EUROPEAN COURT OF HUMAN RIGHTS

M.E. v. Sweden, Application no. 71398/12

*Written comments of FIDH (Fédération Internationale des Ligues des Droits de l'Homme) and ILGA-Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association).*

**SUMMARY:**


1. The Chamber's judgment in *M.E. v. Sweden*[1] was the Court's first judgment on the merits in a case involving a gay asylum-seeker in Europe. The Chamber's conclusion that it was acceptable under the Convention that "the applicant would have to be discreet about his private life during [the estimated waiting time in Libya of four months]" (§ 88), and that there was "*no reason to believe that the applicant's sexual orientation would be exposed*" during this "*short time-frame*" (§ 89), is at odds with developing jurisprudence in other respected jurisdictions, sending a very negative message throughout the 47 member states of the Council of Europe and around the world about the treatment of lesbian, gay, bisexual, trans and intersex (LGBTI) asylum-seekers.

2. It conflicts with the recent case law of the Court of Justice of the European Union ('CJEU'), a detailed and very persuasive judgment of the Supreme Court of the United Kingdom, and the guidelines of the United Nations High Commissioner for Refugees (which were influenced by the UK Supreme Court's judgment). National courts are being asked to review more and more claims by LGBTI asylum-seekers, and are therefore in need of guidance from the Court regarding the minimum standard imposed by Article 3 of the Convention, especially in the 19 Council of Europe member states that are not subject to European Union law on asylum. The third-party interveners therefore urge the Court to adopt the same clear statement of principle as the CJEU, the UK Supreme Court, and Judge Power-Forde in her dissenting opinion in the Chamber: **in determining whether or not an LGBTI asylum-seeker faces a real risk of ill-treatment violating Article 3 if they are returned to their country of origin (which will often mean physical harm, ie, violence committed by state or private actors against an LGBTI individual), 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.**


**INTRODUCTION:**

3. These written comments are drafted by Mr. S. Chelvan, a Barrister of the Inner Temple at No5 Chambers, London, instructed by Mr Wesley Gryk, the Senior Partner at Wesley Gryk Solicitors LLP, London, and by Prof. Robert Wintemute, Professor of Human Rights Law, King's College London, on behalf of the third-party interveners. On 9 April 2013, the third-party interveners submitted written comments, with the ICJ (International Commission of Jurists).[2] Leave to provide fresh joint submissions to the Grand Chamber was granted on the 18th of December 2014.

***The Court's earlier case law on asylum claims of gay men:***

4. Prior to *M.E.* v. *Sweden*, the Court's only guidance on expulsion of gay applicants for asylum was the June and December 2004 admissibility decisions in *F. v. United Kingdom*[3] and *I.I.N. v. Netherlands*[4]. Both decisions related to gay men from Iran, and declared their applications inadmissible. In *F v.*

[1] *Application No 71398/12*, Judgment 26th June 2014.

[2] See http://www.fidh.org/IMG/pdf/fidh-icj-ilga_europe_intervention_-_me_v_sweden_-_app_no_71398_-_12_-_9th_april_2013.pdf (last accessed 21 January 2015).

[3] ECtHR 22 June 2004, *F v. United Kingdom*, no. 17341/03.

[4] ECtHR 9 December 2004, *I.I.N. v. Netherlands*, no. 2035/04.

*United Kingdom*, the Court examined the country background evidence[5] and concluded that the materials did not disclose 'a situation of active prosecution by the authorities of adults involved in consensual and private homosexual relationships'. On this basis, the Court did not find a real risk of treatment contrary to Article 3. The Court's reasoning contains an implicit assumption that the applicant would be 'discreet' about his sexual orientation in Iran, outside the privacy of the home.

5. The Court's reasoning in *I.I.N.* is very similar to its reasoning in *F.*, and includes the same implicit assumption that the applicant would be 'discreet' in Iran. The Court expressed no concern about the applicant's claim 'that he had been arrested after having been caught kissing a male friend in an alley'.

6. The Court's reasoning in both *F* and *I.N.N.* focuses the point of analysis on private conduct *in the home*, and the risk of criminal prosecution and imprisonment or execution for that conduct, as against public non-sexual conduct *outside the home* connected to expression of sexual orientation. This focus ignores the fact that non-sexual conduct outside the home can create a risk of harm to expelled LGBTI individuals. As will be demonstrated below, both the United Nations High Commissioner for Refugees' 2012 'Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity'[6], and the judgment of the United Kingdom Supreme Court in *H.J. (Iran)* (2010)[7] have departed from the Court's 'risk of criminal prosecution' approach in *F.* and *I.N.N.*

**CONSENSUS IN EUROPEAN AND OTHER DEMOCRATIC SOCIETIES IN SUPPORT OF LGBTI ASYLUM CLAIMS:**

7. In 1981, the Netherlands became the first country in the world to recognise asylum claims of homosexuals[8]. The obligation to protect LGBTI asylum-seekers is now incorporated into European Union law. Since the 2004 Qualification Directive entered into force on the 6th of October 2006[9], 27

---

[5] In July 2005, the UK's Immigration Appeal Tribunal in *RM and BB (Homosexuals) Iran CG* [2005] UKIAT 00117, in assessing evidence, as of February 2005, held, reversing the UK's position in *F* only a year before [§ 123]:*" **It is clear ... that ...those guilty of immoral acts under Article 147/115 and Tafkhiz under Article 121 face harsh punishments which can include long prison sentences up to six years and up to one hundred lashes. We remind ourselves of what Mr Kovats accepted on behalf of the Secretary of State that a sentence of lashing would be such as to give rise to a breach of Article 3 rights**. Although we agree with Mr Kovats that the interest of the Iranian authorities in homosexual offenders is essentially focused upon any outrage to public decency, it is in our view clear that the authorities would not simply ignore, as Mr Kovats suggested they might in certain situations, reports made to them of persons carrying out homosexual acts albeit in private. **If a complaint is brought to the authorities then we are satisfied that they would act upon that to the extent that they would arrest the claimed offenders and question them and thereafter there is a real risk that either on the basis of confessions or knowledge of the judge which might arise from such matters as previous history or medical evidence or the evidence of the person who claimed to have observed the homosexual acts, that they would be subjected to significant prison sentences and/or lashing***." [***emphasis added***].

[6] United Nations High Commission for Refugees HCR/GIP/12/09, 23 October 2012, *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.*

[7] UK Supreme Court judgment 7th July 2010, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596.

[8] *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.

[9] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (*Official Journal L 304 , 30/09/2004 P. 0012 – 0023).* Denmark opted out of the 2004 Directive, but does recognise the claims of gay and lesbian applicants (see S. Jansen and T. Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, Amsterdam, 2011, p. 24, fn. 74 '… "Disturbing Knowledge – Decisions from asylum cases as documentation of LGBT-persons", LGBT Denmark and Danish Refugee

EU member states have had a positive obligation to recognise the asylum claims of adult LGBTI persons, pursuant to Article 10(1)(d) (emphasis added):

> 'Member States shall take the following elements into account when assessing the reasons for persecution:
>
> (d) a group shall be considered to form a particular social group where in particular:
>
> members of that group share an innate characteristic, ... 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**. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States ...;'

8. Whilst Denmark opted out of the 2004 Directive, the Danish authorities do consider the asylum claims of LGBTI persons.[10]

9. On the 31st of March 2010, the Committee of Ministers of the Council of Europe published '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'[11]. The Recommendation deals with asylum as follows:

> '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 would be threatened or they face the risk of torture, inhuman or degrading treatment or punishment, on grounds of sexual orientation or gender identity.'

10. Having regard to the above recommendations, the European Parliament, on the 4th of February 2014, voted for the resolution supporting the 'EU Roadmap against homophobia and discrimination on the grounds of sexual orientation and gender identity' (2013/2183 (INI)), which includes the following important provisions regarding asylum and assessment of risk of ill-treatment on return (Annex K – Asylum):[12]

---

Council (2008), http://www.rechten.vu.nl/nl/Images/Denmark%20-%20DisturbingKnowledge.PA.01_tcm22-236584.pdf (last accessed 21 January 2015)).

[10] For the purposes of this case, the 2011 Recast Directive,[10] with a December 2013 deadline for transposition, makes no material difference, as the provision in Article 10 (1) (d) for sexual orientation is not affected. There is an amendment to Article 10 (1) (d) which includes gender identity as a protected identity.

[11] See http://wcd.coe.int/ViewDoc.jsp?id=1606669 (last accessed 21 January 2015).

[12] See http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0009+0+DOC+XML+V0//EN for text, and http://www.europarl.europa.eu/oeil/popups/summary.do?id=1336102&t=e&l=en for summary of the EU Parliamentary vote (last accessed 11 January 2015).

> 'Together with the EASO [European Asylum Support Office] and in cooperation with the European External Action Service, 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).'

11. This resolution, in emphasising the need to document the legal and social situation in countries of origin, acknowledges that the assessment of risk of ill-treatment on return is the overriding factor in determining international protection claims. The third-party interveners submit that it is this principle which should be decisive in such claims, and not whether the applicant can conceal their sexual orientation or gender identity.

12. At least 34 Council of Europe member states already recognise sexual orientation as a ground for claiming asylum. These include the 27 EU member states to which the 2004 Qualification Directive applies.[13]

13. In other democratic societies, the Supreme Court of Canada in *Ward v Canada*[14] and the United States Board of Immigration Appeals in *In re A Costa*[15] have held that sexual orientation can fall within the 'particular social group' category of the Refugee Convention. The same is true of Australia and New Zealand.[16]

14. There now exists in the majority of Council of Europe Member States social, cultural and legal recognition of the right of LGBTI persons to 'live freely and openly'. The Court recognised this right in *Alekseyev* v. *Russia* (judgment of 21 October 2010, § 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.'

---

[13] T. Hammarberg, *Discrimination on grounds of sexual orientation and gender identity*, 2nd edn, 2011, Council of Europe, p. 65: http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf (last accessed 21 January 2015) 'National legislation and data on LGBT asylum and refugee cases. 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, 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). In the other member states there is no explicit mention in their legislation. There are, however, at least seven other member states which, even in the absence of such explicit recognition, have had asylum claims in which sexual orientation has been recognised as a ground for persecution (Denmark, Greece, Norway, Switzerland, Turkey, Ukraine and the United Kingdom) evidenced by decisions of national competent bodies in these countries. In the other 12 member states which are parties to the 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")." The 34th member state is Estonia, where the Act in Granting International Protection to Aliens, in force since the 1st of July 2006, refers to some of the guiding principles of EU protection directives, including the 2004 Qualification Directive, but fails to incorporate the Article 10 (1) (d) inclusion of sexual orientation as a Particular Social Group. (see https://www.riigiteataja.ee/en/eli/530102013009/consolide (last accessed 11 January 2015)). No information is available for Andorra and San Marino.

[14] *Canada (Attorney General) v. Ward* [1993] 2 SCR 689.

[15] *In re Acosta* (1985) 19 I. & N. 211.

[16] For High Court of Australia, see *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473. For New Zealand example, see *Refugee Appeal No 74665/03* [2005] INLR 68.

**AN LGBTI PERSON CANNOT BE EXPECTED TO CONCEAL THEIR SEXUAL ORIENTATION OR GENDER IDENTITY TO REDUCE THE RISK OF ARTICLE 3 ILL-TREATMENT:**

***Guidelines of the United Nations High Commissioner for Refugees ('UNHCR'):***

15. The UNHCR's 2012 'Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity'[17] incorporate the reasoning of the United Kingdom Supreme Court in *H.J. (Iran)* (2010) (see paragraph 16 below), and depart from the Court's 'risk of criminal prosecution' approach in *F.* v. *United Kingdom* (2004). The Guidelines provide as follows (footnotes omitted; emphasis added):

> '12. A proper analysis as to whether a LGBTI applicant is a refugee under the 1951 [Refugee] Convention needs to start from the premise that applicants are entitled to live in society as who they are and need not hide that. As affirmed by the position adopted in a number of jurisdictions, sexual 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, including how the applicant lives in society, or how he or she expresses (or wishes to express) his or her identity. ...
>
> 19. Behaviour and activities may relate to a person's orientation or identity in complex ways. It 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 consequences that would follow such behaviour. In other words, an activity associated with sexual orientation may merely reveal or expose the stigmatized identity, it does not cause or form the basis of the persecution. In UNHCR's view, the distinction between forms of expression that relate to a "core area" of sexual orientation and those that do not, is therefore irrelevant for the purposes of the assessment of the existence of a well-founded fear of persecution.
>
> 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.** 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.
>
> 32. ... The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences. It 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. … '

[17] United Nations High Commission for Refugees HCR/GIP/12/09, 23 October 2012, *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.*

***The UK Supreme Court:***

16. In the United Kingdom, between 2004[18] and 2006, the England and Wales Court of Appeal developed the 'being discreet test', whereby the United Kingdom found lawful the expulsion of gay and lesbian asylum seekers to their countries of origin, on the basis that they would be 'discreet' about their sexual orientation, and that this would be 'reasonably tolerable'[19]. On the 7th of July 2010, the UK Supreme Court held, in the unanimous (5-0) landmark judgment of *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*[20], that this 'reasonably tolerable test' of 'being discreet' was unlawful, especially because no heterosexual person would find such constraints on being open about their sexual orientation to be reasonably tolerable [§ 77]. Drawing from earlier cases, the UK Supreme Court held that the underlying rationale of the Refugee Convention was to enable a person, whether they were gay, black, or a descendent of a political dictator, to 'live freely and openly' without fear of persecution [§ 65]. The UK Supreme Court's test, by which UK decision makers now determine gay asylum claims, is found at § 82 of *H.J. (Iran)* (emphasis added)

> "When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.
>
> If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.
>
> If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.
>
> If the applicant 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".
>
> If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.
>
> If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e g, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.
>
> **If, on the other hand, 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, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. 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 Convention exists to protect – his right to live freely and openly**

[18] England and Wales Court of Appeal judgment 2 December 2004, *Z v Secretary of State for the Home Department* [2004] EWCA Civ 1578; [2005] Imm A.R. 75.

[19] England & Wales Court of Appeal judgment 26 July 2006, *J v Secretary of State for the Home Department* [2006] EWCA Civ 1238; [2007] Imm A R 73 [§ 16].

[20] UK Supreme Court judgment 7th July 2010, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596.

> **as a gay man without fear of persecution.** By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him."

17. A decisive factor in the UK Supreme Court's decision to reject 'being discreet' as a requirement was that, had it been applied during World War II, it would have meant (hypothetically) that Anne Frank could have been returned from the UK to the Nazi-occupied Netherlands, as long as denying that she was Jewish and hiding in an attic were 'reasonably tolerable' means to protect her from harm [§§ 106-107 of HJ]. Under the *H.J. (Iran)* test, 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".

18. The UK Supreme Court's test can be summarised in the following manner:

    (i) Is the applicant gay or lesbian, or perceived to be?
    (ii) Do openly gay and lesbian individuals in the country of origin face a well-founded fear of persecution?
    (iii) Will the individual be 'open' on return? If so, they qualify as a refugee. If the individual is 'discreet' (conceals their sexual orientation), then
        (a) is it only because of family or social pressure? Then the individual does not qualify as a refugee; or
        (b) is *a material reason* for being 'discreet' the fear of persecution? If it is, then the individual qualifies as a refugee.

19. The UK's Home Office has incorporated the UK Supreme Court's test into its own published policy document.[21] The UK Supreme Court, having found in *HJ (Iran)* that its test would be equally applicable to asylum claims based on all other Refugee Convention grounds, has applied it to asylum claims based on political opinion (see *RT (Zimbabwe)*[22]). The Upper Tribunal (Immigration and Asylum Chamber) has applied the test to religious claims (*MN and others (Ahmadis – country conditions – risk) Pakistan CG*).[23]

20. From January 2011, the Swedish authorities adopted the *HJ (Iran)* approach in their national guidelines (see *Fleeing Homophobia* report, page 38, fn. 134[24]). The Superior Courts of both Finland and Norway, in January 2012[25] and March 2012[26] respectively, have also adopted the guidance as part of their own domestic case law.

---

[21] Asylum Instruction on *Sexual Orientation Issues in the Asylum Claim* (updated June 2011) http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/sexual-orientation-gender-ident?view=Binary (last accessed 21 January 2015).

[22] UK Supreme Court judgment 25th July 2012, *RT (Zimbabwe) and KM (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38; [2013] 1 AC 152.

[23] UK Upper Tribunal (Immigration and Asylum Chamber) judgment 14th November 2012, *MN and others (Ahmadis – country conditions – risk) Pakistan CG* [2012] UKUT 00389 (IAC).

[24] Rättschefens rättsliga ställningstagande angående metod för utredning och prövning av den framåtsyftande risken för personer som åberopar skyddsskäl på grund av sexuell läggning (RCI 03/2011) available at: www.migrationsverket.se/lifos

[25] *Decision KHO:2012: 1* judgment 13th January 2012, Summary Online. < http://www.unhcr.org/refworld/pdfid/4f3cdf7e2.pdf> (last accessed 21 January 2015).

[26] *"A"* 29th March 2012, Online (Norwegian only). http://www.domstol.no/upload/HRET/saknr2011-1688(anonymisert).pdf (last accessed 21 January 2015).

21. Outside Europe, Australian and New Zealand courts have adopted similar positions. The High Court of Australia in *Appellant S395*[27] rejected the argument that gay asylum-seekers can be excluded from refugee protection by being 'discreet' in their countries of origin. The New Zealand Refugee Status Appeals Authority in *Refugee Appeal No 74665/03*[28] held in approaching the claim from a human rights perspective [§ 114] '… Understanding the predicament of "being persecuted" as the sustained or systematic violation of basic human rights demonstrative of a failure of state protection means that the refugee definition is to be approached not from the perspective of what the refugee claimant can do to avoid being persecuted, but from the perspective of the fundamental human right in jeopardy and the resulting harm'.

***The Court of Justice of the European Union:***

22. On the 5th of September 2012, the Court of Justice of the European Union ('CJEU') held in the joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland (Federal Republic of Germany) v. Y and Z*, that under the 2004 Qualification Directive[29] and its definition of persecution in Article 9(1)(a), if it is found that conduct connected to Ahmadi religious practice would result in persecution in Pakistan, then 'the fact that [the Ahmadi person] could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant' [§ 62].

23. On the 7th of November 2013, the CJEU gave their judgment in response to the references from the Dutch Council of State in the joined cases C-199/12 to C-201/12, *X, Y and Z v. Minister voor Immigratie en Asiel*. The Dutch court posed several questions related to the 2004 Qualification Directive. These included questions as to whether homosexual asylum seekers could be expected to conceal their sexual orientation, and if so, to what extent. Adopting the approach in *Y and Z*, the CJEU made it clear that 'it is important to state that requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it.' [§ 70] and 'therefore, an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution' [§ 71]. The specific reference to religious worship "in public" in Article 10(1)(b) of the Directive did not mean that 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" [§ 69].

24. The CJEU concluded (emphasis added) that "the person concerned 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 in that respect … [T]he 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. [§§ 75-76]. …** [I]t 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" [§ 78].

---

[27] *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

[28] *Refugee Appeal No 74665/03* [2005] INLR 68.

[29] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (*Official Journal L 304, 30/09/2004 P. 0012 – 0023)*.

25. Applying the UK Supreme Court's test, the following can be concluded with regard to gay asylum-seekers in Council of Europe member states:

    (i) A man who is married to another man in a Council of Europe Member State *is* gay, or would be perceived to be gay, by state or private actors who would wish to subject him to treatment prohibited by Article 3 of the Convention in his country of origin;

    (ii) It is irrelevant that the man could avoid this treatment by concealing or 'being discreet' or ‘exercising reserve’ about his sexual orientation and same-sex marriage, just as it would be irrelevant if a political dissident or a member of a religious minority could avoid similar treatment by keeping their political opinion or religion a secret.

**CONCEALMENT AND TEMPORARY RETURN TO A COUNTRY WHERE THERE IS A REAL RISK OF ARTICLE 3 ILL-TREATMENT:**

26. Even where the exposure to a risk of treatment contrary to Article 3 is expected (although not guaranteed) to be temporary (eg, four months), the period of expulsion is immaterial, because the Article 3 right to be protected against such treatment is absolute. Paragraphs 88 and 89 of the Chamber’s judgment do not cite any judgments of the Court stating that exposure to a risk of Article 3 ill-treatment must have a minimum duration, or be for an indefinite period, before it can be considered “a real risk”. Although the duration in some hypothetical cases (eg, a transit period of four hours at an airport) might be so short that the duration combined with other circumstances (eg, security safeguards) precludes a finding of “a real risk”, a period of four months is a very long time, during which an individual’s sexual orientation or gender identity could easily be disclosed and cause them to be subjected to physical harm, ie, violence committed by state or private actors in their country of origin.

**CONCLUSIONS:**

27. The CJEU, national courts in a number of Council of Europe member states, and the guidelines of the UN High Commissioner for Refugees all concur in holding that an LGBTI applicant for asylum has the right to be open in their country of origin about their sexual orientation (including as disclosed by their marital status and the sex of their spouse) or gender identity, and cannot be expected to remain silent, or engage in active concealment, about these important aspects of their life.

28. Under the *H.J. (Iran)* test, the decision-maker asks what is the risk of harm if the applicant is open about their sexual orientation, not what is the risk if the applicant is coerced into concealment. Concealment because of fear of physical harm is never truly voluntary.

29. The third-party interveners submit that the same considerations apply in the context of Article 3. In determining whether or not an LGBTI asylum seeker faces a real risk of ill-treatment violating Article 3 if they are returned to 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.

30. The Grand Chamber has never addressed, in the context of an asylum claim, a risk of Article 3 ill-treatment based on sexual orientation or gender identity in the country of origin. Its consideration of this application provides an important opportunity for this Court to revise the Chamber’s approach, and to provide positive guidance for asylum claims based on sexual orientation or gender identity.

31. The third-party interveners respectfully urge the Grand Chamber to adopt the reasoning of Judge Power-Forde in her dissenting opinion in the Chamber judgment, in which she relies on the UNHCR guidelines and the judgments of the CJEU and the UK Supreme Court (all discussed above; emphasis added below):

> "**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 in this case 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. With this judgment, the Strasbourg Court introduces a new test of 'duration' that is not to be found elsewhere in comparative European law. The asylum case law of the [CJEU] imposes no such 'time' requirement. **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 are other flaws in the majority's approach. There is an assumption, at least, an implicit one, 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 being visited upon him. Sexual orientation is, of course, something far more fundamental than sexual conduct and involves 'a most intimate aspect of private life' (Norris v. Ireland, 26 October 1988 ….). 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. At the most basic level, if a gay man were to live discreetly, he would, in practice, have to avoid any open expression of his sexual orientation. … he would have to think twice before revealing that he was attracted and committed to another man in a foreign jurisdiction.
>
> Finally, the majority's approach ignores the fact that even 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. …
>
> … It is more than a minor inconvenience for the applicant to do as the majority requires. 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.** Such a requirement of forced reserve and restraint in order to conceal who one is, is corrosive of personal integrity and human dignity."

S. CHELVAN
Barrister
No5 CHAMBERS
London, United Kingdom

ROBERT WINTEMUTE
Professor of Human Rights Law
King's College London
London, United Kingdom

22 January 2015