

EUROPEAN COURT OF HUMAN RIGHTS

Application No. 30953/11

BETWEEN:

A.E.

Applicant

-and-

FINLAND

Respondent

SUBMISSIONS FOR THE INTERVENORS

AIRE (Advice for Individual Rights in Europe) Centre, ECRE (European Council on Refugees and Exiles), FIDH (Fédération Internationale des Ligues des Droits de l'Homme), FLHR (the Finnish League for Human Rights), ILGA-Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), INTERIGHTS and UKLGIG (UK Lesbian and Gay Immigration Group).

ECRE, FIDH, FLHR and ILGA Europe are represented by Wesley Gryk Solicitors and Mr. S. Chelvan. AIRE Centre, INTERIGHTS and UKLGIG joined and contributed to their submissions.

SUMMARY:

1. The case of *A.E. v. Finland* provides the European Court of Human Rights ('the Court') an opportunity to revisit an issue it last considered in 2004, and provide guidance on the application of the European Convention on Human Rights ('the Convention') to claims made by gay men and lesbians that they will be subjected to ill treatment if expelled.¹ Since 2004, European consensus has developed socially, politically and legally to a point where there is greater recognition of, and protection for, the right of gay and lesbian individuals to 'live freely and openly'. The focus of these written comments, given the expertise of the respective intervenors, is with respect to Article 3 ECHR risk on return, even though other Convention articles are engaged in the application. In summary, the following points are covered within these written comments:
 - (i) A person cannot be expelled to a place where (s)he will be subjected to treatment contrary to article 3 because (s)he is, or would be perceived as, gay or lesbian;
 - (ii) It is irrelevant that the applicant could avoid this treatment by 'being discreet' about his sexual orientation, just as it would be irrelevant if a political dissident or a member of a religious minority could avoid similar treatment by keeping their political opinion or religion a secret²;
 - (iii) Further, the fact that a country criminalises adult private same-sex sexual conduct creates the presumptions (i) that actual or perceived lesbians and gay men are at real risk of treatment contrary to Article 3 in that country; and (ii) in any event, actual and perceived lesbians and gay men will be offered no state protection against serious harm which they would face on the basis of that sexual identity;
 - (iv) Further, even if an applicant is voluntarily discreet for only family or societal reasons, then the fact that he or she is required to present publicly (or create or manufacture) elements of a heterosexual narrative to evade harm (such as 'proving' heterosexuality by being sexually receptive to members of the opposite sex, and/or by getting married and/or having children), and therefore conform to a stereotype to evade harm through identification of difference, is in itself contrary to Article 3.

INTRODUCTION:

2. The intervenors FIDH and ILGA-Europe have already submitted written comments, with the ICJ (International Commission of Jurists), dated the 9th of April 2013, in the case of *M.E. v Sweden* (*Application no. 71398/12*)³ and a letter, dated the 10th of December 2013 following the judgment of the Court of Justice of the European Union in *C-199/12, C-200/12, C-201/12 - X, Y, Z v Minister voor Immigratie en Asiel* (judgment of 7 November 2013). The intervenors' highlight those so as to enable the Court to note that similar points are being raised in proceedings currently before the Court in *M.E. v Sweden*, where the issue is "whether a Council of Europe member state may expel (even temporarily) a man who is genuinely married to another man, or a woman who is genuinely married to another woman, if the expelled individual would face a real risk of treatment violating Article 3 in his or her country of origin if he or she were to speak publicly (or otherwise be open) about his or her sexual orientation and same-sex marriage".

¹ References to 'gay and lesbian', include bisexual individuals. 'Homosexual' is used only where the original source uses this term. The definition of sexual orientation is drawn from the 2007 *Yogyakarta Principles*.

² See by analogy the reasoning of the UK Supreme Court in *HJ (Iran) and HT (Cameroon) v SSHD* [2010] UKSC 31; *RT (Zimbabwe) and others* [2012] UKSC 38. The intervenors submit that to adopt any lesser protection in the context of Article 3 ECHR would render the absolute protection offered by that Article ineffective and illusory.

³ See http://www.fidh.org/IMG/pdf/fidh-icj-ilga_europe_intervention_-_me_v_sweden_-_app_no_71398_-_12_-_9th_april_2013.pdf (Accessed 14th March 2014).

The Court's earlier case law on Article 3 claims of gay men:

3. The Court's last guidance on expulsion of gay applicants for asylum are the June and December 2004 admissibility decisions in *F. v. United Kingdom*⁴ and *I.I.N. v. Netherlands*⁵. Both decisions related to gay men from Iran, and the Court declared their applications inadmissible. In *F. v. United Kingdom*, the Court reviewed the February 2002 decision of the Adjudicator who found that privately conducted homosexual conduct was extremely unlikely to lead to ill-treatment or harassment. The Court examined the country background evidence⁶, the most recent being from 2003, and concluded that the materials did not disclose 'a situation of active prosecution by the authorities of adults involved in consensual and private homosexual relationships'. The Court found very scarce material on actual prosecutions based solely on sexual conduct, and if they existed, the homosexual community in Iran would have been aware of such trials. A tenuous and hypothetical basis of Article 3 treatment occurring was insufficient, and even though Iran does not protect the human rights of homosexuals, who may be vulnerable to abuse, there were no substantial grounds for a finding of real risk of treatment contrary to Article 3. The Court's reasoning in *I.I.N.* was very similar to its reasoning in *F.*
4. There have been rapid developments in recent years in the Council of Europe as concerns the understanding and recognition of the rights of gay men and lesbians. These advances have been reflected in the Court's own case law. See *Schalk and Kopf v Austria*⁷; compare *Fretté v France*⁸ with *E.B. v France*.⁹ As will be demonstrated below, since 2004, both the United Nations High Commissioner for Refugees' 2012 'Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity'¹⁰, and the judgment of the United Kingdom Supreme Court in *H.J. (Iran) (2010)*¹¹ have set the standard for how these issues are now considered in Europe.

⁴ ECtHR 22 June 2004, *F. v. United Kingdom*, no. 17341/03.

⁵ ECtHR 9 December 2004, *I.I.N. v. Netherlands*, no. 2035/04.

⁶ In July 2005, the UK's Immigration Appeal Tribunal in *RM and BB (Homosexuals) Iran CG* [2005] UKIAT 00117, in assessing evidence, as of February 2005, held, reversing the UK's position in *F* only a year before [§ 123]: "***It is clear ... that ...those guilty of immoral acts under Article 147/115 and Tafkhiz under Article 121 face harsh punishments which can include long prison sentences up to six years and up to one hundred lashes. We remind ourselves of what Mr Kovats accepted on behalf of the Secretary of State that a sentence of lashing would be such as to give rise to a breach of Article 3 rights. Although we agree with Mr Kovats that the interest of the Iranian authorities in homosexual offenders is essentially focused upon any outrage to public decency, it is in our view clear that the authorities would not simply ignore, as Mr Kovats suggested they might in certain situations, reports made to them of persons carrying out homosexual acts albeit in private. If a complaint is brought to the authorities then we are satisfied that they would act upon that to the extent that they would arrest the claimed offenders and question them and thereafter there is a real risk that either on the basis of confessions or knowledge of the judge which might arise from such matters as previous history or medical evidence or the evidence of the person who claimed to have observed the homosexual acts, that they would be subjected to significant prison sentences and/or lashing.***" [emphasis added].

⁷ ECtHR 24 June 2010, *Schalk and Kopf v Austria*, no.30141/04.

⁸ ECtHR 26 February 2002, *Fretté v France*, no. 36515/97.

⁹ ECtHR 22 January 2008, *E.B. v France*, no. 43546/02

¹⁰ United Nations High Commission for Refugees HCR/GIP/12/09, 23 October 2012, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.*

¹¹ UK Supreme Court judgment 7th July 2010, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596.

CONSENSUS IN EUROPEAN AND OTHER DEMOCRATIC SOCIETIES IN SUPPORT OF GAY AND LESBIAN ASYLUM CLAIMS:

5. In 1981, the Netherlands became the first country in the world to recognise asylum claims of homosexuals¹². The obligation to protect lesbian and gay asylum-seekers is now incorporated into European Union law. Since the 2004 Qualification Directive entered into force on the 6th of October 2006¹³, 24 (and now 27) EU member states have a positive obligation to recognise the asylum claims of adult lesbians and gay men, pursuant to Article 10(1)(d):

'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 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 ...;'

6. For the purposes of this case, the 2011 Recast Directive,¹⁴ which is to be transposed by December 2013 by 25 Member States, makes no material difference, as the provision in Article 10 (1) (d) for sexual orientation is not affected.¹⁵ On the 31st of March 2010, the Committee of Ministers of the Council of Europe published 'Recommendation CM/Rec (2010) of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity'¹⁶. The Recommendation includes the right to seek asylum on account of persecution based on sexual orientation or gender identity where there are applicable international obligations (see *Annex A* to these written comments). At least 34 Council of Europe member states already recognise sexual orientation as a ground for claiming asylum. These include the 26 EU member states to which the 2004 Qualification Directive applies.¹⁷

¹² *Afdeling rechtspraak van de Raad van State* (Judicial Division of the Council of State) 13 August 1981, *Rechtspraak Vreemdelingenrecht* 1981, 5, *Gids Vreemdelingenrecht (oud)* D12-51.

¹³ 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 (Official Journal L 304 , 30/09/2004 P. 0012 – 0023). Denmark opted out of the 2004 Directive, but does recognise the claims of gay and lesbian applicants (see S. Jansen and T. Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, Amsterdam, 2011, p. 24, fn. 74 '... "Disturbing Knowledge – Decisions from asylum cases as documentation of LGBT-persons", LGBT Denmark and Danish Refugee Council (2008), <http://www.lgbtdk/uploads/media/DisturbingKnowledge.PA.01.pdf>").

¹⁴ Council Directive 2011/95/EC of 13 December 2011 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 (re cast) (Official Journal L 337 , 22/12/2011, P. 0009 – 0036).

¹⁵ There is an amendment to Article 10 (1) (d) which includes gender identity as a protected identity.

¹⁶ See <http://wcd.coe.int/ViewDoc.jsp?id=1606669> (last accessed 15 March 2014).

¹⁷ T. Hammarberg, *Discrimination on grounds of sexual orientation and gender identity*, 2nd edn, 2011, Council of Europe, p. 65: http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf (last accessed 15 March 2014) 'National legislation and data on LGBT asylum and refugee cases. Twenty-six member states have explicitly recognised in their national legislation that sexual orientation is included in the notion of "membership of a particular social group" (Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden). In the other member states there is no explicit mention in their legislation.

7. The same is true in other democratic societies. The Supreme Court of Canada in *Ward v Canada*¹⁸ and the United States Board of Immigration Appeals in *In re A Costa*¹⁹ have held that sexual orientation can fall within the 'particular social group' category of the Refugee Convention. The High Court of Australia in *Appellant S395*²⁰ rejected the argument that gay asylum-seekers can be excluded from refugee protection by being 'discreet' in their countries of origin. The New Zealand Refugee Status Appeals Authority in *Refugee Appeal No 74665/03*²¹ held in approaching the claim from a human rights perspective [§ 114] '... Understanding the predicament of "being persecuted" as the sustained or systematic violation of basic human rights demonstrative of a failure of state protection means that the refugee definition is to be approached not from the perspective of what the refugee claimant can do to avoid being persecuted, but from the perspective of the fundamental human right in jeopardy and the resulting harm'.
8. There now exists in the majority of Council of Europe Member States social, cultural and legal recognition of the right of gay and lesbian individuals to 'live freely and openly'. The Court recognised this right in *Alekseyev v. Russia* (App. Nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010, [§ 84]): 'There is no ambiguity about the other [46] member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly.'

GUIDELINES OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES:

9. The United Nations High Commissioner for Refugees' 2012 'Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity'²² incorporate the reasoning of the United Kingdom Supreme Court in *HJ (Iran) and HT Cameroon v Secretary of State for the Home Department*²³ (2010) . The relevant paragraphs of the Guidelines which address the right to outwardly express sexual orientation are cited within *Annex B* to these written comments.

THE HJ (IRAN) TEST AND SUBSEQUENT CASE LAW

10. In the United Kingdom, between 2004²⁴ and 2006, the England and Wales Court of Appeal developed the 'being discreet test', whereby the United Kingdom found lawful the expulsion of gay and lesbian asylum seekers to their countries of origin, on the basis that they would be 'voluntarily discreet' about

There are, however, at least seven other member states which, even in the absence of such explicit recognition, have had asylum claims in which sexual orientation has been recognised as a ground for persecution (Denmark, Greece, Norway, Switzerland, Turkey, Ukraine and the United Kingdom) evidenced by decisions of national competent bodies in these countries. In the other 12 member states which are parties to the 1951 Convention there is no explicit recognition of persecution on the basis of sexual orientation as a valid ground for asylum claims either in legislation or in actual successful cases filed by LGBT asylum seekers (Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Estonia, Georgia, Liechtenstein, Monaco, Montenegro, the Russian Federation, Serbia and "the former Yugoslav Republic of Macedonia").' The 34th member state is Estonia, where the 2004 Qualification Directive must be implemented. No information is available for Andorra and San Marino.

¹⁸ *Canada (Attorney General) v. Ward* [1993] 2 SCR 689.

¹⁹ *In re Acosta* (1985) 19 I. & N. 211.

²⁰ *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

²¹ *Refugee Appeal No 74665/03* [2005] INLR 68.

²² United Nations High Commission for Refugees HCR/GIP/12/09, 23 October 2012, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*. <http://www.refworld.org/docid/50348afc2.html> (Accessed on 14 March 2014).

²³ UK Supreme Court judgment 7th July 2010, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596.

²⁴ England and Wales Court of Appeal judgment 2 December 2004, *Z v Secretary of State for the Home Department* [2004] EWCA Civ 1578; [2005] Imm. A.R. 75.

their sexual orientation, and that this would be ‘reasonably tolerable’²⁵. On the 7th of July 2010, the UK Supreme Court held, in the unanimous (5-0) landmark judgment of *HJ (Iran) and HT (Cameroon)*, that this ‘reasonably tolerable test’ of ‘being discreet’ was unlawful, especially because no heterosexual person would find such constraints on being open about their sexual orientation to be reasonably tolerable [§ 77]. Drawing from earlier cases, the UK Supreme Court held that the underlying rationale of the Refugee Convention was to enable a person to ‘live freely and openly’ without fear of persecution [§ 65]. The UK Supreme Court’s test, by which UK decision makers now determine gay asylum claims are found at § 82 of *HJ (Iran)* and are cited within *Annex C* to these written comments.

11. The UK Supreme Court’s test can be summarised in the following manner:

- (i) Is the applicant gay or lesbian, or perceived to be?
- (ii) Do openly gay and lesbian individuals in the country of origin face a well-founded fear of persecution?;
- (iii) Will the individual be ‘open’ on return? If so, they qualify as a refugee. If the individual is voluntarily discreet, then
 - (a) is it only because of family or social pressure? Then the individual does not qualify as a refugee; or
 - (b) is *a material reason* for being discreet the fear of persecution (notwithstanding the presence of other operative reasons)? If it is, then the individual qualifies as a refugee.

12. The UK’s Home Office has incorporated the UK Supreme Court’s test into its own published policy document.²⁶ The UK Supreme Court, having found in *HJ (Iran)* that its test would be equally applicable to asylum claims based on all other Refugee Convention grounds, has applied the same test to asylum claims by persons with no political opinion (see *RT (Zimbabwe)*²⁷). The Upper Tribunal (Immigration and Asylum Chamber) has applied the test to religious claims (*MN and others (Ahmadis – country conditions – risk) Pakistan CG*).²⁸

13. The assessment of risk in the case of *HJ Iran* in the Tribunal below had been that the “enforcement of anti-homosexual laws is arbitrary” but there was “no real risk of discovery or of adverse action against homosexuals who conduct their homosexual activities discreetly” [§ 35]. In *HT Cameroon* case, the tribunals below had found that HT could relocate to a different part of Cameroon and be discreet there while “there was no evidence that there was any area of Cameroon where gay men could live openly without any fear of persecution” [§ 84]. The cases were remitted for re-determination by the Tribunal but prior to further proceedings the appellants were recognised as refugees by the Secretary of State for the Home Department. It is of note that *HJ Iran* was disbelieved on his account of past persecution, but it was believed that he was gay.

14. From January 2011, the Swedish authorities adopted the *HJ (Iran)* approach in their national guidelines (see *Fleeing Homophobia* report, page 38, fn. 134²⁹), and the Superior Courts of both Finland and

²⁵ England & Wales Court of Appeal judgment 26 July 2006, *J v Secretary of State for the Home Department* [2006] EWCA Civ 1238; [2007] Imm A R 73 [§ 16].

²⁶ Asylum Instruction on *Sexual Orientation Issues in the Asylum Claim* (updated June 2011) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257397/sexual-orientation-gender-ident.pdf (Accessed 13 March 2014).

²⁷ UK Supreme Court judgment 25th July 2012, *RT (Zimbabwe) and KM (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38; [2013] 1 A.C. 152.

²⁸ UK Upper Tribunal (Immigration and Asylum Chamber) judgment 14th November 2012, *MN and others (Ahmadis – country conditions – risk) Pakistan CG* [2012] UKUT 00389 (IAC).

²⁹ Rättschefens rättsliga ställningstagande angående metod för utredning och prövning av den framåtsyftande risken för personer som återoppar skyddsskäl på grund av sexuell läggning (RCI 03/2011) available at: www.migrationsverket.se/lifos (last accessed 9 April 2013).

Norway, in January 2012³⁰ and March 2012³¹ respectively have adopted the guidance as part of their own domestic case law.

15. In a September 2012 *Sentenza*³² (*TT v Minister of the Interior*), the Italian Supreme Court went beyond *H.J. (Iran)*, holding that ‘[t]he penalty for homosexual acts, as provided by art. 319 of the Senegalese Penal Code, constitutes *per se* a general condition of deprivation of the fundamental right to live one’s sexual and affective life freely’. Because this deprivation of fundamental rights ran counter to the Italian Constitution, the European Convention and the EU Charter of Fundamental Rights, it provided an ‘objective situation of persecution’.
16. In September 2012, the Court of Justice of the European Union held in the joined cases C71/11 and C99/11, *Bundesrepublik Deutschland (Federal Republic of Germany) v. Y and Z*, that under the 2004 Qualification Directive³³ and its definition of persecution in Article 9(1)(a), if it is found that conduct connected to Ahmadi religious practice would result in persecution in Pakistan, then ‘the fact that [the Ahmadi person] could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant’ [§ 62].
17. On the 7th of November 2013, the Luxembourg Court provided its judgment following the references from the Dutch authorities in the joined cases C109/12 to C201/12, *X, Y and Z v. Minister voor Immigratie en Asiel*.³⁴ The Dutch authorities posed several questions related to the 2004 Qualification Directive, with respect to the asylum claims of three gay men.³⁵ The judgment sets out minimum standards by which all EU member states, including the respondent Contracting Party in the present case, are bound. CJEU found on the questions referred:
 - (i) The existence of criminal laws, such as those in Senegal, Uganda and Sierra Leone, which specifically target homosexuals, supports the finding that the applicants must be regarded as forming a particular social group [§ 35];
 - (ii) Answering the question whether criminalisation of homosexual acts alone constitutes persecution for the purpose of Article 9(1)(a), read in conjunction with Article 9(2)(c) of the Qualification Directive, the Court concluded that it did not, but it was for the national court to undertake an examination of all the relevant facts concerning that country of origin, including its laws and regulations and the manner in which they are applied [§ 58-61];
 - (iii) 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 [§ 76];

³⁰ *Decision KHO:2012: 1* judgment 13th January 2012, Summary Online. <<http://www.unhcr.org/refworld/pdfid/4f3cdf7e2.pdf>> (last accessed 6 April 2013).

³¹ “A” 29th March 2012, Online (Norwegian only). [http://www.domstol.no/upload/HRET/saknr2011-1688\(anonymisert\).pdf](http://www.domstol.no/upload/HRET/saknr2011-1688(anonymisert).pdf) (last accessed 6 April 2013).

³² *Sentenza n. 15981 del 2012 depositata il 20 settembre 2012*. http://www.retelenford.it/sites/retelenford.it/files/2012_Cass_15981-asilo.pdf (last accessed 6 April 2013).

³³ 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 (Official Journal L 304 , 30/09/2004 P. 0012 – 0023).

³⁴ For judgment – see <http://curia.europa.eu/juris/document/document.jsf?text=&docid=144215&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=323037> (accessed 13th March 2014). For Case Comment see S. Chelvan “X, Y and Z v Minister voor Immigratie en Asiel: A Missed Opportunity or a New Dawn?” [2014] E.H.R.L.R. (1) pp. 49-58.

³⁵ *Official Journal of the European Union* C 217, 21/07/2012 P. 0008-0009. On 20 March 2013, the Dutch Council of State referred three cases involving gay or lesbian asylum-seekers to the Luxembourg Court: Cases C-148/13, C-149/13 and C-150-13.

- (iv) For the purposes of assessing which acts constitute persecution, it is unnecessary to distinguish acts that interfere with the core areas of the expression of sexual orientation, even assuming it were possible to identify them, from acts which do not affect those purported core areas. [§ 78].
18. The CJEU in *X, Y and Z* addressed the point with respect to ‘expectation to be discreet’ at § 69 to 75 of the judgment and found that “an applicant for asylum cannot be expected to conceal his homosexuality in order to avoid persecution” [§ 71] and that “[t]he fact that he could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect” [§ 75]. The operative part of the judgment concluded that “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”.
 19. Intervenors submit that the following can be concluded with regard to gay and lesbian asylum-seekers in Council of Europe member states:
 - (i) A person cannot be expelled to a place where (s)he will be subjected to treatment contrary to article 3 because (s)he is, or would be perceived as, gay or lesbian;
 - (ii) It is irrelevant that the applicant could avoid this treatment by 'being discreet' about his sexual orientation, just as it would be irrelevant if a political dissident or a member of a religious minority could avoid similar treatment by keeping their political opinion or religion a secret;
 - (iii) Further, the fact that a country criminalises adult private same-sex sexual conduct creates the presumptions (i) that actual or perceived lesbians and gay men are at real risk of treatment contrary to Article 3 in that country; and (ii) in any event, actual and perceived lesbians and gay men will be offered no state protection against serious harm which they would face on the basis of that sexual identity.
 20. The Court’s assessment of risk commences with establishing whether there are “substantial grounds for believing that there is a real risk” of Article 3 prohibited treatment on return (e.g. *Vilvarajah and Others v United Kingdom* (App. No. 13163/87, 30 October 1991)) as applicable to persons who are known to be gay or lesbian in the context where it is unnecessary to prove “personal” risk in the sense of “existence of further special distinguishing features” (*Salah Sheekh v. Netherlands* (App. No. 1948/04, 11 Jan. 2007), §148).
 21. Assessment of risk in the country of origin does not end with the analysis of legislative provisions with respect to criminalisation of same-sex consensual activity, but must include the assessment of risk of serious harm as a result of their impact on the society in question in the form of (1) totality of social circumstances and risk from both non-state actors and state actors based on reliable up to date country information and adequacy of any measures of protection; (2) existence of impunity for those subjecting LGBTI persons to abuse by virtue of victims’ inability to avail themselves of the protection of the law by virtue of fear of prosecution; (3) subjective as well as objective threat of Article 3 prohibited treatment in the form of self-censorship; and (4) effect of other relevant measures including other laws affecting the LGBTI persons. The analysis in *XYZ* examined a narrow issue - whether existence of criminal laws amounted to prosecution - but clearly preserved the duty of member states to examine all the circumstances in the country of origin.
 22. A gay or lesbian applicant for asylum has the right to be open in their country of origin about their sexual orientation, and cannot be expected to remain silent about this important aspect of their life. Under the *HJ (Iran)* test, the decision-maker asks what is the risk of harm if the applicant is open about their sexual orientation, not what is the risk if the applicant is coerced into being discreet (being

discreet because of fear of harm is by definition never truly voluntary). The fact that an Applicant was ‘successfully’ discreet in the past, even for a number of years, is irrelevant. What the decision maker must do, is find the reason for discretion on return: “predicting what would or might happen in the future” [§ 88 of *HJ*]. Even where there is the complete rejection of the narrative of past ill-treatment, there can still be future risk. A decisive factor in the UK Supreme Court's decision to reject 'being discreet' as a requirement was that, had it been applied during World War II, it would have meant (hypothetically) that Anne Frank could have been returned from the UK to the Nazi-occupied Netherlands, as long as denying that she was Jewish and hiding in an attic were 'reasonably tolerable' means to protect her from harm [§§ 106-107 of *HJ*].

23. The intervenors further submit that the concealment of sexual orientation given the fundamental nature of sexual identity in itself is sufficiently serious to amount to Article 3 prohibited treatment³⁶. Recent research documents the link between mental ill health among the non-heterosexual population and perceived stigmatization and discrimination on the basis of sexual orientation in the context of higher incidence of mental ill health among that population³⁷.
24. The Court is thus further invited to find that even if an applicant is voluntarily discreet for only family or societal reasons, then the fact that he or she is required to publicly present (or create or manufacture) elements of a heterosexual narrative to evade harm (such as ‘proving’ heterosexuality by being sexually receptive to members of the opposite sex, and/or by getting married and/or having children), and therefore conform to a stereotype to evade harm through identification of difference, the act of evasion is in itself an Article 3 violation as it debases the human being and constitutes degrading treatment (*as per Ireland v the UK*, judgment 18th January 1978). This constitutes foreseeable harm as has been determined by the UK Courts in *SW (Jamaica)*.³⁸
25. At the very least, placing a person in a position – having to choose between treatment contrary to article 3 or a severe interference with the right to respect for private life – means that expulsion under the Convention cannot be justified. The presence of laws which interfere with the personal sphere of sexual identity has been repeatedly found to be contrary to obligations of the Member States under Article 8 ECHR, even where they are never enforced given their chilling effect on the protected right in question³⁹. The failure to take measures to protect from interference with Article 8 rights including interference by private parties has consistently been held to be a breach of Convention obligations of Member States⁴⁰. In the context of serious harm resulting from concealment, expulsion is unlawful where there is no evidence that the receiving state has any mechanisms to protect the private sphere of the applicants⁴¹.

³⁶It's effect is “such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance” (§167, *Ireland v the United Kingdom* (App. no. 5310/71) 2EHRR 25

³⁷Chakraborty A, McManus S, Brugha TS, Bebbington P, King M (2011) Mental health of the non-heterosexual population of England, *Br J Psychiatry* 198(2):143-8.

³⁸UK Upper Tribunal (Immigration and Asylum Chamber) judgment 24th June 2011, *SW (lesbians – HJ and HT applied) Jamaica CG* [2011] UKUT 00251. See also footnote 132 of *Fleeing Homophobia Report Op. cit* fn. 9: “J. Millbank and C. Dauvergne have noted 'even an individual who wishes to hide, 'who desperately wishes – and takes all possible steps – to remain closeted does, in fact become increasingly "visible" with the passage of time', see C. Dauvergne and J. Millbank, ‘Before the High Court: Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh’ (2003) *Sydney Law Review* 97, Vol 25, 122. See also S. Chelvan, 'Put Your Hands Up (If You Feel Love)', *Immigration, Asylum and Nationality Law*, Vol 25, No 1, 2011, S. 65, where the author remarked 'that even where (voluntary) discretion is not due to a fear of well-founded persecution, the fact that an individual is not living a straight life, will identify them as “different” leading to LGB identification.’”

³⁹*Dudgeon v UK* (App. no. 7525/76) 4 EHRR 30; *Norris v Ireland* (App no. 10581/83) 13 EHRR 186

⁴⁰*Storck v Germany* (2006) 43 EHRR 6 at [§ 101]

⁴¹It is of note that the Court had communicated the complaint under Article 8 of a Zimbabwean lesbian on the issue as to whether her expulsion could amount to a fundamental breach of her private life as it protects gender

26. On the other hand, in countries where there is a real risk of persecution the assessment in *HJ* makes it possible to identify persons who may not require international protection on account of an alternative motive for their “discretion”. The court in *HJ* noted the likely response of most persons faced with persecution is that they modify their behaviour [§ 59 *HJ*] - making the number of persons who would do it for some alternative reason *only* - with persecution playing *no* part - extraordinarily low and in reality reduced to those who are unaware of the presence of real risk. The separation of motivation for concealment of identity is more consistent with the principle of *Salah Sheekh* in that there is no need for a particular identification of an individual risk, where there is evidence of substantial grounds to find that there is a real risk of serious harm. If a whole group is at risk, it follows that all its potential members, irrespective of why they may dissemble, are also at risk.
27. The Court is invited to find that criminalisation of same-sex consensual relations per se amounts to persecution as was found in *Sentenza* by the Italian Supreme Court (see para 17 above). The Convention is a living instrument and should reflect the change in the social perceptions and recognition of serious harm caused by the existence of criminalisation of same-sex conduct.
28. The existence of laws criminalising homosexuality can cause LGBTI people to abstain from acts and statements constituting a legitimate expression of their fundamental nature, through fear of prosecution and penalty and, even without prosecution, fear of stigmatisation (by others and self) as a criminal. The fear of some or all of these consequences can be well-founded, even absent prosecutions, and can be so severe as to amount to persecution. They amount to a reflection of a “predisposed bias on the part of a heterosexual majority against a homosexual minority”⁴² and carry a real risk of serious harm. In non-Convention states there had been a number of decisions finding criminalisation of consensual same-sex acts unlawful. The South African constitutional Court⁴³ clearly identified the harm caused by such legislation: “Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity...” The Hong Kong- Court of Appeal,⁴⁴ noted the effects on gay man of criminalisation “29(2) Notwithstanding the fact that a prosecution is neither in existence nor in contemplation... it is clear on the facts that he and many others like him have been seriously affected by the existence of the legislation under challenge. ... the very existence of the legislation directly affected his private life: either he respected the law and refrained from engaging in any prohibited sexual acts prior to the age of 18 or he committed such acts and thereby became liable to criminal prosecution.”

THE RISK OF HARM TO OPENLY GAY MEN IN IRAN:

29. The Statement of Facts refers to the findings of the Finnish Court in 2011 where:
- “[T]he court noted that, according to several sources, about 4,000 homosexual persons had been executed since 1979 in Iran. A majority of the convictions were not based on evidence required by law but on the judge’s own assessment. If a homosexual relationship came to the authorities’ knowledge, a person could be persecuted”.
30. Risk generated by such prosecutions amounting to 125 executions per year without a doubt demonstrates that there are “substantial grounds for believing that there is a real risk” of Article 3

identification, sexual orientation and sexual life *D.B.N. v United Kingdom* - 26550/10 [2011] ECHR 192 (27 January 2011), later struck out for applicant’s disappearance.

⁴² See, mutatis mutandis, *Smith and Grady v UK* (2000) EHRR 493, [§ 97]

⁴³ South Africa- Constitutional Court, CCT 11/98, 9 October 1998.

The National Coalition for Gay and Lesbian Equality et al. v. The Minister of Justice et al., [§ 28]

⁴⁴ Hong Kong Court of Appeal, Civil Appeal No. 317 of 2005, 20 September 2006, Leung T C William Roy v. Secretary for Justice, [§ 29]

prohibited treatment on return to those perceived to be gay and lesbian (applying principles set out above at para 20 (*Vilvarajah* and *Salah Sheekh*)).

31. Outcome of analysis of risk is the same under the analysis of *XYZ* which suggests an examination of application of laws in order to establish whether there is a real risk of persecution.
32. The statement of facts, when citing at Section B “Relevant International Materials”, cites the UK’s Operational Guidance Note of November 2011, which clearly records the UK’s acceptance that ‘openly’ gay men and lesbians in Iran have a well-founded fear of persecution [§ 3.10.10]. The current Operational Guidance Note, while falling short of that express acceptance, describes the situation for LGBTI individuals as “severe” but also replicates what was contained in the 2011 version (version 8, dated October 2012) [§ 3.11.12].⁴⁵

The country evidence is that LGBT activists, who come to the attention of the authorities, are in danger of persecution at the hands of the state and should be granted asylum.

33. The reliance on ‘activists’ is analogous to gay men and lesbians who are ‘open’, in accordance with the second limb of *HJ*. Worryingly, the new 2012 Islamic Penal Code, on which there is no information as to its implementation, distinguishes an ‘active’ partner who participates in consensual male same-sex conduct (100 lashes), and a ‘passive’ partner (death penalty), whatever the marital status [§ 3.11.2 2012 OGN] while the former is commuted to death penalty in cases of “active” non-Muslims in relations with “passive” Muslims [§ 3.11.3]. The punishment for lesbianism is 100 lashes [§ 3.11.3]. All three categories are at a real risk of violation contrary to Article 3 of the ECHR. This background country evidence shows that any gay man who, for example, openly discussed his sexual orientation would have substantial grounds for fearing a real risk of arrest, torture and the death penalty. The OGN demonstrates risk from non-state actors by way of “harassment, discrimination, and abuse” as a result of existence of criminal sanctions [§ 3.11.10]. Gay men and lesbians cannot ‘live freely and openly’ in Iran, without the real risk of treatment contrary to Article 3 of the Convention. This risk to gay men from Iran was noted as not being seriously in issue by the UK Supreme Court [§ 17 of *HJ*] as well as that to persons from Cameroon where prosecutions which carried up to five years imprisonment were rare and there was also risk of being denounced and subjected to acts of violence and harassment.
34. The recent legislative re-codification of the criminalisation of consensual same-sex sexual activity further reinforces homophobic societal norms and prejudices in Iran. The risk of discovery and consequent persecution is ever-present for returning gay men and lesbians, impacting upon and informing their behaviour in all aspects of their private and public lives in a manner wholly inconsistent with their right to freedom from treatment contrary to Article 3.

CONCLUSIONS:

35. Article 3 of the Convention does not permit a Council of Europe member state to expel a gay man or a lesbian if the expelled individual would face a real risk of treatment violating Article 3 in their country of origin if they were to speak publicly, or otherwise be open about their sexual orientation. Similarly, a gay man or lesbian who can be identified as such by their non-conformity with a heteronormative stereotype held by the potential persecutor, thereby placing them at a real risk of treatment contrary to Article 3, cannot be expelled.

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⁴⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270324/iranogn.pdf (Accessed 13th March 2014).

Annex A:

Recommendation CM/Rec (2010) of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity'

'42. In cases where member states have international obligations in this respect, they should recognise that a well-founded fear of persecution based on sexual orientation or gender identity may be a valid ground for the granting of refugee status and asylum under national law.

43 Member states should ensure particularly that asylum seekers are not sent to a country where their life or freedom would be threatened or they face the risk of torture, inhuman or degrading treatment or punishment, on grounds of sexual orientation or gender identity.'

Annex B:

United Nations High Commissioner for Refugees' 2012 'Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity'

'12. A proper analysis as to whether a [lesbian or gay] applicant is a refugee under the 1951 [Refugee] Convention needs to start from the premise that applicants are entitled to live in society as who they are and need not hide that. As affirmed by the position adopted in a number of jurisdictions, 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. While one's sexual orientation and/or gender identity may be revealed by sexual conduct or a sexual act, or by external appearance or dress, it may also be evidenced by a range of other factors, including how the applicant lives in society, or how he or she expresses (or wishes to express) his or her identity. ...

19. Behaviour and activities may relate to a person's orientation or identity in complex ways. It may be expressed or revealed in many subtle or obvious ways, through appearance, speech, behaviour, dress and mannerisms; or not revealed at all in these ways. While a certain activity expressing or revealing a person's sexual orientation and/or gender identity may sometimes be considered trivial, what is at issue is the consequences that would follow such behaviour. In other words, an activity associated with sexual orientation may merely reveal or expose the stigmatized identity, it does not cause or form the basis of the persecution. In UNHCR's view, the distinction between forms of expression that relate to a "core area" of sexual orientation and those that do not, is therefore irrelevant for the purposes of the assessment of the existence of a well-founded fear of persecution.

31. That an applicant may be able to avoid persecution by concealing or by being "discreet" about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. As affirmed by numerous decisions in multiple jurisdictions, a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution. [Lesbian and gay] people are as much entitled to freedom of expression and association as others.

32. ... The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences. It is important to note that even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetime. The risk of discovery may also not necessarily be confined to their own conduct. There is almost always the possibility of discovery against the person's will, for example, by accident, rumours or growing suspicion. It is also important to recognize that even if [lesbian or gay] individuals conceal their sexual orientation or gender identity they may still be at risk of exposure and related harm for not following expected social norms (for example, getting married and having children, for example). The absence of certain expected activities and behaviour identifies a difference between them and other people and may place them at risk of harm.

33. Being compelled to conceal one's sexual orientation and/or gender identity may also result in significant psychological and other harms. Discriminatory and disapproving attitudes, norms and values may have a serious effect on the mental and physical health of [lesbian and gay] individuals and could in particular cases lead to an intolerable predicament amounting to persecution. Feelings of self-denial, anguish, shame, isolation and even self-hatred which may accrue in response to an inability to be open about one's sexuality or gender identity are factors to consider, including over the long-term.'

Annex C:

HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010] UKSC 31; [2011] 1 A.C. 596 [§ 82].

When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.

If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.

If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".

If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.

If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, eg, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect - his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.

Annex D - Excerpt from Judgment of Court of Justice of the European Union in XYZ

69 The very fact that Article 10(1)(b) of the Directive expressly states that the concept of religion also covers participation in formal worship in public or in private does not allow the conclusion that the concept of sexual orientation, to which Article 10(1)(d) of that Directive refers, must only apply to acts in the private life of the person concerned and not to acts in his public life.

70 In that connection, it is important to state 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.

71 Therefore, an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution.

72 As regards the restraint that a person should exercise, in the system provided for by the Directive, when assessing whether an applicant has a well-founded fear of being persecuted, the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subject to acts of persecution (see, to that effect, *Y and Z*, paragraph 76).

73 That assessment of the extent of the risk, which must, in all cases, be carried out with vigilance and care (Joined Cases C-175/08, C-176/08, C-178/08 and C- 179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493, paragraph 90), will be based solely on a specific evaluation of the facts and circumstances, in accordance with the rules laid down in particular by Article 4 of the Directive (*Y and Z*, paragraph 77).

74 None of those rules states that, in assessing the extent of the risk of actual acts of persecution in a particular situation, it is necessary to take account of the possibility open to the applicant of avoiding the risk of persecution by abstaining from the religious practice in question and, consequently, renouncing the protection which the Directive is intended to afford the applicant by conferring refugee status (see, by analogy, *Y and Z*, paragraph 78).

75 It follows that the person concerned must be granted refugee status, in accordance with Article 13 of the Directive, where it is established that on return to his country of origin his homosexuality would expose him to a genuine risk of persecution within the meaning of Article 9(1) thereof. The fact that he could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect.

76 In the light of those considerations, the answer to parts (a) and (b) of the second question, referred in each of the three cases in the main proceedings, is that Article 10(1)(d) of the Directive, 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.