

JUDGMENT OF THE COURT (Fourth Chamber)

7 November 2013 (*)

(Directive 2004/83/EC – Minimum standards relating to the conditions for granting refugee status or subsidiary protection status – Article 10(1)(d) – Membership of a particular social group – Sexual orientation – Reason for persecution – Article 9(1) – Concept of ‘persecution’ – Well-founded fear of being persecuted on account of membership of a particular social group – Acts sufficiently serious to justify such a fear – Legislation criminalising homosexual acts – Article 4 – Individual assessment of the facts and circumstances)

In Joined Cases C-199/12 to C-201/12,

REQUESTS for a preliminary ruling under Article 267 TFEU, from the Raad van State (Netherlands), made by decision of 18 April 2012, received at the Court on 27 April 2012, in the proceedings

Minister voor Immigratie en Asiel

v

X (C-199/12),

Y (C-200/12),

and

Z

v

Minister voor Immigratie en Asiel (C-201/12),

intervening parties:

Hoog Commissariaat van de Verenigde Naties voor de Vluchtelingen (C-199/12 to C-201/12),

THE COURT (Fourth Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the Fourth Chamber, M. Safjan, J. Malenovský and A. Prechal, Judges,

Advocate General: E. Sharpston,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 11 April 2013,

after considering the observations submitted on behalf of:

- X, by H. M. Pot and C. S. Huijbers, advocaten,
- Y, by J. M. Walls, advocaat,

- Z, by S. Sewnath and P. Brochet, advocaten, and K. Monaghan and J. Grierson, Barristers,
- the Hoog Commissariaat van de Verenigde Naties voor de Vluchtelingen, by P. Moreau, acting as Agent, and M.-E. Demetriou, Barrister,
- the Netherlands Government, by B. Koopman, C. S. Schillemans, C. Wissels and M. Noort, acting as Agents,
- the German Government, by T. Henze, N. Graf Vitzthum and A. Wiedmann, acting as Agents,
- the Greek Government, by G. Papagianni and M. Michelogiannaki, acting as Agents,
- the French Government, by G. de Bergues and S. Menez, acting as Agents,
- the United Kingdom Government, by L. Christie, acting as Agent, and S. Lee, Barrister,
- the European Commission, by M. Condou-Durande and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2013,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 9(1)(a) of Council Directive 2004/83/EC of 29 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 (OJ 2004 L 304, p. 12) ('the Directive'), read in conjunction with Article 9(2)(c) and Article 10(1)(d) thereof.

2 The requests have been made in proceedings, first, between the Minister voor Immigratie en Asiel (Minister for Immigration and Asylum, 'the Minister') and X and Y, nationals of Sierra Leone and Uganda respectively, in Cases C-199/12 and C-200/12, and second, in Case C-201/12, between Z, a Senegalese national and the Minister, concerning the rejection by the latter of their applications for residence permits for a fixed period (asylum) in the Netherlands.

Legal context

International law

The Convention Relating to the Status of Refugees

3 The Convention Relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, vol. 189, p. 150, No 2545 (1954)), entered into force on 22 April 1954. It was supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967 ('the Geneva Convention').

4 The first subparagraph of Article 1(A)(2) of the Geneva Convention provides that the term 'refugee' is to apply to any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his

nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country’.

The European Convention for the Protection of Human Rights and Fundamental Freedoms

5 The European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (‘the ECHR’), provides, in Article 8, entitled ‘Right to respect for private and family life’:

- ‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

6 Article 14 of the ECHR, entitled ‘Prohibition of discrimination’, provides:

‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

7 Article 15 of the ECHR, entitled ‘Derogation in time of emergency’, is worded as follows:

- ‘1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2 [“Right to life”], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [“Prohibition of torture”], 4 (paragraph 1) [“Prohibition of slavery”] and 7 [“No punishment without law”] shall be made under this provision.

...’

European Union law

The Charter of Fundamental Rights of the European Union

8 The rights which cannot be subject to any derogation under Article 15(2) of the ECHR are enshrined in Articles 2, 4, 5(1) and 49(1) and (2) of the Charter of Fundamental Rights of the European Union (‘the Charter’).

The Directive

9 Recital 3 in the preamble to the Directive states that the Geneva Convention provides the cornerstone of the international legal regime for the protection of refugees.

10 As follows from recital 10 in the preamble to the Directive, read in the light of Article 6(1) TEU, the Directive respects the rights, freedoms and principles recognised by the Charter. In particular, it seeks to

ensure, on the basis of Articles 1 and 18 of the Charter, full respect for human dignity and the right to asylum of applicants for asylum.

11 Recitals 16 and 17 in the preamble to the Directive are worded as follows:

‘(16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.’

12 In accordance with Article 1 of the Directive, its purpose is to lay down minimum standards as regards, first, the requirements to be met by third-country nationals or Stateless persons in order to receive international protection and, second, the content of the protection granted.

13 Article 2(c) and (k) contains the following definition, for the purposes of the Directive:

‘(c) “refugee” means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country ...;

...

(k) “country of origin” means the country or countries of nationality or, for Stateless persons, of former habitual residence.’

14 Article 4(3) of the Directive defines the conditions for the assessment of the facts and circumstances and provides:

‘The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

...’

15 Under Article 4(4) of the Directive, the fact that an applicant has already been subject to persecution, or to direct threats of such persecution, is a ‘serious indication of the applicant’s well-founded fear of persecution’, unless there are good reasons to consider that such persecution will not be repeated.

16 Article 9(1) and (2) of the Directive defines acts of persecution:

'1. Acts of persecution within the meaning of Article 1(A) of the Geneva Convention must:

(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the [ECHR]; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:

...

(c) prosecution or punishment, which is disproportionate or discriminatory;

...'

17 In accordance with Article 9(3) of the Directive, there must be a connection between the reasons for persecution mentioned in Article 10 and the acts of persecution.

18 Article 10 of the Directive, headed 'Grounds for refusal or invalidity', provides:

'1. Member States shall take the following elements into account when assessing the reasons for persecution:

...

(d) a group shall be considered to form a particular social group where in particular:

– members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it; and

– that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

– depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States ...

...'

19 Under Article 13 of the Directive, a Member State is to grant the applicant refugee status if that person meets, inter alia, the requirements laid down in Articles 9 and 10 of the Directive.

Netherlands law

20 Article 28(1)(a) of the Law of 2000 on foreign nationals (Vreemdelingenwet 2000, Stb 2000, No 495) empowers the Minister to accept, to refuse or not to consider an application for a residence permit for a fixed period.

21 In accordance with Article 29(1)(a) of that law, a residence permit for a fixed period, as referred to in Article 28, may be granted to a foreign national 'who is a refugee under the terms of the [Geneva] Convention'.

22 The Guidelines on the Implementation of the Law on foreign nationals of 2000 (Vreemdelingen circulaire 2000) ('the Guidelines'), in its version in force at the date on which the applications concerned were lodged, provides, in point C2/2.10.2:

'If an asylum applicant relies on the fact that he or she has experienced problems as a result of his or her homosexuality, it can under certain circumstances lead to the conclusion that the person concerned is a refugee within the meaning of the [Geneva] Convention. ...

If punishment is possible on the basis of a penal provision which applies only to homosexuals, it is an act of persecution. That is the case, for example, if being homosexual or expressing specifically homosexual feelings is made a criminal offence. To support the finding that the person concerned has refugee status the punitive measure concerned must be of a certain level of severity. A simple fine would thus generally be insufficient to lead to the conclusion that refugee status is warranted.

The mere fact that homosexuality or homosexual acts are criminalised in a country does not automatically lead to the conclusion that a homosexual from that country is a refugee. The asylum applicant must make a plausible case (if possible with supporting documents) that he personally has a well-founded reason to fear persecution.

Persons with a homosexual orientation are not expected to conceal that preference on their return.

...'

The disputes in the main proceedings and the questions referred for a preliminary ruling

23 X, Y and Z, who were born in 1987, 1990 and 1982 respectively, lodged applications for residence permits for a fixed period (asylum) in the Netherlands on 1 July 2009, 27 April 2011 and 25 July 2010.

24 In support of their applications, they claim that they should be granted refugee status on the ground that they have reason to fear persecution in their respective countries of origin on account of their homosexuality.

25 They claim, in particular, to have been subject, in different respects, to violent reactions by their families and entourage, or to acts of repression by the authorities in their respective countries of origin on account of their sexual orientation.

26 It is clear from the orders for reference that, in the countries of origin of X, Y and Z, homosexuality is a criminal offence. Thus, in Sierra Leone (Case C-199/12), under Section 61 of the Offences Against the Person Act 1861, homosexual acts are punishable by a sentence of imprisonment of 10 years to life. In Uganda (Case C-200/12), under Article 145 of the Penal Code Act 1950, anyone found guilty of an offence described as 'carnal knowledge of any person against the order of nature' is liable to a term of imprisonment for which the maximum sentence is life. In Senegal (Case C-201/12), under Article 319.3 of the Senegalese Penal Code, any person found guilty of homosexual acts is to be sentenced to a term of imprisonment of 1 to 5 years and a fine of CFA francs (BCEAO) (XOF) 100 000 to XOF 1 500 000 (approximately EUR 150 to EUR 2000).

27 By decrees of 18 March 2010, 10 May 2011 and 12 January 2011, the Minister refused to grant residence permits for a fixed period (asylum) to X, Y and Z.

28 According to the Minister, although the sexual orientation of the applicants is credible, they have not proved to the required legal standard the facts and circumstances relied on and, therefore, have failed to demonstrate that on return to their respective countries of origin they have a well-founded fear of persecution by reason of their membership of a particular social group.

29 Following the rejection of their applications for residence permits for a fixed period (asylum), X and Z appealed before the Rechtbank 's-Gravenhage. Y lodged an application for interim measures before the same court.

30 By judgments of 23 November 2010 and 9 June 2011, the Rechtbank 's-Gravenhage upheld X's appeal and Y's application. That court took the view, in particular, that, although the Minister could reasonably consider that the accounts in X and Y's applications were not credible, he had none the less given insufficient reasons in both of those cases as to whether, having regard in particular to the criminalisation of homosexual acts in the countries of origin concerned, X and Y's fear of being persecuted on account of their homosexuality was well-founded.

31 By judgment of 15 August 2011, the Rechtbank 's-Gravenhage dismissed Z's appeal. It held that not only was the Minister entitled to consider that Z's account was not credible but, further, it did not appear from the statements and documentation produced by Z that in Senegal homosexuals are routinely persecuted.

32 The Minister appealed before the Raad van State against the two judgments which annulled his decisions rejecting the applications brought by X and Y.

33 Z appealed to the same court against the judgment dismissing his appeal against the Minister's decision rejecting his application.

34 The Raad van State pointed out that, in the three cases in the main proceedings, neither the sexual orientation of the applicants, nor the fact that the Minister could reasonably consider that the accounts in the applications for asylum were not credible are contested on appeal.

35 Furthermore, according to that court, the Minister argued, inter alia, that although he did not expect foreign nationals to conceal their sexual orientation in their country of origin, in accordance with the policy laid down in point C2/2.10.2 of the Guidelines, that did not mean that they must be free to publicly express it in the same way as in the Netherlands.

36 The Raad van State also observed that the parties in the main proceedings are not in agreement as to the extent to which fully expressing a sexual orientation, such as that shared by X, Y and Z, is protected by Articles 9 and 10 of the Directive.

37 In those circumstances, the Raad van State decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling which have been formulated in almost identical terms in each of the three cases:

'(1) Do foreign nationals with a homosexual orientation form a particular social group as referred to in Article 10(1)(d) [of the Directive]?

(2) If the first question is to be answered in the affirmative: which homosexual activities fall within the scope of the Directive and, in the case of acts of persecution in respect of those activities and if the other requirements are met, can that lead to the granting of refugee status? That question encompasses the following subquestions:

(a) Can foreign nationals with a homosexual orientation be expected to conceal their orientation from everyone in their [respective] country of origin in order to avoid persecution?

(b) If the previous question is to be answered in the negative, can foreign nationals with a homosexual orientation be expected to exercise restraint, and if so, to what extent, when giving expression to that orientation in their country of origin, in order to avoid persecution? Moreover, can greater restraint be expected of homosexuals than of heterosexuals?

(c) If, in that regard, a distinction can be made between forms of expression which relate to the core area of the orientation and forms of expression which do not, what should be understood to constitute the core area of the orientation and in what way can it be determined?

(3) Do the criminalisation of homosexual activities and the threat of imprisonment in relation thereto, as set out in the Offences against the Person Act 1861 of Sierra Leone (Case C-199/12), the Penal Code Act 1950 of Uganda (Case C-200/12) or the Senegalese Penal Code (Case C-201/12) constitute an act of persecution within the meaning of Article 9(1)(a), read in conjunction with Article 9(2)(c) of the Directive? If not, under what circumstances would that be the case?’

38 By order of the President of the Court of 19 June 2012, Cases C-199/12 to C-201/12 were joined for the purposes of the written and oral procedure and of the judgment.

Consideration of the questions referred

Preliminary observations

39 It is apparent from recitals 3, 16 and 17 in the preamble to Directive 2004/83 that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria (Joined Cases C-71/11 and C-99/11 *Y and Z* [2012] ECR I-0000, paragraph 47 and the case-law cited).

40 The Directive must, for that reason, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the directive must also be interpreted in a manner consistent with the rights recognised by the Charter (Case C-364/11 *Abed El Kareem El Kott and Others* [2012] ECR I-0000, paragraph 48 and the case-law cited).

The first question

41 By its first question, in each of the cases in the main proceedings, the referring court asks essentially whether Article 10(1)(d) of the Directive must be interpreted as meaning that, for the assessment of the grounds of persecution which are relied on in support of an application for refugee status, homosexuals may be regarded as being members of a particular social group.

42 In order to answer that question, it must be borne in mind that, under Article 2(c) of the Directive, the term 'refugee' refers, in particular, to a third-country national who is outside the country of his nationality 'owing to a well-founded fear of being persecuted' for reasons of race, religion, nationality, political opinion or membership of a particular social group and is unable or, owing to such fear, unwilling to avail himself of the protection of that country.

43 The third-country national concerned must therefore, on account of circumstances existing in his country of origin and the conduct of actors of persecution, have a well-founded fear that he personally will be subject to persecution for at least one of the five reasons listed in the Directive and the Geneva Convention, one such reason being 'membership of a particular social group'.

44 Article 10(1) of the Directive gives a definition of a particular social group, membership of which may give rise to a genuine fear of persecution.

45 According to that definition, a group is regarded as a 'particular social group' where, inter alia, two conditions are met. First, members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. Second, that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.

46 As far as concerns the first of those conditions, it is common ground that a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it. That interpretation is supported by the second subparagraph of Article 10(1)(d) of the Directive, from which it appears that, according to the conditions prevailing in the country of origin, a specific social group may be a group whose members have sexual orientation as the shared characteristic.

47 The second condition assumes that, in the country of origin concerned, the group whose members share the same sexual orientation has a distinct identity because it is perceived by the surrounding society as being different.

48 In that connection, it should be acknowledged that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports a finding that those persons form a separate group which is perceived by the surrounding society as being different.

49 Therefore, the answer to the first question referred in each of the cases in the main proceedings is that Article 10(1)(d) of the Directive must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group.

The third question

50 By its third question, referred in each of the cases in the main proceedings, which must be examined before the second question, the referring court asks essentially whether Article 9(1)(a) of the Directive, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the mere fact that homosexual acts are criminalised and accompanying that criminalisation with a term of imprisonment is an act of persecution. If the answer is negative, that court wishes to know in what circumstances an act is to be classified as an act of persecution.

51 In order to answer that question, it must be recalled that Article 9 of the Directive defines the elements which support the finding that acts constitute persecution within the meaning of Article 1(A) of the Geneva Convention. In that regard, Article 9(1)(a) of the Directive, to which the national court refers, states that the relevant acts must be ‘sufficiently serious’ by their nature or repetition as to constitute a ‘severe violation of basic human rights’, in particular the unconditional rights from which there can be no derogation, in accordance with Article 15(2) of the ECHR.

52 Moreover, Article 9(1)(b) of the Directive states that an accumulation of various measures, including violations of human rights, which is ‘sufficiently severe’ as to affect an individual in a manner similar to that referred to in Article 9(1)(a) of the Directive, must also be regarded as amounting to persecution.

53 It is clear from those provisions that, for a violation of fundamental rights to constitute persecution within the meaning of Article 1(A) of the Geneva Convention, it must be sufficiently serious. Therefore, not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness.

54 In that connection, it must be stated at the outset that the fundamental rights specifically linked to the sexual orientation concerned in each of the cases in the main proceedings, such as the right to respect for private and family life, which is protected by Article 8 of the ECHR, to which Article 7 of the Charter corresponds, read together, where necessary, with Article 14 ECHR, on which Article 21(1) of the Charter is based, is not among the fundamental human rights from which no derogation is possible.

55 In those circumstances, the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive.

56 However, the term of imprisonment which accompanies a legislative provision which, like those at issue in the main proceedings, punishes homosexual acts is capable, in itself of constituting an act of persecution within the meaning of Article 9(1) of the Directive, provided that it is actually applied in the country of origin which adopted such legislation.

57 Such a sanction infringes Article 8 ECHR, to which Article 7 of the Charter corresponds, and constitutes punishment which is disproportionate or discriminatory within the meaning of Article 9(2)(c) of the Directive.

58 In those circumstances, where an applicant for asylum relies, as in each of the cases in the main proceedings, on the existence in his country of origin on legislation criminalising homosexual acts, it is for the national authorities to undertake, in the course of their assessments of the facts and circumstances under Article 4 of the Directive, an examination of all the relevant facts concerning that country of origin, including its laws and regulations and the manner in which they are applied, as provided for in Article 4(3)(a) of the Directive.

59 In undertaking that assessment it is, in particular, for those authorities to determine whether, in the applicant’s country of origin, the term of imprisonment provided for by such legislation is applied in practice.

60 It is in the light of that information that the national authorities must decide whether it must be held that in fact the applicant has a well-founded fear of being persecuted on return to his country of origin within the meaning of Article 2(c) of the Directive, read together with Article 9(3) thereof.

61 Having regard to all of those considerations, the answer to the third question is that, in each of the cases in the main proceedings, Article 9(1) of the Directive, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts alone does not, in itself, constitute persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.

The second question

Preliminary observations

62 By its second question, referred in each of the cases in the main proceedings, the referring court asks essentially whether, if a homosexual applicant were to be regarded as being a member of a particular social group for the purposes of Article 10(1)(d) of the Directive, a distinction must be made between homosexual acts which fall within the scope of the directive and those which do not and therefore cannot lead to the grant of refugee status.

63 In order to answer that question, that the referring court has divided into several parts, it must be observed that it refers to a situation in which, as in the cases in the main proceedings, the applicant has not shown that he has already been persecuted or has already been subject to direct threats of persecution on account of his membership of a particular social group whose members share the same sexual orientation.

64 The lack of such a serious indication of a well-founded fear on the part of the applicants, within the meaning of Article 4(4) of the Directive, explains the referring court's need to know to what extent it may be open to it, where an applicant cannot base his fear on persecution already suffered on account of his membership of that group, to require that, on return to his country of origin, he should continue to avoid the risk of persecution by concealing his homosexuality or, at the very least, that he should exercise restraint in expressing his sexual orientation.

The second question, parts (a) and (b)

65 By its second question, parts (a) and (b), referred in each of the cases in the main proceedings, which it is appropriate to examine together, the referring court asks essentially whether Article 10(1)(d) of the Directive, read together with Article 2(c) thereof, must be interpreted as meaning that it is unreasonable to expect that, in order to avoid persecution, an asylum seeker must conceal his homosexuality in his country of origin or exercise restraint in expressing it. Furthermore, that court wishes to know, where appropriate, whether such reserve must be greater than that of a heterosexual person.

66 In that connection, it must be stated that, under Article 10(1)(d) of the Directive, sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States.

67 Apart from those acts considered to be criminal in accordance with the national law of the Member States, nothing in the wording of Article 10(1)(d) suggests that the European Union legislature intended to

exclude certain other types of acts or expression linked to sexual orientation from the scope of that provision.

68 Thus, Article 10(1)(d) of the Directive does not lay down limits on the attitude that the members of a particular social group may adopt with respect to their identity or to behaviour which may or may not fall within the definition of sexual orientation for the purposes of that provision.

69 The very fact that Article 10(1)(b) of the Directive expressly states that the concept of religion also covers participation in formal worship in public or in private does not allow the conclusion that the concept of sexual orientation, to which Article 10(1)(d) of that Directive refers, must only apply to acts in the private life of the person concerned and not to acts in his public life.

70 In that connection, it is 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.

71 Therefore, an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution.

72 As regards the restraint that a person should exercise, in the system provided for by the Directive, when assessing whether an applicant has a well-founded fear of being persecuted, the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subject to acts of persecution (see, to that effect, *Y and Z*, paragraph 76).

73 That assessment of the extent of the risk, which must, in all cases, be carried out with vigilance and care (Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493, paragraph 90), will be based solely on a specific evaluation of the facts and circumstances, in accordance with the rules laid down in particular by Article 4 of the Directive (*Y and Z*, paragraph 77).

74 None of those rules states that, in assessing the extent of the risk of actual acts of persecution in a particular situation, 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 in question and, consequently, renouncing the protection which the Directive is intended to afford the applicant by conferring refugee status (see, by analogy, *Y and Z*, paragraph 78).

75 It follows that the person concerned must be granted refugee status, in accordance with Article 13 of the Directive, where it is established that on return to his country of origin his homosexuality would expose him to a genuine risk of persecution within the meaning of Article 9(1) thereof. 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.

76 In the light of those considerations, the answer to parts (a) and (b) of the second question, referred in each of the three cases in the main proceedings, is that Article 10(1)(d) of the Directive, read together with Article 2(c) thereof, must be interpreted as meaning that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope. When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the

risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation.

The second question, part (c)

77 Having regard to the reply given to the first question, parts (a) and (b), there is therefore no need to reply to part (c) of the second question.

78 Nevertheless, it must be recalled that, for the purpose of determining, specifically, which acts may be regarded as constituting persecution within the meaning of Article 9(1) of the Directive, it is unnecessary to distinguish acts that interfere with the core areas of the expression of sexual orientation, even assuming it were possible to identify them, from acts which do not affect those purported core areas (see, by analogy, *Y and Z*, paragraph 62).

Costs

79 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

- 1. Article 10(1)(d) of Council Directive 2004/83/EC of 29 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 must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group.**
- 2. Article 9(1) of Directive 2004/83, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts per se does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.**
- 3. Article 10(1)(d) of Directive 2004/83, read together with Article 2(c) thereof, must be interpreted as meaning that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope. When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation.**

[Signatures]

* Language of the case: Dutch.