

CJEU - C-199/12, C-200/12 and C-201/12, Minister voor Immigratie en Asiel v X, Y and Z

Country of Applicant:

Senegal
Sierra Leone
Uganda

Date of Decision:

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Citation:

C-199/12, C-200/12, and C-201/12

Court Name:

Fourth Chamber of the CJEU

Keywords:

[Discrimination](#) [1]
[Membership of a particular social group](#) [2]
[Well-founded fear](#) [3]
[Persecution \(acts of\)](#) [4]
[Persecution Grounds/Reasons](#) [5]
[Sexual orientation](#) [6]

Relevant Legislative Provisions:

International Law > [1951 Refugee Convention](#) [7] > [Art 1A \(2\)](#) [8]
International Law
International Law > [1951 Refugee Convention](#) [7]
European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [9] > [Recital 3](#) [10]
European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [11] > [Article 1](#) [12]
European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [11] > [Article 2](#) [13]
European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [9] > [Recital 10](#)
European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [9] > [Recital 16](#) [14]
European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [9] > [Recital 17](#)

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Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and
Fundamental Freedoms](#) [18] > [Article 8](#) [19]
European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [11] > [Article 7](#)
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9](#) [27] > [Art 9.3](#) [27]
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Headnote:

LGBTI asylum seekers (1) may be members of particular social group, (2) cannot be expected to conceal or restrain their expression of sexual orientation to reduce risk of persecution. (3) All criminalisation does not *per se* amount to persecution, but imprisonment actually applied does.

Facts:

The case concerns three asylum applicants in the Netherlands from Sierra Leone, Uganda and Senegal respectively. 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.

Questions referred for a preliminary ruling:

(1) Do foreign nationals with a homosexual orientation form a particular social group as referred to in Article 10(1)(d) [of the Directive]?

(2) If the first question is to be answered in the affirmative: which homosexual activities fall within the scope of the Directive and, in the case of acts of persecution in respect of those activities and if the other requirements are met, can that lead to the granting of refugee status? That question encompasses the following subquestions:

(a) Can foreign nationals with a homosexual orientation be expected to conceal their orientation from everyone in their [respective] country of origin in order to avoid persecution?

(b) If the previous question is to be answered in the negative, can foreign nationals with a homosexual orientation be expected to exercise restraint, and if so, to what extent, when giving expression to that orientation in their country of origin, in order to avoid persecution? Moreover, can greater restraint be expected of homosexuals than of heterosexuals?

(c) If, in that regard, a distinction can be made between forms of expression which relate to the core area of the orientation and forms of expression which do not, what should be understood to constitute the core area of the orientation and in what way can it be determined?

(3) Do the criminalisation of homosexual activities and the threat of imprisonment in relation thereto, as set out in the Offences against the Person Act 1861 of Sierra Leone (Case C-199/12), the Penal Code Act 1950 of Uganda (Case C-200/12) or the Senegalese Penal Code (Case C-201/12) constitute an act of persecution within the meaning of Article 9(1)(a), read in conjunction with Article 9(2)(c) of the Directive? If not, under what circumstances would that be the case??

Decision & Reasoning:

The CJEU answered the questions in a different order, deciding that:

(1) ?The existence of criminal laws, ? which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group? [48].

Article 10(1)(d) of the Qualification Directive (?QD?) says a group will be a ?particular social group?, membership of which may give rise to a genuine fear of persecution, if two conditions are met: (a) members share a characteristic or belief that is fundamental to their identity or conscience; (b) members have a ?distinct identity? because they are ?perceived as being different by the surrounding society?. As to (a), the second subparagraph of Article 10(1)(d) of the QD states that 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?. On this basis, the Court ruled that ?a person?s sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it? [46]. As to (b), the court saw the condition as met by virtue of ?the existence of criminal laws ? which specifically target homosexuals? [48].

(2) Although ?the criminalisation of homosexual acts per se does not constitute an act of persecution?, imprisonment that is ?actually applied? [56] must constitute an act of persecution.

Article 9(1)(a) of the QD states that the relevant acts must be ?sufficiently serious? by their nature or repetition as to constitute a ?severe violation of basic human rights?. The Court infers from this that ?not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness? [53]. Therefore, ?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? [55]. Instead, the Court says it is for the national authorities to undertake an examination of all the relevant facts concerning the country of origin including its laws and regulations in particular [whether] the term of imprisonment provided for by such legislation is applied in practice? [58-59].

(3) Applicants for asylum cannot be reasonably expected to conceal their homosexuality in their country of origin, or to exercise reserve in the expression of his sexual orientation? [71].

Considering the issue of concealment, the Court reasons by analogy with *Y and Z Joined Cases C-71/11 and C-99/11*, where the Court ruled that the possibility open to the applicants of avoiding the risk of persecution by abstaining from religious practice is not to be taken into account in determining the risk of persecution. The same applies analogously to cases of sexual orientation persecution. The court states 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]. In addition, the fact that [the applicant] could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account? [75].

Outcome:

The Court ruled that:

1. Article 10(1)(d) of 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 must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group.
2. Article 9(1) of Directive 2004/83, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts per se does not constitute an act of 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.

Article 10(1)(d) of Directive 2004/83, read together with Article 2(c) thereof, must be interpreted as meaning that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope. When 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.

Case Law Cited:

[CJEU - C-175/08, C-176/08, C-178/08 and C-179/08, Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi, Dier Jamal v Bundesrepublik Deutschland](#) [29]

[CJEU - C-71/11 and C-99/11 Germany v Y and Z](#) [30]

[CJEU - C-364/11 Mostafa Abed El Karem El Kott, Chadi Amin A Radi, Hazem Kamel Ismail v Bevandorlasi es Allampolgarsagi Hivatal \(BAH\)](#) [31]

Attachment(s):

[Original judgment - C-199.docx](#)[32]

Other sources cited:

Sierra Leone: Section 61 of the Offences Against the Person Act 1861

Uganda: Article 145 of the Penal Code Act 1950

Senegal: Article 319.3 of the Senegalese Penal Code

Authentic Language:

Dutch

Country of preliminary reference:

Netherlands

National / Other Legislative Provisions:

TFEU - Art 267

Netherlands - Vreemdelingenwet 2000 (Aliens Act)

Netherlands - Circular on Aliens 2000

TEU - Art. 6(1)

Links:

- [1] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A966
- [2] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A200
- [3] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A89
- [4] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A54
- [5] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A55
- [6] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A2448
- [7] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention>
- [8] <http://www.asylumlawdatabase.eu/en/content/1951-refugee-convention#1>
- [9] <http://www.asylumlawdatabase.eu/en/content/qualification-directive>
- [10] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Rec%202>
- [11] <https://www.asylumlawdatabase.eu/node/453>
- [12] https://www.asylumlawdatabase.eu/node/453#toc_14
- [13] https://www.asylumlawdatabase.eu/node/453#toc_17
- [14] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Rec%2016>
- [15] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Rec%2017>
- [16] https://www.asylumlawdatabase.eu/node/453#toc_29
- [17] https://www.asylumlawdatabase.eu/node/453#toc_32
- [18] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>
- [19] https://www.asylumlawdatabase.eu/node/195#toc_46
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- [22] https://www.asylumlawdatabase.eu/node/195#toc_64
- [23] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%201%20QD>
- [24] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%202%20QD>
- [25] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art 4 QD>

- [26] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%204%20QD>
- [27] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%209%20QD>
- [28] <http://www.asylumlawdatabase.eu/en/content/qualification-directive#Art%2010%20QD>
- [29] <https://www.asylumlawdatabase.eu/en/content/cjeu-c-17508-c-17608-c-17808-and-c-17908-aydin-salahadin-abdulla-kamil-hasan-ahmed-adem>
- [30] <https://www.asylumlawdatabase.eu/en/content/cjeu-c-7111-and-c-9911-germany-v-y-and-z>
- [31] <https://www.asylumlawdatabase.eu/en/content/cjeu-c-36411-mostafa-abed-el-karem-el-kott-chadi-amin-radi-hazem-kamel-ismail-v-bevandorlasi>
- [32] <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Original%20judgment%20-%20C-199.docx>