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M.B. v. Spain

Application no. 15109/15

WRITTEN SUBMISSIONS ON BEHALF OF

THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)

INTERVENER

pursuant to the Section Registrar's notification of 16 December 2015

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15 January 2016

Introduction

1. These written submissions are presented on behalf of the International Commission of Jurists (ICJ), hereinafter "the intervener", pursuant to the grant of permission of the Vice-President of the Third Section of the Court notified in a letter dated 16 December 2015 and addressed to the ICJ by the Section Registrar.

2. The rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: "the Convention" or ECHR) are not applied in a vacuum,[1] but fall to be interpreted in the light of and in harmony with other international law standards and obligations,[2] including under treaty and customary international law.[3] In addition, for those Contracting Parties that are Member States of the European Union (EU), EU law in the field of asylum should be interpreted as constituting "national law" for the purposes of the Convention.[4] This should be the case unless the domestic law of the Contracting Party concerned provides for higher protection standards since the EU asylum *acquis* – while directly applicable in participating EU Member States – constitutes a minimum standard.[5]

3. It is not generally the role of this Court to decide whether States have acted in accordance with EU law "unless and in so far as they may have infringed rights and freedoms protected by the Convention."[6] Nonetheless, it is for this Court to consider any EU Respondent State's obligations under applicable provisions of the EU asylum *acquis* – as interpreted and construed by the Court of Justice of the EU (CJEU) – when assessing whether the Contracting Party's proposed actions will be "in accordance with the law" under the Convention.[7] This Court can also optimally supervise a Contracting Party's compliance with Article 53 of the Convention by adopting an approach that guarantees at least the protection required under the applicable EU law.

4. The EU Charter of Fundamental Rights has the same legal force as the EU Treaties.[8] Its provisions are addressed, among others, to the Member States when implementing EU law[9] and are binding on them "when they act in the scope of Union law".[10] As the EU has developed a comprehensive set of instruments governing asylum, asylum decisions taken by Member States[11] come within the scope of EU law.[12] The Charter guarantees the right to asylum "with due respect for the rules of the Geneva [Refugee] Convention"[13] and the 1967 Protocol.[14]

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[1] *Öcalan v. Turkey* [GC], no. 46221/99, judgment, 12 May 2005, § 163.
[2] *Demir and Baykara v. Turkey* [GC], no. 34503/97, judgment, 12 November 2008, § 67; *Al-Adsani v. the UK* [GC], no. 35763/97, judgment, 21 November 2001, § 55.
[3] *Al-Adsani*; *Waite and Kennedy v. Germany* [GC], no. 26083/94, judgment, 18 February 1999; *Taskin v Turkey*, no. 46117/99, 10 November 2004.
[4] The EU asylum *acquis* is the *corpus* of law comprising all EU law adopted in the field of international protection claims. See, in particular, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), hereafter the recast Qualification Directive. Some EU Member States (Denmark, Ireland and the UK) have opted out of some of the Directives forming the EU asylum *acquis*. Notwithstanding this, they remain bound by the EU Charter of Fundamental Rights.
[5] See, e.g., Article 3 of the recast Qualification Directive.
[6] See *Jeunesse v. the Netherlands* [GC], no. 12738/10, judgment, 3 October 2014, § 110, and *Ullens de Schooten and Rezabek v. Belgium*, cited therein.
[7] *Aristimuño Mendizabal v. France*, no. 51431/99, judgment, 17 January 2006, § 69 and §§ 74-79; and *Suso Musa v. Malta*, no. 42337/12, judgment, 23 July 2013, § 97.
[8] Charter of Fundamental Rights of the European Union; Article 6(1), Treaty on European Union. The Charter has become legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009.
[9] Charter of Fundamental Rights of the EU, Article 51(1).
[10] Explanations relating to the Charter of Fundamental Rights, Official Journal of the European Union 2007/C 303/32 (14 December 2007). The Explanations set out the sources of the provisions of the Charter, and "shall be given due regard by the courts of the Union and of the Member States"; Charter of Fundamental Rights of the EU, Article 52(7).
[11] *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, Case 5/88, Judgment of the Court (Third Chamber) of 13 July 1989 para. 19: the requirements of the protection of the fundamental rights in the EU legal order are binding on the Member States when they implement EU rules. Also Case C-260/89 ERT, § 42.
[12] S. Peers, 'Human Rights in the EU Legal Order: Practical Relevance for EC Immigration and Asylum Law', in: S. Peers & N. Rogers (eds.), EU Immigration and Asylum Law – Text and Commentary (2006), p. 137, cited at:

5. In this context, the intervener recalls the role of the UNHCR in the supervision of the application of the Refugee Convention. The UNHCR is mandated by the UN General Assembly to provide international protection to refugees and to supervise the application of treaties relating to refugees, pursuant to its 1950 Statute.[15] Its supervisory responsibility is also reflected in the preamble[16] to and in Article 35 of the Refugee Convention,[17] and Article II of its 1967 Protocol.[18] In the exercise of its supervisory mandate, in 2012 the UNHCR published a set of Guidelines on claims to refugee status based on sexual orientation and/or gender identity under the Refugee Convention.[19]

6. The intervener submits that in interpreting the scope and content of the Contracting Parties' obligations under the Convention, this Court's premise should be that relevant EU asylum law constitutes "national law" for the purposes of the Convention for those Contracting Parties that are EU Member States. Furthermore, since pursuant to Article 78 of the Treaty on the Functioning of the EU the EU asylum policy "must be in accordance with the [Refugee] Convention",[20] and given the UNHCR's role as the guardian of the Refugee Convention, the intervener submits that any applicable EU asylum law should, in turn, be interpreted in light of relevant UNHCR guidance, namely, in the context of this Court's determination of the present case, the UNHCR SOGI Guidelines. Therefore, the UNHCR Guidelines are highly pertinent to the interpretation of the obligations of the Contracting Parties under the Convention.

7. In light of the above, the intervener's submissions in the present third-party intervention focus on the relevance of: a) the Refugee Convention, as interpreted by a number of domestic courts; and b) the EU asylum *acquis* and the EU Charter of Fundamental Rights, to the

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Laurens Lavrysen, 'European Asylum Law and the ECHR: An Uneasy Coexistence', Goettingen Journal of International Law 4 (2012) 1, p. 202.

[13] The 1951 Convention Relating to the Status of Refugees, 189 United Nations Treaty Series 137, entered into force 22 April 1954 (hereafter: the Refugee Convention or the Convention), as amended by the Protocol Relating to the Status of Refugees, 606 United Nations Treaty Series 267, entered into force 4 October 1967 (hereafter: the Protocol or 1967 Protocol).

[14] Charter of Fundamental Rights of the EU, Article 18.

[15] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), Annex, § 8(a) of which states "8. The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto". While not explicitly elaborated in the Statute, the UNHCR has an implied competence to define and adopt the measures that are reasonably necessary to achieve the purpose of the international legal framework governing the protection of persons of concern to UNHCR; see, Volker Türk (then Director of International Protection, UNHCR), Keynote address at the International Conference on Forced Displacement, Protection Standards, Supervision of the 1951 Convention and the 1967 Protocol and Other International Instruments, York University, Toronto, Canada, 17-20 May 2010, p.5. Further, the need for international cooperation is also recognized in the preamble to the Refugee Convention (recital 4). The recast Qualification Directive refers in its preamble to consultations with the UNHCR, which "may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention" (recital 22).

[16] The preamble to the Refugee Convention states: "Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner".

[17] Article 35(1) reads: "The Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention."

[18] Article II(1) reads: "The States Parties to the present Protocol undertake to cooperate with the office of the United Nations High Commissioner for Refugees, or any other agency which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol."

[19] The UNHCR 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, 23 October 2012, HCR/GIP/12/01, (hereafter: the UNHCR SOGI Guidelines). They provide authoritative guidance on substance and procedure "with a view to ensuring a proper and harmonized interpretation of the refugee definition" in the Refugee Convention (§ 4), and "are intended to provide legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out refugee status determination under its mandate", (cover page).

[20] Treaty on the Functioning of the EU, Article 78(1).

determination of the scope and content of *non-refoulement* obligations under Article 3 of the Convention of those Contracting Parties that are also EU Member States. The intervener's submissions will address, in particular, the following:

i) requiring coerced, including self-enforced, suppression of a fundamental aspect of one's identity — as enforced concealment of one's same-sex sexual orientation entails — constitute persecution under refugee law and is incompatible with the Convention, in particular, Article 3; and
ii) the criminalization of consensual same-sex sexual conduct gives rise to a real risk of Article 3 prohibited treatment, thus triggering *non-refoulement* obligations under that provision of the Convention.

i) Enforced concealment of one's same-sex sexual orientation

8. In the context of refugee claims based on sexual orientation, some courts, refugee-status determination authorities and academics have referred to concealment of one's sexual orientation as "discretion" or "restraint".[21] As the reality is that people will be required to "hide", "deny" or "restrain" their identity in the course of being "discreet", "discretion" is a euphemistic misnomer for what is in fact "concealment". Whatever the term employed, the nub of the issue is that concealing one's sexual orientation requires the suppression of a fundamental aspect of one's identity and its expression or aspects thereof. In these circumstances, the self-enforced suppression of one's sexual orientation (or aspects thereof) is not generally undertaken voluntarily, resulting from full, free, informed consent. Rather, concealment typically results from a fear of adverse consequences such as physical or psychological harm or both, whether at the hands of State (e.g. by way of prosecution and imprisonment for engagement in consensual same-sex acts) and non-State actors that may amount to persecution. Thus, concealing is coerced. In fact, concealment is a typical response,[22] consistent with the existence of a well-founded fear of persecution and, indeed, itself constitutes evidence that an applicant's fear is well-founded.[23]

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[21] See, e.g., *From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom*, Jenni Millbank, January 19, 2009, International Journal of Human Rights, Vol. 13, No. 2/3, 2009, pp. 2-4, "[a]t its baldest, discretion reasoning entailed a 'reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection', by exercising 'self-restraint' such as avoiding any behaviour that would identify them as gay; never telling anyone they were gay; only expressing their sexuality by having anonymous sex in public places; pretending that their partner is a 'flatmate'; or indeed remaining celibate. This approach subverted the aim of the Refugees Convention – that the receiving state provides a surrogate for protection from the home state – by placing the responsibility of protection upon the applicant: it is he or she who must avoid harm. The discretion approach also varied the scope of protection afforded in relation to each of the five Convention grounds by, for example, protecting the right to be 'openly' religious but not to be openly gay or in an identifiable same-sex relationship. The appearance of discretion reasoning in a decision strongly correlated to failure for lesbian and gay applicants [….] The discretion approach explicitly posited the principle that human rights protection available to sexual orientation was limited to private consensual sex and did not extend to any other manifestation of sexual identity (which has been variously characterised as 'flaunting', 'displaying' and 'advertising' homosexuality as well as 'inviting' persecution). Thus for example in 2001 the Federal Court of Australia held that the Iranian Penal Code prohibiting homosexuality and imposing a death penalty did 'place limits' on the applicant's behaviour; the applicant had to 'avoid overt and public, or publicly provocative, homosexual activity. But having to accept those limits did not amount to persecution.' On appeal, the Full Federal Court endorsed the view that 'public manifestation of homosexuality is not an essential part of being homosexual'. The discretion approach thus has had wide-reaching ramifications in terms of framing the human rights of lesbians and gay men to family life, freedom of association and freedom of expression as necessarily lesser in scope than those held by heterosexual people."

[22] On this point, in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department,* [2010] UKSC 31, United Kingdom Supreme Court, 7 July 2010, Lord Roger noted this effect in practice: "[u]nless he were minded to swell the ranks of gay martyrs, when faced with a real threat of persecution, the applicant would have no real choice: he would be compelled to act discreetly. Therefore the question is whether an applicant is to be regarded as a refugee for purposes of the Convention in circumstances where the reality is that, if he were returned to his country of nationality, he would have to act discreetly in order to avoid persecution", § 59.

[23] In *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department,* Lord Roger also noted, "threatened with serious harm if they [i.e. gay men and lesbian women] live openly, then most people threatened with persecution will be forced to take what steps they can to avoid it. But the applicant's country of nationality does not meet the standard of protection from persecution which the Convention envisages simply because conditions in the country are such that he would be able to take, and would in fact take, steps to avoid persecution by concealing the fact that he is gay. **On the contrary, the fact that he would feel obliged to**

9. Effectively requiring individuals to conceal their sexual orientation – whether through adoption or manufacture of heterosexual or asexual lifestyles, orientation and/or gender identity, purportedly in order to avoid persecution – is inconsistent with the Refugee Convention's human rights and humanitarian purpose. It is incompatible with respect for human dignity since it negates each person's capacity for, and freedom to develop, an emotional and sexual attraction for other individuals, regardless of gender, and to choose to engage in consensual sexual conduct with them.[24] On this point, the UNHCR SOGI Guidelines affirm "[t]hat 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. LGBTI people are as much entitled to freedom of expression and association as others."[25]

10. Thus, under refugee law, the fact that people may have previously concealed their same-sex sexual orientation is not a valid reason to refuse them refugee status, nor is the possibility that they could or would suppress their identity/status in the future.[26] Individuals should not be required to lie or to exercise restraint about their protected characteristics, be it, for example, one's religious beliefs,[27] or, *mutatis mutandis*, their sexual orientation. Indeed, in its judgment in the three joined cases of *X, Y and Z v. Minister voor Immigratie en Asiel*, the CJEU affirmed 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".[28] Thus, "an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution".[29] In *X, Y and Z* the CJEU went as far as to hold that, even if through concealing the applicant may avoid the risk of persecution, "[t]he 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",[30] and that "[w]hen assessing an application for

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take these steps to avoid persecution is, prima facie, an indication that there is indeed a threat of persecution to gay people who live openly", § 65 (**emphasis added**).

[24] The *2010 Update report of the EU Agency for Fundamental Rights on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity* observes that, "sexual orientation is a personal characteristic protected under the ECHR, not a shameful condition to be hidden. Any failure to appreciate the specific burden of forced invisibility and of the duty to hide a most fundamental aspect of one's personality such as sexual orientation or gender identity, is a severe misconception of the real situation of LGBT people", p. 56.

[25] The UNHCR SOGI Guidelines, § 31, footnotes in the original omitted. In *Sadeghi-Pari v Canada*, the Federal Court of Canada held that requiring a person to conceal or suppress their sexual orientation amounts to persecution: "[c]oncluding that persecution would not exist because a gay woman in Iran could live without punishment by hiding her relationship to another woman may be erroneous, as expecting an individual to live in such a manner could be a serious interference with a basic human right, and therefore persecution", *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282, 37 Imm LR (3d) 150, § 29.

[26] *RRT Case No. 1102877* [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, "[b]ased on the applicant's past conduct, the Tribunal is of the view that he would be able to avoid the harm he fears by being discreet. However, the Tribunal cannot require a protection visa applicant to take steps and modify his conduct to avoid persecution (*Appellant S395/2002 v MIMA* (2003) 216 CLR 473). The applicant had acted discreetly in the past because of the threat of harm. As noted by the High Court, in these cases it is the threat of serious harm with its menacing implications that constitutes the persecutory conduct", § 96; see also *RRT Case No. 071862642* [2008] RRTA 40, Australia: Refugee Review Tribunal, 19 February 2008.

[27] See, e.g., the 5 September 2012 judgment of the Grand Chamber of the CJEU in the Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z* where the Court held that, in determining an application for refugee status the national authorities cannot reasonably expect the applicant to abstain from the manifestation or practice of certain religious acts in order to avoid exposure to persecution (§§ 79-80). Or, *mutatis mutandis*, one's religious conversion, see the *written submissions on behalf of the AIRE Centre, ECRE and the ICJ* lodged with the Grand Chamber of the European Court of Human Rights on 10 October 2014 in the case of *F.G. v. Sweden*, no. 3611/11. NB judgment in *F.G. v. Sweden* is pending.

[28] Joined Cases C-199/12, C-200/12, C-201/12 *X, Y and Z v. Minister voor Immigratie en Asiel*, CJEU, Fourth Chamber, 7 November 2013, § 70.

[29] *X, Y and Z v. Minister voor Immigratie en Asiel*, § 71.

[30] *X, Y and Z v. Minister voor Immigratie en Asiel*, §§ 72-75; see also the Dissenting Opinion of Judge Power-Forde in *M.E. v. Sweden*, European Court of Human Rights (Fifth Section), no. 71398/12, judgment, 26 June 2014, "[t]he fact that the applicant could avoid the risk of persecution in Libya by exercising greater restraint

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."[31]

11. Therefore, in light of the CJEU's judgment in *X, Y and Z*, in particular, in the context of refugee claims based on sexual orientation, the ultimate question is whether the individuals concerned would face a real risk of persecution if they chose to live openly on return. Refugee-status determination authorities, including judges, should not seek to go behind this issue by entertaining consideration of "if and why" questions (i.e., 'if s/he is likely to exercise restraint, why would s/he do so?').[32] It is now clear that where, upon removal, individuals would face a real risk of persecution if their sexual orientation and/or gender identity became known, that is sufficient to warrant recognition of refugee status irrespective of any concealment/modification/avoidance action they could or would take. Indeed, consistent with the principles canvassed above, the UNHCR SOGI Guidelines advise that: "the question thus to be considered is what predicament the applicant would face if he or she were returned to the country of origin. This requires a fact-specific examination of what may happen if the applicant returns to the country of nationality or habitual residence and whether this amounts to persecution. The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences."[33]

12. Furthermore, as the UNHCR SOGI Guidelines note: "[b]eing 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 LGBTI 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."[34] In this context, studies have shown that pervasive discrimination has led, in particular, to mental health problems, feelings of self-denial, anguish, depression, psychosocial and psychological distress, shame, isolation and self-hatred.[35] Expert opinion has attested to the severe mental suffering caused by concealing one's sexual orientation and/or gender identity.[36]

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and reserve than a heterosexual in expressing his sexual orientation is not a factor that ought to be taken into account."

[31] *X, Y and Z v. Minister voor Immigratie en Asiel*, § 76. Consistent with this decision, in the case of *MSM (journalists; political opinion; risk) Somalia*, the Immigration and Asylum Chamber of the UK's Upper Tribunal has held: "[i]n our judgement, the only issue on which there is a possible element of dissonance between the decisions of the [UK] Supreme Court and those of the [CJEU] is whether it is permissible to take into account the avoidance or modification of conduct on the part of the person concerned which is voluntary [….] we consider that the decisions of the United Kingdom Supreme Court, the High Court of Australia and the [CJEU] are in alignment with each other. They are united by their common espousal of the dominant principle that the stature of the right and the unbridled freedom to exercise it (subject only to limitations which do not arise in this appeal) rise above and eclipse other considerations […] To the extent that there is any disharmony between the approaches of the Supreme Court and the [CJEU], we are, by virtue of the principle of supremacy of EU Law, obliged to follow the latter", *MSM (journalists; political opinion; risk) Somalia* [2015] UKUT 413 (IAC), 3 July 2015, §§ 46-48.

[32] "Unlike the United Kingdom's Supreme Court judgment in *HJ (Iran) and HT (Cameroon)*, the CJEU did not ask – nor suggest to adjudicators – that they ask the 'if and why' questions [….] The CJEU states instead that 'the fact that he could avoid the risk of exercising restraint … is not to be taken into account.' In our Guidelines, we did not advocate for the 'if and why' questions, but instead to look at the overall predicament and risk of persecution regardless of concealment, discretion or restraint. The applicant is thus not required to exercise greater restraint than a heterosexual in expressing his sexual orientation, even if that would allow him to avoid the risk of persecution. Hopefully the CJEU's judgment puts to rest the reliance on the *HJ (Iran) and HT (Cameroon)* reasoning", see, UN High Commissioner for Refugees (UNHCR), International Commission of Jurists: Expert Roundtable on asylum claims based on sexual orientation or gender identity or expression Brussels, 27 June 2014 - X, Y and Z: The "A, B, C" of Claims based on Sexual Orientation and/or Gender Identity? 27 June 2014, by Dr Alice Edwards, then UNHCR's Chief of Protection Policy and Legal Advice, footnotes in the original omitted.

[33] The UNHCR SOGI Guidelines, § 32.

[34] The UNHCR SOGI Guidelines, § 33, footnotes in the original omitted.

[35] *Guidelines for Psychological Practice With Lesbian, Gay, and Bisexual Clients*, American Psychological Association.

[36] See, e.g., the expert opinion provided by Dr Meyer to the European Court of Human Rights in the case *Bayev v. Russia*, no. 67667/09, case communicated on 16 October 2013 (judgment pending). His area of social epidemiological expertise is the effects of social stress related to prejudice and discrimination on the health of

13. Under international human rights law, in certain circumstances, psychological, mental harm resulting from fear of exposure to physical harm (i.e. from the apprehension of prospective physical ill-treatment inflicted on oneself or one's loved ones)[37] has been found to constitute cruel, inhuman and degrading treatment.[38] Such findings are consistent with refugee law holding that in some cases psychological harm is persecutory.[39] This is of particular concern in the case of rejected asylum-seekers required to conceal their sexual orientation and/or gender identity on return in an attempt to avoid persecution, since fear of discovery and of the resulting physical ill-treatment by State or non-State actors, imprisonment and, in extreme cases, execution, may hang over them for the rest of their lives.[40]

LGB populations. His opinion stated: "[…] concealing one's lesbian or gay identity is itself a significant stressor for at least three reasons. First, people must devote significant psychological resources to successfully conceal their LGB identities. Concealing requires constant monitoring of one's interactions and of what one reveals to others. Keeping track of what one has said and to whom is very demanding and stressful, and it leads to psychological distress. Among the effects of concealing are preoccupation, increased vigilance of stigma discovery, and suspicion, which, in turn, lead to mental health problems […] Second, concealing has harmful health effects by denying the person who conceals his or her lesbian or gay identity the psychological and health benefits that come from free and honest expression of emotions and sharing important aspects of one's life with others […] Third, concealment prevents LGB individuals from connecting with and benefiting from social support networks and specialized services for them. Protective coping processes can counter the stressful experience of stigma […] LGB people who need supportive services, such as competent mental health services, may receive better care from sources in the LGB community […] But individuals who conceal their LGB identities are likely to fear that their sexual identity would be exposed if they approached such sources […] LGB people who conceal their gay identity have been found to suffer serious health consequences from this concealment", Declaration of Ilan H. Meyer, in *Bayev v. Russia*, May 2014, §§ 64-67. Furthermore, in "*Minority Stress and Physical Health Among Sexual Minorities*", David J. Lick, Laura E. Durso and Kerri L. Johnson note, "[…] LGB individuals who live in stigma-rich environments may also face health concerns because they conceal their sexual identity in order to prevent future victimization […] Such concealment […] is associated with a host of psychological consequences in the long-term, including depressive symptoms […] poor self-esteem and elevated psychiatric symptoms […] and psychological strain […] findings from the general population indicate that such heightened distress hinders physical functioning […] In fact, several previous studies uncovered associations between sexual orientation concealment and physical health outcomes among HIV-positive gay men, linking concealment to increased diagnoses of cancer and infectious diseases […] dysregulated [sic] immune function […] and even mortality […] Collectively, these findings suggest that LGB individuals who live in stigmatizing environments may face frequent victimization that leads them to conceal their sexual orientation, with negative implications for longterm health", and "[t]hus, fears of discrimination stemming from previous experiences with antigay stigma may lead LGB adults to avoid healthcare settings or to conceal their sexual orientation from medical providers, resulting in a low standard of care that contributes to long-term physical health problems […]", see Lick et al in *Perspectives on Psychological Science* 2013 8: 521 DOI: 10.1177/1745691613497965, at p. 531 and 533, respectively. Apu Chakraborty *et al* in *Mental health of the non-heterosexual population of England*, British Journal of Psychiatry (2011) 198, 143-134 corroborate international findings that "non-heterosexual individuals are at higher risk of mental disorder, suicidal ideation, substance misuse and self-harm than heterosexual people", p. 147.

[37] In *Keenan v. the United Kingdom*, this Court clarified that someone's treatment is capable of engaging Article 3 when it is "such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance […] or as driving the victim to act against his will or conscience…", *Keenan v. the UK*, no. 27229/95, judgment, 3 April 2001, § 110 and *Ireland v. the UK*, no. 5310/71, judgment, 18 January 1978, § 167; *Identoba*, §§ 68-71 and § 79.

[38] This Court has recognized, including most recently in *Identoba and Others v. Georgia,* that, "Article 3 cannot be limited to acts of physical ill-treatment; it also covers the infliction of psychological suffering", *Identoba and Others v. Georgia*, no. 73235/12, judgment, 12 May 2015, § 65, §§ 70-71; see also, *Gäfgen v. Germany* [GC], no. 22978/05, judgment, 1 June 2010, § 103.

[39] See, *Abay v. Ashcroft*, 368 F.3d 634, United States Court of Appeals for the Sixth Circuit, 19 May 2004, where a mother's psychological trauma due to the risk of her child undergoing female genital mutilation was found to constitute persecutory harm and thus enough to entitle her to protection as a refugee. Psychological, mental harm is capable of constituting persecution for the purposes of the Refugee Convention when it results from coercion. US case law also confirms this clearly: *Fisher v I.N.S.*, 37 F.3d 1371 (9th Cir. 1994) "being forced to conform to, or being sanctioned for failing to comply with, a conception of Islam that is fundamentally at odds with one's own…can rise to the level of persecution", § 45.

[40] See, *inter alia*, *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, per McHugh and Kirby JJ, "[….] **It is the threat of serious harm with its menacing implications that constitutes the persecutory conduct.** To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly ", § 43 (**emphasis added**).

14. It should also be recalled that even if the people concerned do attempt to conceal their sexual orientation/identity, there remains a possibility of discovery against their will,[41] for example by accident, rumours, growing suspicion, use of social media,[42] assumptions about people who have not married and who do not have children.[43] With respect to the risk of discovery, the UNHCR SOGI Guidelines emphasize: "[i]t 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 LGBTI 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 […]). The absence of certain expected activities and behaviour identifies a difference between them and other people and may place them at risk of harm."[44]

15. In light of the above, and given the aforementioned relevance of the Refugee Convention and relevant UNHCR guidance in interpreting ECHR,[45] with respect to the enforcement of removals, the intervener submits in conclusion that requiring coerced, including self-enforced, concealment of someone's same-sex sexual orientation or identity – as a way, purportedly, to mitigate the real risk of their being exposed to Article 3 prohibited treatment – is incompatible with the Convention's obligations. Such coerced concealment constitutes pain and suffering amounting to proscribed treatment under Article 3. Indeed, enforcing removals on the basis that the individuals concerned would be expected to conceal their sexual orientation or identity – purportedly to sufficiently mitigate the risk of Article 3 prohibited treatment upon return – would constitute arbitrary *refoulement* (*mutatis mutandis M.S. v Belgium*)[46] and thus violate Article 3.

ii) Criminalization of consensual same-sex sexual conduct

16. It is well established that laws criminalizing same-sex conduct are discriminatory and incompatible with human rights standards.[47] Where persons are at risk of capital punishment, prison terms or corporal punishment,[48] such as flogging, the persecutory character is, according to the UNHCR SOGI Guidelines, "particularly evident."[49] However, the general approach taken by asylum Courts, including the CJEU, has been that the mere existence of a law criminalizing same-sex relations, without "enforcement" or other acts, does not, *per se*, amount to persecution.[50] Conversely, recent judgments from superior courts in Belgium[51] and

[41] See, e.g., *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, §§ 56-58.
[42] E.g. the Human Rights Watch report, "*We Are a Buried Generation" Discrimination and Violence against Sexual Minorities in Iran*, 15 December 2010, documenting internet surveillance of gay chat rooms in Iran and the ensuing human rights violations.
[43] The UNHCR SOGI Guidelines, § 32. See also *SW (lesbians - HJ and HT applied) Jamaica CG* [2011] UKUT 251 (IAC), 24 June 2011, in the context of the successful appeal under the Refugee Convention of a Jamaican lesbian applicant, the Immigration and Asylum Chamber of the UK's Upper Tribunal described the risk of discovery faced by lesbian women in Jamaica, § 107.
[44] The UNHCR SOGI Guidelines, § 32 (footnotes in the original omitted).
[45] See the introduction and, in particular, § 7.
[46] This Court has found Contracting Parties liable in cases of constructive *refoulement, e.g.*, *M.S. v. Belgium*, no. 50012/08, judgment, 31 January 2012, §§ 121-125.
[47] E.g., the UN Working Group on Arbitrary Detention has concluded that detaining someone under laws criminalizing consensual same-sex sexual activity in private breaches international law, Working Group on Arbitrary Detention Opinion 22/2006 (Cameroon), A/HRC/4/40/Add.1, adopted (2007) pp. 91-94.
[48] The CJEU has accepted that the application of a term of imprisonment upon conviction for offences criminalizing consensual homosexual acts would also amount to persecution, see *X, Y and Z v. Minister voor Immigratie en Asiel*, where the CJEU held 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", § 61.
[49] The UNHCR SOGI Guidelines, § 26.
[50] In *X, Y and Z v Minister voor Immigratie en Asiel*, the CJEU held: "[…] 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", *X, Y and Z v. Minister voor Immigratie en Asiel*, § 55. However, the

Italy[52] have found in favour of Senegalese homosexual applicants based on, *inter alia*, the risk to the individuals concerned arising from Senegal's criminalization of consensual same-sex relations and of becoming victims of homophobic crimes, including at the hands of family members, from which there is no effective state protection.

17. The intervener submits that this Court, in interpreting ECHR provisions that are coterminous with provisions in the EU Charter of Fundamental Rights, is bound by Luxembourg Court's interpretation of the said provisions only insofar as considering them a floor and not a ceiling in human rights protection. Thus, while this Court should take note of certain aspects of the CJEU's judgment in *X, Y and Z*, the Luxembourg Court's abovementioned finding on criminalization *per se* is not germane to this Court's determination of the present case, since it pertains exclusively to the CJEU's construction of one of the limbs of Article 9 of the 2004 Qualification Directive.

18. Under refugee law, prosecution may amount to persecution if the criminal law is enforced or punishment meted out in a disproportionate or discriminatory manner.[53] Historically, issues arising as a result of the criminalization of sexual orientation/identity have been considered under the ambit of "private life", rather than under the rubric of non-discrimination, integrity and/or dignity. This Court, for example, has consistently found that laws criminalizing consensual same-sex activity amount to an unjustifiable interference with an individual's right to private life, including in circumstances where in practice the law was not applied.[54] In the wake of this Court's ruling in *Dudgeon v. the United Kingdom*, recognizing the harm caused by

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concept of persecution calls for an analysis of the seriousness/severity of the violation of the rights that it entails. Erroneously in the intervener's view, instead of focusing on whether criminalization of consensual same-sex conduct constituted persecution, the CJEU's focus of enquiry was on whether it could constitute a lawful measure of derogation from certain rights under the ECHR, such as the right to private and family life. It is to be noted that, in any event, any such derogation would be hardly likely to be lawful under the ECHR. It addition, that the ruling of the Court, ultimately, was directed to the construction of one of the limbs of Article 9 of the 2004 Qualification Directive. Had the Court reformulated the question to look beyond Article 9(2)(c), it could have addressed persecution stemming from the existence of laws criminalizing consensual sexual conduct or same-sex sexual orientation by reference to Article 9(2)(b) of the Qualification Directive, i.e.: "legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner" whether or not there is a recent record of enforcement in the sense of imprisonment resulting from the application of the relevant provisions. This approach recognizes the potential for persecution arising from the mere existence of these laws, even in the absence of a recent record of prosecutions and imprisonments, whether arising from misfeasance of State actors outside due process or of non-State actors against whom the State does not offer effective protection. See also *'X, Y and Z: a glass half full for "rainbow refugees"? The International Commission of Jurists' observations on the judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel'*, International Commission of Jurists, Geneva, 3 June 2014.

[51] Judgment *No. 36 527* of 22 December 2009, *Conseil du Contentieux des Etrangers*; Judgment *No. 50 967* of 9 November 2010, *Conseil du Contentieux des Etrangers*; Judgment *No. 50 966* of 9 November 2010, *Conseil du Contentieux des Etrangers*; and Judgment No. 134 833 of 9 December 2014, *Conseil du Contentieux des Etrangers*.

[52] The Supreme Court of Cassation considered whether the existence of laws criminalizing homosexuality in Senegal was a valid reason for granting international protection. In its judgment, the Court reasoned that the fact that the Senegalese Penal Code criminalizes homosexual acts with penalties of up to five years' imprisonment constituted *per se* a deprivation of the fundamental right to live freely one's sexual and emotional life. Consequently, homosexuals were forced to violate the Senegalese criminal law, exposing themselves to severe penalties if they wanted to live their emotional and sexual life freely. The Court held that this was a violation of the right to private life, embedded in the Italian Constitution, the European Convention on Human Rights and the EU Charter on Fundamental Rights. The criminal law placed homosexuals in a situation of objective persecution, and this justified the granting of protection. The criminalization of consensual same-sex sexual conduct in Senegal was *per se* considered to be a serious and unlawful interference with private life and deemed to severely compromise individual freedom. *Sentenza n. 15981/12,* Court of Cassation, *sesta sezione civile,* 20 September 2012; and *Sentenza n.16417/2007*, Court of Cassation, *prima sezione civile*, 25 July 2007.

[53] Therefore, if an LGBTI person is more likely to be prosecuted for offences connected with 'morality', for example, this may be sufficient to amount to persecution. Similarly, if prosecutions are undertaken without adhering to basic standards of procedural fairness or due process in order to achieve a prohibited aim (discrimination against or suppression of homosexuality, for example) the risk of conviction and any subsequent penalty may constitute serious harm. See, Hathaway and Foster, *The Law of Refugee Status*, Second Edition, 2014, Cambridge University Press, Chapter 3, 3.4.2 Prosecution, pp. 245-246; and also *Khan v Secretary of State for the Home Department* [2003] EWCA Civ 530.

[54] *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *Norris v. Ireland*, 26 October 1988, Series A no. 142; and *Modinos v. Cyprus*, 22 April 1993, Series A no. 259.

the mere existence of the criminalization of consensual same-sex sexual conduct, UN human rights Treaty Bodies and independent human rights experts have repeatedly urged States to repeal laws criminalizing homosexuality.[55] Further, they have called attention to the ways in which the criminalization of consensual same-sex sexual conduct legitimizes prejudice and exposes people to hate crimes and police abuse, and have recognized that it can lead to torture and other ill-treatment.[56] Laws and regulations that directly or indirectly criminalize consensual same-sex sexual orientation or conduct provide State actors with the means to perpetrate human rights violations, and enable non-State actors to persecute individuals on account of their real or imputed sexual orientation and/or gender identity with impunity.[57] As a result of criminal sanctions, people may be threatened with arrest and detention based on their real or imputed sexual orientation and may be subjected to baseless and degrading physical examinations, purportedly to "prove" their same-sex sexual orientation.[58] This Court has also found that pernicious legal, administrative, policy and/or judicial measures that were *in themselves* discriminatory – whether or not currently enforced – or that were implemented in a discriminatory manner, violated the European Convention and caused their victims to experience fear and distress.[59] This approach recognizes the potential for persecution arising from the mere existence of these laws, even in the absence of a recent record of prosecutions and imprisonments, whether arising from misfeasance of State actors outside due process or of non-State actors' abuses, against whom the State does not offer protection. In the case of *Dudgeon v. the UK*, the European Commission in fact noted the possibility of such laws making it more likely that police and private actors would commit acts of extortion and other crimes as well as engage in discriminatory treatment,[60] instead of, or at times in addition to, prosecution.

19. Thus, the mere existence of laws criminalizing consensual same-sex sexual conduct, including in countries where they have not been recently enforced,[61] can give rise to acts of persecution,

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[55] E.g., Human Rights Committee, *Toonen v Australia* (Communication 488/1992, 4 April 1994), UN Doc. CCPR/C/50/D/488/1992); see also the 2015 Report of the Office of the United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity* (hereafter the 2015 OHCHR SOGI Report), UN Doc. A/HRC/29/23, 4 May 2015, § 15 and § 43, in particular.

[56] E.g., see *Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law*, Office of the High Commissioner for Human Rights, HR/PUB/12/06, 2012, p. 33; and the Report of the UN Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc.: A/56/156, 3 July 2001, § 20 and, generally, §§ 18-25.

[57] As the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has noted: "sanctioned punishment by States reinforces existing prejudices, and legitimizes community violence and police brutality directed at affected individuals," A/HRC/14/20, § 20. The UN Special Rapporteur on extrajudicial executions noted that criminalization increases social stigmatization and made people "more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity", A/57/138, § 37.

[58] The use of non-consensual anal examinations, often used to determine criminal liability against men suspected of homosexuality, contravenes the prohibition of torture and other ill-treatment. UN human rights bodies have long held that such acts are in violation of the prohibition of torture and other ill-treatment. See A/HRC/16/47/Add.1, opinion No. 25/2009 (Egypt), §§ 24, 28-29; Concluding Observations of the Committee against Torture on Egypt (CAT/C/CR/29/4), §§ 5(e) and 6(k). See also A/56/156, § 24; A/HRC/4/33/Add.1, p. 316, § 317; A/HRC/10/44/Add.4, pp. 86-87, § 61; and A/HRC/16/52/Add.1, p. 276, § 131.

[59] See, *Dudgeon v. the United Kingdom*, no. 7525/76, judgment, 22 October 1981, §§ 40 to 46; *Norris v. Ireland*, no. 10581/83, judgment, 26 October 1988, §§ 38 and 46 to 47; *Modinos v. Cyprus*, no. 15070/89, judgment, 22 April 1993, §§ 23, 24 and 26; and *A.D.T. v. the UK*, no. 35765/97, judgment, 31 July 2000, §§ 26 and 39. See also, *Marangos v. Cyprus*, no. 31106/96, Commission's report of 3 December 1997, unpublished.

[60] See the European Commission's report in *Dudgeon*, cited in the Court's judgment in the same case, where, in arriving at its conclusion that it saw no reasons to doubt the truthfulness of the applicant's allegations, the Commission had noted that, "the existence of the law will give rise to a degree of fear or restraint on the part of male homosexuals […] the existence of the law prohibiting consensual and private homosexual acts […] provides opportunities for blackmail […] and may put a strain upon young men […] who fear prosecution for their homosexual activities". They reached this conclusion despite their finding that the number of prosecutions in such cases […] was so small "that the law has in effect ceased to operate". It appears inevitable to the Commission that the existence of the laws in question will have similar effects. The applicant alleges in his affidavits that they have such effects on him", Commission's report, § 94.

[61] It is the European Court of Human Rights' settled case-law that the criminalization of consensual same-sex conduct per se — even in the absence of an actual record of enforcement through an active prosecution policy — violates the Convention. See, in particular, *Modinos v. Cyprus* and *Dudgeon v. the United Kingdom*. As long as statutes are not repealed, there continues to be a real risk of their enforcement and therefore a real risk that

without necessarily leading to recorded court cases and convictions; it also entails a real risk that the said laws may be enforced in the future.[62] Furthermore, as the 2015 OHCHR SOGI Report notes: "[h]uman rights mechanisms continue to emphasize links between criminalization and homophobic and transphobic hate crimes, police abuse, torture, family and community violence and stigmatization, as well as the constraints that criminalization puts on the work of human rights defenders."[63] The UNHCR's view is that laws that criminalize SOGI are incompatible with international human rights standards and are discriminatory. "Even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution. Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors.[64] They can promote political rhetoric that can expose LGB individuals to risks of persecutory harm. They can also hinder LGB persons from seeking and obtaining State protection."[65]

20. In light of the above, the intervener urges the Court to find that the existence of laws criminalizing consensual same-sex sexual conduct discloses dispositive evidence of a real risk of Article 3 prohibited treatment,[66] thus triggering the prohibition on exposing the individual concerned -- in any manner whatsoever -- to the same under that provision of the Convention.[67] In the alternative, the Court should find that there is a strong presumption that such laws engender a real risk of Article 3 prohibited treatment, and, therefore, the burden is on the State to rebut that presumption by proving conclusively the absence of such a risk.

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individuals would face criminal investigations, charges, trials, convictions and penalties such as imprisonment, because of their real or perceived sexual orientation or gender identity. See, also, the UNHCR SOGI Guidelines, §§ 27, 29.

[62] In *Dudgeon v. the United Kingdom*, the European Court of Human Rights observed that, notwithstanding the then apparent paucity or even absence of a record of prosecutions in these types of cases, it could not be said that the legislation in question was a dead letter, because there was no stated policy on the part of the authorities not to enforce the law (para. 41 of the Court's judgment). In *Modinos v. Cyprus*, the European Court of Human Rights reiterated this point by noting that, notwithstanding the fact that the Attorney-General had followed a consistent policy of not bringing criminal proceedings in respect of private homosexual conduct considering that the law in question was a dead letter, the said policy provided "no guarantee that action will not be taken by a future Attorney-General to enforce the law, particularly when regard is had to statements by Government ministers which appear to suggest that the relevant provisions of the Criminal Code are still in force", *Modinos*, judgment of the Court, § 23.

[63] The 2015 OHCHR SOGI Report, UN Doc. A/HRC/29/23, § 45, which also refers to the Special Rapporteur on freedom of religion or belief noting that these laws may give a pretext to vigilante groups and other perpetrators of hatred for intimidating people and committing acts of violence.

[64] In *Peiris v Canada*, the claimant, a homosexual man from Sri Lanka was forced out of his home after coming out to his family. He founded an association that aimed to educate others about homosexuality. The group was the target of an attack where members were beaten and threatened. After reporting the incident, the police threatened to imprison the claimant and the other members of the association under Sri Lankan anti-sodomy laws. The adjudicator found that the claimant's family rejection and police harassment due to his "lifestyle choice" did not amount to persecution. However, the Federal Court of Canada found that there was a direct link between the police persecution and the claimant's sexual orientation. Even though the State law banning sodomy was rarely enforced, evidence showed that authorities often used it to blackmail homosexuals. *Peiris v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1251, 134 ACWS (3d) 137.

[65] The UNHCR SOGI Guidelines, § 27; "Even where consensual same-sex relations are not criminalized by specific provisions, laws of general application, for example, public morality or public order laws (loitering, for example) may be selectively applied and enforced against LGBTI individuals in a discriminatory manner, making life intolerable for the claimant, and thus amounting to persecution", the UNHCR SOGI Guidelines, § 29 (footnotes omitted); see *RRT Case No. 1102877*, [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, §§ 89, 96; and *RRT Case No. 071862642*, [2008] RRTA 40, Australia: Refugee Review Tribunal, 19 February 2008.

[66] Cf., *Ülke v. Turkey*, no. 39437/98, judgment, 24 January 2006. *Mutatis mutandis*, disclosing evidence satisfying the objective limb of the "well-founded fear" test in Article 1A(2) of the Refugee Convention.

[67] See also, the International Commission of Jurists' *Written Submissions in the case of A.N. v. France* (Application no. 12956/15) before the European Court of Human Rights, 8 July 2015, section C, §§ 13-18. NB: the judgment of the European Court of Human Rights in the case is pending.