Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 17 July 2014[1]

Joined Cases C-148/13, C-149/13 and C-150/13

A, B and C

(Request for a preliminary ruling from the Raad van State (Netherlands))

(Common European Asylum System — Directive 2004/83/EC — Refugee status — Directive 2005/85/EC — Assessment of applications for international protection — Assessment of facts and circumstances — Credibility of an applicant's averred sexual orientation)

1. In this request for a preliminary ruling the Raad van State, Afdeling Bestuursrechtspraak (Council of State, Administrative Section; 'the Raad van State' (Netherlands); 'the referring court') raises a broad conceptual question as to whether EU law limits the actions of Member States when assessing requests for asylum made by an applicant who fears persecution in his country of origin on grounds of his sexual orientation. That question gives rise to difficult and delicate issues concerning, on the one hand, the rights of individuals such as personal identity and fundamental rights and, on the other hand, the position of Member States when applying measures of minimum harmonisation, namely the Qualification Directive[2] and the Procedures Directive[3] in the gathering and assessment of evidence relating to applications for refugee status. In addressing those issues further questions arise. Must Member States accept an applicant's averred sexual orientation? Does EU law allow the competent authorities of Member States to examine an averred sexual orientation and how should that process be conducted in a manner that is consistent with fundamental rights? Are claims for asylum based on sexual orientation different from claims made on other grounds and should special rules apply when the Member States examine such requests?

1 — Original language: English.

2 — 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 (OJ 2004 L 304, p. 12) ('the Qualification Directive'); see further footnote 13, below. That directive was recast and repealed and replaced by Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country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 (OJ 2011 L 337, p. 9) with effect from 21 December 2013.

3 — Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13) ('the Procedures Directive'); see further footnote 13 below. That directive was recast and repealed and replaced by 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 (OJ 2013 L 180, p. 60) with effect from 21 July 2015.

International law

The Geneva Convention relating to the Status of Refugees

2. The first subparagraph of Article 1(A)(2) of the Geneva Convention [4] provides that the 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'.

3. Article 3 states that the Convention should be applied in a manner that is consistent with the principle of non-discrimination.

The European Convention for the Protection of Human Rights and Fundamental Freedoms

4. Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [5] prohibits torture or inhuman or degrading treatment or punishment. Article 8 guarantees the right to respect for private and family life. Article 13 provides for a right to an effective remedy. Article 14 prohibits discrimination. [6] Protocol 7 to the ECHR provides certain procedural safeguards relating to the expulsion of aliens, including the alien's right to submit reasons against his expulsion, the right to have his case reviewed and the right to representation for those purposes.

European Union law

The Charter of Fundamental Rights of the European Union

5. Article 1 of the Charter of Fundamental Rights of the European Union ('the Charter') [7] states that human dignity is inviolable, and must be respected and protected. According to Article 3(1), everyone has the right to respect for his or her physical and mental integrity. Article 3(2)(a) states that in the field of medicine and biology the free and informed consent of the person concerned should be obtained according to procedures laid down by law. Article 4 corresponds to Article 3 of the ECHR. Article 7 provides: '[e]veryone has the right to respect for his or her private and family life, home and communications'. The right to asylum is guaranteed with due respect for the rules of the Geneva Convention and the Treaty on the Functioning of the European Union by Article 18 of the Charter. Discrimination on grounds of, inter alia, sexual orientation is prohibited by Article 21. Article 41 of the Charter is addressed to the institutions and guarantees the right to good administration. [8] Article 52(1) states that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and is subject to the principle of proportionality. Limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. Article 52(3) states that the rights enshrined in the Charter should be interpreted consistently with corresponding rights guaranteed by the ECHR.

4 — The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 150, No 2545 (1954)) entered into force on 22 April 1954. It was supplemented by the Protocol Relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967. I shall refer to the Convention and the Protocol together as 'the Geneva Convention'.

5 — Signed at Rome on 4 November 1950 ('the ECHR').

6 — The indefeasible rights under Article 15(2) of the ECHR are the right to life (Article 2), the prohibitions against torture and slavery and forced labour (respectively Articles 3 and 4) and an individual's right not to be punished without prior due legal process (Article 7).

7 — OJ 2010 C 83, p. 389.

8 — See further point 78 and footnote 83 below.

The Common European Asylum System

6. The Common European Asylum System ('the CEAS') began after the entry into force of the Treaty of Amsterdam in May 1999 and is designed to implement the Geneva Convention. [9] Measures adopted for the purposes of the CEAS respect fundamental rights and observe the principles recognised in the Charter. [10] In their treatment of persons within the scope of those measures, Member States are bound by their obligations under instruments of international law which prohibit discrimination. [11] The aim of the CEAS is to harmonise the legal framework applied in the Member States on the basis of common minimum standards. It is intrinsic to measures providing minimum standards that Member States have the power to introduce or maintain more favourable provisions. [12] The CEAS has led to the adoption of a number of measures. [13]

The Qualification Directive

7. The Qualification Directive seeks to establish minimum standards and common criteria for all Member States for the recognition of refugees and the content of refugee status, for the identification of persons genuinely in need of international protection, and for a fair and efficient asylum procedure. [14]

8. Article 2(c) of the directive provides: '"refugee" means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply'.

9. Article 4 is entitled 'Assessment of facts and circumstances'. It provides:

'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 paragraph 1 consist of the applicant's statements and all documentation at the applicant's 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.

9 — See recital 3 in the preamble to the Qualification Directive.

10 — See recital 10 and recital 8 in the preambles to the Qualification and the Procedures Directives respectively.

11 — See recital 11 and recital 9 in the preambles to the Qualification and the Procedures Directives respectively.

12 — See recital 8 in the preamble to and Article 3 of the Qualification Directive; and recital 7 in the preamble to and Article 5 of the Procedures Directive.

13 — Apart from the Qualification Directive and the Procedures Directive, see Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ 2001 L 212, p. 12); Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18); and the measures known as 'the Dublin system' (the Dublin and EURODAC Regulations), notably Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1). New rules governing the CEAS were agreed in 2013. I have indicated the measures that replace the Qualification and Procedures Directives in footnotes 2 and 3 respectively. I have not listed the remaining new measures because those instruments are not directly in issue here.

14 — See recitals 1 to 4, 6, 7, 8, 10, 11 and 17 in the preamble to the Qualification Directive.

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;

(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.

...

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.'

10. Article 9 of the Qualification Directive defines acts of persecution. Such acts must be sufficiently serious by their nature as to constitute a severe violation of basic human rights, in particular the indefeasible rights (set out in Article 15(2) of the ECHR), or involve an accumulation of various measures which is sufficiently severe as to amount to such a violation of basic human rights. [15] Acts of physical or mental violence including acts of sexual violence are capable of falling within the definition of acts of persecution. [16] There must be a connection between the reasons mentioned in Article 10 and the acts of persecution in Article 9 of the Qualification Directive. [17]

15 — Article 9(1).
16 — Article 9(2).
17 — Article 9(3).

11. Article 10 is entitled ‘Reasons for persecution’. Article 10(1)(d) states:

‘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: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article.

…

2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.’ [18]

The Procedures Directive

12. The objective of the Procedures Directive is to introduce a minimum framework on procedures for granting and withdrawing refugee status. [19] It applies to all applications for asylum made within the territory of the Union. [20] Each Member State must designate a determining authority that is responsible for examining applications in accordance with the Procedures Directive. [21]

13. The requirements for examining applications are set out in Article 8. Member States must ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States must ensure that: (a) applications are examined and decisions are taken individually, objectively and impartially; (b) precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (‘the UNHCR’); and (c) the personnel examining applications and taking decisions have appropriate knowledge with respect to relevant standards applicable in the field of asylum and refugee law. [22]

14. Where an application is rejected, the reasons in fact and in law must be stated in the decision (Article 9(2), first subparagraph) and, before a decision is taken by the responsible authority, the applicant for asylum must be given the opportunity of a personal interview on his application under conditions which allow him to present the grounds for the application in a comprehensive manner (Article 12).

18 — The grounds of persecution listed in Article 10 include the concepts of race, religion, nationality and political opinion.

19 — See recitals 2, 3, 5, 7, 8, 10, 13 and 22 in the preamble to the Procedures Directive.

20 — Article 3(1).

21 — Article 4(1).

22 — Article 8(2).

15. Article 13 sets out the requirements for the personal interview which should normally take place without the presence of other family members, under conditions which ensure appropriate confidentiality and allow applicants to present the grounds for their application in a comprehensive manner. [23] To that end Member States must 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, in so far as it is possible to do so, and must select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. [24]

16. Article 14 states that Member States must ensure that a written report is made of every personal interview, containing at least the essential information regarding the application, as presented by the applicant, in terms of Article 4(2) of the Qualification Directive and that applicants have timely access to that report. [25] Member States may request the applicant's approval of the contents of the report of the personal interview. [26]

17. Member States must allow applicants for asylum the opportunity, at their own cost, to consult a legal adviser or other counsellor permitted under national law to advise on asylum applications. [27]

18. Article 23 is entitled 'Examination procedure' and is part of Chapter III of the Procedures Directive, where the procedures to be followed at first instance are set out. Member States must process applications for asylum in an examination procedure which accords with the basic principles in Chapter II of that directive. They must ensure that such a procedure is concluded as soon as possible without prejudice to an adequate and complete examination. [28]

19. Article 39 provides that Member States must ensure that applicants for asylum have an effective remedy before a court or tribunal against, inter alia, a decision taken on their application. [29]

National law

20. According to the explanation of the national rules provided by the referring court, the onus is upon the applicant to establish the plausibility of the grounds on which asylum is requested and to provide the relevant information in support of that request. The competent authorities then invite the applicant to two interviews. The services of an interpreter and legal aid in order to obtain legal assistance are available to applicants. A record of the interviews is communicated to the applicant. He then has the opportunity to request that amendments to that record be made and to submit further information. A decision on the applicant's request for asylum is taken by the relevant Minister who communicates his intended decision to the applicant before it becomes final, at which point the applicant may make written observations. The Minister then notifies the applicant of his final decision which the applicant may challenge by lodging an application for judicial review. [30]

23 — Article 13(1), (2) and (3).

24 — Article 13(3)(a) and (b).

25 — Article 14(1) and (2).

26 — Article 14(3).

27 — Article 15(1).

28 — Article 23(2).

29 — Article 39(1)(a).

30 — The national rules are contained in Article 31(1) of the Vreemdelingenwet 2000 (Law on Foreign Nationals 2000), Article 3.111 of the Vreemdelingenbesluit 2000 (Decree on Foreign Nationals 2000) and Article 3.35 of the Voorschrift Vreemdelingen 2000 (Regulation on Foreign Nationals 2000). Guidance on those provisions is contained in the Vreemdelingencirculaire 2000 (Foreign Nationals Circular 2000), in particular paragraphs C2/2.1, C2/2.1.1, and C14/2.1 to C14/2.4.

Facts, procedure and the question referred

21. A, B and C have submitted requests to the Netherlands authorities for temporary residence permits (asylum) under the Vreemdelingenwet 2000 on the grounds that they have a well-founded fear of being persecuted in their respective countries of origin because they are homosexual men.

22. A had made an earlier request for refugee status on the grounds of his sexual orientation, which the Minister had refused as not being credible. The Minister also refused A's subsequent request for refugee status by decision issued on 12 July 2011 on the grounds that he did not find A's account to be credible. The Minister considered that the fact that A indicated his willingness to submit to a test to prove that he is homosexual did not mean that he must unconditionally accept A's self-averred sexual orientation without conducting any credibility assessment.

23. In relation to B, the Minister concluded that his application was not credible because it was perfunctory and vague both as to the account of a sexual relationship that B had had in his youth with a friend and concerning B's statement of his own realisation that he was homosexual. In the Minister's view, because B is from a Muslim family and a country where homosexuality is not accepted he should be able to give details about his feelings and how he came to terms with his homosexuality. The Minister refused B's request for refugee status by decision issued on 1 August 2012.

24. The Minister considered C's claim to be homosexual lacked credibility, because his account was inconsistent. C claimed that it was only after he had quit his country of origin that he himself had been able to acknowledge that he was possibly homosexual. He believed that he had had such feelings since he was 14 or 15 years of age and he informed the competent authorities that he had had a sexual relationship with a man in Greece. Yet he had earlier based his application for refugee status on the fact that he had experienced problems in his country of origin because he had had a sexual relationship with his employer's daughter. The Minister took the view that C could have, and should have, declared his sexual orientation in the earlier procedure. The Minister considered the fact that C produced a film depicting him performing sexual acts with a man did not establish that he is homosexual. Furthermore, C was unable to give a clear account of how he became aware of his sexual orientation and he was unable to answer questions, such as those concerning identification of organisations in the Netherlands that defend homosexual rights. The Minister refused C's request for refugee status by decision issued on 8 October 2012.

25. A, B and C challenged the Minister's decisions in proceedings seeking interim relief before the Rechtbank 's-Gravenhage ('s-Gravenhage District Court, 'the Rechtbank'). The appeals were dismissed as unfounded on 9 September 2011, on 23 August 2012 and on 30 October 2012 respectively. Each applicant subsequently lodged an appeal against the judgment of the Rechtbank dismissing his appeal before the Raad van State.

26. In its request for a preliminary ruling the referring court expressly took into account two cases before this Court: *Y and Z*,[31] in which judgment had already been delivered, and *X, Y and Z*[32] (referred by the Raad van State on 18 April 2012), then pending before the Court. In the latter case guidance was sought, inter alia, as to whether foreign nationals with a homosexual orientation form a particular social group for the purposes of Article 10(1)(d) of the Qualification Directive. The appeals in the main proceedings were suspended pending the outcome of *X, Y and Z*.

31 — Judgment in *Y and Z*, C-71/11 and C-99/11, EU:C:2012:518, concerning the concept of religious conviction under Article 10(1)(b) of the Qualification Directive.

32 — Judgment in *X, Y and Z*, C-199/12, C-200/12 and C-201/12, EU:C:2013:720.

27. In the main proceedings A, B and C claimed that the Minister had erred in taking his decision because he had failed to base his decision regarding whether they were homosexual upon their respective declarations regarding sexual orientation. They alleged that the Minister's position was contrary to Articles 1, 3, 4, 7 and 21 of the Charter in so far as it amounted to a denial of an averred sexual orientation.

28. The referring court considered that verifying an averred sexual orientation is more complex than verifying other grounds of persecution listed in Article 10(1) of the Qualification Directive. In that respect it observed that there is no uniform manner in which such verification is carried out throughout the Member States.[33] However, it considered the applicants' submissions, that the Minister was obliged to accept an averred sexual orientation and was precluded from examining it, to be doubtful. In the light of those considerations, of the Court's ruling in *Y and Z* and of *X, Y and Z* (then pending), the Raad van State wished for guidance as to whether EU law imposes limits on the inquiry that competent national authorities can make as regards the averred sexual orientation of an applicant for refugee status. It has therefore referred the following question to the Court for a preliminary ruling:

'What limits do [the Qualification Directive], 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?'

29. Written observations were submitted by A and B, the UNHCR, the Netherlands, Belgium, the Czech Republic, France, Germany and Greece and the European Commission. With the exception of B, the Czech Republic and Germany, all parties made oral submissions at the hearing on 25 February 2014.

Assessment

Preliminary remarks

30. It is settled law that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees. The Qualification Directive was adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria.[34] That directive must therefore be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. Furthermore, the Qualification Directive must also be interpreted in a manner consistent with the rights recognised by the Charter.[35]

31. Within the CEAS the Procedures Directive establishes a common system of safeguards serving to ensure that the Geneva Convention and fundamental rights are fully complied with as regards Member States' procedures for granting and withdrawing refugee status.[36]

33 — See the report by Sabine Jansen and Thomas Spijkerboer, *Fleeing homophobia — asylum claims related to sexual orientation and gender identity in Europe* ('Fleeing homophobia'), Vrije Universiteit Amsterdam, 2011.

34 — Judgment in *Salahadin Abdulla and Others*, C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105, paragraph 52; judgment in *Y and Z*, EU:C:2012:518, cited in footnote 31 above, paragraph 47; and judgment in *X, Y and Z*, EU:C:2013:720, cited in footnote 32, paragraph 39.

35 — Judgment in *X, Y and Z*, EU:C:2013:720, cited in footnote 32 above, paragraph 40. See also Article 10 of the Charter.

36 — See recitals 2, 3, 5, 7 and 8 in the preamble to the Procedures Directive and Article 1 thereof. See further, judgment in *Samba Diouf*, C-69/10, EU:C:2011:524, paragraph 34.

32. However, neither the Procedures Directive itself nor the Geneva Convention or the Charter lays down specific rules as to how to assess the credibility of an applicant who requests refugee status on any of the grounds listed in Article 10(1) of the Qualification Directive, including that he belongs to a particular social group because of his homosexual orientation. That assessment thus falls within the ambit of national rules;[37] but EU law may limit Member States' discretion as to the rules they can apply when assessing the credibility of applicants for asylum.

Qualification as a refugee

33. As the referring court explains, the present request for a preliminary ruling arises against the background of an earlier request by the same jurisdiction in *X, Y and Z*.[38] Certain issues concerning the interpretation of the Qualification Directive in so far as it applies to requests for refugee status on the grounds of sexual orientation were resolved by the Court's ruling in that case. The Court has confirmed that a homosexual orientation is a ground for claiming that the applicant is a member of a particular social group within Article 10(1)(d) of that directive.[39] The Court explained that such applicants should not be expected to behave in a certain way, for example, by expressing their sexual orientation with restraint or concealing their sexual orientation in their country of origin.[40] In relation to assessing whether there is a well-founded fear of persecution, the Court held that the competent authorities must ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subject to acts of persecution.[41] The assessment of the extent of the risk must, in all cases, be carried out with vigilance and care, and will be based solely on a specific evaluation of the facts and circumstances, in accordance with the rules laid down in particular by Article 4 of the Qualification Directive.[42]

34. The present matter must be considered against that background. It does not therefore, for example, require the Court to rule whether an applicant who establishes that he is homosexual must automatically obtain refugee status within a Member State. Rather the steps laid down in the legislative scheme involve establishing first, whether the applicant is a member of a particular social group.[43] Protection is also provided in cases where applicants are not members of that group (here, homosexual) but are perceived as such.[44] It must then be determined whether the particular applicant has a well-founded fear of persecution.[45]

35. The referring court's request for a preliminary ruling does not indicate whether Article 10(2) of the Qualification Directive is as such in point. The question raised is placed in a minimal contextual setting and is consequently rather abstract. I shall therefore focus on whether it is permissible under EU law for the competent national authorities to examine whether an applicant is a member of a particular social group for the purposes of Article 10(1)(d) on the grounds of his homosexuality (rather than simply taking his word for it), how any verification process should be conducted and whether there are limits to the manner in which that issue can be assessed.

37 — See settled case-law going back to judgment in *Rewe Zentralfinanz*, 33/76, EU:C:1976:188, paragraph 5; more recently, see judgment in *Unibet*, C-432/05, EU:C:2007:163, paragraph 39.

38 — See point 28 above.

39 — Judgment in *X, Y and Z*, EU:C:2013:720, cited in footnote 32 above, paragraphs 46 and 47.

40 — Judgment in *X, Y and Z*, EU:C:2013:720, cited in footnote 32 above, paragraphs 67 to 69.

41 — Judgment in *X, Y and Z*, EU:C:2013:720, cited in footnote 32 above, paragraph 72 and the case-law cited.

42 — Judgment in *X, Y and Z*, EU:C:2013:720, cited in footnote 32 above, paragraph 73 and the case-law cited.

43 — Article 10(1)(d) of the Qualification Directive.

44 — Article 10(2) of the Qualification Directive.

45 — Articles 2(c) and 9 of the Qualification Directive.

Self-declared sexual orientation

36. It is common ground amongst those submitting observations to the Court that a person's sexuality is a highly complex issue that is integral to his personal identity and the sphere of his private life. Furthermore, all parties agree that there is no objective method of verifying an averred sexual orientation. However, there are different views as to whether the competent authorities of a Member State should verify whether an applicant is homosexual and is therefore a member of a social group within the meaning of Article 10(1)(d) of the Qualification Directive.

37. Both A and B submit that only the applicant himself is capable of defining his own sexuality and that it is inconsistent with the right to private life [46] for the Member States' competent authorities to verify an averred sexual orientation. A submits that there are no general characteristics relating to homosexuality and no consensus concerning the factors that influence such a sexual orientation. Given that context, national authorities are not competent to substitute their assessment for an applicant's declared sexual orientation. All Member States submitting observations to the Court contend that their respective national authorities retain competence to examine the credibility of an applicant's averred sexual orientation. The Commission supports that view, submitting that it is consistent with Article 4 of the Qualification Directive. The UNHCR submits that the verification of an applicant's declaration of his sexual orientation is a normal element of the factual assessment in such cases and should constitute the starting point of an examination of that issue. [47]

38. I too agree that an individual's sexual orientation is a complex matter, entwined inseparably with his identity, that falls within the private sphere of his life. Thus, whether an individual's averred sexual orientation should be accepted without further examination by the competent national authorities should be assessed within the following framework. First, the right to a private life is guaranteed by Article 7 of the Charter and protection from discrimination on grounds including sexual orientation is expressly provided for in Article 21(1). Those rights correspond to Article 8, read together where necessary with Article 14, of the ECHR. [48] They are not however amongst the indefeasible rights from which no derogation is possible. [49] Second, the Strasbourg Court has held that the concept of 'private life' is broad and that it is not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person including elements such as sexual orientation and sexual life which fall within the personal sphere protected by Article 8 of the ECHR. [50]

39. Third, in cases concerning gender identity and transsexuality the Strasbourg Court has stated that the notion of personal autonomy is an important principle underlying the guarantees in Article 8 of the ECHR. [51] Whilst it is true that the issues arising in that case-law are not exactly the same as those arising where sexual orientation is at issue, I consider that it provides valuable guidance. [52] The

46 — As interpreted by the European Court of Human Rights ('the Strasbourg Court').

47 — So far as the UNHCR's (helpful) intervention is concerned, I note that paragraph 7 of the UNHCR Guidelines on international protection No 9 ('the UNHCR Guidelines') refer to the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity ('the Yogyakarta Principles'), adopted in 2007. The Yogyakarta Principles are not legally binding, but they nevertheless reflect established principles of international law. In paragraph 4 of the preamble to the Yogyakarta Principles, 'sexual orientation' refers to 'a person's capacity for profound emotional, affectional and sexual attraction to, and intimate sexual relations with, individuals of a different gender or the same gender or more than one gender'.

48 — The Strasbourg Court has dealt with a number of cases concerning discrimination on grounds of sexual orientation in the sphere of private and family life; see Eur. Court H. R., *X and Others v. Austria* [GC], no. 19010/07, paragraph 92 and the case-law cited, ECHR 2013, regarding the interpretation of Article 8 of the ECHR alone and that provision read together with Article 14 of the ECHR.

49 — See footnote 6 above.

50 — Eur. Court H. R., *Van Kück v. Germany*, no. 35968/97, paragraph 69 and the case-law cited there, ECHR 2003-VII.

51 — *Van Kück v. Germany*, cited in footnote 50 above, paragraphs 69 and 73 to 75.

52 — See, for example, Eur. Court H. R., *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI, and *Van Kück v. Germany*, cited in footnote 50 above. In *Goodwin* the issue was whether, by failing to recognise the applicant's gender reassignment, the United Kingdom had failed to comply with certain obligations to ensure, in particular, her rights to private life. The applicant in *Van Kück* alleged that decisions of the German courts and the related proceedings refusing her claims for reimbursement of medical expenses incurred for gender reassignment measures breached, inter alia, her right to private life in so far as the courts required evidence showing that gender reassignment was the only possible treatment for her condition.

Strasbourg Court has not had occasion to decide whether Article 8 of the ECHR guarantees a right not to have one's averred sexual orientation examined by the competent authorities in particular in the context of an application for refugee status. I read the existing case-law as stating that because the notion of personal autonomy is an important principle underlying the interpretation of the protection afforded by Article 8 of the ECHR, individuals have a right to define their own identity which includes defining their own sexual orientation.

40. An applicant's definition of his own sexual orientation must therefore play an important role within the assessment process of applications for refugee status under Article 4 of the Qualification Directive. I agree with the UNHCR that such declarations should, at the very least, form the starting point of the assessment process. But are Member States precluded from verifying such declarations?

Assessment under the Qualification Directive

41. Article 4 of the Qualification Directive requires Member States to assess all applications for international protection. No distinction is made between the various grounds of persecution listed in Article 10 of that directive. It follows that applicants who claim refugee status on the ground that they are homosexual and belong to a particular social group within the meaning of Article 10(1)(d) are not exempt from the assessment process under the directive. [53]

42. Article 4(1) allows Member States to place the onus upon applicants '… to submit as soon as possible all elements needed to substantiate the application for international protection …'. [54] That provision also places a positive duty on Member States to act in cooperation with the applicant to assess the relevant elements of his application. The assessment should be carried out on an individual basis and should include taking into account the applicant's individual position and personal circumstances. [55] Article 4(5) of the Qualification Directive acknowledges that an applicant may not always be able to substantiate his claim with documentary or other evidence. Such evidence is therefore not required where the cumulative conditions of Article 4(5)(a) to (e) are met. [56]

43. Where an applicant invokes Article 10(1)(d) of the directive, claiming refugee status on the grounds that he is a member of a particular social group on the basis of his sexual orientation, it is — I think — virtually inevitable that Article 4(5) of the directive will come into play. An averred sexual orientation cannot easily be objectively verified; and it is unlikely that there will be documentary or other evidence to support an applicant's self-declared statement of his sexual orientation. [57] Credibility therefore becomes the central issue.

44. Is an assessment of the applicant's credibility consistent with the Charter and respect for fundamental rights?

45. It seems to me that it is.

46. Article 18 of the Charter guarantees the right to asylum with due respect for the rules of the Geneva Convention and the Treaties. There is no corresponding right in the ECHR, although Article 1 of Protocol No 7 provides for certain procedural safeguards relating to the expulsion of aliens. In relation to applications for refugee status, the Strasbourg Court has recognised that the Contracting States have the right as a matter of international law (subject to their Treaty obligations)

53 — See recital 11 in the preamble to the Qualification Directive and the principle of non-discrimination enshrined in Article 3 of the Geneva Convention and Article 21 of the Charter.

54 — The elements mentioned in Article 4(1) are listed in detail in Article 4(2), see point 9 above. See also judgment in *M.M.*, C-277/11, EU:C:2012:744, paragraph 73.

55 — Article 4(3)(c) of the Qualification Directive. See also Article 8(2) of the Procedures Directive.

56 — See point 9 above.

57 — See points 60 and 61 below.

to control the entry, residence and expulsion of aliens within their territory. [58] That is not surprising. In applying an asylum policy it is incumbent upon Member States to establish who is in genuine need of protection and accept them as refugees. By the same token, they are entitled to refuse assistance to bogus claimants.

47. Whether an applicant is a member of a particular social group for the purposes of Article 10(1)(d) (or is perceived to be a member, triggering Article 10(2)) is indissolubly linked to the question of whether he has a well-founded fear of persecution. [59] The assessment of the existence of a real risk must necessarily be a rigorous one; [60] carried out with vigilance and care. What is at issue in such cases are matters relating to the integrity of the person, to individual liberties and the fundamental values of the European Union. [61]

48. Although an applicant's averred sexual orientation must necessarily always be the starting point, the competent national authorities are entitled to examine that element of his claim together with all other elements in order to assess whether he has a well-founded fear of persecution within the meaning of the Qualification Directive and the Geneva Convention.

49. It therefore follows ineluctably that applications for refugee status on the grounds of sexual orientation, like any other applications for refugee status, are subject to a process of assessment as required by Article 4 of the Qualification Directive. That assessment must, however, be carried out in a way that respects the individual's rights as guaranteed by the Charter. (So much is, indeed, common ground between the parties.)

Assessing credibility

50. Neither the Qualification Directive nor the Procedures Directive make specific provision for the manner in which an applicant's credibility is to be assessed. Thus, the general position is that, in the absence of EU rules on a subject, it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection conferred by EU law. [62]

51. Is that general position subject to limits under EU law?

52. A and B submit that it is necessary in any assessment to establish the facts relating to the applicant's account substantiating his request for refugee status; and that the purpose of the next stage (the process of cooperation between the applicant and the national authorities) is to determine whether those facts can be confirmed. Applicants cannot be required to support requests for refugee status in a manner that undermines their dignity or personal integrity. Accordingly, methods such as medical examinations, questioning about an applicant's sexual experiences, or comparing the applicant in question to homosexual stereotypes are inconsistent with the Charter. [63]

53. The Netherlands points out that Article 4 of the Qualification Directive is silent as to the manner in which an applicant's declaration of his own sexuality should be examined. That is therefore for the Member States themselves to determine under national rules. The Czech Republic submits that methods least intrusive to an applicant's private life should be employed. However, recourse to other procedures should not be excluded if less demanding methods do not establish the applicant's

58 — Eur. Court H. R., *F.N. and Others v. Sweden*, no. 28774/09, paragraph 65 and the case-law cited, 18 December 2012.

59 — Within the meaning of Article 2(1)(c) of the Qualification Directive.

60 — Eur. Court H. R., *M.K.N. v. Sweden*, no. 72413/10, paragraph 27 and the case-law cited, 27 June 2013.

61 — Judgment in *Salahadin Abdulla and Others*, EU:C:2010:105, cited in footnote 34 above, paragraph 90.

62 — See, for example, judgment in *Agrokonsulting*, C-93/12, EU:C:2013:432, paragraph 36.

63 — The applicants refer to Articles 1, 3, 4 (the indefeasible rights), 7, 18, 19, 21 and 41 of the Charter.

credibility and if he consents. The French, German and Greek Governments agree that the UNHCR guidelines provide helpful guidance relating to the process of assessing credibility. Germany submits that pseudo-medical tests or asking applicants to perform sexual acts to establish their sexual orientation would be contrary to Article 1 of the Charter. The Belgian Government also endorses the UNHCR guidelines, stating that it is not necessary to verify clinically or scientifically an applicant's sexual orientation. What matters is whether the applicant's account is plausible. The right to a private life is already taken into account adequately by the text of the Qualification Directive and the Procedures Directive. That right cannot therefore be relied upon a second time to reduce the rigour of assessment or create more flexibility in the rules in favour of applicants for asylum who claim to be homosexual.

54. The UNHCR divides the various methods of assessing credibility under discussion into two categories. Some, which are in all circumstances contrary to the Charter, it describes as comprising a 'blacklist'. They cover: invasive questioning concerning the details of an applicant's sexual practices; medical or pseudo-medical examinations; and abusive requirements relating to evidence, such as asking applicants to provide photographs of themselves performing sexual acts. The UNHCR's second category is described as a 'grey list'; it concerns practices which, if not applied in an appropriate or sensitive manner, risk being contrary to the Charter. The grey list includes practices such as concluding that an applicant lacks credibility because he did not invoke his sexual orientation as his basis for claiming refugee status at the first opportunity, or because he fails to give a correct reply to general knowledge questions, for example, concerning organisations that represent homosexuals in the country where asylum is claimed. The UNHCR grey list also covers national procedures that fail to offer an applicant an opportunity to explain elements that do not appear to be credible.

55. The Commission submits that the Qualification Directive does not place limits on the type of evidence that might be presented in support of an application for refugee status. None the less, evidence should be collected in a manner that respects applicants' fundamental rights. Methods that are degrading or inconsistent with human dignity, such as pseudo-medical tests or assessment by reference to stereotypes, are inconsistent with both the Qualification Directive and the Charter. The Commission considers that it is not possible to give general indications over and above those already provided by Article 4 of the Qualification Directive and Articles 3 and 7 of the Charter.

56. It is true that there is no express wording in the Qualification Directive regulating Member States' discretion regarding the practices or methods for assessing an applicant's credibility. However, it does not follow in my view that EU law places no limits on that discretion.

57. The Charter provides overarching standards that must be applied in the implementation of any directive. The Qualification Directive harmonises by introducing minimum standards for obtaining refugee status within the European Union.[64] It would undermine the CEAS, in particular the Dublin system, if Member States were to apply widely divergent practices when assessing such applications. It would be undesirable if the differences in its implementation led to applications being more likely to succeed in one jurisdiction than in another because the evidentiary requirements were easier to satisfy.

58. In order to provide the referring court with a useful answer, I believe it is necessary to identify practices that are inconsistent with EU law. The UNHCR submissions are particularly helpful in that regard. Nevertheless, I have not adopted the terminology of a 'blacklist' or a 'grey list' for two reasons. First, setting out a blacklist involves laying down prescriptive rules of general application which is a

64 — Article 1 thereof.

task better suited to the legislature. Second, in the context of the current proceedings such labelling would not enhance clarity or assist legal certainty because the Court's assessment within the procedure under Article 267 TFEU is limited to the material placed before it and it would be unclear whether either list was meant to be illustrative or exhaustive.

59. I should also indicate that I disagree with the position of the Belgian Government in so far as it regards the issue as creating more flexibility in favour of applicants seeking refugee status on the grounds of sexual orientation. Rather, it is a matter of establishing the parameters of Member States' action when applying the Qualification Directive and the Procedures Directive. Accordingly, I shall identify below those practices which I consider to be incompatible with Article 4 of the Qualification Directive interpreted in the light of the Charter.

60. Within the European Union, homosexuality is no longer considered to be a medical or psychological condition. [65] There is no recognised medical examination that can be applied in order to establish a person's sexual orientation. As regards the right to private life, interference with an individual's right to his sexual orientation can only be made where, inter alia, it is provided for by law and it complies with the principle of proportionality. [66]

61. Since homosexuality is not a medical condition, any purported medical test applied to determine an applicant's sexual orientation could not, in my view, be considered to be consistent with Article 3 of the Charter. It would also fail the proportionality requirement (Article 52(1)) in relation to a violation of the right to privacy and family life because, by definition, such a test cannot achieve the objective of establishing an individual's sexual orientation. It follows that medical tests cannot be used for the purpose of establishing an applicant's credibility, as they infringe Articles 3 and 7 of the Charter. [67]

62. The German Government and the UNHCR commented in particular on the pseudo-medical test of phallometry [68] in their respective observations. It follows from what I have said in points 60 and 61 above which apply *mutatis mutandis* to such pseudo-medical tests that I consider such tests to be prohibited by Articles 3 and 7 of the Charter. Phallometry is a particularly dubious way of verifying homosexual orientation. First, it involves the competent national authorities in facilitating the purveying of pornography in order to enable such tests to be conducted. Second, it ignores the fact that the human mind is a powerful instrument and a physical reaction to the material placed before the applicant could be provoked by the person imagining something different from the image that he is being shown. Such tests fail to distinguish between genuine applicants and bogus ones and are clearly therefore ineffective as well as in violation of fundamental rights.

63. It seems to me that explicit questions concerning an applicant's sexual activities and proclivities are also inconsistent with Articles 3 and 7 of the Charter. By their very nature, such questions violate an individual's integrity as guaranteed by Article 3(1) of the Charter. They are intrusive and violate respect for private and family life. Their probative value in the context of an application for refugee

65 — The World Health Organization's ICD-9 (1977) listed homosexuality as a mental illness; it was removed from the ICD-10, endorsed by the Forty-Third World Health Assembly on 17 May 1990. The International Classification of Diseases (ICD) is the standard diagnostic tool for epidemiology, health management and clinical purposes.

66 — Article 7 read together with Article 52(1) of the Charter.

67 — Medical tests applied without an applicant's consent could infringe Articles 1 and 4 of the Charter. They would clearly be incompatible with Article 4 of the Qualification Directive since they are incompatible with the principle of cooperation. In Eur. Court H. R., *Jalloh v. Germany* [GC], no. 54810/00, ECHR 2006-IX, the Strasbourg Court set out general principles concerning the interpretation of Article 3 of the ECHR (which corresponds to Article 4 of the Charter) in relation to the conduct of medical examinations. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. That assessment is relative; it depends on all the circumstances of the case in question and is subject to a high burden of proof, beyond all reasonable doubt (see paragraph 67). The Strasbourg Court also took into account in its assessment whether the objective of the medical treatment is to humiliate and debase the person concerned (see further paragraphs 68 and 69 to 74).

68 — Phallometric testing focuses on the subject's physical reaction to pornography which can include heterosexual or homosexual (male or female) material. See further paragraph 6.3.5 of the report 'Fleeing homophobia', mentioned in footnote 33 above.

status is, moreover, questionable. First, a bogus applicant can easily invent the necessary information. Second, such a practice may alienate certain individuals (including genuine applicants) and thus undermines the principle of cooperation between the applicant and the national authorities (Article 4(1) of the Qualification Directive).

64. Moreover, the Court stated in *X, Y and Z* that, in relation to the expression of sexual orientation, nothing in the wording of Article 10(1)(d) of the Qualification Directive suggests that the EU legislature intended to exclude certain other types of acts or expression linked to sexual orientation from the scope of that provision.[69] Thus, Article 10(1)(d) of the Qualification Directive does not lay down limits on the attitude that the members of a particular social group may adopt with respect to their identity or to behaviour which may or may not fall within the definition of sexual orientation for the purposes of that provision.[70]

65. That suggests to me that the Court thereby recognised that the competent authorities should not examine applications for refugee status on the basis of a homosexual archetype. Unfortunately, an examination based upon questions concerning an applicant's sexual activities would indeed suggest that those authorities are basing their assessment upon stereotypical assumptions about homosexual behaviour. Such questions are unlikely to be able to distinguish genuine applicants from bogus claimants who have schooled themselves in preparing their application, and are therefore inappropriate and disproportionate within the meaning of Article 52(1) of the Charter.

66. In my view it is clearly contrary to Article 7 of the Charter to require applicants to produce evidence such as films or photographs or to request them to perform sexual acts in order to demonstrate their sexual orientation. I add that, again, the probative value of such evidence is doubtful because it can be fabricated if needed and cannot distinguish the genuine applicant from the bogus.

67. Even if an applicant consents to any of the three practices (medical examinations,[71] intrusive questioning, or providing explicit evidence), such consent does not change my analysis. The applicant's consent to a medical test for something (homosexuality) that is not a recognised medical condition (i) cannot remedy a violation of Article 3 of the Charter, (ii) would not increase the probative value of any evidence obtained and (iii) cannot render such a limitation of the rights guaranteed by Article 7 of the Charter proportionate for the purposes of Article 52(1). Furthermore, I also entertain serious doubts as to whether an applicant, who is the vulnerable party in the procedure of applying for refugee status, could really be deemed to have given fully free and informed consent to the competent national authorities in such circumstances.

68. All parties making observations to the Court accept that sexual orientation is a complex issue. Therefore, in conducting the credibility assessment the national authorities should not apply stereotypical notions to applicants' claims. Determinations should not be predicated on the assumption that there are 'correct' and 'incorrect' responses to an examiner's questions — for example, that an applicant is not credible if he did not experience anxiety when he realised that he was homosexual rather than heterosexual, or fails to display knowledge of political issues or particular activities that concern homosexuals. Such practices are inconsistent with Article 4(3)(c) of the Qualification Directive which requires the competent authorities to take account of the individual and personal circumstances of the applicant in question. I add for the sake of good order that the purpose of the interview is to invite the applicant to give his account. If in so doing he volunteers, for example,

69 — Apart from those acts considered to be criminal in accordance with the national law of the Member States, see paragraph 67. See also point 34 above.

70 — See judgment in *X, Y and Z*, EU:C:2013:720, cited in footnote 32 above, paragraph 68.

71 — See Article 3(2)(a) of the Charter.

explicit sexual information about himself, that situation is distinguishable from the competent authorities posing such questions to him. However, it still remains incumbent on those authorities to assess his credibility bearing in mind that information of that nature cannot establish his sexual orientation. In that respect I draw attention to the UNHCR guidelines.

69. I conclude that, since it is not possible to determine an individual's sexual orientation definitively, practices which seek to do so should play no part in the assessment process under Article 4 of the Qualification Directive. Such practices infringe Articles 3 and 7 of the Charter. Depending on the circumstances of the case, they might well breach other rights guaranteed by the Charter. The assessment to establish whether refugee status should be afforded should instead focus upon whether the applicant is credible. That means considering whether his account is plausible and coherent.

The process of assessing credibility

70. An applicant's credibility is first assessed by the competent national authorities ('the first instance procedure') whose decision may be subject to judicial scrutiny if the applicant lodges an appeal against that decision before the relevant national courts.

71. The basic principles and guarantees of the first instance procedure are found in Chapter II of the Procedures Directive.[72] Member States must ensure that decisions by the determining authority[73] on applications for asylum are taken after an appropriate examination.[74] Applicants must be given an opportunity to participate in a personal interview before a decision is taken by the determining authority.[75] The requirements for the personal interview are laid down in Article 13 of the Procedures Directive. They include ensuring that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. Accordingly, Member States must ensure that the officials who conduct such interviews are sufficiently competent and that applicants have access to the services of an interpreter to assist them.[76]

72. In relation to the credibility assessment, B submits that if the Court does not accept that the question of an applicant's sexual orientation should be established simply on the basis of his declaration then the burden of proof should shift to the competent authorities to prove that he is not homosexual.

73. I disagree with that position. The process of cooperation under Article 4(1) of the Qualification Directive is not a trial. Rather it is an opportunity for the applicant to present his account and his evidence and for the competent authorities to gather information, to see and hear the applicant, to assess his demeanour and to question the plausibility and coherence of that account. The word 'cooperation' implies that both parties work towards a common goal.[77] It is true that that provision allows Member States to require the applicant to submit the elements needed to substantiate his claim. It does not follow, however, that it is consistent with Article 4 of the Qualification Directive to apply any requirement of proof which has the effect of making it virtually impossible or excessively difficult (for example a high standard of proof, such as beyond reasonable doubt, or a criminal or quasi-criminal standard) for an applicant to submit the elements needed to substantiate his request

72 — The purpose of that directive is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status, see Article 1.

73 — The 'determining authority' falls within the term 'competent authorities' in the Qualification Directive.

74 — The requirements for that examination are laid down in Article 8(2)(a) to (c) of the Procedures Directive. See further Articles 9 to 11 of that directive concerning the requirements for a decision by the determining authority, guarantees for applicants and applicants' obligations.

75 — Article 12(1) of the Procedures Directive.

76 — Article 13(3) of the Procedures Directive.

77 — See the Opinion of Advocate General Bot in *M.M.*, C-277/11, EU:C:2012:253, cited in footnote 54 above, point 59.

under the Qualification Directive.[78] Nor should the applicant be required to 'prove' his sexual orientation to some other (different) standard since that issue cannot be proven as such. It is therefore important that the official making the determination has an opportunity to see the applicant giving his account or at the very least has a full report as to his demeanour during the course of the examination (my preference is for the former).

74. Genuine applicants for refugee status often find themselves requesting asylum because they have suffered an ordeal and endured difficult and distressing circumstances. It is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. That seems to me to be the principle that informs Article 4(1) of the Qualification Directive. However, 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 discrepancies.[79]

75. Where the competent authorities consider an applicant's credibility to be doubtful, should he be given notice before an adverse determination is made?

76. The Procedures Directive contains no such requirement. Article 14(1) merely requires a status report of the personal interview to be drawn up and provided to the applicant, containing 'at least' the essential information regarding the application. Furthermore, the Member State may request the applicant's approval of the contents of the report, while any points with which he does not agree may be entered on his personal file. The applicant thus is meant to be guaranteed an opportunity to rectify certain elements either before a decision is adopted or, if not, after its adoption in the context of an appeal. Furthermore, where an application for refugee status is rejected the reasons must be set out in the relevant decision and information provided on how to challenge that decision (Article 9 of the Procedures Directive).

77. These procedures[80] are designed to ensure that the applicant has a fair hearing at first instance. The applicant has an opportunity to put his case and to draw further elements to the attention of the competent authorities at the stage of the personal interview. However, it is not clear from the Procedures Directive whether the legislator had specifically in mind the extent to which the credibility assessment could determine cases such as those in the main proceedings, where refugee status is sought on the basis of an applicant's sexual orientation but there is no evidence to corroborate his averred homosexuality. In such cases, the applicant's demeanour when delivering his narrative is of equal importance to the actual account itself. The Procedures Directive does not require the determination to be made by the official who conducts the interview (under Articles 12 and 13 of that directive). Thus, a determination could be made by an official who has neither seen nor heard the applicant, on the basis of a file which perhaps contains a report with blank spaces indicating that the applicant failed to respond to questions about his sexual behaviour or to demonstrate knowledge of 'gay rights'. Whilst video-recording interviews might go some way towards mitigating this problem, it is not without its own hazards, particularly in such a sensitive area.

78 — See for example, judgment in *San Giorgio*, 199/82, EU:C:1983:318, paragraph 14, concerning national rules which required proof that effectively rendered it virtually impossible to secure repayment of charges levied contrary to (then) Community law. In that respect, according to consistent case-law, the principle of effectiveness prohibits a Member State from rendering the exercises of rights conferred by the EU legal order impossible in practice or excessively difficult; see judgment in *Littlewoods Retail and Others*, C-591/10, EU:C:2012:478, paragraph 28 and the case-law cited.

79 — Eur. Court H. R., *J.H. v. the United Kingdom*, no. 48839/09, paragraph 50, 20 December 2011, and the case-law cited.

80 — Article 4 of the Qualification Directive read together with the Procedures Directive.

78. In *M.M.*[81] the Court held that observance of the right to good administration includes the right of every person to be heard, and is required even where the applicable legislation does not expressly provide for such a procedural requirement.[82] Furthermore, that right guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely.[83]

79. Depending on the circumstances of the case, a failure to (i) inform an applicant that his application is unlikely to succeed because the competent authorities doubt his credibility, (ii) provide him with the reasons for that view and (iii) give him an opportunity to address those specific concerns could result in a breach of that general procedural requirement.

80. In the cases at issue in the main proceedings the referring court explains that under the procedural rules applied in the Netherlands the respective applicants should be given an opportunity to comment on the competent authorities' findings relating to the issue of credibility. Subject to verification by the referring court that that is indeed what happened here, I would not myself think that these cases give rise to such a breach.

81. Article 4(5)(b) of the Qualification Directive states that where aspects of an applicant's statements are not supported by other evidence, all relevant elements at the applicant's disposal should be submitted and a satisfactory explanation regarding any lack of other relevant elements should be given. That suggests to me that the procedures for granting refugee status must ensure that applicants have the opportunity specifically to address questions concerning their credibility in cases where the sole evidence of their sexual orientation is their own declaration.

82. It would seem to me both desirable and prudent for Member States to ensure that applicants are given the opportunity to address specific concerns about their credibility during the course of the administrative stage (or the first instance procedure), before a final decision is made by the determining authorities.

83. Both A and B contest the referring court's description of the way in which the Qualification and Procedures Directives have been transposed into national law and the process of assessing applications for refugee status in the Netherlands, in particular the system of judicial review of decisions of the competent national authorities. For its part, the Netherlands Government indicates that it considers the referring court's description to be informed and accurate. The referring court has indicated that the courts hearing the three applicants' appeals from the Minister's decisions have examined the issue of their respective credibility.

84. There is a question of principle as to how intense the scrutiny of an adverse administrative decision should be where an applicant's lack of credibility is the ground for rejecting a request for refugee status. Should such review be confined to points of law, or should it extend to an examination of the evidence? That issue was not raised by the referring court in the present proceedings and I therefore do not address it here. Furthermore, as it is not a purpose of the preliminary ruling procedure to examine whether the Netherlands has failed to fulfil its obligations in transposing either the Qualification Directive or the Procedures Directive (these are not infringement proceedings), the Court is not required to rule on the difference of view between A and B and the Netherlands Government as to the system that is actually in place.[84]

81 — EU:C:2012:744, cited in footnote 54 above.

82 — Judgment in *M.M.*, EU:C:2012:744, cited in footnote 54 above, paragraphs 83 and 86 and case-law cited.

83 — Judgment in *M.M.*, EU:C:2012:744, cited in footnote 54 above, paragraph 87. Article 41 of the Charter is, as such, addressed solely to the EU institutions not the Member States; see for example, judgment in *Cicala*, C-482/10, EU:C:2011:868, paragraph 28. None the less, as the Court explained in *M.M.*, the Member States are subject to the general principles enshrined in that provision.

84 — Judgment in *Sjöberg and Gerdin*, C-447/08 and C-448/08, EU:C:2010:415, paragraph 45.

85. Are the limits under EU law that apply to the credibility assessment of applications for refugee status based on sexual orientation different from those that apply to claims based on other grounds of persecution in the Qualification Directive?

86. In my view, no.

87. The Charter provides the overarching context for interpreting both the Qualification Directive and the Procedure Directive in relation to all of the grounds of persecution contained in Article 10 of the former. It may be that different fundamental rights are invoked in relation to different grounds. For example the right to freedom of thought, conscience and religion (Article 10 of the Charter) might logically be invoked in relation to an application for refugee status based on grounds of religious persecution.[85] None the less, in all applications for refugee status the assessment of facts and circumstances is subject to the requirements laid down in Article 4 of the Qualification Directive and in the Procedures Directive. That view is consistent with the principle of non-discrimination enshrined in Article 3 of the Geneva Convention and Article 21 of the Charter. The gaps that I have identified in the legislation would be equally relevant to applications based upon any ground of persecution listed in Article 10 of the Qualification Directive in so far as the applicant's credibility is the key issue where there is little or no corroborative evidence.

88. I have already pointed out that the referring court's question is put in abstract terms and that the Court has very little material before it regarding the circumstances of the individual cases in the main proceedings. For the sake of good order, I offer the following comments on them.

89. A has indicated to the competent national authorities his willingness to submit to an examination to prove his homosexual orientation. In my view, however, it would be inconsistent with Articles 3 and 7 of the Charter for those authorities to agree to such a procedure in order to establish his sexual orientation.

90. The Minister refused B's application because (i) he found B's account to be inadequate and (ii) B did not meet expectations as to how a homosexual man from a Muslim family and a country where homosexuality is not accepted might react in becoming aware that he himself is homosexual. In so far as the Minister's decision was based upon (i), it will be for the relevant national court as sole judge of fact to determine whether B was given an adequate opportunity to provide all relevant information in accordance with Article 4 of the Qualification Directive. In order to ensure that B's right to good administration is respected, it is important for the national authorities to ensure that B has been informed of the points where elements to substantiate his account were deemed lacking and that he has been afforded the opportunity to address such concerns. However, in relation to (ii), it would be inconsistent with Article 4(3)(c) of the directive for the national authorities to base their decision solely on the stereotypical assumption that because B is Muslim and from a country where homosexuality is not accepted his account cannot be credible without a statement giving details about his feelings and how he came to terms with his homosexuality.

91. The Minister refused C's claim as he found: (i) it was inconsistent; (ii) it lacked information in as much as C did not give a clear account of his own realisation that he was homosexual; and (iii) that a film depicting C performing a sexual act with a man did not establish C's homosexual orientation. In relation to points (i) and (ii), in so far as the Minister's decision is based upon those points, it will be for the relevant national court as sole judge of fact to determine whether C was given an adequate opportunity to provide all relevant information in accordance with Article 4 of the Qualification Directive. In order to ensure that C's right to good administration is respected it is important for the

85 — Article 10(2)(b) of the Qualification Directive.

national authorities to ensure that C has been informed of the points where elements to substantiate his account were deemed lacking and that he has been afforded the opportunity to address such concerns. As regards (iii), I consider that it would be contrary to Articles 3 and 7 of the Charter for the competent authorities to accept evidence from C of a film showing him engaging in a sexual act.

92. Finally, I suggest that it would be both desirable and prudent to ensure that all three applicants have had an opportunity to address any specific issues concerning their credibility during the course of the administrative stage (or the first instance procedure), before a final decision is made by the determining authorities; and that the official making the determination either (preferably) has seen their demeanour when delivering their respective accounts or at the very least has access to information indicating how they comported themselves during the interview process.

Conclusion

93. In the light of the foregoing considerations, I propose that the Court should answer the question referred by the Raad van State (the Netherlands) to the following effect:

Where an application for refugee status, made under 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) and assessed according to the rules in Council Directive 2005/85/EC of 1 December 2005 (on minimum standards on procedures in Member States for granting and withdrawing refugee status), is founded upon the claim that the applicant belongs to a particular social group because of his sexual orientation within the meaning of Article 10(1)(d) of Directive 2004/83, that application is subject to an assessment of the facts and circumstances for the purposes of Article 4 of Directive 2004/83. The purpose of that assessment is to establish whether the applicant's account is credible; and in conducting their examination the competent authorities must comply with the Charter of Fundamental Rights of the European Union, in particular Articles 3 and 7 thereof.

An applicant's averred statement of his own sexual orientation is an important element to be taken into account. By contrast, practices such as medical examinations, pseudo-medical examinations, intrusive questioning concerning an applicant's sexual activities and accepting explicit evidence showing an applicant performing sexual acts are incompatible with Articles 3 and 7 of the Charter; and general questions from competent authorities based on stereotypical views of homosexuals are inconsistent with assessment of the facts relating to a particular individual required by Article 4(3)(c) of Directive 2004/83.