

RAINBOW REFUGEES: wet by the rain. Missed opportunity on the impact of unenforced anti same-sex law

Today, the [International Commission of Jurists \(ICJ\)](#) published a commentary, analysing in detail the 7 November 2013 judgment of the [Court of Justice of the European Union](#) in the joined cases of *X, Y and Z v. Minister voor Immigratie en Asiel*, which arose from three asylum claims in the Netherlands in which the applicants asserted a well-founded fear of persecution for reason of their sexual orientation.

You can download the commentary '*X, Y and Z: a glass half full for "rainbow refugees"?*' here: <http://www.icj.org/x-y-and-z-a-glass-half-full-for-rainbow-refugees/>.

Positively, the Court found that asylum applicants who have a same-sex sexual orientation and come from countries where consensual homosexual conduct is criminalised, form a particular social group for the purposes of EU refugee law. Further, the Court's recognition that sexual orientation is a characteristic so fundamental to one's identity that one cannot be expected to renounce or conceal it, or to exercise greater restraint in its expression than heterosexuals, is welcome. Likewise, the Court's finding that the enforcement of a term of imprisonment that sanctions consensual homosexual acts must be regarded as a disproportionate or discriminatory punishment, and is thus persecutory, is a step forward, particularly given that in some EU countries this was hitherto not the



case.

However, in some important respects this judgment represents a missed opportunity. The Court failed to clarify the inconsistency between secondary EU refugee law and the [UNHCR](#)'s authoritative interpretation of "a particular social group" in the Refugee Convention's definition of a refugee. Further, in choosing to maintain the narrow scope of the questions referred to it, the Court ended up with an unwarrantedly restrictive reading of EU refugee law, which ignores the numerous persecutory effects of criminalizing consensual same-sex sexual orientation or gender identity. The Court missed a chance to state that these laws, even when they are not enforced in the sense that there exists a recent record of enforcement through the actual imposition of terms of imprisonment, have a persecutory effect, as they criminalize an essential characteristic of one's identity.

Source: Laurens C. Hueting - ICJ

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