



UvA-DARE (Digital Academic Repository)

Persecution for reason of sexual orientation: X,Y and Z

den Heijer, M.

Publication date

2014

Document Version

Final published version

Published in

Common Market Law Review

[Link to publication](#)

Citation for published version (APA):

den Heijer, M. (2014). Persecution for reason of sexual orientation: X,Y and Z. *Common Market Law Review*, 51(4), 1217-1234.

<http://www.kluwerlawonline.com/abstract.php?area=Journals&id=COLA2014091>

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

Persecution for reason of sexual orientation: *X, Y and Z*

Joined Cases C-199 to C-201/12, *Minister voor Immigratie en Asiel v. X* (C-199/12) and *Y* (C-200/12) and *Z v. Minister voor Immigratie en Asiel* (C-201/12), Judgment of the Court (Fourth Chamber) of 7 November 2013, nyr.

1. Introduction

In *X, Y and Z*, the ECJ addresses a delicate matter in contemporary asylum law. How should Member States deal with asylum claims based on sexual orientation? The Court makes three key points. First, persecution for reason of sexual orientation can be brought within the refugee definition. Second, mere criminalization of homosexual activity does not amount to persecution, but the actual application of penal sanctions does. And third, it cannot reasonably be expected that an asylum applicant conceals his homosexuality in his country of origin in order to avoid the risk of persecution. The last point endorses the 2011 judgment of the United Kingdom Supreme Court in *HJ and HT*.¹ The UK Supreme Court found that it can never be tolerable for a homosexual asylum seeker to be forced to live discreetly. The ECJ does not, however, directly engage with divergent legal approaches in the Member States and that of the European Court of Human Rights on the issue of concealment. It can be questioned whether the ruling will bring about full harmony in the Member States' understanding of the refugee definition on this point.

2. Background

Since the adoption of the Qualification Directive,² which was revised in December 2011³ and which forms part of the common policy on asylum, the examination of sexuality-based asylum claims is within the scope of Union law. The Qualification Directive incorporates the definition of refugee set out in the 1951 Refugee Convention and provides a common interpretation of the

1. *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, United Kingdom Supreme Court, 7 Jul. 2010, [2010] UKSC 31.

2. Directive 2004/83, O.J. 2004, L 304/12.

3. Directive 2011/95, O.J. 2011, L 337/9.

key elements of that definition. A refugee is a third country national who has a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group.⁴ It is now widely accepted that LGBT (lesbian, gay, bisexual, and transgender) people can form a particular social group for the purposes of satisfying the refugee definition, although their persecution may also be linked to other persecution grounds, notably political opinion and religion.⁵ This is recognized in the Qualification Directive, which sets forth that “[d]epending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation.”⁶ At least 22 Member States explicitly refer to sexual orientation as a ground for asylum in their national legislation.⁷ Despite the widespread acceptance that persecution of LGBT people is a ground for asylum, there are considerable differences in the way in which Member States examine such claims. The judgment in *X, Y and Z* is chiefly important for that latter issue: what circumstances make a homosexual applicant eligible for refugee status?

The marked increase in attention over the last years in judicial decision-making, policy, press and academia for sexual orientation in the refugee context arguably reflects the rise in the number of sexuality-based asylum claims. Arguably – because there are no EU wide statistics on the number of such claims available, nor on their recognition rate.⁸ Most Member States simply do not store such data centrally. Some countries do. In Belgium, the number of asylum claims based on sexual orientation increased rather dramatically from 116 in 2006 to 1,225 in 2013.⁹ If this is indeed a wider trend,¹⁰ it would be only natural for national authorities to devise policies and instruments in order to ensure that the institution of asylum is not abused and

4. Art. 2(c) of Directive 2004/83 and Art. 2(d) of Directive 2011/95.

5. UNHCR 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, HCR/GIP/12/09, 23 Oct. 2012, paras. 40–50.

6. Art. 10(1)(d), second paragraph of Directives 2004/83 and 2011/95.

7. European Union Agency for Fundamental Rights (FRA), “Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity”, Sept. 2010, p. 55. See also Council of Europe, *Discrimination on grounds of sexual orientation and gender identity in Europe*, Strasbourg, Sept. 2011, p. 65.

8. Jansen and Spijkerboer, *Fleeing Homophobia. Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, COC Nederland, Vrije Universiteit Amsterdam (Sept. 2011), p. 15.

9. *Ibid.*

10. UNHCR notes that a “growing number” of asylum claims is made by lesbian, gay, bisexual and transgender (“LGBT”) individuals: *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* (21 Nov. 2008), para 1.

to filter out those claimants faking homosexuality or claimants who are indeed gay but who invoke their sexuality solely to fabricate a right of residence.

The issue is that it is notoriously difficult to devise instruments that effectively distinguish between bona fide and false claims. Several reports have revealed questionable practices in Member States in the spheres of evidentiary assessment and the conducting of asylum interviews, such as stereotyping, detailed questioning on homosexual activity, expecting a couple to be physically demonstrative at an interview, or even phallometric testing, i.e. testing the physical reaction to heterosexual pornographic material.¹¹ Such practices are either overly intrusive or not suitable for their purpose.

X, Y, and Z does not deal with all these issues. A further reference brought by the Dutch Council of State was pending at the moment of writing, dealing with the permissible methods to verify the sexual orientation of an asylum seeker. This relates to such matters as intimate questioning, stereotyping and the very conceptualization of homosexual orientation.¹²

3. Facts and procedure

The applicants in the main proceedings were anonymized and are referred to as X, Y, and Z. They are nationals from Sierra Leone (X), Uganda (Y) and Senegal (Z) and claimed asylum in the Netherlands, stating that they had a well-founded fear of being persecuted for reason of their sexual orientation. The application of X was refused because, even though his homosexuality was found credible and it was not in dispute that stones had been thrown at him, essential parts of his story were found to be contradictory and absurd, including his statement that he had been poisoned by his father and ended up in hospital.¹³ The application of Y, who had stated that he had been engaged in a four-year long homosexual relationship with a fellow student and had encountered problems because of this relationship and his sexual orientation, was refused because his statements were found to be contradictory and vague.¹⁴ Z's application was refused because his statements about difficulties with the authorities in Senegal and his family were contradictory and vague

11. FRA Report, cited *supra* note 7, pp. 58–60.

12. Joined Cases C-148-150/13, *A, B and C*, pending.

13. Afdeling bestuursrechtspraak van de Raad van State 18 Apr. 2012, ECLI:NL:RVS:2012:BW3078.

14. Afdeling bestuursrechtspraak van de Raad van State 18 Apr. 2012, ECLI:NL:RVS:2012:BW3077.

and therefore not credible.¹⁵ In all three cases, the homosexual orientation of the applicant was not in dispute.

The refusal of the asylum application was upheld in appeal in the case of Z. The appeals of X and Y were successful: the district court considered that the Minister for Immigration and Asylum should not have based his refusal only on a lack of credibility on the part of the applicants, but should also have taken into account the risks for the applicants which could stem from the criminalization of homosexual acts in their countries of origin. In all three cases, further appeals were brought before the Council of State. The Minister brought two key arguments. First, in line with the policy rules applicable to asylum applications based on sexual orientation, homosexuals are not required upon return to conceal their homosexuality, but they can be expected to exercise a certain degree of restraint in living openly as gay.¹⁶ Secondly, the mere fact that homosexual activity is criminalized in the country of origin is not sufficient to satisfy the refugee definition. The applicant must demonstrate that sanctions are likely to be imposed in his case and that they are of a certain gravity.

Taking noting of the different approach set out in the (above-mentioned) UK judgment in *HJ and HT* and the aborted preliminary proceedings in a similar German case,¹⁷ the Council of State decided to refer three questions to the ECJ: i) whether homosexuals form a particular social group within the meaning of the refugee definition, ii) whether concealment or restraint may be expected, and iii) whether the criminalization of homosexual acts amounts to persecution within the meaning of the refugee definition.

4. Judgment¹⁸

The Court ruled that “in each of the cases in the main proceedings” homosexuals form a particular social group within the meaning of the refugee definition. Unlike the Refugee Convention, which refers merely to “membership of a particular social group”, the Qualification Directive defines a particular social group in Article 10(1)(d) by referring to two cumulative conditions. The first condition, i.e. that members of the group share an innate characteristic or a characteristic that is so fundamental to

15. Afdeling bestuursrechtspraak van de Raad van State 18 Apr. 2012, ECLI:NL:RVS:2012:BW3076.

16. Aliens Circular 2000 [*Vreemdelingencirculaire 2000*], para C2/2.10.2.

17. Case C-563/10, *Khavand*, O.J. 2011, C 38/7 and O.J. 2011, C 186/17 (removed from register 11 March 2011).

18. The Opinion of the A.G. is not summarized but mentioned in this section where particularly relevant.

identity that a person should not be forced to renounce it, was satisfied according to the Court, because it is common ground that sexual orientation is such a fundamental characteristic.¹⁹ The second condition is that the group has “a distinct identity in the relevant country, because it is perceived as being different by the surrounding society”. This condition implies that what makes up a particular social group can differ per country of origin. The Advocate General had reasoned that is up to the national authorities of the Member State dealing with the claim to determine whether homosexuals are perceived as being different in Senegal, Uganda and Sierra Leone, by looking at the legal rules and social and cultural mores in those countries.²⁰ The Court, however, chose to make that determination itself. It found that the existence of criminal laws specifically targeting homosexuals in these three countries supports the finding that homosexuals are perceived there as being different.²¹ The second condition was therefore also met.

Second, the Court ruled that legislation criminalizing homosexual acts does not necessarily constitute persecution within the meaning of Article 9(1) of the Qualification Directive. However, actual imprisonment is capable of constituting an act of persecution, in view of its disproportionate and discriminatory character.²² Article 9(2)(c) Qualification Directive sets forth that disproportionate or discriminatory punishment can be an act of persecution. Instructively, the Court made a point in this context about the burden of proof: “where an applicant relies on the existence in his country of origin on legislation criminalizing homosexual acts, it is for the national authorities [of the Member State treating the application] to undertake an examination of all the relevant facts concerning that country of origin”.²³ The Court refers here to the well-established evidentiary rule in asylum law that it may be the initial duty of the asylum applicant to furnish evidence, but that the authorities must cooperate actively with the applicant, so that all the relevant evidence may be assembled.²⁴ This is laid down in Article 4(1)-(3) of the Qualification Directive, to which the Court refers. The authorities must therefore examine, amongst other things, whether imprisonment occurs in practice.

Third, the Court rejected the idea that homosexuals, in order to avoid persecution, may be expected to conceal their sexual orientation in their

19. Judgment, para 46.

20. Opinion, para 35.

21. Judgment, para 48.

22. Ibid., para 56.

23. Ibid., para 58.

24. Cf. Case C-277/11, *M. M. v. Minister for Justice, Equality and Law Reform, Ireland and Attorney General*, judgment of 22 Nov. 2012, nyr, para 66.

country of origin or exercise some degree of restraint.²⁵ Requiring homosexuals to conceal their sexual orientation is, according to the Court, incompatible with the recognition expressly articulated in the Directive that they share a characteristic so fundamental to their identity that they cannot be required to renounce it.²⁶ This also applies to the possibility for an applicant to exercise restraint: “[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”.²⁷ This is so, because the Directive does not state that “it is necessary to take account of the possibility open to the applicant of avoiding the risk of persecution by abstaining from the religious (sic) practice in question.”²⁸ The Court referred in parenthesis to its earlier judgment in *Y and Z*, in which it already found that the fact that an applicant can avoid a real risk of persecution “by abstaining from certain religious practices is, in principle, irrelevant”.²⁹ That case concerned two Ahmadi Muslims from Pakistan. The German *Bundesamt* had argued in the main proceedings that they could refrain, upon return, from practising their faith in public, as such activities did not form part of the “core areas” of religious practice.

5. Analysis

5.1. *Particular social group*

The ruling that homosexuals can form a particular social group is not particularly controversial. The Directive sets out that a particular social group exists, “in particular” if two conditions are met. The incorporation of these two conditions reflects different practices in the Member States at the time of negotiating the Directive. They are two different approaches to identifying particular social groups. The first is the “protected characteristics” test, which examines whether a group shares an immutable characteristic or a characteristic that is so fundamental that a person should not be compelled to forsake it.³⁰ The second approach is the “social perception” test, under which a group must be united by a common characteristic which sets them apart

25. Judgment, para 70.

26. *Ibid.*, para 69.

27. *Ibid.*, para 75.

28. *Ibid.*, para 74.

29. Joined Cases C-71 & 99/11, *Y and Z*, nyr, paras. 78–79.

30. UNHCR Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/02, para 6.

from society at large.³¹ Analyses under both tests will normally converge. But they may in theory produce different results. UNHCR mentions as example a group of the same social class, which can meet the social perception test but will fail the protected characteristics approach because the characteristic is not fundamental to identity or unchangeable.³² Under both tests however, homosexuals have been recognized in various jurisdictions as social group.

It is somewhat unfortunate that the Directive lists these two approaches as cumulative requirements, as this raises the threshold for bringing certain groups within the refugee definition.³³ However, the Directive adds that a group is a particular social group within its meaning “in particular” if these two conditions are fulfilled. The Directive’s logic thus is that if a group meets the two conditions, it *must* be considered to form a particular social group, leaving open the possibility that other groups *can* also be considered to form a particular social group – for example if only one of the conditions is met. This leaves room for the Member States to retain their existing practices. The Court does not explicitly embrace this logic, although it does use the words “*inter alia*” in paragraph 45, thereby indicating that the cumulative fulfilment is not the only situation in which one should accept the existence of a particular social group. In concluding that homosexuals satisfied the “protected characteristics” approach but that it was for the national court to examine whether homosexuals meet the “social perception” test, the Advocate General had presented the two conditions as being always cumulative.

The Court concludes that the second condition for accepting that there is a particular social group is met in respect of all three applicants because their countries of origin criminalize homosexual activity. This does not necessarily imply that homosexuals or other groups cannot form a particular social group if their country of origin has no criminal legislation specifically targeting them. The Court reasons that the existence of criminal legislation in these three countries “supports a finding” that homosexuals form a group, which is perceived in their society as being different. It is common sense that the Court focuses on criminal legislation, because i) this clearly shows that the group is approached differently in the countries in question and ii) this element was simply present in all three countries, leaving it unnecessary for the Court to delve into possible other relevant circumstances that might demonstrate the group’s distinct identity. In all probability therefore, the existence of criminal

31. *Ibid.*, para 7.

32. *Ibid.*, para 9. See extensively Hathaway and Foster, “Membership of a particular social group”, (2003) *International Journal of Refugee Law*, 477–491.

33. UNHCR advocates an approach where satisfying one of the two tests suffices for accepting the existence of a particular social group: UNHCR Guidelines on International Protection No. 2, cited *supra* note 30, paras. 11–12.

laws is not a threshold requirement, but merely one way of demonstrating that the group is perceived as being different. The Advocate General had reasoned that apart from legal rules, social and cultural *mores* are relevant. One might argue indeed that, as long as there is a societal urge even in the most liberal countries in the world to refer to some people as gay and to others as straight, homosexuals are thought of as being different in every society on this globe.

5.2. *Criminalization as persecution*

The Court does not accept that the mere existence of legislation criminalizing homosexual acts amounts to persecution. This led some NGOs to regard the judgment as a “setback for refugees”.³⁴ It has been submitted that criminalization of homosexual acts alone, irrespective of whether sanctions are applied in practice, amounts to persecution, because there is always the possibility of enforcement, because it reinforces the stigmatization of LGBT people, and because State protection against anti-LGBT violence must then be deemed not to be forthcoming.³⁵ This logic was applied by the Italian Supreme Court in a fairly recent decision: “the penalty for homosexual acts in art. 319 of the Senegalese penal code constitutes *per se* a deprivation of the fundamental right to live freely in one’s sex life and be affective.”³⁶ The more common opinion, however, is that criminalization alone does not necessarily give rise to a well-founded fear of being persecuted.³⁷ This is also the position of UNHCR, which however adds that even if criminal laws are rarely or never enforced, they can create or contribute to an oppressive atmosphere of intolerance and generate a threat of persecution.³⁸

It does not necessarily follow from the reasoning of the Court that only actual imprisonment on the basis of discriminatory laws constitutes persecution. The Court makes clear that such a sanction is a persecutory act in view of its discriminatory and disproportionate nature, but holds further that, if homosexual acts are punishable by law, an examination of “all the relevant facts concerning that country of origin must be made”.³⁹ In such examination,

34. Press release Amnesty International and the International Commission of Jurists 7 Nov. 2013, “EU Court ruling a setback for refugees”: <www.amnesty.org/en/news/eu-court-ruling-setback-refugees-2013-11-07> (last visited 17 Apr. 2014).

35. Jansen and Spijkerboer, *op. cit. supra* note 8, p. 25.

36. Corte Suprema di Cassazione 20 Sept. 2012, no. 15981/2012, para 5 (“Che la sanzione penale degli atti omosessuali di cui all’art. 319 del codice penale senegalese costituisce di per sé una condizione generale di privazione del diritto fondamentale di vivere liberamente la propria vita sessuale ed affettiva.”).

37. See e.g. the Dutch Aliens Circular, para C2/3.2, Bundesverwaltungsgericht 20 Feb. 2013, 10 C 23.12, para 28. Also see Jansen and Spijkerboer, *op. cit. supra* note 8, pp. 21–26.

38. UNHCR Guidelines on International Protection No. 9, cited *supra* note 5, para 27.

39. Judgment, para 58.

the application in practice of sanctions is obviously relevant, but the Court does not rule out that other factors may be equally relevant. In applying the ECJ decision in *X, Y and Z* in the main proceedings, the Dutch Council of State confirmed this view. It found that “the examination should not only concern the question whether application of these provisions actually leads to the imposition of sentences of imprisonment or other penalties, but also to possible preliminary criminal investigations and the consequences of penalization for the social position of homosexuals, such as the impossibility for homosexuals to request protection from the authorities.”⁴⁰

Equally helpful is what the Court says about the evidentiary burden in this context. It is particularly welcome that the Court gives meaning to the evidentiary rule of Article 4 of the Qualification Directive in a very concrete and therefore instructive manner: if an asylum applicant bases his claim on the existence of penal sanctions for homosexual behaviour in his country of origin, it is for the national authorities to examine – of their own motion – all relevant facts. The Member State may accordingly not simply deny a claim by arguing that a well-founded fear of being persecuted has not been sufficiently demonstrated, but must actively assemble and evaluate facts, including on the issue of whether sanctions are applied in practice. The manner in which the Court gives effect to Article 4 of the Directive is in harmony with the approach of the ECtHR in its non-refoulement case law. The standard formula of the ECtHR in such cases is that “[i]t is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 3 ECHR.” But “[w]here such evidence is adduced, it is for the Government to dispel any doubts about it.”⁴¹

5.3. *Concealment and exercising restraint*

Arguably the most important aspect of the judgment in terms of the consequences it will have in practice is the Court’s rejection of the so-called discretion requirement. That requirement is based on the logic that a homosexual has nothing to fear in his country of origin and is therefore not a refugee as long as he remains “discreet”. It appears that at least up to recently, discretion reasoning was practised in asylum decision making in a majority of

40. Afdeling bestuursrechtspraak van de Raad van State 18 Dec. 2013, ECLI:NL:RVS:2013:2422, para 8.2.

41. ECtHR, *Saadi v. Italy*, Appl. No. 37201/06, judgment of 28 Feb. 2008, para 129; ECtHR, *R.C. v. Sweden*, Appl. No. 41827/07, judgment of 9 March 2010, para 50. Cf. *M. M.*, cited *supra* note 24, para 66.

Member States.⁴² But the test faced swelling criticism, including from courts, as it was deemed antithetical to the Refugee Convention's aim to uphold everyone's liberty to exercise fundamental freedoms and to protect those who are threatened for doing so.

In 2003, the High Court of Australia held that "[i]t would undermine the object of the Convention if the signatory countries required [individuals] to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention."⁴³ Similar rulings were issued by the New Zealand Refugee Status Appeals Authority in 2004, the United States Court of Appeals for the Ninth Circuit in 2005, the Federal Court of Canada in 2008, and the UK Supreme Court in *HJ and HT*.⁴⁴ The ECJ adopts essentially the same reasoning. It discards the idea that homosexuals can be expected to conceal their identity – and extends this reasoning to the exercise of "restraint". But the ruling also leaves some questions unanswered. Most crucially, one could ask whether the judgment must be read as prohibiting Member States from even looking into the possibility that someone will act discreetly, or that they may still, on an objective basis, conclude that someone will in fact choose to live discreetly. A further issue is whether the approach should be the same in cases of sexual orientation and religion (the case of *Y and Z*⁴⁵). To fully appreciate the significance of *X, Y and Z* for this discussion, it is fruitful first to set out three divergent approaches on the matter of concealment in contemporary European adjudication: the approach developed in *HJ and HT*, the approach of German courts, especially the Bundesverwaltungsgericht, and the approach of the European Court of Human Rights. The case law of the ECtHR has no direct bearing on the refugee definition, but informs the Qualification Directive's subsidiary protection regime.

42. Jansen and Spijkerboer, op. cit. *supra* note 8, p. 34, mentioning Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Hungary, Ireland, Malta, the Netherlands, Poland, Romania and Spain.

43. *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*; *Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, High Court of Australia, 9 Dec. 2003, [2003] HCA 71, para 41.

44. *Refugee Appeal No. 74665*, New Zealand Refugee Status Appeals Authority, 7 July 2004; *Nasser Mustapha Karouni v. Alberto Gonzales, Attorney General*, United States Court of Appeals for the Ninth Circuit, 7 March 2005, No. 02-72651; *Atta Fosu v. Canada (Minister of Citizenship and Immigration)*, Federal Court of Canada, 8 Oct. 2008, [2008] FC 1135.

45. *Y and Z*, cited *supra* note 29.

5.3.1. *The approach in HJ and HT*

The UK Supreme Court judgment in *HJ and HT* was important, not only because it embraced the criticism against discretion reasoning but also because it set out an alternative approach for handling asylum claims based on sexual orientation. The UK Supreme Court rejected the “reasonable tolerance” test, which was a lighter version of the discretion test, under which it was accepted that if an applicant were to live discreetly and avoid the danger, he would not be a refugee, unless he could not reasonably be expected to tolerate that situation. Lord Rodger, who wrote the leading opinion, cast aside any assumption that it could be tolerable to conceal one’s sexual identity:

“At the most basic level, if a male applicant were to live discreetly, he would in practice have to avoid any open expression of affection for another man which went beyond what would be acceptable behaviour on the part of a straight man. He would have to be cautious about the friendships he formed, the circle of friends in which he moved, the places where he socialized. He would have constantly to restrain himself in an area of life where powerful emotions and physical attraction are involved and a straight man could be spontaneous, impulsive even. Not only would he not be able to indulge openly in the mild flirtations which are an enjoyable part of heterosexual life, but he would have to think twice before revealing that he was attracted to another man. Similarly, the small tokens and gestures of affection which are taken for granted between men and women could well be dangerous. In short, his potential for finding happiness in some sexual relationship would be profoundly affected. It is objectionable to assume that any gay man can be supposed to find even these restrictions on his life and happiness reasonably tolerable.”⁴⁶

In the opinion of Lord Rodger, accepting a situation where an applicant will conceal his sexual identity amounts to denying his right to live freely and openly as a gay man. The alternative test formulated by the UK judges is that, if gay people who live openly are liable to persecution in the country of return, the question must be asked, first, whether the applicant would in fact live openly as gay. If he would do so, he is a refugee, even if he *could* avoid that risk by living discreetly. But if he would in fact live discreetly, the second question is why he would do so. If he conceals his sexual identity for a fear of persecution, he is a refugee, as this would be the only avenue to protect the applicant’s right to freely express his sexual identity. If, on the other hand, he lives discreetly because that is how he himself would wish to live or because of

46. *HJ and HT*, cited *supra* note 1, para 77.

social pressures, he is no refugee, because such pressures do not amount to persecution.⁴⁷

This last limitation has been criticized, as it is said to proceed from the questionable assumption that homosexuals who indicate that they will live discreetly of their own volition will never be “discovered”,⁴⁸ but also because the motives for living discreetly will often be a mix of personal and State-related reasons. Further, it would be well-nigh impossible for decision-makers to establish for what precise reasons a person will choose to live discreet.⁴⁹ Nonetheless, the Swedish authorities and the Superior Courts of both Finland and Norway have adopted the *HJ and HT* test as part of their domestic law.⁵⁰

5.3.2. *The approach in German courts and the new Dutch policy*

In the context of persecution for reason of religion, German courts revised their position on the discretion issue following the ECJ’s decision in *Y and Z*.⁵¹ The Bundesverwaltungsgericht now maintains, similar to the UK Supreme Court in *HJ and HT*, that “an abstention from practising a religion, when compelled under the pressure of the threat of persecution, may already achieve the quality of a persecution.”⁵² The chief difference with the approach in *HJ and HT* is that the German judges do consider the question relevant how important religious practice in public is for the individual: “the deciding factor is how the individual believer lives out his faith, and whether the religious practice that incurs persecution is necessary to him personally according to his understanding of his religion.”⁵³ Therefore, it must be examined what the “religious self-understanding” of the asylum seeker is both before and after his flight. Put bluntly, if the applicant did not practise his faith publicly before his flight, does not go to religious celebrations or engage in other public religious practices in Germany that would expose him to persecution if he would practise them in his home country, he will not be a refugee. The test is accordingly two-pronged. First, it must be determined that the religious practice is a central element of the applicant’s religious identity. Second, it must be determined whether the religious practice gives rise to a well-founded

47. *Ibid.*, para 82.

48. This point is made by the A.G.: Opinion, para 69.

49. Wessels, “HJ (Iran) and HT (Cameroon) – Reflections on a new test for sexuality-based asylum claims in Britain”, (2013) *International Journal of Refugee Law*, 815–839 at 821.

50. Jansen and Spijkerboer, *op. cit. supra* note 8, p. 38; *Supreme Administrative Court of Finland Decision of 13 Jan. 2012*, KHO:2012:1; *A v. The State (Immigration Appeals Board)*, Norwegian Supreme Court 29 Mar. 2012, HR-2012-667-A (Case No. 2011/1688).

51. *Y and Z*, cited *supra* note 29.

52. Bundesverwaltungsgericht 20 Feb. 2013, 10 C 23.12, para 26.

53. *Ibid.*, para 29.

fear of being persecuted. The revised Dutch policy rules on persecution for reason of religion have incorporated this reasoning.⁵⁴

The Bundesverwaltungsgericht bases its approach on the ECJ's judgment in *Y and Z*. There, the ECJ held that, in examining the risk, authorities must also look into "the subjective circumstance that the observance of a certain religious practice in public, which is subject to the restrictions at issue, is of particular importance to the person concerned in order to preserve his religious identity". At least implicitly, therefore, the ECJ deemed it necessary to determine whether practising faith in public is a fundamental part of one's religious identity. That reasoning is however absent in the context of sexual orientation in *X, Y and Z* (I will come back to this below). Nonetheless, one lower court in Germany applied this reasoning in a case concerning a homosexual asylum applicant.⁵⁵ Further, the Dutch Council of State, in giving effect to the judgment in *X, Y and Z* in the main proceedings, also reasoned that statements of the homosexual asylum-seeker about his future behaviour in the country of return must be tested against his current and past behaviour.⁵⁶ And the revised Dutch policy rules on persecution for reason of sexual orientation now state that: "In the assessment of the individual situation of the alien, the immigration service also takes into account the manner in which the alien intends in his country of origin to express his sexual orientation and the likelihood of it. To this end, the immigration service investigates how the alien in the past and present, in the Netherlands or elsewhere, has given expression to his sexual orientation."⁵⁷

Accordingly, an objective assessment of how the applicant will in fact behave upon return must be made. The policy rules do not state that someone who refrains from freely expressing his sexual identity for a fear of being persecuted can also be a refugee.

5.3.3. *The approach of the ECtHR*

The ECtHR has in its expulsion case law under Article 3 ECHR not explicitly rejected the discretion logic. On the contrary, in two inadmissibility decisions concerning gay men from Iran, the ECtHR considered that there was no real risk of ill-treatment, because the Iranian authorities did not actively prosecute

54. Aliens Circular 2000, para C2/3.2 (as amended by Wijzigingsbesluit Vreemdelingendecretaire 2014/3, *Staatscourant* 2014, 5333).

55. VGH Baden-Württemberg 7 March 2013, A 9 S 1872/12.

56. Afdeling bestuursrechtspraak van de Raad van State 18 Dec. 2013, ECLI:NL:RVS:2013:2422, para 8.1.

57. Aliens Circular 2000, para C2/3.2 (as amended) cited *supra* note 54.

“adults involved in consensual and private homosexual relationships”.⁵⁸ In both cases, the applicants, like the three applicants in *X, Y and Z*, had failed to demonstrate that they had been at risk before their flight. The ECtHR implicitly assumed that the applicants would live discreetly in Iran and that, by doing so, they could avoid discriminatory punishment. The ECtHR has applied the same reasoning in a few cases concerning members of a religious minority. In *Z. and T.*, the ECtHR refused to accept that the ECHR ensured persons from non-Contracting States whose religion is banned the possibility of practising their faith freely and open on the territory of the Contracting States.⁵⁹ To conclude otherwise “would be imposing an obligation on Contracting States effectively to act as indirect guarantors of freedom of worship for the rest of the world.”⁶⁰ Notably, in a fairly recent judgment where the same reasoning was applied, three dissenters objected to this approach with reference to the ECJ’s judgment in *Y and Z*: “The majority appears to endorse, implicitly, the Government’s submission that for as long as the applicant does not bring his religious affiliation to the attention of the Iranian authorities by publicly practising his faith then, in all probability, no real risk should arise in the event of his deportation. This is a dangerous line of reasoning. Such an argument was rejected, unequivocally, by the Court of Justice of the European Union in its recent judgment in *Bundesrepublik Deutschland v Y and Z*.”⁶¹

It should however be noted that the ECtHR does not simply assume that homosexuals or persons from a religious minority will conceal their sexual identity or faith upon return. The ECtHR does not *require* discretion, but examines, objectively, how an applicant will behave upon return. If it is established that he will openly pursue his religion or sexual preferences and if that conduct puts him at a real risk, his expulsion may well be prohibited by Article 3 ECHR.⁶² But if he practises his freedoms in private and avoids any harm, the Convention’s protection cannot come into play. In making that assessment, the ECtHR follows a similar approach to that of the German courts: the past and current behaviour of the applicant is the primary indicator for future conduct. The key difference with the approach of German courts is that the ECtHR is only indirectly interested in the question how essential public worship (or a public life as homosexual) is for the person in question. For the ECtHR, this may be a relevant factor for predicting how the person will behave upon return, but does not in and of itself generate an entitlement to

58. ECtHR, *F. v. the United Kingdom*, Appl. No. 17341/03, decision of 22 Jun. 2004; ECtHR, *I.I.N. v. the Netherlands*, Appl. No. 2035/04, decision of 9 Dec. 2004.

59. ECtHR, *Z. and T. v. United Kingdom*, Appl. No. 27034/05, decision of 28 Feb. 2006.

60. Ibid.

61. ECtHR, *F.G. v. Sweden*, Appl. No. 43611/11, judgment of 16 Jan. 2014.

62. Eg ECtHR, *N.K. v. France*, Appl. No. 7974/11, judgment of 19 Dec. 2013.

protection. As matters stand in the ECtHR case law therefore, and contrary to the approaches in Germany and *HJ and HT*, persons who avoid dangers by living discreetly cannot come within the protective ambit of the ECHR. The ECtHR's approach, it should be recalled, is however not directly relevant for interpreting the refugee definition.

5.3.4. *Synthesis*

What does *X, Y and Z* bring to this debate? The key question is whether the ECJ simply rejects any reasoning based on the possibility of living discreetly or whether it rejects discretion in the form of an assumption or requirement. In the latter interpretation, it may still be asked how an applicant will actually behave in the country of origin. But it may not simply be assumed that he will act discreetly. The judgment in *Y and Z*, in the context of the persecution reason of religion, provides some basis for this: "[T]he applicant's fear of being persecuted is well founded if, in the light of the applicant's personal circumstances, the competent authorities consider that it may reasonably be thought that, upon his return to his country of origin, he will engage in religious practices which will expose him to a real risk of persecution. In assessing an application for refugee status on an individual basis, those authorities cannot reasonably expect the applicant to abstain from those religious practices."⁶³

Hence, a person is only a refugee if it *may reasonably be thought that he will engage* in dangerous religious practices. This presumes that it may also be thought that the person will not engage in such practices and thus acts discreetly. The personal circumstances are decisive for reasonably thinking that the applicant will act discreetly or not. Amongst these circumstances is how important public worship is for the individual.⁶⁴ In this interpretation, it must be determined on the basis of subjective and objective criteria whether a person will actually engage in a religious practice upon return which exposes him to persecution. The subsequent sentence in the quoted paragraph, prohibiting authorities from expecting that the applicant abstains from religious practices, would then merely entail a prohibition to simply assume, without looking at the factual circumstances, that someone will act discreetly. This interpretation is followed by the Bundesverwaltungsgericht (in the context of religion), the revised Dutch policy (in the contexts of religion and sexual orientation) and is not necessarily at variance with the approach of the European Court of Human Rights.

63. *Y and Z*, cited *supra* note 29, para 80.

64. *Ibid.*, para 70.

In *X, Y and Z* however, the ECJ employs slightly different language: “the person concerned must be granted refugee status ... where it is established that on return to his country of origin his homosexuality would expose him to a genuine risk of persecution 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.”⁶⁵

The words “in that respect” seem to indicate that in the assessment, the possibility of concealment may simply not be taken into account. There is no suggestion in this paragraph, or in any other part of the judgment, that it may reasonably be thought that the person will conceal his homosexuality. Neither does the ECJ mention as relevant factor how important it is for the homosexual to be open about his sexuality. And this, arguably, is no accident or omission. In paragraph 70, the Court finds it “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.” Concealment of homosexuality amounts to renouncing it and is contrary to the Directive. This is in harmony with Lord Rodger’s observation that it is “objectionable to assume that any gay man can be supposed to find even these restrictions [i.e. living discreetly] on his life and happiness reasonably tolerable” and that, therefore, he does not need to show that his homosexuality plays a particularly prominent part in his life.⁶⁶

In this interpretation it would follow that different tests apply to the persecution reasons of homosexuality and religion. It is never tolerable for a homosexual to conceal his identity, but it can be tolerable for a religious person to only worship in private. This would imply, secondly, that the diverging approaches of the UK Supreme Court and the Bundesverwaltungsgericht find justification in the different nature of the persecution reasons at issue. And it follows, thirdly, that contrary to the revised Dutch policy and the lower German court (and the ECtHR in the context of Art. 3 ECHR), national authorities may not take account of the possibility open to a homosexual applicant of avoiding persecution by acting discreetly. Understood this way, *X, Y and Z* may even be stronger than *HJ and HT*, in which it must still be asked whether and why the applicant would in fact live discreetly.

While I believe that this analysis properly reflects the judgments in *Y and Z* and *X, Y and Z* and can find justification in the different character of the

65. Judgment, para 75.

66. *HJ and HT*, cited *supra* note 1, paras. 77, 79.

persecution reasons of religion and sexual orientation, the abstract and general character of the ECJ's reasoning leaves room for different thinking – as is demonstrated by the new Dutch policy rules. More clarity could have been provided if the ECJ had addressed the question squarely whether the persecution reasons of religion and sexual orientation warrant different approaches on the issue of concealment, or if the ECJ had engaged in judicial dialogue, in particular with the judgment in *HJ and HT*. It is somewhat odd that transnational judicial dialogue on this issue is very much present, but that none of this surfaces in the Court's ruling. Further, the Court's reasoning is at one point simply flawed. It rejects the possibility that a homosexual can exercise restraint because "none of the directive's rules state that 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 (sic) in question."⁶⁷ This logic would render false all interpretations of the Directive which do not feature literally in the text.

6. Conclusion

The ruling in *X, Y and Z* is important for its confirmation that persecution for sexual orientation is a ground for refugee status and that it may not simply be assumed that a homosexual can avoid persecution by concealing his sexual identity. On the point of concealment, the ruling emphasizes that the refugee protection regime is meant to enable persons to exercise their fundamental freedoms openly. This shows that the personal scope of the refugee regime may be wider than the subsidiary protection regime. The latter regime, which is to a considerable extent grounded in ECtHR case law, is occupied primarily with the question of whether there is a "real risk" upon return. It does not have the purpose, as the ECtHR once put it in a case concerning Christians from Pakistan, of "imposing an obligation on Contracting States effectively to act as indirect guarantors of freedom of worship for the rest of world."⁶⁸ But the Refugee Convention does have that purpose, as was held by the UK Supreme Court in *HJ and HT* and as is now confirmed by the ECJ.

But the Court stopped short of fleshing out its principled stance. The rather abstract reasoning leaves open whether the factual question may still be posed how a homosexual will behave upon return. Further, although building on its earlier ruling in *Y and Z*, the Court does not address the possibly different character of the persecution grounds of religion and sexual orientation. Last,

67. Judgment, para 74. The words "religious practice" are erroneous. Other language versions correctly refer to the acting out of sexual orientation.

68. *Z. and T. v. United Kingdom*, cited *supra* note 59.

the ruling leaves open whether the differentiation made by the UK Supreme Court between concealment for personal and State-related reasons is permissible. It is therefore no surprise that Member State practices on these issues continue to diverge.

Maarten den Heijer^{*}

^{*} Assistant professor of international law, University of Amsterdam.