

## France - CNDA, 23 December 2010, Mr. K., n°08014099

**Country of Decision:**

France

**Country of Applicant:**

Algeria

**Date of Decision:**

23-01-2010

**Citation:**

Cour nationale du droit d'asile, 23 décembre 2010, M. K., n°08014099

**Court Name:**

National Asylum Court/Cour nationale du droit d'asile (CNDA)

**Keywords:**

Persecution Grounds/Reasons

Membership of a particular social group

Sexual orientation

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**Relevant Legislative Provisions:**International Law > [1951 Refugee Convention](#) [1] > [Art 1A \(2\)](#) [2]European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [3] > [Art 2](#) [4] > [Art 2 \(e\)](#) [4]European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [3] > [Art 2](#) [4]European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [3] > [Art 6](#) [5]European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [3] > [Art 10](#) [6]European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [3] > [Art 10](#) [6] > [Art 10.1 \(d\)](#) [6]European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [3] > [Art 15](#) [7]

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**Headnote:**

In the situation which currently prevails in Algeria, while homosexuality is in some ways

tolerated by society, as long as it is not explicitly expressed by the behaviour or the clothes, individuals who openly manifest their homosexuality may nevertheless be subjected to intimidation in their social environment and by the security forces. In addition, legislation punishes homosexuals by a prison sentence and a fine.

**Facts:**

Mr. K., an Algerian national, was rejected by his relatives and subjected to several attacks for reason of his homosexuality. Because of the repression of the authorities against gender minorities, he fled his country and applied for asylum in France. The French Office for the Protection of Refugees and Stateless Persons (Ofpra) rejected his application. On appeal, he requested the National Asylum Court/*Cour nationale du droit d'asile* (CNDA) to grant refugee status.

**Decision & Reasoning:**

The CNDA considered firstly that the sexual orientation of the applicant was established.

The CNDA considered that it stemmed from the interpretation of Article 1A(2) of the 1951 Refugee Convention that

*?a group shall be considered as 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, and membership of that group is established where the attitude of a claimant is considered by whole or part of the society of his/her country of origin as an infringement of the customs and laws in force, and for this reason he/she is likely to face persecution against which the authorities refuse or are unable to protect him/her?.*

In the present case, the CNDA considered that the assessment of the case file showed that in the situation which currently prevails in Algeria, while homosexuality is in some ways tolerated by society, as long as it is not explicitly expressed by the behaviour or the clothes, individuals who openly manifest their homosexuality may nevertheless be subjected to intimidation in their social environment and by the security forces. In addition, the social climate makes it difficult for homosexuals to fully come to terms with themselves, all the more since legislation, as provided under Article 338 of the Criminal Code, punishes them by a prison sentence of two months to two years and a fine.

The CNDA concluded that, in case of return, the applicant faced persecution in the meaning of Article 1A(2) of the 1951 Refugee Convention for reason of his membership of a particular social group, *?in as far as his peacefulness and his social integration would necessarily be conditioned by a high degree of personal repression of a determining character of his identity which he did not hesitate to assume in front of his relatives, and which led him to be rejected by them?.*

Consequently, the applicant had a well-founded claim for refugee status.

**Outcome:**

The applicant was recognised as a refugee.

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**Observations/Comments:**

In this decision, the CNDA uses the definition of a particular social group which it also uses in a decision taken on the same day in a case of forced marriage (see [CNDA, 23 décembre 2010, Mlle D., n°09011388](#) [8] also summarised in this database).


In this definition, the CNDA firstly recalled the provisions of Article 10.1 d) of the Qualification Directive according to which *?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?*.

The CNDA however added an element relating to the external infringing behaviour of the person concerned which is, according to the Court, the basis of the distinction between membership of a particular social group in the meaning of Article 1A2 of the 1951 Refugee Convention and subsidiary protection (see [CNDA, 23 décembre 2010, Mlle D., n°09011388](#) [8]).

In the present case, as in many other CNDA decisions relative to LGB applicants (a certain number of which are also summarised in this data base), the CNDA requires that applicants have manifested their characteristic or identity by their external behaviour (?explicitly?, ?openly?) in order to be members of a particular social group. According to the Court, as long as the individual hides this characteristic or identity, he/she is not perceived as such and therefore cannot be a member of the social group. This seems to stem from an erroneous interpretation of Article 10.1 d) of the Qualification Directive which states that a particular social group has a distinct identity in the relevant country because that group is perceived as being different by the surrounding society. The question is about whether the social group is perceived to be different by the surrounding society instead of whether the individual him/herself (who manifests or not his/her characteristic or identity) is perceived to be different. (For a more thorough analysis of this issue, see *Fleeing Homophobia ? Asylum claims related to sexual orientation and gender identity in Europe*, report from COC Netherlands and VUA, September 2011).

Furthermore, the definition of the membership of a particular social group which is given in the present CNDA decision includes persecution (?for this reason [his/her attitude], the claimant is likely to face persecution?). Yet, according to UNHCR, ?a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one?s human rights? ([UNHCR Guidelines on membership of a particular social group, HCR/GIP/02/02, 7 May 2002](#) [9]).

**Attachment(s):**

 [Fr 050 08014099.pdf](#)[10]

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**Other sources cited:**

Article 338 of the Algerian Criminal Code

**National / Other Legislative Provisions:**

**Links:**

- [1] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention>
- [2] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention#1>
- [3] <http://www.asylumlawdatabase.eu/en/content/qualification-directive>
- [4] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%202%20QD>
- [5] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%206%20QD>
- [6] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%2010%20QD>
- [7] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art 15 QD>
- [8] <https://www.asylumlawdatabase.eu/en/case-law/france-cnda-23-december-2010-miss-d-n%C2%B009011388>
- [9] <https://www.asylumlawdatabase.eu/en/content/en-unhcr-guidelines-international-protection-%E2%80%9Cmembership-particular-social-group%E2%80%9D-within>
- [10] <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Fr%20050%2008014099.pdf>
- [11] <https://www.asylumlawdatabase.eu/en/taxonomy/term/741>