



## **UNHCR's Oral Intervention at the Court of Justice of the European Union**

### **Hearing of the case of *X and Others* (C-199/12 – C-201/12)**

**11 April 2013, Luxembourg**

Members of the Court, Madam Advocate General,

#### **Introduction**

1. In accordance with the Court's request, I will focus my submissions today on two of the questions referred to the Court by the Dutch Council of State, notably the first part of Question 2(b) and Question 3. I will address Question 3 first, and Question 2(b) second.

#### **1. Preliminary considerations**

2. As a preliminary matter, I would like to make a point about the scope of the application of the Court's judgment and about the terminology UNHCR uses in its submissions. Although, on their facts, these cases concern gay male claimants, it is UNHCR's submission that the Court's ruling will apply in principle to all claims made on the basis of "sexual orientation" and/or "gender identity" as this is the term used in the Qualification Directive. This is also consistent with UNHCR's *Guidelines on Assessing Claims to Refugee Status based on Sexual Orientation and/or Gender Identity*, which recognize that persons making claims on the basis of their gender identity may experience persecution in similar ways to persons who experience persecution on the basis of their sexual orientation.

3. This is why UNHCR also uses the term “LGBTI individuals” – i.e. lesbian, gay, bisexual, transgender and intersex individuals. Rather than referring to “sexual activity between homosexuals”, UNHCR would instead refer to “consensual same-sex relations between adults”. This terminology is intended to be inclusive of a wide range of individuals who fear persecution for reasons of their sexual orientation and/or gender identity, and it makes clear that the consequences of this Court’s ruling will not be confined to homosexual men.

**2. Whether criminalization of consensual same sex relations between adults constitutes an act of persecution (Question #3)**

4. The third question referred to the Court asks whether the criminalization of consensual same-sex relations between adults constitutes an act of persecution within the meaning of Article 9 of the Qualification Directive.
5. First, by way of general observation, UNHCR notes that it is well established that laws criminalizing consensual same-sex relations are discriminatory and violate international human rights norms. By way of example, the European Court of Human Rights has held that laws criminalizing same-sex relations are contrary to the European Convention on Human Rights. It is however UNHCR’s position that an assessment into “what constitutes an act of persecution” in cases based upon sexual orientation and/or gender identity needs to look at whether such legislation is enforced and the overall context of the case. Although the existence of such legislation is undoubtedly a significant factor, the assessment must be fact-based, focusing on all the relevant circumstances of the case - both individual and contextual. The assessment must therefore also take into consideration the interpretation, application and enforcement of such legislation, as well as its broader impact on the applicant and upon

society as a whole, including on the behavior of potential non-State actors of persecution, as I will explain shortly.

6. As noted in our written submissions, it is possible to distinguish two particular situations when considering the link between acts of persecution and laws criminalizing same-sex relations. The first is where such laws exist and are enforced, and the second is where such laws exist, but are rarely, irregularly or never enforced.
7. With regard to situations where there are laws criminalizing same-sex relations and such laws are enforced, by way of prosecution and the imposition of punishment, such as the death penalty, imprisonment, or corporal punishment, the persecutory character of such legislation is particularly evident.
8. In the second scenario where laws criminalizing consensual same-sex relations exist, but they are rarely, irregularly or never enforced, these laws will be an *important part* of the overall assessment of whether a well-founded fear of persecution exists. The focus of the inquiry will need to consider both the individual and contextual circumstances of the case. For example, laws that criminalize same-sex relations – even if rarely, irregularly or never enforced - can create or contribute to an oppressive atmosphere of intolerance, and a climate of homophobia. For an LGBTI individual, such laws can generate a fear of prosecution or of serious physical or psychological harm. The existence of such laws can be used for blackmail and extortion purposes by the authorities or by non-State actors. They can promote or lead to the tolerance of political rhetoric that can in turn expose LGBTI individuals to risks of persecutory harm. They can also hinder LGBTI individuals from seeking and obtaining State protection. The

decision-maker must look at the consequences of laws, and not simply their penal character. Even where not enforced, laws can have serious consequences for applicants.

9. In addition, other laws or measures (for example, public order laws preventing loitering), which do not explicitly concern same-sex relations, may be selectively applied and enforced against LGBTI individuals in a discriminatory or harsh manner amounting to persecution.

**3. Whether LGBTI individuals may be expected to exercise restraint in order to avoid persecution (Question #2(b))**

10. I will now turn to provide UNHCR's position on the first part of question 2(b) referred to this Court, that is, whether LGBTI individuals may be expected to exercise restraint in order to avoid persecution.

11. It is UNHCR's position that an applicant cannot be required to conceal his/her sexual or exercise restraint in the expression of his/her sexual orientation and/or gender identity, in order to avoid persecution. Both concealment and restraint raise similar issues of behaviour modification in order to avoid persecution. The principle that a person cannot be denied refugee status based on a requirement that they can change or conceal a protected characteristic - for example their racial or ethnic identity, their religion, or their political opinion - in order to avoid persecution has been affirmed by numerous decisions in multiple jurisdictions. This general principle applies to individuals making claims on the basis of each of the grounds of persecution listed in the 1951 Convention and in Article 10 of the Qualification Directive, including membership of a particular social group. It must therefore also apply to cases based on sexual orientation and/or gender identity.

12. Indeed, the Court itself affirmed this principle in *Z and Y* at paragraph 79, where it stated, in relation to claims based upon religious freedom: “The fact that [the asylum applicant] could avoid [the risk of persecution] by abstaining from certain religious practices is, in principle, irrelevant.” The Court went on to observe, at paragraph 78, that in refraining from the protected religious expression, the applicant would be renouncing the very protection the Qualification Directive is intended to afford through the conferral of refugee status. In this respect, we endorse the finding made by Lord Dyson in the UK Supreme Court’s decision in *HJ(Iran) / HT(Cameroon)*, where he stated at paragraph 110 that:

“If the price that a person must pay in order to avoid persecution is that he must conceal his race, religion, nationality, membership of a social group or political opinion, then he is being required to surrender the very protection that the Convention is intended to secure for him. The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he would conceal the fact that he is a gay man *in order to avoid persecution* on return to his home country.”

13. LGBTI individuals are entitled to respect of their rights and freedoms, including but not limited to their freedom of expression and association, in the same way as others. Therefore, a proper analysis as to whether such an applicant is a refugee needs to be based on the premise that applicants are entitled to live in society as who they are, and need not hide or exercise restraint with regard to the expression of their identities, including their sexual orientation. That is not to say that governments are not entitled to enact laws which are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of those in its jurisdiction. However, these laws must still comply with widely

accepted principles of international human rights law, including the principles of equality and non-discrimination, and must not be applied or enforced in a manner that gives rise to a well-founded fear of persecution.

14. The appropriate question for decision-makers to ask is “what predicament or situation would the applicant face if he or she were returned to the country of origin?” This requires an objective and fact-specific examination of the applicant’s situation, namely what may happen if the applicant returns to the country of nationality or habitual residence, and whether this amounts to persecution.

15. It is important that this enquiry does not focus exclusively on what activities and behaviour could be expected of the particular individual because sexual orientation is about a person’s very identity. It is not simply about engaging in sexual activity with members of the same sex or about engaging in particular forms of behaviour. This identity may be expressed or revealed (whether in subtle or obvious ways) through appearance, speech, behaviour, dress and mannerisms. A person should not be expected to suppress or modify these fundamental aspects of his or her identity. Even if someone may seek to exercise restraint, such restraint may not protect them from persecutory harm. Expression and revelation of sexual orientation and/or gender identity may occur in ways that are deliberate or inadvertent.

16. Thus, for example, even if an applicant has so far managed to avoid harm through concealment or restraint, 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, betrayal, rumours or suspicion. It is also important to

recognize that even if LGBTI individuals conceal or exercise restraint with respect to the expression of their sexual orientation and/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). The absence of certain expected activities and behaviour may expose someone's sexual orientation and/or gender identity and place him or her at risk of harm or persecution.

17. A further difficulty which arises, and a further reason why an applicant should not be expected to exercise restraint in order to avoid persecution is that this would beg the question: "Restraint in what respect?" For example, should a person be expected to suppress those particular aspects of their dress or appearance that might lead people to guess their sexual orientation and/or gender identity? Or just over particular types of behaviour? If so, what behaviour? This process would require decision-makers to prescribe appropriate behaviour. This is not part of the assessment required by the 1951 Convention and the Qualification Directive.

18. The Convention and the Qualification Directive require an assessment of whether restrictions or limitations placed on the applicant rise to the level of persecution. This requires the decision-maker to take account of international human rights standards, including lawful limitations on the exercise of the protected right, but also evaluate the breadth of the restriction and the severity of any punishment for non-compliance. The importance or centrality of the behaviour or activity to the individual personally is relevant, as indeed the Court emphasised at paragraph 70 of its judgment in *Z and Y*. However, the decision-maker must tread carefully, and be cautious in this respect, and take into account the fact that what

may seem trivial or peripheral to an outsider may be central to the claimant's sexual orientation and/or gender identity.

#### **4. Conclusion/UNHCR's Proposed Answers to the Questions**

19. In conclusion:

- UNHCR's proposed response to **Question #3** is that where a country enforces criminal laws that impose punishment for consensual same-sex relations between adults, including the death penalty, imprisonment or corporal punishment, this constitutes an act of persecution. In other situations where laws criminalizing consensual same-sex relations between adults exist, but they are rarely, irregularly or never enforced, such legislation will be an important part of the overall assessment of a well-founded fear of persecution. In such circumstances, the focus of the inquiry will need to consider both the individual and contextual circumstances of the case.
- UNHCR's proposed response to the **first part of Question #2(b)** is that an applicant for international protection cannot be required to conceal his/her sexual orientation and/or gender identity, or to exercise restraint in the expressions of that sexual orientation and/or gender identity in order to avoid persecution,

Thank you.