

S.A.C. v. the United Kingdom

Application no. 31428/18

**WRITTEN SUBMISSIONS ON BEHALF OF
ILGA-EUROPE (THE EUROPEAN REGION OF THE INTERNATIONAL
LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION),
THE INTERNATIONAL COMMISSION OF JURISTS (ICJ) AND THE UK
LESBIAN AND GAY IMMIGRATION GROUP (UKLGIG)**

INTERVENERS

pursuant to the Deputy Section Registrar's notification of 24 January 2019

28 February 2019

Introduction

1. In interpreting the scope and content of the Contracting Parties' obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: "the Convention" or ECHR), this Court's case-law has consistently considered that Convention rights are not applied in a vacuum,¹ but fall to be interpreted in the light of and consistently with other applicable international law standards and obligations,² including under treaty and customary international law.³ The interveners also recall the role of the UN High Commissioner for Refugees⁴ (UNHCR) in the supervision of the application of the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol.⁵ In the exercise of its supervisory mandate, in 2012 UNHCR published a set of Guidelines on claims to refugee status based on sexual orientation and/or gender identity under the Refugee Convention.⁶ Given UNHCR's role as the guardian of the Refugee Convention, the interveners submit that any applicable ECHR provisions should be interpreted in light of relevant UNHCR guidance, and that, in the context of this Court's determination of the present case, the UNHCR SOGI Guidelines are highly pertinent to the interpretation of the obligations of the Contracting Parties under the Convention. Bearing in mind the relevance of the Refugee Convention, as interpreted by a number of domestic courts, to the determination of the scope and content of *non-refoulement* obligations under Article 3 of the Convention, the interveners' submissions in the present third-party intervention focus on: i) the risk of persecution based on same-sex sexual orientation in Bangladesh; ii) how criminalization of consensual same-sex sexual conduct gives rise to a real risk of Article 3 prohibited treatment, thus triggering *non-refoulement* obligations under the Convention; and iii) how enforced concealment of one's same-sex sexual orientation constitutes persecution under refugee law and is incompatible with the Convention, in particular, Article 3.

i) The risk of persecution based on same-sex sexual orientation in Bangladesh

2. The interveners draw this Court's attention to a number of recent UN Treaty Bodies' decisions that have dealt with the real risk of torture and persecution faced by lesbian, gay, bisexual and transgender (LGBT) individuals on account of their sexual orientation, gender identity and/or gender expression.⁷
3. In its unanimous decision of 17 November 2016 in the case of *M.K.H. v. Denmark*,⁸ the UN Human Rights Committee observed as follows: "[t]he Committee also notes the State party's assessment that the

¹ *Öcalan v. Turkey* [GC], no. 46221/99, judgment, 12 May 2005, § 163.

² *Demir and Baykara v. Turkey* [GC], no. 34503/97, judgment, 12 November 2008, § 67; *Al-Adsani v. the UK* [GC], no. 35763/97, judgment, 21 November 2001, § 55.

³ *Al-Adsani* § 55; *Waite and Kennedy v Germany* [GC], no. 26083/94, judgment, 18 February 1999; *Taskin v Turkey*, no. 46117/99, 10 November 2004.

⁴ UNHCR is mandated by the UN General Assembly to provide international protection to refugees and to supervise the application of treaties relating to refugees, pursuant to its 1950 Statute. UNGA, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), Annex, § 8(a). Further, UNHCR's supervisory responsibility is also reflected in the preamble to and in Article 35 of the Refugee Convention and Article II of its 1967 Protocol.

⁵ The 1951 Convention Relating to the Status of Refugees, 189 United Nations Treaty Series 137, entered into force 22 April 1954 (hereafter: the Refugee Convention), as amended by the Protocol Relating to the Status of Refugees, 606 United Nations Treaty Series 267, entered into force 4 October 1967 (hereafter: 1967 Protocol). Article 1A(2) of the Refugee Convention defines a refugee for the purposes of the instrument as someone, who, among other things, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, s outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

⁶ The 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](#), 23 October 2012, HCR/GIP/12/01, (hereafter: the UNHCR SOGI Guidelines).

⁷ In addition, in its recent Concluding observations on the initial report of Bangladesh, the Human Rights Committee expressed concern at the "criminalization under section 377 of the Penal Code of consensual sexual acts between same-sex couples, which are termed "unnatural behaviour", stigmatization, harassment and violence against lesbian, gay, bisexual and transgender persons", and recommended that the State party should "decriminalize consensual sexual acts between same-sex couples, provide protection to lesbian, gay, bisexual and transgender persons from violence and harassment by ensuring that all cases are promptly investigated and that perpetrators are prosecuted and punished with appropriate sanctions", [CCPR/C/BGD/CO/1](#), 27 April 2017, paras 11(e) and 12(e), respectively. The Committee on Economic, Social and Cultural Rights has also expressed concern at Bangladesh's criminalization of same-sex relations between consenting adults, and has recommended "that the State party decriminalize same-sex relations between consenting adults and take the measures necessary to raise public awareness regarding, and combat discrimination based on, sexual orientation and gender identity", Concluding observations on the initial report of Bangladesh, [E/C.12/BGD/CO/1](#), 18 April 2018, paras 23 and 24, respectively.

information provided by the author did not enable it to conclude that, even if he were homosexual, he would be at risk of persecution upon his return to Bangladesh; that section 337 of Penal Code 1860 which criminalizes homosexual acts is not applied in practice; and that the situation of homosexuals has improved considerably in recent years..."⁹ In particular, "the information provided by the author, according to which homosexuality is stigmatized in Bangladesh and remains criminalized by section 377 of the Criminal Code, which in itself constitutes an obstacle to the investigation and sanction of acts of persecution against lesbian, gay, bisexual and transgender persons. In addition, the Committee notes that the author is Muslim, and that at the date of the present decision, such people in Bangladesh are frequently the victims of threats of violence, particularly after homophobic public comments by Islamic leaders." In view of the above, the Committee held that M.K.H's "deportation to Bangladesh would amount to a violation of article 7 [enshrining the prohibition on torture or other ill-treatment] of the Covenant", because the State party had failed to adequately consider his account, evidence in support of it, and "the available background information about the risks faced by lesbian, gay, bisexual and transgender people in Bangladesh".¹⁰

4. In its unanimous decision in the case of *M.I. v. Sweden* of 26 September 2013,¹¹ the Human Rights Committee took note of the State party's arguments that, "notwithstanding the Bangladesh law criminalizing homosexual acts and concerns about the human rights situation regarding LGBT individuals, the law is not applied in practice."¹² However, the Committee went on to observe that "section 377 of the Criminal Code of Bangladesh forbids homosexual acts; and [...] homosexuals are stigmatized in Bangladesh society. The Committee considers that the existence of such a law **in itself** fosters the stigmatization of LGTB individuals and constitutes an obstacle to the investigation and sanction of acts of persecution against these persons"¹³ (**emphasis added**). The Committee noted, among other things, "the background of the situation faced by persons belonging to sexual minorities [in Bangladesh], as reflected in reports provided by the parties",¹⁴ and against that background went on to rule that "the author's deportation to Bangladesh would constitute a violation of article 7 of the Covenant."¹⁵
5. In its unanimous decision in the case of *Uttam Mondal v. Sweden* of 7 July 2011,¹⁶ the UN Committee against Torture observed that, "the State party acknowledged that homosexual acts are illegal under the Penal Code and can entail imprisonment for life in Bangladesh". The Committee thus "note[d] that the State party's argument that Bangladeshi authorities are not actively persecuting homosexuals does not rule out that such prosecution can occur."¹⁷ In light of "the risk of persecution on the basis of [the author's] homosexuality",¹⁸ among other things, the Committee went on to hold that his expulsion to Bangladesh "would constitute a violation of the State party's obligations under article 3 [enshrining the *non-refoulement* principle] of the Convention."¹⁹
6. These decisions are consistent with an older decision of the High Court of Australia, *S395/Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, discussed and analyzed in detail by the United Kingdom Supreme Court in *HJ (Iran) and HT (Cameroon) v SSHD* [2010] UKSC 31. As the Supreme Court recorded, the Australian Tribunals had found that "to attempt to live openly as a homosexual in Bangladesh 'would mean to face problems ranging from being disowned by one's family and shunned by friends and neighbours to more serious forms of harm, for example the possibility of being bashed by the police.'" The Tribunals had, nonetheless, rejected S395's asylum claim on the basis that he and his partner could avoid this persecutory harm by concealing the fact that they were gay men. The High Court rejected that argument.
7. There is thus a consistent approach in the case-law relating to Bangladesh as a country where imputation, suspicion, discovery or identification of someone's sexual orientation or identity as LGBT is likely to give rise to a real risk of serious harm. This harm may arise out of the acts of non-State agents

⁸ *M.K.H. v. Denmark*, Human Rights Committee, CCPR/C/117/D/2462/2014, 17 November 2016.

⁹ *M.K.H. v. Denmark*, para. 8.4.

¹⁰ *M.K.H. v. Denmark*, para. 8.8.

¹¹ *M.I. v. Sweden*, Human Rights Committee, CCPR/C/108/D/2149/2012, 26 September 2013.

¹² *M.I. v. Sweden*, para. 7.3.

¹³ *M.I. v. Sweden*, para. 7.5.

¹⁴ *M.I. v. Sweden*, para. 7.5.

¹⁵ *M.I. v. Sweden*, para. 7.5.

¹⁶ *Uttam Mondal v. Sweden*, Committee against Torture, 7 July 2011, available at.

¹⁷ *Uttam Mondal v. Sweden*, para. 7.3.

¹⁸ *Uttam Mondal v. Sweden*, para. 7.7.

¹⁹ *Uttam Mondal v. Sweden*, para. 7.7.

against whom the State is unwilling to offer protection, or out of the acts of the State itself. The recent decisions of the Treaty Bodies, in particular, attest to the fact that the mere existence of laws that criminalize consensual same-sex sexual conduct enables, encourages and contributes to the persecutory environment that exists in Bangladesh. Criminalization of homosexuality also removes any realistic prospect that State agents will offer protection to victims of violence on grounds of sexual orientation or gender identity, and exposes LGBT individuals to real risks of persecutory harm.

8. The interveners also draw this Court's attention to the recent Universal Periodic Review of Bangladesh conducted by the UN Human Rights Council.²⁰ In response to concerns raised by a number of States, UN agencies and other stakeholders concerning the discrimination, harassment and violence to which LGBT individuals are subjected in the country, and the specific recommendations made about the repeal of Section 377 of the Bangladeshi Penal Code, given the resulting stigmatization, harassment and violence against LGBT people, the Government responded: "The issue of LGBTI rights is a religious, social, cultural, moral, ethical issue for Bangladesh. While dealing with this issue, the Government takes into account the views, aspirations, sentiments and religious belief of the majority of its people. The government is committed to ensure fulfilling the rights of all citizens of the country. We do not see it necessary to create new set of rights, which is not universally accepted as a right."²¹ This statement attests to the full breadth and scope of discrimination and hostility officially espoused by the authorities in Bangladesh against LGBT individuals, and the clear lack of commitment by the Government to address these issues.

ii) Criminalization of consensual same-sex sexual conduct

9. Laws criminalizing same-sex conduct are discriminatory and incompatible with general international human rights law and standards.²² Generally, issues arising as a result of the criminalization of sexual orientation have been considered under the ambit of "private life", rather than under the rubric of non-discrimination, integrity and/or dignity. Historically, this Court, for example, has consistently found that laws criminalizing consensual same-sex activity amount to an unjustifiable interference with an individual's right to private life, including in circumstances where in practice the law had not been applied.²³ However, in *Smith and Grady v. the UK*, which concerned the investigation and administrative discharge of armed forces personnel as a result of the implementation of an absolute policy against the participation of homosexuals in the armed forces, this Court observed that it "would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3".²⁴ More recently in *Identoba and Others v. Georgia*, this Court reiterated that "discriminatory treatment as such can in principle amount to degrading treatment within the meaning of Article 3 where it attains a level of severity such as to constitute an affront to human dignity. More specifically, treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority may, in principle, fall within the scope of Article 3".²⁵
10. In the wake of this Court's seminal ruling in *Dudgeon v. the United Kingdom* – recognizing the harm caused by the mere existence of laws criminalizing consensual same-sex sexual conduct – UN human rights Treaty Bodies and independent human rights experts have repeatedly urged States to repeal laws criminalizing homosexuality.²⁶ Further, they have called attention to the ways in which the criminalization of consensual same-sex sexual conduct legitimizes prejudice and exposes people to hate crimes and police abuse, and have recognized that it can lead to torture and other ill-treatment.²⁷ Laws and

²⁰ Universal Periodic Review - Bangladesh, Third Cycle, May 2018.

²¹ Additional Remarks by Bangladesh on Recommendations Received from State parties in the 3rd Cycle of UPR held in May 2018, A/HRC/39/12/Add.1, para. 3, p. 3.

²² E.g., the UN Working Group on Arbitrary Detention has concluded that detaining someone under laws criminalizing consensual same-sex sexual activity in private breaches international law, Working Group on Arbitrary Detention Opinion 22/2006 (Cameroon), A/HRC/4/40/Add.1, adopted (2007) pp. 91-94.

²³ *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *Norris v. Ireland*, 26 October 1988, Series A no. 142; and *Modinos v. Cyprus*, 22 April 1993, Series A no. 259.

²⁴ *Smith and Grady*, nos. 33985/96 33986/96, judgment, 27 September 1999, § 121.

²⁵ *Identoba and Others v. Georgia*, (no. 73235/12), judgment, 12 May 2015, § 65.

²⁶ E.g., Human Rights Committee, *Toonen v. Australia* (Communication 488/1992, 4 April 1994), UN Doc. CCPR/C/50/D/488/1992. In addition, see *supra* at footnote 7.

²⁷ E.g., see *Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law*, Office of the High Commissioner for Human Rights, HR/PUB/12/06, 2012, p. 33; and the Report of the UN Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc.: A/56/156, 3 July 2001, § 20 and, generally, §§ 18-25.

regulations that directly or indirectly criminalize consensual same-sex sexual orientation or conduct provide State actors with the means to perpetrate human rights violations, and enable non-State actors to persecute individuals on account of their real or imputed sexual orientation with impunity.²⁸ As a result of criminal sanctions, people may be threatened with arrest and detention based on their real or imputed sexual orientation and may be subjected to baseless and degrading physical examinations, purportedly to “prove” their same-sex sexual orientation.²⁹ This Court has also found that pernicious legal, administrative, policy and/or judicial measures that were *in themselves* discriminatory – whether or not currently enforced – or that were implemented in a discriminatory manner, violated the ECHR and caused their victims to experience fear and distress.³⁰ This approach recognizes the potential for persecution arising from the mere existence of these laws, even in the absence of a recent record of prosecutions and imprisonments, whether arising from misfeasance of State actors outside due process or – frequently – from the abuses of non-State actors, whose own discrimination and discriminatory violence are legitimized by the existence of discriminatory penal sanctions, and against whom the State does not offer protection. In the case of *Dudgeon v. the UK*, the European Commission in fact noted the possibility of such laws making it more likely that police and private actors would commit acts of extortion and other crimes as well as engage in discriminatory treatment,³¹ instead of, or at times in addition to, prosecution.

11. Thus, the mere existence of laws criminalizing consensual same-sex sexual conduct, including in countries where they have not been recently “enforced”,³² can give rise to acts of persecution, without necessarily leading to recorded court cases and convictions; it also entails a real risk that the said laws may be enforced in the future.³³ Furthermore, as the 2015 UN Office of the High Commissioner for Human Rights SOGI Report notes: “[h]uman rights mechanisms continue to emphasize links between criminalization and homophobic and transphobic hate crimes, police abuse, torture, family and community violence and

²⁸ As the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has noted: “sanctioned punishment by States reinforces existing prejudices, and legitimizes community violence and police brutality directed at affected individuals,” [A/HRC/14/20](#), § 20. The UN Special Rapporteur on extrajudicial executions noted that criminalization increases social stigmatization and made people “more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity”, [A/57/138](#), § 37.

²⁹ The use of non-consensual anal examinations, often used to determine criminal liability against men suspected of homosexuality, contravenes the prohibition of torture and other ill-treatment. UN human rights bodies have long held that such acts are in violation of the prohibition of torture and other ill-treatment. See [A/HRC/16/47/Add.1](#), opinion No. 25/2009 (Egypt), §§ 24, 28-29; Concluding Observations of the Committee against Torture on Egypt ([CAT/C/CR/29/4](#)), §§ 5(e) and 6(k). See also [A/56/156](#), § 24; [A/HRC/4/33/Add.1](#), p. 316, § 317; [A/HRC/10/44/Add.4](#), pp. 86-87, § 61; and [A/HRC/16/52/Add.1](#), p. 276, § 131.

³⁰ See, *Dudgeon v. the United Kingdom*, no. 7525/76, judgment, 22 October 1981, §§ 40 to 46; *Norris v. Ireland*, no. 10581/83, judgment, 26 October 1988, §§ 38 and 46 to 47; *Modinos v. Cyprus*, no. 15070/89, judgment, 22 April 1993, §§ 23, 24 and 26; and *A.D.T. v. the UK*, no. 35765/97, judgment, 31 July 2000, §§ 26 and 39. See also, *Marangos v. Cyprus*, no. 31106/96, Commission’s report of 3 December 1997, unpublished. See also *Bayev and Others v. Russia*, where this Court recently reiterated that it “has consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority”, *Bayev and Others v. Russia*, nos. [67667/09](#) and 2 others, judgment, 20 June 2017, § 68.

³¹ See the European Commission’s report in *Dudgeon*, cited in the Court’s judgment in the same case, where, in arriving at its conclusion that it saw no reasons to doubt the truthfulness of the applicant’s allegations, the Commission had noted that, “the existence of the law will give rise to a degree of fear or restraint on the part of male homosexuals [...] the existence of the law prohibiting consensual and private homosexual acts [...] provides opportunities for blackmail [...] and may put a strain upon young men [...] who fear prosecution for their homosexual activities”. They reached this conclusion despite their finding that the number of prosecutions in such cases [...] was so small “that the law has in effect ceased to operate”. It appears inevitable to the Commission that the existence of the laws in question will have similar effects. The applicant alleges in his affidavits that they have such effects on him”, Commission’s report, § 94.

³² It is this Court’s settled case-law that the criminalization of consensual same-sex conduct per se – even in the absence of an actual record of enforcement through an active prosecution policy – violates the Convention. See, in particular, *Modinos v. Cyprus* and *Dudgeon v. the United Kingdom*. As long as statutes are not repealed, there continues to be a real risk of their enforcement and therefore a real risk that individuals would face criminal investigations, charges, trials, convictions and penalties such as imprisonment, because of their real or perceived sexual orientation or gender identity. See, also, the [UNHCR SOGI Guidelines](#), §§ 27, 29.

³³ In *Dudgeon v. the United Kingdom*, this Court observed that, notwithstanding the then apparent paucity or even absence of a record of prosecutions in these types of cases, it could not be said that the legislation in question was a dead letter, because there was no stated policy on the part of the authorities not to enforce the law (para. 41 of the judgment). In *Modinos v. Cyprus*, this Court reiterated this point by noting that, notwithstanding the fact that the Attorney-General had followed a consistent policy of not bringing criminal proceedings in respect of private homosexual conduct considering that the law in question was a dead letter, the said policy provided “no guarantee that action will not be taken by a future Attorney-General to enforce the law, particularly when regard is had to statements by Government ministers which appear to suggest that the relevant provisions of the Criminal Code are still in force”, *Modinos*, judgment of the Court, § 23.

stigmatization, as well as the constraints that criminalization puts on the work of human rights defenders.”³⁴

12. Under refugee law, prosecution may amount to persecution if the criminal law is enforced or punishment meted out in a disproportionate or discriminatory manner.³⁵ Where people risk capital punishment, detention or corporal punishment,³⁶ such as flogging, the persecutory character is “particularly evident.”³⁷
13. Certain asylum Courts, including to some extent, the CJEU,³⁸ have held that the mere existence of a law criminalizing same-sex relations, without “enforcement” or other acts, does not, *per se*, amount to persecution. However, the interveners submit that in its judgment in *X, Y and Z* the CJEU did not conclude that only actual imprisonment on the basis of discriminatory laws constitutes persecution.³⁹ Rather, the Court held that: a) imprisonment as a result of laws criminalizing consensual same-sex relations is clearly a persecutory act in view of its discriminatory and disproportionate nature; and b) if homosexual acts are punishable by law, the authorities must carry out an examination of “all the relevant facts concerning that country of origin”. Thus, the Court does not rule out that other factors may be equally relevant. In applying the CJEU judgment the Dutch Council of State confirmed this view. It found that, “the examination should not only concern the question whether application of these provisions actually leads to the imposition of sentences of imprisonment or other penalties, but also to possible preliminary criminal investigations and the consequences of penalization for the social position of homosexuals, such as the impossibility for homosexuals to request protection from the authorities.”⁴⁰ Other judgments from superior courts in Austria,⁴¹ France,⁴² and Italy,⁴³ have found in favour of

³⁴ The 2015 OHCHR SOGI Report, UN Doc. [A/HRC/29/23](#), § 45, which also refers to the Special Rapporteur on freedom of religion or belief noting that these laws may give a pretext to vigilante groups and other perpetrators of hatred for intimidating people and committing acts of violence.

³⁵ Therefore, if an LGBT person is more likely to be prosecuted for offences connected with ‘morality’, for example, this may be sufficient to amount to persecution. Similarly, if prosecutions are undertaken without adhering to basic standards of procedural fairness or due process in order to achieve a prohibited aim (discrimination against or suppression of homosexuality, for example) the risk of conviction and any subsequent penalty may constitute serious harm. See, Hathaway and Foster, *The Law of Refugee Status*, Second Edition, 2014, Cambridge University Press, Chapter 3, 3.4.2 Prosecution, pp. 245-246; and also *Khan v Secretary of State for the Home Department* [2003] EWCA Civ 530.

³⁶ The CJEU has accepted that the application of a term of imprisonment upon conviction for offences criminalizing consensual homosexual acts would also amount to persecution, see *X, Y and Z*, where the CJEU held that: “the criminalisation of homosexual acts alone does not, in itself, constitute persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution”, § 61.

³⁷ The [UNHCR SOGI Guidelines](#), § 26.

³⁸ While this Court should take note of certain aspects of the CJEU’s judgment in *X, Y and Z*, the Luxembourg Court’s finding on criminalization *per se* is not germane to this Court’s determination of the present case, since it pertained exclusively to the CJEU’s construction of one of the limbs of Article 9 of the 2004 Qualification Directive.

³⁹ In *X, Y and Z*, the CJEU held: “[...] the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive”, *X, Y and Z*, § 55. However, the concept of persecution calls for an analysis of the seriousness/severity of the violation of the rights that it entails. Erroneously in the interveners’ view, instead of focusing on whether criminalization of consensual same-sex conduct constituted persecution, the CJEU’s focus of enquiry was on whether it could constitute a lawful measure of derogation from certain rights under the ECHR, such as the right to private and family life. It is to be noted that, in any event, any such derogation would be hardly likely to be lawful under the ECHR. In addition, the CJEU ruling, ultimately, was directed to the construction of one of the limbs of Article 9 of the 2004 Qualification Directive. Had the CJEU reformulated the question to look beyond Article 9(2)(c), it could have addressed persecution stemming from the existence of laws criminalizing consensual sexual conduct or same-sex sexual orientation by reference to Article 9(2)(b) of the Qualification Directive, i.e.: “legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner” whether or not there is a recent record of enforcement in the sense of imprisonment resulting from the application of the relevant provisions. This approach recognizes the potential for persecution arising from the mere existence of these laws, even in the absence of a recent record of prosecutions and imprisonments, whether arising from misfeasance of State actors outside due process or of non-State actors against whom the State does not offer effective protection. See also ‘Criminalization of same-sex relations’, in [‘Refugee Status Claims Based on Sexual Orientation and Gender Identity: A Practitioners’ Guide’](#), International Commission of Jurists, Geneva, February 2016, pp. 137-156.

⁴⁰ Afdeling bestuursrechtspraak van de Raad van State 18 Dec. 2013, ECLI:NL:RVS: 2013:2422, § 8.2.

⁴¹ In respect of the Gambia, for example, the Federal Administrative Court, [Number W159 2112334-1](#), 9 June 2017, “Homosexual acts are subject to serious penalties in the Gambia. Whilst there are no reports of regular convictions it can not be assumed that the penalties are not applied at all. On the other hand, the extremely homophobic climate amongst the population must be taken into account and the fact that even without formal convictions, deaths, arbitrary

homosexual applicants based on, *inter alia*, the risk to the individuals concerned arising from the criminalization of consensual same-sex relations and of becoming victims of homophobic crimes, including at the hands of family members, from which there is no effective State protection.

14. The UNHCR's view is that laws that criminalize SOGI are incompatible with international human rights standards and are discriminatory. "Even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution. Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors.⁴⁴ They can promote political rhetoric that can expose LGB individuals to risks of persecutory harm. They can also hinder LGB persons from seeking and obtaining State protection."⁴⁵
15. In light of the above, the interveners submit that the existence of laws criminalizing consensual same-sex sexual conduct discloses dispositive evidence of a real risk of Article 3 prohibited treatment,⁴⁶ thus triggering the prohibition on exposing the individual concerned to the same under that provision of the Convention.
16. In the alternative, the Court should consider that laws criminalizing consensual same-sex sexual conduct raise a serious doubt as to whether LGBT individuals who engage in or are suspected of engaging in such conduct would face treatment, including criminalization solely on the basis of sexual orientation or gender identity, contrary to their fundamental rights. In those circumstances (i) there is a strong presumption that such laws engender a real risk of Article 3 prohibited treatment, and, therefore, (ii) the burden lies on the State to rebut that presumption by dispelling the doubt, thus proving conclusively the absence of such a risk.⁴⁷

iii) Enforced concealment of one's same-sex sexual orientation

17. In the context of refugee claims based on sexual orientation, some courts, refugee-status determination authorities and academics have referred to concealment of one's sexual orientation as "discretion" or "restraint".⁴⁸ As the reality is that people will typically be required to "hide", "deny" or "restrain" their

killings and attacks by private individuals are to be expected... In summary if the applicant was returned to the Gambia he is at a high risk of interference with his person due to his belonging to a particular social group of homosexuals.", original judgment.

⁴² Another case concerning the Gambia, the Marseille Administrative Court of Appeal, Number 17MA00296, 22 June 2017,.

⁴³ Venice Court, 16 June 2016, Number 7823/2015.

⁴⁴ In *Peiris v Canada*, the claimant, a homosexual man from Sri Lanka was forced out of his home after coming out to his family. He founded an association that aimed to educate others about homosexuality. The group was the target of an attack where members were beaten and threatened. After reporting the incident, the police threatened to imprison the claimant and the other members of the association under Sri Lankan anti-sodomy laws. The adjudicator found that the claimant's family rejection and police harassment due to his "lifestyle choice" did not amount to persecution. However, the Federal Court of Canada found that there was a direct link between the police persecution and the claimant's sexual orientation. Even though the State law banning sodomy was rarely enforced, evidence showed that authorities often used it to blackmail homosexuals. *Peiris v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1251, 134 ACWS (3d) 137.

⁴⁵ The UNHCR SOGI Guidelines, § 27; "Even where consensual same-sex relations are not criminalized by specific provisions, laws of general application, for example, public morality or public order laws (loitering, for example) may be selectively applied and enforced against LGBTI individuals in a discriminatory manner, making life intolerable for the claimant, and thus amounting to persecution", the UNHCR SOGI Guidelines, § 29 (footnotes omitted); see RRT Case No. 1102877, [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, §§ 89, 96; and RRT Case No. 071862642, [2008] RRTA 40, Australia: Refugee Review Tribunal, 19 February 2008.

⁴⁶ Cf., *Ülke v. Turkey*, no. 39437/98, judgment, 24 January 2006. *Mutatis mutandis*, disclosing evidence satisfying the objective limb of the "well-founded fear" test in Article 1A(2) of the Refugee Convention.

⁴⁷ In *F.G. v. Sweden*, the Grand Chamber of this Court reiterated that where the Contract Party is made aware of facts that could expose an applicant to an individual risk of ill-treatment, regardless of whether the applicant chooses to rely on such facts, it is obliged to assess this risk *ex proprio motu*. It also affirmed that if a Contracting State is made aware of facts that could plausibly expose the asylum seeker to a risk of ill-treatment in breach of Arts. 2 and 3 of the Convention, considering the absolute nature of the rights therein protected, the State authorities have the obligation to carry out an *ex nunc* assessment of that risk of their own motion using all means at their disposal to produce necessary evidence in support of the application.

⁴⁸ See, e.g., *From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom*, Jenni Millbank, January 19, 2009, *International Journal of Human Rights*, Vol. 13,

identity in the course of being “discreet”, “discretion” is an inappropriate and euphemistic misnomer for what is in fact “concealment” or “deceit”. Whatever the term employed, concealing one’s sexual orientation requires the suppression of a fundamental aspect of one’s identity. The free expression of a fundamental aspect of one’s identity is, in itself, a critical element of the right to identity. Therefore, where there is evidence of some risk of persecution to persons because of their real or imputed same-sex sexual orientation, the self-enforced suppression of that orientation is not, other than in exceptional circumstances, a properly ‘voluntary’ act, which can be equated with a decision entered into on the basis of full, free, informed consent. Rather, concealment presumptively results from a genuine subjective fear of adverse consequences such as physical or psychological harm or both, whether at the hands of the State (e.g. by way of prosecution and imprisonment for engagement in consensual same-sex acts) or of non-State actors. In these circumstances, concealing should presumptively be considered to be coerced. Where there is at least some evidence of persecutory treatment of individuals who are open about their same-sex sexual orientation, concealment is a typical response,⁴⁹ clearly probative of a subjective fear of persecution, consistent with the existence of an objectively well-founded fear of persecution and, indeed, itself constituting evidence of the objective well-foundedness of a subjective fear of persecution.⁵⁰

18. Effectively requiring individuals to conceal their sexual orientation – whether through adoption or manufacture of heterosexual or asexual lifestyle, purportedly in order to avoid persecution – is inconsistent with the Refugee Convention’s human rights and humanitarian purpose. It is incompatible with respect for human dignity since it negates each person’s capacity for, and freedom to develop, an emotional and sexual attraction for other individuals, regardless of gender, and to choose to engage in consensual sexual conduct with them.⁵¹ On this point, the UNHCR SOGI Guidelines affirm “[t]hat 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. As affirmed by numerous decisions in multiple jurisdictions, 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.”⁵²

No. 2/3, 2009, pp. 2-4, “[a]t its baldest, discretion reasoning entailed a ‘reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection’, by exercising ‘self-restraint’ such as avoiding any behaviour that would identify them as gay; never telling anyone they were gay; only expressing their sexuality by having anonymous sex in public places; pretending that their partner is a ‘flatmate’; or indeed remaining celibate. This approach subverted the aim of the Refugees Convention – that the receiving state provides a surrogate for protection from the home state – by placing the responsibility of protection upon the applicant: it is he or she who must avoid harm. The discretion approach also varied the scope of protection afforded in relation to each of the five Convention grounds by, for example, protecting the right to be ‘openly’ religious but not to be openly gay or in an identifiable same-sex relationship.”

⁴⁹ On this point, in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, UK Supreme Court, 7 July 2010, Lord Roger noted this effect in practice: “[u]nless he were minded to swell the ranks of gay martyrs, when faced with a real threat of persecution, the applicant would have no real choice: he would be compelled to act discreetly. Therefore the question is whether an applicant is to be regarded as a refugee for purposes of the Convention in circumstances where the reality is that, if he were returned to his country of nationality, he would have to act discreetly in order to avoid persecution”, § 59. See also Lord Dyson’s speech in *HJ (Iran)* where he held that distinguishing between “‘requiring’ the asylum-seeker to act discreetly on return and [...] making a finding that the asylum-seeker will in fact act discreetly on return [...] is an unrealistic distinction. Most asylum-seekers will opt for the life of discretion in preference to persecution. This is no real choice. If they are returned, they will, in effect, be required to act discreetly”, § 123.

⁵⁰ In *HJ (Iran)*, Lord Roger also noted, “threatened with serious harm if they [i.e. gay men and lesbian women] live openly, then most people threatened with persecution will be forced to take what steps they can to avoid it. But the applicant’s country of nationality does not meet the standard of protection from persecution which the Convention envisages simply because conditions in the country are such that he would be able to take, and would in fact take, steps to avoid persecution by concealing the fact that he is gay. **On the contrary, the fact that he would feel obliged to take these steps to avoid persecution is, prima facie, an indication that there is indeed a threat of persecution to gay people who live openly**”, § 65 (emphasis added).

⁵¹ The *2010 Update report of the EU Agency for Fundamental Rights on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity* observes that, “sexual orientation is a personal characteristic protected under the ECHR, not a shameful condition to be hidden. Any failure to appreciate the specific burden of forced invisibility and of the duty to hide a most fundamental aspect of one’s personality such as sexual orientation or gender identity, is a severe misconception of the real situation of LGBT people”, p. 56.

⁵² The *UNHCR SOGI Guidelines*, § 31, footnotes in the original omitted. In *Sadeghi-Pari v Canada*, the Federal Court of Canada held that requiring a person to conceal or suppress their sexual orientation amounts to persecution: “[c]oncluding that persecution would not exist because a gay woman in Iran could live without punishment by hiding her relationship to another woman may be erroneous, as expecting an individual to live in such a manner could be a serious interference with a basic human right, and therefore persecution”, *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282, 37 Imm LR (3d) 150, § 29. See also case: No. 103 722 of 29 May 2013

19. Thus, under refugee law, the fact that individuals may have previously concealed their same-sex sexual orientation is not a valid reason to refuse them refugee status, nor is the possibility that they could or would suppress their identity/status in the future.⁵³ Individuals should not be required to lie or to exercise restraint about their protected characteristics, be it, for example, one's religious beliefs,⁵⁴ or, *mutatis mutandis*, their sexual orientation.⁵⁵ Indeed, in its judgment in the three joined cases of *X, Y and Z v. Minister voor Immigratie en Asiel*, the Court of Justice of the EU (CJEU) affirmed 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".⁵⁶ Thus, "an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution".⁵⁷ In *X, Y and Z* the CJEU went as far as to hold that, even if through concealing the applicant **may** avoid the risk of persecution, "[t]he 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 in that respect",⁵⁸ and that "[w]hen assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation."⁵⁹ The interveners submit that in its judgment in *X, Y and Z* the CEJU made it clear that in the risk assessment the authorities must not take into account the possibility of concealment; that it is never tolerable for homosexuals to conceal their identity; and that national authorities may not take account of the possibility that homosexual applicants may avoid persecution by acting discreetly. Indeed, nowhere does the judgment suggest that it may reasonably be thought that the person **will** conceal their homosexuality. This is no accident or omission.⁶⁰ Concealment of homosexuality amounts to renouncing it and is contrary to the Directive.⁶¹ In its ruling in *X, Y and Z*, the CJEU emphasizes that the refugee protection regime is meant to enable persons to exercise their

where the Belgian Council for Alien Law Litigation held, *inter alia*, in an asylum case concerning Senegal that "sexual orientation constitutes a fundamental characteristic of the human identity which a person cannot be demanded to abandon or dissimulate", § 6.8.3.7 (translation from French original); in case 1 A 1824/07 of 13 November 2007, VG Oldenburg, the Constitutional Court of Lower Saxony in Oldenburg, rejected the requirement of concealment, § 41; and the Dutch Council of State decision in case No. 201109928/1 of 18 December 2013.

⁵³ *RRT Case No. 1102877* [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, "[b]ased on the applicant's past conduct, the Tribunal is of the view that he would be able to avoid the harm he fears by being discreet. However, the Tribunal cannot require a protection visa applicant to take steps and modify his conduct to avoid persecution (*Appellant S395/2002 v MIMA* (2003) 216 CLR 473). The applicant had acted discreetly in the past because of the threat of harm. As noted by the High Court, in these cases it is the threat of serious harm with its menacing implications that constitutes the persecutory conduct", § 96; see also *RRT Case No. 071862642* [2008] RRTA 40, Australia: Refugee Review Tribunal, 19 February 2008.

⁵⁴ See, e.g., the 5 September 2012 judgment of the Grand Chamber of the CJEU in the Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z* where the Court held that, in determining an application for refugee status the national authorities cannot reasonably expect the applicant to abstain from the manifestation or practice of certain religious acts in order to avoid exposure to persecution (§§ 79-80).

⁵⁵ In 2003, the High Court of Australia held that, "[i]t would undermine the object of the Convention if the signatory countries required [individuals] to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention", *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, High Court of Australia, 9 Dec. 2003, [2003] HCA 71, § 41. Similar rulings were made by the New Zealand Refugee Status Appeals Authority (Refugee Appeal No. 74665, 7 July 2004); the United States Court of Appeals for the Ninth Circuit (*Nasser Mustapha Karouni v. Alberto Gonzales, Attorney General*, No. 02-72651, 7 March 2005); and the Federal Court of Canada (*Atta Fosu v. Canada (Minister of Citizenship and Immigration)*, 8 Oct. 2008, [2008] FC 1135).

⁵⁶ Joined Cases C-199/12, C-200/12, C-201/12 *X, Y and Z v. Minister voor Immigratie en Asiel*, CJEU, Fourth Chamber, 7 November 2013, § 70.

⁵⁷ *X, Y and Z*, § 71.

⁵⁸ *X, Y and Z*, §§ 72-75; see also the Dissenting Opinion of Judge Power-Forde in *M.E. v. Sweden*, European Court of Human Rights (Fifth Section), no. 71398/12, 26 June 2014, "[t]he 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."

⁵⁹ *X, Y and Z*, § 76.

⁶⁰ As stated above, the CJEU held 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", *X, Y and Z*, § 70. This Court has also recognized that one's sexual orientation is not simply a matter of privacy and that the Convention protects the right to express it publicly (*Baczowski and others v. Poland*, no. 1543/06, 48 EHRR, §§ 68,100 and 101; and *Alekseyev v. Russia*, no. 4916/07, ECHR, 21 October 2010, §§ 86-88 and 109-11).

⁶¹ This is in harmony with Lord Rodger's observation in *HJ (Iran)* that it is "objectionable to assume that any gay man can be supposed to find even these restrictions [i.e. living discreetly] on his life and happiness reasonably tolerable" and that, therefore, he does not need to show that his homosexuality plays a particularly prominent part in his life (*HJ (Iran)* §§ 77, 79).

fundamental freedoms openly. On the question of concealment, in their Joint Separate Opinion appended to the judgment of the Grand Chamber of this Court in the case of *F.G. v. Sweden*, Judges Ziemele, De Gaetano, Pinto de Albuquerque and Wojtyczek observed, “[a]s the United Kingdom Supreme Court ruled in a case where the claim for asylum was based on homosexuality, using a convincing historical allusion, to hold otherwise would countenance the return of Anne Frank to Nazi-occupied Netherlands, had she managed to escape from there, on the basis that she could have hidden in the attic and therefore could have successfully avoided the possibility of Nazi detention. The Supreme Court held that such a position would be ‘absurd and unreal’.”⁶² Consistent with this line of authorities, in its decision in the case of *I.K. v. Switzerland*,⁶³ this Court held that because sexual orientation constitutes a fundamental aspect of an individual’s identity and awareness, those claiming international protection based on their sexual orientation cannot be required to hide it.⁶⁴

20. Therefore, where upon removal individuals would face a real risk of persecution if their sexual orientation became known (or was otherwise imputed to them), that is sufficient to warrant recognition of refugee status irrespective of any concealment/modification/avoidance action they could or would take. The fact that individuals might have other reasons, in addition to their fear of persecution, for concealing their identity is irrelevant. Indeed, consistent with the principles canvassed above, the UNHCR SOGI Guidelines advise that: “the question thus 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 if the applicant returns to the country of nationality or habitual residence and whether this amounts to persecution. The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences.”⁶⁵
21. Furthermore, as the UNHCR SOGI Guidelines note: “[b]eing compelled to conceal one’s sexual orientation and/or gender identity may also result in significant psychological and other harms. Discriminatory and disapproving attitudes, norms and values may have a serious effect on the mental and physical health of LGBTI individuals and could in particular cases lead to an intolerable predicament amounting to persecution. Feelings of self-denial, anguish, shame, isolation and even self-hatred which may accrue in response an inability to be open about one’s sexuality or gender identity are factors to consider, including over the long-term.”⁶⁶ In this context, studies have shown that pervasive discrimination has led, in particular, to mental health problems, feelings of self-denial, anguish, depression, psychosocial and psychological distress, shame, isolation and self-hatred.⁶⁷ Expert opinion has attested to the severe mental suffering caused by concealing one’s sexual orientation.⁶⁸
22. Psychological, mental harm resulting from fear of exposure to physical harm (i.e. from the apprehension of prospective physical ill-treatment inflicted on oneself or one’s loved ones)⁶⁹ has been found to constitute cruel, inhuman and degrading treatment.⁷⁰ Such findings are consistent with refugee law

⁶² Joint Separate Opinion of Judges Ziemele, De Gaetano, Pinto de Albuquerque and Wojtyczek, *F.G. v. Sweden*, [GC] App. no. 43611/11, 23 March 2016, § 6, p. 64, footnotes omitted (case referred to is *HJ (Iran)*).

⁶³ *I.K. v. Switzerland*, decisions on admissibility, no. 21417/17, 19 December 2017.

⁶⁴ “[L]a Cour estime que l’orientation sexuelle constitue un aspect fondamental de l’identité et de la conscience d’un individu et qu’il ne saurait dès lors être exigé de personnes déposant une demande de protection internationale fondée sur leur orientation sexuelle qu’elles dissimulent cette dernière”, *I.K. v. Switzerland*, para. 24.

⁶⁵ The UNHCR SOGI Guidelines, § 32.

⁶⁶ The UNHCR SOGI Guidelines, § 33, footnotes in the original omitted.

⁶⁷ *Guidelines for Psychological Practice With Lesbian, Gay, and Bisexual Clients*, American Psychological Association.

⁶⁸ See, e.g., Dr. Meyer’s expert opinion provided to this Court in the case *Bayev v. Russia*, (no’s 67667/09 44092/12 and 56717/12, 20 June 2017) on the harmful psychological health effects of concealing one’s same-sex sexual orientation. See also, “*Minority Stress and Physical Health Among Sexual Minorities*”, David J. Lick, Laura E. Durso and Kerri L. Johnson Lick et al in *Perspectives on Psychological Science* 2013 8: 521 DOI: 10.1177/1745691613497965, at p. 531 and 533, respectively; and Apu Chakraborty et al in *Mental health of the non-heterosexual population of England*, *British Journal of Psychiatry* (2011) 198, 143-134, corroborating international findings that “non-heterosexual individuals are at higher risk of mental disorder, suicidal ideation, substance misuse and self-harm than heterosexual people”, p. 147.

⁶⁹ In *Keenan v. the United Kingdom*, this Court clarified that someone’s treatment is capable of engaging Article 3 when it is “such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance [...] or as driving the victim to act against his will or conscience...”, *Keenan v. the UK*, no. 27229/95, judgment, 3 April 2001, § 110.

⁷⁰ This Court has recognized, including in *Identoba and Others v. Georgia*, that, “Article 3 cannot be limited to acts of physical ill-treatment; it also covers the infliction of psychological suffering”, *Identoba*, no. 73235/12, judgment, 12 May 2015, § 65, §§ 70-71.

holding that in some cases psychological harm is persecutory.⁷¹ This is of particular concern in the case of rejected asylum-seekers required to conceal their sexual orientation on return in an attempt to avoid persecution, since fear of discovery and of the resulting physical ill-treatment by State or non-State actors, imprisonment and, in extreme cases, execution, may hang over them for the rest of their lives.⁷²

23. It should also be recalled that even if the people concerned do attempt to conceal their sexual orientation/identity, there remains a strong probability of discovery against their will,⁷³ for example by accident, rumours, growing suspicion, use of social media,⁷⁴ assumptions about people who have not married and who do not have children.⁷⁵ With respect to the risk of discovery, the UNHCR SOGI Guidelines emphasize: “[i]t is important to note that even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetime. 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. It is also important to recognize that even if LGBTI individuals conceal their sexual orientation or gender identity they may still be at risk of exposure and related harm for not following expected social norms (for example, getting married and having children [...]). The absence of certain expected activities and behaviour identifies a difference between them and other people and may place them at risk of harm.”⁷⁶ In addition, it is the imputation of sexual orientation/identity by the persecutor and consequential risk of persecutory treatment that matters.⁷⁷ A person could take as many precautionary steps as possible and yet still be labelled and persecuted.
24. In light of the above, and given the aforementioned relevance of the Refugee Convention and relevant UNHCR guidance in interpreting the ECHR,⁷⁸ with respect to the enforcement of removals, the interveners submit in conclusion that requiring coerced, including self-enforced, concealment of someone’s same-sex sexual orientation – as a way, purportedly, to mitigate the real risk of their being exposed to Article 3 prohibited treatment – is incompatible with the Convention’s obligations. Such coerced concealment constitutes pain and suffering amounting to proscribed treatment under Article 3 even if temporary. Indeed, enforcing removals on the basis that the individuals concerned would be expected to conceal their sexual orientation – purportedly to sufficiently mitigate the risk of Article 3 prohibited treatment upon return – would constitute arbitrary *refoulement* and thus violate Article 3.

⁷¹ See, *Abay v. Ashcroft*, 368 F.3d 634, United States Court of Appeals for the Sixth Circuit, 19 May 2004, where a mother’s psychological trauma due to the risk of her child undergoing female genital mutilation was found to constitute persecutory harm and thus enough to entitle her to protection as a refugee. Psychological, mental harm is capable of constituting persecution for the purposes of the Refugee Convention when it results from coercion. US case law also confirms this clearly: *Fisher v I.N.S.*, 37 F.3d 1371 (9th Cir. 1994) “being forced to conform to, or being sanctioned for failing to comply with, a conception of Islam that is fundamentally at odds with one’s own...can rise to the level of persecution”, § 45.

⁷² See, *inter alia*, *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, per McHugh and Kirby JJ, “[....] **It is the threat of serious harm with its menacing implications that constitutes the persecutory conduct.** To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly”, § 43 (**emphasis added**).

⁷³ See, e.g., *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, §§ 56-58.

⁷⁴ E.g. the Human Rights Watch report, “*We Are a Buried Generation*” *Discrimination and Violence against Sexual Minorities in Iran*, 15 December 2010, documenting internet surveillance of gay chat rooms in Iran and the ensuing human rights violations.

⁷⁵ The UNHCR SOGI Guidelines, § 32; *SW (lesbians - HJ and HT applied) Jamaica CG* [2011] UKUT 251 (IAC), 24 June 2011, describing the risk of discovery faced by lesbian women in Jamaica, § 107.

⁷⁶ The UNHCR SOGI Guidelines, § 32 (footnotes in the original omitted).

⁷⁷ In the case of *Dykon v Canada*, the claimant, a citizen of Ukraine, sought refugee status based on the fear of persecution because he was perceived to be a homosexual. The claimant was sexually assaulted by another man and following, and because of, this incident was perceived to be a homosexual. His mother had received threats of extortion as a result of this perception. The Federal Court concluded that there was persecution against the claimant based on his imputed homosexuality. The Federal Court stated that: “**it is totally irrelevant** ... whether he was in fact a **homosexual or not.**” **It is the beliefs of the persecutors that** are important, and in this case the individuals responsible for the harassment perceived the claimant to be a homosexual. *Dykon v. Canada (Minister of Employment and Immigration)*, [1995] 1 F.C. 0, 27 September 1994, (1994), 25 Imm LR (2d) 193, 50 ACWS (3d) 1085. See also *Sentenza no. 15023/15*, Tribunal of Genova, 13 May 2016 where the Tribunal found that the applicant had a well-founded fear of persecution based on membership of a particular social group as, although he was not gay, he was perceived as such by his community, his family and the authorities in his country of origin.

⁷⁸ See in particular § 1 above.