



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Joined Cases C-199/12, C-200/12, C-201/12
X, Y, Z v. Minister voor Immigratie, Integratie en Asiel

According to Advocate General Sharpston, applicants for refugee status claiming to be persecuted for their homosexual orientation may form a 'particular social group' under EU refugee law

While the criminalisation of homosexual activity in the home country does not per se constitute an act of persecution, the national authorities must, however, examine whether a particular applicant is likely to be subject to acts that qualify as such

X, Y and Z are nationals of respectively Sierra Leone, Uganda and Senegal. All three men are homosexuals and are seeking refugee status in the Netherlands, claiming they have a well-founded fear of persecution in their home countries based on their sexual orientation. In this regard, homosexual acts are criminal offences in all three countries and can lead to severe punishments, ranging from heavy fines to imprisonment, in some cases up to life.

Under a European directive¹, that refers to the provisions in the Geneva Convention², 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 can claim refugee status. In this context, such acts of persecution must be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights.

The Dutch Raad van State, which is hearing the case at final instance, made three requests for a preliminary ruling to the Court of Justice on the assessment of applications for refugee status under the provisions of the directive. The national court asks the Court whether third country nationals who are homosexual form a particular social group within the meaning of the directive. Furthermore, it asks how national authorities should assess what constitutes an act of persecution concerning homosexual activities within this context, and whether the criminalisation of those activities in the applicant's country of origin, which can lead to imprisonment, amounts to persecution.

In today's Opinion, Advocate General Eleanor Sharpston proposes that the Court declare, first of all, that applicants for refugee status who have a homosexual orientation may, depending on the circumstances in their country of origin, form a particular social group within the meaning of the directive. In her opinion, the wording of the directive shows that the EU legislator has given the clearest possible indication that persons with a shared characteristic of sexual orientation may indeed be members of a particular social group. Subsequently, the national court has to assess whether such a group has a 'distinct identity', in each applicant's country of origin, 'because it is perceived as being different by the surrounding society'.

¹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12).

² Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, Vol. 189, p. 150, No 2545 (1954)), which entered into force on 22 April 1954. It was supplemented and amended by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967.

According to Ms Sharpston, the criminalisation of homosexual activity does not per se constitute an act of persecution for the purposes of the directive. Rather, it is for the competent national authorities to assess whether a particular applicant is likely to be subject either to acts which are sufficiently serious by their nature or repetition as to constitute a severe violation of human rights, or to an accumulation of various measures, including violations of human rights, which is sufficiently severe similarly to affect the applicant. In the light of the circumstances pertaining in the applicant's country of origin, the national authorities must take into account the risk and frequency of prosecution, the severity of the sanction normally imposed, and any other measures and social practices to which the applicant may reasonably fear to be subjected.

Finally, in the context of the assessment whether criminalisation of the expression of a sexual orientation is an act of persecution, the Advocate General is of the opinion that the directive does not draw a distinction between such an expression in public or in private. Moreover, an applicant for asylum cannot, according to the Advocate General, be expected to exercise restraint or conceal his sexual orientation in order to avoid persecution in his home country. Furthermore, she states that it would lead to arbitrariness to suggest that a distinction should be made between different types of expression of a person's sexual orientation or indeed instances of expression that are not sexual acts or acts of affection. Finally, in a case where the alleged acts of persecution in the home country apply to both homosexuals and heterosexuals, it is for the national authorities to consider whether the applicant is specifically likely to be targeted by acts of persecution or an accumulation of various measures, that are sufficiently serious by their nature or repetition to constitute a severe violation of basic human rights.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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