ways. Moreover, the CJEU's approach fails to consider the effects of the discriminatory nature of such laws on the everyday life of sexual minorities, owing to the 'oppressive atmosphere of intolerance' they generate and the impunity they grant to State and non-State persecutors.[21] When looking at these effects, the 2012 SOGI Guidelines do not distinguish between derogable and non-derogable rights, a distinction which, in any case, under international human rights law, is attached to public emergencies threatening the life of the nation (see Article 15 ECHR) and is not meant to relate to the definition of 'persecution.' Instead, the UNHCR insists on the need for a contextual assessment of every individual situation.[22]

In fact, only such an assessment verifies the detrimental cumulative—exogenous and endogenous—effect of criminal law on sexual minorities' everyday lives irrespective of the nature of the rights that have been or could be violated in case of return.[23] Criminalisation can make sexual minorities' life so insecure that, in light of each individual context, it may generate a well-founded fear that leads to forced departures from the country of origin as the only way out. In *X, Y and Z*, not only did the CJEU

20. Alice Edwards, '*X, Y and Z*: The "A, B, C" of Claims Based on SOGI?' presentation at the Experts Roundtable on asylum claims based on sexual orientation and gender identity or expression (Brussels, 27 June 2014), 2.

21. UNHCR, *UNHCR SOGI Guidelines No. 9*, paras. 26–27. See also the vivid accounts of people fleeing their home countries in Danisi et al., *Queering Asylum in Europe*, esp. ch. 5.

22. UNHCR, *UNHCR SOGI Guidelines No. 9*, para. 28. See, also, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR, 1992, reissued in 2019), paras. 51–53.

23. For a wider discussion, see Carmelo Danisi, 'Crossing Borders between International Refugee Law and International Human Rights Law in the European Context,' *Netherlands Quarterly of Human Right*s 37 (2019), 359–368.

fail to undertake such a contextual analysis, but also, in contrast to its approach to discretion (see section 'The Good'), the CJEU even ignored the reasoning already emerged in the previous *Y and Z* case where it considered that the exercise of freedom of religion—a derogable right—could amount to persecution in light of the consequences experienced by the concerned person, such as the genuine risk of being prosecuted.[24] Moreover, the Court failed to consider the possibility of qualifying criminalisation and its consequences under the QD's alternative definition of persecution: 'an accumulation of various measures, *including* violations of human rights which is sufficiently severe as to affect an individual in a similar manner as [provided in Article 9(1)(a)].'[25] Crucially, such a reasoning could also rely on one of the examples of persecution listed in—the equally ignored—Article 9(2)(b): 'legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner.' These norms require a proactive role on the part of asylum decision makers,[26] and an understanding of criminalisation at least as *prima facie* persecution, thus either reversing the burden of proof or moving the assessment onto the other elements of the refugee notion. [27]

The re-written judgment takes into account these developments by advancing an interpretation of the QD that, at the very least, always leads to a presumption of persecution when the applicant's country of origin criminalises same-sex sexual acts. The burden is then on decision makers to prove that there is not, in fact, a risk of persecution, despite the existence of such criminal law. In order to discharge such a burden of proof, in line with the UNHCR Guidelines No. 9 and procedural obligations set out in the same QD, decision makers are asked to carry out a contextual analysis of the situation of sexual minorities in their country of origin, one that considers the overall effects of the criminalisation on the applicant's own life, including (but not exclusively) whether it is applied and what sanctions it entails.

The way forward for a queer CJEU in asylum law

This commentary has shown the CJEU's mixed approach in interpreting EU asylum law when refugee status is requested on sexual orientation grounds. Although the limitations imposed by its role and competences cannot be underestimated, the CJEU could have navigated better the straits left open by the EU legislator to offer a truly queer interpretation of the QD, one that takes into account the specific conditions, needs and rights of sexual minorities along the lines suggested here. The re-written version of the original judgment in the *X, Y and Z* case that follows in the next pages shows exactly what the CJEU should have done differently to achieve a more appropriate

24. For a full comparison, see ICJ, *X, Y and Z*, paras. 54–58.
25. Article 9(1)(b) QD, emphasis added.
26. Danisi et al., *Queering Asylum in Europe*, ch. 6.
27. See Italian Supreme Court of Cassation, decision no. 15981, 20 September 2012, where the Court found that the criminalisation of same-sex sexual acts amounts to persecution because it entails a deprivation of the fundamental right to live freely one's sexual and emotional life.

interpretation—for both sexual minorities and asylum law as an international coherent system—of the legal framework that was available in November 2013.

Some preliminary clarifications about the re-written judgment are necessary. The re-written version adheres closely to the original wording and structure where those were generally unproblematic.[28] Instead, where the original judgment is problematic on account of its terminology or legal analysis, the wording has been changed and the structure has been adapted. Generally, the term 'homosexuals' was replaced with 'sexual minorities,' 'homosexuality' with 'sexual orientation,' and 'homosexual acts' with 'same-sex sexual acts,' to avoid the Western, medicalised and pathologizing history of the former term. Gender-neutral terminology was also favoured throughout, even though the judgment deals in particular with male applicants. We hope that our suggestions can inform not only the next wave of CJEU judgments on asylum claims based on sexual orientation and, possibly, gender identity, but also future EU asylum legislation.

28. Owing to the limited space available, several non-essential passages have been omitted, which is signalled by '(…).' Moreover, the numbering of the paragraphs in the re-written judgment does *not* correspond to the numbering of the original judgment.

JUDGMENT OF THE COURT (Fourth Chamber)

7 November 2013

(…)
In Joined Cases C-199/12 to C-201/12,
REQUESTS for a preliminary ruling under Article 267 TFEU from the Raad van State (Netherlands), made by decision of 18 April 2012, received at the Court on 27 April 2012, in the proceedings

Minister voor Immigratie en Asiel

v

X (C-199/12),
Y (C-200/12),

and

Z

v

Minister voor Immigratie en Asiel (C-201/12),

intervening parties:

Hoog Commissariaat van de Verenigde Naties voor de Vluchtelingen (C-199/12 to C-201/12),

THE COURT (Fourth Chamber),
(…)
gives the following

Judgment

[1] These requests for a preliminary ruling concern the interpretation of Article 9(1)(a) of Council Directive 2004/83/EC (...) (OJ 2004 L 304, p. 12) ('the Directive'), read in conjunction with Article 9(2)(c) and Article 10(1)(d) thereof.

[2] The requests have been made in proceedings, first, between the Minister voor Immigratie en Asiel (Minister for Immigration and Asylum, 'the Minister') and X

and Y, nationals of Sierra Leone and Uganda respectively, in Cases C-199/12 and C-200/12, and second, in Case C-201/12, between Z, a Senegalese national and the Minister, concerning the rejection by the latter of their applications for residence permits for a fixed period (asylum) in the Netherlands.

Legal context

International law

The Convention Relating to the Status of Refugees ('the Geneva Convention')

[3] (…)

[4] 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 [their] nationality and is unable or, owing to such fear, is unwilling to avail [themselves] of the protection of that country.'

[5] It is now consensual that international protection applications on grounds of sexual orientation or gender identity fall within the scope of international refugee law, and that international human rights law and the principle of non-refoulement apply to such applications, as enshrined in Principle 23 of the (non-legally binding but legally authoritative) Yogyakarta Principles.

[6] The UNHCR 2012 Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity ('the UNHCR 2012 Guidelines No. 9') set out the key aspects that need to be considered when deciding on these applications.

The European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR')

[7] The ECHR, signed at Rome on 4 November 1950, protects several rights, including the 'Right to life' in Article 2, the 'Prohibition of torture' in Article 3, the 'Right to respect for private and family life' in Article 8, and the 'Prohibition of discrimination' in Article 14. (…)

European Union law

The Charter of Fundamental Rights of the European Union ('the Charter')

[8] Article 18 of the Charter protects the right to asylum 'with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees,' as well as the EU Treaties.

[9] The Charter also protects the 'Right to life' in Article 2, the 'Prohibition of torture and inhuman or degrading treatment or punishment' in Article 4, 'Respect for private and family life' in Article 7, and 'Non-discrimination' (Article 21).

The Directive

[10] (…)

Netherlands law

[11] (…)

The disputes in the main proceedings and the questions referred for a preliminary ruling

[12] (…)

[13] In those circumstances, the Raad van State decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling which have been formulated in almost identical terms in each of the three cases:

'(1) Do foreign nationals with a homosexual orientation form a particular social group as referred to in Article 10(1)(d) [of the Directive]?

(2) If the first question is to be answered in the affirmative: 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 subquestions:

(a) Can foreign nationals with a homosexual orientation be expected to conceal their orientation from everyone in their [respective] country of origin in order to avoid persecution?

(b) If the previous question is to be answered in the negative, 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 the orientation and in what way can it be determined?

(3) Do the criminalisation of homosexual activities and the threat of imprisonment in relation thereto (…) 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?'

(…)

Consideration of the questions referred

Preliminary observations

[14] (…) The Directive must be interpreted in the light of the Geneva Convention's general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the Directive must also be interpreted in a manner consistent with the rights recognised by the Charter (Case C-364/11 *Abed El Karem El Kott and Others* [2012] ECR, paragraph 48 and the case-law cited). In the case of asylum applications related to sexual orientation, the Directive should also be interpreted in a manner consistent with the UNHCR 2012 Guidelines No. 9.

The first question

[15] (…) To be recognised as a refugee, a third-country national must, on account of circumstances existing in their country of origin and the conduct of actors of persecution, have a well-founded fear that they 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' ('PSG').

[16] Article 10(1) of the Directive gives a definition of a PSG, membership of which may give rise to a genuine fear of persecution.

[17] According to that definition, a group is regarded as a PSG where, *in particular,* 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.

[18] As far as concerns the 'fundamental characteristic test,' it is common ground that a person's sexual orientation is a characteristic so fundamental to the identity of so many people that they 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.

[19] The 'social recognition test' requires that, in the country of 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.

[20] The UNHCR 2012 Guidelines No. 9 state, in paragraph 45, that the fundamental characteristic and the social recognition tests are *alternative*. In the case of the Directive, although the tests are connected with the word 'and,' they are introduced with the words 'in particular.' So, a PSG can be found in circumstances where these tests are not both fulfilled (for example, only one is fulfilled or none is fulfilled but there is still evidence of the existence of a particular social group).

[21] In that connection, the existence of criminal laws that specifically target members of sexual minorities, reinforces a finding that those persons form a separate group which is perceived by the surrounding society as being different. The lack of such criminal laws should not, however, be interpreted as sexual minorities not constituting a PSG.

[22] 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 that specifically target sexual minorities (and knowing such minorities always share a fundamental characteristic), reinforces the finding that those persons must be regarded as forming a particular social group, even if such criminal laws are not at all a requirement for such finding.

The third question

[23] (…) In order to answer this question, it must be recalled that Article 9 of the Directive defines the elements which support the finding that acts constitute persecution within the meaning of Article 1(A) of the Geneva Convention. 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 particular*—but not exclusively—the unconditional rights from which there can be no derogation, in accordance with Article 15(2) of the ECHR.

[24] Moreover, Article 9(1)(b) of the Directive states that an accumulation of various measures, including violations of human rights, which is 'sufficiently severe' as to affect an individual in a manner similar to that referred to in Article 9(1)(a) of the Directive, must also be regarded as amounting to persecution.

[25] It is clear from those provisions that, for a violation of fundamental rights to constitute persecution within the meaning of Article 1(A) of the Geneva Convention, it must be sufficiently serious. Therefore, not all violations of fundamental rights suffered by an applicant with an application related to sexual orientation will necessarily reach that level of seriousness.

[26] Nonetheless, it is well established in international human rights law that 'sodomy laws' that criminalise same-sex sexual acts are a violation of human rights law, as stated since the 1980s in seminal cases by the UN Human Rights Committee (HRC) in *Toonen v Australia* (CCPR/C/50/D/488/1992, 4 April 1994) and the European Court of Human Rights in *Dudgeon v UK* (Application no. 7525/76, 22 October 1981), *Norris v Ireland* (Application no. 10581/83, 26 October 1988) and *Modinos v Cyprus* (Application no. 15070/89, 22 April 1993).

[27] Furthermore, the UNHCR 2012 Guidelines No. 9 state that while penalties such as death penalty, prison terms, or severe corporal punishment make their persecutory character particularly evident, even criminal laws prohibiting same-sex relations that are irregularly, rarely or never enforced can lead to an 'intolerable predicament for an LGB [lesbian, gay or bisexual] person rising to the level of persecution' (paragraphs 26–28). Indeed, despite the lack of actual prosecutions, criminal legislation may be used to facilitate blackmail, discrimination and harassment, including on the part of the police.

[28] Moreover, EU national highest jurisdictions such as the Italian Supreme Court have found that the criminalisation of same-sex sexual acts *in itself* constitutes persecution, whether or not it is effectively applied, on account of the human rights violation it entails (Corte di Cassazione, ordinanza n. 15981/12).

[29] Placing these criminal law norms within their broader societal context of discrimination and intolerance, and taking seriously the human rights violations in question, requires us to also consider that—at the very least—criminalisation of same-sex sexual acts should lead to a *presumption of persecution*, which places on asylum authorities the burden to prove that, despite such criminal laws, the overall social and legal conditions in the country of origin do not amount to persecution. In this sense, in line with the definition provided in Article 9(1)(b), persecution can be meant also as an accumulation of various measures, including violations of human rights, which is sufficiently severe as to affect an individual in a similar manner as resulting from acts provided in Article 9(1)(a).

[30] In those circumstances, the mere existence of legislation criminalizing same-sex sexual acts, including when it is accompanied by a term of imprisonment like those at issue in the main proceedings, should be always presumed to be 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.

[31] Furthermore, when this legislation provides for criminal sanctions like imprisonment, death penalty and so on, such sanctions constitute punishment which is disproportionate or discriminatory within the meaning of Article 9(2)(c) of the Directive, in line with the UNHCR 2012 Guidelines No. 9 (paragraph 26).

[32] Where an applicant for asylum relies on the existence in their country of origin of legislation criminalizing same-sex sexual acts, the burden is on the national authorities to examine all the relevant facts concerning that country of origin and prove that, despite the existence of criminal laws against same-sex sexual acts, the legal and social conditions in the country of origin do not amount to a risk of persecution for the applicant.

[33] Having regard to all of those considerations, the answer to the third question is that, in each of the cases in the main proceedings, Article 9(1) of the Directive, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of same-sex sexual acts alone is, at least, an indication of persecution strong enough as to reverse the burden of proof and place on authorities the burden to prove that such criminal law norms, combined with the social conditions in the country of origin, do not create a risk of persecution for the applicant. Moreover, a term of imprisonment which sanctions same-sex sexual acts must be regarded as being a punishment which is disproportionate and discriminatory and thus constitutes an act of persecution under all circumstances.

The second question

Preliminary observations

[34] (…) The second question refers to a situation in which the applicant has not shown that they have already been persecuted or have already been subject to direct threats of persecution on account of their membership of a PSG whose members share the same sexual orientation.

The second question, parts (a) and (b)

[35] (…) In connection with the second question, parts (a) and (b), it must be stated that nothing in the wording of Article 10(1)(d) suggests that the European Union legislature intended to exclude certain types of acts or expression linked to sexual orientation from the scope of that provision.

[36] Thus, Article 10(1)(d) of the Directive does not lay down limits on the conduct that the members of a PSG may adopt with respect to their identity or to behaviour which may or may not fall within the definition of sexual orientation for the purposes of that provision.

[37] In that connection, 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.

[38] Therefore, applicants for asylum cannot be expected to conceal their sexuality in their country of origin in order to avoid persecution.

[39] In the system provided for by the Directive, when assessing whether an applicant has a well-founded fear of being persecuted, the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of their individual situation, that they will in fact be subject to acts of persecution (see, to that effect, *Y and Z,* paragraph 76).

[40] That assessment of the extent of the risk, which must, in all cases, be carried out with vigilance and care (Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493, paragraph 90), will be based solely on a specific evaluation of the facts and circumstances, in accordance with the rules laid down in particular by Article 4 of the Directive (*Y and Z*, paragraph 77).

[41] It follows that the person concerned must be granted refugee status, in accordance with Article 13 of the Directive, where it is established that on return to their country of origin their sexuality would expose them to a genuine risk of persecution within the meaning of Article 9(1) thereof. The fact that they could avoid the risk by exercising greater restraint than a heterosexual in expressing their sexual orientation is not to be taken into account in that respect.

[42] Similarly, how asylum applicants expressed their sexuality in their countries of origin or how they would express it if they were returned, should not be used by asylum authorities to find that there is no risk of persecution. Even if an applicant may have successfully concealed their sexuality before departing and intend to conceal it if returned, the risk of persecution may remain on account of factors beyond the control of the applicant, such as relatives, neighbours, work colleagues and other people finding out about the applicant's sexuality, which can set in motion a range of social and legal harmful consequences.

[43] In the light of those considerations, the answer to parts (a) and (b) of the second question, referred in each of the three cases in the main proceedings, is that Article 10(1)(d) of the Directive, read together with Article 2(c) thereof, must be interpreted as meaning that, 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 their sexuality in their country of origin or to exercise reserve in the expression of their sexual orientation. Any experience or intention of concealment and reserve do not, in fact, preclude in any way the risk of persecution.

The second question, part (c)

[44] Having regard to the reply given to the first question, parts (a) and (b), there is therefore no need to reply to part (c) of the second question.

[45] Nevertheless, it must be recalled that, 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, from acts which do not affect those purported core areas (see, by analogy, *Y and Z*, paragraph 62).

(…)

On those grounds, the Court (Fourth Chamber) hereby rules:

[1] Article 10(1)(d) of Council Directive 2004/83/EC 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 sexual minorities (and knowing such minorities always share a fundamental characteristic), reinforces the finding that those persons must be regarded as forming a PSG, even if such criminal laws are not at all a requirement for such finding.

[2] Article 9(1) of the Directive, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of same-sex sexual acts alone is, at least, an indication of persecution strong enough as to reverse the burden of proof and place on authorities the burden to prove that such criminal law norms, combined with the social conditions in the country of origin, do not create a risk of persecution for the applicant. Moreover, a term of imprisonment which sanctions same-sex sexual acts must be regarded as being a punishment which is disproportionate and discriminatory and thus constitutes an act of persecution under all circumstances.

[3] Article 10(1)(d) of the Directive, read together with Article 2(c) thereof, must be interpreted as meaning that, 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 their sexuality in their country of origin or to exercise reserve in the expression of their sexual orientation. Any experience or intention of concealment and reserve do not, in fact, preclude in any way the risk of persecution.

[Signatures]