

M.I.

-v-

SWITZERLAND

**WRITTEN COMMENTS OF INTERVENOR
STONEWALL AND AFRICAN RAINBOW FAMILY**

I. Scope of Intervention:

1. This submission of written comments addresses the issue to be considered in the case of MI v Switzerland before the European Court of Human Rights (the “Court”) as to whether the gay applicant from Iran can be expelled to live his life discreetly, without there being a violation of Articles 2 and 3 of the Convention, on the basis that the authorities and his family would not be aware of his sexual-orientation/identity (*Statement of Fact (“SoF”): Issues One and Two*).¹ The Intervention additionally addresses whether application of including assessment of conduct on return in protection claims gives rise to indirect discrimination of gay applicants, thereby constituting a violation of Article 8 read in-conjunction with Article 14 of the Convention. (*SoF: Issue Three*). The Intervenors have not applied to address whether there is a free-standing claim of violation of article 13 of the Convention (*SoF: Issue Four*).

II. Summary of Submissions:

2. It is unarguable there is a real risk of violation of Articles 2 and 3 ECHR for gay applicants in Iran.²
3. The Chamber’s judgment in *M.E. v. Sweden*³ was the Court’s first judgment on the merits in a case involving a gay asylum-seeker in Europe. In addressing **Question One**, the Intervenors suggest the exact September 2020 approach of the Court in *B and C* and drawn upon the UK Home Office’s Country Policy and Information Note: Iran on Sexual Orientation, gender identity or expression⁴ (‘UK CPIN 2022’) to provide probative and unarguable evidence of Article 2 and 3 Convention violation. The intervenors have drawn upon other sources of country background material to additionally support the heightened risk to gay applicants.
4. Risk generated by prosecutions leading to executions unarguably cross the threshold for “*substantial grounds for believing that there is a real risk*” of Article 3 prohibited treatment on return to those perceived to be gay and lesbian. [see **Section IV, paragraphs 12 to 23 below**].
5. The Intervenors in addressing **Question Two** submit that in order for a State to fully consider the potential risk for an applicant along with any available protection, it must firstly engage with evidence that the perpetrator of the most serious harm is the State, and on this basis, there is no effective State protection.

¹ MI v Switzerland, Application No. 56390/21, Questions to the Parties, 23 May 2022.

² References to ‘gay applicants’, include gay, lesbian, and bisexual individuals, noting as the September 2022 country background material also records real risk of execution to two lesbians. ‘Homosexual’ is used only where the original source uses this term. The definition of sexual orientation is drawn from the 2007 *Yogyakarta Principles*.

³ *Application No 71398/12*, Judgment 26th June 2014.

⁴ Country Policy and Information Note, Iran: Sexual orientation and gender identity and expression, United Kingdom, Home Office, Version 4.0, June 2022, para. 2.4.1 [hereinafter *UK CPIN 2022*]. See also paras. 2.4.1 – 2.4.15.

6. In the alternative, and without prejudice to the above, the Intervenors rely on the imputed risk to those who are expelled from Council of Europe ('CoE') Member States who do not conform to gender-sex roles expected from the potential persecutor, i.e. they fail to prove that they are 'straight enough' to the potential persecutor, and this leads to the same real risk highlighted in paragraphs 3 and 4 above [see **Section V, paragraphs 24 to 39 below**].
7. In addressing **Question Three** the Intervenors raise that the profile of an applicant when compared to the social, cultural, and religious norms of the country of origin are logically elevated when protection is determined at a later date. The country background evidence accepted on generic risk to those identifiable to the potential persecutor (through living openly as a minority in countries of real risk), or identifiable (due to lack of straight conformity), must also consider the applicant being older at the time of determining the claim, making the individual more readily identifiable [see **Section VI, paragraphs 40 to 47 below**].
8. The approach to address conduct on return, evidenced by some CoE states as the 'discretion test' has been held by the Court to be an unlawful approach. The Intervenors show that the conduct on return approach, whilst applied in some states as a neutral measure provision to all five Convention reason cases, still gives rise to indirect discrimination to gay applicants, contrary to Articles 8 and 14 ECHR. This is evidenced by a pattern of Switzerland only adopting the 'conduct approach' on gay applicants, and protection claims based on religious beliefs.

III. Procedural History:

9. These written comments are submitted on behalf of Stonewall and African Rainbow Family. They were prepared at the instruction of Stonewall and African Rainbow Family who have instructed Ms Jacqueline McKenzie, a Solicitor at Leigh Day Solicitors in London, who in turn instructed Dr S Chelvan, leading Ms Haydee Dijkstal, Barristers at 33 Bedford Row Chambers in London, the United Kingdom, to settle the written submissions.
10. Leave was granted by the Court on 9th September 2022 to make this submission, with a deadline of 21st October 2022,⁵ after an application pursuant to Rule 44 of the Rules of the Court to intervene in the matter of *MI v Switzerland* was submitted on 19th July 2022.⁶
11. The intervenors, as referred to in the 19th of July 2022 application, have drawn specifically on research they have undertaken, and published.⁷

IV. Questions One: The Real Risk of Harm in Iran in Contravention with Articles 2 and 3 of the Convention?

12. It is recalled that Stonewall and African Rainbow Family sought, and were granted leave, to address both questions one and two of the 'Questions to the Parties' as outlined by the Court on 23rd May 2022.⁸

- **Replicating the Court's approach in *B and C v Switzerland*:**

⁵ *MI v Switzerland*, Application no. 56390/21, Letter from the Section Registrar, Ref number ECHR-LE14.8bP3, 9 September 2022.

⁶ *Op cit.* fn. 3.

⁷ African Rainbow Family, see fn 34; and Stonewall, see fn 34 and 61.

⁸ *Op cit.* fn. 1.

13. The Court's historic guidance on expulsion of gay applicants for asylum from Iran are the declared inadmissible admissibility decisions in *F. v. United Kingdom*⁹ (June 2004) and *I.I.N. v. Netherlands*¹⁰ (December 2004). Both decisions related to gay men from Iran, and the Court declared their applications inadmissible. In *F v. United Kingdom*, the Court reviewed the February 2002 decision of the Adjudicator who found that privately conducted homosexual conduct was extremely unlikely to lead to ill-treatment or harassment. The Court's reasoning in *I.I.N.* followed a similar pathway to its reasoning in *F.*¹¹
14. In July 2005, the UK's Immigration Appeal Tribunal in *RM and BB (Homosexuals) Iran CG* [2005] UKIAT 00117, in assessing evidence, as of February 2005, reversed the UK's position in *F* only a year before, and accepted a real risk of state-sanctioned persecution based on the real risk of arrest, detention, with subsequent torture to gay men.¹² This continues to be the accepted real risk position of the Courts and Tribunals, including the landmark UK Supreme Court judgment in July 2010 in *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; [2011] 1 AC 596 ('HJ (Iran)'). On the date of drafting these submissions, the 2005 Country Guidance case of *RM and BB* continues to be listed as relevant Country Guidance,¹³ and must be the starting point for country real risk assessment adopted by all fact-finding decision-makers, Courts and Tribunals, only to be departed from by current very strong grounds and cogent evidence (country background material) to establish a departure.¹⁴ For the past seventeen-years, the United Kingdom has granted protection claims based on an accepted country background position of real risk of Article 2/3 ECHR violation.
15. The Court in *BC v Switzerland*,¹⁵ held in November 2020 that the "domestic [Swiss] courts did not sufficiently assess the risks of ill-treatment" ... "and the availability of State protection against ill-treatment emanating from non-State actors", such that deportation would "give rise to a violation of Article 3 of the Convention."¹⁶ The error was amplified by the lack of accurate application of the country background material evidencing real risk of state persecution, and on this basis, a complete lack of effective state protection.
16. As the Court in *B and C v Switzerland* applied great weight on the UK Home Office's Country Policy and Information Notes ('CPIN'). The Intervenor's rely specifically the 2022 UK Iran CPIN position statements that "a person living openly as LGBTI" is likely at risk of serious harm and persecution, and that the criminalisation of same-sex sexual conduct carries severe penalties "from flogging to the death penalty".¹⁷
17. With respect to the death penalty, paragraph 2.4.11 cites the following country background material (noting this material predates the September 2022 execution threat to two Iranian lesbians) which states that: "Of the 79 executions identified for same-sex sexual activity between 2004 and 2020, the offenders were all men." ... "Although there have been fewer executions in recent years, at least 2 men were executed for 'sodomy by force' in 2021 and 2 more were executed for the same offence in January 2022."

⁹ ECtHR 22 June 2004, *F v. United Kingdom*, no. 17341/03.

¹⁰ ECtHR 9 December 2004, *I.I.N. v. Netherlands*, no. 2035/04.

¹¹ *Ibid.*, p. 13.

¹² *RM and BB (Homosexuals) Iran CG* [2005] UKIAT 00117, [§ 123].

¹³ Country Guidance Determinations (last updated 11 August 2022, see p. 20 for Iran list, *RM and BB* added 11.07.05.

¹⁴ *SG (Iraq) v Secretary of State for the Home department* [2012] EWCA Civ 940 [§47]. This is also reflected within the Procedural Directions (Practice Direction 12.4 of the Consolidated Practice Directions), last updated 2020 ('Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal').

¹⁵ *BC v Switzerland*, Applications Nos. 889/19 and 43987/16, Judgment, 17 November 2020.

¹⁶ *Ibid.* [63].

¹⁷ *Op. cit.* fn.4, See, paras. 2.4.1 and 2.4.2.

18. Risk generated by prosecutions leading to executions unarguably cross the threshold for “*substantial grounds for believing that there is a real risk*” of Article 3 prohibited treatment on return to those perceived to be gay and lesbian (applying principles set out in *Vilvarajah*,¹⁸ noting if a group is assessed as being at risk, it follows that all its potential members, irrespective of actual extent of individual expression, or ability to be identified by the potential persecutor, falls within the required positive protection status (*Salah Sheekh*¹⁹ applied).

- **Other Country Background Material:**

19. Reports from both the United Kingdom Home Office and the United States of America Department of State document the real risk of harm to LGBTQ+ individuals, including harm contrary to Articles 2 and 3 of the Convention.²⁰ Reports from numerous United Nations mandates echo these findings.²¹ It is further documented in human rights reports from leading human rights organisations on the widespread risk of harm to the LGBTQ+ community in Iran,²² while highlighting specific cases where this risk was realised.²³ Reports from the media further support these sources.²⁴

20. These sources look to laws within Iran’s Penal Code which “*criminalises consensual and non-consensual same-sex sexual activity*”,²⁵ and for which this crime “*punishable by death, flogging, or a lesser punishment*”²⁶ - yet no law in Iran which “*prohibit[s] discrimination based on sexual orientation and gender identity*.”²⁷ Importantly, these laws are applied, and do not exist only in theory.²⁸ Statements from Iranian officials emphasise the State’s willingness and motivation to continue applying these laws in practice.²⁹

¹⁸ *Vilvarajah and Others v United Kingdom* (13163/87, 30 October 1991).

¹⁹ *Salah Sheekh v. Netherlands* (App. No. 1948/04, 11 Jan. 2007), §148.

²⁰ Country Policy and Information Note, Iran: Sexual orientation and gender identity and expression, United Kingdom, Home Office, Version 4.0, June 2022, para. 2.4.1 [hereinafter *UK CPIN 2022*]. See also paras. 2.4.1 – 2.4.15. See also, 2021 Country Reports on Human Rights Practices: Iran, US Department of State, Bureau Of Democracy, Human Rights, And Labor, p. 1-2 [hereinafter *US State Dpt Iran Human Rights Report*].

²¹ See, for example, UN Human Rights Council, Report of the United Nations High Commissioner for Human Rights, Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, A/HRC/19/41, 17 November 2011; UN Human Rights Council, Situation of human rights in the Islamic Republic of Iran: Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, Javaid Rehman, A/HRC/46/50, 11 January 2021, paras 27-29; and UN Human Rights Council, Universal Periodic Review, Summary of Stakeholders’ submissions on the Islamic Republic of Iran, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/WG.6/34/IRN/3, 16 August 2019, para. 8-9.

²² See, for example, Human Rights Watch, World Report 2021, Iran: Events of 2020; Human Rights Watch, World Report 2022, Iran: Events of 2021; Annual Report On The Death Penalty In Iran 2020, Iran Human Rights [hereinafter *Iran HR Report 2020*].

²³ See, Iran: Murder of 20-Year-Old Gay Man Highlights Urgent Need To Protect Lgbti Rights, Amnesty International, 17 May 2021; Urgent Action Update: Iranian LGBTI Defender Sentenced To Death (Iran: Ua 5.22), Amnesty International, 15 September 2022.

²⁴ See, for example, The difficulties of being gay in Iran, DW, 26 February 2021; How Iran’s anti-LGBT policies put transgender people at risk, DW, 28 April 2020; Horrific Killing Of Young Gay Man Puts Plight Of Iran’s LGBT Community In Spotlight, Radio Free Europe, 11 May 2021; Iran purportedly executes 2 gay men over sodomy charges, CBS News, 1 February 2022.

²⁵ UK CPIN 2022, supra fn 4, para. 2.4.2.

²⁶ US State Dpt Iran Human Rights Report, supra fn 21, pp. 69-70.

²⁷ US State Dpt Iran Human Rights Report, supra fn 21, pp. 69-70; UK CPIN 2022, supra fn 4, para. 2.4.3; Human Rights Watch, World Report 2021, Iran: Events of 2020; Human Rights Watch, World Report 2022, Iran: Events of 2021.

²⁸ See, reports of execution of two gay men convicted of sodomy after “*summary trials*” where “*evidentiary standards were not always met*.” Iran HR Report 2020; and US State Dpt Iran Human Rights Report, pp. 69-70.

²⁹ Iran HR Report 2020, supra fn 23, quoting Iranian Foreign Minister Mohammad Javad Zarif statement that “*Our society has moral principles. And we live according to these principles. These are moral principles concerning the behavior of people in general. And that means that the law is respected, and the law is obeyed.*”

21. In addition to direct application of these laws, reports document repression against LGBTQ+ individuals or activists whereby the “*government executed LGBTQI+ individuals under the pretext of more severe, and possibly specious, criminal charges.*”³⁰ In September 2022, news that two women were issued death sentences on the ‘specious’ charges of ‘corruption on earth’ and human trafficking but that they “*had been targeted because they were LGBT activists*”³¹ was widely condemned.³²
22. UN bodies confirm that the “*state’s continued criminalization*” ... “*legitimizes violence*” and “*stigmatization*” by the state and private persons.³³ Human Rights groups highlight that these “*laws foster a permissive climate*” whereby “*LGBTI people in Iran face pervasive discrimination, live in the constant fear of harassment, arrest and criminal prosecution, and remain vulnerable to violence and persecution based on their real or perceived sexual orientation and gender identity.*”³⁴ The climate of abuse cultivated by the criminalisation of same-sex sexual conduct “*perpetuates systemic violence and discrimination*” and leads to “*deadly consequences of state fuelled homophobia*” such as the murder of Alireza Fazeli Monfared, a non-binary gay man, who was murdered in 2021 by relatives but feared had reporting historical abuse to police.³⁵
23. Indeed, the US Government confirmed that in Iran “*Security forces harassed, arrested, and detained individuals they suspected of being LGBTQI+*”³⁶ – with the lack of protection compounding vulnerability. It demonstrates the reality that those who identify as LGBTQ+ live in constant fear that their identity, whether expressly shared or not, puts them at real risk of abuse, human rights violations or threats to their lives from both state and non-state actors.

V. Question Two: The Need to Address Imputed Risk in Gay Protection Claims:

24. Stonewall and African Rainbow Family were further granted leave to address Question Two of the ‘Questions to the Parties’ as outlined by the Court on 23rd May 2022.³⁷
25. The Court of Justice of the European Union (‘the CJEU’) gave their November 2013 judgment in response to the references from the Dutch Council of State in the joined cases C-199/12 to C-201/12, X, Y and Z v. *Minister voor Immigratie en Asiel*. The Dutch court posed several questions related to the 2004 Qualification Directive. These included questions as to whether ‘homosexual asylum seekers could be expected to conceal their sexual orientation, and if so, to what extent’?

³⁰ US State Dpt Iran Human Rights Report, supra fn 5, pp. 69-70.

³¹ [Iran sentences two women to death for ‘corruption on earth’ – IRNA, Openly, 6 September 2022](#). See also, [Iran country profile, Human Dignity Trust](#).

³² See, [Iran: UN experts demand stay of execution for two women, including LGBT activist, United Nations Press Release, 28 September 2022](#); [Iran: UN experts demand stay of execution for two women LGBT rights activists, UN News, 28 September 2022](#); [Iran: LGBTQIA+ Activist Sentenced To Death, Amnesty International, 7 September 2022](#); and [EU condemns death sentences for two women in Iran, Openly, 14 September 2022](#).

³³ UN Human Rights Council, Universal Periodic Review, Summary of Stakeholders’ submissions on the Islamic Republic of Iran, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/WG.6/34/IRN/3, 16 August 2019, para. 8-9. See also, UN Human Rights Council, Situation of human rights in the Islamic Republic of Iran: Report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, Javaid Rehman, A/HRC/46/50, 11 January 2021, para. 28.

³⁴ [Iran: Murder of gay man highlights dangers of state-sanctioned abuses against LGBTI people, Amnesty International, 21 May 2021](#). See also, ‘[NO SAFE REFUGE Experiences of LGBT asylum seekers in detention](#)’, Stonewall, pp. 11, 12; and [Submission To All Party Parliamentary Group on Global LGBT Rights \(APPG LGBT\)’s Invitation to submit written evidence on: The UK’s stance on international breaches of LGBT rights](#), African Rainbow Family, para 5.

³⁵ [Ibid.](#)

³⁶ US State Dpt Iran Human Rights Report, supra note 5, pp. 69-70.

³⁷ SoF, *Op cit.* fn. 1.

26. The CJEU followed its approach in the earlier September 2012 case of *Y and Z*³⁸ (Ahmadi religious discretion case), where it addressed under Article 9 (1) of the 2004 EU Qualification Directive³⁹ whether an Ahmadi could be expected to be discreet in order to avoid persecution. The CJEU in 2013 in *X, Y and Z* made clear “*requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible*” recognising part of one’s identity, and therefore one “*cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution.*”⁴⁰ The specific reference religious worship ‘in public’ in Article 10(1)(b) of the Directive did not mean that sexual orientation in Article 10(1)(d) “*must only apply to acts in the private life*” and “*not to acts in his public life.*”⁴¹
27. The CJEU concluded that when assessing whether a person must be granted refugee status “*[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*” and “*the competent authorities cannot reasonably expect*” the applicant “*to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation*” in order to avoid persecution – with the CJEU finding that there is no distinction between acts interfering with “*core areas of the expression of sexual orientation*” and other acts when identifying acts constituting persecution.”⁴²
28. This Court has made clear that discretion reasoning cannot apply to expulsion claims (*I.K.c. Switzerland* (dec.), No. 21417/17, §§ 24-28, 19th December 2017). Where future risk analysis is applied, a key factor must include acceptance of a passage of time between departure of the refugee applicant from the country of origin, and determination of the protection claim by the fact-finding administrative decision-maker, and any onward judicial Tribunal or Higher Court.
29. The Intervenor note the unarguable starting point where the majority of the population would be opposite-sex attracted (‘straight’), the gay applicant, would be presumptively, in the minority and on this basis, will be ‘different’. In-conjunction with the two-limb definition of Particular Social Group (‘PSG’), the first limb being the innate/immutable characteristic, the second limb engages directly with the ‘difference from surrounding society’, independent of the persecution, enabling sexual-orientation to come within the PSG definition (Article 10 (1) (d) 2004 of Qualification Directive (and 2011 Re-cast Directive) and *X, Y and Z* applied).
30. What must be considered is the ‘perception pathway’, where a gay refugee applicant is identified by the potential persecutor due to their lack of ‘proving straight’ to the potential persecutor. The UK Upper Tribunal in 2011 held in *SW (lesbians – HJ and HT applied) Jamaica CG* [2011] UKUT 251 (IAC) that *all* women aged 16 to 60 in Jamaica, were at real risk of persecution (curative rape and/or murder) if they were not receptive to a potential persecutor of being ‘perceived’ as a sodomite (lesbian) and able to ‘prove straight’ through evidence of a male partner, children, or recent evidence of widowhood.

³⁸ C-71/11 and C-99/11, *Bundesrepublik Deutschland (Federal Republic of Germany) v. Y and Z* [2013] 1 CMLR 5.

³⁹ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (*Official Journal L 304, 30/09/2004 P. 0012 – 0023*).

⁴⁰ *X, Y and Z v. Minister voor Immigratie en Asiel* [2014] 3 WLR 770, paras. 70, 71.

⁴¹ *Ibid.*, at 69.

⁴² *X, Y and Z Op cit.* fn. 44, paras. 75-78 (emphasis added).

31. To be ‘successfully straight’, requires the establishment of ill-informed sexual relationships, with no real informed consent. The England and Wales Court of Appeal in *LC (Albania)*, addressed the ‘silence fallacy’⁴³ acknowledging “[Discretion] involves the individual behaving in such a way that he will not in fact be so identified or perceived” while “‘living openly’ is not restricted” to “exhibit[ing] overt behaviour from which it is likely that he will be identified as being gay” but “behaving in such a way that there is in fact a real risk that he will be identified or perceived as having that characteristic.”⁴⁴ The Court of Appeal dismissed the point of law at paragraph 52 (vii) on the specific facts, finding the country background information from Albania, before them, did not show “to avoid being perceived as gay [required] engaging in some form of positive behaviour” was required to evade identification, and consequent real risk of serious harm.
32. Support for this ‘silence fallacy’ position is found in EU case law, including the 5th October 2017 Advocate-General Wahl’s opinion in *F v Hungary*⁴⁵ - a case concerning use of sexologist/psychiatric tests for determining sexual identity. The CJEU in the final judgment on 25th January 2018,⁴⁶ ruled such reports have limited weight, and are not determinative.⁴⁷ Notably, the Advocate-General’s opinion in *F v Hungary* identified “situations in which the simple act of behaving in a way which, from a traditional point of view, is perceived to be non-gender-conform, may create an actual risk for the person concerned of being subject to physical or psychological harm”; acts including manner of dress, speech or socialisation.⁴⁸
33. In Advocate-General Sharpston’s Opinion for the CJEU in the 2014 case of *ABC*,⁴⁹ Article 10 (2) of the 2004 MSQD set out a two-stage test – the first stage being one of inclusion within the social group (actual or imputed), but imputed where “applicants are not members of that group (here homosexuals)”⁵⁰ and the second stage, the applicant having a well-founded fear of persecution (Articles 2(c) and 9 of the 2004 MSQD). It goes on to qualify that discretion does not provide “protection against discovery and consequent blackmail or persecution”; a factor examined by this Court in November 2020 in *B and C v Switzerland* in regards to risk to gay applicants in the Gambia.⁵¹ Advocate-General Wahl’s 2017 opinion in *F v Hungary* provides the causative bridge – accepting Queer (non-straight conformative) Refugees are part of the (imputed) group, and due to their “gender non-conform[ity]”⁵², they will be at risk of persecution (accepting Queer Refugees are ‘at risk’). This provides the clearest indication of an emerging acceptance of risk through the portal of imputed social group of Queer Refugees, who, *unless* they act contrary to their actual sexual identity, will face persecution.

⁴³ See, Chelvan, S “At the End of the Rainbow – Where Next for the Queer Refugee?: Understanding Queer Refugees’ Lives: From sexual conduct to identity in sexual orientation/identity cases in England and Wales” (Chapter Three: pp. 140 to 144) (PhD thesis, King’s College London, awarded 1 June 2019), paras. 35-37, and 39-44.

⁴⁴ *LC (Albania)v. Secretary of State for the Home Department* [2017] EWCA Civ. 351; [2018] 1 WLR) 4173, 4183H-4183C [29] (Hickinbottom LJ), paras. 25, 29.

⁴⁵ (C-473/16) *F v Bevándorlási és Menekültügyi Hivatal (formerly Bevándorlási és Állampolgársági Hivatal)* (Advocate General Wahl’s Opinion, 5 October 2017): ECLI: EU: C: 2017: 739 (unreported elsewhere).

⁴⁶ Case C-473/16, *F v Bevándorlási és Állampolgársági Hivatal*, 25 January 2018. For analysis of the Court’s judgment, noting this does not address the Article 10 (2) approach in the Wahl Opinion, see Federico Ferri, ‘Assessing Credibility of Asylum Seekers’ Statements on Sexual Orientation: Lights and Shadows of the F Judgment’ *European Papers*, 2018.

⁴⁷ Cf *VO (Nigeria) v Secretary of State for the Home Department* [2012] EWCA Civ. 270 (Rix LJ) (C5/2011/2524) (permission hearing on 9 February 2012 refused) (unreported).

⁴⁸ (C-473/16) *F v Bevándorlási és Menekültügyi Hivatal (formerly Bevándorlási és Állampolgársági Hivatal)* (Advocate General Wahl’s Opinion, 5 October 2017): ECLI: EU: C: 2017: 739, paras. 29, 30, and fns 15 and 16 (emphasis added).

⁴⁹ *A, B and C v Staatssecretaris van Veiligheid en Justitie: C-148/13, C-149/13 and C-150/13* [2015] 1 WLR 2141, 2152G-2153A.

⁵⁰ (emphasis added in text).

⁵¹ *B and C v Switzerland*, paragraph 36 of judgment, citing with approval paragraph 26 of the 23 August 2012 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” (HCR/GIP/12/09).

⁵² *F v Hungary Advocate General’s Opinion (Op cit. fn. 49)* [30].

34. The Court should additionally look to the CJEU which has already provided the basis for finding gay identity is linked with 'dignity'⁵³ with the Advocate General Mengozzi's Opinion in the French blood ban case of *Léger*⁵⁴ which highlighted how reinforcing stereotypes through the blood ban, attacked dignity. Gay asylum-seekers are thereby identified by this 'non-conformative' profile, rendering discretion (which propagates 'silence on being Queer' and the 'silence fallacy') ineffective at offering protection, without engaging in acts of 'proving straight' - thus rendering a gay refugee at continued risk for persecutory harm due to their non-conformity.
35. The Court must consider the reality that a gay man returned to a state like Iran must effectively prove straight as part of living discreetly. There are benchmarks as to what a potential persecutor would find an acceptable 'proof' of straight conformative conduct namely (opposite-sex) marriage. This potentially subjects gay individuals to forced marriage in order to live discreetly and avoid risk of harm. Forced marriage is an established form of persecution (see 2015 UK Upper Tribunal (*LH and IP*)⁵⁵ and 2004 Australian Federal Magistrates Court decision *SNAZ*).⁵⁶
36. Indeed, the Court in *B and C v Switzerland* cited the UK Home Office's report on Iran (CPIN 2022) as to forced marriage of gay applicants which reports that "*LGBTI persons face threats, blackmail and extortion, harassment, forced marriage (or threats of such), pressure to undergo GRS, violence and 'honour' killings by non-state actors, including family members, on account of their sexual orientation or gender identity.*"⁵⁷ Cited in the UK's CPIN 2022 relied upon by this Court, was also the 2020 Australian DFAT report which raised the prevalence of forced marriage in order not to be identified; stating "*gay men and lesbians face considerable societal pressure to enter into a heterosexual marriage and produce children.*"⁵⁸
37. The country background evidence on Iran records the considerable risk of harm to LGBTQ+ individuals by family members, including the risk forced marriage; finding that "*143 (over 62%) of the 230 survey participants had experienced some form of violence against them by their immediate family members. A quarter of the participants reported the threat of forced marriage.*"⁵⁹ Underlying this risk of forced marriage is the reported fact that "[s]exual minorities in Iran face constant threats, insults, harassments, blackmail and abuse in their daily life by non-state actors who feel emboldened to enact violence with impunity, due to discriminatory laws that criminalize same-sex conduct and transgender expression."⁶⁰
38. Work by Stonewall with asylum seekers in Afghanistan demonstrates an analogous social, cultural and religious risk to individuals required make their identity invisible and adopt actions to prove straight, these include testimonials from: 1) 'J', a cis-gay man who tried to 'hide' his identity but "*his refusal to marry exposed him to suspicions of being gay*", led his family to lock him in the basement; 2) another 'M' who "*was beaten*

⁵³ For detailed commentary, see Colm O'Coinneide, 'the Constitutionalization of Equality within the EU Legal Order: Sexual Orientation as a Testing Ground' 22 (3) *Maastricht Journal of European and Comparative Law*, 370-395.

⁵⁴ Case C-528/13 *Léger v. Ministre des Affaires sociales, de la Santé et des Droites des femmes, Établissement français du sang*, EU : C : 2015 : 288. Advocate General's Opinion 17 July 2014. CJEU's judgment on 29 April 2015; [2015] 3 C.M.L.R 36.

⁵⁵ *LH and IP (gay men: risk) Sri Lanka CG* [2015] UKUT 00073 (IAC) [119].

⁵⁶ *Australian Federal Magistrates Court of Australia, SZANS v Minister for Immigration* [2004] FMCA 455 in (Driver FM) (14 July 2004) [19, 20, 35, 36].

⁵⁷ *B and C v Switzerland*, paras. 2.4.18, 2.4.19.

⁵⁸ Source cited by UK CPIN 2022 "DFAT, 'Country Information Report Iran' (paragraph 3.152), 14 April 2020." See, UK CPIN 2022, para. 6.2.2.

⁵⁹ Source cited by the UK CPIN 2022 "6Rang, 'Hidden wounds; A research report on violence against...' (page 16), September 2020." See UK CPIN 2022, para. 6.3.1.

⁶⁰ *Ibid.*, at para. 6.2.3.

and threatened by his immediate family he was forced to marry” and lives in constant fear his wife’s family will find out he’s gay; and 3) examples of a lesbian, ‘A’, forced to marry to prove “she was not queer”, and trans woman, ‘B’ forced to dress “according to social norms for men”, to ‘hide’ their identity, due to “the constant threat of violence”.⁶¹ This supports the Intervenors submission that the ‘silence fallacy’ of the discretion test applies to the position of gay applicants from Iran, for which the societal norms (including the degrading to dignity cultural and religious norms) would lead to violations of Article 3 of the Convention.

39. On this basis, a Council of Europe State authority, when assessing an applicant’s complaint, has an additional duty to assess risk based on actual identity and imputed risk on return. This requires assessment of whether the applicant does not conform, at the date of assessment, to the straight stereotype held by the potential persecutor. Non-conformity with this straight profile, gives rise to risk on return contrary to Article 3.

VI. Question Three: Procedural Approach Giving Rise to Indirect Discrimination amounting to violations of Articles 8 and 14 ECHR:

40. Stonewall and African Rainbow Family were further granted leave to address Question Three of the ‘Questions to the Parties’ as outlined by the Court on 23rd May 2022.⁶²
41. Applying the Court’s established jurisprudence, continued existence of laws criminalizing same-sex sexual conduct violates the rights of individuals to privacy and against discrimination under Articles 8 and 14 of the Convention. Nevertheless, the Court has made clear the mere existence of such laws without application does not prohibit expulsion (*F v UK*); this approach was adopted in the 2013 CJEU judgment in *X, Y and Z*.
42. Within Article 1(A) (2) of the 1951 Refugee Convention,⁶³ there exists five Refugee Convention reasons; race, religion, nationality, particular social group (‘PSG’), and political opinion. Sexual-orientation/identity refugee protection claims come within the PSG Convention reason due to their (a) innate or immutable characteristic; and (b) identified ‘difference by surrounding society’ independent from the persecution (Article 10 (1) (d) of the 2004 QD,⁶⁴ 2011 Re-cast Directive⁶⁵). The Convention, under Article 3 ECHR provides a far greater dictionary of protection claims beyond the five Refugee Convention reasons.
43. Where discretion reasoning was applied, noting forced modification is unlawful, the ‘voluntary discretion test’ was applied on the basis it applied to *all* Convention protection claims. On this basis, the discretion, or for the purposes of these proceedings, the ‘conduct on return’ is a neutral measure, as on the face of the measure *all* protection claims have the neutral measure applied.
44. What is clear is the disproportionate application of the ‘conduct on return’ to protection claims based on sexual-orientation/identity and/or religious belief. Where there exists, in theory, a broad spectrum of all protection claims, the procedural mechanism in determining refugee status determination, notwithstanding

⁶¹ ‘No place to hide: survival strategies of LGBTQ+ people in Afghanistan’, Stonewall (published 21 October 2022).

⁶² SoF, *Op cit.* fn. 1.

⁶³ The Convention Relating to the Status of Refugees, opened for signature, 28th July 1951, 189 U.N.T.S. 150, entered into force, 22nd April 1954, as amended by the Protocol Relating to the Status of Refugees 1967, 606 U.N.T.S. 267, *entered into force*, 4th October 1967. UK’s ratification of the 1951 Convention on 11 March 1954 and accession to the 1967 Protocol on 4 September 1968.

⁶⁴ *Op cit.* fn 42.

⁶⁵ Council Directive 2011/95/EC of 13 December 2011 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (re cast) (*Official Journal L 337, 22/12/2011, P. 0009 – 0036*).

this Court's approach in *Salah Sheekh* as outlined in Section IV above, has been of State parties absolving themselves from positive grants of status, and enabling expulsion on this 'conduct on return' approach.⁶⁶

45. As established, the continued existence of laws in Iran which criminalise homosexuality and the private expression of one's identity, mean the discretion test would force an individual to forgo their identity in Iran, contrary to Article 8 (noting it is common ground Article 8 includes sexual orientation/identity)⁶⁷ and the findings of *IK v Switzerland*. As recognised in October 2022 by the UN Special Rapporteur on Torture, "discriminatory forms of torture and ill-treatment in the context of domestic violence", "often rooted in discriminatory laws" exist against the LGBTQ+ community.⁶⁸
46. Expanding this to the application of 'conduct on return' to protection claims gives rise to indirect discrimination. This reasoning is supported by the landmark September 2018 judgment of the Supreme Court of India in *Navtej Singh Johar v Union of India Ministry of Law* the Court held the 'neutral measure' of section 377 of the Indian Penal Code (the anti-sodomy law) was discriminatory "not by the objects of" its enactment, "but by the effect [it] has on affected individuals and on their fundamental rights."⁶⁹ The Supreme Court held a discriminatory policy can be "facially neutral in its application to certain acts, [but] target[] specific communities in terms of its impact."⁷⁰ It negates any justification that 'conduct on return' is facially neutral as applied given that other communities' required to hide their political or other identity upon refoulement in order to stay safe, as the test can still be found to be discriminatory by way of its impact on the LGBTQ+ community. There is no objective justification,⁷¹ and "may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group", specifically where "the general policy or measure has disproportionately prejudicial effects."⁷² This discriminatory approach needs no intent⁷³ where the applicant can show discrimination of gay and religious applicants, when compared to other Refugee Convention applicants.⁷⁴
47. As to Switzerland, notable is the limited approach to adopting the 'conduct approach' on gay applicants, and protection claims based on religious beliefs.⁷⁵ Noting the Intervenor submissions, the Court's approach to remedial measures to address procedural errors is fully engaged (*F.G v. Sweden*).⁷⁶ The Intervenor submit that it is notable that this will be the first case the Court can address procedural Article 8 and 14 ECHR violations, through the prism of engaging differential and discriminatory measures in protection claims.

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⁶⁶ *Op cit.* note 6, see paragraph 20 above. See also, Study on SOGI in asylum policies, SOGICA.

⁶⁷ *Dudgeon v United Kingdom* (1982) 4 EHRR 149 and *Norris v Republic of Ireland*, *The Times*, 31 October 1988, (1991) 13 EHRR 186; and *Modinos v Cyprus* (1993) 16 EHRR 485.

⁶⁸ Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Alice Jill Edwards, A/77/2972, 4 October 2022, paras. 4, 22.

⁶⁹ Supreme Court of India, *Navtej Singh Johar v Union of India Ministry of Law*, No. 76 of 2016, 6 September 2018, p. 139.

⁷⁰ *Ibid*, *Johar*, pp. 139-140.

⁷¹ See, *Bio v Denmark*, *Grand Chamber*, no. 38590/10, para. 103.

⁷² *Hugh Jordan v. the United Kingdom*, no. 24746/94, para. 154.

⁷³ *DH and Others v. the Czech Republic*, *Grand Chamber*, no. 57325/00, judgment 7 February 2006,

⁷⁴ See also, *Vrontou v. Cyprus*, no 33631/06 (difference in treatment based on sex), and *O'Donoghue and others v. the United Kingdom*, no 34848.07, 14 December 2010.

⁷⁵ Switzerland, FAC judgment D-4952/2014, 23 August 2017; Switzerland, FAC judgment D6539/2018, 2 April 2019.

⁷⁶ *F.G v Sweden*, Application no. 43611/11, Judgment, *Grand Chamber*, 23 March 2016, paras. 58, 156.