

Credibility, or how to assess the sexual orientation of an asylum seeker?

*EDAL Conference 2014: Reflections on the Current Application of the EU Asylum Acquis
Workshop Sexual Orientation, Gender Identity and Human Dignity*

Following the questions in the [XYZ](#) cases, in April last year the Dutch Council of State also issued questions to the European Court of Justice in Luxembourg on this point, in the case of three men from Afghanistan, Gambia and Uganda. The Council of State asked the Court of Justice: What limits are drawn by Article 4 of the Qualification Directive and by the Charter, specifically Articles 3 and 7 thereof, regarding the way in which the credibility of a stated sexual orientation is assessed? Do these limits differ from the limits regarding the assessment of the credibility of other persecution grounds, and if so, how?

I think there are two reasons why it would be welcome if the Court could provide some guidance here.

Firstly, credibility issues are increasingly important, for the number of lesbian, gay and bisexual asylum seekers who are rejected because their stated sexual orientation is not believed, seems to grow significantly. Jenni Millbank, who did extensive research on asylum practice of LGBTI cases in Australia and other Anglosaxon jurisdictions, described in her article *From discretion to disbelief* the trend that credibility is more of an issue in countries where practice becomes more sensitive towards LGBTI applicants. In these countries the reasons for rejecting asylum claims shift from arguments based on discretion or the situation in the country of origin not being bad enough, to arguments based on not believing that the applicant is an LGBT or I person. This trend occurs in the United Kingdom as well as in the Netherlands. A few years ago I hardly saw cases in which the sexual orientation was not believed, whereas nowadays rejections based on incredibility of sexual orientation are very common.

The second reason why guidance would be welcome on this point, is that there is a huge diversity in European Member states in the way asylum authorities assess someone's sexual orientation, as the *Fleeing Homophobia* research showed. In some states self-identification is the general means by which sexual orientation or gender identity is assessed. While in other States sexologists, psychiatrists and psychologists are consulted, in order to carry out this assessment. There is the highly controversial practice of phallometry, a method that has been applied in the Czech Republic in asylum cases to 'prove' sexual orientation, by measuring the applicant's physical reactions while watching different types of pornographic material. The criticism of the Fundamental Rights Agency, the European Commission, UNHCR and NGOs on this intrusive and degrading method led to suspending the practice in the Czech Republic in 2009. However, I am not convinced that this method is history, as the Slovak authorities

still applied phallometry in at least one asylum case in 2012. In addition, there are other medical examinations by psychologists, psychiatrists and sexologists, being used for the assessment of sexual orientation of asylum seekers that we found in several countries. However, sexual orientation is not a medical category and should therefore not be treated as such, and the same should apply to gender identity.

Another problem related to the assessment of sexual orientation is that asylum authorities sometimes ask very detailed and explicit questions on sexual acts. In the Netherlands questions were asked like: “How many people did you have sex with?”; “What did you do exactly when you had sex?”; “How did you feel while having sex?” And in the United Kingdom a woman was asked: “How do you know you are a lesbian? You told us you never had a relationship with a man...” From the UK was also reported that because of the increasing pressure to prove their sexual identity, gay men turn to extraordinary methods of proof, including filming themselves while having sex.

Often asylum seekers are questioned on ‘gay life’ or ‘gay culture’, in the country of origin and in the country of asylum, questions which often lead to a rejection when the answers do not match the assumptions on how a ‘true’ LGBTI person behaves. For instance, here in Ireland a man was rejected because he was not familiar with a famous gay bar in Dublin. These kind of stereotypes were found in the Fleeing Homophobia research as well as in more recent practice.

One of the cases that led to the questions to the Luxembourg Court revealed another stereotype: the Dutch asylum authorities considered that the asylum seeker did not tell enough “about the way in which his sexual relationship started and about his feelings and the inner process regarding his homosexual orientation, as he originated from a muslim family in a country where a homosexual orientation is generally not accepted.” Another asylum seeker who stated that his definition of homosexuality was having sex with another man, was also rejected as not credible.

It seems that a gay male asylum seeker is someone who visits gay venues regularly, who reads gay classics like Oscar Wilde, who is familiar with rainbow flags and pink triangles, who had a difficult coming-out process and a serious psychological struggle connected to it, who on the other hand can elaborate extensively on his coming-out process, and who is very interested in developing his sexual identity instead of just practising same-sex sexual acts. Although such a person could exist, it is highly problematic to expect all gay asylum seekers, or all gays, to fit this picture. Especially since this stereotypical gay seems to be drafted from a western point of view and it is questionable whether these concepts would apply to asylum seekers.

One of the conclusions of the Fleeing Homophobia research was: “As a general principle, establishing sexual orientation or gender identity should be based on self-identification of the applicant.” At the same time, we thought we could get rid of the stereotypes by means of LGBTI sensitivity trainings for asylum authorities. And I still think these type of trainings are very important, because rejections of LGBTI asylum applicants are often based on a lack of understanding of concepts like being in the closet and coming-out (of it). However, I no longer believe that sensitivity trainings will provide a real solution for rejections based on incredibility of one’s sexual orientation.

According to scientists sexuality is so complex that it cannot be understood and defined by anyone but the subject self. However, asylum authorities seem not aware of this complexity. Even if the authorities try to avoid stereotypes, they look for common standards. Asylum authorities have no expertise regarding this topic on the basis of which they could claim that their objective judgment should be preferred above the self-identification of the asylum seeker.

While we were - with a small group of lawyers - preparing the written submissions of the Dutch cases on credibility at the EU Court of Justice, we realised that, given the extremely personal character of sexual orientation, it is simply not possible to assess a sexual orientation in an objective way, which is what Article 8, 2, a of the EU Procedures Directive prescribes: “applications are examined and decisions are taken individually, objectively and impartially”. When asylum authorities try to do such an assessment, stereotypes are inevitable. It is therefore not strange that we found so many stereotypes in asylum decisions. In other words: assessing the credibility of sexual orientation or gender identity is always and by definition based on stereotypes and subjective notions. The only way to assess a sexual orientation or gender identity is to ask the person concerned.

In everyday life, when you wonder what the sexual orientation or gender identity of a given person is, what would you do to find out? If you happen to know friends of this person you could, of course, ask them. But obviously the best and surest way is to ask the person concerned. In the asylum context this would mean that the assessment of the sexual orientation should be based on the declaration of the asylum seeker alone.

We consider verifying sexual orientation contrary to the right to human dignity, as well as to the right to privacy, specifically the right to self-determination and self-identification. As the [Yogyakarta Principles](#) (a set of principles on the application of international human rights law in relation to sexual orientation and gender identity, adopted in 2006 by a group of human rights experts) state: “Each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.”

It is impossible to assess an applicant's sexual orientation, and for the applicant it is likewise impossible to provide proof of her or his sexual orientation, other than through her or his declaration. This also means that it is impossible to effectively rebut a judgement of non-credibility. Asking an applicant to do so, would mean a violation of the right to a fair trial.

The assessment of credibility of a sexual orientation as it is currently dealt with in most European States will lead to a very high risk of mistakes. Because the assessments are by definition based on stereotypes and subjective notions, there is a substantial risk that asylum seekers are rejected on false grounds. People whose sexual orientation or gender identity is found not to be credible, can in fact very well be real L,G, B, T or I-persons who have a well-founded fear of persecution. In the Refugee context this means: refoulement. This risk of refoulement is higher than for other groups of asylum seekers, like political opinion or nationality. This is discriminatory and it undermines the main purpose of the Refugee Convention, which is protection.

Now you might say: "This is all very interesting, and you might even be right in everyday life, but we fear straight asylum seekers who pretend they are LGBTI." I realise that what's pretty obvious in everyday life is not very obvious - and maybe even radical - in the asylum context, but I do think it is the right answer.

Personally I am convinced that the number of LGBTI people who do not dare to speak about their sexual orientation or gender identity to asylum authorities is much higher than the number of straight people who pretend they are gay in order to get asylum. Furthermore, I think it would be much worse to expel an LGBTI person to a situation of persecution, based on a subjective and wrongful credibility assessment, than to risk the acceptance of a fraudulent straight person, once in a while.

Ultimately the issue is not whether the applicant actually is LGBTI, but whether the persecutor believes that he or she is, because the applicant is, or because the persecutor perceives him or her to be LGBTI. In asylum interviews questions could be asked on the consequences of life as an LGBTI in the country of origin, like the reaction of family, friends and society at large, to their sexual orientation or gender identity; or on the effect of hiding it. This way the asylum authorities are released from the hopeless task of assessing something that is impossible to assess, and the focus of the interrogation can shift to the central question, which is whether the applicant, who we assume to be LGBTI, has a well-founded fear of persecution.

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