

A Little Bit Safe?

Asylum on the Basis of Sexual Orientation Persecution in Europe

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by Helmut GRAUPNER, JD
(www.graupner.at)

The Convention Relating to the Status of Refugees (the “Geneva Convention”) of 1951, as amended 1967, defines the term “refugee” as being anyone who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country”.

While persecution on the basis of one’s sexual orientation is not listed in that definition the United Nations High Commissioner for Refugees (UNHCR) since 1993 repeatedly has been recognizing that lesbians, gays and bisexuals are to be seen as “members of a particular social group” and therefore should enjoy the protection against persecution under the Geneva Convention. This opinion however is the opinion of the UNHCR. It is important and weighty. But it is not binding upon the contracting states.

Binding for sure is the most important instrument for the protection of human rights in Europe: the European Convention of Human Rights. This legal body in its turn however does not encompass the right to asylum. But that does not mean that it falls short of any protection for refugees.

Art. 1 of the Convention obliges the Contracting States to secure to everyone within their jurisdiction the rights and freedoms defined within the Convention. The Strasbourg organs, i.e. the European Court of Human Rights, have consistently construed this obligation not only to encompass the duty for the States to refrain themselves from human rights violations but they subjected them also to responsibility for violations committed and suffered outside their jurisdictions if they contributed to such violations, for instance by deportation of someone to a country in the knowledge (or in negligent ignorance) of the fact that the deportee will become a victim of a violation of his human rights there.

Of particular importance in this respect is Art. 3 of the Convention which outlaws torture and any inhuman or degrading treatment or punishment. So the Contracting States are banned from deporting anyone to a place where he is at a real risk of being subjected to torture, to inhuman or degrading treatment or punishment, including the death penalty. This right is absolute. The Convention does not allow for any exception to this right which the Court sees as one of the most fundamental rights enshrined in the Convention. And since the Court uses to construe the Convention rights not only as negative rights granting protection against state acts but as comprehensive rights also encompassing positive obligations for the states to active protection, a deportation is also excluded to places where torture and inhuman or degrading treatment does not emanate from state agencies but from other sectors of society.

Of course also lesbians, gays and bisexuals having fled their countries enjoy that protection. So they can not be deported to places where they would run the risk to be executed, tortured or subjected to any other degrading or inhuman treatment. And they can not be deported to a place where no effective protection is granted against non-state persecution. This general protection however is limited to very grave forms of persecution. It does not for instance apply to simple imprisonment.

But the European Court of Human Rights repeatedly held that a total criminal ban of consensual same-sex acts violates the right to respect for private life enshrined in Art. 8 of the Convention, also – as the Court expressed last year – when more than two persons are involved (in their privacy). The (now defunct) European Commission of Human Rights in 1997 moreover held that special higher age limits for same-sex conduct do violate the right to non-discrimination (Art. 14 in connection with Art. 8), and the Court is expected to follow that suite soon. From what was said about Art. 1 of the Convention before it follows that also a deportation of lesbians, gays and bisexuals to countries are excluded where they are running the risk of being incarcerated and criminally persecuted for their sexual orientation or for their same-sex relations or under a discriminatory criminal law.

The exact content of this protection of sexual-orientation-refugees remains unclear. There have been no cases decided by the Court yet involving deportation with the risk of sexual-orientation-persecution or discrimination so far. And it is still to be demonstrated whether the Court will grant protection in all of those cases or if it will make exceptions, where for

instance a law in a specific country is rarely enforced, where only a fine or a suspended sentence is at risk or where the infraction in question is a petty or administrative offence only. The cases under Art. 3 of the Convention, where the Court held that a deportation is admissible to a country having established the death-sentence or life-imprisonment if that state assures that it will not afflict those penalties, seem to point in that direction. The question however still is to be solved.

A major deficiency in the protection which the European Convention on Human Rights grants to refugees however lies in the fact that even if the Court after years of proceedings does find a violation the complainant has been deported - maybe even executed, murdered, raped, tortured, humiliated or “simply” jailed - already a long time ago.

A complaint to the European Court of Human Rights has no suspensive effect on the national measure complained about. And the States are not even obliged to conform with the interim measures which the Court indicates to them on the basis of Art. 39 of its Rules of Court. Non-compliance with such an interim measure does not – as the Court expressed in a recent case - constitute a violation of the states’ duties under the Convention in itself, it just aggravates a violation, if the Court finally finds one in its judgment on the merits of the original complaint.

Let’s now turn to the European Union. Also Union law does not provide explicit protection of sexual-orientation-refugees. Not yet, as it seems.

In the 1997 Treaty of Amsterdam the European Union embarked upon a plan to establish common rules covering asylum and immigration (Art. 61-69 ECT), as part of the “establishment of the European area of freedom, security and justice” (AFSJ). The European Commission is in the process of issuing a series of draft Directives covering the whole range of asylum and immigration subject matters.

Inter alia also a draft Directive “on the approximation of rules on recognition and content of refugee status” is being elaborated by the Commission, and is due to be published later this year. As a representative of the Commission assured a delegation of the International Lesbian and Gay Association ILGA(-Europe) the Commission’s draft definition does include “sexual orientation” and also “gender identity”. If this really will be the case it nevertheless will take some time until that directive will be passed by the Council of Ministers. And it is not at all

for sure that the explicit inclusion of “sexual orientation” will stand, as the decision requires unanimity.

On the national level among European states only Ireland explicitly grants asylum on the basis of sexual-orientation-persecution. Section 2 of the Refugee Act 1996 defines “membership of a particular social group” as including a group based on sexual orientation. The other European countries do not know such an explicit inclusion.

Nevertheless all of the EU-states in principle recognize that lesbians, gays and bisexuals can qualify for asylum as “members of a particular social group”, be it by such a reference in the explanatory notes to the asylum law itself as in Austria, be it by the case-law applying the general asylum law provisions. In many of those countries however this general dedication to the protection against sexual-orientation-persecution is not mirrored by recognition of asylum status in concrete cases. In most of the EU-states such cases are absent, or they involve cases where also other grounds for asylum were involved, or where not asylum but “only” a residence permit on the basis of humanitarian grounds is granted.

Moreover nowadays it is also common to designate certain countries as being ones where there is in general no serious risk of persecution, so that claims for asylum from those countries will be presumed to be “without foundation” which presumption the asylum-seeker has to rebut beyond reasonable doubt. The so-called “white list” of such countries often includes several in which homosexuality, i.e. male homosexuality, is prohibited. Also this substantially worsens the prospects of sexual-orientation-refugees.

Germany enshrined the right to asylum into its constitution. This however does not mean a higher level of protection on our field. On the contrary German case-law very well mirrors the practice in other EU-states.

The Federal Administrative Court repeatedly since 1988 recognized gay refugees from Iran. It held that lesbians and gay men “with irreversible and fateful homosexual inclination” have a right to asylum if upon return to their home-country they would run the risk of “heavy corporal punishment and of the death penalty”. The Court at the same time decided that criminal persecution as such for homosexual conduct were not enough reason for granting asylum if the respective criminal law provisions are intended to sanction a violation of public decency

and morality. On this basis asylum has been refused for sexual-orientation-refugees from Romania, Armenia and Tajikistan for instance.

However German law interdicts the deportation to places where the deportee runs the risk of inhuman or degrading treatment. On the basis of this provision (§ 53 par. 4 AuslG), and sometimes also referring to the case-law of the European Court of Human Rights establishing that total criminal bans of homosexual acts are in violation of the Convention, German courts have granted persons not accepted for asylum on the basis of sexual-orientation-persecution at least a stop of deportation.

On that basis for instance in 1998 a woman from Romania could remain in Germany, even despite the fact that then there was no total ban anymore. But the Court accepted that criminal law provisions against “homosexual acts causing public scandal”, public scandal not being clearly defined in the law, lead to a concrete danger of arbitrary enforcement. Another court granted a stop of deportation for homosexual Armenians on the basis that they are strongly rejected by their families and, given the deteriorated economic situation in the country, without their support they would run the risk of not being able to fulfil their basic life-needs.

The case-law in this area however is inconsistent. While some courts even have granted homosexual asylum-seekers a stop of deportation to Cuba (1994) and the Ukraine (1997), countries where there are no special criminal laws against homosexuality, in 1999 the Administrative Court of Bremen refused such a stop to a homosexual from Ethiopia on the basis that the criminal ban on homosexual conduct there due to the prevailing moral views were founded upon a pressing public need and that the penalties foreseen “obviously” were not “unbearably severe”.

To sum it up protection seems to be effectively and reliably to be provided only in (“obviously”) very grave cases where the risk of execution, murder, severe corporal punishment or other grave violence is involved. The “mere” fact that a whole social group is persecuted on the basis of a criminalization of their most intimate affection does not suffice.

But even the protection in the most grave cases is not a matter of course as the recent case of a young Iranian gay man shows who has been refused asylum because the court was convinced that in Iran, despite homosexual conduct being a capital offence, there were “no true politics

of persecution of gay men". The Administrative Court of Chemnitz established that in spite of the fact that the applicant claimed to have escaped a police action which led to the arrest, prosecution and to the execution of his lover. The man even produced a copy of his arrest warrant stating the "unislamic offence of homosexual intercourse". The authorities nevertheless did not believe him.

I.e. Sweden, where the right, if not to asylum as such, but to a residence permit on humanitarian grounds, expressly has been included into the Aliens Act in 1997, has become known for the decisions of its Aliens Appeals Board ordering the expulsion of homosexual Iranians to Iran. Since gay men and lesbians were explicitly included into the Swedish refugee legislation, no case has come to the attention of RFSL, the Swedish Federation for Lesbian and Gay Rights, where a residence permit in fact has been granted solely on the grounds of a – as the law says - "well-founded fear of persecution" resulting from the applicant's homosexuality. According to RFSL the authorities' interpretation of the term "well-founded fear of persecution" is extremely restrictive. It is applied mainly in cases where applicants can produce court documents which prove that they are under legal investigation as a result of their homosexuality. As a matter of fact refugees almost never carry their court documents with them when fleeing the country ...

Given the protection of sexual-orientation-refugees mostly granted only in very grave cases, if ever, the prospects for inner-European sexual-orientation-persecutees seems bleak.

And there are such persecutees in European states as well, even within the European Union. Austria, Greece, Ireland and Portugal still uphold discriminatory special criminal offences for homosexuals, mainly higher minimum age limits. I.e. Austria became infamous for its persecution with the respective law, Art. 209 CC, establishing a special minimum age limit of 18 years for gay men supplemental to the general age limit of 14 years for all: heterosexuals, lesbians and gays. The penalty foreseen for consensual homosexual relations with 14 to 18 year old male adolescents, completely legal acts for heterosexuals and lesbians, is a minimum of half a year and a maximum of 5 years, which can even be extended up to 7 1/2 years in the case of "recidivists".

Since the enactment of that law in the year 1971 over 1000 gay and bisexual males have been finally convicted by the Courts under this anti-homosexual statute, in most cases to jail sentences. None of them has ever been pardoned.

A most striking example of this persecution was the recent so called "love-letter-case". A 36 year old gay man was convicted in August to 15 months imprisonment, of which one month has been inflicted unsuspended, for the love relation with his 17 year old partner. The both got acquainted over the internet and fell in love with each other earlier this year. The family of the man and the sister of the adolescent approved of the relation. But as the mother of the 17 year old found affectionate love-letters of her son to the man she reported him to the police. The gay man has been taken into custody on remand and prosecuted and convicted. The prosecutor appealed and last week the Vienna Court of Appeals even raised the unsuspended part of the jail sentence from one to five months saying that "grave guilt" was to blame on him. So the gay man now will have to go back to jail for four months more. He will complain to the European Court of Human Rights and Amnesty International is going to accept him as prisoner of conscience but that will not preserve him from serving the jail sentence.

If victims like him flee to another EU-country it will be hard for them to be granted asylum. In a protocol attached to the Amsterdam treaty the EU-member-states agreed to grant asylum to citizens of another member state only in exceptional circumstances. In considering such an application for asylum they have to presume it to be unfounded so that the burden of proof lies fully with the refugee. Moreover if the state grants asylum it is obliged to give notice to the Council of Ministers of the European Union.

So the threshold is high. However Sweden recently declared it would grant asylum to persons convicted under Art. 209 of the Austrian Criminal Code. Given the restrictive Swedish asylum practice discussed before this announcement astonishes. On the other hand refugees from Austria might be more likely to produce their court documents than refugees from outside Europe.

Union citizenship makes asylum not futile. If an EU-citizen persecuted on the basis of his sexual orientation in his home-country flees to another EU-member-state he could stay there if he finds a job, employs himself or has enough means for his living. He will also not be extradited because his crime will not be a crime in the country where he sought protection

(that might change with the European arrest warrant proposed by the European Commission recently, which wants to abolish the principle of double criminality). But if the refugee does not speak the language, does therefore not find a job and is not wealthy enough to live from his fortune, he could nevertheless be expelled, unless he is being granted asylum. If he does not succeed in that, the only way left will be to engage in a relationship with a national of that state. That will however also help only in those countries which accept a same-sex relationship as basis for immigration.

As a résumé it could be established that most of the European states are not discriminating anymore on the basis of sexual orientation, at least not in their criminal law. Instead some of them show a high level of equality, including discrimination protection and partnership recognition up to even civil marriage for same-sex couples. But the protection which is granted to persecuted lesbians, gays and bisexuals from other places seems to be limited, if not to say underdeveloped. And some European states, also within the European Union, even still do persecute on the basis of sexual orientation.