

Press release

Concerning the judgments of the Administrative Jurisdiction Division of the Council of State of 18 December 2013 in case numbers 201109928/1 (Senegal), 201106615/1 (Uganda) and 201012342/1 (Sierra Leone)

Changes required to how asylum applications by homosexual foreign nationals are assessed

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The State Secretary for Security and Justice must make changes to how asylum applications from homosexual foreign nationals are assessed. It is no longer sufficient for him to assess statements made by the foreign national about events in the country of origin; he must also investigate how the person concerned will give expression to his homosexuality in future upon returning to his country of origin. The State Secretary can no longer expect foreign nationals to exercise restraint in giving expression to their homosexuality. These are the conclusions that arise from three judgments published today (18 December 2013) by the Administrative Jurisdiction Division of the Council of State concerning three homosexual men from Senegal, Uganda and Sierra Leone whose asylum applications were denied by the State Secretary.

Investigation

The Council of State believes that, in addition to the assessment currently made of asylum applications from homosexual foreign nationals, the State Secretary must also examine how the foreign national in question will give expression to his homosexuality in future and whether this will entail a risk of persecution. The State Secretary can no longer expect foreign nationals to avoid persecution 'by exercising restraint'. He must also examine the general situation in the country of origin, considering for instance whether homosexuality is illegal in the country of origin and 'how this legislation is applied or affects people in practice'. The highest Dutch administrative court also held that the State Secretary must determine whether homosexual foreign nationals can seek protection from the authorities in their country of origin.

European Court of Justice

In November 2013 the European Court of Justice in Luxembourg ruled that member states cannot expect foreign nationals to conceal their sexual orientation or exercise restraint in

their country of origin to avoid the risk of persecution. In its judgment the European Court gave a preliminary ruling on questions referred to it by the Council of State in April 2012 concerning the Qualification Directive, which lays down minimum standards for the protection of refugees in member states.

New decisions

The State Secretary must take new decisions on the three foreign nationals' asylum applications, taking into account the judgments of the Council of State. The judgments will also have implications for how the State Secretary assesses asylum applications from lesbian, bisexual, transsexual and intersex individuals.

Decisive considerations from the judgment

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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 European Court identified foreign nationals with a homosexual orientation as a particular social group within the meaning of the Qualification Directive.

7. According to considerations 34 and 63, the judgment concerns those cases in which the State Secretary regards the sexual orientation of the foreign national as credible, but adopts the stance that the foreign national's statements on what happened to him in his country of origin, allegedly on the grounds of his sexual orientation, are not credible and this stance has withstood review by the courts. This means that the foreign national in question cannot rely on the events alleged in his account in support of his asylum application to establish a well-founded fear of persecution. In considerations 58 to 60 and 71 to 76, the Court describes how to assess whether such a foreign national has a well-founded fear of persecution within the meaning of article 9 (1) of the Qualification Directive on the grounds of his sexual orientation. The judgment does not therefore concern foreign nationals whose sexual orientation was not regarded as credible or foreign nationals who claim to be regarded as homosexuals 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 which in the light of section 3:2 of the General Administrative Law Act (*Algemene wet bestuursrecht*) he examines the general situation of homosexual foreign nationals living in the country of origin and considers the statements made by the foreign national during his interviews, is as follows.

8.1. To deny an application for an asylum residence permit it is insufficient that the State Secretary does not regard the events alleged to have taken place in the country of origin by a foreign national with a homosexual orientation as credible. 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 returning 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 a foreign national'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 homosexuals and the acceptance expected for such a course of action in the country in question. If a foreign national asserts that following his return he will give expression to his sexual orientation in a manner that exposes him to persecution, the plausibility of this statement will be affected by whether it 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)).

8.2. If in a foreign national's country of origin there is legislation criminalising 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 gives 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 criminalisation for the social position of homosexuals. 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 has been criminalised will make the authorities unable or unwilling to offer homosexuals protection, 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/V/2; www.raadvanstate.nl). In making this assessment the State Secretary must disregard whether a foreign national can escape persecution by exercising restraint.

9. In assessing whether it was reasonable for the State Secretary in making his assessment to have taken the position that the foreign national has failed to establish satisfactorily that he has reason to fear persecution on the grounds of his sexual orientation in his country of origin, the district court therefore wrongly attached sole importance to the fact that the foreign national's statements on the events that had taken place were not credible, as a result of which it was not plausible that he feared persecution upon return.

10. The appeal is well founded. The contested judgment must be set aside. The foreign national's other arguments require no discussion. Doing that which the district court should have done, the Division holds as follows.

11. In the decision of 12 January 2011, in assessing whether the foreign national had reason to fear persecution on the grounds of his sexual orientation, the State Secretary took into account only the fact that the foreign national's statements concerning the events that had taken place according to the account in support of his asylum application were not credible and that it was implausible that others were aware of his sexual orientation. The State Secretary made no assessment of the way in which the foreign national will give expression to his sexual orientation following his return and the extent to which he has reason to fear persecution on that basis. For this reason alone the State Secretary did not make his assessment in the manner described above.

12. The application for judicial review is well founded. The decision is annulled.