

SEXUAL ORIENTATION AS A GROUNDS FOR REFUGEE PROTECTION

Background

EU Directives are one of way in which the EU legislates. An EU Directive needs to be translated into national legislation by each Member State within a given time frame. When that is achieved, the EU Directive can be considered adopted.

When a national court has questions concerning the meaning or extent the Directive is applicable, it can refer the case to the European Court of Justice for an assessment.

In this case, the Directive¹ in question was from 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*” (2004/83/EC) – otherwise known as the Qualification Directive, which lays out the minimum criteria that EU countries should have for accepting people as refugees.

The Qualification Directive sets out the reasons why someone can claim to be a refugee, such as persecution due to their actual or perceived race, religion and nationality. It also includes the criteria of persecution due to ‘belonging to a particular social group’, which does not have a strict definition.

Case

The case concerned² the granting of refugee status to three homosexual citizens of Sierra Leone, Uganda and Senegal, who were living in the Netherlands. In Sierra Leone, Uganda and Senegal there were criminal laws against homosexuals, which foresaw a punishment up to - respectively - life imprisonment, the death penalty and five years in prison.

All three persons had applied to the Dutch authorities for refugee status but had been rejected and the parties had argued over whether the criminalization of homosexuality was covered as a grounds for claiming refugee status under Dutch law implementing the Qualification Directive.

They appealed the case and the Dutch Council of State (the highest court for challenging public decisions) which referred the case to the European Court of Justice in order to understand:

1. whether third country nationals who are homosexual can be considered as forming a “particular social group”?

¹ eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l33176

² eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0199

2. if so, to what extent should persons be expected to conceal their sexual orientation or show restraint in expressing their sexuality publicly to avoid persecution?
3. whether criminalization of an act constitutes persecution under the Directive?

Decision

In making its decision on the Directive, the European Court of Justice looked at both international, national and EU law. In particular the 1951 Refugee Convention, international human rights law, the Charter of Fundamental Rights of the European Union and national legislation in the Netherlands and in other member states.

In November 2013, the Court decided that, under the Qualification Directive, sexual orientation can be grounds for claiming refugee status in the EU. It stated that to be a 'particular social group' you need to fulfil two conditions:

- Share innate characteristics: a common background which is not changeable, and
- Possess a distinct identity in the relevant country of origin.

The court recognised that a person's sexual orientation is something extremely fundamental to their identity and that, in countries where criminal laws condemn and punish homosexuality, persons identifying or identified as homosexual must be seen as being part of a particular social group.

The judges also stated that sexual orientation is so fundamental to the identity of a person that they could not be required to hide it or act discreetly to avoid persecution.

Assessment

This decision of the European Court of Justice required EU member states to amend their rules on who qualifies for asylum under the Qualification Directive, making it possible for persons to qualify based on sexual orientation and in cases when criminal law is applied that restricts their ability to express their sexuality.

It also importantly removed any possibility of people being denied asylum on the grounds that they could hide their sexuality to avoid prosecution, which had been the practice in a number of EU member states.³

³ <https://www.boell.de/en/2014/03/11/ecj-recognises-homosexuality-grounds-asylum>