Credibility assessment in asylum claims based on sexual orientation and/or gender identity

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Scope of the report

Selected aspects of credibility assessment

- purpose of the credibility assessment
- its place in overall examination of applications
- principles underpinning credibility assessment
- shared duty to substantiate application
- credibility indicators
- benefit of the doubt
- structured approach

Report structure built around these legal concepts
Multi-disciplinary approach

- Requirement in EU law for **individual, objective and impartial** assessment
- Requirement to take into account **applicant’s individual and contextual circumstances**, his/her individual position and personal circumstances, incl. background, gender and age

- Factors span disciplinary fields of neurobiology, psychology, anthropology, sociology, cultural and gender studies
Multi-disciplinary approach

- Awareness of factors that could influence Decision-Maker’s assessment of credibility
  - Background, life experiences, beliefs, gender, SOGI
  - Thinking process
  - Institutional and political environment
  - Assumptions, Expectations, Misconceptions, Bias...

- Factors recognised in state guidance and European Asylum Curriculum (EAC)

- Factors and relevance explained in Chap.3 and intersected and linked with application of various legal concepts throughout report
What is Credibility Assessment?

For the purpose of the report:
– Process of gathering relevant information from applicant
– DM gathering further relevant information by own means
– Examining statements and other evidence in light of all available information to DM
– Determining whether and which of applicant’s statements relating to material elements of claim can be accepted, and then taken into account in WFF/serious harm analysis
Evidence?

- !! NOT search for truth
- !! NOT proof

- Evidence may be oral or documentary:
  - Applicant’s statements + other oral evidence provided by experts, family members and other witnesses
  - Documentary evidence: written, graphic, digital, and visual materials, incl. COI, exhibits - physical objects and bodily scarring, audio and visual recordings

- Starting point: Applicant’s statements !! Statements may be only source of information

- Applicant’s statements and documentary and other evidence must be looked at “in the round”
Evidentiary Matters & LGBTI Claimants

- Applicant’s statements = primary and often only source of evidence, esp. where persecution is at hands of family members or community
- Relevant and specific COI on situation and treatment of LGBTI often lacking:
  - DM to rely on applicant’s statements alone
  - no automatic conclusion lack of credibility
- COI can be especially scarce for L, B, T, I
- !! No automatic conclusions based on COI about one group BUT may serve as indication of applicant’s situation in certain circumstances
A Two-Stage Approach

- Stage 1 – Establishment of facts and circumstances (Art.4 QD)
  - CA First step in decision-making process
- Stage 2 – Examination of WFF/serious harm

- *M.M. (CJEU)*: Art.4 (1) QD “relates only to the first stage […], concerning the determination of the facts and circumstances qua evidence which may substantiate the asylum application.”

- *Beyond Proof* ONLY discusses Stage 1 to support Decision-Makers’ rigour in practice
Shared duty to substantiate

- Applicant’s duty ‘in principle’ to substantiate application

- Art.4(1) EU QD: State duty to cooperate

- **M.M. (CJEU):**
  - Not adversarial process: “the two parties will work together towards a common goal.”
  - Far-reaching obligations to communicate for both State and applicant
Shared duty to substantiate

● Content applicant’s duty:
  – What needs to be substantiated – the material facts
  – Genuine effort
  – Provide all evidence at applicant’s disposal
  – Provide satisfactory explanation for potential adverse credibility findings

● Content Decision-Maker’s duty:
  – Provision of information and guidance
  – Use of appropriate questioning in interview
  – Opportunity to explain potential adverse credibility findings
  – Gathering evidence by own means
**Credo Practical Tools - Checklists**

**CREDO – Credibility Assessment Checklists:**
http://www.refworld.org/docid/51dd2f0d4.html

- Overview of the credibility assessment
- Purpose and principles
- Gathering the facts
  - The Applicant’s duty to substantiate the application
  - The Decision-Maker’s duty to cooperate
- Factors to take into account
  - Factors affecting the applicant
  - Factors affecting the Decision-Maker
- Credibility indicators
- A structured approach to credibility assessment
GATHERING THE FACTS: THE APPLICANT’S DUTIES

Art.4(1) QD states: “Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection”.

Art.4(2) QD lists the relevant elements needed for the substantiation of the application, which are the “Applicant’s statements and all documentation at the Applicant’s disposal”.

Art.4(3)(a) requires that the Applicant make a genuine effort to substantiate the application.

Art.4(5)(b) requires that “a satisfactory explanation regarding any lack of other relevant elements has been given”.

THE APPLICANT’S DUTY ‘IN PRINCIPLE’ TO SUBSTANTIATE THE APPLICATION

Duty to:
1. Make a genuine effort
2. Provide the statements and all documentation at the Applicant’s disposal
3. Substantiate the application as soon as possible
4. Provide a satisfactory explanation regarding any lack of other relevant elements

THE ELEMENTS

- Age
- Gender
- Identity, nationality(ies), ethnic origin
- Country or origin or place of habitual residence
- Family members
- Education
- Social status
- Rural/urban background
- Religion
- Documentation
- Physical/Mental health
- Previous asylum applications
- Reasons for applying for international protection

Evidence may be oral or documentary. It includes the statements of the Applicant and oral evidence provided by experts, family members and other witnesses. Evidence may be documentary, incl. written, graphic, digital, visual materials, COI, exhibits (physical objects, bodily scarings) and audio/visual recordings. Evidence includes anything which asserts, confirms, supports, or bears on the relevant facts in issue.

The Applicant’s duty to substantiate the application does not entail a duty to provide documentary or other evidence in support of every relevant fact presented. The Applicant’s statements constitute evidence and are capable by themselves of substantiating the application. Some asserted facts are not susceptible to supporting documentary or other evidence.

The DM should not have onerous expectations regarding what documentary or other evidence the Applicant should possess and/or be reasonably able to obtain. The assessment of the ‘genuine effort’ should take into account the individual and contextual circumstances of the Applicant, including the means at his/her disposal to obtain documentary or other evidence.

The Applicant may be requested, or wish to provide, additional relevant statements or other evidence after the assessment of the evidence begins. The interpretation of “as soon as possible” needs to be informed by an understanding of the individual and contextual circumstances which may inhibit disclosure of information and affect the possibility to obtain supporting documentary and other evidence. This includes taking into account the circumstances in the country of origin.

The DM should exercise flexibility with regards to time-frames, and should interpret time-frames with reference to the point when the Applicant is informed in a language s/he understands of the duty to substantiate the application. The DM should be aware that the process of presenting and gathering information and other evidence, as well as the assessment of that information, is not linear and may require the need to obtain additional information relating to relevant facts.
GATHERING THE FACTS: THE DECISION-MAKER’S DUTY TO COOPERATE

Article 4(1) of the EU Qualification Directive states: “In cooperation with the Applicant, it is the duty of the Member State to assess the relevant elements of the application.”

The Court of Justice of the European Union (CJEU) has explained that although “it is generally for the applicant to submit all elements needed to substantiate the application, the fact remains that it is the duty of the Member State to cooperate with the applicant at the stage of determining the relevant elements of that application.”

THE DECISION-MAKER’S DUTY TO COOPERATE

Duty to:
1. Provide information and guidance to the applicant
2. Provide guidance through the use of appropriate questioning during the interview
3. Provide the Applicant with an opportunity to explain potential adverse credibility findings
4. Gather evidence bearing on the application by its own means

EXPLANATION

1. DM’s provision of Information and guidance to the applicant
   The Applicant cannot be expected to know that s/he has a duty to substantiate the application, how to discharge this duty, and what facts and type of documentary or other evidence may be relevant. The DM informs the Applicant in a language and manner s/he can understand of what is required to substantiate the application. The DM invites the Applicant to submit evidence that can reasonably be obtained to support the material facts, and informs him/her of the time-frame and the means at an Applicant’s disposal in order to submit all the elements required. This information must be given in time for Applicants to comply with these obligations.

2. DM’s provision of guidance through the use of appropriate questioning during the interview
   The DM guides the Applicant to gather all the relevant information relating to the material facts of the application. The DM uses open, probing and closed questioning in combination to allow the Applicant to substantiate his/her claim. The interviewer is impartial and objective throughout the interview both in verbal and non-verbal communication. Questioning should be sensitive to the individual and contextual circumstances of the Applicant. Respect for the standards of the credibility assessment and the human dignity of the Applicant should be a guiding principle at all times.

3. DM’s provision of an opportunity for the Applicant to explain potential adverse credibility findings
   The Applicant should be afforded an opportunity to address potentially adverse findings up until the decision is made. The DM identifies any apparent inconsistencies, contradictions, discrepancies, omissions, and implausibilities at the interview and puts them all to the Applicant. It may require the DM to offer a further interview or other means for the Applicant to provide an explanation. Where explanations are offered, these need to be considered before a final decision is taken on the application.

4. DM’s gathering of evidence bearing on the application by his/her own means
   Because of the inherent difficulties faced by Applicants to provide documentary and other evidence in support of their statements, the DM gathers evidence and other specific information bearing on the Applicant’s asserted material facts by his/her own means, including where necessary, any evidence that supports these facts.

I. Country of Origin Information (COI) & Other Evidence
   The DM obtains, by his/her own means, general and specific COI & other evidence. COI should be relevant, accurate, objective, impartial, reliable, and time-appropriate. The DM evaluates the Applicant’s statements and other evidence in light of what is generally known about the situation in the country of origin, or place of habitual residence, as well as any specific evidence available to the case. The DM adheres to the principle of objectivity and impartiality, which may require gathering evidence that confirms or supports, and not just refutes, the asserted facts.

II. Principle of Rigorous Scrutiny
   The DM assesses all the materials gathered in substantiation of the application, taking into account the individual and contextual circumstances of the Applicant. The DM also considers material obtained by his/her own means. It is the DM’s duty to dispel any doubts about this information.
Credibility indicators?

- Handbook (para.204) and Art.4(5)(c) QD: Applicant’s statements “must be coherent and plausible, and must not run counter to generally known facts”

In practice:
- Sufficiency of detail and specificity
- Internal consistency of oral and/or written material facts asserted by applicant
- Consistency of applicant’s statements with information provided by family members and/or other witnesses
- Consistency of applicant’s statements with available specific and general information, incl. COI
- Plausibility
- Coherence
Credibility indicators & LGBTI Claimants

- !! Consistency of applicant’s statements with COI
- !! Plausibility
- !! Demeanour - Report notes limitations of demeanour as indicator of credibility
Credibility Assessment – Challenges

● Expected behaviour:
  ● taking active steps to explore sexual identity in country of asylum having claimed to have done so in country of origin;
  ● contacting claimed partner or associate(s) who remain in country of origin

● Applicant may be questioned on general knowledge of:
  – LGBTQI situation in country of asylum
  – Gay bars, LGBTQI rights organisations in country of origin
  – legal provisions re. LGBTQI persons in country of origin

● !! Risk of subjective stereotyping and unfounded assumptions re. human behaviour, interaction and knowledge
Credibility Assessment – Challenges (2)

- Late disclosure
  - Impact of feelings of shame, social stigma, fear of ostracism and reprisals
  - Impact of coming out process
  - !! Negative credibility findings if SOGI not disclosed at earliest opportunity
  - !! Late disclosure triggers higher burden of proof
Credibility Assessment Methods Incompatible with ECHR

- Intrusive questioning on details of sexual practices
- Medical or pseudo-medical testing of SOGI
- Inappropriate documentary or other evidence
Terminology
**Terminology**

- **Sexual orientation:**
  Each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender.

- **Gender identity:**
  Each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body and other expressions of gender, including dress, speech and mannerisms.
Terminology

- YP Principle 3: SOGI = integral to personality, one of the most basic aspects of self-determination, dignity and freedom
- Broad concepts - create space for self-identification
- SO can range along a continuum, incl. exclusive and non-exclusive attraction to same or opposite sex
- GI and its expression take many forms - some identify neither as male nor female, or as both
- SO and GI: determined at an early age for most but may continue to evolve during lifetime.
  - Different people realize at different points in their lives that they are L,G,B,T,I and their sexual and gender expressions may vary with age, and other social and cultural determinants
- Intersection of Gender, SO and GI – integral part of assessment – not conforming to prevailing political, cultural or social norms, and expected gender roles
Establishing the applicant’s SO and/or GI

UNHCR Guidelines 9 para. 62-63
Credibility Assessment

- Exploring elements around applicant’s
  - personal perceptions
  - feelings
  - experiences of difference, stigma and shame
  - Rather than sexual practices

- Developing list of questions in preparation of interview = helpful BUT no magic formula of questions to ask and no set of “right” answers in response
Credibility Assessment

- Useful areas of questioning may include the following:
  - Self-identification
  - Childhood
  - Self-realisation
  - Gender identity
  - Non-conformity
  - Family relationships
  - Romantic and sexual relationships
  - Community relationships
  - Religion
Self-Identification

- Indication of applicant’s SO and/or GI
- Applicant’s social and cultural background may affect how person self-identifies
  - Some LGB may harbour deep shame and/or internalized homophobia, leading them to deny SO and/or adopt verbal and physical behaviours in line with heterosexual norms and roles
  - Applicants from highly intolerant countries may not readily identify as LGBTI
- This alone should not rule out that the applicant could have a claim based on SOGI where other indicators are present
Childhood

- In some cases, before self-identification, feelings of “difference” as children – probing experience of difference
- Core attractions that form the basis for adult SO may emerge between middle childhood and early adolescence BUT some may not experience same-sex attraction until later in life
- Persons may not be aware of full GI until adolescence, early adulthood or later in life - Gender codes in many societies may be less prescriptive or strict during childhood than in (early) adulthood
Self-Realisation

- “Coming out” = LGBTI is coming to terms with own identity and/or individual communicating identity to others
- Questions about both “coming out” or self-realization processes, incl. in country of origin and country of asylum
- Some know they are LGBTI long before they actually pursue relationships with other people, and/or express identity openly
- Some may engage in sexual activity (with same-sex and/or other-sex partners) before assigning clear label to their SO
Gender Identity

- T applicant may not have undergone medical treatment or other steps to help outward appearance match preferred identity = not evidence that person is not transgender
- Some T identify with chosen identity without medical treatment as part of transition, while others do not have access to such treatment
- May be appropriate to ask questions about steps T applicant has taken in his/her transition
Non-Conformity

- LGBTI applicants may have grown up in cultures where SOGI is shameful or taboo.
- May struggle with SOGI at some point in their lives.
- This may move them away from, or place them in opposition to their families, friends, communities and society in general.
- Experiences of disapproval and of “being different” or the “other” may result in feelings of shame, stigmatization or isolation.
Family Relationships

- Applicant may or may not have disclosed SOGI to close family members
- Disclosures may be fraught with difficulty and can lead to violent and abusive reactions by family members
- Applicant may be married, or divorced and/or have children = Not evidence applicant is not LGBTI
- Questions re. reasons for marriage - If applicant able to provide consistent and reasonable explanation for marriage and parenthood, the portion of the testimony should be found credible
Romantic and Sexual Relationships

- Applicant’s relationships with and attraction to partners, or hope to have future relationships = usually part of narrative
- !! Not everyone, esp. young LGBTI, has had romantic or sexual relationships
- If no relationship(s) in country of origin:
  - not necessarily evidence person is not LGBTI
  - Rather indication of harm avoidance
- Questions
  - !! Sensitive questioning re. past and current relationships - involves personal information and applicant may be reluctant to discuss
  - !! No detailed questions about applicant’s sex life: inappropriate + not effective questioning line
- SOGI = person’s identity, whether or not manifested through sexual acts
Community Relationships

- Knowledge of LGBTI contacts, groups and activities in countries of origin and asylum may be useful

- Applicants who were not open about SOGI in country of origin may not have information about LGBTI venues or culture = Not evidence of lack of credibility

- Lack of engagement with other members of LGBTI community in country of asylum or failure to join LGBTI groups = Not necessarily evidence of lack of credibility

- Reasons?
  - Economic factors? geographic location? language and/or cultural barriers? lack of opportunities? personal choices? fear of exposure?
Religion

- Where applicant’s personal identity is connected with his/her faith, religion and/or belief, this may be helpful to examine as an additional narrative about their sexual orientation or gender identity.

- Influence of religion in lives of LGBTI persons can be complex, dynamic, and source of ambivalence.
THANK YOU!