



Fear of persecution?

Fact of the case

The case concerns three applicants for asylum (X, Y and Z) in the Netherlands from Sierra Leone, Uganda and Senegal. They have lodged applications for residence permits for a fixed period (asylum) in the Netherlands. In support of their applications, they claim that they should be granted refugee status on the ground that they have reason to fear persecution in their respective countries of origin on account of their homosexuality.

In each country of origin, homosexuality is a criminal offence punishable by a term of imprisonment. In none of the cases has the applicant demonstrated that he has already been persecuted or threatened with persecution on account of his sexual orientation.

The Minister refused to grant residence permits for a fixed period (asylum) to X, Y and Z. According to the Minister, although the sexual orientation of the applicants is credible, they have not proved to the required legal standard the facts and circumstances relied on and, therefore, have failed to demonstrate that on return to their respective countries of origin they have a well-founded fear of persecution by reason of their membership of a particular social group.

Legal Framework

International law

the Geneva Convention

Article 1(A)(2)

term 'refugee' is to apply to any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'.

the European Convention for the Protection of Human Rights and Fundamental Freedoms

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Article 14



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REPUBLIC OF AUSTRIA
FEDERAL MINISTRY OF JUSTICE



REPUBLIKA HRVATSKA
Pučki pravobranitelj

‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

Article 15

‘1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2 [“Right to life”], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [“Prohibition of torture”], 4 (paragraph 1) [“Prohibition of slavery”] and 7 [“No punishment without law”] shall be made under this provision.

Relevant European Law

The Charter of Fundamental Rights of the European Union

The rights which cannot be subject to any derogation under Article 15(2) of the ECHR are enshrined in Articles 2, 4, 5(1) and 49(1) and (2) of the Charter of Fundamental Rights of the European Union (‘the Charter’).

The Directive

Recitals 16 and 17

‘(16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.’

Article 2(c) and (k)

‘(c) “refugee” means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country ...;

...

(k) “country of origin” means the country or countries of nationality or, for Stateless persons, of former habitual residence.’

Article 4(3)

‘The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

...'

Article 4(4) of the Directive, the fact that an applicant has already been subject to persecution, or to direct threats of such persecution, is a 'serious indication of the applicant's well-founded fear of persecution', unless there are good reasons to consider that such persecution will not be repeated.

Article 9(1) and (2)

'1. Acts of persecution within the meaning of Article 1(A) of the Geneva Convention must:

- (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the [ECHR]; or
- (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:

...

- (c) prosecution or punishment, which is disproportionate or discriminatory;

...'

In accordance with Article 9(3) of the Directive, there must be a connection between the reasons for persecution mentioned in Article 10 and the acts of persecution.

Article 10

'1. 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 a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it; and
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;
- depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States ...

...'

Relevant national law

Article 28(1)(a) and 29(1)(a) of the Law of 2000 on foreign nationals (Vreemdelingenwet 2000, Stb 2000, No 495)

Questions

1. Does the Charter of Fundamental Rights apply in this case, and if yes which Articles?
2. In your opinion, do foreign nationals with a homosexual orientation form a particular social group?
3. Should foreign nationals with a homosexual orientation be expected to conceal their orientation from everyone in their [respective] country of origin or to exercise restraint in order to avoid persecution?
4. Does criminalization of homosexual activities and threat to imprisonment constitute an act of persecution?