



UNHCR's Oral Submissions at the Court of Justice of the European Union

Hearing of the case of *Minister voor Immigratie en Asiel v A, B and C* (C-148/13, C-149/13, and C-150/13)

25 February 2014, Luxembourg

Mr President, Madam Advocate General, Members of the Court,

Introduction and summary

1. This reference from the Dutch Council of State raises the important question of what limits are placed on the methods employed by national authorities when assessing the credibility of the declared sexual orientation of an asylum applicant. The question also concerns how these limits may differ from those applicable in the assessment of credibility in other types of claims.
2. The appropriate approach to assessing the credibility of such a declaration and thus establishing a material fact central to such claims is a matter which has been addressed by UNHCR in some detail in its Guidelines on International Protection No. 9 ("GIP No. 9") on claims to refugee status based on sexual orientation and/or gender identity [within the context of the 1951 Convention and/or its 1967 Protocol].
3. This Court is, of course, concerned with the application of the EU legal framework to this issue. But, as the Court has consistently held, the EU legal framework must itself be construed in accordance with the 1951 Convention.

UNHCR's Guidelines are therefore highly material and of authoritative guidance in this case.

4. The first part of the question referred in this case can be broken down into two points. First, what is the legal framework governing the credibility assessment of asylum claims? In other words, what legal provisions or principles constrain the conduct of national authorities when assessing the credibility of an asylum application? And, second, how do these principles apply to the credibility assessment of such a claim in the specific context of asylum applications based on sexual orientation and/or gender identity?
5. I will address each of those points in turn.

The applicable legal framework

6. There is a large measure of consensus in the written observations about the applicable legal framework. This legal framework is equally relevant for all asylum claims irrespective of their basis.
7. A key provision is contained in Article 4 of the Qualification Directive, which was considered recently by the First Chamber in the *MM* case. As the Court emphasized in that case, it is generally for the applicant to submit the elements necessary to substantiate the application and it is the duty of the Member State to cooperate actively with the applicant in this regard. In effect, the duty to substantiate is a shared one: as the Court recognized (*MM*, §§ 65/66), the Member State may well be in a better position than the applicant to gather the

information required. This shared duty and requirement of active cooperation applies equally in the context of a claim based on a declared sexual orientation.¹

8. In addition to Article 4 of the Directive, as all the Member States which have intervened and the Commission agree, Member States must comply with the Charter of Fundamental Rights. UNHCR agrees with the Commission that the provisions of the Charter which are most obviously relevant in this context are Articles 1, 3, 4 and 7, although other Articles – such as 18, 19, 21, 41 and 52 are also relevant.

Application of these provisions in the present context

9. The question for the Court in this case is: how do these provisions apply in practice and how do they constrain the assessment by Member States of the credibility of an applicant's declared sexual orientation?
10. It is, of course, difficult to be overly-prescriptive in the abstract. However, it is possible to draw some general conclusions about the requirements of the Charter and of Article 4 of the Directive in this context and UNHCR invites the Court to draw these conclusions in its judgment in order to provide Member States with practical guidance going forwards.
11. In particular, there are three points that UNHCR wishes to make. The first concerns the importance to be attached to an applicant's own testimony about their sexual orientation; the second point addresses methods of assessment that are always impermissible; and the third concerns methods of assessment that may be incompatible with the Qualification Directive and/or the Charter.

¹ Contrary to the Belgian Government's submissions at §43.

12. **First**, in sexual orientation cases, the applicant's own testimony is the primary and often the only source of information, especially where persecution is at the hands of family members or the community (GIP No. 9, §64). But the fact that corroborating evidence regarding the applicant's sexual orientation may not be available does not mean that the State has simply to accept the account of the applicant at face value. We agree with what Member States say in this regard. They are entitled to assess the credibility of an applicant's [declared] sexual orientation. As is the case for all asylum claims and as Article 4 of the Qualification Directive requires, the credibility of an asserted fact material to the claim must be assessed in view of all the available information and with reference to the relevant credibility indicators (including consistency, specificity, sufficiency of detail, and – as stated by the Qualification Directive – coherence and plausibility) and must also take into account any reasonable explanation provided by the applicant for any possible credibility concerns.
13. Thus, Article 4(5) of the QD recognises that an applicant's own account of *how they identify* as lesbian, gay or bisexual *and their experience* for example of difference, stigma, shame, harm and/or ostracism by state, family or community, taken in the context of all the elements and circumstances relevant to the claim may well itself suffice to establish the credibility of their declared sexual orientation.²
14. **Second**, certain methods of assessing the credibility of the applicant's declared sexual orientation are impermissible because they will always amount to an infringement of the applicant's fundamental rights protected by the Charter.

² Contrary to submissions made by the Belgian Government (at §§45, 69 and 77); the Czech Government (at §9); and the Dutch Government (at §26).

Here UNHCR takes issue with the written submissions of the Czech Republic which argue that the Charter places no limits on the methods that may be used; indeed, they go even further and state that any limitation would breach the applicant's rights under Article 18 of the Charter because the applicant would be denied the possibility of demonstrating the existence of reasons justifying the grant of refugee status. There is an obvious fallacy in this argument in that it assumes that evidence above and beyond the applicant's own testimony is necessary in order for the Member State to accept the applicant's declared sexual orientation. It is not and Article 4(5) of the Qualification Directive itself recognizes that.

15. UNHCR wishes to highlight three methods which have been used in some Member States to assess the credibility of an applicant's declared sexual orientation that, in its views, are always incompatible with the Charter.
16. It is incompatible with the Charter to use pseudo-scientific means of assessing sexual orientation such as phallometry (GIP No. 9, §65) and the submissions of the European Commission and the German Government acknowledge this. This will always amount to an infringement of an applicant's fundamental rights under at least Article 1, 3, 4 and 7 of the Charter.
17. The second method that is incompatible with the Charter is to require or ask the applicant to demonstrate their sexual orientation by, for example, asking them to produce photographic or video evidence of them engaging in sexual or intimate acts, as also stated by the German Government and the lawyer for Applicant A. Or by asking them to demonstrate physical intimacy with a partner during the

course of an interview (GIP No. 9, §64). This will always amount to a breach of Articles 1, 3, 4 and 7 of the Charter and as such are impermissible.

18. The third method precluded by the Charter is intrusive questioning about the details of an applicant's sexual practices. As the advocate for A has stated, such explicit questioning of sexual practices is not compatible with the applicant's human dignity and right to private life.³ It should also be noted that the efficacy of such questioning is likely to be limited, as it focuses on only a narrow issue. Sexual orientation is about a person's identity, i.e. about "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". It is not a question of whether or not that identity is manifested through acts.
19. These three methods of assessing the credibility of an applicant's declared sexual orientation are always unlawful. They are not rendered lawful – as some Member States seek to suggest – in circumstances where the applicant consents to their use. Such consent could not be said to be freely given in circumstances where the applicant fears that their account may be disbelieved and, thus, their application rejected if they don't consent. Furthermore, some methods, for example phallometry, are scientifically very dubious, while others will not establish credibility to any extent more than methods compatible with the Charter and so are neither appropriate nor necessary.
20. The *third* point that UNHCR wishes to make concerns methods of assessing an applicant's declared sexual orientation that *may*, depending on their application

³ The Belgian Government at §83 submits that a first-instance asylum body cannot violate Artt. 1 and 3 of the Charter during a juridical-administrative procedure which for a large part consists of an interview conducted by an agent who is equipped to gather all documents and information that may substantiate the applicant's claim for asylum.

to the case at hand, be incompatible with the Charter. Two issues from the parties' submissions arise here. One concerns the tendency to draw negative credibility findings as a result of late disclosure and the other to draw inferences from responses to supposedly "objective" general knowledge questions.

21. But before I mention these two points, I would like to mention a third which concerns the requirement to allow applicants an opportunity to explain possible inconsistencies in their account. To deny applicants this possibility would be a violation of the right to a fair hearing as set out in the Charter.
22. With regard to late disclosure, as the Dutch Government notes,⁴ it is important not to draw adverse credibility conclusions from the failure of an applicant to disclose their sexual orientation and/or relevant information at the earliest opportunity. Instead, in accordance with the applicant's right to be heard under the Charter, the applicant should be afforded the opportunity to explain the delay and the reasonableness of that explanation should be taken into account. This is very important because applicants who have been subjected to persecution as a result of their sexual orientation may have many reasons for not disclosing this. They may, for example, harbour deep feelings of shame and indeed may have internalized their society's homophobia and thus have denied their sexual orientation to themselves; they may also still be in the process of coming to terms with their own identity and be reluctant or unable openly to express their sexual orientation. Such factors may thus diminish the applicant's ability to disclose as soon as possible relevant information and may inhibit them during an interview. This needs to be taken into account.

⁴ §39 of the Dutch Government's observations.

23. The second method of assessing an applicant's declared sexual orientation that *may* be incompatible with the Charter concerns questioning about their knowledge of gay or lesbian culture, organizations or bars in the country of asylum. Such questions are usually of limited probative value as they generally fail to take account of the applicant's individual and contextual circumstances, and tend to be based on stereotypical assumptions around what constitutes lesbian or gay behaviour and interests. Drawing negative credibility findings on the basis of the applicant's answers to such questions may well be incompatible with their fundamental rights.
24. Specialized training, as stated by the Dutch Government,⁵ for both interviewers and interpreters, should sensitize them about sexual orientation, and indeed gender identity issues, so as to ensure that interviews are conducted appropriately and appropriate questioning methods are used. Every effort need also to be made to provide an open, reassuring, non-judgmental and non-biased environment to create an atmosphere of trust.
25. UNHCR's Guidelines No. 9 cover the key considerations in establishing the credibility of an applicant's declared sexual orientation at paragraph 60. While there is no magic formula of questions to ask and no set of right answers, paragraph 63 (i)–(ix) lays down detailed guidance as to the type of questioning that is appropriate in such cases. Questions around the applicant's process of self-identification as gay, lesbian or bisexual, their childhood experiences, their gender identity, their experiences as a result of not conforming to expected gender roles or behaviour, their family relationships, the existence or not of

⁵ §38 of the Dutch Government's observations.

romantic or sexual relationships or contacts with LGBTI communities and the influence of religion, are all useful areas of questioning. Adopting such a broad approach enables Member States to ensure that the applicant's right to respect for their human dignity and privacy can be respected, and the complexities of sexual orientation more fully investigated.

Different limits to other types of claims

26. Moving on very briefly to the second part of the question asked of the Court, this concerns whether the limits imposed on the assessment of the credibility of a declared sexual orientation are different from those applying to the assessment of the credibility of material facts in other types of claims. There is general agreement among the parties' submissions that the limits are not different from one type of claim to another. We agree, but how they apply is an individual and fact specific question.
27. Member States are nevertheless required to ensure that, while the applicable principles are the same, their application necessarily varies from case to case depending on the context, such that the methods and approaches used to assess credibility need to be adapted to ensure that they are lawful. Where an applicant's claim raises issues that go to the heart of someone's identity and/or where key elements of the claim relate to the private sphere, the requirement to respect the right to human dignity and to private life is of particular relevance. This is often the case with sexual orientation and other gender-related claims and to an extent with religion-based claims. As submitted by the Dutch

Government,⁶ because of the nature of claims where sexual orientation is an issue, the limits imposed by the Charter and by the Qualification Directive itself may be more quickly reached. Hence the importance of establishing a reassuring atmosphere, of ensuring confidentiality, of providing specialized training on the conduct of interviews and assessment of credibility where sexual orientation is an issue, and of appropriate and respectful handling of the interview in such cases.

Thank you.

⁶ §45 of the Dutch Government's observations.