

EUROPEAN COURT OF HUMAN RIGHTS

M.E. v. Sweden, Application no. 71398/12

Written comments of FIDH (Fédération Internationale des Ligues des Droits de l'Homme), ICJ (International Commission of Jurists) and ILGA-Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association).

SUMMARY:

1. The case of *M.E. v. Sweden* provides the European Court of Human Rights ('the Court') an opportunity to revisit case law from 2004, and provide guidance on the application of the European Convention on Human Rights ('the Convention') to gay and lesbian asylum claims.¹ Since 2004, European consensus has developed socially, politically and legally to a point where there is greater recognition of, and protection for, the right of gay and lesbian individuals to 'live freely and openly'. This case requires the Court to consider for the first time the question of whether a Council of Europe member state may expel (even temporarily) a man who is genuinely married to another man, or a woman who is genuinely married to another woman,² if the expelled individual would face a real risk of treatment violating Article 3 in his or her country of origin if he or she were to speak publicly (or otherwise be open) about his or her sexual orientation and same-sex marriage.

INTRODUCTION:

2. These written comments are drafted by Mr. S. Chelvan, a Barrister of the Inner Temple at No5 Chambers, London, who has been instructed by Ms. Diana Baxter, a Solicitor at Wesley Gryk Solicitors LLP, London, on behalf of the interveners. Leave was applied for pursuant to Article 36 § 2 of the Convention on the 12th and 14th of March 2013. Leave was granted on the 20th of March 2013, by the President of the Court pursuant to Rule 44 § 3 of the Rules of Court.

The Court's earlier case law on asylum claims of gay men:

3. The Court's last guidance on expulsion of gay applicants for asylum are the June and December 2004 admissibility decisions in *F. v. United Kingdom*³ and *I.I.N. v. Netherlands*⁴. Both decisions related to gay men from Iran, and declared their applications inadmissible. In *F v. United Kingdom*, the Court reviewed the February 2002 decision of the Adjudicator who found that privately conducted homosexual conduct was extremely unlikely to lead to ill-treatment or harassment. The Court examined the country background evidence⁵, the most recent being from 2003, and concluded that the

¹ References to 'gay and lesbian', include bisexual individuals. 'Homosexual' is used only where the original source uses this term. The definition of sexual orientation is drawn from the 2007 *Yogyakarta Principles*.

² This should equally apply to those in other legally recognised relationships, such as registered partnerships or civil partnerships, or durable relationships, and also include gay or lesbian applicants who are not in a relationship.

³ ECtHR 22 June 2004, *F v. United Kingdom*, no. 17341/03.

⁴ ECtHR 9 December 2004, *I.I.N. v. Netherlands*, no. 2035/04.

⁵ In July 2005, the UK's Immigration Appeal Tribunal in *RM and BB (Homosexuals) Iran CG* [2005] UKIAT 00117, in assessing evidence, as of February 2005, held, reversing the UK's position in *F* only a year before [§ 123]: "It is clear ... that ...those guilty of immoral acts under Article 147/115 and Taqshiz under Article 121 face harsh punishments which can include long prison sentences up to six years and up to one hundred lashes. We remind ourselves of what Mr Kovats accepted on behalf of the Secretary of State that a sentence of lashing would be such as to give rise to a breach of Article 3 rights. Although we agree with Mr Kovats that the interest of the Iranian authorities in homosexual offenders is essentially focused upon any outrage to public decency, it is in our view clear that the authorities would not simply ignore, as Mr Kovats suggested they might in certain situations, reports

materials did not disclose 'a situation of active prosecution by the authorities of adults involved in consensual and private homosexual relationships'. The Court found very scarce material on actual prosecutions based solely on sexual conduct, and if they existed, the homosexual community in Iran would have been aware of such trials. A tenuous and hypothetical basis of Article 3 treatment occurring was insufficient, and even though Iran does not protect the human rights of homosexuals, who may be vulnerable to abuse, there were no substantial grounds for a finding of real risk of treatment contrary to Article 3. The Court's reasoning contains an implicit assumption that the applicant would be 'discreet' about his sexual orientation in Iran, outside the privacy of the home.

4. The Court's reasoning in *I.N.N.* was very similar to its reasoning in *F.*, and includes the same implicit assumption that the applicant would be 'discreet' in Iran. The Court expressed no concern about the applicant's claim 'that he had been arrested after having been caught kissing a male friend in an alley'.
5. The Court's reasoning in both *F.* and *I.N.N.* focuses the point of analysis on private conduct *in the home*, and the risk of criminal prosecution and imprisonment or execution for that conduct, as against public non-sexual conduct *outside the home* connected to expression of sexual orientation, as if non-sexual conduct outside the home could not create a risk of harm to expelled gay and lesbian individuals. As will be demonstrated below, since 2004, both the United Nations High Commissioner for Refugees' 2012 'Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity'⁶, and the judgment of the United Kingdom Supreme Court in *H.J. (Iran)* (2010)⁷ have departed from the Court's 'risk of criminal prosecution' approach in *F.* and *I.N.N.*

CONSENSUS IN EUROPEAN AND OTHER DEMOCRATIC SOCIETIES IN SUPPORT OF GAY AND LESBIAN ASYLUM CLAIMS:

6. In 1981, the Netherlands became the first country in the world to recognise asylum claims of homosexuals⁸. The obligation to protect lesbian and gay asylum-seekers is now incorporated into European Union law. Since the 2004 Qualification Directive entered into force on the 6th of October 2006⁹, 26 EU member states have a positive obligation to recognise the asylum claims of adult lesbians and gay men, pursuant to Article 10(1)(d):

made to them of persons carrying out homosexual acts albeit in private. If a complaint is brought to the authorities then we are satisfied that they would act upon that to the extent that they would arrest the claimed offenders and question them and thereafter there is a real risk that either on the basis of confessions or knowledge of the judge which might arise from such matters as previous history or medical evidence or the evidence of the person who claimed to have observed the homosexual acts, that they would be subjected to significant prison sentences and/or lashing." [emphasis added].

⁶ United Nations High Commission for Refugees HCR/GIP/12/09, 23 October 2012, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.*

⁷ UK Supreme Court judgment 7th July 2010, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596.

⁸ *Afdeling rechtspraak van de Raad van State* (Judicial Division of the Council of State) 13 August 1981, *Rechtspraak Vreemdelingenrecht* 1981, 5, *Gids Vreemdelingenrecht (oud)* D12-51.

⁹ 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 (*Official Journal L 304*, 30/09/2004 P. 0012 – 0023). Denmark opted out of the 2004 Directive, but does recognise the claims of gay and lesbian applicants (see S. Jansen and T. Spijkerboer, *Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, Amsterdam, 2011, p. 24, fn. 74 '... "Disturbing Knowledge – Decisions from asylum cases as documentation of LGBT-persons", LGBT Denmark and Danish Refugee Council (2008), <http://www.lgbtdk/uploads/media/DisturbingKnowledge.PA.01.pdf>).

'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 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 ...;

7. Whilst Denmark opted out of the 2004 Directive, they do consider the asylum claims of gay men and lesbians. For the purposes of this case, the 2011 Recast Directive,¹⁰ which is to be transposed by December 2013, makes no material difference, as the provision in Article 10 (1) (d) for sexual orientation is not affected.¹¹
8. On the 31st of March 2010, the Committee of Ministers of the Council of Europe published 'Recommendation CM/Rec (2010) of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity'¹². The Recommendation deals with asylum as follows:

'42. In cases where member states have international obligations in this respect, they should recognise that a well-founded fear of persecution based on sexual orientation or gender identity may be a valid ground for the granting of refugee status and asylum under national law.

43 Member states should ensure particularly that asylum seekers are not sent to a country where their life or freedom would be threatened or they face the risk of torture, inhuman or degrading treatment or punishment, on grounds of sexual orientation or gender identity.'

9. At least 34 Council of Europe member states already recognise sexual orientation as a ground for claiming asylum. These include the 26 EU member states to which the 2004 Qualification Directive applies.¹³

¹⁰ Council Directive 2011/95/EC of 13 December 2011 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 (re cast) (*Official Journal L 337*, 22/12/2011, P. 0009 – 0036).

¹¹ There is an amendment to Article 10 (1) (d) which includes gender identity as a protected identity.

¹² See <http://wcd.coe.int/ViewDoc.jsp?id=1606669> (last accessed 6 April 2013).

¹³ T. Hammarberg, *Discrimination on grounds of sexual orientation and gender identity*, 2nd edn, 2011, Council of Europe, p. 65: http://www.coe.int/t/Commissioner/Source/LGBT/LGBTStudy2011_en.pdf (last accessed 8 April 2013) 'National legislation and data on LGBT asylum and refugee cases. Twenty-six member states have explicitly recognised in their national legislation that sexual orientation is included in the notion of "membership of a particular social group" (Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden). In the other member states there is no explicit mention in their legislation. There are, however, at least seven other member states which, even in the absence of such explicit recognition, have had asylum claims in which sexual orientation has been recognised as a ground for persecution (Denmark, Greece, Norway, Switzerland, Turkey, Ukraine and the United Kingdom) evidenced by decisions of national competent bodies in these countries. In the other 12 member states which are

10. In other democratic societies, the Supreme Court of Canada in *Ward v Canada*¹⁴ and the United States Board of Immigration Appeals in *In re A Costa*¹⁵ have held that sexual orientation can fall within the 'particular social group' category of the Refugee Convention. The High Court of Australia in *Appellant S395*¹⁶ rejected the argument that gay asylum-seekers can be excluded from refugee protection by being 'discreet' in their countries of origin. The New Zealand Refugee Status Appeals Authority in *Refugee Appeal No 74665/03*¹⁷ held in approaching the claim from a human rights perspective [§ 114] '... Understanding the predicament of "being persecuted" as the sustained or systematic violation of basic human rights demonstrative of a failure of state protection means that the refugee definition is to be approached not from the perspective of what the refugee claimant can do to avoid being persecuted, but from the perspective of the fundamental human right in jeopardy and the resulting harm'.
11. There now exists in the majority of Council of Europe Member States social, cultural and legal recognition of the right of gay and lesbian individuals to 'live freely and openly'. The Court recognised this right in *Alekseyev v. Russia* (judgment of 21 October 2010, § 84): 'There is no ambiguity about the other [46] member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly.'

GUIDELINES OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES:

12. The United Nations High Commissioner for Refugees' 2012 'Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity'¹⁸ incorporate the reasoning of the United Kingdom Supreme Court in *H.J. (Iran)* (2010), and depart from the Court's 'risk of criminal prosecution' approach in *F. v. United Kingdom* (2004). The Guidelines provide as follows (footnotes omitted):

'12. A proper analysis as to whether a [lesbian or gay] applicant is a refugee under the 1951 [Refugee] Convention needs to start from the premise that applicants are entitled to live in society as who they are and need not hide that. As affirmed by the position adopted in a number of jurisdictions, sexual orientation and/or gender identity are fundamental aspects of human identity that are either innate or immutable, or that a person should not be required to give up or conceal. While one's sexual orientation and/or gender identity may be revealed by sexual conduct or a sexual act, or by external appearance or dress, it may also be evidenced by a range of other

parties to the 1951 Convention there is no explicit recognition of persecution on the basis of sexual orientation as a valid ground for asylum claims either in legislation or in actual successful cases filed by LGBT asylum seekers (Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Estonia, Georgia, Liechtenstein, Monaco, Montenegro, the Russian Federation, Serbia and "the former Yugoslav Republic of Macedonia").' The 34th member state is Estonia, where the 2004 Qualification Directive must be implemented. No information is available for Andorra and San Marino.

¹⁴ *Canada (Attorney General) v. Ward* [1993] 2 SCR 689.

¹⁵ *In re Acosta* (1985) 19 I. & N. 211.

¹⁶ *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473.

¹⁷ *Refugee Appeal No 74665/03* [2005] INLR 68.

¹⁸ United Nations High Commission for Refugees HCR/GIP/12/09, 23 October 2012, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*.

factors, including how the applicant lives in society, or how he or she expresses (or wishes to express) his or her identity. ...

19. Behaviour and activities may relate to a person's orientation or identity in complex ways. It may be expressed or revealed in many subtle or obvious ways, through appearance, speech, behaviour, dress and mannerisms; or not revealed at all in these ways. While a certain activity expressing or revealing a person's sexual orientation and/or gender identity may sometimes be considered trivial, what is at issue is the consequences that would follow such behaviour. In other words, an activity associated with sexual orientation may merely reveal or expose the stigmatized identity, it does not cause or form the basis of the persecution. In UNHCR's view, the distinction between forms of expression that relate to a "core area" of sexual orientation and those that do not, is therefore irrelevant for the purposes of the assessment of the existence of a well-founded fear of persecution.

31. That an applicant may be able to avoid persecution by concealing or by being "discreet" about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. As affirmed by numerous decisions in multiple jurisdictions, a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution. [Lesbian and gay] people are as much entitled to freedom of expression and association as others.

32. ... The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences. It is important to note that even if applicants may so far have managed to avoid harm through concealment, 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, rumours or growing suspicion. It is also important to recognize that even if [lesbian or gay] individuals conceal their sexual orientation 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, for example). The absence of certain expected activities and behaviour identifies a difference between them and other people and may place them at risk of harm.

33. Being compelled to conceal one's sexual orientation and/or gender identity may also result in significant psychological and other harms. Discriminatory and disapproving attitudes, norms and values may have a serious effect on the mental and physical health of [lesbian and gay] individuals and could in particular cases lead to an intolerable predicament amounting to persecution. Feelings of self-denial, anguish, shame, isolation and even self-hatred which may accrue in response an inability to be open about one's sexuality or gender identity are factors to consider, including over the long-term.'

THE HJ (IRAN) TEST:

13. In the United Kingdom, between 2004¹⁹ and 2006, the England and Wales Court of Appeal developed the 'being discreet test', whereby the United Kingdom found lawful the expulsion of gay and lesbian asylum seekers to their countries of origin, on the basis that they would be 'voluntary discreet' about their sexual orientation, and that this would be 'reasonably tolerable'²⁰. On the 7th of July 2010, the UK Supreme Court held, in the unanimous (5-0) landmark judgment of *HJ (Iran) and HT (Cameroon)*

¹⁹ England and Wales Court of Appeal judgment 2 December 2004, *Z v Secretary of State for the Home Department* [2004] EWCA Civ 1578; [2005] Imm A.R. 75.

²⁰ England & Wales Court of Appeal judgment 26 July 2006, *J v Secretary of State for the Home Department* [2006] EWCA Civ 1238; [2007] Imm A R 73 [§ 16].

*v Secretary of State for the Home Department*²¹, that this 'reasonably tolerable test' of 'being discreet' was unlawful, especially because no heterosexual person would find such constraints on being open about their sexual orientation to be reasonably tolerable [§ 77]. Drawing from earlier cases, the UK Supreme Court held that the underlying rationale of the Refugee Convention was to enable a person, whether they were gay, black, or a descendent of a political dictator, to 'live freely and openly' without fear of persecution [§ 65]. The UK Supreme Court's test, by which UK decision makers now determine gay asylum claims are found at § 82 of *H.J. (Iran)*:

When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant's country of nationality.

If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.

If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".

If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself *why* he would do so.

If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, eg, not wanting to distress his parents or embarrass his friends, then his application should be rejected. Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

If, on the other hand, the tribunal concludes that a material reason for the applicant living discreetly on his return would be a fear of the persecution which would follow if he were to live openly as a gay man, then, other things being equal, his application should be accepted. Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution. By admitting him to asylum and allowing him to live freely and openly as a gay man without fear of persecution, the receiving state gives effect to that right by affording the applicant a surrogate for the protection from persecution which his country of nationality should have afforded him.

²¹ UK Supreme Court judgment 7th July 2010, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596.

14. The UK Supreme Court's test can be summarised in the following manner:

- (i) Is the applicant gay or lesbian, or perceived to be?
- (ii) Do openly gay and lesbian individuals in the country of origin face a well-founded fear of persecution;
- (iii) Will the individual be 'open' on return? If so, they qualify as a refugee. If the individual is voluntarily discreet, then
 - (a) is it only because of family or social pressure? Then the individual does not qualify as a refugee; or
 - (b) is *a material reason* for being discreet the fear of persecution? If it is, then the individual qualifies as a refugee.

15. The UK's Home Office has incorporated the UK Supreme Court's test into its own published policy document.²² The UK Supreme Court, having found in *HJ (Iran)* that its test would be equally applicable to asylum claims based on all other Refugee Convention grounds, has applied it to asylum claims by persons with no political opinion (see *RT (Zimbabwe)*²³). The Upper Tribunal (Immigration and Asylum Chamber) has applied the test to religious claims (*MN and others (Ahmadis – country conditions – risk) Pakistan CG*).²⁴

16. From January 2011, the Swedish authorities adopted the *HJ (Iran)* approach in their national guidelines (see *Fleeing Homophobia* report, page 38, fn. 134²⁵), and the Superior Courts of both Finland and Norway, in January 2012²⁶ and March 2012²⁷ respectively have adopted the guidance as part of their own domestic case law.

17. In a September 2012 *Sentenza*²⁸ (*IT v Minister of the Interior*), the Italian Supreme Court went beyond *H.J. (Iran)*, holding that '[t]he penalty for homosexual acts, as provided by art. 319 of the Senegalese Penal Code, constitutes *per se* a general condition of deprivation of the fundamental right to live one's sexual and affective life freely'. Because this deprivation of fundamental rights ran counter to the Italian Constitution, the European Convention and the EU Charter of Fundamental Rights, it provided an 'objective situation of persecution'.

²² Asylum Instruction on *Sexual Orientation Issues in the Asylum Claim* (updated June 2011) <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/apis/sexual-orientation-gender-ident?view=Binary> (last accessed 8 April 2013).

²³ UK Supreme Court judgment 25th July 2012, *RT (Zimbabwe) and KM (Zimbabwe) v Secretary of State for the Home Department* [2012] UKSC 38; [2013] 1 AC 152.

²⁴ UK Upper Tribunal (Immigration and Asylum Chamber) judgment 14th November 2012, *MN and others (Ahmadis – country conditions – risk) Pakistan CG* [2012] UKUT 00389 (IAC).

²⁵ Rättschefens rättsliga ställningstagande angående metod för utredning och prövning av den framåtsyftande risken för personer som åberopar skyddsskäl på grund av sexuell läggning (RCI 03/2011) available at: www.migrationsverket.se/lifos (last accessed 9 April 2013).

²⁶ *Decision KHO:2012: 1* judgment 13th January 2012, Summary Online. < <http://www.unhcr.org/refworld/pdfid/4f3cdf7e2.pdf>> (last accessed 6 April 2013).

²⁷ "A" 29th March 2012, Online (Norwegian only). [http://www.domstol.no/upload/HRET/saknr2011-1688\(anonymisert\).pdf](http://www.domstol.no/upload/HRET/saknr2011-1688(anonymisert).pdf) (last accessed 6 April 2013).

²⁸ *Sentenza n. 15981 del 2012 depositata il 20 settembre 2012*. http://www.retelenford.it/sites/retelenford.it/files/2012_Cass_15981-asilo.pdf (last accessed 6 April 2013).

18. In September 2012, the Court of Justice of the European Union held in the joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland (Federal Republic of Germany) v. Y and Z*, that under the 2004 Qualification Directive²⁹ and its definition of persecution in Article 9(1)(a), if it is found that conduct connected to Ahmadi religious practice would result in persecution in Pakistan, then ‘the fact that [the Ahmadi person] could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant’ [§ 62]. On the 11th of April 2013, the Luxembourg Court will be hearing oral arguments in the references from the Dutch authorities in the joined cases C109/12 to C201/12, *X, Y and Z v. Minister voor Immigratie en Asiel*. Dutch authorities have posed several questions related to the 2004 Qualification Directive³⁰. Following *Y and Z*, it would be inconceivable that the Luxembourg Court would require gay and lesbian applicants to conceal their sexual orientation, but not require members of a religious minority to do so.
19. Applying the UK Supreme Court's test, the following can be concluded with regard to gay asylum-seekers in Council of Europe member states:
- (i) An applicant who is married to another man in a Council of Europe Member State is gay, or would be perceived to be gay, by state or private actors who would wish to subject him to treatment prohibited by Article 3 of the Convention in his country of origin;
 - (ii) Gay men who live openly in a country which criminalises adult private same-sex sexual conduct are at real risk of treatment contrary to Article 3;
 - (iii) It is irrelevant that the applicant could avoid this treatment by 'being discreet' about his sexual orientation and same-sex marriage, just as it would be irrelevant if a political dissident or a member of a religious minority could avoid similar treatment by keeping their political opinion or religion a secret.
20. A gay or lesbian applicant for asylum has the right to be open in their country of origin about their sexual orientation and marital status, and cannot be expected to remain silent about these important aspects of their life. Under the *H.J. (Iran)* test, the decision-maker asks what is the risk of harm if the applicant is open about their sexual orientation, not what is the risk if the applicant is coerced into being discreet (being discreet because of fear of harm is never truly voluntary). A decisive factor in the UK Supreme Court's decision to reject 'being discreet' as a requirement was that, had it been applied during World War II, it would have meant (hypothetically) that Anne Frank could have been returned from the UK to the Nazi-occupied Netherlands, as long as denying that she was Jewish and hiding in an attic were 'reasonably tolerable' means to protect her from harm [§§ 106-107 of *HJ*]. Under the *H.J. (Iran)* test, the risk of harm to Anne Frank would have been based on the assumption that she had the right to walk down a street in Amsterdam holding a sign saying "I am Jewish".
21. Even where the exposure to a risk of treatment contrary to Article 3 is expected (although not guaranteed) to be temporary (eg, four months), the period of expulsion is immaterial, because the Article 3 right to be protected against such treatment is absolute.
22. The Court is further invited to find that even if an applicant is voluntarily discrete for only family or societal reasons, then the fact that he or she is required to publicly present (or create or manufacture)

²⁹ 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 (*Official Journal L 304*, 30/09/2004 P. 0012 – 0023).

³⁰ *Official Journal of the European Union* C 217, 21/07/2012 P. 0008-0009. On 20 March 2013, the Dutch Council of State referred three cases involving gay or lesbian asylum-seekers to the Luxembourg Court: Cases C-148/13, C-149/13 and C-150-13.

elements of a heterosexual narrative to evade harm (such as ‘proving’ heterosexuality by being sexually receptive to members of the opposite sex, and/or by getting married and/or having children), and therefore conform to a stereotype to evade harm through identification of difference, the act of evasion is in itself an Article 3 violation as it debases the human being and constitutes degrading treatment (*as per Ireland v the UK*, judgment 18th January 1978). This constitutes foreseeable harm as has been determined by the UK Courts in *SW (Jamaica)*.³¹

THE RISK OF HARM TO OPENLY GAY MEN IN LIBYA:

23. The Swedish Government relies on the December 2012 UK Country of Origin Information Report on Libya as a source document on country conditions for gay men in Libya. The Country Report provides the following country background information (footnotes omitted):

[20.03] The International Lesbian, Gay, Bisexual, Trans and Intersex Association summarized the legal situation on its Libya page:

- ‘Male to Male relationships: Not Legal
- Punishment for male to male relationships: Imprisonment of 10 years or more.
- ...
- Marriage and Substitutes for Marriage: No Law

...

[20.04] The same source also added, from its section on law:

...

- Is there any type of legal recognition of same sex relationships? No
- What types of same sex partnerships are recognized? No law.

...

[20.06] Thinkprogress.com on its LGBT page in an undated report Liberated Libya might not improve life for [*sic*] gay community noted: “Interim Libyan leader Mustafa Abdul-Jalil has indicated that Islamic Sharia law will be the basic source of the country’s new legislation, which could mean that persecution of homosexuality will persist...”

[20.08] It was reported on 13 February 2012 by Fox News, in a news release entitled ‘New Libyan leadership takes harsh stance at UN against gays’:

‘A United Nations delegate from Libya’s newly formed government told a human rights panel that gays and other gays threaten ‘reproduction of the human race,’ ...

...

[20.12] Pink News, in a report of 2 December 2012, ‘Libya: Gay men speak out about abductions and beatings by Islamic militia’, noted:

³¹ UK Upper Tribunal (Immigration and Asylum Chamber) judgment 24th June 2011, *SW (lesbians – HJ and HT applied) Jamaica CG* [2011] UKUT 00251. See also footnote 132 of *Fleeing Homophobia Report Op. cit* fn. 9: “J. Millbank and C. Dauvergne have noted ‘even an individual who wishes to hide, ‘who desperately wishes – and takes all possible steps – to remain closeted does, in fact become increasingly “visible” with the passage of time’, see C. Dauvergne and J. Millbank, ‘Before the High Court: Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh’ (2003) *Sydney Law Review* 97, Vol 25, 122. See also S. Chelvan, ‘Put Your Hands Up (If You Feel Love)’, *Immigration, Asylum and Nationality Law*, Vol 25, No 1, 2011, S. 65, where the author remarked ‘that even where (voluntary) discretion is not due to a fear of well-founded persecution, the fact that an individual is not living a straight life, will identify them as “different” leading to LGB identification.’”

'Gay men in Libya have spoken out about the largest and most powerful militia brigade, 'and claim that men have been arrested, and assaulted by them, just for being gay.

'The Times reported that the Nawasi brigade, Tripoli's biggest Islamic militia group, are to blame for the abductions and beatings, and witnesses said such arrests are commonplace in the country's capital.

'The city's largest and most powerful brigade officially work under the authority of the Ministry of Interior, and, according to witnesses, were taking people away just for being gay'.

...

[20.15] Gays worlds news in an article of 3 September 2011, 'Libya: What about the LGBT Rights now?' noted, 'Beyond the criminal laws, cross-dressing and homosexuality are widely seen as immoral activities.'

...

[20.17] Gay Star News published an interview with Libyan LGBT activist Khaleed on 2 March 2012. In the interview Khaleed spoke about life as a gay man in post Gadaafi Libya:

..

"We don't dream of having pride events or showing our affection to each other in public places or coming out to our families. This will require massive social change and for a stable civil society which we are only beginning to build. We are not asking for the moon: all we need and want for now is respect of our privacy, and to have laws that do no incriminate us or our sexual orientation."

24. This background country evidence shows that any gay man who, for example, openly discussed his marriage to a man in a Council of Europe member state faces substantial grounds for fearing a real risk of arrest, abduction and physical assault by state sanctioned militia. Gay men cannot 'live freely and openly' in Libya, without the real risk of treatment contrary to Article 3 of the Convention.

25. The Swedish Government has insisted that the applicant demonstrate a 'personal' risk. Such a requirement would be contrary to the Court's judgment in *Salah Sheekh v. Netherlands* (judgment of 11 Jan. 2007, §148, *mutatis mutandis*): 'It might render the protection offered by [Article 3] illusory if, in addition to the fact of his belonging to the Ashraf – which the Government have not disputed, the applicant were required to show the existence of further special distinguishing features.'

CONCLUSIONS:

26. Article 3 of the Convention does not permit a Council of Europe member state to expel (even temporarily) a gay man who is genuinely married to a man, or a lesbian who is genuinely married to a woman, if the expelled individual would face a real risk of treatment violating Article 3 in their country of origin if they were to speak publicly (or otherwise be open) about their sexual orientation and their same-sex marriage. The genuineness of the marriage can be determined in the Council of Europe member state, without expelling the individual to their country of origin.

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