

**Application No. 15109/15, M.B. v. SPAIN**  
**European Court of Human Rights, Third Section**

**WRITTEN COMMENTS OF**  
**FIDH, APDHE, ILGA-EUROPE, ECSOL, AND UKLGIG**  
**Submitted on 15 January 2016**

1. Prof. Robert Wintemute, School of Law, King's College London, respectfully submits these Written Comments on behalf of FIDH (*Fédération Internationale des ligues des Droits de l'Homme*), APDHE (*Asociación Pro Derechos Humanos de España*), ILGA-Europe (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), ECSOL (European Commission on Sexual Orientation Law), and UKLGIG (United Kingdom Lesbian and Gay Immigration Group). For their interest and expertise, see "Application for leave to submit written comments" (23 Nov. 2015), granted on 16 December 2015 under Rule 44(3) of the Rules of Court.

**Introduction**

2. No judgment of the Court has found that deportation of a lesbian, gay, bisexual, trans or intersex (LGBTI) person from a Council of Europe member state to their country of origin would violate Article 2 or 3 of the Convention. In two decisions, the Court ruled that deportation of gay men to Iran would not give rise to a real risk of treatment violating Article 2 or 3.<sup>1</sup> In 2015, the Court declined to reconsider these decisions, when it struck two applications out of its list of cases, because residence permits had been granted to the applicants late in the proceedings.<sup>2</sup>

3. In 2013 and 2014, the Court of Justice of the European Union (CJEU) adopted two judgments on the treatment of LGBTI asylum-seekers:

- Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v. Minister voor Immigratie en Asiel* (7 Nov. 2013) (Sierra Leone, Uganda, Senegal)
- Joined Cases C-148/13, C-149/13 and C-150/13, *A, B and C v. Staatssecretaris van Veiligheid en Justitie* (2 Dec. 2014) (unspecified non-EU countries)

There are also national supreme court judgments in Council of Europe member states:

- UK, Supreme Court, *H.J. (Iran) and H.T. (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31 (7 July 2010)<sup>3</sup>
- Italy, *Corte Suprema di Cassazione, Sentenza* No. 15981/12 (20 Sept. 2012) (Senegal)<sup>4</sup>

All four of these judgments place restrictions on the deportation of LGBTI persons, unlike the case law of the Court to date.

4. The Court has asked the parties whether the applicant "would ... face a real risk of being killed or subjected to treatment in breach of Articles 2 and 3 of the Convention [in Cameroon] if the expulsion order were enforced".

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<sup>1</sup> *F. v. UK*, No. 17341/03 (22 June 2004); *I.N.N. v. Netherlands*, No. 2035/04 (9 Dec. 2004).

<sup>2</sup> See *M.E. v. Sweden* (Libya; Grand Chamber striking out judgment of 8 April 2015); *A.E. v. Finland* (Iran; Committee striking out decision of 15 October 2015). See also *A.B.N. v. Netherlands*, No. 4854/12 (Jamaica; Committee striking out decision of 10 July 2012); *Sobhani v. Sweden*, No. 32999/96 (Iran; European Commission of Human Rights striking out decision of 10 July 1998).

<sup>3</sup> See [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2009\\_0054\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2009_0054_Judgment.pdf).

<sup>4</sup> See [http://www.retelenford.it/files/2012\\_Cass\\_15981-asilo.pdf](http://www.retelenford.it/files/2012_Cass_15981-asilo.pdf).

5. These Written Comments will consider the appropriate legal test for deciding when an LGBTI person faces a real risk of treatment violating Article 2 or 3 of the Convention, if they are deported to their country of origin. In particular, they will argue that the assessment of this risk must take into account the **likelihood that an openly LGBTI person (not one who sought to conceal their sexual orientation or gender identity) would suffer treatment violating Article 2 or 3.**

6. National courts are being asked to review ever more claims by LGBTI asylum-seekers, and are therefore in need of guidance from the Court regarding the minimum standard imposed by Articles 2 and 3 of the Convention, especially in the 19 Council of Europe member states that are not members of the EU. The third-party interveners respectfully urge the Court to adopt the same clear statement of principle as the CJEU, the United Nations High Commissioner for Human Rights (UNHCR), the UK Supreme Court (UKSC), and Judge Power-Forde in her dissenting opinion in *M.E. v. Sweden*.<sup>5</sup> In determining whether or not **an LGBTI asylum-seeker** faces a real risk of treatment violating Article 2 or 3 if returned to their country of origin (which will often mean lethal or non-lethal physical harm, ie, violence committed by state or private actors), they **cannot be expected to reduce that risk by attempting to conceal their sexual orientation or gender identity, even temporarily**, just as they cannot be expected to conceal their political opinion or religion.

#### **I. There is a strong consensus in European and other democratic societies supporting asylum claims by LGBTI persons.**

7. In 1981, the Netherlands became the first country in the world to recognise asylum claims by lesbian, gay and bisexual persons.<sup>6</sup> More and more EU countries having recognised such claims, the obligation to protect LGBTI asylum-seekers was incorporated into Directive 2004/83/EC, until it was repealed and replaced (for most EU member states) by Directive 2011/95/EU from 21 December 2013. The reference to sexual orientation in Article 10(1)(d) was included in 2004, while the reference to gender identity was added in 2011 (emphasis added):

"(d) a group shall be considered to form a particular social group [for the purposes of the UN's 1951 Convention and 1967 Protocol Relating to the Status of Refugees] where in particular:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society

Depending on the circumstances in the country of origin, **a particular social group might include a group based on a common characteristic of sexual orientation.** ... Gender related aspects, including **gender identity**, shall be given due consideration ..."

<sup>5</sup> Chamber judgment of 26 June 2014.

<sup>6</sup> *Afdeling rechtspraak van de Raad van State* (Judicial Division of the Council of State) 13 August 1981, *Rechtspraak Vreemdelingenrecht* 1981, 5, *Gids Vreemdelingenrecht (oud)* D12-51.

8. Similar action was taken in the Council of Europe through "Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity", adopted on 31 March 2010.<sup>7</sup> Regarding the right to seek asylum, the Recommendation includes the following measures (emphasis added):

"42. In cases where member states have international obligations in this respect, they should recognise that a well-founded fear of persecution based on **sexual orientation or gender identity may be a valid ground for the granting of refugee status** and asylum under national law.

43. Member states should ensure particularly that asylum seekers are not sent to a country where **their life or freedom [from imprisonment] would be threatened or they face the risk of torture, inhuman or degrading treatment or punishment**, on grounds of sexual orientation or gender identity."

9. "European Parliament resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity":<sup>8</sup>

"4. [c]alls on the [EU's European] Commission, Member States and relevant agencies to work jointly on a comprehensive multiannual policy to protect the fundamental rights of LGBTI people, ... featuring ...

K. Asylum

(i) .. the Commission should include specific issues linked to sexual orientation and gender identity in the implementation and monitoring of asylum legislation, including ... Directive 2011/95/EU ...;

(ii) ... the Commission and Member States should ensure that asylum professionals, including interviewers and interpreters, receive adequate training ... to handle issues relating specifically to LGBTI persons;

(iii) ... the Commission and Member States should ensure that the legal and social situation of LGBTI persons in countries of origin is documented systematically and that such information is made available to asylum decision-makers as part of Country of Origin Information (COI); ..."

10. At least 34 of 47 Council of Europe member states (72%) recognise sexual orientation as a ground for claiming asylum. These include all 28 EU member states: 25 are bound by Directive 2011/95/EU, two (Ireland and the UK) continue to be bound by Directive 2004/83/EC, and one (Denmark) recognises sexual orientation claims as a matter of national law.<sup>9</sup> The other 6 Council of Europe member states are Iceland, Moldova, Norway, Switzerland, Turkey and Ukraine.<sup>10</sup>

<sup>7</sup> See <https://wcd.coe.int/ViewDoc.jsp?id=1606669>.

<sup>8</sup> See <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0062&language=EN&ring=A7-2014-0009>.

<sup>9</sup> See "Fleeing Homophobia: Asylum claims related to sexual orientation and gender identity in Europe" (2011), p. 24, n. 74, <http://www.refworld.org/pdfid/4ebba7852.pdf>.

<sup>10</sup> Council of Europe, *Discrimination on grounds of sexual orientation and gender identity in Europe* (2d ed, 2011), p. 65, [http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011\\_en.pdf](http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf): "Twenty-six member states have explicitly recognised in their national legislation that sexual orientation is included in the notion of 'membership of a particular social group' (Austria, Belgium,

11. Sexual orientation is also recognised as a ground for claiming asylum in democratic societies outside Europe, including the United States,<sup>11</sup> Canada,<sup>12</sup> Australia,<sup>13</sup> New Zealand<sup>14</sup> and South Africa.<sup>15</sup>

## **II. An LGBTI person cannot be expected to conceal their sexual orientation or gender identity in their country of origin to reduce the risk of treatment violating Article 2 or 3.**

12. A common response of national immigration officials to the asylum claim of an LGBTI person is that the claimant can eliminate the risk of treatment violating Article 2 or 3 in their country of origin, if they conceal their sexual orientation or gender identity. In the case of an LGB person, this would mean not only ensuring that their same-sex sexual activity takes place strictly in private, but never referring in public to their being LGB, being generally attracted to persons of the same sex, finding a specific person of the same sex attractive, or being in a relationship of any length with a person of the same sex. It would also mean never engaging in any conduct in public that might suggest that they are LGB, including wearing rainbow or other LGB badges, choosing clothing or hairstyles or cosmetics that do not conform to gender stereotypes, or expressing affection for a person of the same sex in a way that might be acceptable for a different-sex couple but not for two friends. This response is inconsistent with how national immigration officials treat persons facing persecution because of their political opinion or religion, which they would not be expected to conceal in their country of origin.

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Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden). ... There are ... at least seven other member states which ... have had asylum claims in which sexual orientation has been recognised as a ground for persecution (Denmark, Greece, Norway, Switzerland, Turkey, Ukraine and the [UK]) evidenced by decisions of national competent bodies in these countries. In the other 12 member states which are parties to the [UN's] 1951 Convention there is no explicit recognition of persecution on the basis of sexual orientation as a valid ground for asylum claims either in legislation or in actual successful cases filed by LGBT asylum seekers (Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Estonia, Georgia, Liechtenstein, Monaco, Montenegro, the Russian Federation, Serbia and 'the former Yugoslav Republic of Macedonia')." Estonia may be considered the 34th member state because, unlike 11 of the 12 member states just mentioned, or Andorra or San Marino (no information available), its 2005 Act on Granting International Protection to Aliens, <https://www.riigiteataja.ee/en/eli/530102013009/consolide>, must be interpreted in a way that is consistent with Directive 2011/95/EU (an Estonian lawyer has reported that gay men from Pakistan and Uzbekistan have been granted asylum).

<sup>11</sup> See U.S. Citizenship and Immigration Services, "Guidance for Adjudicating ... (LGBTI) Refugee and Asylum Claims" (2011), *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822-23 (Board of Immigration Appeals 1990), *Nabulawala v. Gonzales*, 481 F.3d 1115 (8th Cir. 2007).

<sup>12</sup> *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1023/index.do>: "The first category [an innate or unchangeable characteristic] would embrace individuals fearing persecution on such bases as gender ... and sexual orientation ..."

<sup>13</sup> High Court of Australia (the highest court), *S395/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, <http://www.austlii.edu.au/au/cases/cth/HCA/2003/71.html>.

<sup>14</sup> Refugee Status Appeals Authority, Refugee Appeal No 1312/93 (30 Aug. 1995), <http://www.refworld.org/docid/3ae6b6938.html>; Immigration and Protection Tribunal, *A.M. (Egypt)*, [2014] NZIPT 800656 (24 Nov. 2014), [https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref\\_20141124\\_800656.pdf](https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20141124_800656.pdf); *A.O. (Pakistan)*, [2013] NZIPT 800322 (15 April 2013), [https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref\\_20130415\\_800322.pdf](https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20130415_800322.pdf).

<sup>15</sup> Refugees Act, No. 130 of 1998, s. 1, [http://www.saflii.org/za/legis/consol\\_act/ra199899](http://www.saflii.org/za/legis/consol_act/ra199899): "'social group' includes ... a group of persons of particular gender, sexual orientation ..."

13. This response is also inconsistent with the Court's case law. In *N. v. Sweden* (20 July 2010), the Court noted that: "55. ... Actual or perceived transgressions of the social behavioural code [by women in Afghanistan] include ... sexual orientation ..." In *Alekseyev v. Russia* (21 October 2010), the Court observed with regard to Russia's refusal to permit lesbian and gay Pride events in Moscow: "84. ... There is no ambiguity about the other [46] member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly. ..." Although the Court has yet to apply this observation to the question of an LGBTI person being open about their sexual orientation or gender identity in a territory outside of Europe where the Convention does not apply, other courts and the UNHCR have done so.

14. The first European appellate court to do so was the UKSC in *H.J. (Iran) and H.T. (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31.<sup>16</sup> Lord Rodger (with the express support of 3 of 4 other judges) summarised the UKSC's interpretation of the UN's 1951 Convention and 1967 Protocol as follows (emphasis added): "82. ... [1] the tribunal must first ask itself whether it is satisfied on the evidence that [the applicant] is gay, or ... would be treated as gay by potential persecutors ... [2] If so, the tribunal must then ask itself whether ... gay people who lived openly would be liable to persecution [which will often be treatment violating Article 2 or 3] in the applicant's country of nationality. [3] If so, the tribunal must go on to consider what the ... applicant would do if he were returned to that country. [a] If [he] would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living 'discreetly' [concealing his sexual orientation]. [b] If ... [he] would in fact live discreetly and so avoid persecution, [the tribunal] must go on to ask itself why he would do so. ... [ii] **If ... the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, ... his application should be accepted.** ... To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the [Refugee] Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. ..."

15. Lord Rodger also observed: "76. ... No-one would proceed on the basis that a straight [heterosexual] man or woman could find it reasonably tolerable to conceal his or her sexual identity indefinitely to avoid suffering persecution. Nor ... that a man or woman could find it reasonably tolerable to conceal his or her race [or religion or political opinion] indefinitely ... Such an assumption about gay men and lesbian women is equally unacceptable ..." He described (at para. 77) living "discreetly" as "avoid[ing] any open expression of affection for another man which went beyond what would be acceptable behaviour on the part of a straight man[,] ... be[ing] cautious about the ... the places where he socialised[,] ... constantly ... restrain[ing] himself in an area of life where powerful emotions and physical attraction are involved and a straight man could be spontaneous. ... [H]e would have to think twice before revealing that he was attracted to another man."

16. A decisive factor in the UKSC's rejection of any obligation to conceal in the country of origin was that, had it been applied during World War II, it would have meant (hypothetically) that Anne Frank could have been deported from the UK to the

<sup>16</sup> See [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2009\\_0054\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2009_0054_Judgment.pdf).

Nazi-occupied Netherlands, if hiding in an attic would have protected her from harm (paras. 106-107). Sir John Dyson rejected this possibility: "118. Even if it could be imagined that Anne Frank ... would not objectively have been at risk of being discovered in the attic, she would nevertheless have had a well-founded fear of the threat of serious harm, a fear not eliminated by her decision to conceal her identity as a Jew and live in the attic." It is implicit in the UKSC's reasoning that, under the *H.T. (Cameroon)* test (para. 82), the risk of harm to Anne Frank would have been based on the assumption that she had the right to walk down a street in Amsterdam holding a sign saying "I am Jewish". Similarly, assessment of the applicant's Article 2 and 3 rights should assume that she has the right to walk down a street in Douala, or her home village, wearing a T-shirt saying "Lesbian Pride". Would there be a real risk that such conduct would trigger state or private violence against her?

17. Lord Hope noted the global divide with regard to the human rights of LGBTI persons: "3. The fact is that a huge gulf has opened up in attitudes to and understanding of gay persons between societies [eg, Council of Europe countries vs. Iran and Sub-Saharan Africa] ... It is one of the most demanding social issues of our time. ... [T]he problem [of persecution in other countries] ... seems likely to grow and to remain with us for many years. In the meantime more and more gays and lesbians are likely to have to seek protection here [in the UK and other Council of Europe countries] ... It is crucially important that they are provided with the protection that they are entitled to under the [Refugee] Convention [or the European Convention] ..."

18. It is worth noting the similarity between this application and the facts of *H.T. (Cameroon)*: "4. ... H.T. ... is a citizen of Cameroon. He claimed asylum following his arrest at Gatwick [Airport] on 19 January 2007. He had presented a false passport while in transit to Montreal. He ... is a practising homosexual."

19. In 2012, two years after *H.T. (Cameroon)*, the UNHCR strengthened its 2008 Guidance Note<sup>17</sup> by replacing it with "Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity ..." (the UNHCR Guidelines):<sup>18</sup>

"12. A proper analysis as to whether a LGBTI applicant is a refugee under the 1951 Convention needs to start from the premise that applicants are entitled to live in society as who they are and need not hide that. ... [S]exual orientation and/or gender identity are fundamental aspects of human identity that are either innate or immutable, or that a person should not be required to give up or conceal. While one's sexual orientation and/or gender identity may be revealed by sexual conduct or a sexual act, or by external appearance or dress, it may also be evidenced by a range of other factors ...

19. ... [A] person's orientation or identity ... may be expressed or revealed in many subtle or obvious ways, through appearance, speech, behaviour, dress and mannerisms; or not revealed at all in these ways. While a certain activity expressing or revealing a person's sexual orientation and/or gender identity may sometimes be considered trivial, what is at issue is the [serious] consequences that would follow such behaviour. In other words, an activity associated with sexual orientation may merely reveal or expose the stigmatized identity [eg, a 'Lesbian Pride' T- shirt] ...

<sup>17</sup> "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity" (21 Nov. 2008), paras. 12-13, <http://www.refworld.org/docid/48abd5660.html>.

<sup>18</sup> (23 Oct. 2012), <http://www.unhcr.org/509136ca9.pdf>.

31. That an applicant may be able to avoid persecution by concealing or by being 'discreet' about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. ... [A] person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution. LGBTI people are as much entitled to freedom of expression and association as others.

32. ... [T]he question ... to be considered is what predicament the applicant would face if he or she were returned to the country of origin. This requires a fact-specific examination of what may happen ... and whether this amounts to persecution. The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences. ... The risk of discovery may also not necessarily be confined to their own conduct. There is almost always the possibility of discovery against the person's will, for example, by accident, rumours or growing suspicion [within their family]."

20. On 5 September 2012, the CJEU held in Joined Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, that under the definition of "refugee" in Directive 2004/83/EC, Article 2(c), Ahmadis returned to Pakistan could not be expected to refrain from their religious practices to avoid persecution (emphasis added): "79. ... [W]here it is established that, upon his return to his country of origin, the person ... will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status ... The fact that he could avoid that risk by abstaining from certain religious practices is ... irrelevant. 80. ... Article 2(c) ... must be interpreted as meaning that **the applicant's fear of being persecuted is well-founded if ... upon his return ..., he will engage in religious practices which will expose him to a real risk of persecution.** ... [The competent] authorities cannot reasonably expect the applicant to abstain from those religious practices."

21. On 7 November 2013, the CJEU applied its reasoning in *Y and Z* to the cases of three gay men seeking asylum in the Netherlands: Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v. Minister voor Immigratie en Asiel* (emphasis added): "69. The very fact that Article 10(1)(b) of ... Directive [2004/83/EC] expressly states that the concept of religion also covers participation in formal worship in public or in private does not allow the conclusion that the concept of sexual orientation ... [in] Article 10(1)(d) ... must only apply to acts in the private life of the person concerned and not to acts in his public life. 70. ... [R]equiring 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. 71. **Therefore, an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution.** 75. ... [T]he person ... must be granted refugee status ... where it is established that on return to his country of origin his homosexuality would expose him to a genuine risk of persecution ... **The fact that he could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account** ... 78. ... [F]or the purpose of determining, ... which acts may be regarded as constituting persecution ..., 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 ..."

22. On 2 December 2014, the CJEU provided further guidance regarding LGBTI asylum claims in Joined Cases C-148/13, C-149/13 and C-150/13, *A, B and C v. Staatssecretaris van Veiligheid en Justitie*: "51. ... [S]tatements made by applicants for asylum with respect to their declared sexual orientation may require confirmation. ... 60. As regards, ... questioning as to the knowledge on the part of the applicant ... of organisations for the protection of the rights of homosexuals ..., such questioning suggests, according to the applicant in the main proceedings in case C-150/13, that the authorities base their assessments on stereotyped notions as to the behaviour of homosexuals and not on the basis of the specific situation of each applicant ... 62. ... [T]he assessment of applications ... on the basis solely of stereotyped notions associated with homosexuals ... does not allow th[e] authorities to take account of the individual situation and personal circumstances of the applicant ... 63. Therefore, the inability of the applicant for asylum to answer such questions cannot, in itself, constitute sufficient grounds for concluding that the applicant lacks credibility ... 64. ... [Q]uestions concerning details of the sexual practices of th[e] applicant are contrary to the fundamental rights guaranteed by the [EU] Charter and, in particular, to the right to respect for private and family life as affirmed in Article 7 thereof. 65. In relation, ... to the option ... of allowing ... homosexual acts to be performed, the submission of the applicants to possible 'tests' in order to demonstrate their homosexuality or even the production by those applicants of evidence such as films of their intimate acts, it must be pointed out that, besides the fact that such evidence does not necessarily have probative value, such evidence would of its nature infringe human dignity, the respect of which is guaranteed by Article 1 of the Charter. ... 69. ... [H]aving regard to the sensitive nature of questions relating to a person's ... sexuality, it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset. ... 71. ... [T]o hold that an applicant for asylum is not credible, merely because he did not reveal his sexual orientation on the first occasion that he was given ... would [not comply with Directive 2004/83/EC]."

23. In 2014, the African Commission on Human and Peoples' Rights expressed its serious concern about (emphasis added): "85. The discrimination, stigma and **violation of the right to life and physical** and mental **integrity of individuals [in Cameroon] based on their sexual orientation.**"<sup>19</sup>

### **III. Apart from any risk of violence, the Court should consider a real risk of imprisonment for private, consensual, adult, same-sex sexual activity (as in Cameroon) as a real risk of inhuman or degrading treatment violating Article 3.**

24. In Cameroon, the criminal law prohibits all same-sex sexual activity, whether it is between women or between men: "Penal Code of 1965 and 1967, as amended in 1972. The French text of article 347bis is: '*Est puni d'un emprisonnement de six mois à cinq ans et d'une amende de 20.000 à 200.000 francs toute personne qui a des rapports sexuels avec une personne de son sexe.*'"<sup>20</sup>

25. A March 2013 Human Rights Watch report<sup>21</sup> concluded that: "Cameroon prosecutes people for consensual same-sex conduct more aggressively than almost

<sup>19</sup> See [http://www.achpr.org/files/sessions/54th/conc-obs/3-2008-](http://www.achpr.org/files/sessions/54th/conc-obs/3-2008-2011/concluding_observations_cameroon_eng.pdf)

[2011/concluding\\_observations\\_cameroon\\_eng.pdf](http://www.achpr.org/files/sessions/54th/conc-obs/3-2008-2011/concluding_observations_cameroon_eng.pdf) (7-14 March 2014 session).

<sup>20</sup> See [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2015.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf), p. 51.

<sup>21</sup> "Human Rights Violations in the Enforcement of Cameroon's Anti-Homosexuality Law", p. 1, [https://www.hrw.org/sites/default/files/reports/cameroon0313\\_ForUpload.pdf](https://www.hrw.org/sites/default/files/reports/cameroon0313_ForUpload.pdf) ;

any country in the world. Unlike many of the 76 countries that currently have such laws on the books, but which rarely enforce them, Cameroonian prosecutors have brought charges against at least 28 people for homosexual conduct over the last three years. In most cases, the accused are convicted, often on the basis of little or no evidence. Investigators frequently rely on torture or ill-treatment to extract confessions." A February 2015 report by FIDH and *Organisation Mondiale Contre la Torture* (OMCT) found that, "[a]t the time of the mission, there were at least 20 persons who apparently were imprisoned on the basis of article 347 bis".<sup>22</sup> The fact that same-sex sexual activity occurs in private does not protect an LGBTI person, because their neighbours or family members might denounce them to the police, who may not require any witnesses to the sexual activity.

26. It has been reported that at least one court in Cameroon has imposed prison sentences of nine months for private consensual sexual activity between adult women.<sup>23</sup> In another case, a lesbian woman fled to Spain, fearing arrest and prosecution by the police after "[h]er photograph was published in the local media under a headline that read: 'Wanted: the leader of a group of lesbians.'"<sup>24</sup>

27. On 7 November 2013, the CJEU ruled in Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v. Minister voor Immigratie en Asiel* (emphasis added) that: "55. ... the mere existence of legislation criminalising homosexual acts<sup>25</sup> cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of ... Directive [2004/83/EC]. 56. However, **the term of imprisonment which accompanies a legislative provision which ... punishes homosexual acts is capable, in itself of constituting an act of persecution** within the meaning of Article 9(1) ..., **provided that it is actually applied in the country of origin** ... 57. Such a sanction infringes Article 8 ECHR, to which Article 7 of the [EU] Charter corresponds, and constitutes punishment which is disproportionate or discriminatory within the meaning of Article 9(2)(c) of the Directive. 59. ... [I]t is, in particular, for [the national] authorities to determine whether, in the applicant's country of origin, **the term of imprisonment provided for by such legislation is applied in practice.**"

28. The third-party interveners respectfully urge the Court to consider (at the very least) a real risk of imprisonment for private, consensual, adult, same-sex sexual activity (in countries such as Cameroon) as a real risk of inhuman or degrading treatment violating Article 3 (or as a real risk of a flagrant violation of the right to

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<http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/MediaBriefingCameroonLGBT.doc> (16 Nov. 2012): "The UN human rights office is deeply concerned by reports from Cameroon of the ... arrest and imprisonment of individuals on suspicion of being lesbian or gay."

<sup>22</sup> "Cameroon: Homophobia and Violence against Defenders of the Rights of LGBTI Persons", p.14, [https://www.fidh.org/IMG/pdf/report\\_cameroon\\_lgbti\\_eng\\_final.pdf](https://www.fidh.org/IMG/pdf/report_cameroon_lgbti_eng_final.pdf).

<sup>23</sup> See <http://76crimes.com/2013/06/21/cameroon-two-lesbians-sentenced-to-nine-months>.

<sup>24</sup> See [http://elpais.com/elpais/2015/04/15/inenglish/1429106073\\_070293.html](http://elpais.com/elpais/2015/04/15/inenglish/1429106073_070293.html).

<sup>25</sup> Italy's *Corte Suprema di Cassazione* went beyond the CJEU, by holding in *Sentenza* No. 15981/12 (20 Sept. 2012, [http://www.reteford.it/files/2012\\_Cass\\_15981-asilo.pdf](http://www.reteford.it/files/2012_Cass_15981-asilo.pdf)) that, because of Article 319 of the Senegal Penal Code and its maximum sentence of five years in prison (emphasis added): "5. ... *le persone di orientamento omosessuale sono costrette a violare la legge penale del Senegal e a esporsi a gravi sanzioni per poter vivere liberamente la propria sessualità. Ciò costituisce una grave ingerenza nella vita privata dei cittadini senegalesi omosessuali che compromette grandemente la loro libertà personale. Tale violazione di un diritto fondamentale, sancito dalla nostra Costituzione, dalla C.E.D.U. e dalla Carta dei diritti fondamentali dell'Unione Europea, ... si riflette, automaticamente, sulla condizione individuale delle persone omosessuali ponendole in una situazione oggettiva di persecuzione tale da giustificare la concessione della protezione richiesta ...*"

respect for private life in Article 8), which therefore precludes the deportation of an LGBTI person by a Council of Europe member state to their country of origin.

## Conclusion

29. The CJEU, the UNHRC and the UKSC all agree that an LGBTI applicant for asylum has the right to be open in their country of origin about their sexual orientation or gender identity, and cannot be expected to actively conceal, or remain silent about, these important aspects of their life. Under the UKSC's *H.T. (Cameroon)* test, national authorities must assess the risk of physical harm if the applicant is open about their sexual orientation in their country of origin, not the risk if fear of physical harm coerces the applicant into concealing their sexual orientation.

30. The third-party interveners submit that the same considerations apply under the Convention. In determining whether an LGBTI asylum-seeker faces a real risk of treatment violating Article 2 or 3 in their country of origin, the asylum-seeker cannot be expected to reduce that risk by attempting to conceal their sexual orientation or gender identity, even temporarily, just as they cannot be expected to conceal their political opinion or religion. The third-party interveners respectfully urge the Court to adopt the reasoning of Judge Power-Forde in her dissenting opinion in *M.E. v. Sweden* (Chamber judgment of 26 June 2014), in which she relies on the UNHCR Guidelines and the CJEU and UKSC judgments discussed above:

“The fact that the applicant could avoid the risk of persecution in Libya by exercising greater restraint and reserve than a heterosexual in expressing his sexual orientation is not a factor that ought to be taken into account. ...

The majority’s conclusion ... does not ‘fit’ the current state of International and European law on this important question of fundamental human rights. ...

The reasoning is flawed and unconvincing. ... [T]he [majority] introduces a new test of ‘duration’ that is not to be found elsewhere in comparative European law. ... An applicant cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution—period ... What counts, for the CJEU, is the fact of having to exercise greater restraint and reserve than would be required of a heterosexual in the expression of sexual orientation—and not the length of time for which the discriminatory restraint and reserve would have to be endured. ...

... There is an [implicit] assumption ... that sexual identity is, primarily, a matter of sexual conduct which – if not publicly displayed or discussed by the applicant – would eliminate any risk of harm ... Sexual orientation is ... something far more fundamental than sexual conduct and involves ‘a most intimate aspect of private life’ ... It is inherent to one’s very identity and it may be expressed in a myriad of ways. The practical consequences for this applicant of the requirement that he be ‘discreet’ when returned to Libya are nowhere considered in the judgment. ... [I]f a gay man were to live discreetly, he would, in practice, have to avoid any open expression of his sexual orientation. ... [H]e would have to think twice before revealing that he was attracted and committed to another man in a foreign jurisdiction.

... [E]ven if the applicant succeeds in hiding his sexual orientation after expulsion to Libya, the risk of discovery of the truth is not, necessarily, a matter determined entirely by his own conduct. ...

... Having to hide a core aspect of personal identity cannot be reduced to a tolerable bother; it is an affront to human dignity—an assault upon personal authenticity. Sexual orientation is fundamental to an individual’s identity and conscience and no one should be forced to renounce it—even for a while.”