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EUROPE

EU court examines if 'gay' is grounds for asylum

How should national asylum authorities verify a person's claim that they are homosexual? The EU's top court assesses the case of three asylum seekers whose application was rejected by the Netherlands.



After X, Y, Z comes A, B and C - at least for the European Court of Justice (ECJ). In November, the Luxembourg-based court ruled that gay refugees from African countries, where homosexuality is legally punished, form a "particular social group" under the Refugee Convention. Three gay asylum-seekers from Uganda, Sierra Leone and Senegal - named X, Y and Z to protect their identities - had applied for asylum in the Netherlands because they felt persecuted on the basis of their sexual orientation. Dutch authorities denied the applications in 2011 and the three appealed- successfully. Same-sex rights activists [welcomed the November decision by the ECJ](#) for giving hope to people in the 71 countries around the world where homosexuality is still criminalized.

Now, the court has to rule on a much more difficult matter: how national asylum authorities should verify a person's claim that they are homosexual. In oral proceedings on Tuesday (25.02.2014), the ECJ assesses the cases of three refugees named A, B and C - three people who applied for asylum in the Netherlands, claiming to risk persecution in their home countries due to their homosexuality. The Dutch authorities rejected their applications, arguing the concerned didn't credibly prove their homosexuality.

Is self-declaration enough?

The ECJ has to find an answer to the question how far national migration authorities can go in trying to establish whether asylum seekers are speaking the truth when they claim they belong to the group of LGBTI (Lesbian, Gay, Bisexual, Transgender, Intersex) and fear persecution at home. Can an asylum seeker choose to refrain from answering questions on the basis that questioning infringes his or her privacy? "That's utter legal nonsense," said S. Chelvan, a barrister who defends LGBTI asylum seekers in the UK. "Clearly if we say 'just saying you're gay is enough,' that would be open to abuse," he told Deutsche Welle: "The question to the court is now: is anything more than a self-declaration a

violation of the protection of human rights? I say absolutely not."



Some Islamic and sub-Saharan countries prescribe the death penalty for homosexuality.

There are five reasons to grant asylum in Europe: one of them is membership of a particular social group, which gay asylum seekers fall under. Other convention reasons include political opinions and religious belief. "We expect those individuals to prove that they have a political affiliation, or a political opinion," said barrister S. Chelvan, "so why should gay asylum seekers be a protected group who do not need to prove that they are LGBTI? I believe that those who are genuinely LGBTI will be able to prove it."

"There's an entire world between saying 'one's sexual orientation can't be proven at all' and 'it's difficult to prove it'," Neil Grungras, the founder of the Organization for Refuge, Asylum & Migration (ORAM), agreed. "It's about judicators asking the right questions, and about doing it tentatively so that applicants feel safe and are able to come out to them and be honest to them about how they feel."

'Fixation on sex and conduct'

While many European countries have approved asylum applications on the basis of applicants' sexual orientation in recent years, national procedures verifying the claims still vary considerably, according to the ECJ's press department. Therefore, representatives of member states are also heard on Tuesday. Legal experts criticize the wrong focus in verification of gay asylum seekers' claims. "What's happened in European authorities is that there's been far too much of a fixation in relation to sex and conduct rather than analysis of identity outside the bedroom," Grungras said. "There are cases where asylum seekers are being asked humiliating questions, such as: did you ejaculate in him? Why did you use a condom?"

The barrister believes there is a need to improve understanding of what it means to fear persecution because of a person's sexual gender identity. "More than 90 percent of cases will suffer harm not in their bedroom, but when they go outside, at their workplace for example," Chelvan said. "So they're not actually engaged in sex, but what they're doing is not conforming to how the potential persecutor would expect them to behave. We're not speaking of the LGBTI claim, but the 'not straight enough' refugee claim."

Chelvan has worked on best practice for asylum case workers for years. He rejected calls by LGBTI activists to write up a questionnaire to be put forward to asylum seekers claiming to be gay. He argues applicants could have simply "learned the answers via the internet." Instead, he established what he calls the DSSH guidelines - Difference, Stigma, Shame, Harm. Those guidelines are designed to ensure officials ask claimants the right questions. The British Home Office and the Swedish Migration Board are cooperating. And UNHCR, the United Nations' Refugee Agency, also endorsed Chelvan's model in its [guidelines published in 2012](#).

"Difference, stigma and shame can be found in the majority of LGBTI the world over," Chelvan said. "It is harm that makes an LGBTI a refugee."

Worrying trend

He says even Europe still has a long way to go. "We mustn't forget that not so long ago, up to 2009, sexologists in the Czech and Slovak Republics used machinery attached to the genitals of those claiming to be LGTI. They put the entrapments on the penis or the vagina to measure sexual response to pornography."

The LGBTI activists say it was high time European authorities established a better knowledge of homosexuality and what constitutes sexual orientation - also because [there is a worrying trend](#): many countries are no longer just criminalizing same-sex conduct, but also passing laws that encourage straight members of society to report gay people to the authorities. On Monday, [Uganda passed such an anti-homosexuality act](#). "Those laws actually give a green light to those who want to harm LGBTI individuals that they can do so and they can do so with impunity," Chelvan said.



Legally binding gay marriage has been a part of life in the Netherlands for 13 years now.

Therefore, it's all the more important for European authorities to learn how to deal with cases of gay asylum seekers who flee for fear of persecution, Grungras said. "It would be wonderful for those cases not to have to come up at all. But in reality, we're looking at a world where countries are criminalizing same-sex relations and where targeting and persecution are very common in many, many places of the world and are becoming more common in other places."

The ECJ will probably not rule that asking questions besides the self-declaration is a violation of charter rights or of the convention, according to legal experts. "I feel that every asylum seeker needs to prove their case," Chelvan said.



Russia is one of the countries that has been cracking down on gay rights.

Tuesday's hearing is just the first procedural step in the Dutch A, B and C case. The judges are expected to pass their final ruling by the end of this year.

DW RECOMMENDS

Gauck praises Indian rights activists

On his visit to India, German President Gauck has criticized violence against women and the situation of homosexuals in the South Asian country. Civil society activists say Germany's support will help their struggle. (07.02.2014)

Putin says gay 'propaganda' law not discriminatory

Russian President Vladimir Putin has claimed that his country's ban on gay "propaganda" does not target homosexuals. The law has sparked outrage in the West in the run up to the February Winter Olympics in Sochi. (18.01.2014)

Opinion: "Fateful day for human rights in Nigeria"

UN agencies and others warned on Wednesday that a new Nigerian anti-gay law violates human rights. Thomas Mösch says Nigeria should be addressing its real problems instead of legislating against a persecuted minority. (15.01.2014)
