

CASE LAW COVER PAGE TEMPLATE

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| Name of the court ¹ (English name in brackets if the court's language is not English): Raad van State (Council of State) | |
| Date of the decision: | 08-07-2015 |
| Case number: ² | ECLI:NL:RVS:2015:2170 |
| Parties to the case: A, B, C v State Secretary of Security and Justice | |
| Decision available on the internet? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No | |
| If yes, please provide the link: https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=84414 (If no, please attach the decision as a Word or PDF file): | |
| Language(s) in which the decision is written: Dutch | |
| Official court translation available in any other languages? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No (If so, which): | |
| Countr(y)(ies) of origin of the applicant(s): Gambia, Afghanistan and Uganda. | |
| Country of asylum (or for cases with statelessness aspects, country of habitual residence) of the applicant(s): The Netherlands | |
| Any third country of relevance to the case: ³ No. | |
| Is the country of asylum or habitual residence party to: | |
| The 1951 Convention relating to the Status of Refugees <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No | Relevant articles of the Convention on which the decision is based: |
| (Only for cases with statelessness aspects) The 1954 Convention relating to the Status of Stateless Persons <input type="checkbox"/> Yes <input type="checkbox"/> No | Relevant articles of the Convention on which the decision is based: |
| (Only for cases with statelessness aspects) The 1961 Convention on the Reduction of Statelessness <input type="checkbox"/> Yes <input type="checkbox"/> No | Relevant articles of the Convention on which the decision is based: |
| (For AU member states): The 1969 OAU Convention governing the specific aspects of refugee problems in Africa <input type="checkbox"/> Yes <input type="checkbox"/> No | Relevant articles of the Convention on which the decision is based: |
| For EU member states: please indicate which EU instruments are referred to in the decision 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 | Relevant articles of the EU instruments referred to in the decision: Art. 4 |

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| <p>or as persons who otherwise need international protection and the content of the protection granted,</p> <p>COUNCIL DIRECTIVE 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status</p> <p>Charter of fundamental rights of the European Union</p> | <p>Art. 13(3)a</p> <p>Art. 3 and art. 7.</p> |
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Topics / Key terms: (see attached 'Topics' annex):

Persecution on the basis of sexual orientation or gender identity

Social group persecution

Lesbian, gay, bisexual, transgender and intersex (LGBTI)

Credibility assessment

EU Qualification Directive

Key facts (max. 200 words)

Applicants applied for asylum because of their sexual orientation. The State Secretary rejected their claims due to implausibility. Preliminary questions were posed to the European Court of Justice. Which limits does European Union Law impose on the investigation and assessment of the credibility of a sexual orientation? ECJ delivered judgment, *A, B, C v. Staatssecretaris van Veiligheid en Justitie*, C-148/13 to C-150/13, European Union: Court of Justice of the European Union, 2 December 2014, available at: <http://www.refworld.org/docid/547d943da.html>.

The Council of State in this decision dated July 8 2015 ruled that, in general, the investigation by the State Secretary regarding the credibility of sexual orientation is within the limits of EU law. However, he has failed to explain how he assesses the credibility of an applicant's alleged sexual orientation in specific cases. There is no policy or established practice on the basis whereof the State Secretary examines and assesses an alleged sexual orientation. Therefore, it isn't possible for the administrative judge to review a decision on this issue effectively. It is for the State Secretary to impart more substance to this in his immigration policy.

Because the State Secretary hasn't been able to provide sufficient clarity on how he assessed the credibility of the sexual orientation of the three applicants, the appeals are grounded. The State Secretary will have to decide again on their asylum applications, taking into account this ruling.

Key considerations of the court (translate key considerations (containing relevant legal reasoning) of the decision; include numbers of relevant paragraphs; do not summarize key considerations) [max. 1 page]

5. To bring forward sexual orientation at a later stage of the procedure cannot be held against an applicant, cannot be the sole reason for rejecting the application.

5.1. Review by the Court cannot be limited to the question whether new elements have been brought forward.

6.3. State Secretary is not allowed to raise indiscrete questions with regard to sexual activities.

6.4. State secretary will not take into account video material with regard to sexual activities. Medical tests in context of establishing sexual orientation are not allowed.

6.5. The council of State has already considered that the method used by the State Secretary while examining and assessing the sexual orientation, in a general sense, remains within the limits laid down by EU law. No connecting factors were found in that which parties have argued at the court session, to now come to a different conclusion.

7. In order to enable the administrative judge to review the manner in which the decision was arrived at, and the grounds for that decision, in view of the limits provided for in Articles 3:2 and 3:46 of the General Administrative Law Act, the State Secretary must clarify how he actually conducted his assessment in a specific case. He must not only clarify what he did not do in his examination into the credibility of the sexual orientation, but must also clarify how he conducted the assessment of the credibility of the sexual orientation with regard to what is stipulated in Article 4 of Directive 2004/83.

7.3 At the court session, on request, the State Secretary could only clarify which questions may not be asked during the interviewing. While given the opportunity to do so by the Council of State, he has not made clear what sort of questions he does ask during the interviews and whether those questions were drawn up in cooperation with an interest group, such as the Dutch Association for Integration of Homosexuality (COC).

7.4. Furthermore, the State Secretary was unable to clarify how, based on the results of his examination, he conducts the assessment of the credibility of an alleged sexual orientation, and how he has conducted this assessment in the specific cases of the applicants concerned.

7.5 The State Secretary also could not adequately clarify what weight he allocates to a possible lack of credibility of any statements of an applicant as to what happened to him in his country of origin as a result of his alleged sexual orientation, and which partly prompted him or her to leave that country. This also applies to statements by an applicant which the State Secretary considers implausible about events that occurred outside the country of origin, in the Netherlands or elsewhere

7.6. It follows from the above that the State Secretary has made it insufficiently clear on what questions and answers, in a specific case and in view of the asylum account of a particular applicant, his main focus lies and how the State Secretary assesses and weighs the answers given by an applicant to those questions.

7.7. In the absence of a policy document or an established practice of the State Secretary on how he examines and evaluates a claimed sexual orientation, while that examination and evaluation, within the Dutch administrative system, is primarily up to him, it is impossible for the administrative courts to examine how the State Secretary conducts his examination and evaluation in a specific case, and thus how he makes a carefully prepared and properly motivated decision on the credibility of sexual orientation as asylum motive. In this system, it is not for to the administrative courts, but for to the State Secretary to provide more substance in the design and implementation of the immigration policy. Additionally, he must also take note of the following:

8. In the current cases, the applicants have invoked refugee status and subsidiary protection (article 29, first paragraph, introduction and under a and b, of the Aliens Act 2000), respectively invoked only subsidiary protection.

8.3. The State Secretary makes a distinction between refugee status and subsidiary protection with regard to whether, and if so to what extent, restraint may be expected of an applicant (paragraphs C2/3.2 and C2/3.3 of the Aliens Circular 2000). This distinction also seems to exist between the jurisdiction of the ECJ and the ECtHR). If the State Secretary holds a claimed sexual orientation for an established fact, or deems it credible, it is, according to the judgment of the Court of 7 November 2013, in breach of Articles

9 and 10 of Directive 2004/83 to require restraint from an applicant in giving substance to his orientation in his country of origin. In contrast, the jurisdiction of the ECtHR seems to require restraint from an applicant, if this allows him to prevent an inhumane treatment (see in this respect the judgments F.G. versus Sweden, of 16 January 2014, no 43611/11, and M.E. versus Sweden, of 26 June 2014, no 71398/12; www.echr.coe.int). 8.4. As Directive 2004/83 not only relates to refugee status, but also to subsidiary protection, the State Secretary should also include this difference between the jurisprudence of the ECJ and the ECtHR in his implementation of the policy as referred to in 7.7.

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Other comments or references (for example, links to other cases, does this decision replace a previous decision?)

EXPLANATORY NOTE

1. Decisions submitted with this form may be court decisions, or decisions of other judicial, quasi-judicial and administrative bodies.
2. Where applicable, please follow the court's official case reference system.
3. For example in situations where the country of return would be different from the applicant's country of origin.

For any questions relating to this form, please contact the RefWorld team at the address below.

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