Chapter 3
Sexual Orientation, Female Genital Mutilation, and Health in Asylum Cases: International and ECHR Jurisprudence

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ABSTRACT

This chapter examines three categories of cases regarding asylum and refugee rights according to the Geneva Convention provisions (1951) and the European Convention of Human Rights (Art. 3): 1) cases where a fear of persecution to the country of origin is based on the applicant’s sexual orientation (homosexuality), 2) cases where the fear of persecution is connected with practices of female genital mutilation, and 3) cases regarding serious health problems of the asylum seeker. The jurisprudence of national supreme courts and EctHR on these subjects, especially regarding the interpretation of Art. 3 ECHR, which forbids torture, inhuman and degrading treatment, is analyzed. Although an international consensus exists today regarding the protection of asylum seekers on the basis of sexual diversity (homosexuality), in cases of female genital mutilation and health problems the national supreme courts and the ECtHR are far more hesitant in acknowledging asylum rights and refugee status.

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1. INTRODUCTION

The short comment that follows examines three categories of cases regarding asylum and refugee rights according to the Geneva Convention provisions (1951) as well as to the European Convention of Human Rights (Art. 3): a. cases where a fear of persecution to the country of origin is based on the applicant’s sexual orientation (homosexuality), b. cases where the fear of persecution is connected with practices of female genital mutilation and c. cases regarding serious health problems of the asylum seeker. These cases are considered to be hard – in Ronald Dworkin terms – mainly because even if an international consensus exists regarding the legal subjects that arise, they are extremely difficult to decide from a methodological point of view. Indeed, the proof needed for deciding in all the above cases, which consists of a. certification of an asylum seeker sexual diversity (homosexuality), b. recognition of a well founded fear of persecution regarding the issue of female genital mutilation and c. verification of the serious character of an asylum seeker’s health problem, is often extremely difficult even in the level of probability. Equally difficult is the actual protection of asylum seekers in these cases where the enjoyment of refugee protection may unfortunately in some cases depend on relevant public policies.

2. THE LEGAL FRAMEWORK REGARDING ASYLUM CASES OF SEXUAL ORIENTATION

Cases invoking the fear of persecution in the country of origin due to the sexual orientation (homosexuality) of an asylum seeker are based today on an international consensus. Namely, the acknowledgment of refugee status in these cases is provided to all those who face the risk of not being able to enjoy freely and openly their right to sexual orientation if they are forced to return in their country of origin. These cases fall into the category of a ‘particular social group’ according to the Geneva Convention and into the protective scope of Art. 3 ECHR regarding torture, inhuman or degrading treatment in their country of origin because of their sexual orientation. Nowadays, approximately seventy national jurisdictions criminalize homosexual behavior (one of third of the world states internationally) while forty of them specifically criminalize male homosexual behavior (Council of Europe, 2011). If someone examines the issue from a purely quantitative point of view, s/he conclude it concerns a large number of cases.
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