



OPINION

Credibility Assessment in Claims based on Persecution for Reasons of Religious Conversion and Homosexuality: A Practitioners Approach

Uwe Berlit, Harald Doerig & Hugo Storey*

1. INTRODUCTION

In June 2015 the European Chapter of the International Association of Refugee Law Judges (IARLJ) convened a workshop on credibility assessment in claims based on persecution for reasons of religious conversion and homosexuality. Prompting this choice of subject were recent judgments of the Court of Justice of the European Union (CJEU) which define requirements for the recognition as a refugee of asylum seekers who base their claims on persecution of that type.¹ Forty Judges from thirteen EU member states had collected and made available to the workshop their most important national judgments and - if available - the national questionnaires used as the basis of the applicant's interview by the government authorities. The judges' development of criteria for the assessment of the credibility of asylum seekers will be summarized in the following. The article starts with an overview of the legal framework for the assessment of asylum claims in general, as set out in article 4 EU Directive 2011/95/EU - the so-called (Recast) Qualification Directive (QD). It then elaborates specific criteria for the assessment of claims based on religion and homosexuality.

* The authors: Berlit and Doerig are judges at the German Supreme Administrative Court, Storey is a senior judge at the UK Upper Tribunal and President of the European Chapter of the IARLJ-Europe. The article was drafted with support from the judges Cumra (Cz), Decléck (Be), Gleeson (UK), Malvasio (Fr), Steendijk (NL) and the legal adviser Mentzoni (Nor). The views expressed herein are the authors' and are not necessarily those of their courts.

¹ CJEU, Judgment of 5 Sept 2012 (Religion), *Y and Z*, C-71/11 and C-99/11, EU:C:2012:518; Judgment of 7 Nov 2013 (Homosexuality I), *X, Y and Z*, C-199/12, C-200/12 and C-201/12, EU:C:2013:720; Judgment of 2 Dec 2014 (Homosexuality II), *A, B and C*, Joined Cases C-148/13 to C-150/13, EU:C:2014:2406.

2. LEGAL FRAMEWORK FOR THE ASSESSMENT OF ASYLUM CLAIMS

Article 4 QD provides rules for the assessment of asylum claims. It contains optional and mandatory provisions for the member states.

2.1 Duty to substantiate the application

The first sentence of article 4(1) allows member states to regard it as a duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. Most member states have made use of this authorisation.²

The term ‘substantiate’ is not defined in the Qualification Directive. However, the wording of article 4(1), (2) and (5) suggests that ‘to substantiate’ means to provide statements and submit documentary or other evidence in support of an application.³ The concrete ‘elements’ which need substantiation are enumerated in article 4(2), which contains an exhaustive list.⁴ These comprise the applicant’s personal background, identity, nationality(ies), places of former residence, previous asylum applications, travel routes, travel documents, and the reasons for applying for international protection.

According to the wording of the second sentence in article 4(1), the duty of cooperation between the applicant and the member state relates only to the assessment of all elements of the applicant’s application. However, the CJEU has extended this duty to the preceding stage of substantiation in the first sentence of article 4(1), so that in both stages there is a shared duty of the applicant and the member state.⁵

The article 4(1) authorisation also relates to the duty of the asylum seeker to submit all elements relevant to his claim ‘as soon as possible’. The CJEU has decided, in its Judgment of 2 December 2014 (Homosexuality II), that the application of this requirement must be in accordance with the sensitive nature of questions relating to a person’s personal identity and, in particular, his sexuality.⁶ Therefore it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset. Thus, it would be erroneous to hold that an applicant for asylum is not credible merely because he did not reveal his sexual orientation on the first occasion that he was given to set out the basis of his claim to persecution, considering the requirement to take account of the individual position and personal circumstances of each applicant.

2.2 Assessment of the application

According to the second sentence of article 4(1), it is the duty of the member state to assess the relevant elements of the application, and the applicant has to cooperate in this procedure. Article 4(3) lays down the obligation to assess the application on an

² See D Baldinger, *Rigorous Scrutiny versus Marginal Review* (2013), 337 fn 246; for Belgium, the Netherlands, and the UK, see, UNHCR, ‘Beyond Proof - Credibility Assessment in EU Asylum Systems’, May 2013, 86 fn 5; for Germany, see, section 25(1) and section 15 *Asylverfahrensgesetz* (Asylum Procedure Act); for France, see, new article L 723–4 section 2, Code on the Entry and Residence of Foreigners and the Right of Asylum (Asylum Law Reform Bill No 2015–925 from 29 July 2015).

³ See, H Dörig, ‘Art. 4 QD’ in K Hailbronner & D Thym, *EU Immigration and Asylum Law* (2nd edn), para 8.

⁴ G Noll, ‘Evidentiary Assessment and the EU Qualification Directive’, UNHCR Working Paper No 117, June 2005, 7.

⁵ CJEU, Judgment of 22 Nov 2012, *MM*, C-277/11, EU:C:2012:744, para 66.

⁶ CJEU, *A, B and C*, above n 1, para 71.

individual basis and to take into account all relevant facts, statements, and documentation as enumerated in lit. (a) to (e) of that provision. This comprises:

- (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application,
- (b) the relevant statements and documentation presented by the applicant,
- (c) the individual position and personal circumstances of the applicant, including factors such as background, gender, and age,
- (d) post-flight activities,
- (e) the possibility to assert citizenship in another country.

The CJEU has decided, in its *MM* Judgment, that the obligation to cooperate lies on the member state and the applicant.⁷ It is clear from this judgment that for the CJEU the substantiation of the application on one side and its assessment on the other cannot be clearly separated. However it is a shared duty of the applicant and the state to collect the necessary elements of the application and to assess them on the basis of the evidence obtained. The Court stresses in its Judgment of 2 December 2014 (*Homosexuality II*) that the applicant is best placed to provide evidence to establish his own sexual orientation. Nevertheless, the fact remains that it is the duty of the member state to cooperate with the applicant at the stage of assessing the relevant elements of that application.⁸ The cooperation requirement means, in practical terms, that if the elements provided by an applicant are not complete, up to date, or relevant, it is necessary for the member state concerned to cooperate actively with the applicant, so that all the elements needed to substantiate the application may be assembled.⁹ The CJEU also draws attention to the fact that a member state may be better placed than an applicant to gain access to certain types of documents.

The assessment takes place in two separate stages. The first stage concerns the determination of the facts and circumstances of evidence that may substantiate the asylum application.¹⁰ The second stage relates to the appraisal of the conclusions to be drawn from the evidence provided in support of the application, when it is determined whether that evidence does in fact meet the conditions required for the requested international protection to be granted. The examination of the merits of an asylum application (second stage) is solely the responsibility of the competent national authorities and courts or tribunals; accordingly, at that stage in the procedure, a requirement that the authority cooperate with the applicant - as laid down in the second sentence of article 4(1) - is of no relevance.¹¹

In order for judges to assess religious conversion and homosexual orientation cases as objectively as possible it is essential that, pursuant to article 4(3)(a), they base themselves not on their own understanding of these matters but on what is disclosed in the country of origin information. The way that Christianity or Islam, for example,

⁷ CJEU, *MM*, above n 5, para 65.

⁸ CJEU, *A, B and C*, above n 1, para 56.

⁹ CJEU, *MM*, above n 5, para 66.

¹⁰ *ibid* para 68.

¹¹ *ibid* para 70.

is practised and organised in country X (or the relevant region of country X) may be very different from the way it is understood in the judge's own country. In evaluating country of origin information they may find useful the IARLJ Working Party Checklist on criteria for evaluating COI.¹²

2.3 Credibility assessment

When there are indications that the facts presented by the applicant might not be true, the examining authority and - on appeal - the court or tribunal has to assess the credibility of the applicant, his factual background, and the evidence presented in the course of the proceeding. Baldinger has summarized the internationally recognised standards as identified by the CREDO study undertaken by the IARLJ.¹³ The applicant's basic story should meet the following requirements in order to be regarded as credible: It should be sufficiently detailed and internally consistent throughout the proceedings; numerous major inconsistencies and alterations in statements count against credibility; the story should be consistent with country information; it should be brought forward in a timely manner; late submissions of statements may affect the general credibility negatively, in particular if no sound reason is given for it (where relevant); the core of the flight narrative should be corroborated with evidence.

The credibility assessment has to be carried out in a fair procedure. When discrepancies appear, the applicant should be given the chance to explain them and this must be weighed into the final consideration. The examiner has to take into account personal features such as age, gender, education, ethnicity, etc.¹⁴ When the applicant appeals against a negative decision of the status determination authority based on lack of credibility the national court or tribunal must be able to review the merits of the reasons that led the administrative authority to hold the application for international protection to be unfounded or made in bad faith.¹⁵

2.4 Alleviation of the duty to present evidence

Article 4(5) QD regulates the alleviation of the applicant's duty to present evidence according to article 4(1). According to this provision certain aspects of the applicant's statement do not need confirmation by documentary or other evidence if five enumerated 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 has been given regarding any lack of other relevant elements,
- (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,

¹² IARLJ Working Party Checklist, see: <https://www.iarlj.org/general/images/stories/working_parties/guidelines/udicial_Criteria_a_checklist_COI_2006.pdf>.

¹³ Baldinger, above n 2, 382; IARLJ, 'Assessment of Credibility in Refugee and Subsidiary Protection' (2013), <http://www.iarlj.org/general/images/stories/CreDO/CreDO_Paper_March2013-rev1.pdf>.

¹⁴ *ibid* 44 *et seq*; see also James A Sweeney, 'Credibility, Proof and Refugee Law' (2009) 21 IJRL 700.

¹⁵ CJEU, Judgment of 28 July 2011, *Samba Diouf*, C-69/10, EU:C:2011:524, para 61.

- (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.

Article 4(5) is not an expression of the principle of the 'benefit of the doubt'. There are two main differences. First, as the IARLJ has pointed out in its study on credibility assessment, this principle is applied in criminal law. In this context the burden is on the state to demonstrate that, on the totality of the evidence before the court, there is no residual doubt that a reasonable person might entertain as to the guilt of the accused.¹⁶ Article 4(5) does not follow this approach. It regulates an alleviation of the duty to present evidence in favour of the applicant, but does not shift the burden of proof from the applicant to the state.¹⁷ Second, article 4(5) is limited to cases where there is a lack of corroboration, that is, 'where aspects of the applicant's statements are not supported by documentary or other evidence' (chapeau to article 4(5)). As a result, it is more limited in scope than the notion as set out in paragraph 204 of the UNHCR Handbook (where the precondition for affording an applicant the benefit of the doubt is that 'all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility').¹⁸

3. CREDIBILITY ASSESSMENT IN ASYLUM CLAIMS BASED ON RELIGIOUS CONVERSION

Asylum claims can only lead to the granting of refugee status when the conditions of article 9 and 10 QD are fulfilled. That means there must be an act of persecution and it must be based on one of the recognized reasons of persecution. Article 9(1)(a) QD demands that acts of persecution must be sufficiently serious as to constitute a severe violation of basic human rights, in particular those rights from which the ECHR allows no derogation, such as the right to life and the prohibition of torture and inhuman or degrading treatment or punishment. The CJEU has decided that religion has to be regarded as such a fundamental human right,¹⁹ and persecution for reasons of religion is a recognized persecution ground as enumerated in article 10 QD.²⁰

Cases of assumed religious persecution are characterized by the difficulty of assessing the inner conviction of the asylum seeker, which are difficult for examiners to ascertain. Religious identity as an inner fact can be determined only from the statements of the applicant as well as by way of conclusion from external clues to his inner attitude. The interchange of ideas of judges at the Berlin workshop of the IARLJ was concentrated on cases of religious conversion and in this respect mainly - but not exclusively - on cases of conversion to Christianity - because these cases characterize court practice in the thirteen European countries from which the judges came.

¹⁶ IARLJ, above n 13, 50.

¹⁷ UK Upper Tribunal, Judgment of 10 Dec 2014, *KS* (benefit of the doubt) [2014] UKUT 552 (IAC), para 85; consenting: Dörig, above n 3, para 39.

¹⁸ *KS*, *ibid* para 83.

¹⁹ CJEU, *Y and Z*, above n 1, para 57.

²⁰ French National Court of Asylum, Judgment of 4 Nov 2013, *MF*, No 13007332 (atheism).

An applicant who has converted to Christianity has to convince the court or tribunal that a religious practice or activity, which is suppressed in his home country, is fundamental to him in order to preserve his religious identity.²¹ The circumstances under which such an inner religious attitude is to be recognised by the court or tribunal cannot be described in general. Taking into account the impression obtained from both administrative and judicial proceedings the court or tribunal has to be satisfied that the applicant's detachment from his previous religion and his turn to the other faith relies on a full inner conviction. If the applicant has accepted a Christian religion, it is generally not sufficient that the protection seeker has only formally converted to Christianity by being baptized.²²

With regard to an adult, it can generally be expected that the applicant be able to demonstrate his familiarity with the basic elements of his new religion.²³ The extent of his knowledge of his new religion will largely be a function of his individual history, personality, level of education, and intellectual disposition.²⁴ Moreover, it will ordinarily be assumed that the convert is likely to have practiced his Christian religion in his home country seriously if he is able to show that he has adjusted his way of life in the country of refuge to align with the basic precepts of the newly adopted conversion.²⁵ It is to be emphasized that how helpful these general considerations are will always depend on the individual case. For example, a woman may have converted to a particular religion in order to marry her partner, without any real belief in that religion, yet, if she is perceived on return to hold her husband's religion, that may make her a target for persecution on religious grounds.

If, after an overall evaluation, it is acceptable that the applicant did not create the post-flight reasons only with a view to securing refugee status he will have gone a long way to establish his case. As to the scenario where the decision-maker is satisfied that the applicant has created the post-flight reasons abusively, there are two main positions that can be adopted. One is to consider that such abusive conduct precludes the applicant from being eligible for protection. The other is to consider that whether such conduct precludes eligibility has always ultimately to be a matter of fact, so that the question to be asked, in accordance with article 4(5) is whether '... these activities will expose the applicant to persecution or serious harm if returned to that country'.

3.1 Methods to ascertain religious conviction

The government authorities in some member states (for example, the Netherlands, Belgium, and Norway) have developed comprehensive lists of questions to be applied in cases of conversion in judicial procedures. In some member states (for example, Germany) national administrative procedural law does not provide for comprehensive lists of questions that have to be processed in order to clarify a particular matter by

²¹ German Federal Administrative Court, Judgment of 20 Feb 2013, No 10 C 23.12, para 29 *et seq*, available in English at <www.bverwg.de>.

²² Dutch Council of State, Judgment of 6 Mar 2014, No 201304031/1/V2, para 4.4.

²³ French National Court of Asylum, Judgment of 4 Nov 2014, *MG*, No 14006568.

²⁴ Czech Supreme Administrative Court, Judgment of 29 May 2014, No 5 Azs 2/2013–26, published under No 3085/2014 of the Collection of the Supreme Administrative Court Decisions.

²⁵ The same applies to other religions. See the analysis of the United Kingdom Upper Tribunal in *MN and others* (Ahmadis - country conditions - risk) Pakistan CG [2012] UKUT 389 (IAC) 4 Nov 2012.

administrative courts, either by way of mandatory questionnaires or guidelines/recommendations. Nevertheless, questions asked by courts or tribunals in judicial practice may be derived from case law or decisions in similar cases. It has, of course, to be kept in mind that these questions may have been tailored to the specific case or may reflect an evaluation of the answers given and may not be easily adapted to apply to other cases. Nevertheless, an enumeration of factors that have featured in case law or decided cases sheds useful light on available methods.

3.2 General questions/family background

The general family background is not regularly set out in court or tribunal judgments, but has sometimes provided a relevant backdrop for evaluation of an applicant's claim. Of particular importance in this regard has sometimes been the religious character of the family/the environment, their general religious attitude, and/or other religious 'conditions' in the country of origin.²⁶

3.3 Timing of mention of conversion in administrative hearing

Early mention of faith doubts, conversion intentions, or conversion at the first hearing by national administrative bodies has sometimes been seen to be in favour of the applicant. However, in other cases, the lack of early mention has not been seen as a negative factor. For example, the late mention of conversion in the process has been seen to count in favour of the applicant, when it is accepted as an expression of sincere religious conviction rather than something contrived with a view to manufacturing the conditions for an asylum claim.

3.4 Conversion in the country of origin

If an interest in a particular faith or a (internal) conversion is already asserted in the country of origin, the requirements applying to the conversion process are basically the same as those faced by a conversion in the country of refuge. A key question has been whether the corresponding practices of faith in the country of origin credibly portray sincerity of conviction (taking into account the approaches of religious persecution). Irregular visits to places of worship (for example, Christian house churches) due to fear of persecution do not preclude a recognition of refugee status.²⁷

The original religious imprint (intensity of the devotion of the applicant himself and of his family environment in the preceding religion [mostly: Islam], the importance of religion for personal life, the knowledge of this religion or the nature and extent of religious practice) or knowledge and risks of conversion with respect to state persecution and family/social environment are not systematically analysed.

3.5 (External) conversion process

What is required is a comprehensible, detailed assessment of the conversion process and its further development.

²⁶ French National Court of Asylum, *MG*, above n 23; Dutch Council of State, Judgment of 24 May 2013, No 201109839/1/V2, para 3.3.

²⁷ German Administrative Court of Magdeburg, Judgment of 28 Jan 2014 - 2 A 29/13 - para 29 *et seq.*

3.5.1 *Impulses/triggers for conversion*

How did the applicant come into contact with Christianity? How and through what persons (friends, acquaintances, personal environment, use of charitable services) was the applicant's interest in the religion aroused? Was there a key experience that motivated an intensive engagement with the religion (for example, a subdued prayer during illness of close relatives; reading of the holy book (Bible, Quran etc)? Had there already been other cases of conversion in the family? Why was the outreach/transition directed to the religion to which the applicant has turned? For example, the account that the decision to convert to the Christian faith was made after the applicant had two dreams after watching a film about Jesus Christ, was deemed to be not credible.

3.5.2 *Dissatisfaction with/criticism of previous religion*

For persons who were previously of another faith, previous intensity of belief and faith practice and the reasons for diverging from this belief have been seen as noteworthy. Questions that have arisen include: What has displeased the applicant with the previous religion? Why was this belief no longer sufficient, satisfactory, or otherwise acceptable?

3.5.3 *Speed of the conversion process*

One circumstance seen as relevant is the duration of the conversion process: When was the decision to convert made? How much time passed between the specified initial contact with the religion and its key components (for example, in the context of Christianity, with the Bible and baptism)? Is there evidence of tactical efforts to speed up the conversion process in order to aid the asylum claim?

3.5.4 *Preparation for the conversion*

One aspect that has regularly been seen to be of relevance concerns the manner in which the applicant has prepared for the conversion.²⁸ Has there been a systematic schooling in the relevant holy book (for example, Bible teaching or other systematic instruction in Christianity?) Has the applicant individually prepared for the relevant conversion ceremony (for example, baptism)? Does the applicant have a holy book (Bible) in an accessible language to him (if not illiterate)? Caution must be observed not to assume that all holy books have the same type of role in every religion or society (for example, in some societies, prime value may be placed on oral recitations).

3.5.5 *Enforcement/Implementation/Carrying out of conversion*

It is often seen as important that the applicant is able to portray not only the fact, but also the external circumstances of the execution of the conversion.²⁹ Who carried out the act of conversion (for example, baptism), when and under what circumstances? What determined the selection of the specific religious community and/or the person performing the conversion ceremony (for example, baptism)? Can the religious

²⁸ French National Court of Asylum, Judgment of 28 May 2014, *MM*, No 14004535.

²⁹ French National Court of Asylum, Judgment of 5 Dec 2014, *Mme B*, No 14015319.

significance of the actions taken at the ceremony (for example, baptism) be described? In which language was the ceremony (for example, baptism) been carried out? Which people were present? Here, the focus lies on the extent to which the applicant's narrative demonstrates at least a minimal level of genuine personal or emotional concern.

3.5.6 *Information on/reactions of the family/social environment to the conversion*

To what extent has the applicant's own family been involved in the conversion process? Were the parents/family members informed of the turn to this religion? Have they been involved in the decision process? How did they react? Did they support the change of faith, passively accept, or actively reject it? Has the wider social environment (neighbours, work colleagues, etc) been informed? How did these people react?

How important were the feared reactions of the family environment on the conversion decision? If adverse reactions of the family/social environment are reported, it may also be important to consider to what extent the asylum applicant has taken this into account in deciding to convert and how much he was affected emotionally by these negative reactions.

If close family members (spouse, children) live together with the converted asylum seeker, it is also important to assess whether or not they also converted and why this was the case. If jointly converted parents do not have their children converted (for example, by way of baptism) this may in individual cases raise doubts about the sincerity of devotion to the new religion.³⁰ However, this will depend on not only the particular religion but also the sect or type, for example, within Christianity, this is not the case at a Baptist church, where infant or child baptism is not advocated. If the spouse did not convert, it may be pertinent to inquire about the reasons. Has the conversion been discussed with him/her? Did he/she raise objections? How did the conversion affect the continuation of the marriage? Has there been a discussion about the religious education of common children. Are there any arrangements for this purpose?

3.6 *Interest in/knowledge of the new religion*

A serious turn towards the new religion will only be accepted if there is reasonable concern with the content of that faith and a corresponding knowledge of its beliefs/essential features, the religious texts, rituals, traditions, and holidays. The extent to which an applicant may be expected to furnish detail will vary depending on such matters as his or her personality and intellectual disposition. Knowledge of the new religion is not to be expected at the level of scientific and theological debate, but completely non-specific and cliché statements may be significant pointers to a non-credible account.³¹

3.6.1 *External interest in the new religion*

It must be clarified to what extent the applicant has dealt with the beliefs/the essential features of the new religion. In which language and with which media has this address been made? How did the applicant overcome existing language barriers? Which texts have been used (for example, Bible, Quran, other texts)?

³⁰ German Administrative Court of Cologne, Judgment of 15 Aug 2013 - 16 K 271/11.A.

³¹ French National Court of Asylum, *MG*, above n 23; Dutch Council of State, Judgment of 6 Mar 2014, No 201304167/1/V2, para 3.2.

3.6.2 *Knowledge of the place of worship*

Does the applicant know the differences between the various sects, schools, or denominations of the new religion? Is he aware that there are such differences? Is it clear in which particular sect, school, or denomination he converted? Is he aware of the formal structure of the place of worship and its hierarchy?

3.6.3 *(External) knowledge of the essential beliefs/structures*

General knowledge of the new religion? Structure of the holy book? Meaning of key events (for example, in Christianity, Jesus Christ and his death on the cross? Meaning of the cross? Composition and importance of the Holy Trinity? Distinction between heaven and hell? Is there a Christian afterlife? Meaning of miracles?)

Can the applicant define events/passages from the holy book that particularly interested/impressed him and that are of particular importance for him? What content do they have? What information does the applicant have of prayers in his religion (for example, in Christian prayers, esp. of the Lord's Prayer, the Creed and the Ten Commandments? Does he know hymns?).

In this regard, what is important is not (solely) the extent of an applicant's knowledge but also whether the knowledge demonstrates that an applicant has substantially engaged with his or her new religion. Merely externally appropriated, general/ad hoc 'intellectual' knowledge of the new religion may well not be enough.³²

3.6.4 *Religious rites/holidays/religious practice*

Are there any important 'ceremonies' of the new religion that the applicant knows of? In the example of Christianity, does he or she, in particular, know the ritual significance of baptism and the Lord's Supper? Can he describe the flow of the service (including the religious significance of individual sections)? Which Christian holidays are known? What religious significance do these holidays have? When/why and how they are celebrated?

3.6.5 *Demarcation from previous religion*

What are the main differences in the beliefs between the new religion and the preceding religion (for example, Islam)? What attitude do proponents of the new religion have to other world religions?

3.7 *Importance of the new religion for their own lives*

What (internal) significance does the new religion have for the applicant? What consequences do key rituals such as baptism/conversion have to his everyday life? Which commandments of the new religion does the applicant keep to in his daily life? Does the applicant take seriously preparation for certain religious holidays? If so, how?

3.8 *Attending religious place of worship*

According to the case-law, it is unlikely that a convert will be considered to be seriously willing to practice his new religion in the country of origin unless he can show that he

³² See the decision of the UK Upper Tribunal on the Chinese state and house churches in *QH (Christians - risk)(China) CG [2014] UKUT 86 (IAC)*.

has aligned his life in the country of refuge to the basic precepts of his new faith: this includes active participation in the religion's place(s) of worship.

3.8.1 Attending religious services/prayers

Concerning an applicant's attendance at services/prayers, relevant questions may include: Which place of worship is attended? How often are services/prayers attended? What language is used in such services? When do they take place? Is the applicant able to name priests or other persons working there?

Is the applicant involved in other related activities (for example, in Christianity, those of the Caritas/Diakonia)? What are these activities (for example, in Christianity, Bible studies, Conversation circles, Meeting other immigrants)? Does the applicant have any specific function in such services? Does he perform any specific tasks?

3.8.2 Relevant certificates

According to the established case-law, it is the court's duty to form its own opinion of the seriousness of the conversion. Therefore, relevant certificates, for example, conversion certificates or witness statements by a priest or any other church official are not necessarily conclusive or even persuasive. Such certificates may only demonstrate the fact that an applicant has undergone a ceremony, for example, in Christianity, a valid baptism, and thus has demonstrated a change of faith to the relevant religious community or wider world; any further effect is (almost) consistently rejected.³³

Authentic certificates are therefore not entirely irrelevant. Their weight depends on the extent to which they provide detailed and differentiated information about the participation of the applicant in activities of the local religious community, whether they reveal a personal/extended knowledge of these activities by the relevant presiding priest and which religious community/place of worship they have been attending, and whether they are in accordance with the declarations of the asylum seeker.

In the case of a confirmation issued by the National Spiritual Assembly of the Baha'is in Germany, a high significance was attached because it is well known that within this Assembly a membership application is carefully examined in each case, including the motives for conversion.³⁴ Membership is only granted if no doubts about the seriousness of the conviction of faith exist and the National Spiritual Assembly is fully convinced of the inner motives. It must not be assumed that matters of this kind will remain the same. For example, in the UK country guidance case of *MN and others*, evidential significance was attached to letters written by the UK Ahmadiyya Association, but in a subsequent case, *AB*, the Upper Tribunal felt it necessary to qualify the circumstances in which significance would be attached to such letters. In Belgium these documents must always be supported by the other elements in the case and the declarations of the asylum seeker.³⁵

³³ German Federal Administrative Court, Decision of 25 Aug 2015 - I B 40.15.

³⁴ German Administrative Court of Würzburg, Judgment of 18 June 2014 - W 6 K 14.30228: 'Due to internal directives of the Bahai community, the Bahai community intends to preclude misuse of baptism for asylum purposes. This is observed carefully when assessing a membership application.'

³⁵ *MN and others*, above n 25; *AB*, Ahmadiyya Association UK: letters, Pakistan [2013] UKUT 511 (IAC) 18 September 2013; Belgium National Asylum Court, Judgment of 5 June 2012, No 82450.

Occasionally courts hear religious officials (for example, priests, volunteers) as witnesses to the nature and extent of the applicant's participation in religious life and of the history of his conversion (preparation) process, including religious conditions for conversion or induction (for example, in Christianity, baptism).³⁶

3.8.3 *Involvement in the local religious community*

To what extent does an applicant deal with fellow members of the new religion in everyday life? Does he have social interactions with other members of the local religious community or with friends who hold this religion?

3.8.4 *Proselytizing/missionary work*

Proselytizing/missionary work is not a requirement for recognizing the sincerity of conversion, but it may enhance the evidence of a serious conversion. Therefore, courts may ask for information on the nature and extent of proselytizing/missionary activities, the importance of proselytizing/missionary work for an applicant's religious identity or previous successful missions.³⁷ As far as can be seen in published decisions, courts or tribunals do not regularly ask questions as to whether an applicant intends to continue proselytizing/missionary work if returned to his country of origin; in fact this should be done more often, especially in cases where such activities are a requirement of the applicant's new religion.³⁸

In certain types of cases the issue of proselytizing may be crucial because, for example, the country of origin information discloses that it is only those whose religious activities extend to proselytising who face a real risk of persecution. As can be seen from the CJEU case *Y and Z*, in such cases a key issue may be whether, even if it is found that the applicant would refrain from proselytizing activities, that would be in part out of a fear of persecution, where it has been established that proselytizing is sufficiently important to that particular individual's religious identity.

3.9 Information on tactical asylum motivations

In assessing the seriousness of a conversion it is necessary to consider whether it is in fact motivated by opportunistic reasons, in the case of a Christian convert, whether, for example, the date of baptism (or first contact with Christianity) was directly after having received a refusal notice, or when initiating judicial procedures; whether there has been a notable increase in the detail of the religious presentation during judicial procedures; whether the applicant has made a targeted dissemination of baptism through social media (for example, Facebook), including to the family in the home country, especially if such presentations disclose a generally superficial knowledge of the religious faith in question; or whether there is evidence of a conspicuous accumulation of conversions by nationals of a specific country of origin. However, these circumstances must always be looked at in the context of an overall fact-specific assessment. They do not by themselves preclude a court's acceptance of a true conversion.

³⁶ Dutch Council of State, Judgment of 5 June 2015, No 201410596/1/V2, para 3.2.

³⁷ See Norwegian Immigration Appeals Board, Decision of 22 Nov 2013, concerning an applicant from Iran who had converted to Christianity right after his arrival in Norway. His Christian faith had increased over several years and he had participated in evangelistic work with full name and picture on several satellite channels.

³⁸ UK, *MN and others*, above n 25.

4. CREDIBILITY ASSESSMENT IN ASYLUM CLAIMS BASED ON HOMOSEXUALITY

A core issue in considering an asylum application on grounds of sexual identity/homosexuality is whether the applicant in fact has that particular sexual identity. This article uses the terms 'homosexual' and 'gay person' synonymously. Unless otherwise indicated, our analysis only applies to homosexual/gay men, not lesbians. Here, problems of validation and credibility are even greater than in cases of religious persecution, since measures or questions used to determine a particular sexual identity may perpetuate an existing discrimination or even affect the applicant's dignity.³⁹

The CJEU has explicitly accepted that the existence of a particular sexual identity is to be examined in a discrete fashion. The Court states in its judgment of 2 December 2014 that the declarations by an applicant for asylum as to his sexual orientation are merely the starting point in the process of assessment of the application and may require confirmation.⁴⁰ That would appear wholly consistent with the approach taken by national case law in relation to religious identity/conversion.

However, the Court has at the same time declared unlawful certain procedures and forms of examination.⁴¹ It ruled that the methods used by the competent authorities to assess the statements and the evidence submitted in support of applications for asylum must be consistent with the EU law and, in particular, the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity and the right to respect for private and family life.

Furthermore, the problem arises whether or not certain questions/pieces of information are at all suitable for determining a particular sexual identity, without causing additional discrimination to these persons.

In transforming the CJEU's Judgment of December 2014, the Dutch Council of State decided that the government authorities have to decide again on the asylum applications of the three claimants coming from Gambia, Afghanistan, and Uganda.⁴² The Dutch Court holds that the method used by the government 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 asylum officers do not ask questions about the sexual activities of an applicant, nor do they use any images of sexual acts of applicants in their investigation and assessment. They also do not carry out any medical research into the sexual orientation of an applicant. The Dutch Council of State, however, demands the government not only clarify what it does not do in its investigation into the credibility of the declared sexual orientation, but it is also demands clarification of how it conducts the assessment of the credibility of the sexual orientation. Because there is no policy or established practice on which the Dutch authorities base their investigation and assessment of a declared sexual orientation, the Council of State regards it to be impossible for the administrative judge to assess a decision on this issue effectively.

The following section explores what questions and criteria judges from thirteen EU member states have found to be helpful, as discussed at the IARLJ Workshop in June 2015.

³⁹ UNHCR, Guidelines on International Protection No 9, 23 Oct 2012.

⁴⁰ CJEU, *A, B and C*, above n 1, para 49 *et seq.*

⁴¹ *ibid* para 53 *et seq.*

⁴² Dutch Council of State, Judgments of 8 July 2015, No 201208550/1/V2, No 201110141/1/V2 and No 201210441/1/V2.

4.1 Discovery of one's own homosexuality/'coming out'

4.1.1 *Individual discovery of sexual identity*

The formation and discovery of one's sexual identity is a complex process. Thus it can hardly be classified in an objective manner. In particular, in those countries where homosexuality is socially outlawed this process will typically not be straightforward. The key is therefore not the conformity with 'ideal type' socialization grids, but rather whether the applicant can describe credibly and understandably his own pathway to sexual identity.

4.1.2 *Development of own sexuality*

Questions about the path to sexual identity have not been ruled out in principle by the CJEU. What the Court disapproved of were, (1) questions based on stereotyped notions of homosexuality; and (2) questions relating to homosexual activity. It stated that:

... while the national authorities are entitled to carry out, where appropriate, interviews in order to determine the facts and circumstances as regards the declared sexual orientation of an applicant for asylum, questions concerning details of the sexual practices of that applicant are contrary to the fundamental rights guaranteed by the Charter and, in particular, to the right to respect for private and family life as affirmed in Article 7 thereof.⁴³

In line with the Court's ruling and national case law, it is suggested that the following questions may be considered. They do not aim at details of specific homosexual activity, but rather at details of the applicant's development to and personal expression of his sexual identity. Courts or tribunals may assess the internal consistency of answers - including conceivable 'search of identity' and inner conflicts.⁴⁴

How did the applicant's sexual thoughts and activities in school/adolescence develop? When and in what circumstances did the applicant have, for the first time, the suspicion or realisation that he felt attracted to persons of the same gender? What were the (priority) thoughts in this situation (confusion, fear, pleasure)? How has the presumption of homosexual tendency developed in the following years to a full awareness of homosexual sexual identity? Have there been any clearly identifiable stages/events or has it been an ongoing process? When and in what circumstances did the applicant recognize his own identity for the first time and understand intellectually that he was gay? When did the applicant accept his own homosexuality/perceived it as positive?

At what age, in what situation, and with whom did the applicant have homosexual contact for the first time? How did the applicant witness this event? What did this experience mean emotionally for the applicant?⁴⁵

What was the significance of penal sanctions and/or social ostracism of homosexuality in the development of the applicant's sexual orientation? What did the applicant think about the consequences of state/social ostracism for his evolving identity,

⁴³ CJEU, *A, B and C*, above n 1, para 64.

⁴⁴ French National Court of Asylum, Judgment of 19 Dec 2014, *Mme W*, No 14017576.

⁴⁵ *SW* (lesbians - HJ and HT applied) Jamaica CG [2011] UKUT 251 (IAC).

for his own life, his progress in education and employment, for relations with his own family, etc.?

How did the homosexual identity develop after the first homosexual contact? Did it preclude bi- or heterosexual activities? Did the applicant build up a solid, lasting homosexual relationship with a certain person?

4.1.3 *Participation, informing the family, and the social environment*

In countries, where homosexuality is criminalized and prosecuted effectively, homosexuality is often outlawed socially and religiously as well. Therefore, questions arise concerning reactions of family members and the social environment (classmates, friends, work colleagues).⁴⁶

At what time did the applicant trust his family and/or social environment with his possible sexual identity? Was it a one-off attempt or has disclosure been a continuous process? What was the reaction of his family and/or social environment? Was this reaction particularly marked by understanding, openness, and willingness to support, or by rejection? Did parents/siblings try to dissuade the applicant from his homosexual inclination (if yes: at what stage and by what means)? How did the applicant take these reactions?

If the applicant did not inform his family/social environment: why did the applicant hide his homosexual identity completely or partially? Did the applicant ask for any support or advice from other people? What did the applicant do to keep his sexual identity concealed? Did the applicant suffer from hiding his secret? Did he successfully keep his secret?

4.1.4 *Self-perception of homosexual identity*

What does it mean to the applicant to have a homosexual identity? Is his homosexuality limited to the choice of sexual partners and/or certain sexual practices or are there any other dimensions? Is the applicant able to identify particular differences in behaviour, lifestyle (for example, 'externals' such as clothing, hairstyles, etc), in the manner of expression of emotions, the choice of occupation and hobbies?⁴⁷ How important is sexuality for the applicant's social everyday life?

4.1.5 *Homosexual partner in the country of origin*

If the applicant had homosexual partners in his country of origin: how did he come into contact with these people? How did the applicant recognize that his counterpart was gay? How did the relationship develop, how was it 'lived'? Does the (former) partner still live in the applicant's country of origin? Is there still any contact?⁴⁸

4.2 **Situation of homosexuals in the country of origin**

4.2.1 *Knowledge of tracking/ostracism of homosexuals in the country of origin*

What information does the applicant or representatives have concerning the criminal law on homosexuality in his country of origin? Does he know any specific laws and/

⁴⁶ French National Court of Asylum, Judgment of 28 Nov 2014, MW, No 14017851.

⁴⁷ This is not about 'right' answers, but the process for ascertaining the evidence. The CJEU's warning to avoid stereotypical attributions, however, applies also to the asylum applicants themselves: their use of prejudices and stereotypes may speak against their claim to homosexual identity; see German Administrative Court of Munich, Judgment of 29 Nov - M 2 K 13.30275.

⁴⁸ See Norwegian Immigration Appeals Board, Decision of 19 Apr 2011, concerning a homosexual asylum seeker from Iran who did not give a credible explanation on his relationship with other men.

or the severity of penalties? What perceptions does the applicant have of the criminal law and persecution practice? To what extent do these perceptions correspond to the court's knowledge on the legal situation and the government prosecution practice in the country of origin? To what extent do these perceptions correspond with the applicant's behaviour in his country of origin? If the applicant claims to have met with persecution in his country of origin, was this because he acted contrary to his own risk assessment? If so, what does this show?

In relation to risk on return, does the applicant know any possible ways to avoid persecution or to diminish the risk of being detected? If so, would taking those be of fundamental importance to the applicant?

4.2.2 *Knowledge of ways to conduct homosexual identity in the country of origin*

Is there any opportunity to live with a homosexual identity in the country of origin, at least to a certain extent? Was there a 'gay scene' in the country of origin, for example, places that were more or less well-known, where homosexual people could meet in public or private (bars, sports clubs, parks, private homes, etc)? If so, does the applicant know these places?⁴⁹ Did he have any contact with the gay scene? Are there any contact portals, internet forums, chat rooms, etc, for initiating homosexual contact or for general communication?

4.3 Sexual Orientation and the Country of Refuge

4.3.1 *Knowledge*

What information does the applicant have concerning the legal and factual situation of homosexuals in the country of refuge? Is homosexuality, according to the applicant's knowledge, prosecuted?

What information does the applicant have concerning opportunities to safely live out his homosexual identity in the country of refuge? Has he sought knowledge of/contacts with homosexual organizations? Has he sought and/or found information on the existence of a 'gay scene' in the country of refuge and the respective locations? Did the applicant search for information on social networking sites, internet forums, chat rooms, etc, to initiate homosexual contacts or other communication (if so, to what extent does he make use of it)?⁵⁰

4.3.2 *Self-awareness in the country of refuge*

How important is it for the applicant to be able to (regularly) live his sexual identity unpunished and/or in a relatively non-discriminatory manner in the country of refuge? How does he feel about his situation as a homosexual in the country of refuge?⁵¹

4.3.3 *'Disclosure'/acknowledging his identity in the country of refuge*

Does the applicant have homosexual relationships/contacts in the country of refuge? What attempts did he make to get into contact with other gay people? Does the applicant live his homosexual identity more or less openly/publicly or does he hide it

⁴⁹ French National Court of Asylum, *Mme W*, above n 44.

⁵⁰ *MD* (same-sex oriented males: risk) India CG [2014] UKUT 65 (IAC).

⁵¹ *LH and IP* (gay men: risk) (CG) [2015] UKUT 73 (IAC).

continuously when facing his family, his social environment (friends, fellow refugees, work colleagues)? Has his public behaviour changed? Unless he still lives with his former partner, has the applicant found a new partner in the country of refuge? If not, are there valid reasons for that? If so, how did he find him? How is the relationship being shaped (beyond intimate contacts)? Can he give credible details about this partner?⁵²

4.4 'Evidence'

4.4.1 *Psychological assessment*

In Germany, there is apparently one administrative court that made use of a psychiatric report even after the CJEU pronounced its second Homosexuality judgment in 2014. According to the court's reasoning the psychiatric report further enhanced already existing doubts as to whether the plaintiff was actually gay. The report detected contradictions in the sexual history related to sexual preferences, the information given on the plaintiff's sexual development, and other developments and inclinations of the plaintiff.⁵³ As far as Germany is concerned, there are no indications that other administrative courts still make use of sexological, psychological, or medical advice.

During the workshop, a Swedish judge reported that a gay asylum seeker offered to perform sexual acts with his partner during the court session in order to convince the court of his homosexuality. This, of course, was rejected.

4.4.2 *Photographs*

The CJEU has excluded as evidence photographs and video tapes recording intimate acts, even if they are explicitly offered by the applicant himself. Other photographs, for example, those showing demonstrations by homosexual people in the country of origin (for example, on Christopher Street Day) remain permissible, as long as they are sufficiently meaningful.

4.4.3 *Certificates from homosexual organizations*

It is difficult to see how certificates from gay organizations, confirming the applicant's sexual identity, can or should have any significance in court proceedings.

4.4.4 *(New) spouse as a witness*

If the applicant has a (new) partner, the latter may be heard as a witness. Questions may concern the circumstances in which they got to know each other, the development of the relationship, any cohabitation and private activities.⁵⁴ However, intimate questions are excluded.

⁵² Belgium National Asylum Court, Judgment of 22 July 2015, No 149 881 - a relevant decision in a Sierra Leonean case; Norwegian Immigration Appeals Board, Decision of 13 May 2013, concerning a homosexual asylum seeker from Iran who had been open about his sexuality and had experienced various abuses by both family and the authorities.

⁵³ German Administrative Court of Bayreuth, Judgment of 9 Feb 2015 - B 3 K 13.30328.

⁵⁴ The Belgium National Asylum Court dealt in its Judgment of 31 Mar 2014, No 122 007, with the withdrawal of refugee status of a Somalian who had been granted refugee status on the basis of LGBTI. He asked for family reunification with a Somali woman a year later. This was refused as he was in prison in Belgium after being convicted to twelve years imprisonment for attempted murder. The information of his family reunification application, with a woman after a religious marriage, was the basis of the withdrawal of his refugee status. He was questioned and explained it was a marriage arranged by his mother. This was not found credible as he refused to provide any further information and refused to co-operate with the first instance authorities.

5. CONCLUSIONS

It is very difficult to assess the credibility of asylum claims based on inner convictions or on the personal sexual orientation of the individual asylum seeker. However, in practice, there was a surprising consensus between judges from different jurisdictions on the concrete questions to be asked and on the criteria for assessing the credibility of different asylum seekers. As a general rule, the judges much prefer open questions (What importance has Jesus/Mohamed/Buddha for you? How has religion changed your life? How did you become aware of your sexual identity?) and try to prevent questioning on specific bible or koranic stories, or on membership of gay organizations. Questions of knowledge may however be asked by officers of the asylum department. Judges agreed that it is possible to assess credibility without asking questions impairing human dignity. Judges from the different member states also agreed that credibility can be assessed better if the applicant recounts his personal development in detail, as well as the reactions of third persons to his religious conviction or sexual identity. It is important that they come to the conclusion that what the asylum seeker says is authentic and not learned or coached in order to obtain a positive outcome in the proceedings.