



EUAA Expert Panel on Evidence and Credibility Assessment in Sexual Orientation and Gender Identity/Expression ('SOGIE') - based Claims

12 October 2022, 14:00 – 16:00 CET
online via WebEx Meetings

Background Note

1. Background information

In accordance with its mandate to support judicial training in the field of international protection¹ and with the support of the EUAA Courts and Tribunals Network, the EUAA is increasing the roll-out effect of their judicial activities through the EUAA expert panels. This activity was introduced in 2021 with the distinctive objective to address specialised topics in the field of international protection. It involves a panel of three judicial professionals and experts that engage in a discussion on a specific area of the CEAS, allowing attendees to deepen their knowledge in the respective field.

2. The EUAA Expert Panel

Building on suggestions by participants in previous expert panels and following consultation with the EUAA Courts and Tribunals Network, it was decided that the next EUAA expert panel addresses the issue of 'Evidence and Credibility Assessment in Sexual Orientation-based Claims'. The panel will also address claims based on gender identity and expression. The EUAA Expert Panel will take place online via the WebEx Meetings platform on 12 October 2022 from 14:00 to 16:00 Central European Time (CET).

¹ See Article 8 of the [EUAA Regulation](#): “The Agency shall establish, develop and review training for members of its own staff and members of the staff of relevant national administrations, **courts and tribunals**, and of national authorities responsible for asylum and reception” and Article 13: “The Agency shall organise and coordinate activities promoting a correct and effective implementation of Union law on asylum, including through the development of operational standards, indicators, guidelines or best practices on asylum-related matters, and the exchange of best practices in asylum-related matters among Member States.”



3. Framing the topic

The EU legal framework governing evidence and credibility assessment is limited. EU primary law contains certain principles and rights of general application which impact on evidence and credibility assessment², while some more specific norms are provided in EU secondary law.³ In several Member States, there is a rich jurisprudence dealing with this subject area. In addition, the jurisprudence of the ECtHR constitutes an important source of such guidance⁴, while the CJEU also issued some important decisions⁵.

Article 3 of the Charter of Fundamental Rights of the European Union (EU Charter)⁶ establishes the right to physical and mental integrity as a fundamental right in EU law, while Article 52(3) of the Charter prevents the institutions and bodies of the EU and the Member States from developing a different human rights jurisprudence where the provisions of the EU Charter and the European Convention on Human Rights (ECHR)⁷ correspond, although this must ‘not prevent EU law providing more extensive protection’. Materials such as the International Association of Refugee Law Judges (IARLJ) publication on the assessment of credibility as part of the CREDO Project⁸, the United Nations High Commissioner’s (UNHCR) handbook and subsequent guidelines on international protection⁹ and other publications also provide valuable guidance to national courts and tribunals on evidence and credibility assessment, although they are not binding¹⁰.

² EASO, An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis, August 2016, op. cit., fn. 3, Part 2, [url](#)

³ The legal basis for the creation of secondary legislation is derived from Art. 78 Treaty on the Functioning of the European Union (TFEU; consolidated version as amended by the Lisbon Treaty (entry into force: 1 December 2009): in [2012] OJ C 326/47). For further information on Art. 78 TFEU, see EASO, An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis, August 2016, op. cit., fn. 3, Sections 1.4 and 2.1.1.

⁴ EASO, An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis, August 2016, op. cit., fn. 3, Section 3.4.1.

⁵ See part 5 of this note, Relevant case law

⁶ EU Charter of Fundamental Rights, 2012/C 326/02, [url](#)

⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, ETS No 005, 4 November 1950 (entry into force: 3 September 1953) (ECHR). See Art. 53.

⁸ IARLJ, Assessment of credibility in refugee and subsidiary protection claims under the EU Qualification Directive, Judicial criteria and standards, CREDO Project, 2013 (IARLJ, Assessment of Credibility, CREDO project), p. 35. For further information on the CREDO Project see fn. 2 above. Other publications of the project were: UNHCR, Beyond proof, op. cit., fn. 14; Hungarian Helsinki Committee, Credibility Assessment in Asylum Procedure, A Multidisciplinary Training Manual, Vol. 1, 2013 (Hungarian Helsinki Committee, Credibility assessment training manual, Vol. 1); and Hungarian Helsinki Committee, Credibility Assessment in Asylum Procedure, A Multidisciplinary Training Manual, Vol. 2, 2015 (Hungarian Helsinki Committee, Credibility assessment training manual, Vol. 2).

⁹ UNHCR, Handbook and guidelines on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 protocol relating to the status of refugees, 1979, reissued February 2019 ([UNHCR Handbook](#)).

¹⁰ The position of UNHCR is discussed in EASO, An introduction to the Common European Asylum System for courts and tribunals — A judicial analysis, August 2016, op. cit., fn. 3, Section 1.3.



As of today¹¹, 68 countries worldwide have laws that criminalise same-sex relations¹², while 11 countries have jurisdictions in which the death penalty is imposed for private, consensual same-sex sexual activity. At least six of these countries implement the death penalty and it remains a legal possibility in the remaining five¹³. At the same time, in countries where there is anti-cross-dressing legislation, or where there is a lack of legal gender recognition, trans people, and those perceived to be trans, are at risk of arrest and persecution¹⁴. It comes therefore as no surprise that SOGIE asylum claims have increased in recent years and are expected to continue rising¹⁵. The 1951 Convention Relating to the Status of Refugees does not explicitly refer to sexual orientation as a reason for persecution, however, it is now widely accepted that sexual minorities qualify for asylum under at least one of the five grounds outlined in the Convention, that is, their membership of a particular social group¹⁶. The panel makes clear there should be an intersectional approach to the Convention reasons, noting the persecution suppressing open expression of sexual, or gender identity and expression is usually based on social, cultural and religious norms. This may give rise to not only religion and political opinion being additional Convention reason grounds, but also imputed Convention reasons due to an inability to successfully prove conformity with gender-sex roles expected by the potential persecutor.

On this basis, the core issues in SOGIE claims, as is shared by all refugee protection claims is the recognition of ‘difference’ identified by the applicant, (actual/expressed Convention reason), when recognised by the potential persecutor (imputed Convention reason) due, specifically in SOGIE claims, to their lack of conformity with the gender-sex role they are expected to fulfil by the potential persecutor¹⁷.

The starting point must be self-identification by the SOGIE refugee applicant, and the need for the decision-maker to create a safe-space for the applicant to be able to provide the narrative. When it comes to refugee protection claims based on gender identity, or expression, the

¹¹ 1 September 2022.

¹² The most recent reports of decriminalization are Singapore (political change) and St Christopher and Nevis (judicial change). On 21 August 2022, Singapore’s PM announced repeal of section 355, ‘Singapore will decriminalise sex between men, prime minister says’ Chen Lin, Reuters, [url](#). On 29 August 2022, the East Caribbean Supreme Court truck down the sodomy/buggery law as being unconstitutional in St Christopher and Nevis (Jamal Jeffers et al. v The Attorney General of St. Christopher and Nevis, Ward J) [url](#).

¹³ Human Dignity Trust. (2021). Map of countries that criminalise LGBT people. [url](#)

¹⁴ See ILGA Trans Legal Mapping Report (2019), [url](#)

¹⁵ International Commission of Jurists. (2016). Refugee status claims based on sexual orientation and gender identity – A practitioner’s guide. [url](#)

¹⁶ UNHCR. (2012). Guidelines on international protection no. 9: Claims to refugee status based on sexual orientation and/or gender identity within the context of article 1(A)2 of the 1951 Convention and/or 1967 Protocol relating to the status of refugees. [url](#)

¹⁷ See for example, Chelvan, S. “Put Your Hands Up if You Feel Love,” *Journal of Immigration, Asylum and Nationality Law* 25, no. 1 (2011): 55 and Mark Harper and others, *Same Sex Marriage and Civil Partnerships: The New Law* (Jordans, 2014) Chelvan, S. (2021). *The DSSH Model and the Voice of the Silenced: Aderonke Apata—The Queer Refugee: “I Am a Lesbian”*. In: Raj, S., Dunne, P. (eds) *The Queer Outside in Law*. Palgrave Socio-Legal Studies. Palgrave Macmillan, Cham. [url](#)



refugee claimant is highly unlikely, or almost certainly not going to be in a possession of a Gender Recognition Certificate or similar documentary evidence.

Evidence and credibility assessment are among the most challenging tasks in any international protection determination procedure, but it can be particularly complicated when the applicant seeks asylum based on their sexual orientation. There are several reasons for this increased difficulty.

The expert panel will discuss the challenges faced by both the claimant and the decision-maker in the process, but also the implications of the issues arising with regard to evidence and credibility assessment, which are summarized below, in non-exhaustive manner. An overview of the Difference, Stigma, Shame and Harm model ('the DSSH model') will be provided by its creator, who will also address some of the criticism it has received¹⁸.

Using the Yogyakarta Principles relating to sexual orientation and gender identity, as a point of departure, we are provided with helpful definitions on what constitutes sexual orientation and gender identity, making clear sexual orientation (sexual identity) is not just sexual conduct or behaviour, and gender identity and expression is not dependent on medical, or surgical intervention:¹⁹

'UNDERSTANDING 'sexual orientation' to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender;

UNDERSTANDING 'gender identity' to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.'

¹⁸ The DSSH model, a widely endorsed tool for SOGIE refugee determination, was created in 2011 by Dr S. Chelvan. For a presentation on the model please see Chelvan, S. "Migrant Law Clinic: the DSSH Model and LGBT+ Asylum: The Emotional Journey" (15 September 2020) - From 1 hours 7 minutes 40 seconds via youtube: <https://youtu.be/R5lhliw1djg>. For texts on the model, see Chelvan, S. *Queer Outside In Law* Op cit. fn. 17). The UNHCR endorsed the model in the International Protection Guidelines No9 [62] Op cit. fn. 16, and now with IOM use the model for training of all the global fieldworkers, since 2015. See also the CREDO Training Manual 2 (Gábor Gyulai (ed), 'Credibility Assessment in Asylum Procedures: A Multidisciplinary Training Manual' (2) (Hungarian Helsinki Committee, Budapest, 2015), Chelvan S. and Gyulai G., 'Chapter XI. Asylum Claims based on Sexual Orientation or Gender Identity', 59-91 ([url](#)) and Chelvan, S *Written Evidence before the Women and Equalities Select Committee*, 8 November 2020 ([url](#)).

¹⁹ *Yogyakarta principles*, Preamble ([url](#)) as endorsed by UNHCR Protection Guidelines No. 9 Op cit. fn. 16, paragraph 8.



These terms relate to activities to find and attract partners for physical and emotional intimacy and actual sexual contact. Sexual orientation also involves emotions and affections. Sexual behaviour is not always in line with sexual orientation. For instance, a gay man or a lesbian may have engaged in heterosexual relations (e.g. prior to accepting her/his actual orientation/identity) or continue to have opposite-sex relations, and also, a heterosexual person may also have sexual contact with a person of the same sex²⁰. A bisexual person, who is attracted to, and engages in sexual conduct with both sexes is also recognised within refugee protection claims, based on their non-conformity. Those refugee applicants at an age which is under the age of consent of a Member State should not be barred from refugee protection, as this would reduce determination to be solely based on sexual conduct. What is determinative in these protection claims is the need to focus on current identity.

- As sexual orientation is not necessarily characterized by visibility, applicants need to personally disclose their identity to establish their claim²¹. Some asylum-seekers might be uncomfortable disclosing personal matters in a stressful judicial setting, or before an interpreter from their own community. This is particularly likely if applicants have had to conceal their sexual identity or experience internalised homophobia. Fears of being exposed within their own community can further prevent disclosure²². Other claimants may not be aware that their sexual orientation might be relevant to asylum procedures, or they may not even be familiar with relevant terminology used to describe their identity, given that up until that point they have learned to associate who they are with negative terms used in their country of origin to describe such sexual or gender identity. In addition, SOGIE applicants often face challenges in expressing their emotions and, especially if they are called to present their claim while still going through their self-identification process. Any and all of the above reasons, may lead to late disclosure of the SOGIE claim, contrary to what is the norm when describing persecution incidents and factual events²³. The late disclosure may negatively affect credibility assessment²⁴ or even the actual possibility to examine the merits of the case, since SOGIE applicants coming from ‘safe countries of origin’ or ‘safe third countries’ are by

²⁰ EASO, Evidence and credibility assessment in the context of the Common European Asylum System— A judicial analysis, 2018, Section 6.6. [url](#)

²¹ Millbank, J. (2009a). From discretion to disbelief: Recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom. *International Journal of Human Rights*, 29(11), 319–414. [url](#)

²² Mulé, N. J. (2020). Safe haven questioned: Proof of identity over persecution of SOGIE asylum seekers and refugee claimants in Canada. *Journal of Immigrant and Refugee Studies*, 18(2), 207–223. [url](#)

²³ EUAA, Survey on Sexual Orientation and Gender Identity, Key Findings Report, June 2022, p. 13 [url](#)

²⁴ Nonetheless, in par.73 of the Judgment on the A, B and C case (please see below, under ‘Relevant Case Law’), the CJEU argued that late disclosure of the sexual orientation should not automatically be held against asylum seekers in credibility assessment.



default submitted to accelerated procedures ‘and safeguards therefore fail to protect the asylum seekers most afraid to talk about their identity’²⁵.

- The credibility assessment of SOGIE claims focuses mainly on the applicant’s internal experiences²⁶. Given that asylum-seekers can rarely support their claims with documentary or witness evidence²⁷, the asylum outcome often depends solely on their statements and the way they are shared (coherence and linearity may not be achievable for reasons that concern the applicant in question)²⁸. Distortion factors such as social and cultural background, age, religion, education, family, and socio-economic status, the acceptance of one’s own orientation or identity, stigma, shame or trauma, as well as the private nature of SOGIE claims may affect the applicant’s ability to substantiate their claim²⁹. This may create difficulties at the time of defining whether inconsistencies or lack of details are due to personal circumstances or to the inauthenticity of the accounts, thus ultimately impacting the internal credibility of the applicant’s statements. In light of this, the applicant’s personal circumstances have to be taken into consideration in the credibility assessment³⁰. It has also been argued that ‘questions in the asylum interview should take into account the narratives of gender-identification **and/or** gender expression of the applicants, and the configuration of their personality according to their narrated practices and experiences, and not be exclusively identity-based’³¹.
- Furthermore, there is growing mistrust among decision makers (‘a culture of disbelief’, as some scholars have named it³²) due to the number of fraudulent claims, or

²⁵ Le Bellec Amandine, Toward a Gender-Sensitive Securitization of the Common European Asylum System, *Frontiers in Human Dynamics*, Vol.3, 2021 available at [url](#)

²⁶ Ibid.

²⁷ Documenting SOGI persecution by producing evidence is often extremely difficult, especially in discriminatory, oppressive and criminalising environments. See also Ferreira, Nuno (2018) Reforming the Common European Asylum System: enough rainbow for queer asylum seekers? *GenUS - Rivista di studi giuridici sull’orientamento sessuale e l’identità di genere*, 2018 (2), pp. 25-42. [url](#)

²⁸ Senthoran Raj, ‘Protecting the Persecuted: Sexual Orientation and Gender Identity Refugee Claims’ (August 2013, the Winston Churchill Memorial Trust of Australia) 29. [url](#)

²⁹ Laurie Berg and Jenni Millbank warn against “the misapprehension that there is a single path to one “real” sexual identity (...). This reflects an essentialist view that sexual orientation is either innate or established early in life and defines what one “really is”, Laurie Berg and Jenni Millbank, “Constructing the personal narratives of lesbian, gay and bisexual asylum claimants”, *Journal of Refugee Studies*, 2009, 22(2), p.195–223. See also Hedayat Selim, Julia Korkman, Elina Pirjatanniemi & Jan Antfolk, Asylum claims based on sexual orientation: a review of psycho-legal issues in credibility assessments, 25 Feb 2022, [url](#)

³⁰ EUAA, Survey on Sexual Orientation and Gender Identity, Key Findings Report, op.cit. p.13

³¹ ‘For example, a non-binary male-presenting person that was assigned female at birth may not make clear identity claims as transgender or may have not or just partially socially transitioned. This person will have gone through identification processes but still experiences their identity as not easily categorizable’. Please see Avgeri Mariza, Assessing Transgender and Gender Nonconforming Asylum Claims: Towards a Transgender Studies Framework for Particular Social Group and Persecution, *Frontiers in Human Dynamics*, Vol. 3, 2021, [url](#)

³² Jenni Millbank, “The Ring of Truth: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations,” *International Journal of Refugee Law* 21, no. 1 (2009): 1–33; James Souter, “A



new or different SOGIE grounds claimed at different stages of the asylum procedure³³. At the same time, practitioners need to be aware of and avoid stereotypical, heteronormative, mononormative or even homonormative understandings of sexuality³⁴, they need to learn to avoid being subjective or superficial as maintaining erroneous or inappropriate perceptions and making assumptions about the life and experiences of the applicant could prove detrimental to their future. As UNHCR states in Beyond Proof³⁵: “There are no universal characteristics or qualities that typify LGBTI individuals, any more than there are for heterosexual individuals. Their life experiences can vary greatly even if they are from the same country’. What is more, norms, or even COI, about heterosexual or homosexual males may not apply to the experiences of lesbians, whose position may, in a given context, be similar to that of other women in their society³⁶. It is necessary to take full account of diverse and evolving identities and their expression, the individual’s actual circumstances, and the cultural, legal, political, and social context within his or her country of origin or place of habitual residence³⁷.

4. Legal Framework

Treaty on European Union

Article 2	Equality and non-discrimination
Article 4	Assessment of facts and circumstances

Treaty on the functioning of the European Union

Article 10	Non-discrimination
Article 19	Sexual orientation and non-discrimination

EU Charter of Fundamental Rights

Article 1	Human dignity
Article 2	Right to life
Article 3	Right to integrity
Article 4	Prohibition of torture and inhuman or degrading treatment or punishment
Article 6	Right to liberty and security

Culture of Disbelief or Denial? Critiquing Refugee Status Determination in the United Kingdom,” Oxford Monitor of Forced Migration 1, no. 1 (2011): 48–59.

³³ Ibid.

³⁴ Gordon-Orr Rose, Mononormativity and Related Normative Bias in the UK Immigration System: The Experience of LGBTIQ+ Asylum Seekers, *Frontiers in Human Dynamics* Vol.3, 2021 [url](#)

³⁵ United Nations High Commissioner for Refugees, “Beyond proof, Credibility Assessment in EU Asylum Systems”, Brussels, May 2013, p. 71.

³⁶ H Crawley, Gender-Related Persecution and Women’s Claims to Asylum, The Fahamu Refugee Programme, “many lesbians have effectively been denied the right to sexual orientation because they have been forced into marriage.”

³⁷ UNHCR, Guidelines No. 9, para. 14 citing UNHCR, Summary Conclusions: Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity, para. 5.



Article 7	Respect for private and family life
Article 18	Right to asylum
Article 20	Equality before the law
Article 21	Non-discrimination
Article 41	Right to good administration (including the right to be heard)

European Convention on Human Rights

Article 2	Right to life
Article 3	Prohibition of torture
Article 5	Right to liberty and security
Article 8	Private and family life
Article 10	Freedom of expression
Article 11	Freedom of association
Article 14	Prohibition of discrimination

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)

Article 2 (b)	Definition of an application for international protection
Article 3 (1)	Scope
Article 6 (1)-(2)	Access to the procedure
Article 10	Requirements for the examination of applications
Article 11	Requirements for a decision by the determining authority
Article 14	Personal interview
Article 15	Requirements for a personal interview
Article 16	Content of a personal interview
Article 17	Report and recording of personal interview

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)

Article 11	Detention of vulnerable persons and of applicants with special reception needs
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Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification for subsidiary protection (recast)

Article 4	Assessment of facts and circumstances
Article 9(1) and (2) b, c and f	Acts of persecution
Article 10(1) d	Reasons for persecution
Article 30	Healthcare



5. Relevant Case Law

CJEU

The [X Y and Z Case](#)³⁸ concerned three applicants from Sierra Leone, Uganda and Senegal, respectively, who had applied for international protection in the Netherlands. In each of their countries of origin, homosexuality is a criminal offence punishable by a term of imprisonment (maximum of life in Sierra Leone and Uganda, and up to 5 years in Senegal). None of the applicants demonstrated that they had already been persecuted or threatened with persecution in the past, but they sought asylum on the basis that, due to the criminalisation of homosexuality in their countries of origin, they have a well-founded fear of being persecuted if returned.

The Dutch Council of State sought clarification from the CJEU as to how to approach these asylum applications. The domestic court asked, in essence, three questions:

1. Do foreign nationals with a homosexual orientation form a 'particular social group' ("PSG") capable of qualifying for protection under the Article 10(1)(d) QD?
2. Can foreign nationals with a homosexual orientation be expected to conceal their orientation or exercise restraint in their country of origin in order to avoid persecution?
3. Does the criminalisation of homosexual activities and the threat of imprisonment in relation thereto constitute an act of persecution within the meaning of Article 9(1)(a), read in conjunction with Article 9(2)(c) QD?

The CJEU ruled that:

1. ... [48] *it should be acknowledged that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports a finding that those persons form a separate group which is perceived by the surrounding society as being different.*

2. ... [70] *In that connection, it is important to state that requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it.*

[71] *Therefore, an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution. [...]*

[76] *or to exercise reserve in the expression of his sexual orientation.*

3. ... [61] *Having regard to all of those considerations, the answer to the third question is that, in each of the cases in the main proceedings, Article 9(1) of the Directive, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the criminalisation of homosexual acts alone does not, in itself, constitute persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted*

³⁸ Joined Cases C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie, Integratie en Aziel, 7 November 2013, ECLI:EU:C:2013:720.



such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.

In the [A B and C Case](#)³⁹, three third country nationals who had applied for international protection in the Netherlands, claiming that they feared persecution on account of their homosexuality, had seen their applications rejected by the Staatssecretaris and later by the Rechtbank's-Gravenhage for lack of credibility. On appeal, the Dutch Council of State wondered whether, in light of the EU Charter of Fundamental Rights, certain limitations were placed on national authorities when verifying the sexual orientation of an applicant. Thus, it decided to stay the proceedings and to refer the following question to the Court of Justice:

- 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?

By decision of the Court of 19 April 2013, cases C-148/13 to C-150/13 were joined for the purposes of the written and oral procedure and of the judgment. In late 2014, the Grand Chamber delivered a ruling by which it held that the applicants' declarations as to their sexual orientation constitute "merely the starting point" in the process of assessment of the facts and circumstances of their claims, and that, depending on the circumstances, such statements with respect to their sexual orientation may require confirmation⁴⁰ and then answered the question posed by the Dutch authorities as follows:

.... [72] – Article 4(3)(c) of Directive 2004/83 and Article 13(3)(a) of Directive 2005/85 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, 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, 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.

³⁹ Joined Cases C-148/13, C-149/13 and C-150/13, A, B, and C v Staatssecretaris van Veiligheid en Justitie, 2 December 2014, ECLI:EU:C:2014:2406.

⁴⁰ p.48-52 of the Judgment.



– 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.

The most recent CJEU judgment we have with regard to a SOGI-based claim is the one issued on the [F Case](#)⁴¹. This case concerned a Nigerian national whose application for international protection was rejected at first instance by the Hungarian authorities on the basis of a psychologist's report indicating that his homosexuality could not be confirmed via tests. On appeal, the Administrative and Labour Court of Szeged decided to stay the proceedings and to ask for guidance regarding the possibility to rely on psychologists' expert opinions for assessing the credibility of asylum seekers fearing persecution on account of their sexual orientation.

The Court ruled in par.72 that:

1. *Article 4 of Directive 2011/95/EC of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, must be interpreted as meaning that it does not preclude the authority responsible for examining applications for international protection, or, where an action has been brought against a decision of that authority, the courts or tribunals seised, from ordering that an expert's report be obtained in the context of the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant, provided that the procedures for such a report are consistent with the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union, that that authority and those courts or tribunals do not base their decision solely on the conclusions of the expert's report and that they are not bound by those conclusions when assessing the applicant's statements relating to his sexual orientation.*

2. *Article 4 of Directive 2011/95, read in the light of Article 7 of the Charter of Fundamental Rights, must be interpreted as precluding the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist's expert report, such as that at issue in the main proceedings, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant.*

⁴¹ Case C-473/16, F v Bevándorlási és Állampolgársági Hivatal, 25 January 2018, ECLI:EU:C:2018:36.



Other cases frequently cited when examining SOGI cases:

The Judgment on the [M.M. Case](#)⁴², aside from the right to be heard and how it should be respected in the context of international protection proceedings, spoke of the assessment of international protection applications and interpreted art.4 (1) of the Qualification Directive as follows:

64 In actual fact, that ‘assessment’ takes place in two separate stages. The first stage concerns the establishment of factual circumstances which may constitute evidence that supports the application, while the second stage relates to the legal appraisal of that evidence, which entails deciding whether, in the light of the specific facts of a given case, the substantive conditions laid down by Articles 9 and 10 or Article 15 of Directive 2004/83 for the grant of international protection are met.

65 Under Article 4(1) of Directive 2004/83, although it is generally for the applicant to submit all elements needed to substantiate the application, the fact remains that it is the duty of the Member State to cooperate with the applicant at the stage of determining the relevant elements of that application.

66 This requirement that the Member State cooperate therefore means, in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents.

67 Moreover, the interpretation set out in the previous paragraph finds support in Article 8(2)(b) of Directive 2005/85, pursuant to which Member States are to ensure that precise and up-to-date information is obtained on the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited.

68 It is thus clear that Article 4(1) of Directive 2004/83 relates only to the first stage mentioned in paragraph 64 of this judgment, concerning the determination of the facts and circumstances qua evidence which may substantiate the asylum application.

ECtHR Case Law

It should be noted that a considerable number of cases of applicants for international protection fearing persecution or serious harm on the basis of their sexual orientation have been struck out from the Court’s list of cases as the respondent Governments finally granted some form of protection to the applicants or decided to re-open the case⁴³.

⁴² Case C 277/11, M. M. v Minister for Justice, Equality and Law Reform and Others.

Reference for a preliminary ruling from the High Court (Ireland), Judgment of the Court (First Chamber), 22 November 2012, ECLI:EU:C:2012:744. Please note that although this was not an LGBTI+ case, it offered guidance with regard to the assessment of applications for international protection and art. 4(1).

⁴³ Such was the result indicatively for the following cases: A.E. v. Finland, Application no. 30953/11, 22 September 2015; M.B. v. Spain, Application 15109/15, 13 December 2016; A.T. v. Sweden, Application no. 78701/14, 25 of April 2017; E.S. v. Spain, Application no 13273/16, 19 October 2017 (partly struck out



As an example, in the case of [M.E. v. Sweden](#)⁴⁴ the Court was dealing with the case of a Libyan asylum claimant in a same-sex relationship in Sweden. Despite the fact that the Swedish authorities found the applicant's claim to be non-credible, they did not question M.E.'s sexual orientation. However, they said he was required to return to Libya and apply for a visa there, despite having received threats from his family for having married someone of the same sex in Sweden. This decision received criticism, including by Judge Power-Forde in her dissenting opinion, as the Court found that requiring that the claimant be 'discreet' about his sexuality for a period of time in Libya cannot by itself be sufficient to reach the threshold of Article 3 of the Convention. Whilst this decision was being referred to the Court's Grand Chamber, the Swedish Migration Board decided to grant the applicant a permanent residence permit due to the deterioration of conditions in Libya, leading the Court to strike out the case⁴⁵.

The Court has however delved into the examination of issues particular to SOGI-based claims in several instances. In the case of [M.K.N. v. Sweden](#)⁴⁶, an Iraqi applicant firstly complained that he had had to leave Mosul (Iraq) because he was being persecuted on account of his Christian beliefs and his fair economic condition. He later alleged that, he would be at risk of persecution for having had a homosexual relationship in the past, which came to light and his partner had been stoned to death by the Mujahedin. Neither the Swedish migration board nor the migration court accepted his account as credible, also citing the late disclosure. The ECtHR found no violation of Article 3, inter alia, because it considered that the applicant's claim concerning the homosexual relationship was not credible, as no plausible explanation had been given for the delay in making such claims both domestically and before the Court. In other words, the (un)timeliness of the pertinent claim was considered a factor in assessing its credibility. In addition, the applicant had expressed the intention of going on to live with his wife and children before the Swedish authorities. The Court agreed with the importance of affording the benefit of the doubt to asylum claimants, but in the end sided with the Swedish authorities regarding both the possibility of internal relocation and the credibility assessment.

In the [A.N. v. France](#)⁴⁷ case, a Senegalese citizen seeking asylum in France on the basis of having been subjected to blackmail, harassment and violence in Senegal because of his sexual orientation, fled to escape his family and the authorities. It was after being apprehended by the police in France and issued with an expulsion order that the applicant applied for asylum, which was rejected by the domestic authorities on the basis that his narrative was imprecise and stereotypical, that he had no particular knowledge of the Dakar homosexual scene, that his declarations had been imprecise and that the documents submitted had been of little evidentiary value. In this case, the Court inter alia examined if provisions in the Senegal Penal

and partly considered premature); A.R.B. v. the Netherlands, Application no. 8108/18, 17 January 2019; S.A.C. v. United Kingdom, Application no. 31428/18, 5 December 2019.

⁴⁴ M.E. v. Sweden, Application no. 71398/12, Judgment 26 June 2014 [Section V].

⁴⁵ M.E. v. Sweden (striking out) [GC] - 71398/12, 8 April 2015 [GC].

⁴⁶ M.K.N. v. Sweden, Application no. 72413/10, 27 June 2013.

⁴⁷ A.N. v. France, Application no. 12956/15, 19 April 2016.



Code criminalising same-sex acts were enforced systematically. However, the Court decided that the applicant had not produced sufficient evidence capable of demonstrating that he would be exposed to a risk of treatment contrary to Article 3 of the Convention, if he were to be returned to his country of origin, thus concluding that the application was manifestly ill-founded.

In [I.K. v. Switzerland](#)⁴⁸, a male citizen of Sierra Leone claimed that although he had been accepted by his family as a homosexual, the police and religious groups had attacked him following his participation in a protest in favour of same-sex marriage. He further alleged that had been imprisoned and blackmailed. The Swiss authorities however found his account to lack credibility, as far as his sexuality and activism in Sierra Leone were concerned. The state authorities concluded that despite the criminalisation of homosexuality in Sierra Leone, the law was not enforced in the cases of people hiding their sexual orientation and gender identity from the public eye. In its decision, the ECtHR observed that the non-application of the previewed penalties calls for additional evidence that the applicant's return would indeed create a risk for him to be subjected to treatments prohibited under Article 3, thus, siding with the domestic authorities' assessment of the applicant's credibility. Consequently, the Court found the application manifestly ill-founded and declared it inadmissible. It is however noteworthy that the Court acknowledged sexual orientation as a fundamental characteristic of one's identity and conscience, stressed the need to treat the assessment of applicants' credibility in an individualized and delicate manner and confirms the inappropriateness of asking an LGBTI applicant to 'conceal' their identity.

Again, in [M.B. v. the Netherlands](#)⁴⁹, the Court sided with the Dutch authorities with regard to the credibility assessment already conducted by the latter. This was the case of Guinean applicant who claimed he was in a relationship with another man in Guinea, but when caught having intercourse with him, a mob attacked them and killed the applicant's partner. The applicant was then convicted, imprisoned and fined. The Dutch authorities accepted the applicant's sexuality as credible but found the relationship and other events described as non-credible, mainly due to the lack of details provided. The Dutch also concluded that although homosexuality is criminalised and punishable with a prison sentence of between six months and three years, there was no active policy of prosecution in Guinea. The Court acknowledged that it is often difficult in cases such as this one to establish precisely the relevant facts and accepted it that, in principle, the national authorities are in a better position to assess the credibility of the applicant if they have had the opportunity to see him, to hear him and to assess his conduct (R.C. v. Sweden, no. [41827/07](#), § 52, 9 March 2010, M.E. v. Sweden, no. [71398/12](#), § 78, 26 June 2014, and F.G. v. Sweden, ([GC], no. [43611/11](#), § 118).

The case of [B and C v. Switzerland](#)⁵⁰ concerned a homosexual couple, one of whom risked being returned to the Gambia following the rejection of his partner's application for family

⁴⁸ I.K. v. Switzerland, Application no. 21417/17, 19 December 2017.

⁴⁹ M.B. v. the Netherlands, Application no. 63890/16, 21 December 2017

⁵⁰ B. and C. v. Switzerland, Applications nos. 889/19 and 43987/16, 17 November 2020.



reunification. He alleged he was at risk of ill-treatment if returned, irrespectively of how long he would have to spend there. In terms of fear claimed, this was a similar scenario to the one described in *M.E. v. Sweden*⁵¹. However, the judgment issued by the Court held, unanimously, that there would be a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights if the first applicant were deported to the Gambia on the basis of the domestic decisions in his case. The Court considered that criminalisation of homosexual acts was not sufficient to render return contrary to the Convention. The Court found, however, that the Swiss authorities had failed to adequately assess the risk of ill-treatment for the first applicant as a homosexual person in the Gambia and the availability of State protection against ill-treatment from non-State actors. Several independent authorities noted that the Gambian authorities were unwilling to provide protection for LGBTI people.

Other cases frequently cited when examining SOGI cases:

According to par. 93 in the Judgment of [J.K. and Others v. Sweden](#) [GC]⁵²

Owing to the special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support thereof. Yet when information is presented which gives strong reasons to question the veracity of an asylum-seeker's submissions, the individual must provide a satisfactory explanation for the alleged inaccuracies in those submissions (see F.G. v. Sweden, cited above, § 113; Collins and Akaziebie v. Sweden (dec.), no. 23944/05, 8 March 2007; and S.H.H. v. the United Kingdom, no. 60367/10, § 71, 29 January 2013). Even if the applicant's account of some details may appear somewhat implausible, the Court has considered that this does not necessarily detract from the overall general credibility of the applicant's claim (see Said, cited above, § 53, and, mutatis mutandis, N. v. Finland, no. 38885/02, §§ 154-155, 26 July 2005).

In par. 127 of [F.G. v. Sweden](#)⁵³, the Grand Chamber reiterated that

...in relation to asylum claims based on an individual risk, it must be for the person seeking asylum to rely on and to substantiate such a risk. Accordingly, if an applicant chooses not to rely on or disclose a specific individual ground for asylum by deliberately refraining from mentioning it, be it religious or political beliefs, sexual orientation or other grounds, the State concerned cannot be expected to discover this ground by itself. However, considering the absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention, and having regard to the position of vulnerability that asylum-seekers often find themselves in, if a Contracting State is made aware of facts relating to a specific individual that could expose him to a risk of ill-treatment in breach of the said provisions upon returning to the country in question, the obligations incumbent on the States Parties under Articles 2 and 3 of the Convention entail that the authorities carry out an assessment of that risk of their own motion. This applies in particular to situations where the national authorities have been made aware of the fact that the asylum-seeker may plausibly be a member of a group systematically

⁵¹ *M.E. v. Sweden*, o.c.

⁵² *J.K. and Others v. Sweden* [GC], Application no. 59166/12, 23 August 2016.

⁵³ *F.G. v. Sweden* (GC), Application no. 43611/11, 23 March 2016.



exposed to practice of ill-treatment and there are serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned.