



## UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation

### 1. Introduction

The following comments of the Office of the United Nations High Commissioner for Refugees (hereinafter “UNHCR”) on the practice of phallometry in the asylum procedure of the Czech Republic are made in the context of UNHCR’s supervisory responsibility which is set out under its Statute, Article 35 of the 1951 Convention relating to the Status of Refugees (hereinafter “the 1951 Convention”), and Article II of its 1967 Protocol.<sup>1</sup>

Penile plethysmography (“PPG” or hereinafter “phallometry”), a mechanical technique to measure sexual arousal, has been used for medical and psychological purposes as well as in criminal justice.<sup>2</sup> Phallometry measures changes in genital blood flow in response to sexually explicit visual and audio stimuli using electrodes attached to the genitalia. With men<sup>3</sup>, the most common methods involve the measurement of the circumference of the penis with a mercury ring, or the volume of the penis with an airtight cylinder and inflatable cuff at the base of the penis.

In the Czech Republic, phallometry is used in criminal law (to assess sexual paraphilia), and in civil cases (for instance, in cases concerning the establishment of parental responsibility over children after a divorce). In asylum cases, this sexology examination has been used in a number of instances.<sup>4</sup> The procedure may be requested by the Czech national asylum authorities (hereinafter “DAMP”), in cases

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<sup>1</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at:

<http://www.unhcr.org/refworld/docid/3be01b964.html>, and UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

<sup>2</sup> This diagnostic test was developed in the early fifties in Czechoslovakia to prevent military conscripts from claiming they were homosexuals to avoid military service. See further, Organization for Refuge, Asylum and Migration (ORAM), *Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum and Refugee Status Proceedings*, February 2011, available at: <http://www.oraminternational.org/Publications/index.html>.

<sup>3</sup> The corresponding procedure for women is “vaginal photoplethysmography” or “VPG”.

<sup>4</sup> Fundamental Rights Agency, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity – 2010 Update*, available at: <http://www.fra.europa.eu/fraWebsite/attachments/FRA-LGBT-report-update-corr2010.pdf>.

where persecution based on sexual orientation is alleged, to ascertain the sexual orientation and assess the credibility of the claim. Using provisions under the Code of Administrative Procedure, DAMP may seek, upon the written consent of the applicant, an opinion from an authorized expert on sexology and psychology, also registered as a judicial expert in this field, to provide a diagnostic on the sexual orientation of the applicant.

This note describes UNHCR's concerns over the use of phallometry in refugee status determination procedures and the compatibility with international human rights standards.

## **2. Determining the credibility of asylum claims, including claims based on persecution due to sexual orientation**

Determination of refugee status requires an evaluation of the applicant's statements against relevant, up-to-date and reliable country of origin information.<sup>5</sup> It requires an assessment of the credibility of the claim and validity of any evidence.<sup>6</sup> It is hardly possible for an applicant to "prove" every part of her/his case. Therefore, if the claim appears credible, the applicant should be given the benefit of the doubt, unless there are good reasons to the contrary.<sup>7</sup> Normally, an interview should suffice to bring the applicant's story to light, including his/her sexual orientation.

A person's sexual orientation is not a matter of fact that can be easily identified through evidence. Sexual orientation and gender identity are broad concepts which create space for self-identification. Sexual orientation is far more than sexual conduct or a sexual act and rather is fundamental to a person's identity; who they are, how they live in society and how they express who they are.<sup>8</sup> Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.<sup>9</sup>

As a start, self-identification should be taken as an indication of the applicant's sexual orientation and gender identity. It is important to bear in mind that the social and

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<sup>5</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, (hereinafter the "UNHCR Handbook"), paras. 37, 41 and 204, available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.

<sup>6</sup> UNHCR Handbook, para. 195.

<sup>7</sup> UNHCR Handbook, paras. 196 and 203.

<sup>8</sup> See, for instance, *S395/2002*, para. 81; *HJ (Iran) and HT (Cameroon)* and UNHCR's submission in the case: *Nasser Mustapha Karouni v. Alberto Gonzales, Attorney General*, No. 02-72651, U.S. Court of Appeals for the Ninth Circuit, 7 March 2005, available at: <http://www.unhcr.org/refworld/docid/4721b5c32.html>, at III[6]; *Lawrence, et al. v. Texas*, U.S. Supreme Court, 26 June 2003, available at: <http://www.unhcr.org/refworld/docid/3f21381d4.html>, which found that "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.", p. 6.

<sup>9</sup> See e.g. *Pretty v. United Kingdom*, Application No. 2346/02, Council of Europe: European Court of Human Rights, 29 April 2002, available at: <http://cmiskp.echr.int/tpk197/view.asp?item=1&portal=hbkm&action=html&highlight=2346/02&sessionid=19423599&skin=hudoc-en>; and International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at: <http://www.unhcr.org/refworld/docid/48244e602.html>, (hereinafter the "Yogyakarta Principles") Principle 3, the right to recognition before the law.

cultural background of the applicant may affect how the person identifies. Non-judgmental open-ended and specific questions, may allow the applicant to explain his/her claim in a non-confrontational manner. Questions around the applicant's personal perceptions, feelings and experiences are more likely to help the decision-maker ascertain the applicant's sexual orientation and gender identity, rather than a sole focus on any specific events themselves.

It must be acknowledged that an applicant for refugee status is normally in a particularly vulnerable situation.<sup>10</sup> Detailed and intrusive questions about the applicant's sex life or intrusive testing ought to be avoided, as this will often have the effect of making him/her feel embarrassed, ashamed, intimidated, harassed, and may result in the applicant refusing to respond to questions. Decision-makers need to be qualified personnel having the necessary knowledge and experience.<sup>11</sup> They need to bear in mind that sexual orientation and gender identity is about a person's identity, not merely manifestations of sexual acts.<sup>12</sup>

Determining the credibility of the claim, including of the applicant's sexual orientation, should be done through the refugee status determination interview, the use of country of origin information on the situation of sexual minorities in the country of origin (including on the criminalization of same sex relationships), the assistance of NGOs working with homosexuals in the country of origin and in the host country. Investing in the training of staff in the examination of asylum claims based on sexual orientation will also assist the credibility assessment. The use of practices, such as phallometry, are therefore unnecessary.

### **3. Human Rights Standards and the Practice of Phallometry: the prohibition on degrading treatment and the right to privacy**

The practice of phallometry is further constrained by human rights standards, including the right to respect for private life – or privacy - and the prohibition on degrading treatment.

#### **3.1. Prohibition of Degrading Treatment**

In UNHCR's view, the practice of phallometry in asylum proceedings is in principle incompatible with the right not to be subjected to degrading treatment. Various legal instruments prohibit ill treatment, including degrading treatment.<sup>13</sup> Such treatment is prohibited in absolute terms, allowing no exceptions, limitations or derogations.<sup>14</sup>

The European Court of Human Rights has found that for treatment to be degrading, it must attain a minimum level of severity which will depend on all the circumstances of

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<sup>10</sup> UNHCR Handbook, para. 190.

<sup>11</sup> UNHCR Handbook, para. 190.

<sup>12</sup> Overly invasive questioning may infringe on the right to privacy, which include privacy of information about one's own body and specific sexual practices. Yogyakarta Principles, Principle 6.

<sup>13</sup> This includes Article 3 of the European Convention on Human Rights, Article 7 of the International Covenant on Civil and Political Rights, and Article 4 of the EU Charter on Fundamental Rights.

<sup>14</sup> See e.g. Article 15 ECHR. Also, *Labzov v. Russia*, 62208/00, Council of Europe: European Court of Human Rights, 16 June 2005, available at: <http://www.unhcr.org/refworld/docid/42d3edaf4.html>, and *Jalloh v. Germany*, 54810/00, Council of Europe: European Court of Human Rights, 11 July 2006, para. 68, available at: <http://www.coe.int/t/t/hudoc/doc/echr/jalloh%20v.%20Germany.pdf>.

the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.<sup>15</sup> Treatment will in particular be considered “degrading” when it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.<sup>16</sup> Further, it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others.<sup>17</sup> The absence of any purposeful humiliation or debasement cannot conclusively rule out a finding of a violation of Article 3.<sup>18</sup>

Regardless of whether any purposeful humiliation or debasement can be made out in general or in an individual case, an element of humiliation and debasement can be found in the mere examination, as it involves the exposure of the most private parts of the body to intrusive observation and inspection for extended periods of time. It also examines deeply held intimate sexual feelings and may as such inflict feelings of humiliation. Phallometry also imposes sexually explicit material on applicants, which some may view as obscene, shocking or degrading.

Research has found that phallometry is an intrusive examination, interfering with the person’s dignity, psychological and physical integrity and with the core of his intimacy, likely to raise feelings of shame and suffering, fear, anxiety and distress, despite the lack of inflicted physical pain.<sup>19</sup> In addition, the examination in general, and the visual and audio stimuli in particular, are based on stereotypes regarding homosexuals’ sexuality and sexual life, and assumptions of what should trigger or not sexual arousal.

According to the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, “any form of medical or psychological treatment, procedure, testing, or [confinement] to a medical facility, based on sexual orientation or gender identity” is prohibited.<sup>20</sup> The intrusiveness of the examination and its inconsistency with human rights standards suggest that the use of phallometry within asylum procedures falls within the category of harmful medical practices. Of note to this issue are also the reports that have cast scientific doubts regarding the reliability of the examination. Sexologists have questioned its ability to produce a definite and viable conclusion on the individual’s sexual orientation.<sup>21</sup>

In UNHCR’s view, this use of phallometry is particularly inappropriate for asylum-seekers, given that they are in a particularly vulnerable position vis-à-vis the authorities. Bearing in mind that their countries of origin may oppress sexual minorities or even criminalise same-sex relations, they may be reluctant to narrate their experiences in front of the asylum authorities and may be particularly affected by this kind of exposure.

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<sup>15</sup> *Ibid.*, *Labzov v. Russia*.

<sup>16</sup> *Ibid.*, *Jalloh v. Germany*.

<sup>17</sup> *Tyrer v. The United Kingdom*, 5856/72, Council of Europe: European Court of Human Rights, 15 March 1978, para. 32, available at: <http://www.unhcr.org/refworld/docid/402a2cae4.html>.

<sup>18</sup> *Jalloh v. Germany*.

<sup>19</sup> See, ORAM, *Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum and Refugee Status Proceedings*.

<sup>20</sup> Yogyakarta Principles, Principle 18.

<sup>21</sup> ORAM, *Testing Sexual Orientation: A Scientific and Legal Analysis of Plethysmography in Asylum and Refugee Status Proceedings*.

UNHCR thus considers the use of phallometry to determine the credibility of asylum claims based on a well-founded fear of persecution due to sexual orientation to be humiliating and to create feelings of fear, anguish and inferiority, reaching the minimum level of severity to constitute degrading treatment within the meaning of international human rights law.

### 3.2. Right to Privacy

In UNHCR's view, there are also reasonable grounds to consider that the practice of phallometry interferes with the right to respect for private life. The notion of "privacy" or "private life" encompasses a person's sexual life or orientation and gender identity.<sup>22</sup> Regarding discrimination based on sexual orientation, the European Court of Human Rights has severely limited the margin of appreciation of states, stressing that differences in treatment related to this ground require particularly weighty reasons to be legitimate under the Convention.<sup>23</sup> As a consequence, a medical examination, introduced by a public authority in the context of an asylum procedure, of this intrusive nature and which applies only in claims based on sexual orientation could represent interference with the applicant's private life, even if performed with his/her informed consent.

In general, the right to privacy can, however, be limited when it is in accordance with the law and pursued for a legitimate aim. In the case of Article 8 of the European Convention on Human Rights, this includes interests of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others and is necessary in a democratic society for the foresaid aim.<sup>24</sup>

#### a. "In accordance with the law"

In order to be permissible, any interference with the right to privacy must firstly be in accordance with the law. It is well established case-law that

*"the words 'in accordance with the law' require the impugned measure both to have some basis in domestic law and to be compatible with the rule of law,(...). The law must thus be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual -- if need be with*

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<sup>22</sup> *X, Y and Z v. The United Kingdom*, 75/1995/581/667, Council of Europe: European Court of Human Rights, 22 April 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b69010.html>; *Goodwin v. United Kingdom*, Application no. 28957/95, Council of Europe: European Court of Human Rights, 11 July 2002, available at: <http://www.unhcr.org/refworld/docid/4dad9f762.html>; and *Dudgeon v. United Kingdom*, Appl. No. 7525/76, Council of Europe: European Court of Human Rights, 22 October 1981, available at: <http://www.unhcr.org/refworld/docid/47fdaf7d.html>.

<sup>23</sup> *Karner v. Austria*, Application No. 40016/98, Council of Europe: European Court of Human Rights, 24 July 2003, para. 37, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=karner%20%7C%20austria&sessionid=19423599&skin=hudoc-en>; and *Schalk and Kopf v. Austria*, Application no. 30141/04, Council of Europe: European Court of Human Rights, 24 June 2010, para. 97, available at: <http://www.unhcr.org/refworld/docid/4c29fa712.html>.

<sup>24</sup> *Dudgeon v. United Kingdom*. Also, *X, Y and Z v. the United Kingdom*, and *Goodwin v. the United Kingdom*.

*appropriate advice -- to regulate his conduct. For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.”<sup>25</sup>*

DAMP has argued that the practice of phallometry is done according to the provisions in Section 51 and Section 56 of the Czech Code of Administrative Procedure (hereinafter the “Code”) No. 500/2004 Coll. The Administrative Code applies whenever the Asylum Act No. 325/1999 Coll. is silent on the required rule for a specific area of the asylum procedure. Section 51 para. 1 of the Code provides

*“Every means of proof which are convenient to ascertain the position of matter and which are not obtained or produced contrary to legislation may be used in evidence procedure. These shall be, in particular, documents, examinations, witness testimonies and expert reports.”*

Section 56 of the Code further deals with the evidence of an expert opinion

*“where a decision depends upon the consideration of facts, which require specialist knowledge not possessed by officials, and where it is impossible to obtain a specialist consideration of facts from another administrative body, the respective administrative body shall, by resolution, appoint a sworn expert. The resolution shall be modified only to the expert. The participant in the proceedings shall be informed, in a proper manner, of the intention of the administrative body to appoint, or of the appointment of, the expert. The administrative body shall request the expert to produce his report in writing and submit it within the time-limit determined by the administrative body. The administrative body may also subject the expert to interrogation.”*

While the Code of Administrative Procedure permits the appointment of an expert in asylum proceedings, it is the adjudicator in the asylum procedure who has the primary responsibility for determining the claim to asylum. Despite the national law permitting this type of expert evidence, it must nonetheless be compatible with human rights, including the right to privacy or degrading treatment (as described above).

The adjudicator should be qualified to properly assess the claim, including having the necessary knowledge and experience as well as understanding of the applicant’s particular difficulties and needs.<sup>26</sup> If not, expertise from others can be used which should be in accordance with human rights standards and include the necessary procedural safeguards for obtaining such expertise.

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<sup>25</sup> *Gillian and Quinton v. the United Kingdom*, Application No. 4158/05, Council of Europe: European Court of Human Rights, 12 January 2010, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=4158/05&sessionid=19423599&skin=hudoc-en>.

<sup>26</sup> UNHCR Handbook, para. 190.

In addition, while the Czech authorities maintain that the practice is voluntary, and that consent on the part of the asylum-seeker is necessary, with so much at stake (protection from persecution), the asylum-seeker is under tremendous pressure to validate his/her claim. The principle of “informed consent” therefore is not observed since a) applicants are required to agree to undergo the examination without having acquired sufficient knowledge and understanding of all elements and implications of the sexology examination, and, most importantly, b) they are subject to pressure as a failure to take the examination could have a negative effect on the final decision. In such circumstances, the criteria for informed consent cannot be said to be fulfilled.

- b. “Necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”

According to the European Court of Human Rights,

*“a measure interfering with rights guaranteed by Article 8 § 1 of the Convention can be regarded as being ‘necessary in a democratic society’ if it has been taken in order to respond to a pressing social need and if the means employed are proportionate to the aims pursued. The national authorities enjoy a certain margin of appreciation in this matter. The Court’s task consists in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual’s rights protected by the Convention on the one hand and the community’s interests on the other.”*<sup>27</sup>

In UNHCR’s view, interference in the form of phallometry in the asylum context would not be “necessary in a democratic society” for any of the listed reasons. Regarding the requirement that the interference pursue one of the listed legitimate aims, none seem specifically relevant. However, it is possible to argue that the aim sought by the authorities in bringing in an expert opinion in the asylum procedure is legitimate, namely, to ascertain the credibility of the asylum claim. However, in UNHCR’s view, bringing in an expert opinion should not be equated with phallometry. Moreover, there are alternative, less intrusive, means of determining the credibility of the claim and/or the applicant’s sexual orientation. Phallometry is, therefore, a disproportionate response.

Additionally, while finding out whether the claim is credible might correspond to a “*pressing social need*”, i.e. the need to avoid abuse of the asylum system through false claims, national authorities in this instance may not be striking a fair balance between the public interest and the individual’s rights. As previously stated, the phallometry examination may by its nature be considered as interfering with the

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<sup>27</sup> See *Slivenko v. Latvia*, Application No.48321/99, Council of Europe: European Court of Human Rights, 9 October 2003, available at: [http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=8%20the%20question%20whether%20an%20interference%20was%20%20%u201Cnecessary%20in%20a%20democratic%20society%u201D"%20requires&sessionId=57079551&skin=hudoc-en](http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=8%20the%20question%20whether%20an%20interference%20was%20%20%u201Cnecessary%20in%20a%20democratic%20society%u201D).

applicant's private life and as degrading treatment; and there are other, less intrusive ways of achieving the state objective.

In light of the above, the practice of phallometry in the course of the asylum procedure does not sufficiently safeguard the individual's right to privacy and fails to strike a fair balance between the latter and the community's interest. As a result, UNHCR considers that the use of the phallometry test may be at variance with the right to respect the applicant's private life.

#### **4. Conclusion**

UNHCR considers the use of phallometry by the Czech asylum authorities to assess the credibility of asylum claims based on persecution due to sexual orientation intrusive and disproportionate. An applicant's sexual orientation should be assessed based on his or her account who s/he is, how s/he lives in society and how s/he expresses who s/he is.

Phallometry cannot be considered a sufficiently reliable resource to prove or disprove an applicant's sexuality in the context of asylum claims. Moreover, phallometry is at variance with the applicant's dignity and privacy and may amount to degrading treatment as prohibited by international legal standards.

UNHCR argues that the above considerations on the practice of phallometry would also extend to use of vaginal photoplethysmography or "VPG" in asylum claims against lesbians asylum-seekers claiming persecution for sexual orientation, and in other cases on sexual orientation.

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Bureau for Europe/DIP  
April 2011