

PRESS RELEASE OF THE COUNCIL OF STATE

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The Secretary of State should clarify how he assesses the credibility of the sexual orientation of applicants for asylum

The Secretary of State should clarify how he assesses the credibility of the sexual orientation of applicants for asylum in specific cases. This was the ruling of the Administrative Jurisdiction Division today on the asylum applications of three men from Gambia, Afghanistan and Uganda. No appeal is possible against this ruling.

Background

In these cases, the applicants applied for asylum in the Netherlands because of their sexual orientation. The Secretary of State, however, rejected their claims because he finds the sexual orientation of the applicants to be implausible. In these cases, the Administrative Jurisdiction Division posed preliminary questions to the Court of Justice in Luxembourg. She wanted to know which limits European Union Law imposes on the investigation and assessment of the credibility of a sexual orientation.

General method

The Administrative Jurisdiction Division holds that the method used by the Secretary of State in *general*, in investigating the credibility of the sexual orientation of an applicant for asylum, remains within the limits of EU law. For example, the Secretary of State does not ask questions about the sexual activities of an applicant, nor does he use any images of sexual acts of applicants in his investigation and assessment. Contrary to other countries, he also does not carry out any medical research into the sexual orientation of an applicant.

Concrete assessment

However, the Secretary of State has failed to explain how he assesses the credibility of an applicant's alleged sexual orientation in *specific* cases. For example, the Secretary of State has "not made it clear on what questions and answers his focus lies, and how he assesses and evaluates the given answers to those questions". Because there is no policy or established practice on which the Secretary of State investigates and assesses an alleged sexual orientation, it is also not possible for the administrative judge to assess a decision on this issue effectively. It is for the Secretary of State to impart more substance to this in his immigration policy.

New decisions

Because the Secretary of State has not been able to provide sufficient clarity on how he assesses the credibility of the sexual orientation of the three applicants, he will have to decide again on their asylum applications, with regard to this ruling.

SUPPORTING CONSIDERATIONS OF RULING 201208550/1/V2,
201110141/1/V2 AND 201210441/1/V2

(...)

Assessment

4. The legal question raised in the complaints concerns whether, and if so how, the Secretary of State should assess the credibility of an alleged sexual orientation, in light of EU law, for both first and subsequent applications. Answering this question is important for the settlement of the current cases, as well for other cases which are postponed by the Division and the courts of first instance pending the response to the present legal questions. The Division therefore sees reason to consider the following, in the interest of legal uniformity, legal development and legal protection in general in asylum cases in which an alleged sexual orientation is not or hardly accepted in the country of origin of the applicant, is indicated as the reason for asylum.

Moment when a ruling is made regarding sexual orientation

5. A foreigner who claims to be eligible for an asylum residence permit on grounds of his sexual orientation can generally be expected to indicate this as soon as possible in the administrative stage, that is, with his application or in a follow-up interview. It follows from paragraphs 69 and 70 of the judgment that, due to the sensitive nature of questions relating to a person's personal identity and, in particular, his sexuality, it cannot be concluded that the declared sexuality lacks credibility simply because an applicant did not declare his alleged sexual orientation at the outset, given his vulnerability and sensitivity to questions in that regard. The Secretary of State and the administrative courts must therefore, when answering the question whether the applicant disclosed his/her sexual orientation as a asylum motive as soon as reasonably possible, demonstrate that they have conducted an assessment based on the current applicant, in which they considered all relevant elements in light of article 13 of Directive 2005/85, article 4 of Directive 2004/83 and article 83 of the Aliens Act 2000.

5.1. Paragraphs 69 and 70 of the judgment also affect the way in which the administrative courts must apply the judicial assessment framework for appeals based on case-law of the Division (judgment of 6 March 2008 in case no 200706839/1, www.raadvanstate.nl) in decisions on subsequent applications. For an applicant coming from a country where an alleged sexual orientation is not or hardly cultural accepted or even punishable, it may, because of the vulnerability of such applicants and considering the sensitivity of the subject, be difficult to respond to questions about that sexual orientation. Therefore, due to the nature of the asylum motive and the way in which the Secretary of State examines the credibility of the applicant's statements in that regard, in order to answer the question as to whether that sexual orientation is a new fact or a changed circumstance, an objection may not be raised against the applicant in that he did not make

note of his alleged sexual orientation earlier. The administrative court can assess the point of view of the Secretary of State on the credibility of the alleged sexual orientation, even if this is contained in a decision with a similar meaning in a subsequent application – as considered before under 5 – on the basis of the grounds for the appeal against it, as if it was a first refusal to grant an application for asylum.

Limits to the assessment of sexual orientation

6. As the Division considered in her referred questions and the Court endorses according to paragraph 49 of the judgment, the Secretary of State does not have to accept the foreigner's sexual orientation as an established fact based solely on his statement as to his/her sexual orientation. EU law does not prevent the Secretary of State from examining and evaluating whether an applicant is in fact of the claimed sexual orientation. On the other hand, EU law does not oblige the Secretary of State to do so.

6.1. Other than in case no 201109928/1/V2 that the judgment of the Division of 18 December 2013 (www.raadvanstate.nl) relates to, and in which the Secretary of State has based itself on the credibility of the sexual orientation as claimed by the applicant, the issue in the present matter is how the Secretary of State examines and evaluates the credibility of a sexual orientation claimed by an applicant, if he does not hold the declared sexual orientation to be an established fact due to the credibility of the statements made by the applicant in this regard. The prejudicial questions raised by the Division on this matter, the answers given by the Court, and that which was dealt with at the sitting, lead the Division to the following considerations on the manner in which the Secretary of State assesses the sexual orientation in general.

6.2. As the Secretary of State has explained at the sitting, in the investigation into the credibility of the alleged sexual orientation he is of the opinion that an applicant can rarely prove his sexual orientation and the problems he may have encountered in that regard. After all, an applicant for asylum often has no other proof than his own statements (also see the judgment of 10 July 2012 in case no 201112088/1/V1; www.raadvanstate.nl). The Secretary therefore gives an applicant the benefit of the doubt if he considers his statements to be coherent and plausible, and if he has established that the applicant is generally credible. This is therefore not unlike the investigation by the Secretary of State into the credibility of statements of an applicant that are not related to an alleged sexual orientation (in this respect, also see points 49 and 50 of the judgment). Furthermore, the Secretary clarified that he always takes note of specific problems that can go hand in hand with explaining about sexual orientation, such as any fear and shame present in a foreigner.

6.3. Furthermore, the Secretary of State has implemented policy that no questions may be asked during the hearings about sexual activities and sexual actions of an applicant. If the applicant makes a statement in this regard of his own accord, then the Secretary of State, as he explained at the sitting, will not consider those statements in his investigation and

assessment. He immediately informs the applicant that such statements will not be considered in the investigation and assessment, and that the applicant does not need to elucidate, but he also ensures that no further restrictions are imposed on an applicant when making his free statement. This approach is consistent with the judgment.

6.4. Also in accordance with the judgement, the Secretary of State does not involve graphic material of an applicant's sexual acts in his investigation and assessment. The Secretary of State also rejects any offer from an applicant to perform acts to that effect, or to record such acts or to undergo medical examination – in order to render his sexual orientation plausible – and he attaches no value to results of investigations already carried out or to manufactured footage submitted by an applicant. The Court has endorsed the considerations of the Division in point 65 of the judgment, that the involvement of such tests or actions are contrary to fundamental rights and human dignity, guaranteed in article 1 of the Charter. The Court has considered in paragraph 66 that the acceptance of video material or accepting the offer of an applicant to undergo medical examination, irrespective its probative value, would furthermore encourage or oblige other applicants to also seek to render their alleged sexual orientation plausible in this way.

Partly for this reason, the Division holds that a reasonably acting Government should not only leave footage in which an applicant performs sexual acts out of the assessment, but should also return this material to the applicant, without delay.

6.5. The Division has already considered that the method used by the Secretary of State in the investigation into and the assessment of the sexual orientation, in a general sense, remains within the limits laid down by EU law. No connecting factors were found in that which parties have argued at the sitting, to now come to a different conclusion. In view of what has been considered in the judgment, the Division upholds its opinion, also given in its reference statements, that the investigation by the Secretary of State of a sexual orientation claimed by an applicant is, in a general sense, in line with European Union law.

Assessment of sexual orientation

7. The limits as formulated by the Court create a general framework within which the Secretary of State may conduct the assessment of the credibility of the sexual orientation in a specific case. In order to enable the administrative judge to review the manner in which the decision was arrived at, and the grounds for that decision, in view of the limits provided for in articles 3:2 and 3:46 of the General Administrative Law Act, the Secretary of State must clarify how he actually conducted his assessment in a specific case. The sort of questions that the Secretary of State has asked and the manner in which he has assessed the answers to these questions, are of particular importance. The Secretary must not only clarify what he did not do in his investigation into the credibility of the sexual orientation, but must also clarify how he conducted the assessment of the credibility of the sexual orientation with regard to the stipulations of article 4 of Directive 2004/83.

7.1. It follows from paragraph 62 of the judgment that an applicant's answers to questions that are based on stereotypical views on the sexual orientation could constitute a useful element in the assessment of the sexual orientation. The point of view of the Secretary of State, that he may ask such questions and may involve the responses to them in his investigation, is in line with the judgment. The Secretary of State also explained at the sitting that, in his investigation, he only includes answers to such questions of which he was of the opinion to be correct, in order to, in case of doubt as to the credibility of the sexual orientation claimed by an applicant, still consider this orientation to be credible. The Secretary, however, has not made clear what questions he generally qualifies as questions that are based on stereotypical views on a sexual orientation.

7.2. Other than in cases in which a religion is invoked as ground for asylum, for the investigation of an alleged sexual orientation the Secretary of State did not develop a questionnaire specifically aimed at applicants for asylum, in which he includes categories of questions, such as questions about the manner and the time when an applicant has come to realise his sexual orientation and what this has meant for him and his environment, what the situation is for people with that orientation in his country of origin and how his experiences, also according to his/ her asylum story, fit into that general picture. The investigations to be carried out by the Secretary of State on both asylum motives, however, have similarities, considering the nature of these asylum motives and considering the difficulties that a foreigner may experience to prove such an asylum motive. See for the establishment of the investigation into an alleged religious belief the ruling of the Division of 24 May 2013 in case no 201109256/1/V2 (www.raadvanstate.nl).

7.3 At the sitting, on request, the Secretary of State could only clarify which questions may not be asked in the hearings. While given the opportunity to do so by the Division, he has not made clear what sort of questions he does ask during the hearings and whether those questions were drawn up in cooperation with an interest organisation, such as the Dutch Association for Integration of Homosexuality (COC). Although it is clear from the further hearings in the present cases that the Secretary of State does ask questions regarding the alleged sexual orientation, it was not made clear that those questions stem from a standardised system to assess the credibility of an alleged sexual orientation, focused on the specific nature of an asylum account.

7.4. Furthermore, the Secretary of State was unable to clarify how, based on the results of his research, he conducts the assessment of the credibility of an alleged sexual orientation, and how he has conducted this assessment in the specific cases of the current applicants.

7.5 The Secretary of State also could not adequately clarify what weight he allocates to a possible lack of credibility of any statements of an applicant as to what happened to him in his country of origin as a result of his alleged sexual orientation, and which partly prompted him or her to leave

that country. This also applies to statements by an applicant which the Secretary of State considers implausible about events that occurred outside the country of origin, in the Netherlands or elsewhere (compare in this regard the aforementioned ruling of the Division of 24 May 2013).

7.6. It follows from the above that the Secretary of State has made it insufficiently clear on what questions and answers, in a specific case and in view of the asylum account of a particular applicant, his main focus lies and how the Secretary assesses and mutually weighs the answers given by an applicant to those questions (compare the judgment of the Court of 22 November 2012 in case C-277/11, *M.M. versus Ireland*, ECLI:EU:C:2012:744, and the ruling of the Division of 9 April 2015 in case no 201501445/1/V2, www.raadvanstate.nl, and see in that context also the ruling of the Division of 15 July 2014 in case no 201401627/1/V2, www.raadvanstate.nl).

7.7. In the absence of a policy regulation or an established practice of the Secretary of State on how he examines and evaluates a claimed sexual orientation, while that examination and evaluation, within the Dutch administrative system, is primarily up to him, it is impossible for the administrative courts to examine how the Secretary of State conducts his examination and evaluation in a specific case, and thus how he makes a carefully prepared and properly motivated decision on the credibility of sexual orientation as asylum motive. In this system, it is not for to the administrative courts, but for to the Secretary of State to impart more substance in the design and implementation of the immigration policy. Additionally, he must also take note of the following.

Relationship between grounds for granting asylum

8. In the current cases, the applicants have invoked refugee status and subsidiary protection (article 29, first paragraph, introduction and under a and b, of the Aliens Act 2000), respectively invoked only subsidiary protection.

8.1. The system of the Aliens Act 2000 implies that the Secretary of State shall sequentially assess, in a single asylum procedure, whether an asylum application should lead to refugee status, and whether the applicant is eligible for subsidiary protection (see to that effect the judgment of the Division of 28 March 2002 in case no 200105914/1 and that of 22 July 2010 in case no 200900298/1/V2; www.raadvanstate.nl, and compare the judgment of the Court of 22 November 2012).

8.2 The position of the Secretary of State in cases like these, regarding the credibility of the sexual orientation of an applicant, and given the aforementioned system of the Aliens Act 2000, is the starting point for answering the question of whether the applicant is eligible for one of the grounds for granting refugee status or subsidiary protection (see to that effect the judgments of the Division of 17 February 2004 in case no 200308785/1 and that of 30 January 2012 in case

no 201008097/1/V2; www.raadvanstate.nl). The Secretary of State is not allowed to take a different position on the credibility of the sexual orientation of an applicant in the respective grounds for granting refugee status or subsidiary protection.

8.3. The Secretary of State makes a distinction between refugee status and subsidiary protection with regard to whether, and if so to what extent, restraint may be expected of an applicant (paragraphs C2/3.2 and C2/3.3 of the Nationals Circular 2000). This distinction also seems to exist between the jurisdiction of the Court and the European Court of Human Rights (hereinafter the ECtHR). If the Secretary of State holds a claimed sexual orientation for an established fact, or deems it credible, it is, according to the judgment of the Court of 7 November 2013, in breach of Articles 9 and 10 of Directive 2004/83 to require restraint from an applicant in giving substance to his orientation in his country of origin. In contrast, the jurisdiction of the ECtHR seems to require restraint from an applicant, if this allows him to prevent an inhumane treatment (see in this respect the judgments *F.G. versus Sweden*, of 16 January 2014, no 43611/11, and *M.E. versus Sweden*, of 26 June 2014, no 71398/12; www.echr.coe.int).

8.4. As Directive 2004/83 not only relates to refugee status, but also to subsidiary protection, the Secretary of State should also include this difference between the jurisprudence of the Court and the ECtHR in his implementation of the policy as referred to in 7.7.

Conclusion

9. Given that the Secretary of State, in light of what is considered under 7 to 7.6., has provided insufficient clarification into how he conducts the examination of the credibility of a sexual orientation and how he assesses that sexual orientation after he has completed the examination, he has provided insufficient reasoning in his decisions of why the alleged sexual orientation of the applicants in question is implausible. Therefore, the Dutch court has considered wrongly in the various judgments that there is no ground for the opinion that the Secretary of State could not have reasonably come to the conclusion that the alleged sexual orientation of the respective applicants is implausible.

10. The appeals are justified. The disputed rulings must be annulled. Doing what the courts should have done, the Division will declare the preliminary appeals as subsequently justified and annul the decisions listed below. This means that the Secretary of State, with respect to the 'integral credibility assessment', as applicable from 1 January 2015, must take a new decision on these applications.

(...)