

## The Netherlands, Judicial division of the Council of State, 201208550/1/V2, supreme, Judgement of 8 July 2015

### Deciding bodies and decisions

- Dutch Council of States, Applications 201208550/1/V2, 201110141/1/V2, 201210441/1/V2 (Afdeling bestuursrechtspraak van de Raad van State)

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### Area of law

EU asylum law

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### Subject matter

Area of freedom, security and justice- minimum standards for granting refugee status or subsidiary protection - assessment of facts and circumstances - methods of assessment - acceptance of certain types of evidence - extent of the competent national authority's powers - requirements for a personal interview - fear of persecution on grounds of sexual orientation

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### Summary Facts Of The Case

All three applicants made applications for asylum based on persecution as homosexuals in their countries of origin. All three applications were rejected on grounds of credibility as to the true sexual orientation of the applicants. One applicant had failed to indicate his sexual orientation on his initial application. Others gave statements that were vague and inconsistent. Upon rejection, one applicant provided videos of him engaging in sex acts and another offered to undergo medical examination in order to 'prove' his sexual orientation. The referring Court had concerns regarding the nature of questioning and proof and the compatibility of assessment of a claim regarding the sexual orientation of an applicant with the requirements of Articles 1 (human dignity) and 7 (privacy) of the Charter and therefore referred the matter to the Court of Justice having regard to Article 4 of the Qualification Directive and the Charter.

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### Relation to the scope of the Charter

The case fell within the scope of EU Charter as it involved a Member State's act implementing a source of EU secondary law for the purpose of Article 51(1) therein. More specifically, the case dealt with the examination of a refugee status application, whereby the Dutch authorities were to assess whether the credibility of alleged sexual orientation is compatible with the EU Qualifications Directive (Directive 2004/83/EC) Article 4) and the EU Charter. Both, CJEU and the national court both relied heavily on the impact of the credibility assessment on the right of the applicant to human dignity, integrity of the person and respect for his or her private life.

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## Diagram



## Vertical Cooperation

The national court strategically uses the preliminary reference judicial cooperation technique to clarify the interpretation of Article 4 of EU Qualifications Directive with respect to sexual orientation as ground for assessing the credibility of an international protection application.

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### Impact on Legislation / Policy

Following this decision, the Dutch authorities have had to change their policy with regard to the credibility assessment of an alleged sexual orientation, so as to make clear what kind of questions are asked, how the answers to these questions are weighed and how the incredibility of statements relating to the problems faced because of the alleged sexual orientation influence the decision on the credibility of the sexual orientation as such.

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### Sources - EU and national law

- Article 1 - Human dignity
- Article 3 - Right to the integrity of the person
- Article 7 - Respect for private and family life

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### Sources - CJEU Case Law

- Joined Cases C-148/13 to C-150/13, A, B, C v. Staatssecretaris van Veiligheid en Justitie (Secretary of State for the Safety and Justice department), Judgement of 2 December 2014, ECLI:EU:C:2014:2406
- Case C-277/11 M.M. v Ireland, Judgement of 22 November 2012, ECLI:EU:C:2012:744
- Joint Cases C-199/12 to C-201/12, X, Y, Z v the Minister for Immigration and Asylum, Judgement of 7 November 2013, ECLI:EU:C:2013:720

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### Comments

In its preliminary reference ruling the Court of Justice held that assessments of application for asylum, including credibility assessments, must be conducted in compliance with Charter rights and in particular Article 7 EU Charter (CFR). While the details of asylum application procedures are generally a matter for national law a number of conditions flow from Union law. The assessment of any application should be conducted in cooperation with the applicant and it is for

the applicant to advance any particular claims including regarding sexual orientation. Furthermore, assessments must be conducted in compliance with the Charter, in particular Article 7 CFR on the right to privacy, and authorities may be required to modify their procedures in order to ensure compliance. Account should also be taken of Article 4(5) of the Qualification Directive detailing circumstances where documentary evidence may not be required, the authorities being permitted to rely on the statements of the applicants.

In relation to the specific situation of individuals claiming a particular sexual orientation, the Court outlined the limitations that may exist on the type of questioning and the assessment of this credibility. Firstly, it held that questioning based on 'stereotypical' notions may constitute a starting point, but only a starting point for an assessment. To hold otherwise and in particular reject an application based solely on the fact that an applicant is unaware of certain organisations would be contrary to the need to conduct an individual assessment, having regard to the specific circumstances of the applicant. Secondly, it held that detailed questions regarding sex acts would violate Article 7 CFR. Thirdly, it found that authorities cannot accept videos of sex acts, the performance of sex acts and of medical 'tests' regarding sexual orientation. Aside from the questionable probative value of such evidence, accepting it would violate the applicant's human dignity under Article 1 CFR. Moreover, it would encourage others to submit similar evidence leading to a *de facto* requirement of such evidence. Finally, it found the fact of non-disclosure of sexual orientation earlier in the application process would not be fatal to credibility, having regard to the sensitivity of the subject matter.

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