



# Preliminary Deference?

The impact of judgments of the Court of Justice of the EU in cases  
*X.Y.Z., A.B.C. and Cimade and Gisti*  
on national law and the use of the EU Charter of Fundamental Rights



**ecre**

European Council  
on Refugees and Exiles

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## Foreword

This report was written by Caoimhe Sheridan, Amanda Taylor, Isa van Krimpen and Julia Zelvenska.

The European Council on Refugees and Exiles (ECRE) is a pan-European alliance of 90 NGOs protecting and advancing the rights of refugees, asylum seekers and displaced persons. Our mission is to promote the establishment of fair and humane European asylum policies and practices in accordance with international human rights law. Working together with our members and partners to inform and persuade European authorities and the public, we monitor and denounce human rights violations while proposing and promoting fair and effective durable solutions. We accomplish our mission through research, advocacy and the sharing of knowledge and expertise.

This report forms part of ECRE's LEAP project. This project aims at reinforcing collaboration and exchange of information among legal practitioners and decision makers and promoting the rights and principles laid down in the EU Charter of Fundamental Rights in the field of asylum.

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## The objectives and target audience of the study

The study intends to examine the extent of implementation of asylum-related judgments of the Court of Justice of the European Union (hereinafter 'the CJEU') and their impact on relevant asylum policies across the EU. It also looks at the role national authorities and the judiciary play in ensuring the application of CJEU case law and the Charter of Fundamental Rights of the EU (hereinafter 'the EU Charter'). In particular, the study aims to:

- Assess the national legislative and policy impact of the selected CJEU judgments;
- Identify national and EU-level guidance documents as well as national jurisprudence which interpret the judgments or key concepts included therein;
- Analyse whether the CJEU judgments are interpreted divergently across the selected EU Member States;
- Examine how the EU Charter of Fundamental Rights is used in the selected Member States when applying the CJEU judgments in question.

The study is designed for legal practitioners, academics and decision makers who apply the asylum related CJEU judgments and the EU Charter to their policy, decision-making, litigation, research and advocacy work.

### Scope and limitations of the study

Due to the practical and budgetary constraints the study is limited to the analysis of three selected asylum-related CJEU judgments and the application of the EU Charter in seven EU Member States: **Belgium, Bulgaria, France, Germany, Sweden, the Netherlands and the UK**. We were also able to include **Italy**, but only for the first two sections of the report. These three CJEU judgments include:

- Joined Cases C-199/12, C-200/12 and C-201/12, X, Y and Z (Raad van State, reference on Council Directive 2004/83/EC, 7 November 2013),
- Joined Cases C-148, C-149 and C-150/13, A, B and C v Staatssecretaris van Veiligheid en Justitie (Raad van State, the Netherlands, reference for a preliminary ruling on Article 4 of Council Directive 2004/83/EC and Articles 3 and 7 CFREU, 2 December 2014),
- Case C-179/11 CIMADE, Groupe d'information et de soutien des immigrés (GISTI) v Ministre de l'Intérieur, de l'Outre-Mer, des Collectivités Territoriales et de l'Immigration (Conseil d'État (French) reference on Council Directive 2003/9/EC, 27 September 2012).

The study refers to the relevant national administrative authorities responsible for determining asylum applications as well as the Court systems in the respective countries included. For ease of reference we direct readers to the country reports listed on the [Asylum Information Database \(AIDA\)](#) which provides detailed information and illustrative charts on the administrative and judicial asylum procedures within the studied States.

# Executive summary

## General findings in X.Y.Z.

The X.Y.Z. judgment answered three principal questions. First, whether homosexuals asylum seekers are members of particular social group, second whether homosexual asylum applicants can be expected to conceal or restrain their expression of sexual orientation to reduce the risk of persecution, third to what extent criminalisation of homosexual acts amounts to persecution.

- » The impact of the judgment depended on the legislative and policy history of the particular Member State and was less evident in Member States whose practices were consistent with the CJEU judgment such as **France** and **Italy**.
- » Moreover, it was generally challenging to single out whether it was the X.Y.Z. judgment that contributed to changes concerning discretion and/or membership of a particular social group in most Member States. Researchers from **Germany, France, Italy** and **Sweden** specified other factors contributing to such changes, namely the transposition of provisions of the recast Qualification Directive into domestic law, previous CJEU jurisprudence, national case law developments and reforms of asylum agencies.
- » The X.Y.Z. judgment did not result in formal legislative changes in **seven** of the Member States researched. Only **the Netherlands**, which made the preliminary reference in X.Y.Z., amended the 2000 Aliens Circular.
- » Overall, policy and decision makers as well as the judiciary in most Member States applied the judgment relatively consistently, derogating from the Court's conclusions in limited instances and based on the individual circumstances of the case. Divergent interpretation by various actors across a Member State was identified to some extent in **Belgium** and **the UK**, and to a considerable extent in **Bulgaria**. Divergent interpretation by domestic authorities and the judiciary was more evident to aspects of the judgment where the CJEU did not provide clear and sufficient interpretive guidance.

*Member State practice on whether the actual criminalisation of homosexual activities and the threat of imprisonment in relation thereto constituted as an act of persecution following the judgment*

- » Practice in **Belgium, Germany, the Netherlands, the UK** and **Sweden** is in accordance with the CJEU's conclusions in X.Y.Z, deriving, in part, from the judgment.
- » **French** and **Italian** practice was not affected by X.Y.Z. and goes beyond the judgment due to favourable practice predating it.
- » **Bulgaria** has still not addressed the question to what extent a term of imprisonment in the country of origin constitutes an act of persecution.

*Member States practice on whether homosexual asylum seekers can be expected to conceal their sexual orientation or exercise restraint in their country of origin in order to avoid persecution following X.Y.Z.*

- » As the result of the CJEU decision, the **Dutch** policy on restraint rather than concealment *per se* has changed. Policy clarifies that no concealment of sexual orientation can be expected from an asylum seeker upon return in their country of origin. Nonetheless lingering concerns remain over whether concealment is entirely ruled out since questions as to how the asylum seeker expressed their homosexuality in the past and how they are going to express it in future can still be asked.
- » Divergent and more restrictive practice exists in **Belgium** and **the UK**. On the one hand, the non-concealment principle is being applied more strictly in Belgium and is also followed by a number of judges in **the UK**. On the other hand, various actors in **Belgium** and **the UK** still apply the *HJ(Iran)* discretion test to sexual orientation based claims. The authorities and judiciary sometimes differentiate between asylum seekers, who were considered to be 'naturally discreet' and asylum seekers whose concealment of their sexuality was founded on a fear of persecution. Similar restrictive practice exists in **Bulgaria**.
- » The practice in **France, Germany, Italy** and **Sweden** was not significantly affected by the X.Y.Z. judgment due to favourable practice and case law prior to the judgment.
- » Moreover, the above mentioned practice in the Member States generally extends to the other grounds

of persecution such as religious belief and political opinion.

*Member States practice on whether homosexual asylum seekers form a particular social group and whether this is affected by the existence of relevant criminal laws, following the X.Y.Z. judgment.*

- » Prior to X.Y.Z., in all Member States, bar **Bulgaria**, LGBT asylum seekers could be regarded as being part of a particular social group, even if there were no criminal laws in place specifically targeting homosexuals. This practice generally predated the judgment and as a consequence the judgment had little impact in the countries concerned.
- » The X.Y.Z. judgment contributed to a substantial change in practice in **Bulgaria**, where the Sofia City Administrative Court referring to the CJEU decision, found homosexual asylum seekers, whose countries of origin criminalized homosexual acts, as members of a particular social group.

### General findings in A.B.C.

A.B.C. centered on the restrictions which the EU Charter sets in place when assessing an asylum seekers claimed sexual orientation. It concerned the weight that can be attributed to certain evidence presented to substantiate an applicant's homosexuality as well as what decision makers are prohibited and asking and accepting as evidence. It also considered the impact of disclosing one's sexual orientation after a delayed period of time.

- » Both prior to and following the judgment, assessing the credibility of claims based on sexual orientation was described as very difficult by numerous interviewed judges and decision makers.
- » Following the judgment, a number of individuals interviewed stated that while it was clear what couldn't be asked, it wasn't entirely clear what could be asked. This led to some judges compiling lists of what can be asked to counterbalance the guidance by the CJEU of what cannot be asked. It is clear that the issue of how to assess claims based on sexual orientation is still not settled. In October 2016, another question was posed to the CJEU from **Hungary** on the use of evidence and the method of assessing LGBTI claims (Case C-473/16). It asks;

In the light of Article 1 of the Charter of Fundamental Rights of the European Union, must Article 4 of Directive 2004/83/EC 1 be interpreted as not precluding a forensic psychologist's expert opinion based on projective personality tests from being sought and evaluated, in relation to LGBTI applicants for asylum, when in order to formulate that opinion no questions are asked about the applicant for asylum's sexual habits and that applicant is not subject to a physical examination?

If the expert opinion referred to in question 1 may not be used as proof, must Article 4 of Directive 2004/83 be interpreted, in the light of Article 1 of the Charter of Fundamental Rights of the European Union, as meaning that when the asylum application is based on persecution on grounds of sexual orientation, neither the national administrative authorities nor the courts have any possibility of examining, by expert methods, the truthfulness of the applicant for asylum's claims, irrespective of the particular characteristics of those methods?

- » Prior to the judgment, sexually explicit questions were posed, to varying degrees and to various categories of asylum applicants (for example lesbians and those who were subject to the detained fast track procedure in the UK) in **Sweden, Belgium and the UK**.
- » Prior to the judgment, evidence as defined in paragraph 65 of the judgment was allowed to a certain extent in both **Sweden and the UK**. In **Germany and Italy**, psycho-medical evidence was accepted.
- » In almost all Member States there was an acknowledgement that there may be genuine reasons for applicants, whose claims are based on their sexual orientation, for late disclosure. Nonetheless, whilst not a determinative factor of a lack of credibility, it can be used against the applicant's credibility. There are still ongoing concerns in **the UK** as to which stage of the asylum procedure is the appropriate forum for disclosing one's sexual orientation. Following the judgment, three countries have issued a public guidance, notably, **the UK, Sweden and the Netherlands** on late disclosure.
- » Following the judgment, the biggest change in practice could be seen in **the UK** and in **France**, but this also needs to be considered within a broader context. In **France**, credibility practices were already changing where French asylum authorities were taking greater account of the vulnerability of the applicant. Furthermore, Article 4 of the recast Qualification Directive and Article 15 of the recast

Procedures Directive were only transposed into French law<sup>1</sup> in July 2015 so the duty of cooperation and taking into account the applicant's vulnerability now had a legal basis. In **the UK**, the Asylum Policy Instructions were revised in light of *A.B.C.* but during the same period, a change in practice was already occurring in relation to how sexual orientation based claims were assessed, including the applicant's credibility, due to dialogue with NGOs and internal policy work.

- » In almost all the countries reviewed, stereotyped questions continued to be asked after *A.B.C.*, seemingly to counter balance the prohibition of sexually explicit questioning. In other countries such as **France**, **the UK** and **the Netherlands**, specific instructions were issued on how to pose questions and what other factors need to be taken into account to avoid making decisions based on solely stereotypical notions.
- » Post *A.B.C.* in some Member States, such as **Belgium**, there now seems to be an inverse requirement, arguably stereotypical in nature, that applicants are expected to show more modesty and reticence in divulging their personal experiences where applicants hail from a more repressive country.
- » Following the judgment, all photographic and video evidence that illustrated sexual activity were prohibited from being taken into account as evidence to substantiate the credibility of an applicant, marking a change in practice for certain Member States, such as **Sweden** and **the UK**.
- » Following the judgment, practice on late disclosure continued to remain the same. It appears that if valid reasons are given as to why the applicant waited to disclose their sexual orientation, these are taken into account in the credibility assessment. Rules in relation to late disclosure also formed part of practice guidelines in **the Netherlands** and in the internal **French** practice guidelines.

### General Findings in *Cimade and Gisti*

*Cimade and Gisti* considered the application of the Reception Conditions Directive and provision of reception conditions to asylum applicants subject to a Dublin transfer. In addition, it discussed when such entitlement to reception conditions ends for persons within the Dublin procedure.

- » Prior to the judgment, in **France**, **Bulgaria** and **Belgium**, at various stages in the procedure, persons subject to a Dublin transfer decision were denied reception conditions.
- » Following the judgment in **France** and **the Netherlands**, formal changes were made in legislation, to incorporate the judgment.
- » Following the judgment in **Belgium**, instructions were issued by Fedasil, and the Cabinet of the State Secretary for Asylum and Migration in relation to when and what material reception conditions should be provided to Dublin transferees, but no formal change to the law took place.
- » In **France**, despite the instructions, legislative changes and two judgments from the Council of State following *Cimade and Gisti*, practice still diverged from the principles established in the judgment and there is still not enough accommodation available for persons subject to a Dublin transfer decision.
- » Following the judgment, **Bulgaria**, has still not amended its legislation which permits that under certain circumstances, accommodation can cease from the moment another Member State has accepted they are responsible for the examination of an asylum claim. In practice, accommodation is not always available to persons subject to a Dublin transfer procedure.
- » In **the UK**, persons subject to a Dublin transfer who were not detained were granted reception conditions both before and after the *Cimade and Gisti* judgment.
- » Aside from persons who are denied reception conditions and who are subject to a Dublin transfer decision, accommodation is often also denied between the 'making' and the 'lodging' of an asylum claim. This can be the case in **France**, **Belgium** and **Bulgaria**. Sometimes the waiting period between these two stages can be quite significant.

### General Finding on the use of the Charter of Fundamental Rights of the EU

- » While **five** out of the **seven** Member States seem to have conducted an impact assessment of relevant EU asylum laws in light of higher legal norms, only one the Member State (**Belgium**) specifically verifies proposed implementing legislation in light of the EU Charter, among other international instruments.

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1. Law of 29 July 2015.



- » Many of the interviewees and researchers indicated that the EU Charter is still perceived as a relatively new instrument, and that with more information, time and trainings on its use, the instrument would be more relied upon by both practitioners and judges. In the interim, State practice seems to show that if an international instrument is to be relied upon, and this is not always the case, practitioners would look towards the more well-known and more used European Convention on Human Rights.
- » Numerous commentators stated that if more senior national courts and the CJEU themselves relied upon the EU Charter when delivering decisions, other courts and practitioners would follow.
- » In the majority of Member States there were no discernible trends as to whether certain national courts referred and relied upon the EU Charter more than others. In **Germany**, second and third instance courts cited the EU Charter more often than first instance courts in their judgments. In **Sweden**, it was clear that the Migration Court of Appeal made more references to the EU Charter than lower courts.
- » Following **X.Y.Z.**, there was very little reference to the EU Charter in any of the relevant subsequent national judgments that were examined. In **France** and **the Netherlands**, the policy guidelines and training materials published after the judgment did refer to the EU Charter.
- » Following **A.B.C.**, in all of the case law examined, the EU Charter hardly played a role in subsequent relevant national case law.
- » Following **Cimade and Gisti**, the EU Charter informed national relevant case law in **Belgium** and **Bulgaria**. It did not seem to play a major role any guidance issued or case law in the five other Member States.

## Recommendations

- » From reviewing the questions posed in the three judgments studied, as well as a broader analysis of references to the CJEU in the asylum domain, it is clear that the Court will restrict itself to the questions posed, and generally, not go beyond this. Therefore, questions posed to the Court should be phrased in a manner that enables the Court, when examining a legislative provision, to explain both impermissible State actions and proactive obligations upon authorities. Judicial training on EU law should also address how to refer and frame a reference to the Court of Justice of the EU.
- » In order to ensure transparency and provide clarity as to how national courts are interpreting European legislation and CJEU jurisprudence, domestic asylum case law should be made available online. While some asylum law databases exist, such as the European Database on Asylum Law, EDAL, other databases are only available to members of the judiciary. Specific transparency should be assured where the country referring the case to the CJEU implements the Court's judgment.
- » By the same token, any national internal guidance issued in light of a judgment from the CJEU should be accessible so as to better assess whether and to what extent States are implementing CJEU judgments.
- » Member States must ensure that guidance given by the CJEU on how a provision of EU law should be interpreted is duly taken into account. Furthermore, national legislation and/or guidelines as well as actual practice must be in compliance with the EU Charter.
- » In order to ensure that the right to human dignity under the EU Charter is upheld, and in order to comply with the *Cimade Gisti* judgment, applicants for international protection need to be provided with material reception conditions at all stages of the asylum procedure, and must not be denied reception conditions, even for a temporary period of time. Member States must ensure that the national legal framework contains the necessary safeguards to ensure that applicants have access to material reception conditions as soon as an application is made.
- » Judicial authorities, law enforcement bodies and administrations are essential actors to ensure that concrete effect is given to the rights and freedoms enshrined in the EU Charter. It is incumbent upon national authorities to proactively apply and rely upon the EU Charter when taking decisions, or when transposing legislation in order to make it a real living instrument.
- » To increase the use and knowledge of the EU Charter, information exchange and training should be facilitated amongst practitioners and judges regarding its use and application. This should occur both within and between Member States. Furthermore, online training modules such as EASO's training modules should ensure that the EU Charter is mainstreamed throughout.
- » In order to ensure reliance upon the EU Charter, its obligations should be mainstreamed through EU legislation, policy positions and guidance notes.
- » In order to promote awareness of the EU Charter rights, EU funds should continue to be directed to facilitate trainings on the EU Charter. Targeted on-line training modules should also be available for national judges and other legal practitioners. This should be incorporated into the wider fundamental rights framework including the European Convention on Human Rights as well as national Constitutional law.

# Methodology

The methodology was developed by ECRE in a close collaboration with the Advisory Panel and with an input by the national researchers. It was also informed by the findings of the study, published by the Hungarian Helsinki Committee in 2012 ‘The Luxembourg Court: Conductor for a Disharmonious Orchestra?’ The drafters sought to select judgments and jurisdictions that are representative, highlight challenges as well as best practices. In order to obtain detailed, comparable and accurate information on each jurisdiction included in the study, ECRE developed questionnaires which the national researchers filled in.<sup>2</sup> The information provided by the national researchers is based on available academic literature, case law from national and European courts, guidelines issued by national authorities, EU and national legislation as well as interviews with the relevant stakeholders.

## Temporal Scope

The national research took place in April – July 2016 and was supplemented by desk research carried out by ECRE in July – September 2016. The results of the research, while providing detailed information on the impact of the selected CJEU judgments and the use of the EU Charter in selected EU Member States, therefore, might not fully reflect current practice in these Member States. This is due to a number of factors, including the continuing developments in the Common European Asylum System (CEAS) and a lack of transparency and access to case law and policy developments in some Member States.

## Geographical Scope

The present research was carried out in seven EU Member States: **Belgium, Bulgaria, France, Germany, the Netherlands, Sweden** and **the UK**. We were also able to include **Italy** for the first two sections of the report. It focussed on countries that presented a cross-regional view, and a variety of legal systems and traditions. The states selected were identified using the following criteria:

- » *Diverse legal traditions*: The study includes both common law and civil law countries;
- » *Diverse judicial systems*: The study includes two Member States with specialised asylum courts or tribunals.
- » *Correlation between preliminary references and implementation of CJEU judgments*: The courts or tribunals of all selected countries submitted questions for preliminary rulings to the CJEU in the area of justice and home affairs.
- » *Accessible guidance on the implementation of CJEU judgments*: The study includes three countries known to publish interpretative guidelines, or policy positions in reaction to the CJEU judgments, as well as countries without any official guidance in this regard.
- » *Access to case law*: The drafters only included countries, where they were confident they would be able to access domestic jurisprudence.
- » *Divergent practice*: The study includes countries where our preliminary research through the EDAL database and the ELENA network, has shown challenges with the use of the EU Charter and the CJEU case law by decision makers and judiciary as well as the countries that are regularly using these.
- » *Number of asylum applications*: The study includes Member States receiving large numbers of international protection seekers as arguably such countries should have presided over the issues researched in more cases.

## Material Scope and the CJEU judgments selection criteria

One of the crucial points in relation to this study was to select the most informative asylum-related CJEU judgments with regards to how they are implemented domestically and how the EU Charter is being used to assist their implementation. Three CJEU asylum-related judgments researched were identified using the following criteria:

- » *Time passed since the judgment was adopted by the Court*: In order to allow for national trends or practices to become apparent ECRE excluded CJEU judgments adopted post 1 January 2015;

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2. For the case of Italy, we were able to add it as a participating country but only at a later stage when the structure of the report was already known. Therefore, for Italy, the researcher only responded to the sections that were ultimately included in the study.

- » *CJEU procedure and content of the judgment*: ECRE excluded judgments that were not adopted as part of a preliminary ruling procedure, very technical judgments and judgments which only related to country specific procedures;
- » *Research by other stakeholders*: ECRE excluded judgments that have already been researched in detail by other stakeholders, e.g. *C-465/07 Meki Elgafaji, Noor Elgafaji v Staatssecretaris van Justitie*;
- » *References to the EU Charter*: ECRE focused on judgments that make specific reference to the EU Charter;
- » *Policy changes brought about by the revised recast EU asylum acquis or that could be affected by ongoing CEAS reform negotiations*: ECRE excluded Dublin Regulation judgments in view of the numerous pending preliminary rulings as well as the significant review of the Regulation by the European Commission. The drafters also excluded other CJEU judgments when their implementation could have been affected by the policy changes in the recast EU asylum *acquis*.
- » *Importance of the judgment in light of ECRE's advocacy and litigation related activities*.

The material scope of the EU Charter component looks at instances whereby the EU Charter is used by the decision makers and judiciary and to what extent specific provisions of the EU Charter are mentioned or used in the national implementing case law of the three judgments reviewed. The research also analyses whether there is any national guidance, legislation or policy in place in order to ensure the EU Charter is taken into account when applying the EU asylum *acquis*.

For consistency purposes, the Advisory Panel and ECRE provided the national researchers with guidance on how to select stakeholders for interview as well as the criteria against which domestic jurisprudence should be evaluated. The researchers were requested to select domestic judgments that:

- » dealt with the subject matter and has a significant impact in their jurisdiction;
- » indicated an evolution or regression in the national interpretation of an EU or national legislation provision following the CJEU judgment in question;
- » are based on or implement a specific CJEU judgment or indicate divergence from a specific CJEU judgment;
- » demonstrate instances where Member States have maintained higher standards than required by the CJEU judgment.

In order to ensure accurate and balanced research findings, the cases were selected regardless of the outcome for the applicant and were not limited to decisions of higher courts. However, where possible, for practical and methodological purposes, the researchers were requested not to review first instance decisions. Researchers narrowed down the cases reviewed by searching for key terms including the names of the cases, or key issues on which the CJEU judgment decided upon. Summaries and references to the cases reviewed are on file with the author and a more detailed explanation on how each researcher chose the national cases researched. The numbers referred to below are cases that were thoroughly reviewed for this study, many more were screened in order to select the most relevant judgments and the authors have this information on file. For a more holistic view, we also asked the researchers to interview officials, judges, practitioners and other key stakeholders. Some were interviewed in their official capacity, but others spoke in their personal capacity, about their own personal perceptions and experiences (for example, all German interviewees spoke in their personal capacity).

### Cases thoroughly reviewed for this study

Country	Cases reviewed for X.Y.Z.	Cases reviewed for A.B.C.	Cases reviewed for Cimade and Gisti
Belgium	15 judgments	30 judgments	17 judgments
Bulgaria	23 judgments	23 judgments	24 judgments
France	70 judgments	70 judgments	20 judgments
Germany	41 judgments	53 judgments	13 judgments
Italy	33 judgments	33 judgments	N/A
Netherlands	27 judgments	21 judgments	20 judgments
Sweden	37 judgments	37 judgments	17 judgments
United Kingdom	22 judgments	5 judgments	13 judgments

### Persons interviewed for this study

Country	Name, Position and Organisation of interviewee
Belgium	<p>Anonymous Legal Advisor, Directorate European Law, <b>Directorate General Legal Affairs, Ministry of Foreign Affairs</b></p> <p>Benoît D'hondt, <b>Lawyer</b></p> <p>Vincent Pajera, Eurocoordinator, <b>Ministry of Internal Affairs</b></p> <p>Three Magistrates at the <b>Council for Alien Legislation</b></p> <p>Nicolas Jacobs, Assistant, Director of Legal Affairs, <b>Fedasil</b></p> <p>Maité Vanregenmorter, Legal Counsel for CALL and CGRS, <b>State Secretary of Asylum and Migration</b></p>
Bulgaria	<p>Alexander Agopov, Senior Expert, <b>National Commission for Protection against Discrimination</b></p> <p>Nataliya Angelova, Judge, <b>Sofia City Administrative Court</b></p> <p>Boryana Borodzhieva, Judge, <b>Sofia City Administrative Court</b></p> <p>Kameliya Dimitrova, General Secretary, <b>National Commission for Combatting Trafficking in Human Beings</b></p> <p>Tatyana Kulinova, Lawyer, Directorate 'Administrative and legal services and human resources', <b>State Agency for Refugees</b></p> <p>Denitsa Lyubenova, Lawyer, <b>LGBT Youth organization "Deystvie"</b></p> <p>Dobryana Petkova, Senior Expert, <b>National Commission for Combatting Trafficking in Human Beings</b></p> <p>Iliana Savova, Director, Refugees' and Migrants' Legal Protection Programme, <b>Bulgarian Helsinki Committee</b></p> <p>Daniela Siniobradska, Interviewer, Unit 'Procedure on International Protection', Reception Centre Sofia – Voenna Rampa, <b>State Agency for Refugees</b></p> <p>Elisaveta Lyutskanova-Stoyanova, Senior Expert, <b>National Commission for Protection against Discrimination</b></p> <p>Alexander Velichkov, Interviewer, Unit 'Procedure on International Protection', Reception Centre Sofia – Ovcha kupel, <b>State Agency for Refugees</b></p>

<p><b>France</b></p>	<p>Johan Ankri, Head of the 2nd Section on Litigation and Permanent Secretary of the Harmonization Committee, Legal, European and International Affairs Division, <b>French Office for the Protection of Refugees and Stateless Persons</b></p> <p>Coralie Capdeboscq, Officer in charge of Vulnerabilities, Legal, European and International Affairs Division, <b>French Office for the Protection of Refugees and Stateless Persons</b></p> <p>Frédéric Chaumont, President and Coordinator, <b>Association for the Recognition of Homosexuals and Transsexuals' Rights to Immigration and Residence</b></p> <p>Jean-Marie Cravero, <b>SGAE, General Secretary for European Affairs</b></p> <p>Adrienne Rodriguez Cruz, contact person for the thematic working group on Sexual Orientation and Gender Identity, Legal, European and International Affairs Division, <b>French Office for the Protection of Refugees and Stateless Persons</b></p> <p>Isabelle Dely, Judge, President of a <b>National Court of Asylum Chamber</b> and of the Research and Documentation Department</p> <p>Lydiane Dumas, Dublin Officer, <b>Forum réfugiés-Cosi</b></p> <p>Raphaël Nicolle, geopolitical researcher, Research and Documentation Department, <b>National Court of Asylum</b></p> <p>Daniel Tardif, legal researcher, Research and Documentation Department, <b>National Court of Asylum</b></p> <p>Me Thomas Wendling, Lawyer</p>
<p><b>Germany</b></p>	<p>Jan Bergmann, Presiding Judge at <b>VGH Baden-Württemberg</b></p> <p>Harald Dörig, Judge at the <b>Federal Administrative Court</b></p> <p>Pauline Endres de Oliveira, <b>Lawyer</b></p> <p>Julia Kraft, <b>Lawyer</b></p> <p>Bernward Ostrop, <b>Caritas Deutschland</b></p> <p>David Rabenschlag, Judge at the <b>Administrative Court, Berlin</b></p> <p>Katharina Schoenes, <b>PhD researcher</b></p> <p>Barbara Wessel, <b>Lawyer</b></p> <p>Janna Weißels, <b>PhD researcher</b></p> <p>Two Judges who wished to remain anonymous</p>
<p><b>Italy</b></p>	<p>Jonathan Mastellari, Secretary and Board Member, <b>MigraBo' LGBTI</b></p> <p>Emanuela Parisiani, <b>Independent Asylum and Migration Expert</b></p> <p>Interviews with <b>refugees</b> on account of their sexual orientation</p>
<p><b>Netherlands</b></p>	<p>Ashley Terlouw, Professor of Sociology of Law, <b>Radboud University; Deputy Judge, Regional Court in Arnhem</b></p> <p>Robert Visser, Senior Legal Adviser, <b>Immigration and Naturalisation Services</b></p>

<p><b>Sweden</b></p>	<p>Björn Berselius, Judge, <b>Administrative Court of Appeal in Stockholm</b>, Lecturer in Law, one of the chief architects at the Ministry of Justice of the Swedish Aliens Act</p> <p>Linda Öman Bristow, Official at the Division for Migration and Asylum Policy, <b>Ministry of Justice</b>. Previously a law clerk at the Administrative Court of Appeal in Stockholm</p> <p>Tomas Fridh; <b>Attorney, ELENA Coordinator</b></p> <p>Aino Gröndahl, Laywer, <b>The Swedish Federation for Lesbian, Gay, Bisexual, Transgender and Queer Rights</b></p> <p>Henrik Hedberg; Judge, <b>Administrative Court, Malmö and Lecturer in Law</b></p> <p>Helene Hedebris, Attorney, <b>Swedish Migration Agency</b></p> <p>Anna Hjärtberg Wernqvist, <b>Judge Administrative Court of Luleå</b>. Previously worked at the Administrative Court of Appeal in Stockholm</p> <p>Annkatrin Meyerson, PhD researcher, <b>University of Göteborg</b>. Previously a Law Clerk at the Administrative Court in Göteborg</p> <p>Hans Sundberg, Judge, <b>Higher Administrative Court in Övre Norrland</b>, previously worked at the Court of Justice of the EU</p> <p>Mattias Wahlstedt, Deputy Director-General, Division for Migration and Asylum Policy, <b>Ministry of Justice</b>, previously was a Judge</p>
<p><b>United Kingdom</b></p>	<p>Paul Dillane, Executive Director, <b>Lesbian &amp; Gay Immigration Group United Kingdom</b></p> <p>Marie-Anne Fishwick, Legal Researcher, <b>Asylum Support Appeals Project</b></p> <p>Louise Hooper, Barrister, <b>Garden Court Chambers</b></p> <p>John Nicholson, Barrister, <b>Kenworthys Chambers</b></p>

## Terminology and List of Abbreviations

This study uses the concepts of sexual orientation and gender identity as described in the Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity.<sup>3</sup> Where the claim only relates to the sexual orientation of the applicant, we have only used the term 'sexual orientation' to ensure the exactness of the Court's decisions. Where a national court uses the term 'LGBT' or 'LGBTI' we also use this term in explaining that court decision. Finally, where the term 'homosexual' is used either by the CJEU or the national court, we have also used this term where necessary to accurately capture the meaning of the judgment or the legal issue at hand.

<b>AIDA</b>	Asylum Information Database
<b>ADA</b>	<i>Allocation pour demandeurs d'asile</i>   Allowance for asylum seekers, France
<b>API</b>	Asylum Policy Instruction, United Kingdom
<b>ARDHIS</b>	<i>Association pour la Reconnaissance des Droits des personnes Homosexuelles et transsexuelles à l'Immigration et au Séjour</i>   Association for the Recognition of Homosexuals and Transsexuals' Rights to Immigration and Residence, France
<b>ATA</b>	<i>Allocation temporaire d'attente</i>   Temporary Waiting Allowance, France
<b>BAMF</b>	<i>Bundesamt für Migration und Flüchtlinge</i>   Federal Office for Migration and Refugees (The national asylum authority), Germany
<b>BMI</b>	<i>Bundesministerium des Innern</i>   Federal Ministry of the Interior, Germany
<b>BverwG</b>	<i>Bundesverwaltungsgericht</i>   Federal Administrative Court, the highest Administrative Court, Germany
<b>BverfG</b>	<i>Bundesverfassungsgericht</i> , Federal Constitutional Court, Germany
<b>CADA</b>	<i>Centre d'accueil pour demandeurs d'asile</i>   Reception centre for asylum seekers, France
<b>CALL</b>	<i>Conseil du contentieux des étrangers</i>   Council for Alien Legislation (First instance Administrative Court), Belgium
<b>CBAR-BCHV</b>	<i>Comité belge d'aide aux réfugiés</i>   Belgisch Comité voor Hulp aan Vluchtelingen   Belgian Refugee Council
<b>CEAS</b>	Common European Asylum System
<b>CESEDA</b>	<i>Code de l'entrée et du séjour des étrangers et du droit d'asile</i>   Code on entry and residence of foreigners and asylum, France
<b>CGRS</b>	<i>Commissaire général aux réfugiés et aux apatrides</i>   Commissariaat-generaal voor de vluchtelingen en de staatlozen   Commissioner-General for Refugees and Stateless Persons, Belgium
<b>CNDA</b>	<i>Cour nationale du droit d'asile</i>   National Court of Asylum, France
<b>COI</b>	Country of Origin Information
<b>CJEU</b>	Court of Justice of the European Union
<b>CEREDOC</b>	<i>Centre de recherche et documentation</i>   Research and Documentation Department (of CNDA), France
<b>DFT</b>	Detained fast-track procedure, United Kingdom
<b>DG HOME</b>	European Commission Directorate-General for Home Affairs
<b>DIDR</b>	<i>Division de l'information</i> Directorate-General for Home Affairs/lozenlece   Information, Documentation and Research Department (of OFPRA), France
<b>DNA</b>	<i>Dispositif national d'accueil</i>   National Reception Scheme, France
<b>EASO</b>	European Asylum Support Office

3. The Yogyakarta Principles describe sexual orientation and gender identity, respectively, as follows: '(s)exual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender'; '(g)ender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms'.



<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>ECRE</b>	European Council on Refugees and Exiles
<b>EDAL</b>	European Database of Asylum Law
<b>EU</b>	European Union
<b>Fedasil</b>	Federal Agency for the Reception of Asylum Seekers, Belgium
<b>FTT (IAC)</b>	First-Tier Tribunal Immigration and Asylum Chamber, United Kingdom
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>GISTI</b>	<i>Groupe d'information et de soutien des immigrés</i>   Immigration support and information group, France
<b>HUDA</b>	<i>hébergement d'urgence dédié aux demandeurs d'asile</i>   emergency housing for asylum seekers, France
<b>ICIBI</b>	Independent Chief Inspector of Borders and Immigration, the United Kingdom
<b>IND</b>	<i>Immigratie en Naturalisatiedienst</i>   Immigration and Naturalisation Service (the Netherlands)
<b>LAR</b>	Law on Asylum and Refugees, Bulgaria
<b>LRI</b>	Local reception initiative   <i>initiative locale d'accueil (ILA)</i>   <i>lokaal opvang initiatief (LOI)</i> , Belgium
<b>NGO(s)</b>	Non-governmental organisation(s)
<b>OFII</b>	<i>Office français de l'immigration et de l'intégration</i>   French Office for Immigration and Integration
<b>OFPPRA</b>	<i>Office Français pour la Protection des Réfugiés et des Apatrides</i>   French Office for the Protection of Refugees and Stateless Persons
<b>OVG/VGH</b>	<i>Oberverwaltungsgericht/Verwaltungsgerichtshof</i>   Higher Administrative Court, Germany
<b>RFSL</b>	<i>Riksförbundet för homosexuellas, bisexuellas, transpersoners och queeras rättigheter</i>   The Swedish Federation for Lesbian, Gay, Bisexual, Transgender and Queer Rights
<b>SAR</b>	State Agency for Refugees, Bulgaria
<b>SCAC</b>	Sofia City Administrative Court, Bulgaria
<b>SPRAR</b>	<i>Sistema di protezione per richiedenti asilo e rifugiati</i>   System for the protection of asylum seekers and refugees, Italy
<b>SSHD</b>	Secretary of State for the Home Department, United Kingdom
<b>TEU</b>	Treaty on European Union
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UKBA</b>	United Kingdom Border Agency
<b>UKBF</b>	United Kingdom Border Force (previously part of UKBA)
<b>UKHL</b>	United Kingdom House of Lords (appellate court now UKSC)
<b>UKLGIG UK</b>	Lesbian & Gay Immigration Group, United Kingdom
<b>UKSC</b>	United Kingdom Supreme Court
<b>UKVI</b>	United Kingdom Visas and Immigration
<b>UT (IAC)</b>	Upper Tribunal Immigration and Asylum Chamber, United Kingdom
<b>UTT</b>	Upper Tier Tribunal (UK)
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>VG</b>	<i>Verwaltungsgericht</i>   Administrative Court (First-level Administrative Court), Germany

## X. Y. Z. v Minister voor Immigratie en Asiel

### Facts of the case:

*X.Y.Z. v Minister voor Immigratie en Asiel*, decided on 7 November 2013<sup>4</sup> concerned three asylum applicants in the Netherlands from Sierra Leone, Uganda and Senegal respectively. In each country of origin, homosexuality is a criminal offence punishable by a term of imprisonment. In none of the cases has the applicant demonstrated that he has already been persecuted or threatened with persecution on account of his sexual orientation.

### Referred questions:

The Council of State sought clarification from the CJEU as to how to approach these asylum applications. The domestic court asked, in essence, three questions:

1. Do foreign nationals with a homosexual orientation form a 'particular social group' capable of qualifying for protection under the Article 10(1)(d) of the Qualification Directive?<sup>5</sup>
2. Can foreign nationals with a homosexual orientation be expected to conceal their orientation or exercise restraint in their country of origin in order to avoid persecution?
3. Does the criminalisation of homosexual activities and the threat of imprisonment in relation thereto constitute an act of persecution within the meaning of Article 9(1)(a) read in conjunction with Article 9(2)(c) Qualification Directive?

### Decision & Reasoning:

The CJEU answered the questions in a different order, deciding that 'the existence of criminal laws,[...] which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group'.<sup>6</sup> It found that Article 10(1)(d) Qualification Directive provides that membership of a 'particular social group', may give rise to a genuine fear of persecution, if two conditions are met: (a) members share a characteristic or belief that is fundamental to their identity or conscience; (b) members have a 'distinct identity' because they are 'perceived as being different by the surrounding society'. As to (a), the second subparagraph of Article 10(1)(d) Qualification Directive states that depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation'. On this basis, the Court ruled that 'a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it'.<sup>7</sup> As to (b), the court saw the condition as met by virtue of 'the existence of criminal laws[...] which specifically target homosexuals'.<sup>8</sup>

In relation to the 'the criminalisation of homosexual acts', it found that by virtue of Article 9(1)(a) Qualification Directive, the relevant acts must be 'sufficiently serious' by their nature or repetition as to constitute a 'severe violation of basic human rights'. The Court infers from this that 'not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness'.<sup>9</sup> Therefore, 'the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution'.<sup>10</sup> Instead, the Court says it is for 'the national authorities to undertake[...] an examination of all the relevant facts concerning the country of origin including its laws and regulations[...] in particular [whether] [...] the term of imprisonment provided for by such legislation is applied in practice'.<sup>11</sup>

Considering the issue of concealment, the Court reasons by analogy with *Y and Z* Joined Cases C-71/11 and

4. CJEU, Case C-199/12, C-200/12, C-201/12, *X. Y. Z. v Minister voor Immigratie en Asiel*, 7 November 2013.

5. 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 [2004] OJ L 304/12 ('Qualification Directive').

6. CJEU, Case C-199/12, C-200/12, C-201/12, *X. Y. Z. v Minister voor Immigratie en Asiel*, 7 November 2013, para. 48.

7. *Ibid*, para. 46.

8. *Ibid*, para. 48.

9. *Ibid*, para. 53.

10. *Ibid*, para. 55.

11. *Ibid*, paras 58 - 59.

C-99/11, where the Court ruled that the possibility of avoiding the risk of persecution by abstaining from religious practice is not to be taken into account in determining the risk of persecution. The same applies by analogy to cases of sexual orientation persecution. The Court states that ‘requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot be required to renounce it’.<sup>12</sup> ‘The fact that [the applicant] could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account’.<sup>13</sup>

### The Court ruled:

Article 10(1)(d) 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 must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group.

Article 9(1) of Directive 2004/83, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts *per se* does not constitute an act of persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.

Article 10(1)(d) of Directive 2004/83, read together with Article 2(c) thereof, must be interpreted as meaning that only homosexual acts which are criminal in accordance with the national law of the Member States are excluded from its scope. When assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation.

## Introduction

This section looks at the impact the *X. Y. Z. v Minister voor Immigratie en Asiel* (hereinafter ‘X. Y. Z.’) judgment has made to both practice and policy in the selected Member States. Many commentators have praised the *X. Y. Z.* judgment for: (i) recognizing homosexual asylum seekers, who come from countries where homosexuality is criminalized, as a particular social group, (ii) finding that actually applied imprisonment must constitute an act of persecution, and (iii) acknowledging that an asylum seeker cannot be expected to conceal his homosexuality or exercise restraint in the expression of his sexual orientation in his country of origin to avoid the risk of persecution.<sup>14</sup> Others, however, criticised the judgment for failing to acknowledge the persecutory effect of laws criminalizing homosexuality *per se*.<sup>15</sup>

In light of the above, this section will provide an insight into how the judgment has influenced the practice and policy in the selected Member States regarding the assessment of asylum applications based on sexual orientation. This section begins by briefly analysing Member States practice prior to the *X. Y. Z.* judgment. It will then go on to examine the practice and policy changes following the judgment.<sup>16</sup>

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12. Ibid, para. 70.

13. Ibid, para. 75.

14. See e.g., International Commission of Jurists, ‘X, Y and Z: a glass half full for “rainbow refugees”?’ The International Commission of Jurists’ observations on the judgment of the Court of Justice of the European Union in *X, Y and Z v. Minister voor Immigratie en Asiel*, 3 June 2014; S. Chelvan, C-199/12, C-200/12, C-201/12 - X, Y, Z v Minister voor Immigratie en Asiel Court of Justice of the European Union, Judgment 7th November 2013: A Missed Opportunity or a New Dawn?, 13 November 2013, available here <http://europeanlawblog.eu/?p=2042>.

15. See e.g. Matthew Fraser, The Court of Justice of the European Union delivers judgment in the joined cases of C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie en Asiel*, 11 December 2013, available here: <http://bit.ly/2kaZPEh>.

16. Analysis related to recognition of homosexual asylum seekers, who come from countries where homosexuality is criminalized, as a particular social group, pre- and post-X.Y.Z. is included in one sub-section.

## Whether the existence of a law that criminalized homosexuality was sufficient evidence of persecution prior to X.Y.Z.

In the majority of Member States, the mere existence of a law that criminalized homosexuality in their country of origin was insufficient evidence of persecution in practice before the X.Y.Z. judgment. Nevertheless, practice was also apparent whereby the mere existence of a criminal law was sufficient evidence of persecution, in some Member States such as **Italy**.

In **Belgium, Sweden, the Netherlands, the UK and Bulgaria**, mere criminalisation was insufficient to prove persecution. In **Belgium**, for instance, the Council for Alien Law Litigation (hereinafter 'CALL') applied a three pronged approach to assessing asylum applications based on sexual orientation.<sup>17</sup> Firstly, if criminal legislation was generally applied in the country of origin, the CALL acknowledged that those persons must be regarded as forming a particular social group. Secondly, if, however, criminal legislation was not generally applied in the country of origin, it would be up to the individual applicant to prove that there were case specific reasons to fear that the laws could be applied to him/her by the authorities. Thirdly, even if the CALL was not convinced there was an individualized risk, the criminal laws would be applied, it presupposed no protection can be expected from the authorities,<sup>18</sup> and it would then be up to the applicants themselves to establish other forms of non-state persecution they fear.

In **the Netherlands**, an asylum seeker had to substantiate his individual claim, whenever possible with documents, that he personally had a well-founded fear of persecution. As stated by the Asylum Circular 2000:

The mere fact that homosexuality or homosexual acts are criminalized in a country does not automatically lead to the conclusion that a homosexual from that country is a refugee. The asylum applicant must make a plausible case (if possible with supporting documents) that he personally has a well-founded reason to fear persecution.<sup>19</sup>

According to the policy guidelines, the country of origin should pursue an 'active persecution policy' against LGBT's before a well-founded fear will be considered to be established.<sup>20</sup> In addition, the sanction for committing homosexual acts should reach a certain level of severity. In **the United Kingdom**, domestic courts also concluded that the 'mere existence' of a law criminalising same sex activity would not breach Article 3 ECHR if the individual was returned to that country.<sup>21</sup> Similarly, in several country guidance cases where homosexual activity was criminalized in the appellant's country of origin, the existence of a criminal penalty was not held to be sufficient to establish a risk of persecution.<sup>22</sup> In considering what would amount to persecution, the Tribunal did not focus on the character of the punishment which would be meted out in the case of prosecution. Instead, it addressed issues related to the risk of prosecution, the kind of behaviour likely to attract attention, the level of self-restraint that could be regarded as tolerable and the availability of state protection against homophobic violence by non-state agents.<sup>23</sup>

In **Sweden**, the reasoning in the majority of the analysed cases was based on an overall assessment of the relevant circumstances at hand, including the question whether homosexuality or homosexual acts were criminalised by national law. For example, the Administrative Court of Stockholm held that although homosexuality was prohibited in Kenya, it had not been made likely that the asylum seeker had been subjected to persecution or would risk persecution in the future.<sup>24</sup> In comparison, the Administrative Court of Malmö held that an asylum seeker would not be able to seek state protection because the Gambian State seemed to

17. CALL, judgments No. 101488 of 24 April 2013 (Senegal) and No. 103722 of 29 May 2013 (Senegal), available here <http://bit.ly/2licAN8>. L. Leboeuf, S. Saroléa (ed.), 'La réception du droit européen de l'asile en droit belge: la Directive qualification' (The Transposition of the European Asylum Law into Belgian Law: the Qualification Directive), p. 69 ; Vluchtelingenwerk Vlaanderen, 'Gevluchte holebi's – een analyse van beslissingen door de asiinstanties' (Gay, Lesbians and Bisexuals on the Run – an analysis of decisions by the asylum authorities), 17 May 2013, p. 31, available here <http://bit.ly/2jm2ZAz>.

18. Leboeuf, p. 68; incl. other examples: CALL, judgment No. 87839 of 20 September 2012 (Kenya), No. 105201 of 18 June 2013 (Ivory Coast), and 116371 of 23 December 2013 (Mauritania).

19. Aliens Circular 2000, par C2/2.10.2.

20. Ibid.

21. See e.g. *SSHD v Z, A and M* [2002] EWCA Civ 952.

22. *AJ (Risk to Homosexuals) Afghanistan* CG [2009] UKAIT 00001, *DW (Homosexual Men; Persecution; Sufficiency of Protection) Jamaica* CG [2005] UKAIT 00168, *Jonathan Mane Sankale (Homosexual - Behaviour - Prosecution) Kenya* CG [2001] UKIAT 00007 and *JM (homosexuality: risk) Uganda* CG [2008] UKIAT 00065.

23. Ibid.

24. FST UM 4168-11.

encourage the persecution of homosexuals.<sup>25</sup> The Court observed that homosexuality was legally criminalized, sanctioned with a five to fourteen year prison term and is widely considered a taboo in Gambia. In **Bulgaria**, domestic courts required specific country of origin information regarding the actual prosecution of homosexuals in the country of origin. If homosexuality was, for example, solely criminalized in some parts of the country, the court would examine the possibility of internal protection alternative. In two cases related to homosexual asylum seekers from Nigeria, the Supreme Administrative Court did not grant refugee status to the applicants because of a lack of country of origin information. While homosexuality was criminalised in several districts, the Court concluded that the applicants had the possibility to relocate internally.<sup>26</sup>

In **France**, the Council of State (*Conseil d'Etat*) ruled, in a landmark decision which predates the X.Y.Z. judgment,<sup>27</sup> that the criminalization did not have any effect on the assessment of the persecution. It found that even if there were no specific criminal law in place, persecution could have been based on other laws abusively applied to this social group or on behaviours emanating from the authorities, encouraged or fostered or simply tolerated by them. In this particular case, the Council of State found that the *Cour nationale du droit d'asile* (hereinafter 'CNDA') made two legal errors in refusing to recognise refugee status to the applicant on the basis that he did not prove that he manifested his sexual orientation and that homosexuality was not criminalized in the Democratic Republic of Congo (hereinafter 'DRC').<sup>28</sup> In **Germany**, the jurisprudence on sexual orientation initially developed in the context of the Constitutional right to asylum.<sup>29</sup> In 1988, in a case concerning an applicant from Iran, the *Bundesverwaltungsgericht* (hereinafter 'BVerwG') ruled that a law that prohibits sexual acts between adult men does not amount to persecution as such because, a State may regulate homosexual acts to protect public morals.<sup>30</sup> Nevertheless, the applicant was granted asylum due to the severe risk of punishment upon return,<sup>31</sup> and the imposition and enforcement of the death penalty for homosexual acts would be 'evidently unbearably hard' and could by no means be justified for having breached public morals.<sup>32</sup> This, according to the BVerwG, already indicated that this punishment not only aimed at protecting public morals, but aimed at striking at the person's homosexual predisposition as a personal characteristic seen as particularly corrupted by the authorities.<sup>33</sup> The high threshold thus set out by the BVerwG in this judgment coined the jurisprudence of the lower courts on homosexual applicants for the coming years.<sup>34</sup> However, with the shift of focus from the Constitutional right to asylum to the implementation of the Qualification Directive, the requirements for a homosexual to be recognised as a refugee were increasingly under review. For instance, as one Administrative Court points out in a judgment after the X.Y.Z. ruling, its own jurisprudence had been more generous than the CJEU's in that it had regarded the existence of a criminal law targeting homosexuals as sufficient to constitute persecution and was now changing this practice due to the X.Y.Z. judgment.<sup>35</sup>

In **Italy**, the issue of the mere existence of criminal laws *via-à-vis* their actual enforcement had not really been explored. In fact, in 2012, the Italian Court of Cassation held that criminalization of same-sex acts constitutes persecution *per se*, as it deprives individuals of their fundamental right to express their sexual and love life freely.<sup>36</sup> Persecution should be understood as a 'radical form of fight against a minority'<sup>37</sup> that can be carried out also by means of legislation aimed at punishing a certain conduct with imprisonment. Such provisions have the effect of forcing people to violate the law and expose themselves to serious criminal sanctions in order to live their life in freedom. According to the Court, the deprivation of this fundamental right amounts to

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25. FMA UM 4177-11.

26. Judgment No. 13071 of 04 November 2010 of the Supreme Administrative Court (*Върховен административен съд*), case No. 2096/2010; see also Judgment No. 6625 of 12 May 2011 of the Supreme Administrative Court (*Върховен административен съд*), case No. 3386/2011.

27. CE 27 July 2012 M. B., No. 349824 A. This landmark decision is still in effect.

28. Before this landmark decision from the Council of State, CNDA decisions used to take several factors into account for the identification of this particular social group, in particular, alternatively or cumulatively, the existence and or absence of criminal laws and the 'public manifestation' of homosexuality.

29. Basic Law, Art 16 para 2 sentence 2.

30. BVerwG, 15 March 1988, BVerwG 9 C 278.86, para 20, 21.

31. *Ibid*, para. 23.

32. *Ibid*, para. 28.

33. *Ibid*, para. 29.

34. According to Titze, *Sexuelle Orientierung und die Zumutung der Diskretion*, ZAR 2012, p. 93, at pp. 94-95.

35. VG Düsseldorf, 13 December 2013, 13 K 3683/13.A.

36. Corte di Cassazione, Sez. VI Civile, *ordinanza* No. 15981 of 29 May 2012, para 5. In previous decisions of first-instance courts (Tribunals), if it was found that criminal laws existed in the applicant's country of origin, the issue of actual enforcement was not explored. See, for further reference, Thomas Spijkerboer and Sabine Jansen, *Fleeing Homophobia. Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, COC Nederlands and Vrije Universiteit Amsterdam September 2011, pp. 22-23, available here <http://bit.ly/2jMISwT>.

37. *Ibid*.

persecution and entitles the individual to international protection. Along the same line, a ruling by the Tribunal of Bologna went even further, affirming that criminalization is persecutory in itself.<sup>38</sup> To this end, it has to be regarded as posing a serious limitation on human rights, without being necessary to look at whether such laws are actually enforced or not. Therefore, when criminal laws are (even merely) existent, there is a well-founded fear because persecution is *'in re ipsa'*.<sup>39</sup>

### Whether asylum seekers were expected to conceal their sexual identity to avoid the risk of persecution prior to X.Y.Z.

Policy and practice varied significantly between Member States as to whether asylum seekers were expected to conceal their homosexuality in order to avoid the risk of persecution before the X.Y.Z. judgment was delivered. Differences were also apparent in relation to the level of concealment expected of the applicant and whether the reason for concealment was to avoid persecution.

In **Sweden**, asylum seekers were not expected to conceal their homosexuality in order to avoid the risk of persecution. This is also explicitly mentioned in the majority of Swedish cases addressing the question of sexual orientation that predate the CJEU judgment.<sup>40</sup> Domestic courts<sup>41</sup> have, additionally, referred to the *UNHCR Guidelines on International Protection No.9*,<sup>42</sup> which conclude that a state cannot expect or demand that an individual will change or conceal his or her identity in order to avoid persecution. In January 2011, the Migration Agency issued a legal position dismissing the requirement that asylum seekers would conceal their sexual orientation in order to avoid persecution.<sup>43</sup>

In **the Netherlands**, asylum seekers were also not expected to conceal their homosexuality in order to avoid the risk of persecution.<sup>44</sup> Asylum seekers were, however, expected to a certain extent, to exercise restraint in order to avoid persecution, provided they could still express their sexual orientation in a meaningful way.<sup>45</sup> In short, the assessment of persecution would take place according to the following: (i) the credibility of the sexual orientation of the asylum seeker, and (ii) an assessment of the statements by the asylum seeker and the available country of origin information (i.e. in which manner the asylum seeker was subjected to restrictions on the expression of their sexual orientation in their country of origin). The asylum seeker would receive protection when it was considered plausible that the way he expressed his sexual orientation in the country of origin before the asylum application, would lead to a well-founded fear of persecution or a violation of Article 3ECHR.<sup>46</sup>

In **France**, the Council of State (*'Conseil d'Etat'*) ruled in a landmark decision, which predates the X.Y.Z. judgment<sup>47</sup> that membership of a social group based on a common sexual orientation does not depend on the public manifestation of this orientation by the applicant, but rather on how society perceives the applicant. This decision rejected the *'indiscretion'* requirement which was often applied by earlier jurisprudence of the

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38. Tribunal of Bologna, 4 November 2013, p. 4.

39. Ibid.

40. See e.g. FST UM 4735-12; FGO UM 955-13.

41. See e.g. FGO UM 2054-12.

42. 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, available here: <http://bit.ly/2l3htac>.

43. RCI 03/2011, 2011-01-13.

44. Aliens Circular 2000, par C2/2.10.2.

45. Tweede Kamer, vergaderjaar 2013-2014, 19637, No. 1767.

46. There were numerous letters by the State Secretary clarifying the policy guidelines. These clarifications were, however, not always clear, which has led to the divergent practice.

47. CE 27 July 2012 M. B., No. 349824 A.

Appeal Commission for Refugees ('CRR') and the CNDA, as it is now known as.<sup>48</sup> The earlier case law was divergent<sup>49</sup> and while many decisions from the CRR and the CNDA applied this reasoning and required that the applicant displays their sexual orientation in their external behaviour in order to be considered as member of a social group, some other decisions did not. Where homosexuality was criminalised, the criterion of 'public manifestation' did not have to be met in order for the applicant to be recognized as a refugee.<sup>50</sup> In **Italy** the concealment reasoning is basically unexplored. Arguably, this derives from the fact that courts' decisions frame the right to live freely one's sexual orientation as a fundamental right,<sup>51</sup> which is applied to one's identity. For example, a decision by the Court of Appeal of Bari<sup>52</sup> clearly affirms that individuals have the right to manifest and practice their sexual orientation freely. Likewise, the Tribunal of Naples observed that persecution on the basis of sexual orientation constitutes an undue interference with the inherent right to live in freedom according to one's personal condition.<sup>53</sup>

In other selected Member States, such as **Bulgaria**, **Belgium**, and **the UK**, the asylum authorities and domestic courts differentiated between asylum seekers, who were considered to be 'naturally discreet', and asylum seekers, who concealed their sexuality due to a fear of persecution. This practice has been reflected in the domestic case law. On 7 July 2010, the Supreme Court for **the United Kingdom** gave judgment in the case of *HT (Cameroon) and HJ (Iran)* (hereinafter '*HJ (Iran)*').<sup>54</sup> The Court held that if a person would conceal their homosexuality on return and if a material reason for their doing so was fear of the persecution which would follow if they lived as openly gay, then they should be granted asylum. The Supreme Court said:

Such a person has a well-founded fear of persecution. To reject his application on the ground that he could avoid the persecution by living discreetly would be to defeat the very right which the Convention exists to protect – his right to live freely and openly as a gay man without fear of persecution.<sup>55</sup>

The Supreme Court also held that if 'a person would choose to live discreetly because that was how he himself would wish to live, or because of social pressures, e. g. not wanting to distress his parents or embarrass his friends', their asylum application should be rejected. According to the Supreme Court:

Social pressures of that kind do not amount to persecution and the Convention does not offer protection against them. Such a person has no well-founded fear of persecution because, for reasons that have nothing to do with any fear of persecution, he himself chooses to adopt a way of life which means that he is not in fact liable to be persecuted because he is gay.

This section of the judgment came to be treated in many cases, both by the Home Office decision makers and immigration judges, as a basis for differentiating between those considered to be 'naturally discreet' from those, who concealed their sexuality due to a fear of persecution. So although the law was in principle clear from 2010 onwards, the question of whether the reason for concealment was to avoid persecution came to the foreground. Moreover, several domestic courts in **Belgium** and **Bulgaria** have followed this line of reasoning.

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48. See 'Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe, September 2011': The [CNDA] often require[d] LGB applicants to have fully disclosed their sexual orientation in the country of origin. They should have 'exposed their sexual orientation publicly or manifested it by exterior behaviour.' This is another way of saying: "If you are discreet, then there are no grounds to grant you asylum. You will only be granted asylum if you come out of the closet." This 'indiscretion requirement' is not about well-founded fear, as the discretion requirement is, but rather concerns the question whether or not an LGBTI person who has not yet 'come out' as such, can be a member of a particular social group defined by sexual orientation. It is derived from the interpretation of the concept of a 'particular social group' by the Council of State jurisprudence (CE 23 June 1997 M. Ourbih No. 171858: the social group is defined by "common characteristics which define them as a group in the eyes of authorities and society."). The [CNDA] often mistakenly applie[d] this social group requirement as a 'discretion requirement in reverse': as long as a person hides her or his sexual orientation or gender identity from others no one can perceive it. Then this person cannot be a member of the social group of LGBs, since she or he is not perceived as such. This CNDA jurisprudence [was] based on a misapplication of the social perception requirement of Article 10(1)(d) of the Directive. This requirement is about whether the social group is perceived to be different by the surroundings, instead of whether the ('closeted' or 'out') individual is perceived to be different'.

49. See for example CRR SR 12 May 1999 M. D., No. 98006017/328310, CNDA 5 June 2012, TR13MNSLG, CNDA 10 January 2011 M. N. No. 09012710 C+.

50. See for example, CNDA, 7 July 2009, TUN01MRSLG and CNDA, 23 December 2010, ALG04MRSLG.

51. See *supra*, Corte di Cassazione, Sez. VI Civile, *ordinanza* No. 15981 of 29 May 2012.

52. Court of Appeal of Bari, *ordinanza* No. 299 of 5 March 2013, p. 8.

53. Tribunal of Napoli, 25 October 2013, para 7.

54. [2010] UKSC 31.

55. *Ibid*, para. 82.

In **Belgium**, the CALL established the ‘principle of non-concealment’ in 2011. Referring to the Supreme Court decision in *HJ (Iran)*, the CALL did however introduce an additional distinction that allowed for an exception to the principle. A differentiation was made between the motivation for the concealment of the sexual orientation by an (assumed to be) discrete asylum applicant. The CALL stated that behaving discretely to avoid persecution is an inadmissible infraction of a fundamental right and thus deserves protection, but doing so out of free will or only to avoid societal or family disapproval that does not amount to persecution, by contrast is not a sufficient reason for international protection.<sup>56</sup> In **Bulgaria**, the Sofia City Administrative Court, similarly, pointed out that an asylum seeker, who ‘chooses to live discretely in order to avoid the public hostilities and the inconvenience for his family and friends’, would not be subjected to a well-founded fear of persecution.<sup>57</sup>

In **Germany**, practice as to whether asylum seekers were expected to conceal their homosexuality in order to avoid the risk of persecution varied significantly over time.<sup>58</sup> In the above mentioned pivotal 1988 judgment of the BVerwG concerning a homosexual from Iran, the Court found that states may prohibit homosexual acts to protect public morals and that this prohibition as such did not amount to persecution. Only exceptionally could protection be granted, if the sanctions to be expected were severe enough and the homosexuality of the applicant ‘was not a mere inclination that the applicant could give in to more or less according to his choice, but that he was destined to an inescapable determination on homosexual acts in the sense of an irreversible imprint’, as was the case for that particular applicant.<sup>59</sup> Accordingly, it was taken for granted in that case that homosexuals who were eligible for protection were not in a position to refrain from homosexual acts. Ensuing practice, however, focused on the general rule that the BVerwG had established in that case, namely that applicants had to accept that homosexual acts were restrictively regulated in their country of origin. This mostly led to decisions rejecting asylum applications because applicants would be able to conceal their homosexuality and exercise restraint in expressing their sexual orientation.<sup>60</sup> Following the adoption of the Qualification Directive and the *UNHCR Guidance Notes on Refugee Claims Relating to Sexual Orientation and Gender Identity*, a debate on the requirement of concealment led to a preliminary reference on this point to the CJEU from a German court, which was later struck out.<sup>61</sup> However, it was only with explicit reference to the CJEU judgment in *Y and Z* on persecution on religious grounds, that the BAMF changed its practice regarding concealment. As clarified by the President of the BAMF in a letter dated 27 December 2012, an ‘applicant can in principle not reasonably be expected to avoid hazardous behaviours to evade persecution, which would otherwise threaten him, e.g. due to his sexual orientation’.<sup>62</sup>

### An examination of policy and legislative changes following X.Y.Z.

In several of the selected Member States, the country’s asylum authority and/or competent courts did not issue any official guidance regarding the assessment of asylum claims based on sexual orientation following the X.Y.Z. judgment. This is the case, for example, in **Belgium, Bulgaria, and Italy**. Similarly, these Member States did not adopt legislative changes in order to accommodate the X.Y.Z. judgment. While there are various reasons for this, Member States, such as Belgium, considered their current guidelines and laws to be in accordance with the judgment.<sup>63</sup>

56. CALL, judgment No. 103722 of 29 May 2013 (Senegal). An earlier example of this approach where the reasons for a (hypothetical) concealment are being evaluated to assess the risk of persecution: CALL, judgment No. 97865 of 26 February 2013 (Sudan).

57. Judgment No. 5114 of 26 September 2012 of Sofia City Administrative Court (*Административен съд – София град*), case No. 7051/2012.

58. Titze, *Sexuelle Orientierung und die Zumutung der Diskretion*, ZAR 2012, p. 93, at p. 100-101.

59. BVerwG, 15 March 1988, 9 C 278/86, at para. 24.

60. See e.g. VG Düsseldorf, 14 September 2006, 11 K 81/06.

61. For a judgment rejecting concealment, see e.g. VG Oldenburg, 13 November 2007, 1 A 1824/07; ; for the preliminary reference to the CJEU, see OVG Münster, 23 November 2010, 13 A 1013/09.A, respectively CJEU, C-563/10 – *Kashayar Khavand* (The case was struck out by the CJEU on 11 March 2011, as the applicant had obtained a protection status in Germany following the publication of the applicant’s name by the CJEU.); for the debate by legal practitioners and academics, see Hruschka/Löhr, *Das Konventionsmerkmal “Zugehörigkeit zu einer bestimmten sozialen Gruppe” und seine Anwendung in Deutschland*, NVwZ 2009, 205; Lübke, *Verfolgungsvermeidende Anpassung an menschenrechtswidrige Verhaltenslenkungen als Grenze der Flüchtlingsanerkennung?*, ZAR 2012, p 7; Titze, *Sexuelle Orientierung und die Zumutung der Diskretion*, ZAR 2012, p. 93, Markard, *Sexuelle Orientierung als Fluchtgrund – Das Ende der Diskretion*, Asylmagazin 2013, p. 74.

62. [Isvd.de/fileadmin/pics/Dokumente/Recht/BAMF-121227.pdf](http://Isvd.de/fileadmin/pics/Dokumente/Recht/BAMF-121227.pdf), p. 4.

63. For example, according to the State Secretary for Asylum and Migration, Belgian legislation and practice already addressed the requirements laid down in the judgment. Information by e-mail from Maité Vanregenmorter at the Cabinet of the State Secretary.



However, other countries' asylum authorities and competent courts did provide significant guidance regarding the assessment of claims based on sexual orientation following the *X.Y.Z.* judgment. This was the case in **the Netherlands, the United Kingdom** and in **Sweden**.<sup>64</sup>

The Council of State in **the Netherlands**, that referred the preliminary questions to the CJEU, on 18 December 2013, published their judgment applying the *X.Y.Z.* judgment.<sup>65</sup> Consequently, the Aliens Circular 2000 was amended.<sup>66</sup> Most notably, in contrast to their previous policy, asylum seekers are no longer expected to exercise a certain degree of restraint in order to avoid persecution.<sup>67</sup> According to the Council of State the statements of the applicant on how he would express his sexual orientation or would refrain from doing so were relevant to assess whether a well-founded fear exists. In practice, decision makers still ask questions related to the asylum seeker's expression of his sexual orientation in his country or origin. The adjusted Aliens Circular 2000 also adequately reflects the *X.Y.Z.* judgment in relation to the issue of criminalisation in the country of origin. If homosexual activities have been criminalised in the country of origin, the Immigration and Naturalisation Service (*Immigratie en Naturalisatiedienst*, hereinafter 'IND') will assess the practice in the country of origin taking into account the personal situation of the asylum seeker. When deciding on these issues, the IND should take due account of the frequency of prosecution; the application of sanction in terms of imprisonment; the police investigation and prosecution (including custody) prior to the possible term of imprisonment and finally, the consequences of criminalisation in social life.

**The UK** Home Office issued guidance on sexual orientation in asylum claims to the Home Office decision makers in 2015 and 2016.<sup>68</sup> In both the 2015 and 2016 guidance notes, the *X.Y.Z.* judgment is cited as an authority. The 2016 guidance note states that '[t]he existence of criminal laws which specifically target homosexuals supports the finding that those persons must be regarded as forming a particular social group as they are identified though their difference'. The 2016 guidance has also adopted references to feelings of difference, stigma and shame, following the adoption of the Difference, Stigma, Shame and Harm (DSSH) model<sup>69</sup> which has been promoted in training on good practice in sexual orientation claims. It does not, however, explicitly refer to the CJEU's findings in relation to concealment. The guidance notes that:

Caseworkers must note that an individual should not and cannot be required to hide their sexual orientation in order to avoid persecution. This principle has been established in both *RT (Zimbabwe)* and *HJ (Iran)*. In cases in which a heterosexual individual is accused of being LGB in their country of origin and they would be persecuted as a result, they would still fail to be allowed asylum.<sup>70</sup>

In **Sweden**, legislation was viewed to be in accordance with the *X.Y.Z.* judgment.<sup>71</sup> Nevertheless, in 2015, the Swedish Migration Agency issued a new legal policy,<sup>72</sup> which explicitly referred to the *X.Y.Z.* judgment, on how decision makers were to conduct investigations and personal interviews in cases where sexual orientation was invoked as a reason for persecution.<sup>73</sup>

In **France** and in **Germany** no official and publicly accessible positions were specifically adopted following the judgment. In **France**, the French Office for the Protection of Refugees and Stateless Persons (*Office Français de Protection des Réfugiés et des Apatrides*, hereinafter 'OFPRA') drafted an internal commentary note on the *X.Y.Z.* judgment. This commentary was distributed to all protection officers and was made widely available on the intranet. In addition, the National Court of Asylum (*Cour nationale du droit d'asile*, hereinafter 'CNDA') drafted a summary in the monthly Judicial Bulletin. This summary is accessible on the intranet and referred to in internal training tools.<sup>74</sup> In **Germany** a case note was issued in the BAMF's newsletter for both internal

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64. A legal policy was issued following the judgment

65. ABRvS, 18 December 2013, 201109928/1.

66. Aliens Circular 2000, para C2/3.2.

67. Ibid.

68. For guidance valid at the time of writing the present report, see: UK Home Office, Asylum Policy Instruction, Sexual orientation in asylum claims, 3 August 2016.

69. See, Free Movement Blog by S Chelvan, 'From A.B.C. to DSSH: How to prove that you are a gay refugee?', 23 July 2014; Credibility Assessment in Asylum Procedures, manual, Chapter XI, Volume 2: <http://bit.ly/2exj1qm>.

70. Although this guidance post-dates *X.Y.Z.* and refers to it, it does not refer to the judgment in this context of concealment.

71. Prop. 2005/2006:06.

72. SR 38/2015: <http://bit.ly/2j1kB9E>.

73. Interview with an Attorney from the Swedish Migration Agency.

74. Information provided by the researcher.

and external use.<sup>75</sup> Furthermore, in response to Parliamentary questions,<sup>76</sup> the BAMF stated that the legal position taken in X.Y.Z. has been included as a requirement into the internal general instruction on asylum of the BAMF. However, these instructions are not public.

### Whether an applied term of imprisonment that sanctions homosexual acts constitutes an act of persecution following X.Y.Z.

In X.Y.Z., the CJEU held that the criminalisation of homosexual acts does not *per se* constitute persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin that adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and this constitutes an act of persecution.<sup>77</sup> Nearly all Member States are in compliance with this conclusion, but **Bulgaria** has still not addressed the question to what extent a term of imprisonment in the country of origin constitutes an act of persecution.

According to **Belgian** law and policy, the imprisonment of homosexuals when applying criminal laws that sanction homosexual acts is considered disproportionate and discriminatory. Belgian authorities and courts, therefore, consider it an act of persecution because of the difference in treatment on the basis of one's sexual orientation without a legitimate or necessary aim. In **France**, both the OFPRA and CNDA consider that a term of imprisonment actually applied in the country of origin would constitute an act of persecution. The issue of the actual application of laws relates to the assessment of the well-founded fear of persecution in each individual case. In **the Netherlands**, not only a term of imprisonment, which sanctions homosexual acts, could constitute an act of persecution, but also police investigations and prosecution (including custody) prior to a possible term of imprisonment.<sup>78</sup>

Moreover, in **Sweden**, it is considered persecution if homosexuality is criminalized and the national authorities imprison or persecute homosexuals. In a recent case, for example, the Administrative Court of Gothenburg considers the situation in which homosexual acts in the country area are criminalized and information about the country reveals that homosexuals are sentenced to prison for performing homosexual acts an act of persecution.<sup>79</sup> According to Judge Henrik Hedberg at the Administrative Court of Malmö, every prison sentence based on sexual orientation constitutes an act of persecution. Judge Hedberg asserts that the main focus will lie on whether there has been actual punishment as opposed to national regulations that are in fact never applied. The latter will generally not constitute a risk of persecution. As a consequence, country of origin information has become increasingly more significant in order to determine whether someone has actually been sentenced for the so-called crime.

The 2016 **UK** Home Office Guidance on Sexual Orientation in Asylum Claims specifies that in order to consider whether legal provisions will amount to persecution the caseworkers should assess how such provisions are interpreted, whether they are applied in practice and their impact upon the claimant:

Where the country of origin information does not establish whether or not, (or the extent to which) the laws are actually enforced, any pervading and generalized climate of homophobia could be indicative evidence that LGB persons are being persecuted.

However, in order for the criminal sanctions against homosexual acts to amount to persecution, the guidance requires them to reach a certain level of severity, namely imprisonment rather than simply a fine. Where the criminal sanctions are never, or even hardly ever, imposed in practice, a real risk of persecution cannot be established. At the same time, the severity of societal discrimination could in itself meet the required threshold. Moreover, in the unreported Upper Tribunal case *DA/01517/2014* decided in September 2015, the Tribunal acknowledged that in the countries of origin without any record of prosecution for homosexual acts 'if the evidence shows that there is a real risk of prosecution then the claim is likely to succeed.' The penalty in this case was up to ten years in prison, but the Tribunal made no remark about the length of sentence actually imposed. The implication is that the imposition of any sentence would be persecutory.

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75. The case note can be found here: <http://bit.ly/2jtXFyn>.

76. The response phrased by the MOI is available as BT-Drs. 18/8977 of 27 June 2016 and is available here: <http://bit.ly/2kByl5T>. See in particular question nine and its response.

77. Case C-199/12 C -200/12, X. Y. Z., paras. 61 and 79.

78. ABRvS, 18 December 2013, nos. 201109928/1, 201106615/1 en 201012342/1; Tweede Kamer, vergaderjaar 2013-2014, 19637, No. 1788.

79. FGO UM 5662-14; see also FMA UM 3713-14.

In comparison, **Bulgarian** domestic courts have not explicitly addressed the question to what extent a term of imprisonment in the country of origin constitutes an act of persecution. On 2 December 2013, the Sofia City Administrative Court in Bulgaria referred a case back to the State Agency for Refugees in order to gather more information about the application of the criminal law in the country of origin in order to decide whether it constitutes an act of persecution.<sup>80</sup> The Administrative Court noted that there was information that homosexuality was criminalized by imprisonment in the applicant's country of origin, but there was no information in relation to what part of the homosexual relations were declared to be illegal, i.e. whether homosexuality itself was criminalized or only particular sexual activities were criminalized. According to the Administrative Court, in deciding whether the acts that criminalize sexual orientation constitute acts of persecution the State Agency for Refugees should consider evidence regarding the application of the criminal law, for example, whether there are criminal proceedings against homosexuals. It should also assess whether the punishments are enforced and how serious the punishments are in practice as well as information on common practices and attitudes in society in the country of origin.

In **Italy**, following the leading judgment of the Court of Cassation in 2012,<sup>81</sup> the mere existence of criminal laws against same-sex relationships is actually regarded as persecution. Nevertheless, most judicial decisions also contain an express reference to the term of imprisonment foreseen by such laws,<sup>82</sup> often also referring to the specific article of the penal code of the applicant's country of origin,<sup>83</sup> which is considered 'disproportionate or discriminatory'.<sup>84</sup>

### What punishment constitutes persecution if homosexuality is criminalized but not actually enforced following X.Y.Z.

In **Belgium, Bulgaria, Italy, Germany and the United Kingdom**, there has been no detailed official guidance from the national courts or relevant authorities that clarify what punishment is severe enough to constitute persecution in line with Article 9(1) and 9(2)(c) of the Qualification Directive. For example, in **Belgium**, the assessment of what punishment is severe enough to constitute persecution in line with Article 9(1) and Article (2)(c) of the Qualification Directive will be made on a case-by-case basis. The decision maker will take into account the individual elements of the case and the specific country of origin information. Even if homosexuality is criminalized but not actually enforced, the CALL generally assumes that there is no state protection available in the country of origin against persecution by non-state actors.<sup>85</sup> The evaluation of the risk of non-state persecution will take into consideration different elements, such as the public profile of the applicant, the societal reaction to same-sex relationships and the ethical beliefs or religion of his/her family and environment.<sup>86</sup>

Similarly, in **Italy** the risk of persecution is firstly assessed with regard to the existence of laws criminalising homosexuality. Since the actual enforcement of criminal laws is not required for this assessment, their mere existence demonstrates the State's inability and unwillingness to protect LGBTI individuals. Specifically, where criminal laws against homosexuality are in place, discrimination exists first and foremost at legislative level.<sup>87</sup> The risk of future – or past – violence, such as stoning or beating by other people is regarded as persecution. Besides the legislative framework in the country of origin, other elements are taken into account, such as the attitude of State's authorities and the (lack of) protection available by the police.<sup>88</sup> In addition, the individual circumstances,<sup>89</sup> the reactions of the applicants' family and society<sup>90</sup> and defamation through the media are also considered in the assessment of persecution. Furthermore, the religious context is taken into account

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80. Judgment No. 7482 of 02 December 2013 of Sofia City Administrative Court (*Административен съд – София град*), case No. 6297/2013.

81. Corte di Cassazione, No. 15981/12.

82. See, e.g. Tribunal of Genova, 19 September 2016, R.G. No. 2901/2016, which refers to the circumstance that 'acts against nature' are sanctioned with 14 years of imprisonment.

83. For example, Article 214 et seq. of the Nigerian penal code is quoted by Tribunal of Bari, 23 September 2014.

84. Tribunal of Genova, 19 September 2016, R.G. No. 2901/2016.

85. See e.g. CALL, judgment No. 160971 of 28 January 2016.

86. See e.g. CALL, judgment No. 87839 of 20 September 2012 (Kenya); No. 105201 of 18 June 2013 (Ivory Coast); No. 103722 of 29 May 2013 (Senegal); No. 116371 of 23 December 2013 (Mauritania).

87. Tribunal of Bari, 23 September 2014.

88. Tribunal of Genova, 16 May 2016, R.G. No. 15023/15.

89. Tribunal of Venice, 16 June 2016, R.G. No. 7823/15 concerning a gay man who was HIV positive.

90. Tribunal of Genova, 16 May 2016, R.G. No. 15022/15.

too;<sup>91</sup> for instance, the Tribunal of Rome found that the applicant was at risk of persecution since a *fatwa* had been proclaimed against him.<sup>92</sup>

In **the Netherlands** and **Sweden**, the relevant authorities have provided specific guidance that state what punishment is severe enough to constitute persecution in line with Articles 9(1) and 9(2)(c) of the Qualification Directive.<sup>93</sup> In **the Netherlands**, the Aliens Circular 2000 clarifies that police and criminal investigation (including custody) prior to a possible term of imprisonment should be taken into consideration when assessing whether the treatment constitutes an act of persecution.<sup>94</sup>

In **France**, the Council of State clarified that the assessment of persecution has to take into account other laws abusively applied to the given social group or behaviours emanating from the authorities, encouraged or simply tolerated by them.<sup>95</sup> To illustrate, the CNDA recently held that even though Algerian authorities rarely apply the law criminalising homosexuals, homosexuals who suffer from violence or discrimination by non-state actors cannot ask for the protection of the authorities because of the criminalization of their behaviour.<sup>96</sup>

The official guidance in **Germany** as to what constitutes an act of persecution is rather general and does not explicitly deal with the situation where homosexuality is criminalised, but not enforced.<sup>97</sup> The 2016 **UK** Home Office's guidance suggests that in order for the criminal sanctions against homosexual acts to amount to persecution they should reach a certain level of severity, namely imprisonment rather than simply a fine. However, it does not specify the length of the imprisonment required.

### Whether asylum seekers are expected to conceal their homosexuality to avoid a risk of persecution following X.Y.Z.

Following the X.Y.Z. judgment, asylum seekers are not expected to conceal their homosexuality in order to avoid the risk of persecution in **Germany, Sweden** and **the Netherlands**. In **Sweden**, an applicant for international protection cannot be expected to conceal their homosexuality in their country of origin to avoid persecution. On 1 December 2014, the Administrative Court of Gothenburg, for instance, held that an applicant for international protection cannot be expected to conceal his sexual orientation for the purpose of avoiding persecution.<sup>98</sup> One must be allowed to live openly with one's sexual orientation without being exposed to persecution that the authorities in the home country can't protect one from.

Following the X.Y.Z. judgment, **German** courts have generally ruled that asylum seekers may not be expected to conceal their homosexuality in their country of origin to avoid persecution. However, challenges with regard to concealment may still arise in practice. For example, the Administrative Court of Berlin concluded the following:

For the prognosis whether persecution is to be expected, it has to be considered that according to the jurisprudence of the CJEU an asylum applicant may not be expected to keep his homosexuality a secret in his country of origin or to exercise restraint in living out his sexual orientation in order to avoid the danger of persecution [reference to para. 76 of X, Y and Z judgment]. The reporting judge, however, does not understand this interpretation in the way that the personality of the applicant and the sociocultural reality in the country of origin shall be disregarded. Moreover, not every treatment that violates human rights and that breaches the right to a private life that homosexuals enjoy within the EU according to Article 7 of the EU Charter, respectively Article 8 ECHR, amounts to persecution in the sense of refugee law [reference to sec. 3a para. 1 AsylG and CJEU, X, Y and Z, paras. 53-54]. Accordingly, an individual risk assessment is decisive. In this assessment, it is to be considered how the applicant has behaved so far, how important an openly lived homosexuality is for his identity and whether he, for that reason, has to expect measures in Uganda that are severe violations of human rights[...].<sup>99</sup>

91. Ibid, also the judgment of the Court of Appeal of Trieste (18 October 2016, No. 619/2016) refers to the application of Sharia Law in Pakistan with regard to LGBTI individuals.

92. Tribunal of Rome, 27 January 2015.

93. SR 38/2015.

94. Aliens Circular 2000, par C2/2.10.2.

95. CE 27 July 2012 M. B., No. 349824 A, available here <http://bit.ly/2afzhsl>.

96. CNDA, 23 September 2015, ALG10MRSLG.

97. Bundesamt für Migration und Flüchtlinge; Da -Asyl, Stand 18 January 2016, available here: <http://bit.ly/2k8KjIW>.

98. FGO 5485-15; see also FGO UM 5662-14.

99. VG Berlin, 13 November 2015, 34 K 55.12 A.

Moreover, according to the Administrative Court of Saarland, a bisexual man could, in comparison to a homosexual man, give expression to his sexuality by having a relationship with a woman.<sup>100</sup> The High Administrative Court did not grant leave to appeal as there had not been a legal matter of fundamental significance (i.e. not only for the individual case) at stake.<sup>101</sup> As stated by the High Administrative Court, the assessment of whether a claimant could reasonably be expected to behave in a certain manner always depended on the individual circumstances of the case.

The **Dutch** policies provide that no concealment whatsoever can be expected from an asylum seeker upon their return in their country of origin. However, questions as to how the asylum seeker expressed his homosexuality in the past and how he is going to express it in future can be asked, which begs the questions whether a certain degree of concealment or restraint is still required of the applicant.

No concealment is required in **France** and **Italy**. However, such practices cannot be attributed to the impact of X.Y.Z. In **France**, asylum authorities consider<sup>102</sup> that applicants for international protection cannot be expected to conceal their homosexuality in their country of origin to avoid persecution. They tend to consider that homosexuals should be able to “live their sexual orientation freely”. This is illustrated by CNDA case law<sup>103</sup>, even though in a few exceptional cases by the CNDA the terminology regarding the previously applied “indiscretion” requirement is still not always very clear. With regard to **Italy**, the issue of concealment was not explored by the courts even before the X.Y.Z. judgment and it continued to remain such after the CJEU intervention. Also from the interviews conducted so far it appears that concealment is not contemplated.

In **Belgium**, **Bulgaria** and **the UK**, the asylum authorities and domestic courts still differentiated between asylum seekers, who were considered to be ‘naturally discreet’, from asylum seekers whose concealment of their sexuality was founded on a fear of persecution.

In **Belgium**, the CALL has acknowledged that ‘sexual orientation constitutes a fundamental characteristic of the human identity which a person cannot be demanded to abandon or dissimulate’.<sup>104</sup> Referring to *HJ (Iran)*, the CALL however allows for an exception to the non-concealment principle.<sup>105</sup> The following factors will be taken into account: the individual experiences of the LGB asylum seeker in the country of origin, the consequences of a return to the country of origin and the level of support from his environment. If an asylum seeker behaves discretely in order to avoid persecution, the asylum seeker will be granted refugee status. If an asylum seeker, however, behaves discreetly out of free will or only to avoid societal or family disapproval, the asylum seeker will not be granted refugee status as it does not amount to persecution. Moreover, the CGRS declared that concealment would no longer be suggested as a viable way to avoid persecution and thus a reason to refuse asylum, but nevertheless still be used as an element in the credibility assessment.<sup>106</sup> Whether or not someone had been discrete about his sexual orientation in the past is not relevant anymore for the question if a persecution could be avoided but it would be to determine his credibility and the likeliness of future behaviour in case of return.

More critically to the implementation of X.Y.Z., the 2016 **UK** Guidance still contains a section headed ‘Considering Discretion’. This section does not mention X.Y.Z., and is still based on *HJ (Iran)*, requiring the caseworkers to apply the following test:

1. Is the claimant gay or someone who would be treated as gay by potential persecutors in the country of origin?
2. If yes, would gay people who live openly be liable to persecution in that country of origin?
3. How would the claimant behave on return? If the claimant would live openly and be exposed to a real risk of persecution, they have a well-founded fear of persecution even if they could avoid the risk by

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<sup>100.</sup> VG Saarland, 23 January 2015, 5 K 534/13.

<sup>101.</sup> OVG Saarland, 04 February 2016, 2 4 48/15.

<sup>102.</sup> Cf. Interview with Ofpra, 14 April 2016; interview with CNDA, April 2016.

<sup>103.</sup> CNDA 10 July 2014 M. J-J. No. 13025005 C, CNDA, 26 September 2014, ALG09MRSLG, CNDA, 1 December 2015, ALG11MRSLG.

<sup>104.</sup> CALL, judgment No. 103722 of 29 May 2013 (Senegal). Similar reasoning applies even following the judgment in X.Y.Z.

<sup>105.</sup> A requirement of dissimulation must even be excluded in case the asylum applicant would have adopted such a conduct in the past to avoid persecution if such conduct is motivated by a fear and not by a free deliberated choice. It can thus not be demanded of a person to modify or conceal his/her sexual identity or characteristics to avoid the threat of a persecution.

<sup>106.</sup> Vluchtelingenwerk Vlaanderen, Holebi's op de Vlucht, een analyse van beslissingen door de asielinstanties (LGB's on the Run, an analyses of decisions by the asylum authorities), May 2013, pp. 33-34, <http://bit.ly/2I5ewq8>.

living discreetly.

4. If the claimant would live discreetly, why would they live discreetly? If the claimant would live discreetly because they wanted to do so, or because of social pressures (for example, not wanting to distress their parents or embarrass their friends) then they are not a refugee. But if a material reason for living discreetly would be the fear of persecution that would follow if they lived openly, then they are a refugee.

The practitioners interviewed for the purpose of this research, however, stated that the First Tier and Upper Tribunals are embracing *X.Y.Z.* and accepting that concealment is in and of itself persecutory. In the recent case of *MSM (Somalia)*<sup>107</sup> the Court of Appeal affirmed the decision of the Upper Tribunal finding that the journalist appellant could not be required to change his occupation in order to avoid persecution. The fact that the Court of Appeal confirmed this approach, should have led to the abandonment of the 'discretion' argument in **the UK**. It should however be noted that the Court of Appeal judgment was delivered on 12 July 2016, before the publication of the August 2016 guidance.

No specific **Bulgarian** judgments were identified addressing the issue of concealment of homosexuality in the country of origin to avoid persecution. On 18 December 2016, the Sofia City Administrative Court did however conclude that the applicant for international protection did not have a well-founded fear of persecution as he chose to live 'discreetly' in Ghana in order to avoid public harassment.<sup>108</sup>

### Whether asylum seekers are expected to conceal their political opinions or religious belief to avoid persecution following *X.Y.Z.*

In some selected Member States, such as **Belgium**, the **Netherlands** and **the UK**, the CJEU reasoning in the *X.Y.Z.* judgment has been applied to other asylum applicants as to whether they can be expected to conceal their political opinion or religious belief<sup>109</sup> in order to avoid persecution.

Referring to the *X.Y.Z.* judgment, the CALL in **Belgium** decided that Egyptian Coptic Christians,<sup>110</sup> Palestinian atheists from the West Bank,<sup>111</sup> and Iranian apostates could not be expected to conceal their religious beliefs.<sup>112</sup> In those cases, a restriction to the non-concealment principle has been added by specifying that such discretion could not be demanded in so far as the applicant would be forced to hide his conviction for the 'sole reason to avoid a persecution'. In **the Netherlands**, several district courts have confirmed that asylum seekers cannot be expected to conceal their political opinion or religious belief in order to avoid the risk of persecution.<sup>113</sup>

In **the United Kingdom**, the Supreme Court held in the case *RT (Zimbabwe) v SSHD*<sup>114</sup> that a person could not be expected to lie about their politics in order to avoid persecution. Lord Dyson said:

...the right not to hold the protected beliefs is a fundamental right which is recognised in international and human rights law and, for the reasons that I have given, the Convention too. ... Nobody should be forced to have or express a political opinion in which he does not believe. He should not be required to dissemble on pain of persecution. Refugee law does not require a person to express false support for an oppressive regime, any more than it requires an agnostic to pretend to be a religious believer in order to avoid persecution.<sup>115</sup>

Moreover, as mentioned above the Upper Tribunal and the Court of Appeal applied this principle to a journalist in *MSM (Somalia)*.<sup>116</sup> The Tribunal found as a fact that the appellant would, if he continued as a journalist, face persecution. They held on the question of law that he could not be required to forsake his profession,

107. *MSM (Somalia)* [2016] EWCA Civ 715.

108. Judgment No. 7991 of 18 December 2014 of Sofia City – Administrative Court (*Административен съд – София град*), case No. 10240/2013.

109. See also, CJEU - C-71/11 and C-99/11 *Germany v Y and Z*, 05 September 2012, para 80.

110. CALL, judgment No. 135960 of 8 January 2015.

111. CALL, judgment No. 155345 of 26 October 2015: considered not only a religious, but also a 'philosophical and political conviction'.

112. A number of similar cases rather referred to CJEU - C-71/11 and C-99/11 *Germany v Y and Z*.

113. District Court Amsterdam, 23 September 2015, Awb 14/4449, para 5.2; The Hague Court, AWB 16/733, 16/735 AWB, AWB 16/732, 23 January 2017.

114. [2012] UKSC 38.

115. *ibid* para 42.

116. *MSM (Somalia)* [2016] EWCA Civ 715.

not because the profession was protected but because the requirement was, in reality, a requirement to stop expressing political opinions. Journalism in Somalia could not be separated from politics. To require him to stop expressing his political opinions in order to avoid persecution fell squarely within *X.Y.Z.* and *HJ (Iran)* and he was entitled to be granted refugee status. The case of *MN and others Pakistan CG*<sup>117</sup> governs the approach in cases based on persecution on grounds of religion. In its judgment, the Upper Tribunal applied *HJ (Iran)*<sup>118</sup>, *RT (Zimbabwe)*<sup>119</sup> and *Bundesrepublik Deutschland v Y. Z.*<sup>120</sup> to the situation of Ahmadi applicants.<sup>121</sup> Whereas this case predates the *X.Y.Z.* judgment, it continues to be a binding country guideline case for Ahmadi cases.<sup>122</sup>

Similarly, the practice in **Germany, Sweden, France and Italy** did not contemplate concealment requirement regarding other grounds of persecution. Such practice, however, predated the judgment in *X.Y.Z.*

In **Germany**, the BAMF already eliminated its concealment requirement in claims concerning persecution on religious grounds as a result of the *Y. Z.* judgment that predates *X.Y.Z.* In the same manner, the **Swedish** Migration Court reasons that if one cannot be forced to conceal one's religious views or sexual orientation, one cannot be expected to stop with one's political engagements on return to the country of origin.<sup>123</sup> The case referred to the reasoning in the *Y.Z.* judgment. A similar reasoning is applied to cases concerning religious belief. This is specifically stated in the legal position on religion as a ground for asylum.<sup>124</sup> Similarly to asylum claims based on sexual orientation and gender identity, the concealment requirement remains absent from the reasoning of the **Italian** courts, which limit themselves to state the paramount importance of religious freedom.<sup>125</sup> For instance, although the applicant stated that his family suggested he changed his religious beliefs in order to avoid persecution, the judge did not explore this possibility at all.<sup>126</sup> In **France**, the CNDA's reasoning that resembles the reasoning of the *X.Y.Z.* judgment applies to asylum applications based on religious belief.<sup>127</sup> A different reasoning is however applied to asylum applications based on political opinions, which requires some degree of 'visibility'. This means that the actors of persecution need to be aware of the political opinion of the applicant for international protection.

Unlike the other selected Member States, the reasoning of the *X.Y.Z.* judgment has not been applied to asylum applications related to fear of persecution due to political opinion or religious beliefs in **Bulgaria**. In relation to religious belief, the Supreme Administrative Court has, however, referred to country of origin information stating that in Iran 'Christians can freely exercise their religion in worship houses or private homes, provided that they do not disturb the others'.<sup>128</sup>

### Whether criminal laws that target homosexuals need to exist before an applicant can be regarded as a member of a particular social group prior to and following *X.Y.Z.*

In **Belgium, France, Germany, Italy, the Netherlands, Sweden and the United Kingdom**, the practice that criminal laws that specifically target homosexuals in the asylum seeker's country of origin do not need to exist before a homosexual can be regarded as a member of a particular social group, is in line with *X.Y.Z.* However, such practice generally predated the CJEU judgment.

However, following the *X.Y.Z.* the Member States were more consistent in finding that the existence of criminal laws which specifically target homosexuals in the country of origin cannot be considered a decisive element

117. *MN and others (Ahmadis - country conditions - risk) Pakistan Pakistan v. the Secretary of State for the Home Department*, CG [2012] UKUT 00389(IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 13 November 2012.

118. [2010] UKSC 31.

119. [2012] UKSC 38.

120. CJEU, Case C-71/11, C-99/11, *Bundesrepublik Deutschland v Y. Z.* 5 September 2012.

121. MSM (journalists; political opinion; risk) Somalia [2015] UKUT 00413 (IAC) para 45 for the reference to *X.Y.Z.* making this point, and para 54 (ii) for the general conclusion on this point.

122. Case C-71/11, C-99/11, *Bundesrepublik Deutschland v Y. Z.* [2012] ECR I-00000.

123. FGO UM 4066-15; see also FGO UM 2704-13.

124. RCI 26/2012.

125. Tribunal of Rome, 22 January 2016, R.G. No. 21531/14.

126. Tribunal of Catanzaro, 2 January 2011, R.G. No. 852/14.

127. It should be noted that the reasoning by CNDA isn't specifically based on the CJEU reasoning.

128. Judgment No. 5797 of 24 April 2013 of the Supreme Administrative Court (*Върховен административен съд*), case No. 5730/2012.

of the assessment of whether those persons form a particular social group, but merely contributes to it<sup>129</sup>. The classical approaches to defining a particular social group, namely the protected or immutable characteristic approach and the social perception approach, are being applied in these countries, based on the Qualification Directive, X.Y.Z. and domestic jurisprudence requirements.<sup>130</sup>

The X.Y.Z. judgment alone has contributed to a substantial change in practice on this issue only in **Bulgaria**, where the Sofia City Administrative Court referring to the CJEU guidance, found homosexual asylum seekers, whose countries of origin criminalized homosexual acts, members of a particular social group.<sup>131</sup> Both of the judgments from the Administrative Court required that the personal circumstances of the applicant and the general circumstances in the country of origin be assessed in examining whether the applicant was a member of a particular social group. However, it is pertinent to note that both judgments were overturned on appeal, with the Supreme Administrative Court noting in one of the two judgments that criminalisation of the acts of the applicant did not automatically entitle him to refugee status and that if it were to be presumed that the applicant was a member of a particular social group, he had voluntarily chosen that membership.<sup>132</sup>

## Conclusion

Even though the X.Y.Z. judgment did not result in formal legislative changes in seven Member States researched, in the majority of Member States it made some positive impact on policy and practice. Only **the Netherlands**, which made the preliminary reference in X.Y.Z., amended the 2000 Aliens Circular.

The impact of the judgment depended on the legislative and policy history of the particular Member State and was less evident in Member States, whose practices were already regarded consistent with the CJEU judgment. For example, earlier CJEU case law, including Y.Z. has already triggered positive changes in some Member States, e.g. **Germany**, prior to the X.Y.Z. judgment.

Moreover, it was challenging to single out whether it was the X.Y.Z. judgment that contributed to a positive practice and/or policy change in **most Member States**. Researchers from **Germany, France, Italy** and **Sweden** specified other factors contributing to a change such as the transposition of provisions of the recast Qualification Directive into domestic law, national case law developments and reforms of asylum agencies. To illustrate, positive changes in **France** with regard to assessment of asylum claims based on sexual orientation were arguably triggered by OFPRA's reform, better professionalization of CNDA judges and a landmark Council of State judgment, which preceded the CJEU decision. Furthermore, many national courts in other jurisdictions, while following the X.Y.Z. judgment, did not directly reference it, which presented a further challenge to our analysis.

Similarly, in **Italy** the major influence on domestic jurisprudence has been the 2012 decision of *the Court of Cassation*. Whilst X.Y.Z. is quoted in case law on the enforcement of criminal laws, for example, national courts often refer to the Court of Cassation's judgment and its approach to the interpretation of persecution. Nonetheless, in national cases post X.Y.Z. there has been an increased reference to Article 10(1) of the Qualification Directive and the CJEU's judgment with regards to membership of a particular social group.

129. See the German case law: VG München, 19.02.2014 - M 17 K 13.31074; VG Berlin, Urteil vom 13.11.2015 - VG 34 K 55.12 A; VG Würzburg, Urteil vom 23.12.2015 - W 6 K 15.30648; VG Würzburg, 17 December 2014, W 6 K 14.30391. The latter case relates transsexuals in Iran forming a particular social group, even though there is no criminalisation of transsexuality as opposed to homosexuality in Iran.

130. The Belgian legislator introduced a broader definition of a particular social group than arguably required by the Qualification Directive and X.Y.Z., and does not require cumulative application of these approaches. This is due to the transposition of Article 10(1)(d) of the Qualification Directive into Article 48/3 of the Aliens Act, by law of 15 September 2006. Since then, the classical approaches to defining a particular social group, namely the protected or immutable characteristic approach and the social perception approach, were given an independent legal basis. This meant that, from then on, protected characteristics and social perceptions could independently – instead of cumulatively – serve as the basis of a particular social group. In doing so, the Belgian legislator willingly introduced a broader definition of a particular social group than arguably required by the Qualification Directive, in accordance with UNHCR guidelines.

131. Judgment No. 7482 of 02 December 2013 of Sofia City Administrative Court (*Административен съд – София град*), case No. 6297/2013; Judgment No. 7431 of 28 November 2013 of Sofia City Administrative Court (*Административен съд – София град*), case No. 10093/2012.

132. Supreme Administrative Court (SAC) of 07 July 2014 in case No. 1381/2014 and 17 February 2014, case No. 364/2014.



Overall, policy and decision makers as well as the judiciary in **most Member States** applied the judgment relatively consistently, derogating from the most common practice in their country in limited instances and based on the individual circumstances of the case. Divergent interpretation by various actors across Member States was identified to some extent in **Belgium**, and **the UK** and to a large extent in **Bulgaria**. To illustrate, the guidance given by **the UK** courts in *MSM Somalia* suggests there is little scope for a 'discretion' argument since the judgment in *X.Y.Z.*, but the Home Office have not included this in their guidance on sexual identity claims and practitioners interviewed considered that there is inconsistent practice in the Home Office on this point.

The impact assessment of the *X.Y.Z.* judgment is complex as the judgment focused on a number of interconnected issues. The present research suggests that, depending on pre-dating country practices, the CJEU's interpretation of these elements was relevant to various Member States to a differing extent. In order to have a better understanding of how Member States applied *X.Y.Z.* and whether the judgment affected their policy and practice, we analysed the above mentioned elements separately.

*Member States practice on whether homosexual asylum seekers form a particular social group and the impact of the X.Y.Z. judgment.*

In **Belgium, France, Germany, Italy, the Netherlands, Sweden** and **the United Kingdom**, the practice that criminal laws that specifically target homosexuals in the asylum seeker's country of origin do not need to exist before an LGBT asylum seeker can be regarded as a member of a particular social group, is in line with *X.Y.Z.* This practice generally predated the judgment, however.

The *X.Y.Z.* judgment alone has contributed to a substantial change in practice on this issue in **Bulgaria**, where the Sofia City Administrative Court referring to the CJEU guidance, found homosexual asylum seekers, whose countries of origin criminalized homosexual acts, members of a particular social group.

*Member States practice on whether the enforcement of laws criminalising homosexual activities and the threat of imprisonment in relation thereto constituted an act of persecution following X.Y.Z.*

Member State practice on the issue in **Belgium, Germany, the Netherlands and Sweden** is in accordance with the CJEU's conclusions in *X.Y.Z.* and arguably it was the judgment that contributed to relevant positive practices. It should be noted that due to the lack of guidance from the CJEU regarding what constitutes an act of persecution and how the relevant assessment should be made, the practices on whether the severity of the criminal sanctions needs to be evaluated and how to assess whether the law is 'actually applied in practice' vary across Member States.

The case law in **the Netherlands** applied the CJEU decision in a favourable manner. For example, the Dutch Council of State ruled that not only a term of imprisonment leads to persecution, but other aspects should be taken into consideration as well such as a police and criminal investigation (including custody) prior to a possible term of imprisonment.<sup>133</sup>

The 2016 **UK** Home Office's guidance note provided that in order for the criminal sanctions against homosexual acts to amount to persecution, they should reach a certain level of severity, namely imprisonment rather than simply a fine. It also noted that where the criminal sanctions are never, or even hardly ever, imposed in practice, a real risk of persecution cannot be established. In the same vein in **Bulgaria** *X.Y.Z.* is mostly applied restrictively with the judiciary focusing on whether the applicant had been a victim of violence rather than assessing a risk of persecution. At the same time, arguably **the French** and **Italian** practice was not affected by this CJEU judgment due to favourable practice pre-dating the judgment. To illustrate, the French asylum authorities do not solely focus on the issue of criminalization but also take into account the application of other laws and actions by the authorities in the country of origin concerned.<sup>134</sup>

*Member States practice on whether a foreign national with a homosexual orientation can be expected to*

<sup>133.</sup> Additionally, Dutch policy stipulates that homosexual asylum seekers are not expected to seek protection from the authorities in the country of origin in the situation when homosexuality or homosexual acts are criminalized in that country.

<sup>134.</sup> Indeed, they consider that even if there is no specific criminal law, the assessment of the reality of persecution has to take into account other laws abusively applied to the given social group or behaviour emanating from the authorities, encouraged or fostered or simply tolerated by them.

*conceal their sexual orientation or exercise restraint in their country of origin in order to avoid persecution following X.Y.Z.*

As a result of the CJEU decision, the **Dutch** policy on concealment has significantly changed. It now specifies that no concealment of sexual orientation can be expected from an asylum seeker upon return to their country of origin, yet there is perhaps a margin of manoeuvre for concealment considerations to resurface in questions relating to the applicant's expression of his or her homosexuality. Divergent and more restrictive practice exists in **Belgium** and **the UK**. On the one hand, the non-concealment principle is being applied more strictly in Belgium and is also followed by a number of judges in **the UK**. On the other hand, **the UK** still applies the HJ(Iran) discretion test to sexual orientation based claims. The authorities and judiciary differentiate between asylum seekers, who were considered to be 'naturally discreet' and asylum seekers whose concealment of their sexuality was founded on a fear of persecution. Similar restrictive practices exist in **Bulgaria**. The practice in **France, Germany, Italy** and **Sweden** was not significantly affected by the X.Y.Z. judgment due to favourable practice and case-law prior to the judgment.<sup>135</sup>

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<sup>135</sup>. In particular, CJEU Case C-71/11, C-99/11, *Bundesrepublik Deutschland v Y. Z.* triggered positive changes in Germany.

# A, B and C v Staatssecretaris van Veiligheid en Justitie

## Facts of the case:

*A, B and C v Staatssecretaris van Veiligheid en Justitie*<sup>136</sup> concerned three third country nationals who applied for asylum claiming that they feared persecution on account of their homosexuality. In all three cases the Staatssecretaris and later the Rechtbank's-Gravenhage rejected the applications, surmising that the individuals' statements concerning their homosexuality lacked credibility. On appeal the Dutch Raad van State (Council of State) had doubts as to whether, in light of the EU Charter, certain limitations were placed on national authorities when verifying the sexual orientation of an applicant.

## Referred questions:

The Raad van State decided to stay the proceedings and to refer the following question to the Court of Justice: What limits do Article 4 of [Directive 2004/83] and [the EU Charter], in particular Articles 3 and 7 thereof, impose on the method of assessing the credibility of a declared sexual orientation, and are those limits different from the limits which apply to assessment of the credibility of the other grounds of persecution and, if so, in what respect?

## Decision and Reasoning:

Firstly, the Court notes that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that Directive 2004/83 (the Qualification Directive) should be read in light of its general scheme and purpose and the other relevant treaties referred to in Article 78(1) TFEU as well as the EU Charter.

Rejecting the submission by the applicants that assessments of sexual orientation should be based solely on the applicants' declarations, the CJEU does, however, note that Article 4 of Directive 2004/83 read in light of the EU Charter places certain limits on authorities when assessing the facts and circumstances concerning the applicants declared sexual orientation. Notably, the Court highlights that whilst Article 4 of the Qualification Directive is applicable to all claims of international protection, it is necessary that the competent authorities modify their methods of assessing evidence according to the particular category of application for asylum so as to comply with the EU Charter. In this regard an individualised assessment, taking into account the applicant's personal circumstances, must be adhered to when establishing the factual circumstances of the case.

With regards to the present proceedings the Court surmises that the assessment of asylum applications 'solely on the basis of stereotyped notions' does not satisfy the individualised assessment needed to comply with Article 4(3) of the Qualification Directive and Article 13(3)(a) of the Procedures Directive. The Court rules out decisions based uniquely on stereotyped notions, but does confirm that 'questions based on stereotyped notions may be a useful element at the disposal of competent authorities for the purpose of assessment'.<sup>137</sup> The Court continues its assessment by noting that questions by authorities relating to the details of the applicant's sexual practices are contrary to the respect for private and family life enshrined in the EU Charter and that the submission of tests or evidence to demonstrate homosexuality have no probative value and would infringe Article 1 of the EU Charter. The Court states that the conclusion would still be the same if the applicant voluntarily produced such evidence and warns that if authorities were to accept such evidence it may lead to other applicants feeling pressurised to submit similar evidence.<sup>138</sup> Lastly, the Court holds that not declaring homosexuality at the outset to the relevant authorities can not result in a conclusion that the individual's declaration lacks credibility. An individualised assessment in light of the applicant's personal circumstances and vulnerability must be undertaken and thus an applicant's reluctance to detail aspects of his/her personal life should not be taken as a lack of credibility.<sup>139</sup>

## The Court ruled:

<sup>136</sup>. CJEU, Joined cases C-148/13 to C-150/13 *A, B and C v Staatssecretaris van Veiligheid en Justitie*, 2 December 2014 (hereinafter 'A.B.C.').

<sup>137</sup>. *Ibid*, para 62.

<sup>138</sup>. *Ibid*, para 66.

<sup>139</sup>. *Ibid*, para 69.

Article 4(3)(c) of 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 and Article 13(3)(a) of Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status, must be interpreted as precluding, in the context of the assessment by the competent national authorities, acting under the supervision of the courts, of the facts and circumstances concerning the declared sexual orientation of an applicant for asylum, whose application is based on a fear of persecution on grounds of that sexual orientation, the statements of that applicant and the documentary and other evidence submitted in support of his application being subject to an assessment by those authorities, founded on questions based only on stereotyped notions concerning homosexuals.

Article 4 of Directive 2004/83, read in the light of Article 7 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding, in the context of that assessment, the competent national authorities from carrying out detailed questioning as to the sexual practices of an applicant for asylum.

Article 4 of Directive 2004/83, read in the light of Article 1 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding, in the context of that assessment, the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to 'tests' with a view to establishing his homosexuality or, yet, the production by him of films of such acts.

Article 4(3) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 must be interpreted as precluding, in the context of that assessment, the competent national authorities from finding that the statements of the applicant for asylum lack credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution.

## Introduction

As with the other cases examined in this study this section looks at the influence that the judgment *A, B and C v Staatssecretaris van Veiligheid en Justitie* (hereinafter '*A.B.C.*'), decided on 2 December 2014, has had on practice and policy in the selected Member States. The judgment focused on the restrictions that the EU Charter places on the methods of assessing credibility in declared sexual orientation cases. In addition, the Court addressed the potential differences of assessing credibility according to the grounds of persecution relied upon as well as the consequences of late disclosure of sexual orientation on the individual's credibility.

The judgment has been received with mixed commentary amongst academics and practitioners alike. On the one hand the judgment has garnered praise in its finding that sexually explicit questions and evidence/material cannot be used, and in fact are directly prohibited, to assess an individual's credibility. The Court's additional finding that no adverse credibility findings for late disclosure have been similarly welcomed. On the other hand, criticism has been directed at the judgment for not explicitly ruling out questions based on stereotyped notions when assessing an individual's statements, in fact the Court accepts that some stereotypes may be useful. Alongside the lack of specificities as to which stereotypical notions may be allowed, the omissions left in the judgment's wake, according to critics, extend to how Member States should question applicants and, more generally, which approach to take when assessing credibility.<sup>140</sup>

This section is split into the following; first, assessment of Member States practices prior to the *A.B.C.* judgment focusing on stereotyped questioning, the use of evidence within the scope of credibility assessments, individualised assessments and the effect of late disclosure on credibility; second, the guidance issued by Member States following the judgment; third, the assessment of credibility after the judgment and an analysis of the effect of the judgment on Member States practice.

<sup>140</sup>. For commentaries which assess all of these points please see: S Chelvan, 'C-148/13, C-149/13 and C-150/13, *A, B and C v Staatssecretaris van Veiligheid en Justitie*: Stop Filming and Start Listening – a judicial black list for gay asylum claims', 12 December 2014 and S Peers, 'LGBTI asylum-seekers: the CJEU sends mixed messages', 2 December 2014.

## Assessing credibility in declared sexual orientation cases prior to *A.B.C.*

### Questions posed to applicants

Questions eliciting sexually explicit responses and questions framed by stereotypical assumptions were posed by authorities or by judges themselves in the majority of States included in this study,<sup>141</sup> however, countries differed as to what weight was attributed to the two types of questions for credibility purposes, whether they were disentangled from one another or whether stereotypical notions often shaped the sexually explicit questioning and vice versa. To illustrate, in **Sweden** there was a clear separation between the two types of questioning. Invasive questions were almost always asked about the asylum seeker's sex life, as well as questions based on stereotypes before *A.B.C.*

Conversely in **Belgium** stereotypical questions, which tended to subsume sexually intimate questioning, were posed by both the administrative authority ('CGRS') and first instance administrative court ('CALL') and were standard practice before (and after) *A.B.C.* The overlap was evident by the fact that stereotypical questions related to three types of issues: relationship with a partner, sexual experience and awareness and knowledge of the LGBTI movement in the country of origin. The standpoint of both the Belgian administration and courts was that objective proof of the individual's sexual orientation is extraordinarily difficult to have thus the asylum applicant must be convincing about their personal experience and evolution concerning their homosexuality. A similar approach is apparent in **France**. The questioning in **Belgium** was remarkably intimate verging on the intrusive. The authorities demanded that the applicant give a detailed, precise and spontaneous account of their personal experiences which included personal identification with the sexual orientation, childhood experience, *prise de conscience* and the expression of such orientation, criminalisation of homosexuality in the country of origin and the influence of religion.<sup>142</sup> In very few cases did the CALL find that either the assessment by the CGRS was too subjective<sup>143</sup> or that more weight should be given to individual characteristics of the applicant.<sup>144</sup> Indeed it was very rare for the CALL to rule that the administrative authority's questions were irrelevant for a credibility assessment and no case law prior to *A.B.C.* had found that the questioning was in breach of fundamental rights under the EU Charter or ECHR.

In **the UK**, a very similar line of questioning appeared prior to *A.B.C.* Several reports from NGOs and the Independent Chief Inspector of Borders and Immigration (ICIBI) showed that before the CJEU judgment, Home Office case workers and immigration judges had stereotyped assumptions<sup>145</sup> concerning membership of gay organisations, or attendance of gay parades, gay clubs or even reading gay magazines. Similarly assumptions concerning religion, culture and homosexuality were sometimes used as a negative credibility inference, namely where the person had not struggled in coming to terms with their religion and sexuality.<sup>146</sup> Sexually explicit questions, where asked, were noted as being extremely intimate, bordering on the pornographic, especially towards lesbians<sup>147</sup> and those detained in the previously operating Detained Fast Track System.<sup>148</sup> Indeed, this latter finding was extracted from the ICIBI report, a report which was specifically requested from **the UK** Home Secretary after an Observer article detailed the intrusive questioning by immigration authorities of asylum applicants' sexual experiences. In addition, the UK Lesbian & Gay Immigration Group (UKLGIG) noted that refusals of sexual orientation claims were often based on a poor understanding or misconception of sexual identity by authorities. Therefore, the use of unreasonable assumptions was analogous to practice in Belgium in that the UK Home Office would disbelieve an applicant who had said that they had engaged in nonconforming social behaviours since such activities would lead to exposure and harm.<sup>149</sup>

Credibility assessments were noted in many of the countries examined as being very difficult for asylum

141. However, a lot of the research undertaken was based on the analysis of decisions made by the Courts, and generally appeal Courts, rather than on transcripts where a breakdown of questions is provided. Nevertheless, questions can be gained from the Court decisions themselves as well as from answers from interviewees.

142. CALL, judgment No. 103722 of 29 May 2013 (Senegal).

143. CALL, judgments No. 52529 of 7 December 2010, No. 54816 of 24 January 2011 and No. 78887 of 6 April 2012.

144. CALL, judgments No. 53038 of 14 December 2010, and No. 65238 29 November 2011.

145. An Investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation, Independent Chief Inspector of UK Borders and Immigration, October 2014, p.3.

146. UK Lesbian & Gay Immigration Group, *Missing the Mark*, October 2013, p.16.

147. *Ibid* p.25.

148. An Investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation, Independent Chief Inspector of UK Borders and Immigration, October 2014, p.3.

149. See e.g. Asylum Aid, 'Unsustainable: the quality of initial decision-making in women's asylum claims' (2011); Amnesty International 'A Question of Credibility' and 'Still Human Still Here', April 2013. Critique in Chiver [1994] UKIAT 10758.

authorities and judges<sup>150</sup> but also a determinative factor as to whether or not to accept the protection claim and in the majority of countries questioning /interrogation was the main source for assessing the applicant's credibility. For example, in **the UK** and **Belgium**<sup>151</sup> a large amount of claims on the basis of alleged sexual orientation were refused due to doubts about the credibility of that orientation; credibility being assessed by the questioning as specified above. In **the UK**, for example, after the landmark case of *HJ (Iran)*<sup>152</sup> credibility became a more common reason for refusing claims of homosexual asylum applicants.

In **Germany** interrogation of the claimant, and the claimant's partner were the main sources of assessing credibility with questions being asked on the applicant's personal life, when and how they realised their sexual orientation, how they dealt with the realisation, what reactions they encountered and about their life in Germany. In numerous cases, it appears that stereotypical notions played a role in the applicant's credibility, namely the outer appearance of the applicant as being manifestly feminine,<sup>153</sup> and this practice still continues. A similar approach was adopted in **Italy**, although it is not reported that intrusive questions were asked. Interviews revolved more around the applicants' realisation of their sexual orientation, their relationships and how they dealt with it in the country of origin. Moreover, considerable attention was paid to the account of the violence suffered by the applicant because of their sexual orientation.<sup>154</sup> Nonetheless, in Italy too, stereotypes played a role, especially before the administrative bodies.<sup>155</sup> Similarly in **the Netherlands** stereotypical questions were posed before the A.B.C. judgment and still continue to be asked by the asylum authorities.

### The use of evidence

The use of evidence defined by the CJEU in para 65 of the judgment for credibility assessment purposes was addressed differently by the countries included in the study. Indeed, practices fell on opposite ends of the spectrum. On the one end **France, Belgium, Bulgaria** and **the Netherlands** did not refer to tests on the applicant's homosexuality or photographic/film evidence when assessing credibility. However, in one isolated case, in **Bulgaria** the administrative authorities requested the asylum applicant to bring two intimate partners in order to assess the applicant's sexual orientation. This was later retracted after the applicant's lawyers objected.

On the other end of the spectrum **Germany, Sweden, Italy**<sup>156</sup> and **the UK** did accept some sort of evidence demonstrating the applicant's homosexuality. The type of evidence accepted or used differed according to the country, however. To illustrate, in **Germany** and **Italy** psycho-medical evidence<sup>157</sup> along with witness statements, i.e. from the applicant's partner, have been used prior to *A.B.C.* to establish that the applicant was homosexual.<sup>158</sup> However, in one German case, which testifies to the use of psycho-medical evidence in sexual orientation cases, the judge does not detail how the psychotherapist tested the applicant on his sexual orientation. Instead an opinion was prepared by the psychologist on his sexuality, which concluded that the applicant was a homosexual.<sup>159</sup>

In **the UK** differences were less noted in the type of evidence accepted but rather in which procedure the applicant was subjected to. For example, in the Detained Fast Track System officers were instructed to receive and view sexually explicit material, though not to request it. Conversely the instruction in the mainstream procedure was to refuse such material if presented to the officers. Finally, in **Sweden**, in light of the practice of free evidence in the country, explicit evidence of one's sexual orientation was accepted by the national authorities. Interestingly, and as discussed below, the clear conclusion of the Court in *A.B.C.* on the receipt of evidence has meant that for those in Sweden wishing to submit film or photographic evidence, they are now faced with more difficulties in proving their sexual orientation.

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150. As noted in the French and German country report.

151. CALL, judgment No. 54816 of 24 January 2011.

152. *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010.

153. VG Aachen, 12 December 2014, 2 K 1477/13.A.

154. See, for example, Tribunal of Trieste, 8 August 2009, judgment No. 304/09.

155. Territorial Commissions ('Commissioni Territoriali'). For more information on the Italian asylum system, see <http://bit.ly/2kgQ44Q>.

156. Such approach is derived from the jurisprudence of the Italian Court of Cassation, particularly judgment No. 27310/2008.

157. Tribunal of Rome, 2 August 2013, R.G. No. 15571/2013.

158. Among others, see Court of Cassation, No. 11586/12 and No. 15981/12; Tribunal of Milano, 24 March 2013; Tribunal of Trieste, 8 August 2009, No. 304/09.

159. VG Berlin, 29 October 2013, VG 34 L 89.13 A.

## Practice on an individualised assessment of the applicant prior to A.B.C.

The States included in the study differed, again, in respect of assessing the individual's position and personal circumstances. For example, in **Sweden**<sup>160</sup> **Belgium**<sup>161</sup>, **Italy**<sup>162</sup> and **France** the need for an individual assessment was widely acknowledged before the CJEU's judgment. In **Belgium**, whilst the questions posed to the asylum applicant, as highlighted above, tended to be stereotypical in nature, the assessment of the applicant's declarations took into account the prevailing context in the country of origin of the applicant, including the level of social homophobia and legal repression in practice, the activities and the relations of the applicant in Belgium, the existing tensions within his family and community as well as elements declared by the individual.<sup>163</sup> Additionally the CALL has, prior to A.B.C., stated that the credibility assessment of LGBTI persons has to be set against their membership of a specifically vulnerable group and, thus, a large restraint had to be adopted in the evaluation of their claims along with a generous application of the benefit of the doubt. The Court has also stated that socio-cultural, economic, professional as well as the family context of the individual should be taken into consideration.<sup>164</sup>

In **Italy**, however, the individualised assessment approach does not prevent stereotypical questions, which were and still are reported.<sup>165</sup> For example, the Court of Appeal of Bari looked at the asylum seeker's job in the country of origin to conclude that, since it was a remunerative and socially valuable activity, the applicant's flight was motivated by a well-founded fear of persecution rather than by mere economic factors.<sup>166</sup> Notably, the research shows that relevance is often given to the journey undertaken by the asylum seeker to get to **Italy** and this is considered in the overall assessment of credibility, although that is not directly related to the merit of the claim.

In **Germany**, section 25 of the Asylum Act governs the individual hearing of every applicant for international protection. In the case of persons who claim persecution on grounds of belonging to a particular social group, the BAMF generally poses questions on the applicant's biography and background and contrasts the answers against the living conditions in the country of origin. In **the UK** serious concerns on proper credibility assessments were raised in particular with regards to applicants placed in the Detained Fast Track System. As reports have noted, credibility assessments were almost impossible in circumstances of detention, compounded by an environment of bullying, abuse and harassment.<sup>167</sup>

## Practice on late disclosure of sexual orientation prior to A.B.C.

Interlinked with the question of individualised assessment is late disclosure. In general, where guidance or jurisprudence pointed to the requirement of individually assessing the personal circumstances of the applicant, practice, at least in theory, was that late disclosure should not be the *sole* reason for a lack of credibility. For example, in **Sweden**, the Migration Agency would tend to accept and understand late disclosure arguments. Where it did concern the courts, both the administration and judiciary appreciated the reasons of late disclosure in sexual orientation cases, namely the stigma attached to revealing one's sexuality. Having said this, disclosure where there was a time lapse of several years from the moment of application was sometimes held against the applicant and perceived as one of several elements showing a lack of credibility. A complaint against Sweden was lodged before the UN Human Rights Committee principally concerning the large time lag and previous claims on other grounds before sexual orientation was presented as a ground for persecution. The Human Rights Committee highlighted the obligation to evaluate an applicant's explanation for late disclosure no matter how late the submissions on sexual orientation may be.<sup>168</sup> Reference to this judgment has only been made in one subsequent Swedish case.<sup>169</sup>

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160. Sweden Migration Court of Appeal, MIG 2007:12.

161. This is in part due to the partial transposition of Article 4 of the Qualification Directive 2011/95/EU as well as UNHCR guidelines on the burden of proof.

162. Tribunal of Naples, 25 October 2013.

163. CALL, judgment No. 103722 of 29 May 2013 (Senegal).

164. CALL, judgment No. 101488 of 24 April 2013 (Senegal).

165. Tribunal of Rome, 2 August 2013, R.G. No. 15571/2013.

166. Court of Appeal of Bari, 5 March 2013, No. 299/13.

167. The Use of Immigration Detention in the United Kingdom A Joint Inquiry by the All Party Parliamentary Group on Refugees & the All Party Parliamentary Group on Migration, September 2015; Report of the Review into the Welfare in Detention of Vulnerable Persons A report to the Home Office, Stephen Shaw, January 2016 Cm 9186.

168. UN Human Rights Committee, X v Sweden (Communication No. 1833/2008), 17 January 2012.

169. FGO UM 1397-14.

In **Germany**, the administration has prior to *A.B.C.* acknowledged that there may be genuine reasons for homosexual applicants not to disclose their sexual orientation, namely on account of their socio-cultural imprint or privacy concerns.<sup>170</sup> More clearly the Ministry of Interior has said that the BAMF does not reject asylum claims on the basis of late disclosure.<sup>171</sup> Instead a holistic examination of all circumstances must take place. With regards to the courts, given that the Code of Administrative Court Procedures specifies that rulings must be delivered with regards to the overall outcome of the proceedings, one judge interviewed for the study specified that the credibility assessment was the same regardless of whether the sexual orientation had been disclosed at a late stage or early on in the proceedings. Nonetheless, whilst not a determinative factor of a lack of credibility, late disclosure, amongst other reasons, has been used against the applicant's credibility, in German jurisprudence.<sup>172</sup>

Similar practice is noted in **Italy, the Netherlands**,<sup>173</sup> and **Belgium** where a CALL judgment from 2013 stated that the benefit of the doubt must be applied to those who have introduced their asylum application at a later stage and that late disclosure of the acclaimed grounds of persecution cannot be a sufficient reason to refuse the application.<sup>174</sup> Nonetheless, late disclosure before *A.B.C.*, and still today, is an important element in the credibility assessment where it indicates that the applicant did not feel the urge to get protection and accordingly did not fear instant persecution. In **Italy**, the Tribunal of Naples granted refugee status to a gay man who applied for asylum one year and a half after his arrival in Italy. In this case, the judge noted that the asylum seeker had stated that he was fleeing persecution because of his sexual orientation since the very beginning.<sup>175</sup>

In **France**, late submissions of any kind could (and still can) raise concerns since decision makers and judges generally consider that the applicant did not respect his/her obligation of cooperation. As in **Germany** and **Sweden**, however, this is never the determinative reason in concluding upon a credibility assessment.

In **the UK** practice differed demonstrably. Whilst contravening Home Office guidance at the time, studies issued by UKLGIG showed that late disclosure of sexual orientation led to refusals of the asylum application. Particularly worrying was that the definition of late disclosure was disclosing one's sexual orientation in the substantive interview rather than in the very first screening interview.<sup>176</sup> Where asylum on grounds of sexual orientation was claimed months or years after arrival in **the UK**, applications were often rejected with decisions being upheld on appeal.<sup>177</sup> Interestingly, proceedings before the First Tier (FTT) and Upper Tribunal (UT) in one unreported case on late disclosure in the UK fell before and after the judgment of the CJEU. The FTT prior to *A.B.C.* dismissed the appeal advancing that the ground of sexual orientation was only raised after the applicant's initial claim on political opinion grounds and therefore dismissed his claim based on his sexual orientation. Post *A.B.C.* the UT held that it had been an error of law to dismiss the applicant's sexual orientation claim and that 'it cannot be concluded that the declared sexuality lacks credibility simply because, due to reticence in disclosing intimate aspects of personal life, it was not declared at the outset'.<sup>178</sup>

**Bulgaria** was in a somewhat analogous position as **the UK** in that in one judgment the Supreme Administrative Court held that the late disclosure of the applicant's homosexuality influenced negatively the credibility of the asylum application.<sup>179</sup> In this particular case the applicant's application for asylum came after his student visa had expired and he had resided lawfully in Bulgaria for eight years. The statement as to his homosexuality was

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170. Available at <http://bit.ly/2ga3j3S> pp. 8-9.

171. Ibid at 10.

172. For example, in one case the applicant had specifically said that he was not a homosexual in his BAMF interview and the court later doubted his explanations as to why he had lied during the initial interview. VG Aachen, 21 Feb 2013, 2 K 996/11.A. Lack of credibility has also been found in a case concerning the late disclosure of being in a homosexual relationship in Germany for a number of months. VG Augsburg, 6 Dec 2012, Au 7 K 12.30166.

173. According to policy guidelines a subsequent application would not be rejected for reasons of late disclosure when the statements on the sexual orientation are deemed to be credible. WBV 2012/21.

174. CALL, judgment No. 111674 of 10 October 2013.

175. Tribunal of Naples, 25 October 2013. The report 'Fleeing Homophobia' refers also to a 2009 case in which the asylum seeker presented a first claim based on grounds other than sexual orientation, which was refused. He then presented a second asylum claim based on sexual orientation, which was instead accepted. See Jansen, S. and Spijkerboer, T. (2011) *Fleeing Homophobia*, COC Nederland-VUB Amsterdam, p. 68.

176. Cases cited by UKLGIG showed that where applicants disclosed their sexual orientation in the substantive interview, providing reasons for non-disclosure at screening, their applications were still refused.

177. An Investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation, Independent Chief Inspector of UK Borders and Immigration, October 2014, 3.

178. *M v The Secretary of State for the Home Department*, [2014] UKUT 05899 (IAC).

179. Judgment No. 1489/2003 of 01 October 2003, Bulgarian Supreme Administrative Court.



made for the first time before court. In finding a lack of credibility the Court also made reference to attitudes in his country of origin towards homosexuality and that he had returned during the holidays to his country of origin without having been persecuted.

### An examination of guidance issued by Member States following *A.B.C.*

Three of the States included in the study have issued public guidance in light of the *A.B.C.* judgment. **Sweden, the UK and the Netherlands** have issued public guidance, however the detail included varies quite considerably. With regards to **Sweden** and **the UK**, the instructions adhere, for the most part, quite clearly to the black letter wording of the judgment. In **Sweden** the Swedish Migration Agency issued a new legal position to its staff on investigating and deciding asylum cases based on sexual orientation.<sup>180</sup> The instruction note specifies that the asylum interview cannot encompass questions about sexual acts or sexual experiences and that evidence, such as videos of sexual acts, cannot be admitted. The Agency also clarified that questions about relationships are permissible but that a person may have a homosexual identity without ever having had an actual relationship. Furthermore, the Agency also clarified that an asylum seeker can be married and have children with someone of the opposite sex and nevertheless have a non-heterosexual identity.

In **the UK** the Home Office revised two Asylum Policy Instructions on Asylum Interviews and Sexual Identity Issues in the Asylum Claim in March 2015 to accommodate the *A.B.C.* judgment. The two main areas detailed in the instructions relate to sexual or gender identity and credibility, notably with regards to late disclosure. With regards to the first, the instructions specify that an individualised and sensitive enquiry must be made regarding the claimant's sexual identity. No questions must be posed relating to explicit sexual activity nor must a claimant ever be asked to supply evidence of sexually intimate acts. Even where the applicant is forthcoming with this evidence the Home Office officials must reject it. In addition, questions based solely on stereotypical behaviour cannot be relied upon to assess evidence put forward by the claimant, however questions about membership of clubs, groups or organisations are still allowed. The instructions add further details on how the interview should be conducted, namely that the environment of the interview is conducive to the applicant providing a narrative where evidence in support of their sexual orientation is given. The threshold of establishing sexual orientation is a reasonable degree of likelihood.

With regards to late disclosure, an individualised assessment as to the possible reasons for not disclosing during screening must be undertaken which takes into account, for example, feelings of shame and stigma and specifies that late disclosure cannot be the sole reason for finding an adverse credibility inference. Nonetheless, failure to mention one's sexuality at the main asylum interview, when there is every opportunity to do so, may call into question the credibility of the claim, unless there are very good reasons for not having mentioned it at that point. It is this last point that has continued to raise some cause for concern in light of the practice before *A.B.C.* since it does not categorically discount the screening interview as the appropriate forum to disclose one's sexual orientation. Instead, the guidance still assumes the screening interview as the first opportunity to disclose despite Home Office guidance stating that the substance of the asylum claim is not probed at the screening interview. In addition, interview transcripts from the study report demonstrate that **the UK** authorities as well as immigration judges do not follow the guidance. Most notably, judges continue to ask stereotypical questions in the course of deciding whether an applicant is gay.

In **the Netherlands** a combination of internal and public guidance was issued prior to and post the ruling. Internal guidance was given before the judgment and addressed to decision makers on how to assess credibility of a declared sexual orientation, whereas public guidance was published after the judgment following a Council of State judgment in 8 July 2015 which held that there must be a transparent line of conduct from the immigration authorities when assessing the credibility of the sexual orientation. The public guidance<sup>181</sup> specifies that stereotyped questions may be asked, but where the applicant cannot answer these questions a lack of credibility cannot be inferred. Conversely where the person fulfils the stereotypical image of a homosexual person this could substantiate the finding of credibility. A challenge was brought before the Council of State on the legality of both the internal and public guidelines. On 15 June 2016,<sup>182</sup> The Council of State ruled that guidance 2015/9 was sufficient for assessing the credibility of the sexual orientation in an asylum procedure. The Council ruled on three elements: the drafting of the public guidance the research methodology for analysing the credibility of the sexual orientation and the assessment methodology, the value and weight of an applicant's statements.

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<sup>180.</sup> RCI SR 38/2015.

<sup>181.</sup> Werkinstructie 2015/9.

<sup>182.</sup> Afdeling Bestuursrechtspraak van de Raad van State, 15 June 2016, 201509454/1/V2.

It found it was thoroughly drafted and paid particular attention to the fact that they cooperated with LGBT rights organisations and underwent specific training on the topic. It found the credibility methodology to be sound and was based on asylum seekers' declarations during the determination interview. Furthermore, it also found that the questions which are asked by the decision maker are open questions. Finally, it found the methodology used to assess the asylum seekers statements to be transparent. It found that the immigration authorities take into account the personal circumstances, background and age of the asylum seeker. The authorities presume that the asylum seeker has discovered his or her sexual orientation that this orientation is not accepted by society and there may even be the presumption that the applicant's sexual orientation is penalised. Therefore, they should be able to talk about the moment they became aware of their homosexuality, what this has meant for them and in which way this has influenced its expression. Furthermore, their statements are also considered within the larger country of origin information and environmental context.

With regards to **Belgium, Bulgaria, France, Italy**<sup>183</sup> and **Germany** no public guidance on the judgment has been issued, although internal guidelines have been issued for the respective administrative authorities in **France** and possibly in **Belgium** and **Germany**.

In **France**, at the OFPRA level, there are internal guidelines<sup>184</sup> on how to conduct interviews based on sexual orientation gender identity claims,<sup>185</sup> and were updated to take into account the *A.B.C.* judgment. The guidelines illustrate that the aim is to create a secure setting for asylum seekers enabling them to feel confident, taking into account their difficulty to explain fully their account,<sup>186</sup> particularly in the presence of an interpreter. All new officers are trained on how to use these guidelines.

At the CNDA level, the CEREDOC has started to train judges and *rapporteurs* on credibility assessments of asylum claims based on sexual orientation.<sup>187</sup> In particular, a recent training<sup>188</sup> was provided to all the newly recruited *rapporteurs* and a detailed presentation was given to CNDA judges in December 2015.<sup>189</sup> The presentations and trainings recall the *X.Y.Z.* and *A.B.C.* judgments as well as other guiding principles, in particular those from UNHCR. It highlights that judges have to be objective and take into account the vulnerability of LGBTI asylum seekers as well as their cultural, economic, familial, political, religious and social background. It recalls that there is no standard way of living or universal characteristics for LGBTIs. It aimed to deconstruct any stereotyped notions or preconceived ideas about LGBTIs. It also highlights that asylum seekers' oral statements are the basis of the analysis of their well-founded fear of persecution.<sup>190</sup> The presentations recommended creating a secure setting, including by recalling the duty of confidentiality of the interpreter, to use a neutral vocabulary and to be empathetic.

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183. Guidance is potentially offered by the UNHCR Guidelines on International Protection No.9, in consideration of the fact that UNHCR representatives participate to the refugee status determination procedure at the first instance (Territorial Commissions). However, it is unclear whether UNHCR Guidelines are adequately taken into account by other members of the Territorial Commissions.

184. This internal document was not shared with the researcher but some elements of its content were provided by the OFPRA during our interview.

185. This document does not (yet) include any guidance for drafting the decisions. This is part of a current thinking in the broader framework of the quality control process.

186. This can also explain the reason for the late disclosure.

187. Article L 731-4 CESEDA (introduced by the Law No. 2015-925 of 29 July 2015 relative to the Reform of the Right to Asylum) obliges the CNDA to report in its annual activity report on training activities provided to agents and judges, in particular on persecutions based on sexual orientation and gender.

188. This was provided in April 2016.

189. The researcher obtained this training module in her capacity of UNHCR judge-assessor at CNDA. She was not allowed to share the document itself with ECRE but was allowed to explain its content.

190. This was also highlighted by lawyers. According to them, in some countries, one cannot even imagine that an applicant would lie about his/her sexual orientation for the purpose of his/her asylum claim (cf. interview with Me Wendling, 20 April 2016).

## Member States practice on assessing credibility in declared sexual orientation cases following A.B.C.

Following the A.B.C. judgment, two main themes emerged, the first was that there were no major changes in how sexual orientation based claims were assessed, for example, in **Bulgaria**,<sup>191</sup> **Italy**<sup>192</sup> and **Belgium**,<sup>193</sup> the judgment didn't leave much of an impact, but that may be explained by the fact that practice was already rather consistent with the judgment. In the second camp, change in practice and policy was evident following the judgment.

In **the Netherlands** and **the UK**, specific policy instructions were issued and in **Sweden**, a new legal position was issued on investigating and deciding asylum cases based on sexual orientation following the judgment. In **France**, internal guidelines were issued. However, in **France** and **the UK**, this change in practice coincided with changes that were already taking place at the national level.

In **France**, while there were changes to credibility assessments following the judgment, it needs to be considered within a broader context where French asylum authorities endeavoured to change their credibility assessment practices by taking greater account of the vulnerability of the applicant. Furthermore, Article 4 of the recast Qualification Directive and Article 15 of the recast Procedures Directive were only transposed into French law<sup>194</sup> in July 2015 which ensured that States had a duty to assess the application in cooperation with the applicant and to also take into account the applicant's vulnerability. In **the UK**, as noted above, the Asylum Policy Instructions, *Asylum Interviews* and *Sexual Identity Issues* were revised in March 2015 in light of A.B.C. However, during the same period, a change in practice was already occurring in relation to how sexual orientation based claims were assessed, including the applicant's credibility. Following the publication of an article in the *Observer*, which provided an extract from an asylum interview where inappropriate and sexually explicit questions were posed by a Home Office caseworker, an investigation by the Chief Inspector of Borders and Immigration was triggered.

The Chief Inspector published a report<sup>195</sup> and made a number of findings including that of the sample of cases reviewed, over half of the screening interviews 'probed the substance of applicants' asylum claims, contrary to Home Office guidance'.<sup>196</sup> Following A.B.C., a new Asylum Policy Instruction was produced that provided a more positive framework for decision making. Furthermore, decision makers are obliged to complete a training on LGBTI issues. However, it is difficult to assess actual practice, as no data has been published following the A.B.C. judgment which can be used to make clear findings on practice following the judgment.<sup>197</sup> The interviewees believe that the Asylum Policy Instructions are a positive development, but they cannot comment

191. However, the researcher only found six relevant judgments following A.B.C. Five of them are judgments by the Sofia City Administrative Court (*Административен съд – София град*): Judgment of 18.12.2014 in case No. 10123/2014, Judgment of 29.01.2105 in case №12093/2015, Judgment of 27.02.2015 in case No. 12092/14, Judgment of 03.07.2015 in case No. 1173/2015 and Judgment of 14.08.2015 in case No. 5775/2015. There was only one Judgment of the Supreme Administrative Court (*Върховен административен съд*): Judgment of 22.07.2015 in case No.8888/2014.

192. The researcher only found two judgment following A.B.C. that actually quote this CJEU decision: Tribunal of Catanzaro, 2 July 2015, R.G. No. 835/14 and Tribunal of Catanzaro, 7 December 2015. It is noteworthy that both judgments were delivered by the same judge. In both cases, A.B.C. is quoted regarding the interpretation of Article 4(5)(a)(c) Qualification Directive.

193. Individualised assessments were carried out, based on Article 48/6 of the Aliens Act (partly transposing Article 4 recast Qualification Directive), UNHCR guidelines on the burden of proof and some CALL General Assembly judgments. For example, CALL (General Assembly), judgment No. 45396 of 24 June 2010: *'the lack of credibility of the applicant's declarations does not dispense from enquiring in fine about the existence in his respect of a fear of being persecuted or of a real risk of suffering serious harm that could be established sufficiently with the elements of the case that are considered to be certain'*. (own translation). Though the Assembly General composition of the CALL only deals with cases when there is a need to unify diverging jurisprudence, its judgments are not necessarily followed by all the Chambers of the Court. This judgment especially does not systematically get applied in the same strict manner by all the Chambers.

194. Law of 29 July 2015.

195. *An Investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation March-June 2014*, October 2014.

196. Ibid, p.2.

197. Upper Tribunal decisions are second tier appeals from the First-tier Tribunal and may only be made on the basis of error of law. The issue in the Upper Tribunal may be the First-tier Tribunal's credibility assessment, but an error of law at this stage is based on the way that the First-tier Tribunal has approached the evidence; commonly, the weight that has been given to different factors in arriving at the credibility assessment. The presence or absence of factors in A.B.C. judgment cannot be definitively gleaned from this reasoning. First Tier Tribunal decisions are not reported, and are not available in the public domain.

with any certainty to the extent they are being enforced.

There were also less tangible effects on decision making following the judgment. For example, in **Germany**, while there was no major change to case law or practice,<sup>198</sup> the judgment, raised challenges of credibility assessment and the legal limitations that apply, which ultimately increased the sensitivity of judges. One judge interviewed said that German practice had become slightly more refugee-friendly towards applicants with a claim based on sexual orientation, as the CJEU stipulated in *A.B.C.* that you could not ask a myriad of very personal questions. This established 'a sort of reversal of the burden of proof'.<sup>199</sup> Another judge said that the *A.B.C.* judgment had created some uncertainty when assessing an applicant's credibility in an interview as the CJEU merely stipulated negative requirements. Therefore, he found a positive catalogue of permissible questions helpful, as provided in the article 'Credibility Assessment in Claims based on Persecution for Reasons of Religious Conversion and Homosexuality: A Practitioners Approach'.<sup>200</sup> Similarly, in **Bulgaria** the researcher inferred from interviews with SAR officials and with a lawyer from a specialist LGBTI organisation that there was a greater awareness amongst administrative authorities about the need for an individualised assessment of sexual orientation based claims in line with the CJEU judgment.

### Questions posed to the applicant

In almost all the countries reviewed, stereotyped questions continued to be asked after *A.B.C.* In **France, the UK and the Netherlands**, specific instructions were issued on how to pose questions and what other factors need to be taken into account to avoid making decisions based on solely stereotypical notions. Nevertheless, beyond stereotypes, the nature of questions posed by the asylum authorities highlights the general difficulty decision makers and judges face to rid themselves of their socio-cultural prism when conducting the credibility assessment for all protection claims, in particular when sexual orientation/gender issues are raised.<sup>201</sup>

In **Belgium, the Netherlands, Germany and Italy**, stereotypical questions can be posed. In **the Netherlands**, the public guidance *Werkinstructie 2015/9* provides that stereotypical questions can be asked. In all of these Member States questions relating to the applicant's familiarity with the gay scene in both the country of origin and in the Member State, how frequently they attend gay bars and whether they are active in the gay rights movement play an integral part in the credibility assessment of the applicant and it can be said that it is expected that the applicant needs to have some experience or knowledge of these issues.<sup>202</sup> In **the Netherlands**, in practice most weight is placed on the ability of the asylum seeker to elaborate on when they became aware of their sexual orientation, what this meant in practice and how this influenced the way this was expressed. As in other Member States, this is set against the country of origin information.

In some cases, a negative credibility assessment was inferred when an applicant had no or only very limited knowledge of the gay scene.<sup>203</sup> However, this was never the sole determining factor when determining if a sexual orientation based claim is credible<sup>204</sup> and by the same token this was insufficient to conclude that the sexual orientation of the person lacked credibility. For example, in **Germany**, if the applicant did not have contact with the gay scene, this did not necessarily lead to a refusal, but, if explained could support the

198. The German courts generally continue to assess claims on the basis of an individualised assessment, see e.g. VG Aachen, 12.12.2014, 2 K 1477/13.A. Some courts seem to explicitly base their questioning on UNHCR Guidelines on 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.

199. Details of interview on file with the author.

200. Uwe Berlit, Harald Doerig, and Hugo Storey *Credibility Assessment in Claims based on Persecution for Reasons of Religious Conversion and Homosexuality: A Practitioners Approach*, Int J Refugee Law (2015) 27 (4) pp. 649-666.

201. This was noted in particular by the French researcher.

202. E.g.: CALL, judgment No. 136346 of 15 January 2015 (Serbia): the CALL accepts a certain degree of imprecision in the applicants declarations because of his lack of schooling, the passage of time concerning his relations of fifteen years earlier and his bad health, and thus considers the homosexual orientation sufficiently established because the applicant had been able to give 'a certain amount of information regarding his homosexual friend with whom he had a relationship', 'the names of the establishments frequented by the gay community in Brussels and Antwerp', and has answered 'in a spontaneous and precise manner, testifying of a true experience, question about the discovery of his sexual orientation and his partners'.

203. E.g.: CALL judgments No. 152007 of 8 September 2015 (Morocco), No. 157884, 8 December 2015 (Georgia), No. 163514 of 4 March 2016 (Cameroon).

204. E.g.: CALL, judgment No. 153757 of 30 September 2015: 'Even though the applicant criticises the motivation [of the negative first instance decision] that he shows little knowledge of the social environment of homosexuals in Bangladesh and Belgium [by referring to the Vluchtelingenwerk report], the Council stresses that such a motivation should be read integrally and not as a composition of components that would need to support a decision each on its own'. (Researchers own translation).

applicant's account.<sup>205</sup>

One judge in **Germany** did indicate that the outer appearance of an applicant may be relevant in cases in which he finds it hard to assess the credibility. The two judges interviewed confirmed that the main challenge for asylum claims based on sexual orientation was to take sufficient time to speak to the applicant and a potential witness. According to them, it was important to hear details about the applicant's life in order to assess the credibility of their account. A lawyer interviewed for the study pointed out that stereotypes are used by courts to check the plausibility of an applicant's account and another interviewee stated that stereotypes could – and often did - work in favour of the individual applicant. Furthermore, in another judgment, which was examining the claim of a transsexual applicant,<sup>206</sup> the Court explicitly referred to the *A.B.C.* judgment and stated that in court proceedings the applicant credibly described her fate before her flight. The Court found that in light of the *A.B.C.* judgment, questions of an intrusive, discriminating and inhumane nature need to be avoided, particularly relating to the applicant's private life and their sexual experiences.<sup>207</sup> The same wording is found in another case relating to the applicant's sexual orientation.<sup>208</sup> Despite this, it seems as if sexually explicit questions were asked. Indeed, in this particular decision the Court states that 'in his account in the oral proceedings, the claimant pronounced the concrete homosexual acts, including the performed sexual intercourse in parts only upon explicit request of the court. In doing so he indicated repeatedly that he felt embarrassed.'<sup>209</sup>

In **Belgium**, and **Italy**, as was the case before the *A.B.C.* judgment, questions on the emotional and sexual relations of the applicant still play a central role in assessing the applicant's credibility. Notably, in **Italy**, in the overwhelming majority of the cases, asylum claims based on sexual orientation are dismissed because the applicant is not deemed credible.<sup>210</sup>

In **Sweden**, in line with the position paper published after *A.B.C.*, there are generally fewer questions based on stereotypes. However, despite progress there remain problems with questions based on stereotypes, such as questions relating to the compatibility of an applicant's sexual orientation with her or his religion.<sup>211</sup> Furthermore, new stereotypical questions are now being asked, such as the applicant's familiarity with certain organisations such as The Swedish Federation for Lesbian, Gay, Bisexual, Transgender and Queer Rights, (RFSL). These questions, however, only form one part of the assessment. The Swedish Migration Agency in its judgment RCI 09/2013, addressed many of the issues raised in the *A.B.C.* judgment, including permissible methods of assessing credibility. The judgment provides that the burden of proof lies with the asylum seeker but the authorities have an on-going investigative responsibility.<sup>212</sup>

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205. For example, the Aachen Court found that as far as the claimant and the witness have upon question of the court explained why they didn't have contact with other homosexual men in Nigeria or in Germany, respectively the gay scene, this does not justify doubts as to the conviction the court has reached. Instead the court has gained the impression that a close and intimate relationship exists between the claimant and the witness. Particularly the claimant elaborated upon request that he once met a man in Germany, who took him to a 'gay club', but that he immediately told him that he was not interested in another relationship. VG Aachen, 12 December 2014, 2 K 1477/13.A.

206. VG Würzburg, 17 December 2014, W 6 K 14.30391.

207. In German the Court found 'Die Klägerin hat im Gerichtsverfahren, insbesondere im Rahmen der informatorischen Anhörung in der mündlichen Verhandlung ihr Vorfluchtschicksal glaubhaft geschildert. Dazu ist zu anmerken, dass im Lichte der neuen Rechtsprechung des Europäischen Gerichtshofs (EuGH, U. v. 2.12.2014 - C-148/13, C 149-150/13, C-150/13 - juris) zum einen darauf zu achten war, zu zudringliche, diskriminierende und menschenunwürdige Fragen gerade zum Intimbereich und zu Einzelheiten der sexuellen Erlebnisse, insbesondere den erlittenen Vergewaltigungen, zu vermeiden'.

208. VG Würzburg, 23 December 2015, W 6 K 15.30648.

209. Researchers own translation.

210. A decision of the Tribunal of Venice (4 March 2016, R.G. No. 7821/15) refused to grant refugee status, but granted the applicant with subsidiary protection. The judge observed that, while the asylum seeker's account was incoherent and non-credible, there is evidence that homosexuality is criminalized with life imprisonment in the applicant's country of origin (Gambia). The same conclusion was reached by another decision of the Tribunal of Venice (15 September 2016, R.G. No. 7822/15), concerning a Gambian applicant. See also Court of Cassation, 4 August 2016, n. 16361 that rejected an asylum application because the applicant's account was stereotyped, not supported by any other evidence and overall lacking of credibility.

211. Interview with Aino Gröndhal. According to the researchers it is problematic that neither the Migration Agency's new legal position nor Swedish case-law contain an explicit and clear definition of what constitutes a question based on a stereotype.

212. If there are flaws in the evidence, the asylum seeker must be given a chance to correct their statement and the authorities must also examine if the flaws are central or peripheral to the asylum account. Interview with Helene Hedebris, Attorney, Swedish Migration Agency.

In **Bulgaria**, in the limited number of relevant judgments following the *A.B.C.* judgment, it cannot be said that the applicant's credibility assessment was based solely on stereotyped notions. In **France** the internal guidelines on interviews with LGBTI asylum seekers aim to prevent OFPRA officers<sup>213</sup> from having preconceived ideas regarding an LGBTI's background, to deconstruct prejudices and stereotypes and to take into account cultural aspects. The OFPRA does not use a specific questionnaire, but the guidelines suggest how some questions should be posed, and how the interview should be structured. The document states that questions on the applicant's life in France can be asked but only with great caution since mere unfamiliarity with the gay scene should not undermine the credibility of the claim.<sup>214</sup> Furthermore, the guidelines provide that no intrusive or intimate question should be posed to the applicant and OFPRA officers are advised to brief the interpreter before the interview.<sup>215</sup> In the CNDA decisions analysed, unfamiliarity with the 'gay scene' in the country of origin has been taken into account when making a negative decision,<sup>216</sup> but not in isolation, it is one of the elements taken into account.<sup>217</sup>

On the basis of the CNDA decisions analysed by the researcher, it was difficult to establish whether the assessment by the authorities was founded on questions based on stereotyped notions as these will not appear in the written decisions. However, stereotypical questions may have been posed by OFPRA officers and judges during the interview<sup>218</sup> and hearing,<sup>219</sup> as shown by some testimonies from lawyers<sup>220</sup> and NGOs.<sup>221</sup> The CNDA decisions on sexual orientation analysed generally show that the Court's reasoning is quite developed regarding the determination of a social group in a given country (based mainly on COI).<sup>222</sup> Marriage with a different-sex partner does not seem to affect the credibility of the claim.<sup>223</sup> In a decision regarding a homosexual from Sri Lanka,<sup>224</sup> the CNDA also considered that the statements of the applicant were credible, also taking into account that her parents forced her to get married and that her husband attacked her when he discovered her homosexuality.<sup>225</sup> Finally, it is worth mentioning in this respect that despite the efforts made by the OFPRA and CNDA in the reasoning and methods used by decision makers and judges, no training has so far been provided to OFPRA officers and CNDA *rapporteurs* on how to draft decisions. Both asylum authorities have nevertheless launched recent initiatives (quality control for OFPRA; working groups for CNDA) which could have a positive impact on this aspect of their decision making.

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213. OFPRA officers are not specialized in the treatment of specific vulnerable applicants (except unaccompanied minors). They are all trained for examining protection claims submitted by vulnerable applicants, including claims based on sexual orientation. While newly recruited officers will not examine such claims at the beginning of their career, they will observe interviews and be coached for the examination of such claims. Cf. Interview with OFPRA, 14 April 2016.
214. French country report p. 32.
215. In this respect, the OFPRA (reference persons in each thematic group) has started to train interpreters regarding the vulnerability of asylum seekers in 2015.
216. See, for example, CNDA 19 December 2014 Mme W. M. No. 14017576 C; CNDA, 6 February 2015, DRC18FNSLG.
217. On the other hand, familiarity with the 'gay scene' in the country of origin is taken into account when granting protection, but again, it is one factor along with other elements. See for example, CNDA, 16 June 2015, ARM06MRSLG.
218. ARDHIS was only very recently allowed to assist asylum seekers during their interview at OFPRA as a third party (cf. Article L.723-6 CESEDA). On the basis of the few interviews (around 10) in which they were present, they did not notice any specific problems but they acknowledge that this may be linked to their presence.
219. The hearing is usually public but some asylum seekers ask for a hearing *in camera*. There is no (written or oral) record of the hearing.
220. For example, Me Wendling mentioned a recent OFPRA decision where the OFPRA states that 'Regarding the realization of his sexual orientation, the applicant's statements were conventional, oversimplified and not convincing, since he did not explain what enabled him to be sure about his sexual orientation in particular because he did not have any sentimental relationship with a man'.
221. For example ARDHIS.
222. It nevertheless appears that the reasoning in some negative decisions remains less developed, including regarding the existence of a social group even in countries where such social groups have already been identified by the CNDA. See, for example, CNDA 7 January 2016 M. M. No. 15024391 C; CNDA, 2 June 2015, NIG16MNSLG; CNDA, 23 December 2014, CAM19MNSLG; CNDA, 30 November 2015, MRT22MNSLG; CNDA, 2 February 2015, BGD24MNSLG; CNDA, 29 March 2016, DRC26MNSLG; CNDA, 2 February 2016, DRC30FNSLG; CNDA, 27 January 2016, PAK31MNSLG; CNDA, 29 February 2016, PAK33MNSLG. It is also worth mentioning that in some countries (for example, Ivory Coast), the case-law is still not clear about the identification of a social group as defined by Article 1 (A) (2) of the Geneva Convention but that subsidiary protection may be granted.
223. For example, in a decision regarding a homosexual in Ghana, the CNDA considered that the statements of the applicant were personal and detailed about the realization of this homosexuality and the fact that his father forced him to get married and to consummate his marriage. CNDA 4 November 2014 M. S. No. 13021072 C. See also CNDA, 19 February 2016, DRC27FRSLG.
224. CNDA, 1 December 2015, SLK15FRSLG.
225. In another case, in a decision regarding a homosexual from Algeria, the CNDA noted that the statements of the applicant were credible, including the fact that the applicant married a different-sex partner under social and family pressure. CNDA, 26 September 2014, ALG09MRSLG.

In **the UK**, it is difficult to assess to what extent credibility turns on the basis of stereotyped notions, given that the cases reviewed were appeal decisions referring to earlier credibility decisions and it is not possible to evaluate what weight was given to stereotyped notions. The Asylum Policy Instructions, *Asylum Interviews* and *Sexual Identity Issues*, provide guidelines on how credibility should be assessed.

### The use of evidence

Following the judgment, all photographic and video evidence that illustrated sexual activity were prohibited from being taken into account as evidence to substantiate the credibility of an applicant, marking a change in practice for certain Member States such as **Sweden**. Certificates or statements from gay rights organisations continue to play an important role and since the judgment have increased in some Member States, perhaps in response to banning other types of material.

In **Belgium** the CALL disregarded explicit video and photographic footage of sexual acts that were submitted by the asylum applicant. Echoing the CGRS first instance decision, it prohibited the evidence on the basis of the limited probative value it brings as a result of the fact that it can be staged, and without supportive credible declarations, it only shows that a sexual act has taken place, rather than proving the applicant's sexual orientation. The Court however, did not mention the *A.B.C.* judgment in its reasoning. In the same case, the CGRS, in its first instance decision, refuted the suggestion by the applicant that they could examine his sexual orientation with a scientific test, stating this indicated a very stereotypical view on homosexuality from the applicant.<sup>226</sup>

In **France**, the OFPRA internal guidelines on how to conduct interviews with LGBTI asylum seekers<sup>227</sup> stress that human dignity has to be respected, that no explicit questions on sexual activities should be posed and that documents such as photos, videos or any other supporting evidence of a pornographic nature submitted by asylum seekers cannot be accepted. The researcher found only one CNDA case where evidence submitted by the applicant was deemed contrary to human dignity as per the *A.B.C.* judgment. In this case,<sup>228</sup> the applicant submitted several pictures and videos of his sexual relations in order to prove his homosexuality. The CNDA, relying on Article 1 of the Charter and Article 4 of the recast Qualification Directive, rather than on the *A.B.C.* judgment, found that these provisions precluded the OFPRA and CNDA to take into account evidence that was contrary to the human dignity of the applicant and of an identifiable third person.<sup>229</sup> In **the Netherlands**, the public guidance note (*Werkinstructie 2015/9*) states that the IND does not apply any medical test with a view to establishing sexual orientation; and that the IND does not ask for any documentary evidence, such as pictures or films. Furthermore, the IND cannot pose detailed questions regarding sexual activities or practices. No case law on this issue was identified following the judgment.

In **Sweden**, no physical evidence was permitted following the judgment. According to a lawyer interviewed for this study, this is problematic as before the judgment, evidence was permitted and films were of great assistance, particularly in cases where the applicant was served with a deportation order. While he recognizes that for some applicants, whose sexual orientation is clear, it's a positive development in that they do not feel the need to produce such evidence. However, for other groups this judgment has created some obstacles due to the difficulties in proving the applicants sexual orientation, and as a result makes it more difficult to reach the threshold of persecution.<sup>230</sup> According to a judge who was also interviewed for this study, it was obvious that methods as the ones addressed in the case were inappropriate. In the migration courts, it is very rare to see such types of evidence anymore. If they occur, they are usually used as evidence to prove a relationship to a person living in Sweden, in order to get a residence permit on that ground.<sup>231</sup> In **the UK**, in an

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226. CALL, judgment No. 153757, 30 September 2015 (Bangladesh) According to the researcher, the same outcome would also have been reached before *A.B.C.* The researcher indicated that they have never come across a case where such evidence was allowed and relied upon by a Court.

227. This internal document was not shared with the researcher but some elements of its content were provided by the OFPRA during their interview.

228. CNDA 29 October 2015 M. H. No. 15006472 C+. The CNDA added that the pictures and videos were submitted by the applicant without any authorization from this third person and could engage the civil or criminal responsibility of the applicant towards him.

229. The applicant was granted refugee status on the basis of other elements and in particular his oral explanations which were considered credible sincere, concrete and detailed.

230. Interview with Tomas Fridh, Attorney and head of a law firm specialized in asylum and migration law. Lecturer of law, Swedish ELENA coordinator.

231. Interview with Anna Hjärtberg Wernqvist, Judge Administrative Court of Luleå.

unreported case, *Musa Jaiteh v SSHD*,<sup>232</sup> the First Tier Tribunal judge refused an adjournment for the appellant to 'obtain a proctologists report to confirm his homosexual activity'. The Upper Tribunal, refusing his appeal on this and other grounds, said 'this ground falls away in light of the judgment of the Court of Justice of the European Union in *A, B, C v Staatsecretaris van Veiligheid en Justitie*. Such evidence would not be admissible in connection with a protection claim even if the appellant were to consent to such a report being prepared following a medical examination'. One of the practitioners interviewed for the study stated that he represented an applicant where sexual activity was the most important thing for that particular individual and wanted to introduce evidence of that. This was rejected by the judge on the basis of implausibility.

In **Germany**, psychological evidence is generally not used to determine the sexual orientation of an applicant, however, in one first instance decision, decided before *A.B.C.*, an expert opinion was requested from a doctor specialised in psychiatry and psychotherapy.<sup>233</sup> The final judgment was issued after *A.B.C.* and the judge evaluated whether it was prepared in conformity with *A.B.C.* and found that it was.<sup>234</sup> Although the expert opinion was only summarised as part of the judgment, it was clear that they at least spoke about the applicant's initial anal penetration, which seems contrary to the requirement that the dignity of the applicant needs to be upheld when assessing their credibility. Many courts still interview witnesses, particularly the partner of the applicant and one judge mentioned that it was generally the applicants who offered that their partner could be interviewed.

In **Belgium and France, Sweden, Bulgaria, Italy, the UK and the Netherlands** sexual orientation is not treated as something which is capable of being established directly by medical evidence. Statements from gay rights associations,<sup>235</sup> that document how the applicant acts and interacts with others, try and give an objective image of the person and have been taken into consideration when carrying out a credibility assessment.<sup>236</sup> In **Sweden**, there has been a significant increase in certificates from the Swedish Federation for Lesbian, Gay, Bisexual, Transgender and Queer Rights. These have been well received and are submitted as evidence.<sup>237</sup> Similar practices have been noted in **France, Italy**<sup>238</sup> and **Belgium**. However, the absence of such pieces of evidence should not affect the credibility of the asylum application.<sup>239</sup>

### Member States practice on late disclosure of sexual orientation following *A.B.C.*

Practice before *A.B.C.* illustrated that late disclosure of an applicant's sexual orientation didn't automatically result in the refusal of protection status and national case law post *A.B.C.* seems to continue this trend. It appears that if valid reasons are given as to why the applicant waited to disclose their sexual orientation, these are taken into account in the credibility assessment. Following *A.B.C.*, rules in relation to late disclosure have also formed part of practice guidelines in **the Netherlands** and in the internal **French** practice guidelines.

In both **France** and **the Netherlands**, their guidelines and practice reflect this and a negative credibility assessment cannot be made solely on late disclosure grounds. In **the Netherlands**, guidelines prior to *A.B.C.* already stipulated that a subsequent application would not be rejected for the sole reason of late disclosure. However, in practice this did occur, as the guidelines required that a claim based on sexual orientation must be deemed to be credible, for that rule to apply. Following the Council of State judgment in light of *A.B.C.*<sup>240</sup>

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232. AA/05190/2014, para 2. The *A.B.C.* judgment was given after the First Tier Tribunal determination but before the Upper Tribunal hearing.

233. VG Bayreuth, 9 Feb 2015, B 3 K 13.30328.

234. The judge found that the verification carried out by the expert stayed within the framework set out by the CJEU in *A.B.C.* 'in that the questions did not generally concern the sexual practices of the applicant in daily life, but were essentially limited to a singular event, and especially because the interview was conducted by a person with particular specialised knowledge in handling sensitive issues of personal life. The circumstances of the interview as well as the manner of preparing the opinion thus complied with the private sphere of the applicant.' [Researchers translation]

235. See, for example, France, CNDA, 31 August 2015, NIG23MRS LG.

236. The statements have been assisted some applicants to establish their credibility but in other instances they have been dismissed as having no probative value to establish the applicant's sexual orientation. E.g.: CALL judgment No. 160979 of 28 January 2016 and see, for example, CNDA, 6 February 2015, DRC18FNS LG; CNDA, 29 February 2016, PAK33MNS LG.

237. Interview with Tomas Fridh, this was also confirmed by Aino Gröndahl.

238. See, e.g., Tribunal of Venice, 16 June 2016, R.G. No. 7823/15.

239. Cf. interview with OFPRA and CNDA Note on credibility assessment.

240. [Afdeling Bestuursrechtspraak van de Raad van State, 8 July 2015, 201208550/1, 201110141/1, 201210441/1]



this policy was incorporated in the new policy guidelines but with amended wording.<sup>241</sup> There is no longer a pre-requisite that the claim based on sexual orientation is credible before the late disclosure policy can apply. The guidance now provides that if an asylum seeker is late in disclosing their sexual orientation, this, in itself cannot be *the sole reason* for declaring the application inadmissible or manifestly unfounded. However, this does not mean that the authorities cannot ask why the asylum seeker has waited to disclose this and how it fits with the original asylum account. Furthermore, it can also be taken into account in the applicant's general credibility assessment.

In **France**, according to various internal notes, the OFPRA<sup>242</sup> considers that the vulnerability of the applicant may explain the fact that he/she did not disclose his/her sexual orientation at the first occasion he/she was given to set out the grounds for persecution (e.g.: out-of-court settlement<sup>243</sup> or subsequent application before the OFPRA). In this respect, the CNDA also highlights that applicants can even disclose their sexual orientation at the hearing stage as this can be a very slow process. This is particularly problematic in countries where homosexuality is completely taboo.<sup>244</sup> The CNDA have also found that late disclosure does not affect their credibility,<sup>245</sup> particularly when clear explanations are given for the late disclosure (for example, no confidence in the person who helped the applicant to draft her asylum application and no confidence in the interpreter).<sup>246</sup> On the other hand, the late disclosure of the homosexuality by the applicant (before the Court) makes the claim even less credible when the statements on the realisation of homosexuality and experiences in the country of origin are not clear.<sup>247</sup> Subsequent applications based on homosexuality are however rarely accepted either by the OFPRA and the CNDA<sup>248</sup> and can even be rejected without any interview and hearing.<sup>249</sup> In a recent case,<sup>250</sup> however, the CNDA has considered that, according to Article 4(3)(c) of the 2011 recast Qualification Directive, the vulnerability of the applicant and the fear of reprisals by the community in France could explain why the applicant was too inhibited and traumatised by the persecutions he had suffered in this country of origin to allege his homosexuality in his initial claim and was only able to disclose his homosexuality at a later stage, in the framework of a subsequent application, with the help of a LGBTI organization.

In **the UK**, the Asylum Policy Instructions, revised in light of *A.B.C.*, provide that adverse credibility findings cannot be made, merely because a claimant did not raise issues of sexual identity on the first occasion that they claimed asylum. In an unreported case,<sup>251</sup> the Upper Tribunal decision, made after *A.B.C.* found that it was an error of law to dismiss the appellant's sexual orientation claim on the basis that it had been submitted after the initial refusal. Relying on *A.B.C.* the judge said; 'it cannot be concluded that the declared sexuality lacks credibility simply because, due to reticence in disclosing intimate aspects of personal life, it was not declared at the outset'.

In **Belgium**, CALL case law has shown that the late disclosure of the applicant's sexual orientation in the first or following asylum application has added to the negative assessment of the credibility of the alleged sexual orientation of the applicant. However, at least since the *A.B.C.* judgment, it is never the sole factor for a negative credibility assessment, which always takes into account a combination of findings concerning the untrustworthiness of different declarations. If no convincing reasons are given as to why a person introduces a subsequent application on the basis of his sexual orientation many years after a first application had ended, the application can be discarded for lack of credibility.<sup>252</sup> Furthermore, following *A.B.C.*, the CALL has a greater

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241. Par. 4 of Werkinstructie 2015/9.

242. See interview with OFPRA, 14 April 2016. This position is particularly relevant for victims of human trafficking.

243. In this respect, the contribution of ARDHIS is important (Cf. interview with ARDHIS, 20 April 2016).

244. In this case, there is a 'double barrier': the barrier of credibility assessment by the judges and the cultural barrier of the applicant him/herself (shame, fear of the community...). Cf. interview with CNDA, April 2016.

245. See, for example, CNDA, 1 December 2015, ALG11MRSLG (asylum claim submitted 4 years after arrival in France).

246. See, for example, CNDA, 1 December 2015, SLK15FRSLG.

247. CNDA, 18 February 2016, NIG34FSNLG.

248. See, for example, CNDA, 23 March 2016, BSN25MNSLG.

249. CNDA, Ordonnance du 11 February 2016, ALB14MNSLG: the CNDA nevertheless explained that the late disclosure could not be considered as the sole ground for questioning the credibility of the subsequent application but that the application was considered not credible because no personal details were given, including in his written statements, about his life as homosexual which led him to leave his country of origin.

250. See in particular CNDA, 11 February 2016, BGD29MRSLG.

251. AA/05899/2014.

252. E.g.: CALL, judgment No. 165514 of 4 March 2016: 8 years after first asylum application.

understanding as to why asylum seekers do not disclose their sexual orientation at the first opportunity.<sup>253</sup> When the sexual orientation is only brought up by introducing a new asylum application just before a return decision is about to be executed, and after several earlier applications were considered to be manifestly unfounded, serious weight is given to this late declaration in the assessment of the credibility of the alleged sexual orientation, although it does not need to be decisive.<sup>254</sup>

In **Bulgaria**, the researcher identified two judgments, in which the applicant didn't declare their homosexuality at the beginning to the relevant authorities which subsequently resulted in a negative decision. However, in both instances other credibility factors were also taken into account as well as other factors such as COI information, before the applicant was refused protection.<sup>255</sup>

In **Germany**, and **Sweden** there was no obvious change in practice regarding late disclosure following the *A.B.C.* judgment. Late disclosure is looked at in the overall context of credibility assessment as one relevant aspect. In **Italy**, a noteworthy judgment of the Court of Cassation repealed a judgment of the Court of Appeal of Naples, on the basis that the latter (and before, the Tribunal of Naples) omitted to take into due consideration that there could have been psychological, moral and objective reasons which prevented the applicant from putting forward an asylum request on the basis of his sexual orientation since the very beginning.<sup>256</sup>

## Conclusion

Persecution based on one's sexual orientation will depend on the applicant actually having or perceived as having the declared sexual orientation.<sup>257</sup> Given that one's sexuality is an intimate aspect of a person's being, credibility assessments of declared sexual orientation cases are understandably very difficult. Not only is it difficult to determine sexual orientation beyond the applicant stating that he or she is a homosexual, but the questions and methods used to decide on an applicant's sexual orientation can encroach on the person's dignity. With this in mind the CJEU's judgment in *A.B.C.* very clearly delineates what cannot be asked as well as what the decision maker is not able to receive as evidence in sexual orientation cases.

### Interpretation and application of the evidential prohibitions in *A.B.C.*

The judgment concentrates on the prohibitive elements to a credibility assessment in light of Article 1 of the EU Charter. The judgment does not necessarily prescribe what is allowed when determining credibility. It is perhaps due to the lack of controversy in the CJEU's blacklisting of certain tools to assess credibility that practice in this regard has not significantly changed amongst the countries included in the study. Indeed, in the majority of countries, except **the UK** and **Sweden**, sexually explicit evidence was prohibited prior to the judgment. It is therefore difficult to argue that practice changed as a result of the judgment since many countries saw such evidence as inappropriate beforehand. In any case, practice post *A.B.C.* has aligned Sweden and the UK's prohibition of such material with the majority. Interestingly in **Belgium** and **France**, where the applicant submits evidence of this kind and the court rules against its acceptance, the judgment does not usually refer to *A.B.C.* itself but either to the lack of probative value of such material or Article 1 of the Charter.

The other clear prohibition from *A.B.C.* concerned sexually explicit questioning. Here, one could argue that practice has changed as a result of the judgment. Whilst sexually explicit questions may not have been directly asked to the applicant, apart from in **the UK** and **Sweden**, intrusive probing of one's sexual life was

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253. E.g.: CALL, judgment No. 164794 of 25 March 2016. In some cases the CALL has refused to take into consideration an applicant's late disclosure of their sexual orientation when it is only brought before the court in the appeal procedure without presenting a valid reason for not having done so before. E.g.: CALL judgments No. 162138 of 16 February 2016.

254. E.g.: CALL, judgment No. 136346 of 15 January 2015: the CALL has found the homosexual orientation to be credible and annuls the CGRS decision.

255. Judgment No. 1133 from 27 February 2015, Sofia City Administrative Court (*Административен съд – София град*), case No. 12092/2014 and Judgment No. 1133 from 27 February 2015 of Sofia City Administrative Court (*Административен съд – София град*), case No. 12092/2014.

256. Court of Cassation, 5 March 2015, No. 4522/15.

257. However, note persecution on grounds of imputed sexual orientation, Italy - Tribunal of Genova, 13 May 2016, No. 15023/15, 'There is a well-founded fear of persecution based on membership of a particular social group in the case of an applicant who, even though he is not gay, he is perceived as such by his community, his family and the authorities in his country of origin'. EDAL summary here: <http://bit.ly/2hEBFNs>.

often shrouded in a veil of stereotypical questioning. This can be inferred from the **Belgian, Italian**<sup>258</sup> and **German** practice cited above, although worryingly questions on sexual relations in **Belgium** still play a role today in the credibility assessment. Similarly, in **Germany**, cases cited above demonstrate that extremely intrusive questions have either been asked by the Court itself or have been confirmed as in compliance with the *A.B.C.* judgment where a third party has asked the sexually explicit questions. Whilst these cases seem in the minority it is worrying how sexually intimate questioning can still resurface under the auspices of other evidential assessments. For the other countries, whether it be those who did not ask intimate questions or who had no qualms to do so prior to the judgment, publicly issued guidance and training of national determination authorities make it clear that questions eliciting a sexually intimate response cannot be asked and are usually hooked onto the *A.B.C.* determination as justification of this prohibition.

### Going beyond *A.B.C.*: How to assess credibility in sexual orientation cases?

Beyond the blacklisting of the above practices, what is perhaps more interesting is how national authorities and courts are now grappling with credibility assessments in light of *A.B.C.* Whilst the countries studied, have for the most part, adhered to the prohibitions of the judgment, they have seemingly capitalised on the points which the CJEU has stated as being acceptable in credibility assessments, most notably questions based on stereotypical notions, albeit mitigated by the individualised and case-by-case assessment of the case.

The current prominence of stereotypically based notions can be seen throughout the majority of the countries studied. For those countries that consistently relied on questions based on stereotypes for credibility assessments, *A.B.C.* has done little to diminish their use but it has clearly changed the way in which such pre-conceptions have been tapered against individual assessments. This is most notably the case in **Belgium** where stereotypes prior to *A.B.C.* constituted a significant part of the assessment with the Courts rarely allowing appeals on grounds that the decision lacked individual assessment. Post *A.B.C.*, however, far more emphasis is placed on individual elements and declarations of the applicant, with training being undertaken on free narrative-like techniques of interviewing. Whilst stereotypical questions play an integral part in credibility assessments, it is not the all determinative element to inferring a lack of credibility. Assessments are more holistic in nature, although one could question whether this has come about due to the judgment or due to the transposition of Article 4 of the recast Qualification Directive and national jurisprudence more generally on individualised assessment in asylum cases. Interestingly, in some countries there now exists an inverse requirement, arguably stereotypical in nature, that applicants are expected to show more modesty and reticence in divulging their personal experiences where applicants hail from a more repressive country. This perhaps demonstrates the consequences of a decision which does not explain or provide criteria on what stereotypes would be permissible in credibility assessments, thereby allowing administrative authorities an amount of leeway in the form of stereotypical questions and/or assumptions about the applicant.

In other cases, where specific instructions or guidance is provided by national authorities on stereotypes, a similar trajectory appears in how the administration and courts should deal with questions posed. In **the Netherlands** and **France** either public instructions or jurisprudence since *A.B.C.* specify that stereotypical questions should only form part of the assessment and should not solely determine credibility. Specific attention should be paid to where the applicant can substantiate why a preconceived stereotype may not have been met in his or her case. Potentially good practice in this regard can be seen from **France** where training and guidelines to OFPRA and courts specify that the interviewers and/or decision makers should rid themselves of prejudices. This should however be monitored to see how this is complied with in practice. It appears that amongst these countries the judgment has influenced the way in which individualised assessments frame stereotypes, moderating the latter to an extent. Whether the judgment is entirely to be congratulated for this practice, again, is still up for debate, however, given the transposition of Article 4 recast Qualification Directive and reliance on guiding principles of the UNHCR. Nevertheless, it is clear that both *X.Y.Z.* and *A.B.C.* has reinforced the need to carry out an individualised assessment and pay due attention to an applicant's vulnerabilities.

Other than the ongoing use of stereotypical notions, States have proactively assessed credibility with other types of evidence, such as certificates or declarations from LGBTI organisations.<sup>259</sup> Practice in **Sweden** shows that such certificates, which testify to a person's acts and interests in the organisation, have been used as favourable evidence. In other cases, the lack of prescription on permissible types of evidence in *A.B.C.* has led judges from both **Germany** and elsewhere to compile a list of authorised questions in sexual orientation cases.<sup>260</sup>

258. From the interviews, it has emerged that organisations dealing with LGBTI refugees seem to be more aware of what kind of evidence is prohibited after the *A.B.C.* judgment.

259. This has been found to be increasingly the case in Italy.

260. Uwe Berlitz, Harald Doerig, and Hugo Storey 'Credibility Assessment in Claims based on Persecution for Reasons of Religious Conversion and Homosexuality: A Practitioners Approach', *Int J Refugee Law* (2015) 27 (4).

With regards to late disclosure of one's sexual orientation several nuances should be made in determining whether the judgment has changed practice and whether States have correctly interpreted the judgment. For the most part, even before *A.B.C.*, the countries studied would not solely infer a lack of credibility from late disclosure, instead it would usually be in conjunction with other aspects of the applicant's case.

### The impact of *A.B.C.*

Overall, apart from clear evidential prohibitions, it is somewhat difficult to conclusively determine to what extent *A.B.C.* has been implemented in the States studied, not least since the judgment said obvious things on evidence acceptance, which most of the countries implemented prior to the judgment, but also because the transposition of the recast Qualification Directive and the recast Asylum Procedures Directive coincided, in some Member States, with the judgment. Thus from practice notes to determination makers the judgment seems to have been used to reinforce or to scope out the meaning of certain legislative provisions rather than being used as a unique way for decision makers to assess credibility. Nonetheless, without *A.B.C.* highlighting specific obligations within legislation, stereotypical notions or late disclosure issues may not have been so tempered against individualised assessments. It can also be argued that the judgment has made decision makers and, perhaps, judges warier of the content of their questions and far more conscious of the vulnerability of applicants claiming persecution on sexual orientation grounds. What still remains problematic from *A.B.C.*, in part due to the judgments somewhat limited scope, is how countries should go about positively assessing credibility and what questions are appropriate and useful in determining someone's sexual orientation.

# CIMADE, GISTI v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration

## Facts of the case:

In 2010 *CIMADE and GISTI*<sup>261</sup> applied to the Conseil d'Etat seeking to have a circular, dated 3 November 2009 annulled, on the basis that it was contrary to the Reception Conditions Directive as it excluded allowances (ATA) for asylum seekers in the Dublin procedure when France calls upon another Member State to take responsibility for their asylum claim. As the response to the submission required an interpretation of the relevant provisions of EU law, the Court referred the following questions to the CJEU:

## Referred questions:

- (1) Does ... Directive 2003/9 ... guarantee the minimum reception conditions to which it refers to applicants in respect of whom a Member State in receipt of an application for asylum decides, under [Regulation No 343/2003], to refer a request to another Member State which it deems to have jurisdiction to examine that asylum application, throughout the duration of the procedure for taking charge of them or for taking them back by that other Member State?
- (2) If the answer to that question is in the affirmative:
  - (a) Does the obligation, incumbent on the first Member State, to guarantee the minimum reception conditions cease at the moment of the acceptance decision by the State to which the referral was made, upon the actual taking charge or taking back of the asylum seeker, or at some other date?
  - (b) Which Member State should thus assume the financial burden of providing the minimum reception conditions during that period?

## Decision & Reasoning:

As regards the first question the Court held that the Reception Conditions Directive<sup>262</sup> applies to all third country nationals and stateless persons who apply for asylum as long as they are allowed to remain on the territory as asylum seekers. It noted that the definition of an applicant for asylum under the Reception Conditions Directive and the Dublin Regulation is in essence, identical. Article 13 of the Reception Conditions Directive provides that the period during which material reception conditions must be granted to applicants begins when the asylum seeker applies for asylum. With reference to Article 4(1) of the Dublin Regulation, the Court noted that the application for asylum is made before the process of determining the Member State responsible begins. The provisions of the Reception Conditions Directive must be interpreted in light of their general scheme and purpose and recital 5 which links it to the Charter of Fundamental Rights including Article 1 and 18 of the EU Charter in particular. The Court noted that in the Dublin procedure many months may pass pending transfer<sup>263</sup> and in some cases the person may never be transferred. Therefore, in rejecting the States submissions it held that excluding such asylum seekers from accessing reception conditions cannot be justified for any length of time. Accordingly, the Court held that a State in receipt of an application for asylum is obliged to grant the reception conditions even to asylum seekers who are subject to a Dublin transfer procedure.

As regards the second question, the Court noted that an applicant retains his status as an asylum seeker as long as no final decision has been taken on his/her case. The mere request of the requesting Member State to another to take charge of an applicant does not bring the examination of asylum by the requesting Member State to an end. Only the actual transfer of the asylum seeker brings an end to the application for asylum by that State and its responsibility for granting the minimum reception conditions.<sup>264</sup> Further to Article 1 of the EU Charter, human dignity must be respected and protected, and the asylum seeker may not be deprived, even for a temporary period of time of the protection of the minimum standards in that Directive. Only in the cases under Article 16 of the Reception Conditions Directive can conditions be withdrawn or reduced when the

261. CJEU, Case C-179/11, *CIMADE, GISTI v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, 27 September 2012 (hereinafter '*Cimade and Gisti*').

262. Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (hereinafter 'Reception Conditions Directive').

263. CJEU, Case C-179/11, *Cimade and Gisti*, para. 44.

264. CJEU, Case C-179/11, *Cimade and Gisti*, para. 55.

asylum seeker does not comply with national reception rules. The financial burden of providing these minimum conditions is to be assumed by the Member State which is subject to that obligation.

### The Court ruled:

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States must be interpreted as meaning that a Member State in receipt of an application for asylum is obliged to grant the minimum conditions for reception of asylum seekers laid down in Directive 2003/9 even to an asylum seeker in respect of whom it decides, under Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, to call upon another Member State, as the Member State responsible for examining his application for asylum, to take charge of or take back that applicant.

The obligation on a Member State in receipt of an application for asylum to grant the minimum reception conditions laid down in Directive 2003/9 to an asylum seeker in respect of whom it decides, under Regulation No 343/2003, to call upon another Member State, as the Member State responsible for examining his application for asylum, to take charge of or take back that applicant, ceases when that same applicant is actually transferred by the requesting Member State, and the financial burden of granting those minimum conditions is to be assumed by that requesting Member State, which is subject to that obligation.

## Introduction

This section looks at the impact the *Cimade and Gisti*, judgment, decided on 27 September 2012, had on both practice and policy in the selected Member States. Given that the judgment also clarified that, in accordance with Article 1 of the EU Charter,<sup>265</sup> the asylum seeker may not be deprived – even for a temporary period of time of the protection of the minimum standards in that Directive, this section will also look at whether material reception conditions are denied at any other stage of the procedure. It will only examine the main trends that occurred in the relevant Member States. It is very difficult to obtain a complete picture of reception conditions provided, as they can vary dramatically from one region in a Member State to another as well as from one Member State to another. For example, in **France**, housing conditions differ from one region to another but so do the practices of the administrative bodies, such as Prefectures (*Préfectures*) and the French Office for Immigration and Integration (*Office Français de l'Immigration et de l'Intégration*, OFII).<sup>266</sup> Therefore, this should not be considered as a comprehensive overview of reception practices in the relevant Member States, rather the main trends that took place following the *Cimade and Gisti* judgment.

### Whether reception conditions were provided to applicants subject to a Dublin transfer prior to *Cimade and Gisti*

It is useful to examine Member State practice prior to the *Cimade and Gisti* judgment to illustrate the changes that occurred succeeding the judgment. It is clear that practice varied between Member States as to whether reception conditions were provided to people subject to a Dublin transfer decision before *Cimade and Gisti* was delivered.

In **France**, reception conditions were not provided to persons subject to a Dublin transfer, which is why the Conseil d'Etat referred the preliminary reference questions to the CJEU. In **Belgium**, on the basis of Article 6 (1) of the Reception Act, asylum seekers who were subject to a Dublin transfer decision ceased receiving material reception conditions as soon as the time period under which a transfer was supposed to occur lapsed. In July 2015, the ECtHR found in *V.M. and others v Belgium* that **Belgium** violated Article 3 ECHR because (back in 2011) it had not provided adequate material reception conditions for a particularly vulnerable family<sup>267</sup> during the non-automatically suspensive appeal against the Alien's Office transfer decision

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265. Article 1 of the EU Charter provides that human dignity is inviolable. It must be respected and protected.

266. OFII is now (i.e. since the asylum reforms in July 2015) responsible for the management of the national reception scheme and allocates available places to newly registered asylum seekers, whatever procedure they are subject to, see <http://www.ofii.fr/>.

267. The applicants were a family of Roma origin with five children, one of whom suffered from severe physical and mental conditions.

under the Dublin Regulation.<sup>268</sup> In **Bulgaria**, according to Article 12 (2) of the *Ordinance on the responsibility and coordination of the state authorities, taking actions for the implementation of the Dublin Regulation and the Eurodac Regulation*,<sup>269</sup> when another Member State is deemed responsible for the examination of an applicant's asylum claim, the applicant is moved to an immigration detention centre under the auspices of the Migration Directorate at the Ministry of the Interior. According to Article 67c (2) of the Law on Asylum and Refugees<sup>270</sup> (hereinafter 'LAR') upon receipt of acknowledgment of the respective Member State that they are responsible for the examination of the application, the decision maker 'discontinues the procedure for granting international protection to ensure the transfer of the asylum seeker to the competent Member State'. Once the procedure is regarded as discontinued, reception conditions are no longer provided and the person remains in detention.<sup>271</sup> Therefore, national law does not guarantee reception conditions to asylum seekers who should have their claim examined by another Member State.

In **Germany**, and **Sweden**, reception conditions were provided to persons subject to a Dublin transfer decision. In **the Netherlands**, in practice, applicants awaiting transfer were allowed to remain in the reception centre and were entitled to health care and benefits as stipulated in the Reception Conditions Directive. This however, wasn't explicitly provided for in legislation. In **the UK**, persons subject to a Dublin transfer and not detained were generally entitled to support. No appeal case was identified in which the issue was the denial of material support during Dublin proceedings. The more common issue was a challenge to the form of support provided.<sup>272</sup> The researcher indicated that generally the Home Office wanted to keep in contact with applicants during the period before a Dublin transfer, including judicial review proceedings. Therefore, it would have been counter-productive to go against their published policy and deny asylum support.

### An examination of policy and legislative changes following *Cimade and Gisti*

Following the judgment, numerous policy changes were made in two of the Member States specifically, **France** and **the Netherlands**. In **France**, despite formal changes to the legislation, there were still discrepancies as to when material conditions should be provided to those subject to a Dublin Regulation transfer. In **Belgium**, internal instructions were issued by Fedasil, but the Cabinet explicitly didn't find it necessary to change the law in this regard. In **Sweden, the UK and Germany**, no changes took place because their practices were already in conformity with the judgment. In **Bulgaria**, no changes were made despite practice being contrary to the findings of the *Cimade and Gisti* judgment. These practices are set out below.

In **France**, a number of policy changes were made alongside numerous domestic judgments to ensure that procedures were in line with the *Cimade and Gisti* judgment. On 17 April 2013, the Council of State delivered a decision<sup>273</sup> that concluded, on the basis of the *Cimade and Gisti* judgment, that the circular dated 3 November 2009<sup>274</sup> needed to be annulled as it incorrectly excluded allowances (ATA) for asylum seekers in the Dublin procedure. Following from this, the Ministry of Interior issued an instruction on 23 April 2013 concerning the allowance for applicants placed under the Dublin procedure (*Droit à l'allocation temporaire d'attente, ATA, des demandeurs d'asile faisant l'objet d'une procédure Dublin*).<sup>275</sup> In practice, it was only after this instruction was issued that asylum seekers subject to a Dublin transfer were provided with reception conditions (an ATA allowance).

268. ECtHR, *V.M. and others v. Belgium*, Application No 60125/11, Judgment of 7 July 2015. This case, was referred to the Grand Chamber, but was struck out on 17 November 2016 because the lawyer failed to maintain contact with the clients. As a result, the Court replying upon Article 37(1)(a) ECHR, the Court concluded that 'the applicant does not intend to pursue his application'. see: <http://bit.ly/1MYGPvr>.

269. In Bulgarian: *Наредба за отговорността и координацията на държавните органи, осъществяващи действия по прилагането на Регламент Дъблин и на Регламент Евродак*.

270. In Bulgarian: *Article 67в, Закон за убежището и бежанците*.

271. Article 29, paragraph 1 of LAR enumerates the reception conditions rights of asylum seeker and defines that they apply 'during the procedure'.

272. During the Dublin transfer period, for a period of time applicants were treated as eligible for S.4 rather than S95 support under the Immigration and Asylum Act 1999, which meant they were in a different classification to asylum seekers and they were entitled only to non-cash support, but this practice has been reversed.

273. France, Conseil d'État, First and Sixth sections combined, CE, 17 April 2013, *La Cimade & Gisti*, No. 335924, available here: <http://bit.ly/29nw6AG>.

274. Circulaire interministérielle du 3 November 2009 relative à l'allocation temporaire d'attente (ATA), available here: <http://bit.ly/29nw6AG>.

275. See the MOI's instructions to the Prefectures following the *CIMADE and GISTI judgment by the CJEU*, available at [French only]: [http://www.gisti.org/IMG/pdf/circ\\_2013-04-23\\_ata\\_dublin.pdf](http://www.gisti.org/IMG/pdf/circ_2013-04-23_ata_dublin.pdf).

However, even after this instruction was issued, the ATA allowance was not automatically granted to asylum seekers subject to a Dublin transfer. Asylum seekers, with the help of NGOs and lawyers, had to make several requests and even go to Court<sup>276</sup> in order to receive their reception conditions.<sup>277</sup> Furthermore, before the adoption of a new asylum law on the Reform of the Right to Asylum, (*LOI No. 2015-925 du 29 juillet 2015 relative à la réforme du droit d'asile*),<sup>278</sup> published in November 2015 which encompassed more than 20 decrees, circulars and other administrative implementing texts, some asylum seekers were denied material reception conditions from the moment a transfer decision was notified, even though this practice was contrary to EU and domestic case-law and went against the *Cimade and Gisti* judgment.<sup>279</sup> This new law, also created a new registration procedure.<sup>280</sup> Once a claim is registered with the Prefecture, applicants are given an asylum claim certificate (*attestation de demande d'asile*).<sup>281</sup> It is only once the asylum claim certificate has been granted that a form to formally lodge their asylum application is handed over. The certificate specifies the type of procedure under which asylum seekers have been placed, including the Dublin Procedure.<sup>282</sup> It also allows persons subject to a Dublin transfer to remain legally on the French territory during the entire procedure for the determination of the responsible State. All asylum seekers are therefore allowed to remain on the territory<sup>283</sup> during the examination of their application.

The Council of State made another ruling on 30 December 2013,<sup>284</sup> again applying the *Cimade and Gisti* judgment, concluding that parts of another circular, dated 24th May 2011,<sup>285</sup> should be annulled as it wrongly excluded asylum seekers in the Dublin procedure from emergency housing centres once the transfer decision was made instead of waiting until the actual transfer.<sup>286</sup> The judgment also found that the housing conditions could differ for asylum seekers placed under different procedures (such as the Dublin procedure) as long as material conditions defined by the Reception Conditions Directive were respected.

As far as the Dublin procedure is concerned, Article L.742-1 CESEDA<sup>287</sup> transposes the requirements of the Dublin Regulation.<sup>288</sup> Asylum seekers can be placed under house arrest 'in order to implement the Dublin procedure',<sup>289</sup> i.e. not only following the notification of the transfer decision.<sup>290</sup> For individuals subject to a Dublin transfer, their housing conditions and duration are set down in Article L. 744-1 CESEDA. Reflecting

276. See Paris Administrative Court of Appeal, 26 May 2015, No. 14PA04679 and 30 September 2015, No. 14PA04676, in which the Court ruled that the Prefect's refusal to deliver the document necessary to be granted the daily allowance did not comply with the Reception Conditions Directive.

277. According to some practitioners, this sometimes still happens with the new daily allowance (ADA), i.e. the allowance is cut as soon as the transfer decision is notified, not waiting until the actual transfer. This information was provided to the French researcher.

278. Law relative to the Reform of the Right to Asylum (*LOI No. 2015-925 du 29 juillet 2015 relative à la réforme du droit d'asile*) available here: <http://bit.ly/29tBzaW>.

279. Conseil d'État, 2ème et 7ème sous-sections réunies, 12 February 2014, No. 368741 ; available here <http://bit.ly/29ixtzD>.

280. There is no distinction anymore between asylum seekers who were admitted on the territory (former APS, *Admission provisoire au séjour*, temporary authorization to stay) and could freely stay in France and lodge an application before the OFPRA and asylum seekers who were not admitted on the territory (no authorization to stay) and channelled under the accelerated procedure or placed under the Dublin procedure with limited reception conditions.

281. In accordance with Article L.741-1 CESEDA, this should take place within three days after the initial application, or maximum 10 days where numerous applications have been made. During this period, no reception conditions are provided, and this has been challenged before the Paris Administrative Tribunal. For example, in decision from 22 February 2016, the Administrative Tribunal of Paris (see here: <http://bit.ly/2jDcMm1>) held that in light of the delay between the applicant's arrival at "France terre d'asile" and the appointment notice for registration before the Prefect, a delay which goes far beyond the 10 days prescribed by article 741-1 and a delay which deprives the applicant of guarantees, notably material reception conditions, which the applicant is entitled to by virtue of his asylum seeker status, the Police Prefect has committed a serious and manifestly illegal violation of the fundamental right to asylum.

282. Articles L741-1 and L.742-1 Ceseda, as amended by the Law of 29 July 2015.

283. This does not mean that they have a residence right.

284. Conseil d'État 10ème et 9ème sous-sections réunies, 30 December 2013, *La Cimade & FNARS*, No. 350191, available here: <http://bit.ly/29nfECU>.

285. *Circulaire du 24 mai 2011 relative au pilotage du dispositif d'hébergement d'urgence des demandeurs d'asile*, available here [In French] <http://bit.ly/1GQ3TdJ>.

286. In this decision, the Council of State also acknowledged that asylum applicants under Dublin procedure could benefit from different housing conditions (emergency housing) than asylum seekers under the OFPRA/CNDA procedure.

287. *Code de l'entrée et du séjour des étrangers et du droit d'asile* (Code of Entry and Residence of Foreigners and of the Right to Asylum).

288. This regulation is directly applicable and did not necessitate any transposition. However, it was necessary to amend the law in order to give a legal basis to an effective remedy against the transfer decision.

289. Applicants can be placed under 'house arrest' for a maximum duration of 6 months, renewable.

290. Article L.742-2 CESEDA.



the Council of State ruling on 30 December 2013, Dublin transferees do not benefit from the same housing conditions as other asylum seekers, they can be accommodated in emergency housing structures<sup>291</sup> but do not have access to reception centres for asylum seekers.<sup>292</sup>

In **Belgium**, Fedasil, in October 2013, issued an instruction concerning the 'Termination and the Prolongation of Material Aid', in which it stated that material aid would be provided up until the 'actual transfer' which was understood as the time period under which the applicant was given to leave the country elapsed (generally seven days). This time period was mentioned in the Dublin transfer decision, which also acted as an order to leave the country, (the so-called 'Annex 26quater'). Material aid thus ceased once that time period had lapsed, even if an appeal challenging the Dublin transfer decision was introduced.<sup>293</sup> This instruction was based on Article 6 of the Reception Act as well as the initial case law following the *Cimade and Gisti* judgment from the Liege Labour Court and the Brussels Labour Tribunal.<sup>294</sup> The central argument in that case law was that the time provided to execute such an order to leave the territory should be used by the asylum seeker to obtain travel documents to travel to the responsible Member State and that the 'actual transfer' is realised once those documents have been obtained. It is assumed that this time period is reasonable should the applicant cooperate, unless there are good reasons as to why this is not the case. An extension to the time period indicated in the 'Annex 26quater' can be requested at the Aliens Office, if the reason for the extension is not due to the applicant's unwillingness to cooperate. In such instances the material aid will be prolonged.

Following numerous court challenges before Labour Tribunals against decisions to cease providing reception conditions once the time period to execute the order to leave the country had elapsed, the Cabinet of the State Secretary for Asylum and Migration gave instructions to Fedasil, the asylum reception authority, in mid-2015, to amend its definition of an 'asylum seeker' to include asylum seekers subject to a Dublin transfer decision. This would enable such individuals to be entitled to reception conditions. However, it still did not find it necessary to change the law.<sup>295</sup> Fedasil then issued a new instruction on 20 October 2015,<sup>296</sup> providing asylum seekers with a Dublin transfer decision with material aid until the 'actual transfer', (without explicitly specifying the continuation of this right pending an appeal) in an 'open return centre', where a liaison officer from the Aliens Office is present to assist with the transfer. These instructions do not mention when the aid should cease, just that it is the responsibility of the Aliens Office to execute the transfer decision.<sup>297</sup> In practice, pending an appeal before the CALL against a Dublin decision, people can stay in the open return centre. The Aliens Office can and do transfer asylum applicants unwilling to comply with the Dublin transfer decision to closed detention centres, once the CALL has refused to suspend the decision.<sup>298</sup>

In **the Netherlands**, numerous amendments were made to legislation, following the judgment. Persons subject to a transfer decision were added to the Dutch legislation as a special category, and as a result, it was set down in law that they were entitled to reception conditions under the same conditions as asylum seekers awaiting a first instance decision. The amended legislation included the Aliens Act 2000 (Vreemdelingenwet 2000), the Aliens Decree 2000 (Vreemdelingenbesluit 2000) and the 2005 Regulation concerning the reception of asylum seekers (Regeling verstrekkingen asielzoekers 2005).

#### Amendments to the 2005 Regulation concerning the reception of asylum seekers<sup>299</sup>

On 27 June 2013 the legislation was amended to ensure that applicants, who were subject to a Dublin transfer

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291. Article L. 744-3, 2° CESEDA.

292. *Centres d'accueil pour demandeurs d'asile*, CADA. Only foreigners whose asylum application comes within the responsibility of France (Article L.348-1 CESEDA) are eligible to these centres.

293. Fedasil instruction of 15 October 2013 concerning the End and the Prolongation of the Material Aid, point 2.2.4, available here [in Dutch]: <http://bit.ly/1Km961S>.

294. Labour Court Liège (Namur division), judgments No. 2013/CN/3 of 14 May 2013, and No. 2013/CN/2 of 28 May 2013; Labour Tribunal Brussels, judgment No. 13/62/C of 17 September 2013.

295. Article 6 of the Reception Act, information by e-mail from Maité Vanregemorter, Cabinet of the State Secretary for Asylum and Migration.

296. Because the Council of State quashed the earlier 2012 Fedasil instruction concerning the End and the Prolongation of Material Aid (for different reasons though): Council of Stat (Conseil d'Etat), judgment No. 225673 of 3 December 2013.

297. Fedasil, Instruction on the change of place of mandatory registration of asylum seekers having received a refusal decision following a Dublin take charge (replacing point 2.2.4 of the October 2013 Instruction concerning the End and the Prolongation of the Material Aid), available here [in Dutch] <http://bit.ly/1MuInwV>. Additional information obtained by e-mail from Nicolas Jacobs from Fedasil.

298. However, increasingly, others who are still awaiting a first instance Dublin decision are also being transferred to closed detention facilities.

299. *Staatscourant* 12 July 2013, No. 19768.

request were added as a special category equal to asylum seekers awaiting a first decision on their asylum application.<sup>300</sup>

### Amendments to the Aliens Act 2000

As of 1 January 2014, the amended Aliens Act 2000, through amended Article 8 sub (m), ensured that applicants whose asylum claim has been rejected because another Member State is responsible for handling the asylum claim<sup>301</sup> can lawfully stay on the territory until the transfer is carried out. The Explanatory Memorandum<sup>302</sup> cites the *Cimade and Gisti* judgment and provides that, as a result of the judgment, an applicant retains the right to reception until the moment of transfer to the responsible Member State. It further declares that the right to reception also ends when it has become apparent that the applicant has left the Netherlands of their own accord. Furthermore, Article 44 sub (a) was also introduced which ensures that applicants who have had their asylum request rejected because another Member State is responsible for determining their asylum claim, can lawfully stay on the territory until the transfer is carried out.<sup>303</sup>

There was no change in procedure in **Germany** after the *Cimade and Gisti* judgment as their interpretation of the Reception Conditions Directive was already in compliance with the *Cimade and Gisti* judgment. Similarly, in **Sweden**, no specific procedures were put in place by the Swedish Migration Agency, as practice before the judgment was deemed to be in line with *Cimade and Gisti*.<sup>304</sup> In **the UK**, there is nothing in the public domain to suggest a change in procedure after the *Cimade and Gisti* judgment. At an unknown date before 2012, the Home Office issued a letter to stakeholders announcing a change in the type of material support provided to persons subject to a Dublin transfer decision on the basis that their claims have not been determined and so they are treated as asylum seekers.<sup>305</sup> While they did receive support before this change, it was provided on the same basis as those who were no longer considered to be asylum seekers.<sup>306</sup> No reference was made to

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300. 'Aan artikel 3, derde lid, worden, onder vervanging van de punt aan het slot van onderdeel o door een puntkomma, een onderdeel toegevoegd, luidende: p. de vreemdeling wiens asielaanvraag is afgewezen op grond van artikel 30, eerste lid, onderdeel a, terwijl hij in afwachting is van de effectieve overdracht naar een verantwoordelijke lidstaat in de zin van Verordening (EG) nr. 343/2003 van de Raad van 18 februari 2003 tot vaststelling van de criteria en instrumenten om te bepalen welke lidstaat verantwoordelijk is voor de behandeling van een asielerzoek dat door een onderdaan van een derde land bij een van de lidstaten wordt ingediend (PbEU 2003, L 50).'

301. [Staatsblad 2013, 550] Artikel 8, onderdeel m komt te luiden: m. na afwijzing van de aanvraag tot het verlenen van een verblijfsvergunning op grond van artikel 30, eerste lid, onderdeel a, terwijl hij in afwachting is van de feitelijke overdracht naar een verantwoordelijke lidstaat in de zin van de Dublinverordening; translated as "lawful stay for applicants whose asylum application is rejected on the basis of the Dublin Regulation and are awaiting their transfer to the responsible Member State."

302. KST 33699, No. 3

303. Furthermore, in an amendment to the Aliens Decree 2000, dated 2 June 2014, an applicant who lawfully resides in the Netherlands on the basis of Article 8 sub (m) of the Aliens Act must periodically report to the Chief of police. "In artikel 4.51, eerste lid, onderdeel b, wordt «artikel 8, onder f, g of h,» vervangen door: artikel 8, onder f, g, h of m." Staatsblad, 2014, 199, Article 4.51, sub (b).

304. Interview with Helene Hedebris, Legal Expert at the Swedish Migration Agency.

305. The change was from s.4(2) support to s.95 support of the Immigration and Asylum Act 1999 for applicants in the Dublin system.

306. Section 4 (2) of the Immigration and Asylum Act 1999 states:

Section 4(2) The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of persons if

(a) he was (but is no longer) and asylum-seeker, and

(b) his claim for asylum was rejected.

To qualify for s.4(2) support the applicant must be destitute and meet one of the following conditions:

(a) he is taking all reasonable steps to leave the United Kingdom or place himself in a position in which he is able to leave the United Kingdom, which may include complying with attempts to obtain a travel document to facilitate his departure;

(b) he is unable to leave the United Kingdom by reason of a physical impediment to travel or for some other medical reason;

(c) he is unable to leave the United Kingdom because in the opinion of the Secretary of State there is currently no viable route of return available;

(d) he has made an application for judicial review of a decision in relation to his asylum claim— (i) in England and Wales, and has been granted permission to proceed pursuant to Part 54 of the Civil Procedure Rules 1998, (ii) in Scotland, pursuant to Chapter 58 of the Rules of the Court of Session 1994 or (iii) in Northern Ireland, and has been granted leave pursuant to Order 53 of the Rules of Supreme Court (Northern Ireland) 1980; or

(e) the provision of accommodation is necessary for the purpose of avoiding a breach of a person's Convention rights, within the meaning of the Human Rights Act 1998.

Paragraph (e) is normally used when refused asylum seekers have made further submissions which are outstanding.

*Cimade and Gisti* in the letter as it pre dates the judgment.<sup>307</sup> The Home Office's Asylum Support Policy Bulletin states that asylum seekers in the Dublin system can qualify for asylum support, but does not mention *Cimade and Gisti*. The Bulletin was created as an amalgamation of previous disparate instructions on 26th September 2014 and so post-dates *Cimade and Gisti*; none of the listed archived bulletins concern Dublin applicants.<sup>308</sup>

In **Bulgaria**, while reforms were introduced in 2015, certain asylum seekers to whom a Dublin procedure is undertaken cannot enjoy any of the material reception conditions, as the only rights reserved for them are to stay in the territory of the country, to interpretation and to be issued a registration card.<sup>309</sup>

### Whether reception conditions were provided to applicant's subject to a Dublin transfer following *Cimade and Gisti*

While numerous legislative amendments were made following the judgment in selected Member States, practice does not always reflect Member States obligations. Furthermore, where there were challenges to a Member States practice in relation to the provision of reception conditions, even if the outcome was in line with *Cimade and Gisti*, the Courts didn't necessarily refer to the judgment. Therefore, it is difficult to state with any degree of certainty what degree of impact *Cimade and Gisti* had on Member State practice.

In **France**, following this judgment and pending necessary legislative/regulatory changes, the Ministry of Interior issued an instruction on 23 April 2013 concerning the allowance for applicants placed under the Dublin procedure (*Droit à l'allocation temporaire d'attente (ATA) des demandeurs d'asile faisant l'objet d'une procédure Dublin*).<sup>310</sup> This instruction was however not consistently applied by the Prefectures and by public administrations such as *Pôle Emploi*. This gave rise to quite a lot of litigation.<sup>311</sup> The Council of State made two decisions following the CJEU judgment,<sup>312</sup> outlined above,<sup>313</sup> which were in compliance with the *Cimade and Gisti* judgment. However, practice from some *Prefectures* and public administrations continued to diverge from the principles established in these judgments.

In reality, there is still not enough space available in housing centres for asylum seekers in general and priority is given to families. According to the French AIDA report, given the lack of places in regular reception centres for asylum seekers, French authorities have developed emergency schemes.<sup>314</sup> Two systems exist: (1) An emergency reception scheme managed at national level; (2) A decentralised emergency reception scheme: emergency housing for asylum seekers (*hébergement d'urgence dédié aux demandeurs d'asile*, 'HUDA'). Asylum seekers placed under the Dublin procedure can in theory benefit from housing in a HUDA up until the notification of the decision of transfer, while Dublin returnees are treated as regular asylum seekers and therefore benefit from the reception conditions granted to asylum seekers under the regular or the accelerated procedure. In practice, however, many persons under the Dublin procedures live on the streets or in squats.<sup>315</sup> In any case, even with the recent improvements included in the law and in practice (substantial increase of reception capacities), reception conditions are still *de facto* denied to some persons subject to a Dublin transfer procedure. This is not in conformity with the interpretation of the Reception Conditions Directive given by the

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307. Letter to stakeholders from Elaine Bass, Deputy Director National Asylum Operations, undated.

308. The Bulletin covers a miscellaneous range of other issues including maternity payments, overpayments and racist incidents.

309. Article 29(2) LAR, as applicable on 16 October 2015. The provision distinguishes between persons applying for asylum in Bulgaria, who have access to full reception conditions (Article 67a(2)(1) LAR), and persons found irregularly on the territory to whom the Dublin Regulation applies (Article 67a(2)(2) LAR).

310. See the MOI's instructions to the Prefectures following the *CIMADE and GISTI judgment by the CJEU*, available at [French only]: [http://www.gisti.org/IMG/pdf/circ\\_2013-04-23\\_ata\\_dublin.pdf](http://www.gisti.org/IMG/pdf/circ_2013-04-23_ata_dublin.pdf).

311. See for example, CAA Paris, 26 May 2015, No. 14PA04679 available here: <http://bit.ly/2ciPOjq>.

312. France, Conseil d'État, 1ère et 6ème sous-sections réunies, CE, 17 April 2013, *La Cimade & Gisti*, No. 335924, available here: <http://bit.ly/29nw6AG> and Conseil d'État 10ème et 9ème sous-sections réunies, 30 December 2013, *La Cimade & FNARS*, No. 350191, available here: <http://bit.ly/29nfECU>.

313. See footnotes (273) and (284).

314. See, AIDA/ECRE Country Report France, 2016 update, available here: <http://bit.ly/1RQR39q>.

315. See for example, IRIN, 'Non, Merci! Why Refugees Avoid France', October 2015 and See, AIDA/ECRE Country Report France, 2016 update, available here: <http://bit.ly/1RQR39q>. See also, report from the National Assembly, 'Information Report, Pursuant to Article 146-3, paragraph 8, of the Rules of Procedure', October 2016, available here (in French) <http://bit.ly/2j8vwtY>.

CJEU in its judgment of 27 February 2014, *Saciri*.<sup>316</sup>

In **Belgium**, the judgment has gradually been complied with in practice. This was mainly the result of the gradually changing case-law from the labour courts and tribunals that deviated from the Fedasil instruction, instead emphasising the need to provide material conditions up until the actual execution of the transfer decision, independent from the question as to whether an appeal against such a decision is suspensive. The Antwerp Labour Court stated that there is no ‘actual transfer’ as long as the authorities do not communicate a date for the transfer and as long as an appeal against the Dublin decision is pending, even if there is no automatic suspensive appeal. The Court also referenced Article 7(3) of the Reception Act that allowed for reception conditions to be extended in exceptional circumstances and when the right to human dignity required material reception conditions to be provided.<sup>317</sup> The Brussels Labour Tribunal gave a broader interpretation of Fedasil’s reception obligations by stating that there is no ‘actual transfer’ as long as the asylum seekers are still on the Belgian territory. This applies in instances even when there is no Dublin appeal pending.<sup>318</sup> Nevertheless, many asylum seekers who didn’t have committed legal representatives defending them remained homeless during this period. It was only in October 2015 that Fedasil changed its (internal) instructions to reflect the judgment, providing reception conditions to those subject to a Dublin transfer decision. Applicants who are detained in order to forcibly execute a Dublin transfer decision have to be released if the CALL suspends the Dublin decision. In such cases, Fedasil did not automatically provide material aid after their release, pending the (follow-up) judicial appeal before the CALL. The Labour Court of Brussels had to intervene in such cases in order to force Fedasil to provide material reception conditions for such applicants.<sup>319</sup>

In **Bulgaria**, the legislation has not changed, which provides that reception conditions can cease from the moment another Member State has accepted that they are responsible for the examination of an asylum claim. However, in practice, reception conditions may be provided on an arbitrary basis. Following an interview with SAR officials, they confirmed that asylum seekers in practice are allowed to stay in SAR reception centres until the transfer is actually completed. Some practitioners also concurred with this assessment. Nevertheless, other legal practitioners including the researcher observed divergent practice in this regard, which was the consequence of a lack of respective legal guarantees in the national legislation. There is no national case law specifically relating to the reception conditions of asylum seekers who, as per the Dublin III Regulation, should have their claim examined by another Member State.

In **the UK**, asylum seekers subject to a Dublin transfer decision, are often detained, but those who are not, are entitled to material reception conditions. They are still considered as asylum seekers under S. 94 (1) of the 1999 Immigration and Asylum Act. In **Germany, the Netherlands and Sweden**, reception conditions continue to be provided to asylum seekers who are subject to a Dublin transfer decision. In **Sweden** Article 1 of the 1994:137 Law Regarding the Reception of Asylum Seekers (LMA) sets out the conditions as to who is entitled to assistance, as well as those who do not qualify for such assistance.<sup>320</sup> Dublin transferees qualify for such assistance.<sup>321</sup>

## Whether material reception conditions are provided to asylum seekers during the asylum procedure

While *Cimade and Gisti* primarily dealt with the provision of reception conditions to applicants for international protection who were subject to a Dublin transfer decision, the judgment also crucially stipulated that ‘asylum seekers, may not, [...] be deprived- even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that Directive’. As a result, we also examined whether there were other circumstances in which reception conditions were systematically not provided to asylum seekers.

316. CJEU, Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri, Danijela Dordevic, Danjel Saciri, Sanela Saciri, Denis Saciri, Openbaar Centrum voor Maatschappelijk Welzijn van Diest*, 27 February 2014.

317. Labour Court Brussels, Judgment of 4 December 2013; Labour Tribunal, Antwerp, Judgment of 6 March 2014, available in Dutch at: <http://bit.ly/1FGadUL>.

318. Labour Court Brussels, judgment 2011/AB/1022, 15 July 2013; Labour Tribunal Brussels, judgment 14/11990/A, 14 January 2015.

319. Labour Tribunal, Brussels, Judgment of 7 December 2015, available at <http://bit.ly/2jQxOhN>.

320. Those who are exempted from assistance are enumerated in other provisions of this law.

321. To date there have been very few cases brought before the administration courts in relation to challenging the provision of reception conditions. According to the researchers, 17 cases in total have referenced the recast Reception Conditions Directive, mainly in relation to the proportionality of detention, and there have been no references to *Cimade and Gisti*.

From the country reports, it became clear that one of the main instances whereby material conditions are not provided is the time period between when an asylum claim is made, registered and lodged. The recast Asylum Procedures Directive provides strict time limits as to when a claim needs to be registered.<sup>322</sup> Article 6(2) of the recast Procedures Directive makes clear that an application can only be lodged once it has been made and therefore ‘completes’ the registration of the asylum application, but is not a necessary step for the applicant to enjoy the right to remain on the territory during the examination of the asylum application and be protected from *refoulement*. Furthermore, material reception conditions must be made available to applicants ‘when they make their application for international protection’.<sup>323</sup> Member State practice is not always consistent with the reading of the recast Reception Conditions Directive with the result that in certain instances, asylum applicants do not have access to material reception conditions during the period between when an asylum claim is made and when one is considered lodged.

In **France**, the new Law on the Reform of the Right to Asylum, 29 July 2015 creates a registration procedure.<sup>324</sup> According to Article L.741-1 CESEDA, the Prefect registers the asylum application (at the latest three days after the application, maximum 10 days in case of numerous simultaneous applications) and issues an asylum claim certification (*attestation de demande d’asile*). Between the period of making and registering a claim, no reception conditions are provided. There have also been instances whereby this time period has not been respected and cases have been brought before the Paris Administrative Tribunal to challenge this practice. For example, on 22 February 2016, the Paris Tribunal in Decision no. No 1602545/9<sup>325</sup> held that in light of the delay between the applicant’s arrival at France terre d’asile and the appointment notice for registration before the Prefect, a delay which is far superior to the 10 days prescribed by Article 741-1 and a delay which deprives the applicant of guarantees, notably material, which the applicant is entitled to by virtue of his asylum seeker status, the Police Prefect has committed a serious and manifestly illegal violation of the fundamental right to asylum. In addition to this, there is not enough space available in housing centres for all asylum seekers and priority is given to families, as a result some asylum seekers end up destitute and homeless.<sup>326</sup>

In **Belgium**, Article 6 of the Reception Act grants the right to material aid to those who make or ‘introduce’ an asylum application.<sup>327</sup> Nevertheless, Fedasil demands that applicants provide proof of registration at the Aliens Office (this comes in the form of a form referred to as ‘Annex 26’) before they assign the asylum seeker to a reception centre where they receive reception conditions. This seems to be at odds with Article 6 of the recast Asylum Procedures Directive, which allows applicants to make or introduce an asylum claim with other authorities other than the asylum authorities. In the second half of 2015, when there was an increase in the numbers of people claiming asylum, there was a significant backlog at the Aliens Office which meant that people who were in need of international protection were unable to make their asylum claim. This ultimately resulted in Fedasil refusing accommodation to hundreds of people who then became homeless. At one stage applicants were required to wait up to three weeks before their claims were registered. While Fedasil and the Secretary of State continued to state that proof of registration was required (Annex 26) before material aid could be provided, some labour tribunals and courts ordered them to provide material aid for persons who proved they wanted to make an asylum application<sup>328</sup> but could not make it due to the back-log.<sup>329</sup> Subsequently, the Aliens Office gave those claimants priority to register, avoiding the need to change their practice.

In **Bulgaria**, there is a distinction made between when an asylum application is made, and when it is deemed to have been registered and lodged. The relevant asylum law (LAR) was amended in December 2015, which set

322. See also ECRE ‘Information note on 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), December 2014, available [here](#).

323. Article 17(1) recast Reception Conditions Directive.

324. There is no distinction anymore between asylum seekers who were admitted on the territory (former APS, *Admission provisoire au séjour*, temporary authorization to stay) and could freely stay in France and lodge an application before the OFPRA and asylum seekers who were not admitted on the territory (no authorization to stay) and channelled under the accelerated procedure or placed under the Dublin procedure with limited reception conditions.

325. France - Administrative Tribunal of Paris, decision of 22 February 2016, No 1602545/9, available here: <http://bit.ly/1NwI7oj>.

326. For more information, see ECRE, AIDA France, 2016 update, available here: <http://bit.ly/1RQR39q>.

327. This is in line with Article 3 of the recast Reception Conditions Directive which provides reception conditions when applicants ‘make’ an application (rather than lodge and application).

328. E.g. A letter by a lawyer sent to the AO, or a document that proved they had presented themselves.

329. Labour Court Brussels, judgment 2015/3098 of 7 December 2015, accessible at: <http://bit.ly/2jQxOhN>. In this case, two days after the asylum seeker got accommodation from Fedasil, the AO detained him under the Dublin Regulation for risk of absconding. The main intention however, seems to have been, given the State Secretary’s comments to the press, to deter other (potential) asylum seekers on whom Dublin might be applicable from insisting to get accommodation.

out time periods under which the registration should take place, in line with those set out in the recast Asylum Procedures Directive.<sup>330</sup> However, these terms are often not respected. While there is no official data available as to the length of the delay, practitioners state that this delay can be for up to two months. Furthermore, people in need of international protection are only regarded as asylum seekers from the moment their claim has been lodged.<sup>331</sup> Article 68 (1) of LAR states that the asylum procedure is initiated 'with the registration of the foreign national regarding his lodged application for international protection'.<sup>332</sup> During the period between when the asylum seeker makes a claim and when it is actually lodged, they are not entitled to reception conditions as they are not deemed to be within the asylum procedure.

The **Bulgarian** courts have condemned this practice and reiterated that the asylum procedure and the respective reception conditions shall start from the moment the asylum applicant *makes* the asylum application.<sup>333</sup> Following the *Cimade and Gisti* judgment, in two separate judgments, the Bulgarian court explicitly referred to *Cimade and Gisti* in providing that reception conditions should be applied from the moment an asylum application is made. In a Judgment dated 10 October 2014 in case No. 6486/2014 the SCAC, referred to the Advocate General's opinion and the judgment in *Cimade and Gisti*. Relying on the *Cimade and Gisti* decision, it found that material reception conditions must be granted from the moment the asylum seeker applied for asylum.<sup>334</sup>

In a Dissenting Opinion of the Supreme Administrative Court, Judge Sonya Yankulova in case No. 9305/2014 on 05 August 2014, relied on the Advocate General's opinion in *Cimade and Gisti* to reiterate that the relevant period as to when an asylum claim was lodged/made, which was the relevant period upon which a person becomes an asylum seeker. While the other two judges in the panel of three judges voted to return the case file to the lower level court in order to clarify the fact whether the asylum seeker had been *registered* by SAR. The dissenting Judge stated that from the moment of the lodging of the asylum application the status of the country national was changed to an asylum seeker and therefore Directive 2008/115/EC and the detention under it ceased to be applicable.

Furthermore, linked to the delay between when an applicant's claim is made and officially registered, there is a growing administrative practice of carrying out the asylum procedure in immigration detention for the purpose of removal. People in need of international protection are placed in immigration detention after requesting asylum (before a claim is 'registered'), during this time, they can be subject to a removal order for irregular entry, violating Bulgaria's *non-refoulement* obligations.<sup>335</sup> The national courts have not found this practice to be unlawful, once registered, they can be continued to be detained under Article 15 of the Return Directive 2008/115/EC and thus are deprived of the reception conditions under the Reception Conditions Directive.

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330. Three working days, if the asylum application is lodged at a centre of SAR, and 6 working days, if the asylum application is lodged through another institution (usually the detention centre of the Migration Directorate).

331. See, for example, ECRE/ADIA Country Report Bulgaria, 2016 update available here <http://bit.ly/1QiksZN>. The registration is carried out by officials of the State Agency for Refugees.

332. Furthermore, as confirmed through interviews with various stakeholders, (SAR, SCAC, BHC), the State Agency for Refugees (SAR) provides reception conditions from the moment of the asylum seekers claim is registered, not from the moment when the third country nationals lodge the asylum application.

333. In Judgment of 25 July 2011 in case No. 2219/2011, (before *Cimade*) SCAC found that the behaviour of the administrative authority to delay the registration of the third country national for months for reasons that were not related with his behaviour, violated the principle of promptness of the procedure, the requirement that administrative bodies should exercise their power in reasonable way and in good faith under Article 6, para 1 of the Code on Administrative Procedure, and contradicted the right to good administration under Article 41 of the EU Charter of Fundamental Rights.

334. The case concerned an appeal against an order for immigration detention under *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*. The applicant had lodged a subsequent application for asylum on 15 January 2014, but the State Agency for Refugees didn't register him on the same date. Due to the lack of any document proving that the applicant had lodged an asylum application, on 4 June 2014 a removal order was issued against him and he was detained. The national court ruled that from the moment of lodging an asylum application the applicant should be considered an asylum seeker and not treated as an illegal immigrant.

335. See ECRE/AIDA Country Report Bulgaria, 2016 update, available here: <http://bit.ly/1QiksZN>.

## Conclusion

Following *Cimade and Gisti*, formal legislative changes were made in two Member States, in **France** where practice was not considered to be consistent with the judgment, and in **the Netherlands**, where practice to provide individuals awaiting a Dublin transfer with reception conditions was given a legislative basis. In **Belgium** instructions from Fedasil were initially amended in 2013, but fell short of what was required by the *Cimade and Gisti* judgment. In mid-2015, upon instruction from the Cabinet of the State Secretary for Asylum and Migration, Fedasil again amended its instructions to include persons subject to a Dublin Regulation transfer into the definition of an asylum seeker.<sup>336</sup> However, it still did not find it necessary to change the law (Article 6 ReceptionAct) accordingly.<sup>337</sup>

No changes in legislation were made in **Germany**, **the UK** or in **Sweden**, as according to the researchers, their practice was already aligned with the *Cimade and Gisti* judgment. In **Bulgaria**, the amendments to the Law on Asylum made in 2015 still does not guarantee reception conditions to all asylum seekers who, as per the Dublin III Regulation, should have their claim examined by another Member State.

However, as is common when providing material reception conditions to asylum seekers, practice does not always imitate what is provided for by law. In **France**, while the judgment did lead to improved access to reception conditions and necessary legislative changes, there is still a shortage of capacity to house all those in need of international protection, and those subject to a Dublin Regulation transfer often find themselves destitute.<sup>338</sup> In **Bulgaria**, while the legislation allows material conditions to be withdrawn before a transfer is carried out, this does not always happen in practice.

Another trend that became apparent was the lack of material conditions between when a claim is made, registered and lodged. While the recast Reception Conditions makes clear that material reception conditions should be provided from when an asylum claim is 'made'<sup>339</sup> practice illustrates that material reception conditions are sometimes only provided when a claim is 'lodged' and despite the strict time limits that are set down in the recast Asylum Procedures Directive for registering claims, there can be lengthy delays between when a claim is made and lodged (for example in **France**, **Belgium** and **Bulgaria**). During this time material reception conditions are not always provided. It is welcome that clearer definitions and rules are now foreseen in the new recast Reception Conditions Directive and under the Asylum Procedures Regulation.

Most of these trends can only be gathered from the cases that actually appeared before a Court. In most Member States there were recorded problems in actually accessing a court to challenge a decision to deny aid. Given the precarious situation applicants find themselves in when denied material conditions, it can be very difficult to actually challenge that decision. In short, *Cimade and Gisti* brought about changes for the better in all but one of the Member States that had practices that were contrary to the judgment. However, when applying the judgment, few courts or instructions actually refer to the judgment.

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<sup>336</sup>. Also because the Council of State quashed the earlier 2012 Fedasil instruction concerning the End and the Prolongation of Material Aid (for different reasons): Council of Stat (Conseil d'Etat), judgment No. 225673 of 3 December 2013.

<sup>337</sup>. Information by e-mail from Maïté Vanregemorter, Cabinet of the State Secretary for Asylum and Migration.

<sup>338</sup>. See ECRE/AIDA Country Report France, 2016 update.

<sup>339</sup>. Article 17(1) recast Reception Conditions Directive.

# The use of the Charter of Fundamental Rights of the EU in selected Member States

## Introduction

As part of the present study, we wished to evaluate, to the extent possible, the application of the Charter of Fundamental Rights of the EU (hereinafter ‘the EU Charter’) in Member States asylum systems. The national case law reviewed for the purpose of this study was the primary source of the data, and researchers reviewed whether the EU Charter was relied upon when Member States changed policy or practice in light of the judgment. Furthermore, we endeavoured to establish trends in relation to its use, such as whether a compatibility test with the EU Charter was conducted when implementing EU legislation, whether certain courts relied upon and referenced it more than others and its relationship with the European Convention on Human Rights. While it was not possible to carry out a comprehensive analysis of these trends, relying on the case law analysed for the purpose of this study, through the researchers own knowledge and interviews, we endeavoured to establish how the EU Charter is being used in their Member State.

## The use of the EU Charter of Fundamental Rights when implementing EU legislation

The EU Charter has two main functions in the EU legal order: firstly, the interpretation of EU law and the national implementing legislation must comply with fundamental rights and the general principles of the EU legal order.<sup>340</sup> Secondly, a breach of a fundamental right can be a ground for a judicial review by the EU courts in accordance with Article 263 Treaty on the Functioning of the EU (hereinafter ‘TFEU’). Alternatively, in most cases involving a possible breach of a fundamental right or principle, the validity of a legal act may initially be challenged in the national court under Article 267 TFEU, although only the CJEU has authority to declare a Union act invalid. When drafting any piece of legislation, EU institutions are obligated to carry out a compatibility check with the Charter. A compliance assessment with the EU Charter needs to occur during the initial drafting of the proposal, during the impact analysis of the Proposal and finally on the final text.<sup>341</sup>

Member States are bound by the EU Charter when they are ‘implementing EU law.’ In such circumstances, Member States are directly bound by the EU Charter as the EU institutions themselves. Breaches of the EU Charter by the Member States when they are transposing or applying EU law are breaches of the EU Treaties. While Member States are not required to carry out a compatibility check with the EU Charter, they are obliged to transpose secondary legislation in line with the EU Charter. We examined whether any of the selected EU Member States carry out a compatibility check with fundamental rights including the EU Charter before implementing relevant EU asylum law legislation.

## Selected Member State practice

It appears that few Member States carry out a specific compatibility check with the EU Charter when transposing EU asylum legislation. However, most Member States review whether the proposed piece of legislation is in compliance with higher national legal norms, EU law, international Treaties including the ECHR, and as a result, there could be a concomitant compatibility check with the EU Charter.

According to the **Swedish** Ministry of Justice,<sup>342</sup> there is no specific compatibility test with the EU Charter, but the processes of adopting Swedish legislation is lengthy, thorough and meticulous, designed to ensure that all implementing legislation is in full conformity with EU law to which the EU Charter is part of.<sup>343</sup> In **Germany**, the Ministry of Interior drafts asylum legislation where Bills have been introduced to the Bundestag by the Federal Government, but the Minister of Justice ensures that it is compliant with ‘higher-ranking’ law, including

340. See e.g. CJEU (joined cases) C-402/05 P and C- 415/05 *Yassin Abdullah Kadi v. Council of the European Union P, Al Barakaat International Foundation v Council of the European Union*, 3 September 2008, para’s 281-286 and 302-308.

341. Communication from the Commission; Compliance with the Charter of Fundamental Rights in Commission legislative proposals Methodology for systematic and rigorous monitoring; COM(2005) 172 final, p.5.

342. Interview with Mattias Wahlstedt och Linda Öman Bristow, Swedish Ministry of Justice.

343. Swedish national report, on file with the author. Legal experts within the Ministry of Justice and the Ministry of Foreign Affairs are also said to carefully monitor the jurisprudence from the ECtHR and the CJEU, so in that sense, when the EU Charter is interpreted by the CJEU, the Ministry of Justice and Ministry of Foreign Affairs take it into account where relevant.



the EU Charter. The Federal Ministries have joint rules of procedure which sets out the compliance procedure (the *Gemeinsame Geschäftsordnung der Bundesministerien*).<sup>344</sup> As per the rules of procedure, the manual of the Federal Ministry of Justice and Consumer Protection describes what needs to be taken into account when implementing EU law.<sup>345</sup> It indicates that when reviewing laws that have been transposed, the focus should be on whether the regulations are compatible with higher-ranking law ('vertical scrutiny of legislation'), primarily in regard to their Constitutionality, their compatibility with European Union law, and their compatibility with international law, particularly the United Nations' Universal Declaration of Human Rights and the ECHR wherever there is an obvious link to the draft law or if the Ministry submitting the draft has raised queries in that regard. In particular, the explanatory memorandum relating to the draft will indicate whether such links exist.<sup>346</sup>

In **Belgium**, the Ministry of Justice has the competence to examine whether national legislation transposing EU legislation respects human rights including its compatibility with the EU Charter. In the field of asylum law, the Cabinet of the State Secretary for Asylum and Migration systematically verifies the compatibility of any proposed piece of legislation with international human rights law, including the EU Charter, with a particular focus on Articles 1, 3, 4, 7, 18 and 24. Nevertheless, more emphasis is placed on the proposed piece of legislation's compatibility with the ECHR and the 1951 Refugee Convention.<sup>347</sup>

In **France**, an impact study is carried out on every piece of proposed legislation. The impact study analyses whether the proposed piece of legislation is compatible with relevant national and EU norms. However, there is no direct reference to the EU Charter in the impact study which was carried out on the bill (*projet de loi*) submitted by the ministry of Interior in July 2014 before the adoption of the Law of 29 July 2015 relative to the Reform of the Right to Asylum, which is currently applied.<sup>348</sup> In **the UK**, Section 19 of the Human Rights Act 1998 requires a declaration of compatibility with the ECHR for all new legislation by the Minister of the promoting Ministry, although this does not require a publicly disclosed human rights impact assessment. The effect of the EU Charter in **the UK** is still a matter of controversy at the political level,<sup>349</sup> which militates against introducing a compatibility check. The House of Commons European Scrutiny Committee has recommended that primary legislation be introduced by way of an amendment to the European Communities Act 1972 to dis-apply the EU Charter from the UK'.<sup>350</sup>

In **the Netherlands**, no compatibility test is carried out as it is presumed to have been carried out by the relevant EU institutions who are responsible for ensuring EU legislation is compatible with fundamental rights. Similarly, in **Bulgaria**, no compatibility test is carried out. However, the Sofia City Administrative Court (hereinafter 'SCAC') found that Directive 2004/83/EC must be implemented in light of the EU Charter.<sup>351</sup> This leading judgment from 30 April 2013 in case No. 3502/2013 came before the SCAC which first made an assessment as to whether the administrative authority had issued its decision in compliance with general principles of EU law as per Article 6 (3) of the Treaty on European Union (hereinafter 'TEU'). Then, SCAC stated that the provisions of Directive 2004/83/EC must be interpreted in light of the EU Charter, relying on Article 51 of the EU Charter. This reasoning can be applied to other EU implemented legislation.

344. Downloadable in German here <http://bit.ly/2cfB71e>. Chapter 6 Section 42 paragraph (5) and (6) stipulate that two manuals issued by the Federal Ministry of the Interior, respectively the Federal Ministry of Justice and Consumer Protection, shall be abided by when drafting legislation that is to be tabled by the Federal Government. The manual of the Federal Ministry of Interior (so called *Handbuch zur Vorbereitung von Rechts- und Verwaltungsvorschriften*) guides all ministries when drafting legislation and includes references to EU law.

345. *Handbuch der Rechtsförmlichkeit*, 3rd ed. 2008 (4th ed. in preparation), translated as "Manual for Drafting Legislation" by the Ministry itself, available here: <http://bit.ly/2cg4kc7>.

346. *Ibid*, Margin 8.

347. Belgian report, this information was obtained through an email on file with the national researcher from the State Secretary Cabinet.

348. For more information on the study impact 'Etude d'impact' see the impact study carried out on the Law of 29 July 2015 relative to the Reform of the Right to Asylum (LOI No. 2015-925 du 29 July 2015 relative à la réforme du droit d'asile, <http://bit.ly/28P9Sp7>).

349. See, Marina Wheeler, 'Cavalier with our Constitution: a Charter too far', 2 February 2016, available here <http://bit.ly/2ixx3xL>.

350. House of Commons European Scrutiny Committee *The application of the EU Charter of Fundamental Rights in the UK: a state of confusion* Forty-third Report of Session 2013–14 HC 979 March 2014. Furthermore, it is unclear at this stage what effect Brexit will have on the UK's legislative procedure.

351. Bulgaria, Case No. 3502/2013, Judgment is of 30 April 2013.

## The use of the EU Charter of Fundamental Rights in asylum proceedings

The use of the EU Charter was mixed in the Member States included for the purpose of this study. General observations from the researchers and interviewees indicated that this was the result of a variety of factors including the legal traditions in the Member State. Numerous responses indicated that traditional practice is to rely on national law only, rather than look towards international and European law. Other Member States indicated that they were more likely to use the ECHR if they were to rely on a European Human Rights instrument. Another finding was that even if it was referenced and relied upon by practitioners, it would not be reflected in the judgment itself. Many of the interviewees indicated that the EU Charter is still a relatively new instrument and that with more information, time and seminars on its use, the instrument would be more relied upon by both practitioners and judges.

In **Sweden**, the EU Charter is rarely relied upon either by judges or practitioners, for example, in one PhD study that analysed 300 cases in relation to credibility, it was found that there was not one reference to the EU Charter by legal practitioners.<sup>352</sup> Two of the judges interviewed concurred that it is not common to use the EU Charter in national judgments. Should they need additional guidance, they would turn to the ECHR. Nevertheless, both stressed the 'newness' of the Charter, and with time and with more preliminary references mentioning the EU Charter being made to the CJEU, the EU Charter's use may increase.<sup>353</sup> Another interviewee stated that if the Migration Court of Appeal would refer to the EU Charter more often, other courts would follow and it would make it easier for other courts and practitioners to also rely upon it.<sup>354</sup> A hurdle for the EU Charter to gain traction in Sweden relates to the fact that a lot of the EU Charter's provisions correspond to the ECHR which has been incorporated into national law. For most Swedish practitioners and the courts, it has been difficult to perceive the added value of the EU Charter where its articles correspond to articles of the ECHR. Furthermore, some interviewees indicated that the EU Charter is too abstract to be applied to a particular case, while instead they could rely on other sources of EU law that are directly applicable.<sup>355</sup> According to the Swedish researchers, with the changing legislative provisions which will offer lower protection levels, it is likely that the EU Charter will be perceived as being significantly more relevant both as a guide to interpretation of EU secondary law and also in areas that don't correspond or correspond fully with the ECHR, such as Articles 18, 24 and 47 of the EU Charter.

In **Bulgaria**, a SAR official, when interviewed for the purpose of this study stated that the EU Charter 'is not applied directly', instead the relevant EU Directives in the field of asylum and the 1951 Convention relating to the Status of Refugees are relied upon. SAR officials added that the EU Charter is discussed in SAR decisions, 'only if such instructions are given by the Court'. In eight separate cases, the national Courts have relied upon Article 51 of the EU Charter stating that Directive 2004/83/EC shall be interpreted in light of EU Charter.<sup>356</sup> A judge at the Sofia City Administrative Court stated that the EU Charter is applied 'when additional arguments are needed' besides the legal provisions in the EU Directives.<sup>357</sup> A prominent practitioner stated that the EU Charter is not applied and it is not invoked as a source of law in national administrative and judicial practice.<sup>358</sup>

The researcher indicated that the EU Charter is relied upon by the national courts in numerous instances, in

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352. Sweden, interview with Annkatrin Meyerson, *Credibility Assessments in the Swedish Asylum Process*, publication forthcoming.

353. Sweden, interview with a judge at the Higher Administrative Court in Övre Norrland, (Hans Sundberg).

354. Sweden, interview with Anna Hjärtberg Wernqvist.

355. Interviews with Björn Berselius, Judge, Administrative Court of Appeal in Stockholm, lecturer in migration law, and Anna Hjärtberg Wernqvist Judge, Administrative Court of Luleå.

356. Judgment No. 5860 of 23 September 2013 of the Sofia City Administrative Court in case No. 8191/2013; Judgment No. 772 of 19 March 2014 of the Sofia City Administrative Court in case No. 1512/2014; Judgment No. 3953 of 13 June 2013 of the Sofia City Administrative Court in case No. 4625/2013; Judgment No. 5748 of 03 September 2013 of Sofia City Administrative Court in case No. 7661/2013; Judgment No. 2938 of 30 April 2013 of Sofia City Administrative Court in case No. 3502/2013; Judgment No. 5399 of 07 August 2013 of Sofia City Administrative Court in case No. 7358/2013; Judgment No. 5113 of 23 July 2014 of Sofia City Administrative Court in case No. 6374/2014; Judgment No. 1295 of 25 February 2013 of Sofia City Administrative Court in case No. 758/2013.

357. The judge in question had invoked Article 4 and Article 41 of the EU Charter in two of her judgments in asylum cases. The other interviewed judge had made the preliminary ruling request to the CJEU in the *Halaf* case, Case C-528/11.

358. Interview on file with the author.

general asylum cases. The national courts relied on and referred to Article 18 of the Charter.<sup>359</sup> In another case, case No.9129/2010 the national judge as SCAC made a preliminary ruling request to the CJEU<sup>360</sup> and asked *inter alia* what is the content of the right to asylum under Article 18 of the EU Charter. As the CJEU found that there was 'no need' to answer to that question in this case, in Judgment No. 297 of 15 January 2014 of SCAC, Judge Nataliya Angelova stipulated the following:

The right to seek asylum according to Art.14 of the Universal Declaration of Human Rights includes access both to the State's territory in order to ask for asylum and to the procedures through which the asylum application can be examined, as the only possibility to respect the right to asylum in case the person is found to be persecuted. [...].

According to the Explanations relating to Article 18 of the EU Charter of Fundamental Rights the text is based on Article 78 of the TFEU – 'this policy must be in accordance with the Geneva Convention of 28 July 1951', but in the text of Article 18 it is explicitly said that the right to asylum is guaranteed not only by the rules of this Convention, but by the TEU and the TFEU as well. Therefore, the right to asylum is guaranteed in accordance with the text of Article 78 TFEU as a whole and not only with regard to the obligation to observe the Convention.

[...] The guaranteed right to asylum according to Article 18 of the Charter and the TFEU includes the right of every third-country national to require from the Member State before which he has applied for asylum to fulfil its obligation ... 'to offer appropriate status to any third-country national in need of international protection and to ensure compliance with the principle of *non-refoulement*'. This obligation should be fulfilled in the framework of the common European policy in the field of asylum, subsidiary and temporary protection along the meaning of Article 78 (2) of the TFEU, including by guaranteeing access to the procedure for granting a uniform status and for determining a Member State responsible to examine his applications for asylum or subsidiary protection envisaged in the framework of that policy.

[...] In all cases applying EU law, one of the Member States should be determined as competent within the meaning of Article 3 (1) of the Dublin Regulation to consider the application of the person seeking asylum [...]. Otherwise the right to asylum of the person within the meaning of Art.18 of the EU Charter of Fundamental Rights, guaranteed by the TFEU, will be violated, because it is unacceptable that the procedure for determining the competent Member State, which concerns the relations between Member States, represents an obstacle to the procedures for refugee status determination.<sup>361</sup>

There are also instances (four national judgments) where the court relies upon Article 19 of the EU Charter in *non-refoulement* cases.<sup>362</sup> Reliance on the EU Charter, particularly Article 24 can also be found in judgments related to unaccompanied minors (three cases) where the Court found by virtue of Article 24, the child's best interests must be a primary consideration.<sup>363</sup>

In **France**, it was reported that the CNDA generally only relies upon the 1951 Refugee Convention and the CESEDA (which transposes EU Directives). It generally does not refer to the EU Charter and even less to the ECHR. The interviewees indicated that many legal practitioners were not very familiar with the EU Charter and even when they are, they are reluctant to use it before the CNDA as it is generally not reflected in the decisions. According to a CNDA *rapporteur*, it is also a question of time. Given that their case load is very high, there is not always time to draft long decisions referencing EU law. When the EU Charter is relied upon, it generally is in relation to the procedural guarantees it affords through Article 47 and Article 41 in particular in relation to the

359. See for example, Judgment No. 297 of 15 January 2014 of the Sofia City Administrative Court in case No.9129/2010; Judgment No. 5860 of 23 September 2013 of the Sofia City Administrative Court in case No.8191/2013; Judgment No. 1772 of 19 March 2014 of the Sofia City Administrative Court in case No.1512/2014; Judgment No. 3953 of 13 June 2013 of the Sofia City Administrative Court in case No.4625/2013; Judgment No. 5748 of 03 September 2013 of the Sofia City Administrative Court in case No. 661/2013; Judgment No. 2938 of 30 April 2013 of the Sofia City Administrative Court in case No. 3502/2013; Judgment No. 5399 of 07 August 2013 of the Sofia City Administrative Court in case No. 7358/2013.

360. CJEU, Case C- 528/11, *Zuheyra Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet*, 30 May 2013.

361. Unofficial translation from Bulgarian into English by the researcher of Paragraphs 21 to 25 of the Judgment. The author has included the full description given the fact that there are few judgments within the EU that go into such depth regarding the of Article 18 of the EU Charter.

362. Judgment No. 13631 from 21 October 2013, Bulgarian Supreme Administrative Court in case No. 14146/2012; Judgment No. 7157 of 28 May 2014 of the Bulgarian Supreme Administrative Court in case No.10566/2013; Judgment No.8570 of 23 June 2014 of the Bulgarian Supreme Administrative Court in case No. 490/2014.

363. Judgment No.2418 of 10 April 2014 of Sofia City Administrative Court in case No.7663/2012; Judgment No.5579 of 19 August 2013 of Sofia City Administrative Court in case No. 5169/2013; Judgment No. 6754 of 06 November 2013 of Sofia City Administrative Court in case No. 7353/2013.

applicant's right to be heard before a Court (the CNDA), and not to have their case heard by *ordonnance*. Under the *ordonnance* procedure, there is no hearing and the case is handled by a single judge, rather than appearing before a three-person panel under the normal procedure.

In **Germany**, according to one judge at a second instance court, the EU Charter has, so far, been of little relevance. While recognising that it was an important text that reconfirmed shared values and rights, there is a general impression that these were already provided for in German Basic Law, without the need to rely on the EU Charter. If quoted at all, the EU Charter was merely 'an adjunct that needed to be quoted'. Several practitioners mentioned that the CJEU needed to elaborate on its added value, particularly in comparison to the ECHR, so that the EU Charter could better be understood and actually be used in practice.<sup>364</sup>

In 2015, an article was published on the relevance of the EU Charter for refugee protection,<sup>365</sup> which indicated that one of the main reasons the EU Charter didn't play a prominent role in national jurisprudence was because it wasn't prominently relied upon in CJEU case law either, it concluded:

the current relevance of the Charter does not correspond with its latent potential neither with regard to refugee law nor refugee politics nor refugee ethics. The Charter could in many ways be an 'elephant', more elegantly: a 'sleeping beauty', which could be kissed awake for refugee protection, too.<sup>366</sup>

In **the Netherlands**, judges do not really rely on the EU Charter in their reasoning. It is believed that relying on the EU Charter does not change the conclusion that has been reached based on the ECHR or national legislation. The EU Charter is used more in Dublin cases, specifically Articles 1, 4, 18 and 24 are often invoked by legal representatives to try to prevent removals. These arguments relying on the EU Charter are usually not successful. The notable exception is when Article 4 is invoked, but this is generally due to the *N.S and M.E.* judgment and its incorporation into the Dublin III Regulation.<sup>367</sup> Article 47 of the EU Charter is also often invoked when arguing that there has been a violation of procedural guarantees, but with limited success.<sup>368</sup>

In **Belgium**, reliance on the EU Charter is marginal, and generally only arises in very specific circumstances. Courts and asylum authorities give priority to the ECHR over the EU Charter. Judges interviewed for this study also reiterated the importance of the ECHR rather than the EU Charter. The CALL has rarely referred to the EU Charter in its judgments, while the Labour Courts have, in some instances, referred to Article 1 of the EU Charter, in relation to reception conditions. Another right that is more often referred to is Article 24 of the EU Charter, as the ICRC does not have direct effect. The EU Charter is also referred to in Dublin cases, mainly Articles 4 and 7 and on some rare occasions, the CALL has referred to Article 18.<sup>369</sup>

In **the UK**, although still limited, the main identified use of the EU Charter was reliance on Article 47 to argue for the right to a remedy in challenges to removals implementing the Dublin Regulation.<sup>370</sup> These arguments have so far not succeeded, and neither did reliance on Articles 1 and 18 to argue for a right to asylum.<sup>371</sup> A leading practitioner interviewed for the study reported using Article 1 in arguments before the Tribunal in LGBTI cases, but generally found limited reliance on Article 1 in Tribunal judgments.

## Whether the EU Charter of Fundamental Rights was relied upon by specific Courts in a Member State

Researchers examined cases relating to the three CJEU judgments mainly from appeal and higher courts in

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<sup>364.</sup> Interviewees who indicated this are on file with the author.

<sup>365.</sup> Bergmann, Die Bedeutung der EU-Grundrechtecharta für den Flüchtlingsschutz, in: Calliess, Herausforderungen an Staat und Verfassung, Nomos (2015), at 427.

<sup>366.</sup> Ibid, pp. 444 -445, researchers own translation.

<sup>367.</sup> CJEU, Joined Cases C411/10 and C493/10, *N. S. (C411/10) and M. E. (C493/10) v Secretary of State for the Home Department, Refugee Applications Commissioner, and the Minister for Justice, Equality and Law Reform*, 21 December 2011.

<sup>368.</sup> See for example ABRvS, 13 April 2016, 201507952/1/V2, ECLI:NL:RVS:2016:890, available here <http://bit.ly/2ljkxIC>.

<sup>369.</sup> Maes & Wijnants, *Het Handvest van de Grondrechten van de Europese Unie: een nieuwe speler in het vreemdelingenrecht*, (The Charter of Fundamental Rights of the European Union: a new player in the Aliens Law), Tijdschrift voor Vreemdelingenrecht, 2016, p. 38; with reference to CALL, judgments No. 75849 of 27 February 2012, and No. 73654 of 19 January 2012 and CALL, judgment No. 165478 of 11 April 2016.

<sup>370.</sup> For e.g. *R (on the application of AI) v SSHD* [2015] EWHC 244 (Admin); *R (on the application of Hagos) v Secretary of State for the Home Department (Dublin returns – Malta)* IJR [2015] UKUT 271 (IAC); *Dudaev v SSHD* [2015] EWHC 1641 (Admin).

<sup>371.</sup> *HA (Article 24 QD) Palestinian Territories* [2015] UKUT 465 (IAC). *R (on the application of Hassan and Another) v Secretary of State for the Home Department (Dublin – Malta; Charter Art 18)* IJR [2016] UKUT 00452(IAC).

their respective Member States.<sup>372</sup> They documented whether there were more references to and reliance on the EU Charter per court, where possible through Courts search engines, that went beyond the three CJEU judgments, they also examined whether any trends could be identified.

In **the UK, Belgium and the Netherlands**, there were no discernible trends as to whether a certain Courts referenced the EU Charter more than others. In **Germany**, first-instance courts generally do not mention the EU Charter while second and third instance Courts cite the EU Charter more in their judgments.<sup>373</sup> In **France**, the EU Charter is not mentioned in any OFPRA decisions but is referred to in several internal training and guidelines (e.g. Guidelines on interviews with LGBTI asylum seekers). The EU Charter is rarely mentioned in CNDA decisions. It is more often relied on by the applicant/lawyer than by the CNDA in its reasoning. In **Bulgaria**, both the Sofia City Administrative Court and the Supreme Administrative Court that examine cases in the field of asylum have referred to the EU Charter. No judgments of the Haskovo Administrative Court that have applied the EU Charter in asylum cases were found.

In **Sweden** researchers found that there were differences in relation to which Court referred to the EU Charter. Taking into account the Courts' caseloads, it is clear that references to the EU Charter are by far more frequent in the Migration Court of Appeal than the lower courts. There are also clear differences amongst the lower courts with fewer references to the EU Charter in Stockholm and Luleå than Gothenburg and Malmö. As for Malmö, the great majority of references made by the Migration Court in Malmö concerned Article 24 of the EU Charter.<sup>374</sup>

### The relevance of the EU Charter of Fundamental Rights in the application and interpretation of the selected CJEU case law

The following sections will look at instances whereby guidelines or policy positions were released following the judgment where it specifically referenced the EU Charter as well as cases related to the three CJEU judgments that relied upon the EU Charter.

#### *X.Y.Z. v Minister voor Immigratie en Asiel*

In **Sweden**, the EU Charter has not been mentioned in any case from the Swedish migration courts or the Migration Court of Appeal that refer to X.Y.Z. Indeed, the EU Charter was only mentioned twice in the 1,200 Swedish cases since 2010 relating to sexual orientation.<sup>375</sup> In **the Netherlands and Germany**, the judgment was generally applied in a manner consistent with the rights recognised by the EU Charter so no practice came to light to dispute this finding. In **Germany**, there was only one passing reference to the EU Charter in all the cases analysed by the researcher. In **Belgium**, hardly any reference was made to the Charter in the relevant case law researched. It was informed by X.Y.Z. the Qualification Directive and Article 3 ECHR, but no reference is made to the corresponding EU Charter provision. In **the UK** it was found that there was little or no mention of the EU Charter in any of the actual decisions researched.<sup>376</sup> In **France and the Netherlands**, the EU Charter is referred to in policy guidelines and training materials relating to the treatment of LGBTI asylum seekers, but there was

372. In Sweden, there are only two levels of courts that decide asylum and migration cases, as such the Swedish researchers also examined cases from the Courts of first instance. In Germany, many of the decisions reviewed were first instance decisions as a result of the fact there was a lack of higher instance decisions.

373. For example, OVG Nordrhein-Westfalen, 23 November 2010, 13 A 1013/09.A, states 'the Charter of Fundamental Rights of the European Union may be relevant. If Directive 2004/83/EC was to be interpreted also taking into consideration the Charter of Fundamental Rights, particularly Art. 52 of the Charter of Fundamental Rights, may be relevant which limits the scope of the rights guaranteed'.

374. These cases were mostly decided between 2010-2011 and addressed the issue as to whether children needed to provide their identity when applying for a residence permit because of their relation to a person with residence permit in Sweden. The court stated that the rights of the child and the principle of family reunification were more important than proof about the applicant's identity. (see for example FMA UM 3286-10 E, index No. 64).

#### The total number of references to the EU Charter divided by Court in Sweden

References to EU Charter	Migration Court of Stockholm	Migration Court of Gothenburg	Migration Court of Malmö	Migration Court of Luleå	Migration Court of Appeal
117	3	17	79	1	17

375. Information from the Swedish Report, the cases include FST UM 7786-12, the applicant referred to Articles 9 and 21 and FMA UM 5847-14, this was in connection with non-asylum grounds relating to the *Zambrano* principle, the court referred to Article 7.

376. In the UK, one of the interviewees noted that the EU Charter was sometimes used when arguing for the application of the right to dignity, found in Article 1 of the EU Charter, before the Tribunal in asylum appeals, particularly in X.Y.Z. type issues, but as mentioned above, this often does not translate into reliance by the judge.

very little reference to the EU Charter in any of the national cases relating to X.Y.Z.

### *A. B. C. v Staatssecretaris van Veiligheid en Justitie*

In **the Netherlands**, following the judgment, the Council of State adopted the CJEU reasoning and conclusions and public and internal guidelines were issued which is followed rather than relying on the reasoning of the judgment itself. The Council of State cited the relevant CJEU paragraphs that referred to Article 1 and 7 of the EU Charter. The reliance on the EU Charter had significant consequences in practice. It concluded that the CJEU excluded certain evidence based on Article 1 of the EU Charter which is now national practice. It found that the current practice precluded IND officers from asking detailed questions and practice was in conformity with the judgment. At the moment the preliminary reference was asked to the CJEU, detailed questions were being asked to the applicant, but this ceased while the case was pending. However, in the case law that followed, there was little mention of the Charter.

In **France**, at OFPRA level, the internal Guidelines<sup>377</sup> on interviewing LGBTI asylum seekers take into account the *A.B.C.* judgment and refer to the EU Charter. The aim of the guidelines is to create a secure setting for asylum seekers enabling them to feel confident, taking into account potential difficulties in explaining their asylum claim particularly in the presence of an interpreter. At the CNDA level, the CEREDOC has started to train judges and *rapporteurs* on credibility assessment of asylum claims based on sexual orientation.<sup>378</sup> The presentations stress that human dignity needs to be respected and that no explicit questions on sexual activities can be asked and that documents of an explicit nature cannot be accepted. The researcher only found one case where the EU Charter was relied upon by the CNDA. In this case, the applicant submitted several pictures and videos of his sexual relations in order to prove his homosexuality. The CNDA, found that they and the OFPRA were precluded to accept or take into account any evidence, anyway deprived of any probative nature, which was contrary to the human dignity of the applicant and of an identifiable third person.<sup>379</sup> It relied on Article 4 of the recast Qualification Directive read in light of Article 1 of the EU Charter (rather than on the *A.B.C.* judgment itself).

In **Belgium**, the EU Charter didn't inform the application of the *A.B.C.* judgment. A recent study by two CALL judges has found no CALL case-law referred explicitly to Article 1 of the EU Charter (in any of the migration or asylum related judgments under the CALL's competence).<sup>380</sup> Thus far, in **Germany, Sweden and Bulgaria**, the EU Charter was rarely if ever referred to or relied upon in the decisions issued by domestic courts in the cases reviewed for this study in relation to sexual orientation claims. Similarly, in **the UK**, the EU Charter was not relied upon to any substantial degree in relation to credibility assessment, or other aspects of assessing evidence in LGBTI claims following *A.B.C.*

### *Cimade, (GISTI) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*

In **Belgium**, *Cimade and Gisti* had the biggest impact on national practice. Numerous cases came before the Labour Tribunals and courts in which state authorities were condemned for violating EU law, including the EU Charter.<sup>381</sup> They mainly referred to the right to human dignity when making their decision, but rarely referenced Article 1 of the EU Charter when doing so. The right to human dignity is also found in Article 7 (3) of the Reception Act. It was relied upon by a number of courts as a reason to continue to provide material aid to a person who normally is no longer entitled to material aid. In one such recent case, the Antwerp Labour Court (Hasselt division) referred to Article 47 and 52 of the EU Charter, and their application by the Constitutional Court in its 1/2014 judgment, deciding that there was a need for a suspensive appeal against Dublin decisions and thus a continuation of material reception conditions pending such an appeal.<sup>382</sup>

377. This internal document was not shared with the researcher but some elements of its content were provided by the OFPRA during their interview.

378. Article L 731-4 CESEDA (introduced by the Law No. 2015-925 of 29 July 2015 relative to the Reform of the Right to Asylum) obliges the CNDA to report in its annual activity report on training activities provided to agents and judges, in particular on persecutions based on sexual orientation and gender. The researcher obtained this training module in her capacity of UNHCR judge-assessor at CNDA. She was not allowed to share the document itself with ECRE but was allowed to explain its content.

379. CNDA 29 October 2015 M. H. No. 15006472 C+. The CNDA added that the pictures and videos were submitted by the applicant without any authorization from this third person and could engage the civil or criminal responsibility of the applicant towards him.

380. This related to all migration and asylum related judgments under the CALL's competence. Maes & Wijnants, *Het Handvest van de Grondrechten van de Europese Unie: een nieuwe speler in het vreemdelingenrecht* (The Charter of Fundamental Rights of the European Union: a new player in the Aliens Law), *Tijdschrift voor Vreemdelingenrecht*, 2016, p. 16.

381. This subsequently caused a change in the Fedasil reception instructions.

382. Labour Tribunal Antwerp (Hasselt division), judgment No. 15/1418/A, 18 December 2015.

In **Bulgaria**, national law does not guarantee reception conditions to asylum seekers who, as per the Dublin III Regulation, should have their claim examined by another Member State.<sup>383</sup> Nevertheless there have been a number of decisions by the Sofia City Administrative Court challenging this law in which they rely on the EU Charter for justifying their decision. For example, in a judgment from 10 October 2014, in case No. 6486/2014, SCAC cited the interpretation of the CJEU that '[i]n the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter of Fundamental Rights of the European Union, under which human dignity must be respected and protected, preclude the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that directive'. The Sofia Administrative Court was answering the question from which moment the reception conditions should be applied to an asylum seeker. In a related issue, in case No. 2219/2011 on 25 July 2011, the Sofia City Administrative Court found that the delay by the asylum authorities in registering foreign nationals as asylum seekers contradicted the right to good administration under Article 41 of the EU Charter.

In **the Netherlands** and in **the UK**, the EU Charter didn't inform the implementing case law or guidance concerning reception conditions or reception facilities. Similarly, in **France**, there was no mention of the EU Charter in any of the case law reviewed for the purpose of this study applying the *Cimade and Gisti* judgment<sup>384</sup>, or in the subsequent legislative changes. In **Germany** and **Sweden**, practice is generally in line with the judgment which is consistent with the EU Charter, therefore, there were no relevant cases available to the researchers to examine how the EU Charter was applied in the application of this judgment.

## Conclusion

While this was a very specific analysis in relation to the use of the EU Charter by Courts and how it informs national legislation, it can be concluded that the EU Charter had limited influence in these areas. Most of the researchers indicated that Article 47 of the EU Charter was the most used in domestic proceedings<sup>385</sup> followed by other articles that are not found in the ECHR such as Article 1, the right to dignity, Article 18,<sup>386</sup> the right to asylum and Article 24, the rights of the child.<sup>387</sup> The EU Charter also seems to be used more in Dublin proceedings and when challenging procedural points of law than in other areas of asylum law. Furthermore, rights that have not yet been defined in relation to their scope by the CJEU have been found to be too vague to be of any great use in domestic proceedings. It is clear that the EU Charter, despite being part of primary EU law since 2009, is still perceived as a relatively new instrument and one both practitioners and decision makers are wary of relying upon when other more established instruments such as the ECHR could be invoked instead. Almost all persons interviewed for the study indicated that more awareness raising activities on the EU Charter are needed. If this were to be pursued, coupled with both the CJEU and higher instance national courts taking a more proactive role in referring to it and defining its scope, the EU Charter could become more of a living instrument which can play a real role in ensuring a fairer asylum procedure across the EU.

383. According to Article 67c, point 2 of LAR (in Bulgarian it is Article 67e), upon receipt of the respective reply by the requested Member State, the decision maker 'discontinues the procedure for granting international protection and allows for the transfer of the asylum seeker to the competent Member State'. Article 29, paragraph 1 of LAR enumerates the reception conditions rights of asylum seeker and defines that they apply 'during the procedure'.

384. French national questionnaire, there was no case-law from the administrative jurisdictions relating to reception conditions of asylum seekers (following the *Cimade and Gisti* judgment) which referred directly to the EU Charter.

385. For example, this is the case in France and Belgium.

386. For example, this is the case in Belgium and Bulgaria. The following Bulgarian cases referenced Article 18, Judgment No. 297 of 15 January 2014 of the Sofia City Administrative Court in case No.9129/2010; Judgment No. 5860 of 23 September 2013 of the Sofia City Administrative Court in case No. 8191/2013; Judgment No. 1772 of 19 March 2014 of the Sofia City Administrative Court in case No. 1512/2014; Judgment No.3953 of 13 June 2013 of the Sofia City Administrative Court in case No. 4625/2013; Judgment No. 5748 of 03 September 2013 of the Sofia City Administrative Court in case No. 7661/2013; Judgment No. 2938 of 30 April 2013 of the Sofia City Administrative Court in case No.3502/2013; Judgment No. 5399 of 07 August 2013 of the Sofia City Administrative Court in case No. 7358/2013; Judgment No. 5113 of 23 July 2014 of the Sofia City Administrative Court in case No. 6374/2014; Judgment No. 1918 of 21 March 2016 of the Sofia City Administrative Court in case No. 1004/2016; Judgment No. 1073 of 22 February 2016 of the Sofia City Administrative Court in case No. 574/2016.

387. Swedish researchers and Belgian interviewees indicated this was the case. For example, in Sweden, most of the references to the EU Charter from the Malmö Court concern Article 24 of the EU Charter. These cases mostly related to the question as to whether children need to prove their identity when applying for a residence permit because they were already related to someone with a residence permit in Sweden. The Court found that the rights of the child and the principle of ensuring family reunification were more important than obtaining proof of the applicant's identity. Most of these cases were brought between 2010 -2011. (See for example FMA UM 3286-10 E, index No. 64).

## Annex I: Number of preliminary references lodged in the field of asylum

Country	Number of preliminary references lodged in the field of asylum (as displayed on the Curia website as of 1 February 2017)*
Belgium	9
Bulgaria	4
France	5
Germany	11
Italy	1
The Netherlands	7
Sweden	4
United Kingdom	3
<b>Total</b>	<b>42</b>

\* These include all references relating to the instruments adopted as part of the Common European Asylum System as well as references made under the Family Reunification Directive and the Returns Directive relating to applicants for, or beneficiaries of international protection. The full list of references is on file with the author.



## Annex II: Policy and legislative changes following the Judgments

Country**	Legal Instruction/Guidance - Public	Legal Instruction/Guidance - Internal	Body	Date
	<b>X. Y. Z. v Minister voor Immigratie en Asiel</b>			
<b>Belgium</b>	N/A	Possible internal guidance issued to protection officers of the Commissioner-General for Refugees and Stateless Persons	Legal service of the Office of the Commissioner-General for Refugees and Stateless Persons	N/A
<b>Bulgaria</b>	N/A	N/A	N/A	N/A
<b>France</b>	N/A	French Office for the Protection of Refugees and Stateless Persons note on the XYZ judgment and Council of State, M. B., No. 349824 A, 27 July 2012	French Office for the Protection of Refugees and Stateless Persons and Council of State	27/07/2012
<b>Germany</b>	N/A	N/A	N/A	N/A
<b>Italy</b>	N/A	N/A	N/A	N/A
<b>The Netherlands</b>	Council of State, 201109928/1, 18 December 2013(judgment) and C2/3.2 Vc 2000 (policy guidelines)	N/A	Council of State and State Secretary of Security and Justice	18/12/2013 (judgment) and 18/02/2014 (Policy guidelines)
<b>Sweden</b>	Legal Position on investigating and deciding asylum cases based on sexual orientation (RCI SR 38/2015).	N/A	Swedish Migration Agency	02/10/2015
<b>United Kingdom</b>	Sexual identity issues in the asylum claim; Sexual orientation in asylum claims	N/A	Home Office	16/02/2015; 03/08/2016
	<b>A.B.C. v Staatssecretaris van Veiligheid en Justitie</b>			
<b>Belgium</b>	N/A	Possible internal guidance issued to protection officers of the Commissioner-General for Refugees and Stateless Persons	Legal service of the Office of the Commissioner-General for Refugees and Stateless Persons	N/A

<b>Bulgaria</b>	N/A	N/A	N/A	N/A	N/A	N/A
<b>France</b>	N/A	French Office for the Protection of Refugees and Stateless Persons	French Office for the Protection of Refugees and Stateless Persons guidelines on the interview with LGBTI asylum seekers****	N/A	French Office for the Protection of Refugees and Stateless Persons	09/2014
<b>Germany</b>	N/A	N/A	N/A	N/A	N/A	N/A
<b>Italy</b>	N/A	N/A	N/A	N/A	N/A	N/A
<b>The Netherlands</b>	Council of State, 201208550/1, 8 July 2015 and work instruction 2015/9	N/A	N/A	N/A	Council of State and Immigration and Naturalisation Service	08/07/2015 (judgment) and 1 October 2015 (work instruction)
<b>Sweden</b>	Legal Position on investigating and deciding asylum cases based on sexual orientation (RCJ SR 38/2015).	N/A	N/A	N/A	Swedish Migration Agency	02/10/2015
<b>United Kingdom</b>	Asylum Policy Instruction: Asylum Interviews; Sexual identity issues in the asylum claim; Sexual orientation in asylum claims	N/A	N/A	N/A	Home Office	04/03/2015; 16/02/2015; 03/08/2016
<b>CIMADE, GISTI v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration</b>						
<b>Belgium</b>	Fedasil instruction of 15 October 2013 concerning the End and the Prolongation of the Material Aid replaced by Fedasil instruction of 20 October 2015 on the change of place of mandatory registration of asylum seekers having received a refusal decision following a Dublin take charge request.	N/A	N/A	N/A	Federal Agency for the Reception of Asylum Seekers	15/10/2013 and 20/10/2015
<b>Bulgaria</b>	N/A	N/A	N/A	N/A	N/A	N/A

<b>France</b>	Council of State, La Cimade & Gisti, No. 335924, 17 April 2013; Ministry of Interior instructions to the Prefectures following the CIMADE and GISTI judgment by the CJEU 23 April 2013, Council of State, La Cimade & FNARS, No. 350191, 30 December 2013; Law relative to the Reform of the Right to Asylum, 29 July 2015 (Articles L741-1, L742-1, L744-1 and L744-9****)	N/A	Council of State; Ministry of Interior and National Assembly and Senate	17/04/2013; 23/04/2013; 30/12/2013; 29/07/2015
<b>Germany</b>	N/A	N/A	N/A	N/A
<b>The Netherlands</b>	Article 3, third paragraph (p) of the Regulation concerning the reception of asylum seekers 2005; Article 8(m) of the Dutch Aliens Act; Article 4.51(1) of the Aliens Decree 2001*****	N/A	House of Representatives and Senate	27 June 2013 (Regulation); 1 January 2014 (Aliens Act); 2 June 2014 (Aliens Decree)
<b>Sweden</b>	N/A	N/A	N/A	N/A
<b>United Kingdom</b>	N/A	N/A	N/A	N/A

\*\* The information included in the table relates solely to what the researchers have themselves found/are aware of. The list may therefore not be exhaustive and additional guidance, which the researchers have not been notified about, may exist. The information relates solely to guidance (including legislation) which is intended to instruct national authorities and courts in the application of the judgment. The information does not extend to summarised versions of the cases.

\*\*\* This guidance was published after the AG Opinion but before the CJEU judgment. An internal commentary with an analysis of the judgments was also done by the French Office for the Protection of Refugees and Stateless Persons harmonisation committee. The date of the commentary is unknown, however it does seem to have been used for other internal notes and training tools.

\*\*\*\* Whilst not a guidance on the judgment's application, *per se*, according to the researcher, it was only due to the legislative amendments in France that the judgment was fully accommodated.

\*\*\*\*\* As in the case of France, the Netherlands required legislative amendments in order to implement the judgment.

## Annex III: Questionnaires for national experts

### General questions

1. In your Member State is there a specific procedure in place that should be followed after a CJEU judgment is delivered on how the asylum authority and/or courts should interpret the provision in question? (e.g. a specific instruction issued) If so, who sets such procedure or issues an instruction?
2. Is this issued after every asylum related judgment or only on an *ad hoc* basis, e.g. when the judgment is particularly relevant to your Member State or if your Member State intervened in the case? Are there specific criteria as to when such a procedure is put in place or when an instruction is issued?
3. Is there a procedure in place in your national court or asylum systems that distributes important judgments from the CJEU to Judges, decision makers and clerks? Please explain how this works.

### *Joined Cases C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel ('X.Y.Z.')*

1. Has your Member State transposed Article 9 and 10 of Council Directive 2004/83/EC of 29 April 2004 Directive and its equivalent provision, Article 9 and 10 of Council Directive 2011/95/EU of 13 December 2011 as set down in the Directives? Please indicate the transposition date and provide direct wording of relevant provisions in your national law both in English and the original language.
2. Please describe the practices with regard to international protection claims based on sexual orientation in your Member State before the judgment was issued related to the following issues:
  - A. Was the mere existence of a law that criminalizes homosexuality in their country of origin regarded as sufficient evidence of persecution or other conditions should have also been met? Was the character of this particular punishment a decisive point in the decision? (i.e. if the punishment had merely been a fine, would the decision have been the same – if this information is available).
  - B. Were asylum seekers expected to conceal their homosexuality in order to avoid the risk of persecution?
3. Has your country's asylum authority and/or competent court issued any guidance in light of this judgment or were any legislative changes made to accommodate this judgment?
4. In case a specific instruction is issued, to what extent in your view does it accurately reflect the judgment in relation to the issues of concealment and criminalisation in the country of origin and to what extent, in your view, is it implemented in practice?
5. Please describe current practices with regards to asylum claims based on sexual orientation in your Member State.
  - A. Do criminal laws that specifically target homosexuals in the applicant's country of origin need to exist before a homosexual can be regarded as a member of a particular social group?<sup>388</sup>
  - B. Is a term of imprisonment that sanctions homosexual acts and which is actually applied in the country of origin regarded as disproportionate or discriminatory punishment, which constitutes an act of persecution?<sup>389</sup>
    - Please indicate if the same standard is applied for other reasons for persecution, such as for example, political opinion or religious belief.
  - C. If homosexuality is criminalised but not actually enforced, has there been any guidance from your national court or from the relevant authorities that state what punishment is severe enough to constitute persecution in line with Article 9 (1) and Article 9 (2) (c) thereof?
  - D. Does your Member State apply the conclusion that an applicant for international protection cannot be expected to conceal his homosexuality in his country of origin to avoid persecution?<sup>390</sup> Is there any assessment of the reasons why an applicant would conceal his homosexuality?

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388. Para. 79 of the judgment.

389. Para 61 of the judgment.

390. Paras 72 – 75 of the judgment.

6. Has the reasoning of this judgment, in particular paras 45 -46 of the judgment been applied to other asylum applicants as to whether they cannot be expected to conceal their political opinions or religious belief in order to avoid persecution?<sup>391</sup>
7. Has it been applied in the same manner? Please elaborate on any differences or similarities.
8. To what extent Articles 1, 7, 18 and 21 of the EU Charter of Fundamental Rights inform the national implementing case law or guidance?<sup>392</sup> Please indicate in what instances they are applied and whether they are relied upon to a substantial degree by the national authorities and judiciary when applying the judgment.
9. Please provide a brief overview of your main findings:
  - In your opinion, did national practice and procedures (where relevant), change as a result of the CJEU judgment? Were there any other legal instruments or case law that contributed to this change.
  - Has there been divergent or consistent application of this judgment by the authorities and courts in your Member State? If relevant and possible, please briefly describe the character of, and the reasons for inconsistencies.
  - Do you think authorities and judiciary in your Member State applied the CJEU judgment in restrictive manner? If yes, please briefly explain the reasons for your conclusion.
  - Do you think the judgment was applied in your Member State in a manner consistent with the rights recognised by the Charter?<sup>393</sup> Please provide more information.
  - Please specify any positive and negative practices in relation to the implementation of this judgment in your Member State.
  - Please indicate any other important findings that were not addressed by this questionnaire.
  - Please indicate how many national judgments were reviewed when answering this questionnaire.
  - Please indicate the stakeholders interviewed and reference any other sources researched in order to complete this questionnaire.
  - Please include the following information for any interviews that were conducted:
    - Name of the interviewee, position, organisation/affiliation
    - In official or personal capacity
    - Date(s), venue of the interview(s)
    - Oral or written, if written who translated the answers?

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391. See also, CJEU, Cases C-71/11 and C-99/11 *Germany v Y and Z* 05 September 2012, para 80.

392. These provisions were referenced by CJEU.

393. See para. 40 of the judgment.

*Joined cases C-148/13 to C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie*

Case specific questions:

1. Has your Member State transposed Article 4 of Directive 2004/83 and Article 13 of Directive 2005/85/EC and their equivalent provisions, Article 4 of Council Directive 2011/95/EU and Article 14 of Council Directive 2013/32/EU as set down in the Directives? Please indicate the transposition date and provide the actual wording of relevant provisions in your national law, both in English and the original language.
2. Has the asylum authority and/or competent courts of your Member State issued any guidance in light of this judgment or were any legislative changes made to accommodate this judgment?
3. In case a specific instruction is issued, to what extent, in your view, does it accurately reflect the judgment in relation to the credibility assessment of the applicant's sexual orientation and to what extent, in your view, it's implemented in practice?
4. Please describe the credibility assessment practice in claims based on the applicant's sexual orientation in your Member State before the judgment was issued.
  - A. Please describe whether the methods the CJEU found to be in breach of human dignity and the right to respect for private and family rights,<sup>394</sup> were used in assessing such claims both by judiciary and decision makers.
  - B. Please describe whether in your opinion there were differences in the assessment of the credibility of sexual orientation based claims and international protection claims based on other grounds of persecution.
  - C. Please specify whether a late disclosure of one's homosexuality was considered as a ground for questioning his or her credibility? If yes, was this a general, frequent or sporadic practice?
5. Please describe current credibility assessment practices of international protection claims based on the applicant's sexual orientation in your Member State.
  - A. Please describe current methods used in assessing credibility in such claims both by judiciary and decision makers. Please include relevant domestic case law which describe permissible methods of credibility assessment that are not in breach of human dignity and respect for private and family life, or which provide any concrete guidance in this respect. Please also include evidence submitted by the applicant's themselves that were deemed contrary to human dignity as per the A.B.C. judgment.
  - B. Is psychological evidence used in determining the credibility of an asylum seeker's sexual orientation in such cases? If yes, please provide details (i.e. Who provides an expert opinion, is it a psychologist or psychiatrist etc.)?
  - C. Please describe whether these are different for the assessment of credibility of sexual orientation based claims and international protection claims based on the other grounds of persecution.
  - D. Please provide information on whether, in your view, there was any practice and case law that resulted in the refusal of an international protection claim due to the fact that the assessment by the authorities was founded on questions based only on stereotyped notions. If yes, please provide more information on what these 'stereotyped notions' entailed. For example, in order to be considered credible: Are asylum-seekers in such cases are expected to be familiar with the 'gay scene' in a) the country of origin or b) the country of asylum? Are they expected to have a specific gender expression (e.g. effeminate man/masculine woman)? Are they expected not to be married with a different-sex partner? Are they expected not have children? Etc.
  - E. Please describe whether the EU Charter, in particular Article 1, was applied in domestic case law dealing with the credibility assessment in sexual orientation based claims and/or international protection claims based on other grounds of persecution since the judgment was adopted.
  - F. Please specify whether there was any case law or practice that resulted in a negative credibility assessment if the applicant was not declaring their homosexuality at the beginning to the relevant authorities.

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394. See paras. 64 – 67 of the judgment.

6. Is this judgment applied to the credibility assessment of other categories of international protection claims? And if yes, how do the judiciary and authorities in your Member State apply the judgment? Please specify whether there were references to a more extensive analysis by the Advocate General?<sup>395</sup>
7. To what extent does the Charter and in particular Articles 1, 3, 7, of the EU Charter inform the national implementing case law or guidance that goes beyond credibility assessment?<sup>396</sup> Please indicate in what instances they are applied and whether they are relied upon to a substantial degree by the national authorities and judiciary when applying the judgment.
8. Please provide a brief overview of your main findings:
- In your opinion, did national practice and procedures, where relevant, change as a result of the CJEU judgment? Were there any other legal instruments or case law that contributed to this change?
  - Please specify whether the judgment in your opinion contributed to a more individualised assessment of sexual orientation based claims taking into account the individual position and circumstances<sup>397</sup> as surmised by the judgment and in line with the recast Qualification Directive.
  - Has there been a divergent or consistent application of this judgment by the authorities and courts in your Member State? If relevant and possible, please briefly describe the reasons for inconsistencies.
  - Do you think the authorities and judiciary in your Member State applied the CJEU judgment in restrictive manner? If yes, please briefly explain the reasons for your conclusion.
  - Do you think the judgment was applied in your Member State in a manner consistent with the rights recognised by the EU Charter?<sup>398</sup> Please provide more information.
  - Please specify any positive and negative practices in relation to the implementation of this judgment in your Member State.
  - Please indicate any other important findings that were not addressed by this questionnaire.
  - Please indicate how many national judgments were reviewed when answering this questionnaire.
  - Please indicate the stakeholders interviewed and reference any other sources researched in order to complete this questionnaire.
  - Please include the following information for any interviews that were conducted:
    - Name of the interviewee, position, organisation/affiliation
    - In official or personal capacity
    - Date(s), venue of the interview(s)
    - Oral or written, if written who translated the answers?

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395. See paras 65 - 69.

396. These provisions were referenced by CJEU.

397. See para 61.

398. See para. 40 of the judgment.

*Case C-179/11, CIMADE, GISTI v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*

1. Was a specific procedure put in place or instruction issued following this judgment?
2. In instances whereby a specific instruction is issued, or when there was a change to legislation, to what extent, in your view, does it accurately reflect the judgment and to what extent is it implemented in practice?
3. Has your Member State transposed Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers and Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)? Please indicate the transposition date and provide the actual wording of relevant provisions in your national law. Please provide the wording in the original language and if possible also in English.
4. What Court decides on reception conditions issues? Are there difficulties with getting access to the Court?
5. Does your State provide reception conditions to asylum seekers who, as per the Dublin III (Regulation No 604/2013), should have their claim examined by another Member State?
  - A. Was this the case before the judgment?
6. Are there instances or specific time periods during the asylum procedure under which an asylum seeker is deprived of the protection standards set down in the Reception Conditions Directive and its recast?<sup>399</sup>
7. Has a Court or instruction interpreted what minimum reception conditions consist of? Has there been a change in what is considered minimum reception conditions pre and post *Cimade and Gisti*? Has this changed since the coming into force of the recast?
8. When is the Reception Conditions Directive and its recast applied? Is it from the moment an application for international protection is lodged in the respective Member State? Is any proof required of having lodged an application in order to access reception conditions?
9. Is there a distinction made between when an application is made/lodged and received? Does this impact when an applicant for international protection receives reception conditions as set down in the Reception Conditions Directive and its recast?
10. To what extent does the EU Charter and in particular Articles 1, 4 and 18 inform the national implementing case law or guidance?<sup>400</sup> Please indicate in what instances they are used and whether they are applied to a substantial degree by the national authorities and judiciary when applying the judgment.
11. Please provide a brief overview of your main findings:
  - In your opinion, did national practice and procedures (where relevant), change as a result of the CJEU judgment? Were there any other legal instruments or case law that contributed to this change.
  - Has there been a divergent or consistent application of this judgment by the authorities and courts in your Member State? If relevant and possible, please briefly describe the reasons for inconsistencies.
  - Do you think authorities and judiciary in your Member State applied the CJEU judgment in restrictive manner? If yes, please briefly explain the reasons for your conclusion.
  - Do you think the judgment was applied in your Member State in a manner consistent with the rights recognised by the EU Charter?<sup>401</sup> Please provide more information.
  - Please specify any positive and negative practices in relation to the implementation of this judgment in your Member State.

399. Paragraph 56 of the judgment, What is crucial are the 'minimum' reception conditions i.e. shelter, food, clothing and access to emergency health care.

400. Paragraph 42 of the judgment.

401. See para. 40 of the judgment.



- Please indicate any other important findings that were not addressed by this questionnaire.
- Please indicate how many national judgments were reviewed when answering this questionnaire.
- Please indicate the stakeholders interviewed and reference any other sources researched in order to complete this questionnaire.
- Please include the following information for any interviews that were conducted:

Name of the interviewee, position, organisation/affiliation  
 In official or personal capacity  
 Date(s), venue of the interview(s)  
 Oral or written, if written who translated the answers

### Questions in relation to the Charter of Fundamental Rights of the EU

1. When drafting or before implementing new asylum-related legislation, is a compatibility test carried out with the EU Charter of Fundamental Rights? If yes, which authorities are responsible for this?
2. In relation to the three CJEU judgments examined (*Cimade and Gisti*, *A.B.C. or X.Y.Z.*), which one in your national context was the EU Charter most often referred to and applied?
3. In your opinion, what domestic case law implementing the CJEU judgments researched, were most informed by the EU Charter?
4. In what way (i.e. which Article of the EU Charter was most relied upon)? Please justify your conclusion
5. In relation to this specific judgment, was the EU Charter always referred to in conjunction with other human rights instruments such as the European Convention of Human Rights? In general, in judgments, is the EU Charter always referred to in conjunction with another Human Rights instrument?
6. In your view, if the EU Charter Article concerned corresponds to the ECHR provision, do the courts or national authorities primarily rely on the ECHR and the ECtHR's case law rather than referencing and applying the EU Charter? Based on your research, were there specific circumstances under which the EU Charter was most referred to?
7. Based on your research, were there specific courts that referred to and applied the Charter of Fundamental Rights more than others?

#### Interview points and questions for the use of the Charter of Fundamental Rights of the EU

- What is the opinion of decision makers and judges of applying the EU Charter (i.e. is it applied much in the course of their decision making? What added value does it bring)? Is it used more in certain procedures than in others?
- Do legal practitioners often rely on the EU Charter in their asylum-related submissions? Are there instances where they use it more often during the course of representing an applicant for international protection?
- In general, what tools are needed (if any) to ensure the EU Charter is used more during the course of an asylum?
- Are there any perceived barriers to using the EU Charter?
- On the basis of your research and opinions of interviewees which elements (if any) of the EU Charter in particular improve the asylum procedure and decision making in your Member State?
- Please indicate stakeholders interviewed and reference any other sources researched in order to complete this questionnaire.
- Please include the following information for any interviews that were conducted:
 

Name of the interviewee, position, organisation/affiliation  
 In official or personal capacity  
 Date(s), venue of the interview(s)  
 Oral or written, if written who translated the answers



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