

CASE LAW COVER PAGE TEMPLATE

Name of the court ¹ (English name in brackets if the court's language is not English): Corte di Appello di Bari, prima sezione civile (Appeal Court)	
Date of the decision:	2013/03/05
Case number: ²	640/2012
Parties to the case: S. v. Italian Government	
Decision available on the internet? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
If yes, please provide the link: http://www.articolo29.it/decisioni/corte-di-appello-di-bari-prima-sezione-civilesentenza-del-5-marzo-2013/ (If no, please attach the decision as a Word or PDF file):	
Language(s) in which the decision is written: Italian	
Official court translation available in any other languages? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No (If so, which):	
Country(y)(ies) of origin of the applicant(s): Gambia	
Country of asylum (or for cases with statelessness aspects, country of habitual residence) of the applicant(s): Italy	
Any third country of relevance to the case: ³ Senegal	
Is the country of asylum or habitual residence party to:	
The 1951 Convention relating to the Status of Refugees <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Relevant articles of the Convention on which the decision is based: Art. 1 A (2)
(Only for cases with statelessness aspects) The 1954 Convention relating to the Status of Stateless Persons <input type="checkbox"/> Yes <input type="checkbox"/> No	Relevant articles of the Convention on which the decision is based:
(Only for cases with statelessness aspects) The 1961 Convention on the Reduction of Statelessness <input type="checkbox"/> Yes <input type="checkbox"/> No	Relevant articles of the Convention on which the decision is based:
(For AU member states): The 1969 OAU Convention governing the specific aspects of refugee problems in Africa <input type="checkbox"/> Yes <input type="checkbox"/> No	Relevant articles of the Convention on which the decision is based:
For EU member states: please indicate which EU instruments are referred to in the decision	Relevant articles of the EU instruments referred to in the decision:

Topics / Key terms: (see attached 'Topics' annex):

Lesbian, gay, bisexual, transgender and intersex (LGBTI) – sexual orientation – State persecution – non-state actors – credibility

Key facts (as reflected in the decision): [No more than 200 words]

Mr. S., a native citizen of Gambia, claimed refugee status in Italy for persecution in his country of origin based on sexual orientation. Well-educated, speaking five languages, he was subject to numerous attempts of arranged marriage by his family, as well as invitations by his uncle (and stepfather) – the local *imam* – to change his sexual orientation, and death threats. For all these reasons he was hindered by his community and forced to leave home. After a picture showing him and his partner in physical intimacy during a beach party was taken, they were both victims of a violent assault that caused him an injury to his left eye, and his car was destroyed. Mr. S. was accused of homosexuality, and while waiting for the trial, after five days, he was released on bail by a friend.

In view of the trial, he fled to Senegal, where he was hosted by a relative, who warned him that in some cases, after a conviction for homosexuality, some people have disappeared, and was treated at the hospital. His relative suggested him to leave Senegal, where homosexuality is also criminalized. Mr. S. flew to Italy where he submitted his asylum claim. After his asylum application was rejected by the Territorial Commission on 8 November 2010, he appealed the decision before the Civil Court and, following a negative decision, he brought the case before the Court of Appeal of Bari.

Key considerations of the court (translate key considerations (containing relevant legal reasoning) of the decision; include numbers of relevant paragraphs; do not summarize key considerations) [max. 1 page]

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Decision and reasoning: The *Court of Appeal of Bari* overruled the decision of the Court of first instance, by granting refugee status on the basis of serious acts of persecution – physical and also from judicial authorities – for reasons of sexual orientation.

First of all, the Court ascertains that the applicant's homosexuality is not disputed, and considering his education and economic condition, it can be affirmed that he did not escape for economic reasons, that are not relevant to grant international protection (except cases of catastrophes, disasters). According to the assessment of the subjective element, his migration is due to the fear of personal persecution.

The Court further ascertains that the fear is well-founded, not only by a subjective examination on the individual, but also by an objective examination of his statement, comprehensive and extremely analytic, so that it can be considered credible and consistent (no elements of contradiction). For all the aforementioned reasons, the claim has to be taken into consideration, for the purpose of accepting the request of international protection.

Furthermore, the decision of the Court takes into account the Gambian Criminal Code, in particular its article 144 "*Unnatural offences*" which provides for up to 14 years of imprisonment for "*any person who has carnal knowledge of any person against the order of nature*". Contrarily to the definition of LGBTI¹ as a *natural variation in human behavior* elaborated by the World Health Organization, the Court ascertains that, in the Gambian legislation, "*acts against the order of nature*" refer to "homosexual acts", also between consenting adults. The decision also refers to a previous Supreme Court decision on the same issue: "*The circumstance that homosexual acts are criminalized in the country of origin is relevant, because it is a severe interference in homosexual citizens' private life, threatening personal freedom and creating an objective situation of persecution that would justify the grant of international protection*". On the basis of the aforementioned reasoning, the decision overturns the Territorial Commission and First instance Tribunal's outcomes by affirming that the fact that the act is not punished in practice is irrelevant, because just the threat of a criminal sanction justifies fear and may compromise the personal freedom of LGBTI people. In fact, in the country of origin the application of the criminal provision relies on a discretionary choice to tolerate or not to tolerate such acts. Moreover, the policy of tolerance is not established, considering also Gambian President Yahya Abdul-Aziz Jemus Junking Jammeh's 2008 speech affirming that he would approve "criminal provisions more strict than those of Iran" against LGBTI, promising the "*cut off the head*" and inviting them to leave the country. The combination of strict criminal provisions as well as public declarations is sufficient to cause a serious fear of persecution.

The decision is also focused on the credibility of the statement: it is irrelevant that the applicant, who is not a jurist, has mistaken the competent judge, as long as in the country of origin such conduct is criminalized, being the sole fear sufficient. Moreover it is irrelevant that the applicant did not ask for information about his partner, considering that in such situation the first concern was his own safety. The Court considers other contradictions about the night of the incident irrelevant, for being minor and non-influential. Furthermore if those conducts are criminalized and the President of the Republic delivers such speeches in public, it is likely that fanatical aggressions and persecution occur against the "sinners". The lack of credibility of denial and negative decision was also based on a fake *summons of appearance*; while the Court of Appeal, recognizing the lack of sufficient knowledge on criminal Gambian procedure, holds to be true the photocopy, in lack of the original.

Outcome – In conclusion, the Court of Appeal recognizes refugee status on the basis of serious persecution, both judicial and physical, for the only reason of sexual orientation that the person concerned has the right to exhibit and carry out without any fear. The decision clarifies that it is not likely that the fear of prejudice for his sexual orientation is a repercussion of a family internal conflict.

¹ In the sentence, the judge refers to homosexuality. LGBT is the term that is used to identify members of specific sub-groups, that is lesbian, gay, bisexual, transgender, intersex and queer individuals, according to *Guidelines on International Protection. 9: Claims to refugee Status based on sexual Orientation and/or Gender Identity within the context of Article 1 A (2) of the 1951 Convention and/or its 1967 protocol relating to the status of Refugees (2012)*

Other comments or references (for example, links to other cases, does this decision replace a previous decision?)

The judgment refers to other decisions of the Italian Supreme Court (*Corte di Cassazione*): n. 994/2012 and n. 15981/2012.

EXPLANATORY NOTE

1. Decisions submitted with this form may be court decisions, or decisions of other judicial, quasi-judicial and administrative bodies.
2. Where applicable, please follow the court's official case reference system.
3. For example in situations where the country of return would be different from the applicant's country of origin.

For any questions relating to this form, please contact the RefWorld team at the address below.

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