

CASE LAW COVER PAGE TEMPLATE

Name of the court ¹ (English name in brackets if the court's language is not English): Afdeling Bestuursrechtspraak Raad van State (Dutch Council of State, Administrative Jurisdiction Division)	
Date of the decision:	18/12/2013
Case number: ²	201012342/V2
Parties to the case: Applicant (Sierra Leonean national) v. Dutch minister for Security and Justice	
Decision available on the internet? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
If yes, please provide the link: http://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=77139 (If no, please attach the decision as a Word or PDF file):	
Language(s) in which the decision is written: Dutch	
Official court translation available in any other languages? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No (If so, which):	
Countr(y)(ies) of origin of the applicant(s): Sierra Leone	
Country of asylum (or for cases with statelessness aspects, country of habitual residence) of the applicant(s): the Netherlands	
Any third country of relevance to the case: ³ No	
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: Article 1(A)
(Only for cases with statelessness aspects) The 1954 Convention relating to the Status of Stateless Persons <input type="checkbox"/> Yes No	Relevant articles of the Convention on which the decision is based: X
(Only for cases with statelessness aspects) The 1961 Convention on the Reduction of Statelessness <input type="checkbox"/> Yes No	Relevant articles of the Convention on which the decision is based: X
(For AU member states): The 1969 OAU Convention governing the specific aspects of refugee problems in Africa <input type="checkbox"/> Yes No	Relevant articles of the Convention on which the decision is based: X
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: Qualification Directive 2004/83/EG

Topics / Key terms: (see attached ‘Topics’ annex):

1951 Refugee Convention, homosexuality, qualification directive

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

The applicant is a gay man from Sierra Leone. His asylum application was rejected by the Minister of Justice on 18 March 2010. The appeal lodged by the applicant at the District Court of the Hague was, according to the Court, well founded and by decision of 23 November 2010 the Court decided that the decision of the State Secretary should be annulled and that the Minister should take a new decision on the application taking into consideration the decision of the District Court. The State Secretary appealed the District Court’s decision at the Administrative Jurisdiction Division of the Council of State. He argued in this respect that the applicant’s asylum story was considered not plausible. For that reason he was not to be considered as a refugee.

This case was dealt with together with two other cases, 201109928/1/V2 and 201106615/1/V2, cases concerning gay men from Uganda and Senegal. The Council of State raised prejudicial questions. The judgment by the Court of Justice of the European Union is dated 7 November 2013 (cases C-199/12, C200/12 and C 201/12). The Council of State reopened the case on 20 November 2013 and the decision was made on 18 December 2013.

In this case the fact that the applicant’s account was deemed not to be credible was crucial. It led to considerations 8.1 (see below). The Council of State held that an applicant’s account being deemed not credible is not sufficient reason to reject the application. The assessment should include the way the applicant will give expression to his sexual orientation upon return. The State Secretary cannot expect applicants to keep their sexual orientation secret. If in a country legislation exists criminalizing homosexuality and/or homosexuals activities, the burden of proof rests with the State Secretary to show how this legislation is applied or affects people in practice.

The Council of State considered the appeal of the State Secretary ill-founded and decided that the appealed decision of the District Court of the Hague should be upheld.

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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6. In its judgment of 13 August 1981 in case no. A-2.113 (RV 1981, no. 5), the former Administrative Jurisdiction Division of the Council of State observed that persecution within the meaning of the Refugee Convention for belonging to a particular social group may include persecution on the grounds of sexual orientation. Since then the State Secretary has adopted this as a general policy principle. In its judgment the Court of Justice of the European Union identified foreign nationals with a homosexual identity as a particular social group within the meaning of the Qualification Directive.

7. (...) The judgment does not concern foreign nationals whose sexual orientation was not regarded as credible or foreign nationals who claim to be regarded as homosexual by the authorities in their countries of origin or the surrounding society despite their own assertions to the contrary.

8. When applied to the Dutch system of administrative law, the assessment to be made by the State Secretary, in light of section 3:2 of the General Administrative Law Act (Algemene wet bestuursrecht) is as follows.

8.1. The fact that the State Secretary does not regard the statements by an applicant with a homosexual identity about the events that are alleged to have taken place in the country of origin to be credible is insufficient reason to reject an application for an asylum residence permit. In assessing whether a foreign national has a well-founded fear of persecution, the State Secretary must also take into account the foreign national's statements on how he will give expression to his sexual orientation upon return to his country of origin, or why he will be refraining from doing so (see paragraph 82 of the judgment of the Supreme Court of the United Kingdom of 7 July 2010 in case no. [2010] UKSC 31; www.supremecourt.gov.uk). In assessing the plausibility of an applicant's statement that he will give expression to his sexual orientation in a particular way following his return, the State Secretary must take into account the situation of homosexual individuals and the extent to which such a course of action may be expected to be accepted in the country in question. If an applicant asserts that following his return he will give expression to his sexual orientation in a manner that exposes him to persecution, the assessment of the plausibility of this statement will be affected by an assessment of whether his statement is consistent or inconsistent with his statements about the way in which he previously gave expression to his sexual orientation in the Netherlands or elsewhere (see paragraph 24 of the judgment of the Federal Administrative Court of Germany of 20 February 2013 in case no. BVerwG 10 C20.12 ([ECLI:DE:BVerwG:2013:200213U10C20.12.0](https://eur-lex.europa.org/eli/other/2013/2002/13U10C20.12.0))).

8.2. If in a foreign national's country of origin there is legislation criminalizing homosexuality or the performance of homosexual acts, the State Secretary must examine how this legislation is applied or affects people in practice. This examination must also address whether merely being homosexual or performing homosexual acts give rise to a well-founded fear of persecution. It must address not only the question of whether the application of these provisions does in fact lead to the imposition of custodial or other sentences, but also any investigation by the police or criminal justice authorities prior to sentencing and the implications of criminalization for the social position of homosexual individuals. The State Secretary must also consider whether homosexuals can seek protection from the authorities when faced with hostile treatment from third parties. It is not inconceivable that the mere fact that being homosexual or performing homosexual acts have been criminalized, will make the authorities unable or unwilling to offer protection to homosexual individuals, in other words that asking for protection may be deemed

dangerous or useless from the outset (see the judgment of the Administrative Jurisdiction Division of 28 March 2012 in case no. [201101753/1/V2](#); [www.raadvanstate.nl](#)). In making this assessment the State Secretary must disregard whether a foreign national can escape persecution by exercising restraint.

9. The District Court rightfully considered that the State Secretary has insufficiently motivated his position that the applicant has no fear of persecution for reason of his sexual orientation. The State Secretary has wrongly attached sole importance to the fact that the applicant's statements about the events that had taken place were not credible; the State Secretary did not consider the way in which the applicant will upon return give expression to his sexual orientation and whether as a result he has a well-founded fear of being persecuted.

10. and 11. The appeal of the State Secretary is ill founded. The contested judgment must be upheld.

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

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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