



## *Confirming sexual orientation?*

### *Fact of the case*

Person F., a Nigerian national applied for asylum in Hungary in April 2015 claiming that he feared persecution in his country of origin on account of his homosexuality. In October 2015, his application was rejected on the basis of an expert's report prepared by a psychologist that concluded that it was not possible to confirm the applicant's sexual orientation. That expert's report entailed an exploratory examination, an examination of personality and several personality tests, namely the 'Draw-A-Person-In-The-Rain' test and the Rorschach and Szondi tests. F brought an action before the Administrative and Labour Court of Szeged contending that the psychological tests he had undergone prejudiced his fundamental rights and did not make it possible to assess the plausibility of his sexual orientation.

The Administrative and Labour Court of Szeged asked the opinion of the Hungarian Institute of Forensic Experts and Investigators, which found the methods used by the report to be appropriate and not to prejudice human dignity. Even though the referring court considered itself bound by the conclusions of the expert's report, it decided to stay the proceedings and seek the CJEU's assistance on the matter.

### *Legal Framework*

#### **International law**

##### **European Convention for the Protection of Human Rights and Fundamental Freedoms**

Article 8(1)

'Everyone has the right to respect for his private and family life, his home and his correspondence.'

#### **Relevant European Law**

##### **Directive 2005/85/EC**

##### **Article 2(e)**

'For the purposes of this Directive:

...

(e) "determining authority" means any quasi-judicial or administrative body in a Member State responsible for examining applications for asylum and competent to take decisions at first instance in such cases, subject to Annex I'.



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Article 4(1) of that directive provides:

‘Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of applications in accordance with this Directive ...’

Article 8(2)

‘Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. ...’

Article 13(3)

‘Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end Member States shall:

(a) ensure that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant’s cultural origin or vulnerability, insofar as it is possible to do so; ...’

Article 39(1) and (2)

‘1. Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for asylum ...

...

2. Member States shall provide for time limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1.’

## **Directive 2011/95**

Recital 30

‘It is equally necessary to introduce a common concept of the persecution ground “membership of a particular social group”. For the purposes of defining a particular social group, issues arising from an applicant’s gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant’s well-founded fear of persecution.’

Article 4

‘1. 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. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in paragraph 1 consist of the applicant’s statements and all the documentation at the applicant’s disposal regarding the applicant’s age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

- (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;
- (b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;
- (c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;
- (d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country;
- (e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship.

...

5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following 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;
- (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 10

'1. Member States shall take the following elements into account when assessing the reasons for persecution:

...

- (d) a group shall be considered to form a particular social group where in particular:
  - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
  - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. ...

...

2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.'

## Directive 2013/32/EU

Article 4(1)

'Member States shall designate for all procedures a determining authority which will be responsible for an appropriate examination of applications in accordance with this Directive. Member States shall ensure that such authority is provided with appropriate means, including sufficient competent personnel, to carry out its tasks in accordance with this Directive.'

Article 10(3)

'Member States shall ensure that decisions by the determining authority on applications for international protection are taken after an appropriate examination. To that end, Member States shall ensure that:

(d) the personnel examining applications and taking decisions have the possibility to seek advice, whenever necessary, from experts on particular issues, such as medical, cultural, religious, child-related or gender issues.'

Article 15(3)

'Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end Member States shall:

(a) ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability;

Article 46(1) and (4)

'1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:

(i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status,

4. Member States shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy pursuant to paragraph 1. ...

## *Questions*

1. Does the Charter of Fundamental Rights apply in this case, and if yes which Articles?
2. In your opinion, can the authority responsible for examining applications for international protection order and expert's report in the context of assessment of the facts and circumstances relating to the declared sexual orientation of an applicant? Can such reports bound the responsible authorities?