

Verifying sexual orientation of asylum seekers?

Fact of the case

A, B and C, third country nationals, each lodged an application for a temporary residence permit (asylum) in the Netherlands. In support of their applications, they stated that they feared persecution in their respective countries of origin on account, in particular, of their homosexuality.

In all three cases the Staatssecretaris and later the Rechtbank's-Gravenhage rejected the applications, as not being credible. On the appeal the Dutch Raad van State had doubts as to whether, in light of the Charter, certain limitations were placed on national authorities when verifying the sexual orientation of an applicant.

Legal Framework

International law

the Convention relating to the Status of Refugees

term "refugee" is to apply to any person who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

Relevant European Law

DIRECTIVE 2004/83/EC

Article 4

1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.
2. The elements referred to in of paragraph 1 consist of the applicant's statements and all documentation at the applicants disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.
3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:
 - (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;



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- (b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;
 - (c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;
 - (d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;
 - (e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.
4. The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.
5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:
- (a) the applicant has made a genuine effort to substantiate his application;
 - (b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;
 - (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
 - (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
 - (e) the general credibility of the applicant has been established.

Directive 2004/83

Article 10

'1. Member States shall take the following elements into account when assessing the reasons for persecution:

...

- (d) a group shall be considered to form a particular social group where in particular:
 - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
 - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States ...

Directive 2005/85/EC

Article 13

‘Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall:

- (a) ensure that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant’s cultural origin or vulnerability, insofar as it is possible to do so; ...

Relevant national law

Article 31 of the Law on Foreign Nationals 2000; Article 3.111 of the Decree on Foreign Nationals 2000 and Article 3.35 of the Regulation on Foreign Nationals 200

Questions

1. Does the Charter of Fundamental Rights apply in this case, and if yes which Articles?
2. Considering Article 4 of [Directive 2004/83] and [the Charter], in particular Articles 3 and 7, what do you think would be methods of assessing the credibility of a declared sexual orientation and what would be the limits to these methods?