Introduction

On 7 November 2013, the Court of Justice of the European Union (?CJEU?) handed down a judgment - Joined Cases C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel (?XYZ?) - interpreting the Qualification Directive 2004/83/EC [2] (QD?) in the context of asylum applicants fleeing persecution on the basis of their sexual orientation. Despite a carefully worded judgment [1] and an official CJEU press release [3], the implications of this ruling are a matter of considerable dispute. The Organisation for Refugee, Asylum and Migration (ORAM), a global LGBTI refugee organisation, proclaims [4] that the ?European Union Court of Justice rules that lesbian and gay asylum seekers can?t be told to ?go home and hide???. By contrast, Amnesty International and the International Commission of Jurists (ICJ) call [5] the ?EU Court ruling a setback for refugees?. How can two refugee-supporting organisations read the same judgment and draw such opposing conclusions?

Facts of the case

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 (maximum of life in Sierra Leone and Uganda, and up to 5 years in Senegal). 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. Nonetheless, they seek asylum on the basis that, due to the criminalisation of homosexuality in their countries of origin, they have a well-founded fear of being persecuted if returned.

The Dutch Raad van State (Council of State) sought clarification from the CJEU as to how to approach these asylum applications. The domestic court asked [6], in essence, three questions:

1. Do foreign nationals with a homosexual orientation form a ?particular social group? (PSG?) capable of qualifying for protection under the Article 10(1)(d) QD?
2. Can foreign nationals with a homosexual orientation be expected to conceal their orientation or exercise restraint in their country of origin in order to avoid persecution?

3. Does the criminalisation of homosexual activities and the threat of imprisonment in relation thereto constitute an act of persecution within the meaning of Article 9(1)(a), read in conjunction with Article 9(2)(c) QD?


The ruling of the CJEU

Reversing the order in which it answered questions 2 and 3, the CJEU ruled 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].

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.

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 their sexual orientation? [71, 76].

Analysis and commentary

Particular social group

Article 10(1)(d) QD says a group will be a PSG, membership of which may give rise to a genuine fear of persecution, if: (1) members share a characteristic or belief that is fundamental to their identity or conscience; and (2) members have a distinct identity because they are perceived as being different by the surrounding society?. The wording of the QD indicates a cumulative? approach, requiring both conditions to be met. This approach is followed by the CJEU in this case. UNHCR?s Observations in XYZ [8] (which were submitted to the CJEU) (p.8), as well as the European Council on Refugees and Exiles (ECRE) Information Note on the Qualification Directive (recast) [9] (p.9), strongly recommend that an alternative? approach should instead be adopted, according to which only one condition must be met, so as to avoid protection gaps?.

In the specific context of this case, the disputed interpretation is immaterial, as the CJEU found that both conditions were met. As to (1), 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 (2), the court saw the condition as met by virtue of the existence of criminal laws which specifically target homosexuals? [48]. It is worth noting that the CJEU opted for a narrower test for condition (2) than the AG in her Opinion. AG Sharpston recommended a broad test: whether or not they do satisfy the second indent entails an assessment of the legal rules and the social and cultural mores in the applicant?s country of origin? [35].

This ruling is to be welcomed as confirming that the QD is intended to include sexual orientation as the basis for a PSG. However, it is important to recognise that the Court has chosen to not go beyond what questions were specifically asked, and what circumstances apply in the context of
this case. I.e. the Court is only looking at the context in which criminal laws specifically targeting homosexuals are in place. The Court’s reasoning is therefore not intended to exclude a group from qualifying as a PSG in the absence of criminal laws specifically targeting homosexuals. This is just as well, since sexual orientation can be the common basis of a PSG regardless of what the laws of the country say. UNHCR’s *Observations in XYZ* advocate a broad approach to determining whether a group based on sexual orientation or gender identity qualifies as a PSG (p.12):

> Members of a social group may not be recognizable even to each other. It is furthermore not necessary that members of the group or their common characteristics be publicly known in a society. The determination rests simply on whether a group is cognizable? or set apart from society? in a more general, abstract sense?.

The Court’s exclusive attention to the circumstances of this case and the questions referred are important to note for another reason. This ruling does not cover the many laws regulating sexual behaviour which, while not specifically targeting homosexuals, are indirectly discriminatory in their practical application. It is therefore not open to prosecutors, on the basis of this narrow ruling, to apply an apparently neutral criminal law disproportionately against persons of a particular sexual orientation (this is because it would constitute an act of persecution under Article 9(2)(b) ? see below).

*Acts of persecution*

Article 9(1)(a) of the QD states that the relevant acts of persecution 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]. The Court goes on to say that a term of imprisonment as punishment for homosexual acts, as referred in this case, is capable in itself of constituting an act of persecution provided that it is actually applied? [56].

The recognition by the Court that a term of imprisonment for homosexual activity actually applied? in itself constitutes persecution is an important step forward. However, the Court leaves it open to the national authorities to determine:

1. Whether lesser forms of state punishment, such as disenfranchisement, community service, or fines, would be sufficiently serious to constitute persecution. There is therefore a risk that national decision-makers will have too much discretion to interpret a country of origin’s criminalisation of homosexual activity as ‘insufficiently serious’, merely because it doesn?t go as far as imprisoning homosexuals.
2. Whether legislation that does not specifically criminalise homosexual acts, but nonetheless has a discriminatory and persecutory impact on homosexuals, is included within the scope of this ruling. UNHCR’s *Observations in XYZ* state (at 4.3.3.): ?Even in countries where consensual same-sex relations are not criminalized by specific provisions, other laws, for example, public morality or public order laws (e.g. loitering), may be selectively applied and
enforced against LGBTI individuals in a discriminatory manner, making life intolerable for the claimant, and thus amounting to persecution?

3. What ?actually applied? means. If it means ?once in the history of the legislation? or ?once every ten years?, then this will protect applicants who flee from rarely or irregularly applied criminal laws on homosexuality. However, if courts interpret ?actually applied? to mean ?frequently? or ?regularly? applied, then this will create protection gaps.

4. The persecutory effect of unapplied legislation. According [10] to the Human Dignity Trust, ?the Court missed an important opportunity to tackle head on the serious and systemic persecutory treatment that criminalisation enables and perpetuates, quite apart from any risk of incarceration? there is no such thing as benign criminalisation?.

On points (3) and (4), note the following points raised by NGOs and other commentators.

The UNHCR?s Observations in XYZ highlight that (p.17-18):

4.3.2. ?Even if the relevant laws are irregularly or rarely, if ever, enforced, laws criminalizing same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors, as well as promote political rhetoric that can expose LGBTI individuals to risks of persecutory harm. They can also hinder LGBTI individuals from seeking and obtaining State protection.

ILGA Europe?s statement [11] while XYZ was still pending points out that ?the existence of legislation criminalising consensual same-sex relations also enables non-state actors to persecute or harm LGBT people with impunity?. Amnesty and ICJ?s Observations on XYZ [5] explain that ?laws that criminalise same-sex sexual activity ? even when they are not enforced ? have the effect of humiliating, debasing and dehumanising people who are, or are suspected of being, lesbian, gay, bisexual, transgender or intersex (LGBTI), causing serious psychological harm in turn? (p.3).

S. Chelvan?s Case Comment on XYZ [12] notes that the CJEU?s interpretation of what constitutes ?sufficiently serious? criminalisation of homosexual activity is at odds with that of the European Court of Human Rights (?ECtHR?). The ECtHR held in Dudgeon v UK [13] (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 [14] (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?.

S. Chelvan also highlights that the referring court asks for an interpretation of Article 9(2)(c), namely the act of persecution taking the form of ?prosecution or punishment which is disproportionate or discriminatory?. This explains the Court?s focus on the severity of the application.
of criminal laws, rather than on the nature of the laws themselves. The Court was not asked to interpret Article 9(2)(b), which covers acts of persecution taking the form of illegal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner? (emphasis added). It therefore remains a potentially open question whether laws directly or indirectly discriminating on the basis of sexual orientation, regardless of the extent of application or form of punishment, can constitute a sufficiently serious act of persecution within Article 9(2)(b).

National authorities should therefore carefully interpret XYZ on this point. The ruling does not say that only imprisonment actually applied is sufficiently serious to constitute persecution. The focus on prosecution and imprisonment is a consequence of the question the CJEU was asked. When conducting an assessment of the criminal law and practice towards homosexuality in the country of origin, national authorities should consider the above guidance of UNHCR and the ECtHR, which both take a wider approach to defining acts of persecution on the basis of sexual orientation and gender identity. UNHCR?s Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity [15] recommend that ?Where the country of origin information does not establish whether or not, or the extent, that the laws are actually enforced, a pervading and generalized climate of homophobia in the country of origin could be evidence indicative that LGBTI persons are nevertheless being persecuted? (p.8, [28]). Furthermore, it is important to note that societal persecution can exist even when there is no legislative criminalisation of homosexuality, whether applied or not.

Concealing sexual orientation

Prior to discussing the issue of concealing sexual orientation to reduce risk of persecution, the Court affirms the provision under Article 10(1)(d) of the QD that ?sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States?. This is designed to exclude from protection, for example, those asylum seekers fleeing prosecution for paedophilia (which should, of course, not be viewed as in any way connected to sexual orientation).

This provision may lead to unfair exclusions of legitimate asylum seekers from protection. For example, asylum seekers who flee a risk of prosecution for homosexual activity committed at the age of 17 may be excluded under EU law if the legal age of consent in the receiving Member State is 18. This is so even if the applicant was at risk of prosecution not for under-age sex but for homosexual activity. In another example, exploited sex workers who seek asylum because they fear punishment for homosexual activity will be unable to seek protection in a Member State that criminalises prostitution. This is a problem with the wording of Article 10(1)(d) of the QD itself, which is drawn attention to by this judgment.

Considering the main issue of concealment, the Court reasons by analogy with Y and Z Joined Cases C-71/11 and C-99/11 [16], 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.

By analogy, the same applies 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].
The Court?s main discussion of the issue of concealment is welcomed. It recognises that the possibility of concealment and exercising restraint in expression of sexual orientation and gender identity, as in scenarios of religious practice, must be irrelevant to the determination of persecution.

Conclusion

Overall, despite the judgment being open to criticism, the development is positive for LGBTI asylum seekers. It is important to re-state that this judgment is carefully crafted by the CJEU to address the questions it was asked, and not to reach beyond the confines of the specific circumstances of the case. This is a crucial consideration for national authorities seeking to correctly apply the judgment. Many parts of the world remain a hostile environment for LGBTI people. 5 countries (and parts of Somalia and Nigeria) still impose the death penalty for homosexual activity, and 71 countries impose a term of imprisonment (ILGA [17], May 2013 ? note: these figures say nothing about whether the legislation is actually applied). Although XYZ is far from a ruling that all ?gay Africans are entitled to asylum [18]?, as interpreted by The Telegraph (UK), the judgment provides some important guidance to national authorities determining LGBTI asylum applications.

Matthew Fraser

Legal Assistant, European Council on Refugees and Exiles (ECRE)

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(This journal entry is an expression of the author?s own views, and not those of EDAL or ECRE. If you would like to share any comments, you can contact us[19].)

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