



Advocate General Sharpston considers that when verifying an asylum seeker's claimed sexual orientation, Member States' freedom of action is constrained by the Charter of Fundamental Rights

Although Member States do have the right to verify the credibility of such claims, certain verification methods such as medical and pseudo-medical examinations, intrusive questioning and requiring evidence of sexual activities are all incompatible with the Charter of Fundamental Rights

Under the EU directive on minimum standards for the qualification of refugees,¹ which refers to the relevant provisions of the Geneva Convention, a third country national who has a well-founded fear of being persecuted in his home country for reasons of race, religion, nationality, political opinion or membership of a particular social group may request refugee status within the EU. The Court has previously held that an individual may claim to be a member of a particular social group on grounds of sexual orientation.²

A, B and C have applied for asylum in the Netherlands on the grounds that, as homosexual men, they have a well-founded fear of being persecuted in their home countries. Their requests were refused on the basis that the Netherlands authorities doubted the veracity of their respective claims based on their self-avowed sexual orientation. The relevant Minister maintained that he was not required to accept unconditionally an individual's assertion of his own homosexuality. Therefore, neither A's willingness to submit himself to an examination nor C's production of a film depicting himself performing sexual acts with another male were considered sufficient to establish that either was a homosexual. The Minister also took account of C's inconsistency in failing to base his earlier asylum claim on his homosexuality, and his lack of knowledge of homosexual rights organisations in the Netherlands. In relation to B various reasons were cited, including his vague account of: (i) his feelings regarding his own sexuality; (ii) his sexual relationships; and (iii) how he had handled the realisation of his own sexual orientation in a Muslim country.

The Dutch Raad van State (Council of State) which heard the appeals of all three men against the Minister's decisions considered that verification of whether an applicant is a member of a social group on grounds of sexual orientation, may be more complex than examining other grounds of persecution. The Qualification Directive provides no guidance as to how far Member States may question an avowed sexual orientation, whether there are limits and, if so, whether any such limits are the same as those that apply to asylum applications based on other grounds. The Raad van State therefore asked the Court of Justice whether EU law limits Member States' actions in conducting credibility assessments where applicants claim refugee status on the grounds of their sexual orientation.

In her Opinion today, Advocate General Eleanor Sharpston indicates that, as homosexuality is not considered to be a medical condition and in the absence of supporting documentary evidence (which is unlikely to be available in most cases), there is no objective way of definitively proving a

¹ Directive 2004/83/EC of 29 April on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p.12), ('the Qualification Directive').

² Joined Cases [C-199/12](#), [C-200/12](#) and [C-201/12](#) X, Y and Z. The Court also decided that the mere criminalisation of homosexuality is not sufficient to found persecution. The legislation must be enforced in a way that results in a serious violation of fundamental rights.

person's averred sexual orientation. Personal autonomy is an important element of the right to private life protected in the EU Charter on Fundamental Rights and an individual therefore has the right to define his own sexuality. This means that **an asylum seeker's averred sexual orientation should always form the starting point of any assessment**. However, the need to protect the integrity of the asylum system and identify bogus claims so as to be able to assist those in genuine need of protection means that Member States must be entitled under the Qualification Directive to examine such a declaration.

Advocate General Sharpston emphasises that **nothing can be required of applicants that would undermine their human dignity or personal integrity**. The lack of express guidance in the Qualification Directive for Member States carrying out a credibility assessment does not mean that they can act without taking account of the overarching standards set out in the Charter of Fundamental Rights. **The rights to physical and mental integrity and to private life are violated by the use of methods of an intrusive and humiliating nature** such as medical or pseudo-medical tests like phallometry.³ Intrusive questioning also violates those rights. Such questioning includes not only requesting photographic and video evidence of sexual practices, but also encouraging and accepting the submission of such material as evidence.

The Advocate General also doubts the probative value of these methods in distinguishing between genuine and bogus applicants. Medical examinations should not be used as homosexuality is not a recognised medical condition and pseudo-medical examinations cannot establish sexual orientation. An applicant's responses to explicit questioning can never be conclusive and in any event the 'correct' answers can be invented. Evidence such as personal photographs or videos can also be fabricated. As it is, in fact, impossible to prove sexual orientation, she believes that assessment techniques which seek to do so should not form part of the assessment process for asylum claims.

Even where the asylum seeker consents to such testing, questioning or providing explicit evidence, Advocate General Sharpston considers that this would still breach his fundamental rights. Consent cannot remedy such breaches and would not increase the probative value of any evidence obtained in this way. Given the vulnerable position that asylum seekers are in, whether such consent would be fully free and informed is also questionable.

The Advocate General takes the view that such intrusive examinations as described above are also based on stereotypical assumptions about homosexual behaviour, which runs counter to the individual examination required by the Qualification Directive.

Rather than such testing, **Advocate General Sharpston considers that the assessment to establish whether refugee status should be granted should instead focus upon whether the applicant is credible**. This means considering whether his account is plausible and coherent.

In this regard, the Advocate General emphasises that the asylum procedure is one of cooperation, rather than a trial. It is neither for the authorities to disprove the asylum seeker's claim nor for him to prove it but rather for both parties to work towards a common goal. She therefore considers it important that the official making the decision has either seen the applicant's demeanour when giving his account (which is preferable) or at the very least has a full report including such information. She further recommends that, in order to respect the principle that every person has a right to be heard before a decision is taken which adversely affects him asylum seekers should have an opportunity to address any specific issue concerning the credibility of their account which arises during the course of the procedure before a final decision is made.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

³ Phallometric testing focuses on the subject's physical reaction to pornographic material.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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