



**IN THE COURT OF JUSTICE OF THE  
EUROPEAN UNION**

**JOINED CASES C-148/13, C-149/13 & C-150/13**

**MINISTER VOOR IMMIGRATIE EN ASIEL**

**-v-**

**A, B AND C**

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**WRITTEN OBSERVATIONS OF THE  
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES**

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**The Office of United Nations High Commissioner for Refugees (“UNHCR”) is  
represented by Marie Demetriou QC, instructed by UNHCR,  
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## 1. Introduction<sup>1</sup>

1.1. This preliminary reference from the Dutch Council of State to the Court of Justice of the European Union (“the Court”) concerns the limits on the method of assessing the credibility of the declared sexual orientation of an asylum applicant<sup>2</sup> imposed by Article 4 of 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 (“the Qualification Directive”)<sup>3</sup> and by the Charter of Fundamental Rights of the European Union (“the Charter”), in particular Articles 3 and 7 thereof.<sup>4</sup>

1.2. The main proceedings concern three male applicants claiming to be homosexual/gay. The issues raised by these cases in relation to the assessment of credibility are nevertheless relevant for all claims made on the basis of an applicant’s sexual orientation, whether the applicant is gay, lesbian or bisexual.<sup>5</sup> This submission is divided into five parts. Following this section, the interest and expertise of UNHCR in this matter is explained (Part 2). Part 3 responds to the first part of the Court’s question on the limits imposed by Article 4 of the Qualification Directive and Charter provisions, and Part 4 responds to the second and third parts of the Court’s question about whether the same limits apply to the other grounds of persecution and if so, in what respect. Part 5 concludes and summarizes UNHCR’s position on both these issues.

## 2. UNHCR’s interest and expertise in this matter

2.1. UNHCR has built up particular expertise in the area of refugee status determination in general, as well as in relation to claims based on sexual orientation and/or gender identity. UNHCR carries out refugee status determination in 66 countries and territories, and registered approximately 113,600 applications in 2012.<sup>6</sup>

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<sup>1</sup> This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law.

<sup>2</sup> For the exact wording of the question see [Request for a preliminary ruling from the Raad van State \(Netherlands\) lodged on 25 March 2013 – A. v Staatssecretaris van Veiligheid en Justitie](#), Case C-148/13, Court of Justice of the European Union (“CJEU”), 25 March 2013. The questions referred in the cases of *C-149/13*, *C-150/13* are the same.

<sup>3</sup> 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 (OJ) L 304/12 of 30 September 2004 (“[Qualification Directive](#)”). See also its successor Council 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), OJ L 337/9 of 20 December 2011, pp. 9–26 (“[Qualification Directive recast](#)”).

<sup>4</sup> European Union (EU), *Charter of Fundamental Rights of the European Union*, 7 December 2000, OJ 2000/C 364/01 of 18 December 2000 (“[the Charter](#)”).

<sup>5</sup> For an explanation of terminology, see 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 [[“Guidelines on International Protection No. 9 on Sexual Orientation and/or Gender Identity Claims”](#)], paras. 8–11.

<sup>6</sup> UNHCR, [Note on International Protection](#), 4 June 2013, EC/64/SC/CPR.10, para. 24.

UNHCR also advises governments on their national asylum systems as part of its supervisory responsibility, laid down in paragraph 8(a) of its Statute and the Preamble of the 1951 Convention relating to the Status of Refugees (“1951 Convention”),<sup>7</sup> read together with Article 35(1) of the 1951 Convention<sup>8</sup> and Article II(1) of the 1967 Protocol relating to the Status of Refugees (“1967 Protocol”).<sup>9</sup>

2.2. As part of its supervisory role, UNHCR issues guidelines on the interpretation and application of the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention and the 1967 Protocol.<sup>10</sup> In the area of claims based on sexual orientation and gender identity, UNHCR refers the Court to its *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity*, in particular paragraphs 62-66 dealing with credibility and assessing the applicant’s sexual orientation and/or gender identity [see attached as Annex to this submission].<sup>11</sup>

2.3. UNHCR’s supervisory responsibility has been reflected in European Union (EU) law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (“TFEU”),<sup>12</sup> as well as in Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees [...] on matters relating to asylum policy”.<sup>13</sup> Secondary EU legislation also emphasizes the role of UNHCR. For example, Recital 15 of the Qualification Directive states that consultations with UNHCR “may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention”.<sup>14</sup> The supervisory responsibility of UNHCR is specifically articulated in Article 21 of Council Directive 2005/85/EC on minimum standards on procedures in Member

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<sup>7</sup> UN General Assembly, [Convention Relating to the Status of Refugees](#), 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137. According to Article 8(a) of UNHCR’s Statute: “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” [emphasis added].

<sup>8</sup> According to Article 35(1) of the 1951 Convention, “The Contracting States undertake to co-operate 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.”

<sup>9</sup> UN General Assembly, [Protocol Relating to the Status of Refugees](#), 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

<sup>10</sup> Such guidelines are included in the UNHCR [Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees](#), 1979, reissued December 2011, HCR/1P/4/ENG/REV. 3, (“UNHCR Handbook”), as well as other notes and guidance.

<sup>11</sup> UNHCR, *Guidelines on International Protection No. 9 on Sexual Orientation and/or Gender Identity Claims*.

<sup>12</sup> EU, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9 May 2008 (“TFEU”).

<sup>13</sup> EU, [Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts](#), OJ C 340/134 of 10 November 1997, Declaration on Article 73k of the Treaty establishing the European Community.

<sup>14</sup> The same reference to consultations with UNHCR is made in Recital 22 of the Qualification Directive (recast).

States for granting and withdrawing refugee status (“Asylum Procedures Directive”).<sup>15</sup>

2.4. The TFEU expressly requires EU secondary legislation on asylum to conform to the 1951 Convention.<sup>16</sup> The Qualification Directive recognizes the 1951 Convention as the “cornerstone of the international legal regime for the protection of refugees”<sup>17</sup> and stipulates that the Directive’s minimum standards are laid down with a view to guiding Member States in the application of the 1951 Convention.<sup>18</sup> Importantly, the Court has repeatedly reiterated that this instrument must be interpreted “in a manner consistent with the 1951 Convention and the other relevant treaties” referred to in Article 63(1) TEC.<sup>19</sup>

### **3. Question part 1: Limits on the method of assessing the credibility of a declared sexual orientation**

3.1. As the Charter is the overarching framework for the protection of fundamental human rights in the EU, any activities undertaken by Member States must be compatible with Charter provisions. As such, methods of assessing the credibility of asylum applicants must therefore comply with the Charter. The EU Qualification Directive lays down minimum standards for qualification as a refugee or as a person who otherwise needs international protection.<sup>20</sup> As the Qualification Directive indicates, it seeks to ensure the full respect for the principles recognized in particular by the Charter, including explicitly human dignity and the right to asylum of applicants for asylum and their accompanying family members.<sup>21</sup>

3.2. In relation to asylum claims based on sexual orientation, the Charter requires that the methods of assessing credibility in Article 4 of the Qualification Directive be

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<sup>15</sup> [Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status](#), OJ L 326/13 of 13 December 2005. Article 21(c) in particular obliges Member States to allow UNHCR “to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.” See also *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, L 180/60 of 29 June 2013 (“[Asylum Procedures Directive \(recast\)](#)”), Article 29(c).

<sup>16</sup> Article 78 para. 1 TFEU provides that the policy on asylum “must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”.

<sup>17</sup> Recital 3 of the Qualification Directive; Recital 4 of the Qualification Directive (recast).

<sup>18</sup> Recital 16 of the Qualification Directive; Recital 23 of the Qualification Directive (recast). For UNHCR’s remarks on the Qualification Directive, see: UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29.04.2004 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 (OJ L 304/12 of 30 September 2004)*, 28 January 2005 (“[UNHCR Annotated Comments on the Qualification Directive](#)”).

<sup>19</sup> [Treaty Establishing the European Community \(Consolidated Version\)](#), Rome Treaty, 25 March 1957. Now Article 78 para. 1 TFEU. See *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08, C-176/08, C-178/08 and C-179/08, CJEU, 2 March 2010, at paras. 53–54, (“*Salahadin Abdulla*”); *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, CJEU, 17 June 2010, (“*Bolbol*”), at para. 38; *Bundesrepublik Deutschland v. B. and D.*, C-57/09 and C-101/09, CJEU, 9 November 2010, at para. 78.

<sup>20</sup> Qualification Directive, Articles 1 and 3. The Qualification Directive (recast) removes the word “minimum” from Article 1.

<sup>21</sup> Qualification Directive, Recital 10, and Qualification Directive (recast), Recital 16.

compatible with the Charter provisions. Of particular relevance to the cases underlying this preliminary reference, and to sexual orientation claims in general, are the limits imposed by Articles 3 (the right to integrity of the person) and 7 (respect for private life).<sup>22</sup> Other articles of the Charter may also be relevant in determining the limits on credibility assessments – namely Articles 1 (human dignity), 4 (prohibition of torture, inhuman or degrading treatment or punishment), 18 (right to asylum), 19 (protection in the event of removal, expulsion or extradition), 21 (non-discrimination),<sup>23</sup> and 41 (right to good administration) – however, they are not all addressed in detail in this submission.

3.3. At the outset, it ought to be acknowledged that the verification of material facts relevant to a claim for asylum – including a declaration by an applicant that he is gay, for example – is a normal part of assessing the facts. The applicant is in turn required to make a genuine effort to provide a plausible and coherent narrative that is capable of being believed against the background of generally known facts.<sup>24</sup> Nevertheless, claims based on sexual orientation raise particular challenges for adjudicators, as well as for applicants. As noted in UNHCR’s *Guidelines on Sexual Orientation and/or Gender Identity Claims*,

“[s]ome [applicants] may feel deeply affected by feelings of shame, internalized homophobia and trauma, and their capacity to present their case may be greatly diminished as a consequence. Where the applicant is in the process of coming to terms with his or her identity or fears openly expressing his or her sexual orientation and gender identity, he or she may be reluctant to identify the true extent of the persecution suffered or feared.”<sup>25</sup>

3.4. The Guidelines also note that such feelings may lead “them to deny their sexual orientation and/or to adopt verbal and physical behaviours in line with heterosexual norms and roles. Applicants from highly intolerant countries may, for instance, not readily identify as [gay]”.<sup>26</sup> For these reasons, UNHCR’s Guidelines stress the need for sensitivity in the assessment of credibility in such cases and outline

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<sup>22</sup> As acknowledged by the European Court of Human Rights (“ECtHR”), the notion of “privacy” or “private life” encompasses a person’s sexual life or orientation and gender identity. See [Dudgeon v. UK](#), Appl. No. 7525/76, ECtHR, 22 October 1981; [X, Y and Z v. UK](#), 75/1995/581/667, Appl. No. 21830/93, ECtHR, 22 April 1997; [Bensaid v. The United Kingdom](#), Appl. No. 44599/98, ECtHR, 6 May 2001, para. 47.; and [Goodwin v. UK](#), Appl. No. 28957/95, ECtHR, 11 July 2002.

<sup>23</sup> Article 21 of the Charter prohibits discrimination, *inter alia*, on the basis of sex and sexual orientation. See also Qualification Directive, Recital 11; 1951 Convention, Article 3. The ECtHR has held that sexual orientation is a prohibited ground of discrimination under Article 14 of the European Convention on Human Rights (“the ECHR”) and that laws criminalizing same-sex relations are contrary to the ECHR. See ECtHR, [Mouta v. Portugal](#), Appl. No. 33290/96, judgment of 21 December 1999; [Modinos v. Cyprus](#), Appl. No. 7/1992/352/426, ECtHR, 23 March 1993. The ECtHR has also found violations of Article 14 on the basis of alleged discrimination on grounds of sexual orientation in conjunction with Article 8 of the ECHR, the right to respect for private and family life. See also [Sutherland v. UK](#), Appl. No. 25186/94, 27 March 2001; [Schalk and Kopf v. Austria](#), Appl. No. 30141/04, 24 June 2010. In addition, the [Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence](#), 11 May 2011, in Article 4(3) prohibits discrimination on the basis of sexual orientation and gender identity.

<sup>24</sup> See Qualification Directive Article 4. See also *UNHCR Handbook*, paras. 203 and 204.

<sup>25</sup> UNHCR, *Guidelines No. 9 on Sexual Orientation and/or Gender Identity Claims*, para. 59 [footnotes removed].

<sup>26</sup> UNHCR, *Guidelines No. 9 on Sexual Orientation and/or Gender Identity Claims*, para. 63(i) on self-identification.

a range of methods to achieve this in the process of the credibility assessment. It is essential that the assessment is carried out in an impartial and objective manner and contains neither superficial understandings of the experiences of lesbians, gays and bisexual persons, nor erroneous, culturally inappropriate, or stereotypical assumptions.<sup>27</sup>

3.5. Respecting these principles also requires any interviewer and interpreter to avoid expressing, whether verbally or through distancing or demeaning body language, any judgment about the applicant's sexual orientation, sexual behaviour or relationship pattern. This precludes the use of questions and vocabulary that are offensive. Even seemingly neutral or scientific terms can have the same effect as pejorative terms.<sup>28</sup>

3.6. To assist the Court in responding to the first part of the question before it, UNHCR has grouped existing State practices (or methods) of assessing credibility, including those arising in the context of the underlying cases, into two categories. The first category comprises those practices or methods that are incompatible with at least Charter Articles 3 and 7 *in all circumstances*, inter alia because they are disproportionate to the pursued objective or go beyond what is necessary in the general interest.<sup>29</sup> These practices include: (i) intrusive questioning about the details of the applicant's sexual practices; (ii) medical or pseudo-medical testing including penile plethysmography (phallometry); and (iii) being required to produce inappropriate documentary or other evidence of one's claimed sexual orientation or otherwise demonstrate one's sexual orientation.

3.7. The second category comprises those practices or methods which if not applied in a manner sensitive or appropriate to the particular circumstances of the individual claim risk violating provisions of the Charter. The second category cannot be judged in the abstract, but would need to be assessed on a case-by-case basis. UNHCR refers the Court to its *Guidelines No. 9 on Sexual Orientation and/or Gender Identity Claims* for further guidance on how to carry out such assessments in a manner which is compatible with Charter rights, taking into account the particular circumstances of claims based on sexual orientation. This submission also outlines some specific considerations that ought to be taken into account, relevant to the underlying cases.

#### *Methods that are incompatible with the Charter in all circumstances*

- (i) Intrusive questioning about the details of sexual practices

3.8. While adjudicators have a legitimate interest in eliciting information sufficient to make an accurate determination as to whether the applicant qualifies for international protection, and the applicant also bears a duty to disclose relevant information, this needs to be balanced against the applicant's right to respect for

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<sup>27</sup> UNHCR, *Guidelines No. 9 on Sexual Orientation and Gender Identity Claims*, para. 60(ii). For background see more generally UNHCR's study *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, ("[UNHCR, Beyond Proof Full Report](#)"), pp. 37–41.

<sup>28</sup> UNHCR, *Guidelines No. 9 on Sexual Orientation and Gender Identity Claims*, paras. 60(iii), (v) and (vii). For instance, although widely used, the term "homosexual" is considered a derogatory term in some countries. In the Arabic-speaking world, there are often no equivalent local terms for gay or lesbian, or at least no terms that are not derogatory.

<sup>29</sup> Charter, Article 52(1).

his/her Charter rights. Romantic or sexual relationships with, and/or hopes for future relationships, will usually be part of the narrative of gay applicants. Not every applicant, however, will have had such relationships; there may be good reasons, including a fear of persecution, why the applicant has not had any past relationships with a member of the same sex. Likewise, there may be good reasons why the applicant is reluctant or finds it difficult to disclose such information.<sup>30</sup>

3.9. Intrusive questioning about the details of the applicant's sexual practice should be avoided.<sup>31</sup> Sexual orientation encompasses all aspects of a person's life. It goes to the core of a person's sense of identity and is thus defined by a much wider and more complex range of factors than sexual relations or practices alone. In fact, the probative value of information obtained through such questioning is limited, as it may be easier for an applicant to fabricate an account of a sexual experience with someone of the same sex, than to describe the complex internal experience of being sexually and/or gender non-conforming.

3.10. Such intrusive lines of questioning can have the effect of making the applicant feel embarrassed, ashamed, intimidated, and harassed, and may result in them refusing or finding it difficult to respond to such questions. Reluctance to share intimate details or discomfort in speaking about sexual conduct is common to almost all people. In addition, lesbians, gays and bisexual persons who have had to hide their sexual orientation may be unable to recount intimate details of sexual experiences.<sup>32</sup> Respect for human dignity and privacy preclude the use of questions which seek intrusive detail around the applicant's sexual practices. Such questioning goes beyond what is needed for the purposes of establishing the material elements of the claim and subsequently determining an applicant's eligibility for refugee status or other forms of international protection.<sup>33</sup>

3.11. In light of the above, it is UNHCR's submission that intrusive questioning about the details of the applicant's sexual practices to assess the credibility of an applicant's stated sexual orientation is a method not compatible with several Articles of the Charter, including the right to human dignity (Article 1), the right to respect for mental integrity (Article 3(1)), the right not to be subjected to degrading treatment (Article 4), and the right to private life (Article 7).

(ii) Medical or pseudo-medical testing

3.12. In the context of claims based on sexual orientation some Member States have used medical (or pseudo-medical) evidence based on a procedure to measure sexual arousal in men called penile plethysmography ("PPG" or "phallometry"). UNHCR has previously set out its concerns in relation to the use of phallometry and the

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<sup>30</sup> UNHCR, *Guidelines No. 9 on Sexual Orientation and Gender Identity Claims*, para. 63(viii).

<sup>31</sup> *Ibid.*

<sup>32</sup> Useful areas of questioning, in addition to the applicant's self-identification as a starting point, may include the following: childhood; feelings of difference; the process of self-realization or "coming out"; the applicant's experience of not conforming with societal norms and resulting feelings of shame, stigmatization or isolation; family relationships, whether this relates to family member responses to the disclosure of their sexual orientation or reasons why they may, or may not, be married or have, or not have, children. See UNHCR, *Guidelines No. 9 on Sexual Orientation and Gender Identity Claims*, para. 63(i)-(ix).

<sup>33</sup> Charter, Article 52(3).

practice's inconsistency with international human rights standards.<sup>34</sup> The procedure itself has been questioned as to its probative or scientific value.<sup>35</sup> Other medical "testing" of the applicant's sexual orientation would likewise infringe basic human rights and must not be used.<sup>36</sup>

3.13. Phallometry involves the exposure of the male sexual organs to intrusive observation and inspection. It also examines deeply held intimate sexual feelings and may as such give rise to feelings of humiliation. In addition, phallometry imposes sexually explicit material on applicants, which some may view as obscene, shocking or degrading.<sup>37</sup> Bearing in mind that their countries of origin may oppress sexual minorities or even criminalize same-sex relations, gay applicants may be particularly affected by this kind of treatment.<sup>38</sup> UNHCR has previously argued that the use of phallometry is especially inappropriate for applicants for international protection, given that they are in a particularly vulnerable position vis-à-vis the authorities. Likewise, UNHCR considers that in the context of applications for international protection, the principle of "informed consent" in Article 3(2) of the Charter cannot be satisfied when phallometry or similar practices are used. This is because applicants are under pressure to cooperate with the procedure; a failure to consent to the examination could be interpreted as a negative credibility indicator and thus have a detrimental effect on the final decision, which could in turn expose them to forced return and persecution.<sup>39</sup>

3.14. With regard to Article 3 of the European Convention on Human Rights (which corresponds to Article 4 of the Charter),<sup>40</sup> the European Court of Human Rights has found that for treatment to be degrading, it must attain a minimum level of severity which will depend on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.<sup>41</sup> Treatment will in particular be considered "degrading" when it

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<sup>34</sup> UNHCR, *UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation*, April 2011, (["UNHCR Comments on the Practice of Phallometry"](#)).

<sup>35</sup> Sexologists have questioned the reliability of phallometry as a method to establish an individual's sexual orientation. The method of phallometry in general, and the visual and audio stimuli in particular, are based on stereotypes regarding gay sexual orientation and sexual life, and assumptions of what should or should not trigger sexual arousal. See Organization for Refuge, Asylum and Migration (ORAM), *Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum and Refugee Status Proceedings*, December 2010.

<sup>36</sup> UNHCR, *Guidelines No. 9 on Sexual Orientation and/or Gender Identity Claims*, para. 65.

<sup>37</sup> UNHCR Comments on the Practice of Phallometry, pp. 3–4.

<sup>38</sup> UNHCR Comments on the Practice of Phallometry, pp. 4 and 8. See also European Agency for Fundamental Rights, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity - 2010 Update, 10 December 2010*, p. 59. The discussion on "phallometry" stems from a decision adopted on 7 September 2009 by the German Administrative Court in Schleswig Holstein granting an interim measure and ordering the stay of transfer under the Dublin II Regulation of an Iranian gay man because of the possible use of phallometry in the Czech Republic ([Germany/Verwaltungsgericht Schleswig-Holstein/Judgement of 7 September 2009](#)).

<sup>39</sup> UNHCR Comments on the Practice of Phallometry, p. 7.

<sup>40</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5*. See also Article 52(3) of the Charter which stipulates that "in so far this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention".

<sup>41</sup> [Labzov v. Russia](#), Appl. No. 62208/00, ECtHR, 16 June 2005.



is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.<sup>42</sup> Further, treatment may be at variance with Article 3 where the victim is humiliated in his or her own eyes, even if not in the eyes of others.<sup>43</sup> Even without purposeful humiliation or debasement a violation of Article 3 of the European Convention on Human Rights may nevertheless be found.<sup>44</sup>

3.15. Research has found that phallometry is an intrusive examination, interfering with the person's dignity, psychological and physical integrity and with the core of his intimacy, likely to raise feelings of shame and suffering, fear, anxiety and distress, despite the lack of inflicted physical pain.<sup>19</sup> In addition, the examination in general, and the visual and audio stimuli in particular, are based on stereotypes regarding sexual orientation and sexual practices, and assumptions of what should or should not trigger sexual arousal.<sup>45</sup>

3.16. In light of the above, it is UNHCR's submission that the use of phallometry and other medical testing to assess the credibility of an applicant's stated sexual orientation is a method in conflict with several Articles of the Charter, including the right to human dignity (Article 1), the right to respect for physical and mental integrity (Article 3(1)), the right not to be subjected to degrading treatment (Article 4), and the right to private life (Article 7).<sup>46</sup>

(iii) Inappropriate documentary or other evidence or demonstrations

3.17. A third method of assessing the credibility of the applicant's sexual orientation which is incompatible with Charter provisions concerns requests for certain types of documentary or other evidence of one's claimed sexual orientation, as well as other demonstrations of one's claimed sexual orientation. It is UNHCR's view that applicants should never be expected or asked to produce or submit documentary or photographic/video evidence of intimate acts.<sup>47</sup> Like intrusive questioning, being asked to produce photographic or video evidence, or asking a couple to be physically demonstrative at an interview,<sup>48</sup> is firstly degrading (in the sense of Articles 1, 3(1) and 4 of the Charter), but also is a disproportionate limitation on the right to private life (Article 7, Charter) and unnecessary to the objective of fair status determination.<sup>49</sup> It is recalled that Articles 4(2) and 4(3)(b) of the Qualification Directive require decision makers to take into account the applicant's statements and relevant documentation presented by the applicant, while Article 4(5) explains the circumstances in which the applicant's statements do not require further confirmation,

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<sup>42</sup> *Jalloh v. Germany*, Appl. No. 54810/00, ECtHR, 11 July 2006.

<sup>43</sup> *Tyler v. UK*, Appl. No. 5856/72, ECtHR, 15 March 1978, para. 32.

<sup>44</sup> *Jalloh v. Germany*.

<sup>45</sup> UNHCR Comments on the Practice of Phallometry, p. 4.

<sup>46</sup> International Commission of Jurists, *Yogyakarta Principles - Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (hereafter "[Yogyakarta Principles](#)"), March 2007, affirm that "[n]o person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity", Principle 18.

<sup>47</sup> UNHCR, *Guidelines No. 9 on Sexual Orientation and/or Gender Identity Claims*, para. 64.

<sup>48</sup> *Ibid.*

<sup>49</sup> Charter, Article 52(1) and (3).

including where (a) the applicant has made a genuine effort to substantiate his or her application; and (b) all relevant elements, at the applicant's disposal, have been submitted and a satisfactory explanation regarding any lack of other relevant elements has been given. In the context of claims based on sexual orientation, which usually involve issues of a private nature, the types of evidence that could be produced in applications based on other grounds may not be readily available and the applicant's statements may be the only source of evidence.<sup>50</sup> In such circumstances, any insistence on the part of the relevant authorities that the applicant produce documentation to "prove" his or her sexual orientation would also be at variance with Article 4(5) of the Qualification Directive.

*Methods that may be incompatible with the Charter, depending on the circumstances*

3.18. Three particular examples of the **second category of practices or methods** of assessing the credibility of an applicant's sexual orientation are relevant to the underlying cases: (i) drawing adverse credibility findings from a failure to disclose sexual orientation at the earliest opportunity; (ii) drawing adverse credibility findings from a failure to correctly answer general knowledge questions about gay or lesbian organizations, venues, personalities etc.; and (iii) providing limited or no opportunity to explain potentially adverse credibility findings. These are dealt with in turn below.

- (i) Drawing adverse credibility findings from a failure to disclose sexual orientation at the earliest opportunity

3.19. Article 4(1) of the Qualification Directive provides that Member States "may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application". This would include the basis for the claim, such as fear of persecution on account of one's sexual orientation. However, it is well-recognized that some applicants will have great difficulty disclosing their sexual orientation, including in particular towards persons in authority such as asylum interviewers or decision makers dealing with applications for international protection.<sup>51</sup> UNHCR's *Guidelines No. 9 on Sexual Orientation and/or Gender Identity Claims* elaborate on the importance of ensuring that both procedures for assessing applications for international protection as well as the environment in which the assessment is carried out are suitable for such claims. A safe and supportive environment that establishes trust between the interviewer and the applicant needs to be in place, along with effective safeguards to protect confidentiality.<sup>52</sup>

3.20. Where an applicant makes a late disclosure of sexual orientation as the basis for his or her application for international protection, this should not, without further

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<sup>50</sup> *UNHCR Handbook*, para. 196.

<sup>51</sup> Self-identification as a lesbian, gay or bisexual person should be taken as an indication of the applicant's sexual orientation. The social and cultural background of the applicant may affect how the person self-identifies. Some lesbian, gay or bisexual persons, for example, may harbour deep shame and/or internalized homophobia, leading them to deny their sexual orientation and/or to adopt verbal and physical behaviours in line with heterosexual norms and roles. Applicants from highly intolerant countries may, for instance, not readily identify as lesbian, gay or bisexual. This alone should not rule out that the applicant could have a claim based on sexual orientation where other indicators are present. See *UNHCR, Guidelines No. 9 on Sexual Orientation and/or Gender Identity Claims*, para. 63(i).

<sup>52</sup> *UNHCR, Guidelines No. 9 on Sexual Orientation and/or Gender Identity Claims*, para. 60(i). and *UNHCR Handbook*, para. 200.

consideration, form the basis of an adverse credibility finding in relation to the applicant's stated sexual orientation. However, it can be expected that the applicant provide an explanation for failing to disclose this at an earlier opportunity. The requirement for the applicant to submit the relevant elements "as soon as possible" is limited by the decision maker's obligation under Article 4(3) of the Directive to make an individualized assessment of the application that takes into account the applicant's individual position and personal circumstances, including any reasons why the applicant may not have disclosed his or her sexual orientation at an earlier stage.<sup>53</sup> Nor should late disclosure trigger the application of a higher burden of proof.<sup>54</sup> A failure to take into account the applicant's individual circumstances may be at variance with Article 4(3) of the Qualification Directive and the requirement for States to ensure the fair and impartial handling of the applicant's claim (Article 41 of the Charter).

- (ii) Drawing adverse credibility findings from a failure to answer correctly general knowledge questions about gay organizations, venues, etc.

3.21. There are no universal characteristics or qualities that typify gay, lesbian or bisexual persons. Their life experiences can vary greatly even if they are from the same country.<sup>55</sup> The presence or absence of certain stereotypical behaviours or appearances should not be relied upon to conclude that an applicant possesses or does not possess a given sexual orientation.<sup>56</sup> Likewise, requiring applicants to know the names or mandates of organizations working on sexual orientation issues in either the country or origin or asylum is not a reliable or fair test of one's sexual orientation. In this regard, the failure of an applicant to be able to answer questions about such organizations cannot be taken on its own as evidence of a lack of credibility.

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<sup>53</sup> Late disclosure may be because the applicant has suffered human rights abuses, discrimination, harassment, stigmatization, marginalization, and/or isolation in his or her home society. It may also be the result of feelings of shame, stigma and difference. The existence of laws criminalizing same-sex relations, their implementation and societal attitudes may have compelled the applicant to conceal and deny his or her identity in an effort to avoid such treatment. Being compelled to conceal one's sexual orientation may also result in significant psychological and other forms of harm. Feelings of self-denial, anguish, shame, isolation, and even self-hatred may accrue in response to an inability to be open about one's sexual orientation. Such feelings may diminish the applicant's capacity to disclose relevant information, inhibiting him or her from informing interviewers and decision makers that his or her fear of persecution and/or serious harm relates to his or her sexual orientation. An applicant in the process of coming to terms with, or afraid of openly expressing, his or her sexual orientation may be reluctant to identify the true extent of the persecution suffered or feared. Lesbian, gay or bisexual applicants may change their claim during the process by initially making a claim on grounds unrelated to sexual orientation and/or stating that their sexual orientation is imputed to them, before eventually expressing their sexual orientation. See UNHCR, *Guidelines No. 9 on Sexual Orientation and Gender Identity Claims*, paras. 33 and 59; for background see UNHCR's study *Beyond Proof Full Report*, p. 71 and pp. 72–73 on stigma, shame and fear of reprisals influencing disclosure, and pp. 97–103 on the meaning of "as soon as possible".

<sup>54</sup> For background see UNHCR's study *Beyond Proof Full Report*, p. 91.

<sup>55</sup> UNHCR, *Guidelines No. 9 on Sexual Orientation and/or Gender Identity Claims*, para. 59(ii).

<sup>56</sup> UNHCR, *Guidelines No. 9 on Sexual Orientation and/or Gender Identity Claims*, para. 59(ii).

- (iii) Providing limited or no opportunity to explain elements that may appear to be lacking in credibility

3.22. The rights to be heard and of defence are part of the general principles of EU law<sup>57</sup> that are affirmed not least in Article 41 of the Charter. This Court has stated that this provision is of general application. It has affirmed its importance and its very broad scope in the EU legal order, for the right must apply in all proceedings that are liable to culminate in a measure adversely affecting a person, including national procedures to determine qualification for international protection.<sup>58</sup>

3.23. With reference to these rights, and given the limits and variations of human memory to record, retain and retrieve memories,<sup>59</sup> the determining authority must provide the applicant with an opportunity to explain elements of his or her account that may appear to be lacking in credibility, before a decision on the application is made. This Court has recognized that in a procedure to assess applications for international protection “which inherently entails difficult personal and practical circumstances and in which the essential rights of the person concerned must clearly be protected, the observance of this procedural safeguard is of cardinal importance”.<sup>60</sup> Thus applicants who base their claims to international protection on their declared sexual orientation must be given an opportunity to explain elements that may appear lacking in credibility.

#### **4. Question part 2: Are those limits different from the limits which apply to assessment of the credibility of the other grounds of persecution? Question part 3: If so, in what respect?**

4.1. The provisions of the Charter, along with Article 4 of the Qualification Directive, apply to all applications for international protection, regardless of the grounds of persecution. This means that the limits applicable to claims based on sexual orientation (outlined above at paragraphs 3.1–3.23) also apply to other claims. That said, the methods for assessing credibility may need to be tailored to the particular ground of persecution and the circumstances of each individual case within the limits of the Charter provisions.

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<sup>57</sup> *Krombach v. Bamberski*, C-7/98, CJEU, 28 March 2000, para. 42; *SopropeÅL – Organizacoes de Calcado Lda v. Fazenda Publica*, C-349/07, CJEU, 18 December 2008, para. 36: “Observance of the rights of the defence is a general principle of Community law which applies where the authorities are minded to adopt a measure which will adversely affect an individual”; *Fulmen and Mahmoudian v. Council*, Joined Cases T-439/10 and T-440/10, CJEU, 21 March 2012, paras. 71 and 72 and the case law cited. See also UNHCR, *Beyond Proof Full Report*, p. 43.

<sup>58</sup> *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-277/11, CJEU, 22 November 2012, para. 85. In this case, which specifically concerned a procedure to determine qualification for subsidiary protection, the Court stated at para. 87: “The right to be heard guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely.” See also *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General (Opinion of Advocate General)*, C-277/11, CJEU, 26 April 2012, para. 32: “Consequently, the right to be heard must apply in relation to the procedure for examining an application for international protection followed by the competent national authority in accordance with rules adopted in the framework of the common European asylum system.”

<sup>59</sup> For background see UNHCR’s study *Beyond Proof Summary Report*, p. 13.

<sup>60</sup> *M.M. v. Minister for Justice, Equality and Law Reform, Ireland, Attorney General* (Opinion of Advocate General), para. 43.

4.2. For example, intrusive questioning of rape victims about the details of the rape or other forms of sexual or gender-based violence or questioning about past sexual behaviour when assessing a claim are just as inappropriate and incompatible with Charter provisions as similar questioning regarding the sexual practices of gay, lesbian or bisexual applicants. In contrast, while medical testing to establish one's sexual orientation is incompatible with Charter provisions, medical evidence in other cases, such as those based on torture or transsexual or intersex status, could be an important source of evidence where such evidence is available. Drawing negative credibility findings from the absence of such physical evidence would, however, not be appropriate.

4.3. Credibility can also pose some challenges in religion-based claims, especially those relating to religious conversion. Religious beliefs and practices can go to the heart of an applicant's sense of identity and way of life. In its *Guidelines No 9. on Sexual Orientation and/or Gender Identity Claims*, UNHCR has adopted a similar approach in respect of questioning in religion-based claims as to questioning in claims based on sexual orientation. UNHCR's *Guidelines No. 6 on Religion-Based Refugee Claims* note that "extensive examination or testing of the tenets or knowledge of the claimant's religion may not always be necessary or useful".<sup>61</sup> Rather, UNHCR has suggested that narrative forms of questioning, which it also advocates in sexual orientation-related claims, should guide the credibility assessment in religion-based claims:

"it is useful to resort to a narrative form of questioning, as recommended in claims based on sexual orientation, including through open-ended questions allowing the claimant to explain the personal significance of the religion to him or her, the practices he or she has engaged in (or has avoided engaging in out of a fear of persecution), or any other factors relevant to the reasons for their fear of being persecuted".<sup>62</sup>

4.4. At the same time, the types of questions that an adjudicator may ask in religion-based claims are generally likely to be less sensitive and explicit and less likely to lead to offence or otherwise arouse negative feelings, provided they are also expressed with appropriate respect and within a safe and secure environment. The overarching principles of non-discrimination and human dignity are applicable to all applications for international protection, regardless of the grounds of persecution.

## 5. Conclusion

5.1. In conclusion, it is UNHCR's submission that there are limits on the methods of assessing the credibility of the declared sexual orientation of an asylum applicant derived from Article 4 of the Qualification Directive and various Charter provisions, particularly Articles 3 and 7. In UNHCR's view, three practices or methods are inconsistent with Charter provisions *in all circumstances*, namely: (i) intrusive questioning about the details of sexual practices; (ii) medical or pseudo-medical testing including penile plethysmography (phallometry); and (iii) being required to produce inappropriate documentary or other evidence of one's claimed sexuality or to

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<sup>61</sup> UNHCR, "*Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*", 28 April 2004, HCR/GIP/04/06, paras. 29–30.

<sup>62</sup> *Ibid.*, para. 29.

demonstrate one's sexual orientation. A second category of methods of assessing credibility comprises practices or methods, which, while not being incompatible with Charter rights in all cases, risk violating provisions of the Charter if not applied in a manner sensitive or appropriate to the particular circumstances of the individual claim. The second category cannot be judged in the abstract, but needs to be assessed on a case-by-case basis.

5.2. In relation to the Court's second and third parts of their question, UNHCR's submission is that the limits set by the Qualification Directive and the Charter provisions apply to all applications for international protection, regardless of the grounds of persecution. However, the precise content of the limitations set by these provisions on the methods of credibility assessment will of necessity depend on the particularities related to each specific ground, and on the individual or contextual circumstances of the case.

UNHCR  
21 August 2013