

APPLYING QUALIFICATION DIRECTIVE - 2011/95/UE. CJEU'S DECISION C-473/16

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Abstract: *Credibility of the asylum applicant's assertions within any member state of the European Union with regard to his or her possible persecution on grounds of sexual orientation, following return, is extremely important for the assessment of asylum admission. Nevertheless, in the case C-473/16, the Court of Justice of the European Union (CJEU) states that performing a psychological expertise for assessment of an applicant's sexual orientation does not comply with the Directive, as concerns the Eu Charter of Fundamental Rights.*

Key words: *asylum, ECHR, CJEU, deportation, private life.*

1. Introduction

Migration to Europe is an old and extensive phenomenon which has recently increased in speed and scale. Although migrants are not particularly mentioned in the European Convention on Human Rights, they are entitled to human rights protection as every human being is.

2. Legal Context

The starting point for considering asylum in Europe is the Geneva Convention of 1951 and the Additional Protocol from 1967, which are now comprehensively incorporated into EU law through the Qualification Directive (2011/95/UE).

The *non-deportation* principle represents the key element of refugee protection, meaning that, essentially, refugees must not be returned to a country where they have a reason to fear oppression.

Under the EU Charter of Fundamental Rights, Article 18 guarantees the right to asylum and this certifies compliance with the *non-deportation* principle. Article 19 of the Charter stipulates that no one may be removed, evacuated or sent by force to a state where they would face death penalty, persecution or other inhuman or humiliating treatment or abuse. The Explanation to the Charter states that Article 19 (2) assimilates the appropriate case law of the ECHR with regards to Article 3 of the European Convention on Human Rights.

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Concerning the above-mentioned approaches, as provided by EU law, any formal expulsion under the Return Directive (2008/115/EC) or transfer of an individual to another EU Member State under the Dublin Regulation must be in compliance with the right to asylum and the principle of *non-deportation*.

Within the ECHR, Articles 2 and 3 of the ECHR entirely forbid any return of a person who would come up against a real risk of a treatment contrary to any specified provisions. This approach differs from the risk of persecution based on one of the ground established by Geneva Convention.

European Convention on Human Rights, through Article 8, guarantees the right for "private and family life". The term "private life" is too general and a thorough definition could not be evenly found, as it encloses the physical and psychological integrity of an individual, the right to personal development and the right to build and strengthen relationships with other human beings and with the outside world.

Beside the potential "family life", the removal of a settled migrant might represent an interference with the individual's respect for "private life", which may or may not be justified, based on the facts of the case.

A particular case is *Omojudi v. the U.K.*, where the ECHR restates that article 8 of the Convention also preserves the right to build and develop relationships with other human beings and could also incorporates regards of an individual' social identity. It must be admitted that the whole social connections between migrants and the community in which they live makes part of the concept of "private life" as provided by Article 8, without considering the existence of a "family life".

3. Case C-473/16

In April 2015, F., a Nigerian nationality individual, submitted an application for asylum to the Hungarian authorities. Upholding the application, during the first interview directed by the Office, he claimed that he had an authentic fear of being persecuted in his country of origin on the grounds that he is homosexual.

Considering the decision dated October, 1st 2015, the Office rejected F's application for asylum. Although it assessed that F's statements were not essentially inconsistent, the Office concluded that F. lacked credibility taking into account an expertise prepared by a psychologist. That expert's report encompassed an examination of personality and several personality tests, namely the 'Draw-A-Person-In-The-Rain' test and the Rorschach and Szondi tests. The expertise's conclusion was that no feasible confirmation could be given regarding F's assertion to his sexual orientation.

F. brought legal charges against the Office's decision before the referring court, particularly arguing that the psychological tests he had undergone severely prejudiced his fundamental rights and did not enable proper assessment of the trustworthiness of his sexual orientation.

The referring court stated that the applicant did not explain during the main proceedings how those tests injured the fundamental rights guaranteed by the Charter. It also noticed that the applicant declared that he had not undergone any physical examination and had not been asked to view pornographic images or videos.

Successive measure of inquiry requested by the referring court was provided by the Igazságügyi Szakértői és Kutató Intézet (Institute of forensic experts and investigators, Hungary). The Institute made an expert report, according to which the methods used during the procedure for examining the asylum application do not harm human dignity and are relevant for pointing out an individual's sexual orientation as well as, where applicable, for enforcing the validity of a person's assertions in that regard. The referring court confirmed that it had considered itself bound by the conclusions of that expertise.

Taking into account the circumstances, the Szegedi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szeged, Hungary) decided to reside the proceedings and to submit the following questions to the Court for a preliminary ruling:

(1) In the light of Article 1 of the Charter, must Article 4 of Directive [2011/95] be interpreted as not excluding a psychologist's opinion based on personality tests from being sought and evaluated, in relation to [Lesbian, Gay, Bisexual, Transsexual and Intersexed ("LGBTI")] applicants for asylum, when, in order to formulate that opinion, no questions are asked about the sexual habits of the applicant for asylum and that applicant is not subject to a physical examination?

(2) If the expert opinion referred to in question 1 may not be used as proof, must Article 4 of Directive [2011/95] be interpreted, in the light of Article 1 of the [Charter], as meaning that when the asylum application is based on persecution on grounds of sexual orientation, neither the national administrative authorities or the courts have any possibility of examining, by expert methods, the truthfulness of the claims of the applicant for asylum, irrespective of the particular features of those methods?'

4. Consideration of the Questions Referred

Within its assessment, as regard with the second question, the Court stated the followings:

Sexual orientation is a characteristic which is capable of proving an applicant's membership of a particular social group, within the meaning of Article 2(d) of Directive 2011/95, where the group of persons whose members share the same sexual orientation is perceived by the surrounding society as being different (see, to that effect, judgment of 7 November 2013, *X and Others*, C- 199/12 to C- 201/12, EU:C:2013:720, paragraphs 46 and 47), as is confirmed, moreover, by Article 10(1)(d) of that directive.

Accordingly, it is not always necessary, in order to formally judge an application for international protection based on a fear of persecution on grounds of sexual orientation, to assess the credibility of the applicant's sexual orientation in the context of the assessment of the facts and circumstances laid down in Article 4 of Directive 2011/95.

That said, it must be noted that Article 4(3) of Directive 2011/95 lists the factors which the competent authorities must take into account during the individual assessment of an application for international protection and that Article 4(5) of that directive specifies the conditions under which a Member State, applying the principle that it is the duty of the applicant to give evidence of his application, must consider that certain aspects of the applicant's statements do not require confirmation. Those conditions include, in

particular, the fact that the applicant's statements are found to be coherent and credible and do not run counter to available specific and general information relevant to his case, as well as the fact that the applicant's general credibility has been established

In that regard, it must be held that those provisions do not restrict the means available to the authorities and, specifically, do not exclude the use of expert reports in the context of the process of assessment of the facts and circumstances in order to determine more accurately the applicant's actual need for international protection.

Nevertheless, should recourse be had, in the context of an expert's report, the procedures must be consistent with other relevant EU law provisions, and especially with the fundamental rights guaranteed by the Charter, such as the right to respect for human dignity, stipulated in Article 1 of the Charter, and the right to respect for private and family life guaranteed by Article 7 thereof (see, to that effect, judgment of 2 December 2014, *A and Others*, C- 148/13 to C- 150/13, EU:C:2014:2406, paragraph 53).

Even though Article 4 of Directive 2011/95 is relevant to all applications for international protection, whatever the ground for persecution relied on in support of those applications, the competent authorities must adapt their methods of assessing statements and documentary or other evidence with regard to the specific characteristics of each category of application for international protection, in adherence of the rights guaranteed by the Charter (see, to that effect, judgment of 2 December 2014, *A and Others*, C- 148/13 to C- 150/13, EU:C:2014:2406, paragraph 54).

It cannot be ruled out that, in the explicit circumstances of the assessment of assertions made by an applicant for international protection relating to his or her sexual orientation, certain forms of expertise may prove effective for the assessment of the facts and context and may be prepared without prejudicing the fundamental rights of that applicant.

Subsequently, the determining authority cannot base its decision solely on the conclusions of an expert's report and that authority cannot, a fortiori, be bound by those conclusions when assessing the statements made by an applicant relating to his or her sexual orientation.

In the light of those considerations, the answer to the second question is that Article 4 of Directive 2011/95 must be interpreted as meaning that it does not restrain the authority responsible for examining applications for international protection or the court or tribunal where an action has been brought against a decision of that authority, from ordering that an expert's report to be obtained in the context of the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant, provided that the procedures for such a report are consistent with the fundamental rights guaranteed by the Charter and that the determining authority and courts or tribunals do not base their decision exclusively on the conclusions of the expert's report and that they are not bound by those conclusions when assessing the applicant's statements relating to his or her sexual orientation.

4.1. The First Question

The right to respect for private and family life, as stipulated in Article 7 of the Charter, particularly, is among the fundamental rights with specific relevance in the context of the assessment of the statements made by an applicant for international protection relating to his or her sexual orientation (see, to that effect, judgment of 2 December 2014, *A and Others*, C- 148/13 to C- 150/13, EU:C:2014:2406, paragraph 64).

Article 4 of Directive 2011/95 must, accordingly, be interpreted in the light of Article 7 of the Charter (see, by analogy, judgment of 21 April 2016, *Khachab*, C- 558/14, EU:C:2016:285, paragraph 28).

In this regard, it should be noted that a psychologist's expert report, such as that at issue in the main proceedings, is authorized by the determining authority in the circumstances of the examination of the application for international protection submitted by a concerned individual.

So that the report is prepared in a context where the person called upon to undergo predictive personality tests faces a situation in which his or her future is closely linked to the decision that the authority will take on his or her application for international protection and in which a possible disapproval to undergo these tests may constitute an important factor on which the authority will rely for the purpose of determining whether that individual has adequately substantiated his application.

Therefore, even if the performance of the psychological tests on which an expert's report grounds, such as that at issue in the main proceedings, is formally depending on the consent of the concerned individual, it must be considered that that consent is not undoubtedly given freely, being *de facto* required under the pressure of the circumstances in which applicants for international protection find themselves (see, to that effect, judgment of 2 December 2014, *A and Others*, C- 148/13 to C- 150/13, EU:C:2014:2406, paragraph 66).

Within this situation, the development and use of a psychologist's expert report such as that at issue in the main proceedings represents an interference with that person's right to respect for private life.

In this context, although interference with an applicant's private life can be justified by the search for information justifying actual need for international protection to be assessed, it is for the determining authority to assess, under the court's supervision, whether a psychologist's expert report which it intends to authorize or wishes to take into account is appropriate and significant in order to achieve that objective.

It should be noted that the suitability of an expert's report such as that at issue in the main proceedings may be accepted only if it is based on adequately reliable methods and principles in the light of the standards recognised by the international scientific community. Also, worth-mentioning that, although it is not for the Court to rule on this issue, which is, as an assessment of the facts, a matter within the national court's jurisdiction, the trustworthiness of such an expertise has been resolutely contested by the French and Netherlands Governments as well as by the Commission.

In any event, the impact of an expert's report such as that at issue in the main proceedings on the applicant's private life seems superfluous to the aim pursued, since

the significance of the interference with the right to privacy cannot be regarded as proportionate to the benefit that it may eventually represent for the assessment of the facts and circumstances set out in Article 4 of Directive 2011/95.

In the first place, the interference with the private life of the applicant for international protection arising from the preparation and use of such an expertise is, in view of its nature and subject matter, particularly important.

Such an expert's report is based especially on the fact that the person undergoes a series of psychological tests intended to establish an essential element of his or her identity concerning personal boundary in that it relates to intimate aspects of his or her life (see, to that effect, judgments of 7 November 2013, *X and Others*, C- 199/12 to C- 201/12, EU:C:2013:720, paragraph 46, and of 2 December 2014, *A and Others*, C- 148/13 to C- 150/13, EU:C:2014:2406, paragraphs 52 and 69).

It is also relevant to consider, in order to assess the seriousness of the interference arising from the preparation and use of a psychologist's expert report, such as that at issue in the main proceedings, the Principle 18 of the Yogyakarta principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, to which the French and Netherlands Governments have referred. They state, *inter alia*, that no person may be forced to undergo any form of psychological test on account of his or her sexual orientation or gender identity.

When those elements are looked at together, it is likely that the seriousness of the interference with private life required by the preparation and use of an expert's report, such as that at issue in the main proceedings, exceeds the importance of an assessment of the statements of the applicant for international protection relating to a fear of persecution on grounds of his or her sexual orientation or recourse to a psychologist's expert report having a purpose other than that of establishing the applicant's sexual orientation.

Secondly, it must be borne in mind that an expert's report such as that at issue in the main proceedings falls within the scope of the assessment of the facts and circumstances laid down in Article 4 of Directive 2011/95.

In this context, such an expertise cannot be considered essential for the purpose of confirming the statements of an applicant for international protection relating to his sexual orientation in order to formally judge on an application for international protection based on a fear of persecution on grounds of that orientation.

On the one hand, the carrying out of a personal interview conducted by the staff of the determining authority is such as to contribute to the assessment of those statements, inasmuch as both Article 13(3)(a) of Directive 2005/85 and Article 15(3)(a) of Directive 2013/32 provide that the Member States must ensure that the person who conducts the interview is competent to take account of the private circumstances surrounding the application, those circumstances covering especially the applicant's sexual orientation.

More generally, it seems from Article 4(1) of Directive 2013/32 that the Member States are under an obligation to ensure that the determining authority is provided with the appropriate means, including sufficient competent personnel, to carry out specific tasks. It follows that the personnel of that authority must in particular have appropriate

skills to assess applications for international protection which are based on a fear of persecution on grounds of sexual orientation.

Also, provisions from Article 4(5) of Directive 2011/95 states that, where the Member States apply the principle that it is the duty of the applicant to justify his application, the applicant's statements concerning his sexual orientation which are not substantiated by documentary evidence or evidence of another kind do not need confirmation when the conditions set out in that provision are fulfilled: those conditions consider, *inter alia*, the consistency and reliability of those statements and do not make any mention of the preparation or use of an expert's report.

Furthermore, even assuming that an expert's report based on personality tests, such as that at issue in the main proceedings, may contribute to identifying with a degree of reliability the sexual orientation of the person, it follows from the statements of the referring court that the conclusions of such an expert's report are only capable of giving an indication of that sexual orientation. Accordingly, those conclusions are, in any event, approximate in nature and are therefore of only limited interest for the purpose of assessing the statements of an applicant for international protection, specifically where, as in the case at issue in the main proceedings, those statements are not contradictory.

Therefore, it is not necessary, in order to answer the first question, to interpret Article 4 of Directive 2011/95 also in the light of Article 1 of the Charter.

Considering previous explanations, the answer to the first question is that Article 4 of Directive 2011/95, read in the light of Article 7 of the Charter, must be interpreted as deterring the preparation and use, in order to assess the truthfulness of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist's expert report, such as that at issue in the main proceedings, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant.

On those grounds, the Court (Third Chamber) hereby ruled:

"Article 4 of Directive 2011/95/EC of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, must be interpreted as meaning that it does not preclude the authority responsible for examining applications for international protection, or, where an action has been brought against a decision of that authority, the courts or tribunals seized, from ordering that an expert's report be obtained in the context of the assessment of the facts and circumstances relating to the declared sexual orientation of an applicant, provided that the procedures for such a report are consistent with the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union, that that authority and those courts or tribunals do not base their decision solely on the conclusions of the expert's report and that they are not bound by those conclusions when assessing the applicant's statements relating to his sexual orientation.

Article 4 of Directive 2011/95, read in the light of Article 7 of the Charter of Fundamental Rights, must be interpreted as precluding the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection

concerning his sexual orientation, of a psychologist's expert report, such as that at issue in the main proceedings, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant."

5. Conclusion

With regards to the above-described decision, it must be noticed that the jurisprudence of national instances judging current asylum applications does not comply with European Directive's conditions for granting refugee statute, where preparation and use of an expertise is required for determining the sexual orientation of the asylum applicant. In these circumstances, the instances must refer to other means to evaluate the reliability of applicant's statements.

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***ECHR, *Omojudi v. the United Kingdom*, No. 1820/08, 24 November 2009, para. 37

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***CJEU, *X and Others*, C- 199/12 to C- 201/12, EU:C:2013:720, paragraphs 46 and 47

***CJEU, *Khachab*, C- 558/14, EU:C:2016:285, paragraph 28