



### *Confirming sexual orientation?*

#### *Findings of the Court of Justice of the European Union*

In reference to the **applicability of the Charter** – the answer would be yes, Article 7.

The Court noted that the statements made by an applicant for international protection relating to his sexual orientation constitute merely the starting point in the process of assessment of the facts and circumstances envisaged under Article 4 of Directive 2011/95. It recalled that sexual orientation is a characteristic which is capable of proving an applicant's membership of a particular social group, where the group of persons whose members share the same sexual orientation is perceived by the surrounding society as being different (in line with the X, Y and Z judgement). It further stated that it is immaterial whether the applicant actually possess the characteristic linked to the membership of a particular social group which attracts the persecution, provided that such a characteristic is attributed to him by the actor of persecution. Therefore, the Court noted that it is not always necessary 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.

However, it cannot be ruled out that **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 may prove useful. However, the use of expert reports must be consistent with other relevant EU law provisions, and in particular with the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union** (right to respect for human dignity, enshrined in Article 1 of the Charter, and the right to respect for private and family life guaranteed by Article 7). These reports may prove useful for the assessment of the facts and circumstances and may be prepared without prejudicing the fundamental rights of that applicant.

The examination of the application for international protection must include an individual assessment of that application, taking into account all relevant facts as they relate to the country of origin of the applicant at the time of taking a decision on the application, the relevant statements and documentation presented by him as well as his individual position and personal circumstances. However, the **determining authority cannot base its decision solely on the conclusions of an expert's report and that authority must not be bound by those conclusions when assessing the statements made by an applicant relating to his sexual orientation.**

Furthermore, the Court noted that it should be noted that a psychologist's expert report, such as that at issue in the main proceedings, is commissioned by the determining authority in the context of the examination of the application for international protection submitted by the person concerned. It follows that that report is prepared in a context where the person called upon to undergo projective personality tests is in a situation in which his future is closely linked to the decision that that authority will take on his application for international protection and in which a



possible refusal to undergo these tests is liable to constitute an important factor on which the authority will rely for the purpose of determining whether that person has sufficiently substantiated his application.

Therefore, even if the performance of the psychological tests on which an expert's report, such as that at issue in the main proceedings, is based is formally conditional upon the consent of the person concerned, it must be considered that that consent is not necessarily given freely, being de facto imposed under the pressure of the circumstances in which applicants for international protection find themselves. Hence, the Court 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 sufficiently reliable methods and principles in the light of the standards recognised by the international scientific community, which is for the national court's jurisdiction to ascertain.

The Court concluded that it is apparent that the seriousness of the interference with private life entailed by the preparation and use of an expert's report, such as that at issue in the main proceedings, exceeds that entailed by an assessment of the statements of the applicant for international protection relating to a fear of persecution on grounds of his sexual orientation or establishing the applicant's sexual orientation. The Court took into account Principle 18 of the Yogyakarta principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, which states, inter alia, that no person may be forced to undergo any form of psychological test on account of his sexual orientation or gender identity.

Finally, the Court stated that such an expert's report 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 adjudicate on an application for international protection based on a fear of persecution on grounds of that orientation. The Court recalled that Member States must ensure that the person who conducts the interview is competent to take account of the personal circumstances surrounding the application, including an applicant's sexual orientation. The personnel involved must also have appropriate skills to assess applications based on a fear of persecution on grounds of sexual orientation.

Finally, the CJEU found that Article 4 of the recast QD, read in the light of Article 7 of the Charter of Fundamental Rights of the European Union, **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.**

## *Follow-Up Question*

- In your national context, would it be possible to use such expert report and would you as a judge be bound by the them?

*For a critical assessment of the case you can check the following article:*

- *Check X, Y and Z judgment in relation to social groups*

See: *F v Bevándorlási és Állampolgársági Hivatal*, CJEU - Case C-473/16, Judgment of 25.01.2018.