

## **Case Summary**

### ***Joined cases A (C-148/13), B (C-149/13), C (C-150/13) v Staatssecretaris van Veiligheid en Justitie***

**Preliminary ruling under article 267 TFEU, from the Raad van State (Netherlands).**

#### **1. Reference details**

Jurisdiction: European Court of Justice (Grand Chamber)

Date of decision: 2 December 2014

Link to full case:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=160244&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=178902>

#### **2. Facts of the case**

A, B and C, third country nationals, each lodged an application for asylum in the Netherlands, relying on their fear of persecution in their country of origin on account of their homosexuality. However, the competent authorities rejected their applications on the grounds that their sexual orientation had not been proven.

The three applicants appealed against those decisions. Hearing the dispute, the Raad van State (Council of State, the Netherlands) was uncertain as to whether any limits are imposed by EU law as regards the verification of the sexual orientation of applicants for asylum. The Raad van State requests for a preliminary ruling concerned the interpretation of:

- Article 4 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;
- Articles 3 (integrity of the person) and 7 (respect for private and family life) of the Charter of Fundamental Rights of the European Union ('the Charter').

#### **3. Law**

##### *International Law*

- Article 1(A)(2) of the Convention relating to the Status of Refugees.

##### *Regional Law*

- Articles 3 and 7 of the Charter of Fundamental Rights of the European Union;
- Recital 3, 10, 16, and 17 in the preamble 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;
- Article 2, 4, and 10 of Council Directive 2004/83/EC;

- Recital 8 in the preamble of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status;
- Article 13(3) of Council Directive 2005/85/EC.

#### *National Law*

- Article 31 and paragraphs C2/2.1, C2/2.1.1, and C14/2.1 to C14/2.4 of the Law on Foreign Nationals 2000 (Vreemdelingenwet 2000);
- Article 3.111 of the Decree on Foreign Nationals 2000 (Vreemdelingenbesluit 2000);
- Article 3.35 of the Regulation on Foreign Nationals 2000 (Voorschrift Vreemdelingen 2000).

#### **4. Legal Arguments**

##### **Claimant's arguments**

According to the applicants in the main proceedings, in the course of assessing the credibility of the statements made by an applicant for asylum, those authorities ask questions in respect of the declared sexual orientation which breach, in particular, the applicant's right to human dignity and his right to respect for private life. The questions asked by the authorities, furthermore, take account neither of the shame that the applicant could feel during the hearings nor of the cultural reservations that would prevent him from speaking freely of that orientation. In addition, the fact that the Staatssecretaris found that the accounts given by the applicants for asylum were not credible should not lead to the same conclusion as regards the credibility of the sexual orientation itself.

##### **Respondent's arguments**

The Staatssecretaris observed that it is not clear either from Directive 2004/83 or from the Charter that the determination must be made on the basis solely of the declarations by the applicants for asylum as to their declared sexual orientation. According to the Staatssecretaris, it was, however, necessary to verify not whether the applicants for asylum actually had the sexual orientation that they claimed to have but rather whether they had made a plausible case that they belonged to a social group within the meaning of Article 10(1)(d) of Directive 2004/83, or whether the "actors of persecution" regarded them as doing so for the purposes of Article 10(2) of that directive.

##### **The Raad van State's considerations**

The Raad van State observed that neither Article 4 of Directive 2004/83 nor the provisions of the Charter relied on require the Staatssecretaris to find that the declared sexual orientation of an applicant for asylum is established on the basis solely of his declarations. Furthermore, according to that court, the verification of the sexual orientation of applicants for asylum is no different from the verification of other grounds for persecution. Nevertheless, the referring court considered that the mere fact of putting questions to the applicant for asylum may, to a certain extent, infringe the rights guaranteed by Articles 3 (right to integrity of the person) and 7 (respect of private and family life) of the Charter.

In those circumstances, the Raad van State decided to stay the proceedings and to refer the following question to the Court of Justice, which is framed in the same terms in each of Cases C-148/13 to C-150/13:

*What limits do Article 4 of [Directive 2004/83] and [the 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?*

## 5. Decision

In the first place, the Court of Justice stated that the declarations by an applicant for asylum as to his sexual orientation are merely the starting point in the process of assessment of the application. However, the methods used by the competent authorities to assess the statements and the evidence submitted in support of applications for asylum must be consistent with the EU law and, in particular, the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity and the right to respect for private and family life. Furthermore, the assessment must be made on an individual basis and must take account of the individual situation and personal circumstances of the applicant (including factors such as background, gender and age) in order for it to be determined whether the acts to which the applicant has been or could be exposed would amount to persecution or serious harm.

Against that background, the Court gave the following guidance as to the methods of assessment used by national authorities.

Firstly, assessment of applications for asylum on the basis **solely** of stereotyped notions associated with homosexuals does not allow those authorities to take account of the individual situation and personal circumstances of the applicant concerned. The inability of the applicant for asylum to answer such questions is not therefore, in itself, a sufficient reason for concluding that the applicant lacks credibility.

Secondly, while the national authorities are entitled to carry out, where appropriate, interviews in order to determine the facts and circumstances as regards the declared sexual orientation of an applicant for asylum, questions concerning the details of the applicant's sexual practices are contrary to the fundamental rights guaranteed by the Charter and, in particular, to the right to respect of private and family life.

Thirdly, as regards the option for the national authorities of allowing, as certain applicants for asylum proposed, homosexual acts to be conducted, the submission to possible "tests" in order to demonstrate their homosexuality or even the production by those applicants of evidence such as films of their intimate acts, the Court made clear that, besides the fact that such evidence does not necessarily have probative value, such evidence would of its nature infringe human dignity, the respect of which is guaranteed by the Charter. Furthermore, the effect of authorising or allowing such types of evidence would be to incite other applicants to offer the same and would lead, *de facto*, to requiring applicants to provide such evidence.

Fourthly, having regard to the sensitive nature of information that relates to a person's personal identity and, in particular, his sexuality, the conclusion of a lack of credibility cannot be reached

merely because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset.

Accordingly, the Court declared:

Article 4(3)(c) of Directive 2004/83/EC of 29 April 2004 and Article 13(3)(a) of Directive 2005/85/EC of 1 December 2005 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.