
LGBTI asylum seekers: discord between the European courts?

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*This article is to be read in conjunction with the [EDAL Case Summary](#)[1]***Introduction**

Seven and a half months after the Court of Justice of the European Union (?CJEU?) handed down their landmark judgment in [Joined Cases C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel\(?XYZ?\)](#) [2], which concerns how to adjudicate asylum applications by those fleeing persecution on the basis of their sexual orientation, the European Court of Human Rights (?ECtHR?) gave judgment in [M.E. v. Sweden \(no. 71398/12\)](#) [1] (?M.E.?) on the very same issue. The single dissenting opinion (Judge Power-Forde) and the single separate opinion (Judge De Gaetano) highlight two different and crucial points of discord between the positions of the courts of Luxembourg and Strasbourg. The first point concerns whether LGBTI asylum seekers can be expected to return home and conceal their sexual orientation to avoid persecution. The second point is whether the mere criminalisation of homosexual acts, irrespective of the actual application of the criminal law in practice, can constitute an act of persecution.

Concealing sexual orientation to avoid persecution**The judgments**

In XYZ, the CJEU ruled, among other things, that LGBTI applicants for asylum cannot be reasonably expected to ?conceal their homosexuality in their country of origin?, or ?to exercise reserve in the expression of their sexual orientation? in order to reduce the risk of persecution and make return a safe option [71, 76].

M.E. concerns Sweden?s refusal of a homosexual Libyan?s asylum claim and the government?s decision that he must return to Libya temporarily in order to apply for family reunion with his partner, a permanent resident of Sweden to whom he is married. The Swedish authorities indicated that the reunification process would take about four months. The applicant argued that removal to Libya, even for four months, would entail a risk of ill-treatment contrary to Article 3 of the [European Convention on Human Rights](#) [3](?ECHR?) due to his sexual orientation.

A six-to-one majority of the ECtHR concluded that, based on the applicant?s decision not to reveal his sexual orientation to his family back in Libya, he has made an ?active choice to live discreetly? due to ?private considerations? rather than fear of persecution [86]. In the majority?s view, ?even if the applicant would have to be discreet about his private life [during the four months in Libya], it would not require him to conceal or suppress an important part of his identity permanently or for any

longer period of time? [88]. Such a short term of discretion ?cannot by itself be sufficient to reach the threshold of Article 3 [ECHR]?

The single dissenting opinion of Judge Power-Forde argues that ?[w]ith this judgment, the Strasbourg Court introduces a new test of ?duration? that is not to be found elsewhere in comparative European law?. Citing XYZ, the dissenting judge states that ?[w]hat counts 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?.

Homosexuals in Libya

Before going deeper into this alleged fissure in comparative European law, what is the situation for homosexuals in Libya? On this point, the dissenting judge and the majority further disagree. Based on the absence since the fall of Gadhafi?s regime in 2011 of public records of any prosecutions for homosexual acts, which are punishable by imprisonment under the Libyan Penal Code, the ECtHR majority hold that there is insufficient evidence that ?the Libyan authorities actively persecute homosexuals? [87]. In reaching this conclusion, the majority notes that ?homosexuality is a taboo subject and seen as an immoral activity against Islam in Libya? [87].

The dissenting judge cannot support this finding. Although there have been no recorded prosecutions, she highlights the [United Kingdom Border Agency Country of Origin Information Report on Libya](#) [4], dated 19 December 2012, which reports allegations of homosexuals in Libya being arrested, assaulted and beaten ?simply for being homosexual?.

Judge Power-Forde?s dissenting opinion

With this Libyan context in mind, how does Judge Power-Forde elaborate on the ECtHR majority?s alleged departure from XYZ?

Earlier ECtHR jurisprudence

She starts with the ECtHR?s earlier case law on this issue, in particular the inadmissibility decision in [F. v. the United Kingdom \(no. 17341/03\)](#) [5] from 22 June 2004. This case concerns a gay asylum seeker attempting to resist his return to Iran. The ECtHR rejected the complaint as inadmissible because the available information sources on Iran ?do not disclose a situation of active prosecution by the authorities of adults involved in consensual and private homosexual relationships? (emphasis added). In reaching this conclusion, the ECtHR notes that ?Islamic law is more concerned with public immorality and not what goes on in the privacy of the home?. Commenting on this decision in *M.E.*, Judge Power-Forde correctly suggests that ?[i]mplicit in the Court?s reasoning is the assumption that the applicant would be ?discreet? about his sexual orientation in Iran beyond the privacy of his home?.

Recent developments

Judge Power-Forde argues that significant developments have taken place concerning LGBTI asylum seekers in the 10 years since this ECtHR judgment. She references the UK Supreme Court judgment in [HJ \(Iran\) and HT \(Cameroon\) v. SSHD \[2010\] UKSC 31](#) [6] as marking a ?clear departure? from the ?risk of criminal prosecution? approach in the ECtHR?s Iranian case above. In this July 2010 judgment the Supreme Court rejected the ?reasonably tolerable test? of ?being discreet? in order to reduce persecution risk. Lord Hope, at paragraph 26, writes:

?... The [ECHR] does not permit, or indeed envisage, applicants being returned to the countries of their nationality ?on condition? that they take steps to avoid offending their persecutors... persecution does not cease to be persecution for the purpose of the Convention because those

persecuted can eliminate the harm by taking avoiding action...?

Judge Power-Forde also refers to paragraph 12 of UNHCR's [2012 Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity](#) [7], which, on the basis of judgments from Canada, USA, Australia and New Zealand, concludes that:

?... 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...?

XYZ, the UK Supreme Court's judgment, and UNHCR's guidelines all lead Judge Power-Forde to argue that "[t]he majority's conclusion in [M.E.] does not fit the current state of International and European law on this important question of fundamental human rights". Despite citing XYZ at paragraph 50, the dissenting opinion accuses the ECtHR majority of ignoring recent developments and reverting to the old "reasonably tolerable" test from ten years ago.

Time is of the essence?

According to Power-Forde, the majority's new "duration test" i.e. the ruling that the applicant would only need to be discreet for a short period of time is at odds with XYZ, which imposes no such "time" requirement. The dissenting judge puts the point simply: "An applicant cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution". The length of time of concealment is immaterial what matters is whether a homosexual must exercise greater restraint in their free expression than a heterosexual.

Anne Frank

Power-Forde raises the so-called "Anne Frank" hypothesis: under the "reasonably tolerable" test, Anne Frank's asylum claim can be refused if she could be expected to tolerate living in an attic to avoid detection by the Nazis. Agreeing with the UK Supreme Court, Power-Forde recognises that such a hypothesis exposes the "absurdity" of the "reasonably tolerable" test.

The ability to conceal

The dissenting opinion also advocates another interesting point against the majority. There is an implicit assumption in their judgment that "sexual identity is, primarily, a matter of sexual conduct", which, if restrained, will successfully hide the sexual identity. However, as Power-Forde notes, sexual orientation "may be expressed in a myriad of ways", all of which must be suppressed in order to ensure safety from detection. Furthermore, "the risk of discovery of the truth is not, necessarily, a matter determined entirely by his own conduct". This is especially dangerous because, due to the lack of Swedish representation in Libya, the applicant in M.E. will need to travel to the Swedish embassy in Algeria, Tunisia or Egypt (all of which criminalise homosexuality) for a few days in order to be interviewed for family reunion. Power-Forde highlights the obvious risk of disclosure of sexual orientation during an interview process for family reunification.

Where to draw the line?

By holding that a short time frame of concealment doesn't meet the threshold of ill-treatment under Article 3 ECHR, Power-Forde argues that the ECtHR majority begs the question "where to draw the line"? She refers to Lord Rodger in the UK Supreme Court's judgment, at paragraph 80:

?... Where would the tribunal find the yardstick to measure the level of suffering which a gay man ... would find reasonably tolerable? How would the tribunal measure the equivalent level for a straight man asked to suppress his sexual identity indefinitely? The answer surely is that there is no relevant standard since it is something which no one should have to endure...?

Reading glasses v. sexual identity

The dissenting judge's final paragraph raises the inconsistency between the majority's finding on Article 3 in *M.E.* concerning a gay man being required for four months to conceal his sexual identity and the ECtHR's April 2010 decision in [Slyusarev v. Russia \(no. 60333/00\)](#) [8]. The court held, in this case, that "to deprive a person of his reading glasses for a few months reaches the required threshold under Article 3".

?An affront to human dignity?

Judge Power-Forde's last sentences tie the threads of her forceful opinion together:

?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?.

Does mere criminalisation constitute persecution?

The CJEU ruled in *XYZ* that "the criminalisation of homosexual acts *per se* does not constitute an act of persecution" [56]. There needs to be some actual prosecution and punishment to show the law is actually applied "homosexuality simply being illegal on the statute books is not enough. In an [EDAL blog article on the XYZ judgment](#) [9] published when it was handed down, the forceful opposition of [UNHCR](#) [10], [ILGA-Europe](#) [11], [Amnesty International and the International Commission of Jurists](#) [12] to this particular conclusion was highlighted. In addition, the [XYZ case comment](#) [13] of UK barrister S. Chelvan points out that this conclusion on mere criminalisation is at odds with ECtHR jurisprudence. The relevant part of the EDAL blog article is reproduced here:

The ECtHR held in [Dudgeon v UK](#) [14] (no. 7525/76) that the "very existence" of laws in Northern Ireland prohibiting "gross indecency" and "buggery" between males, carrying a potential custodial sentence, "continuously and directly affected the applicant's private life" [41]. The court ruled that the restriction imposed on the applicant "by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved" [61]. In [Norris v Ireland](#) [15] (no. 10581/83), the ECtHR held that the mere statutory existence of similar offences, despite the risk of prosecution being "minimal" [33], meant the applicant acquired victim status and could complain of a violation of his rights. The ECtHR revealingly reasoned that [33]:

?A law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example there is a change of policy. The applicant can therefore be said to "run the risk of being directly affected" by the legislation in question?.

In short, unlike the CJEU in *XYZ*, the ECtHR seems to suggest that mere criminalisation *can* amount to persecution.

Back to *M.E.*, the separate opinion of Judge De Gaetano overall supports the majority because he regards the applicant as lacking credibility. But, in the last paragraph of his opinion, he appears to endorse the view of S. Chelvan that XYZ's conclusion on 'mere criminalisation' has caused another point of discord between the European Courts:

The controversial statement (admittedly made in the specific context of Council Directive 2004/83/EC) to the effect that 'the criminalisation of homosexual acts per se does not constitute an act of persecution' could be seen as somehow undermining the standards set by the Court as far back as the 1980's in connection with the criminalisation of homosexual acts and the resulting violation of Article 8 (see Dudgeon v. the United Kingdom...; Norris v. Ireland) and the consequent irrelevance, for the purpose of a violation of fundamental human rights, of whether or not such laws are in fact applied or applied sporadically.

In other words, Judge De Gaetano appears to agree that the actual application of laws criminalising homosexuality is 'irrelevant' when determining whether a homosexual is at risk of persecution. The CJEU's judgment can be accused of 'undermining' the long-held standards of the ECtHR.

Conclusion

Many readers of judgments often ignore the separate and dissenting opinions. But in the case of *M.E.* these opinions highlight two fundamental points of discord between the courts of Strasbourg and Luxembourg on two crucial principles concerning LGBTI asylum seekers. It is possible that these opinions will prompt the applicant in *M.E.* to request a referral to the Grand Chamber of the European Court of Human Rights for reconsideration. If so, the Grand Chamber will be given an important opportunity to achieve two things: first, re-align the ECtHR's jurisprudence with that of the CJEU by ruling that concealment of sexual orientation for any period of time is unacceptable, and thereby abandon the 'reasonably tolerable' test once and for all; second, expressly distinguish the ECtHR's position on 'mere criminalisation' from that of the CJEU, in order to ensure that LGBTI asylum seekers are protected from the harm that homophobic criminal laws can cause even when not formally and frequently enforced.

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Keywords:

Credibility assessment

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Links:

[1] <http://www.asylumlawdatabase.eu/en/content/ecthr-%E2%80%93-me-v-sweden-application-no-7139812#content>

[2] <http://www.asylumlawdatabase.eu/en/content/cjeu-c-19912-c-20012-and-c-20112-minister-voor-immigratie-en-asiel-v-x-y-and-z>

- [3] http://www.echr.coe.int/Documents/Convention_ENG.pdf
- [4] <http://ecre.us1.list-manage1.com/track/click?u=8e3ebd297b1510becc6d6d690&id=7087d6ad80&e=3003c02bf9>
- [5] <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-24020>
- [6] <http://www.asylumlawdatabase.eu/en/case-law/uk-supreme-court-7-july-2010-hj-iran-v-secretary-state-home-department-2010-uksc-31>
- [7] <http://www.refworld.org/docid/50348afc2.html>
- [8] <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98331>
- [9] <http://www.asylumlawdatabase.eu/en/journal/court-justice-european-union-delivers-judgment-joined-cases-c-19912-c-20012-and-c-20112-x-y>
- [10] <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=5065c0bd2>
- [11] http://www.ilga-europe.org/home/news/latest/statement_cjeu_august_2012
- [12] <http://www.asylumlawdatabase.eu/en/content/amnesty-international-and-international-commission-jurists-joint-observations-sexual>
- [13] <http://europeanlawblog.eu/?p=2042>
- [14] <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57473>
- [15] <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57547>