



## *Fear of persecution?*

### *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.

Article 10(1) of the Directive gives a definition of a particular social group, membership of which may give rise to a genuine fear of persecution. According to that definition, a group is regarded as a ‘particular social group’ where, inter alia, two conditions are met. First, 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. Second, that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.

The second subparagraph of Article 10(1)(d) of the QD states that 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. On this basis, **the Court decided that a person’s sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it. As to the second, the court saw the condition as met by virtue of the existence of criminal laws, which specifically target homosexuals.**

**The court concludes that the existence of criminal laws, ... which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group.**

The referring court asked whether Article 9(1)(a) of the Directive, read together with Article 9(2)(c) thereof, must be interpreted as meaning that the mere fact that homosexual acts are criminalised and accompanying that criminalisation with a term of imprisonment is an act of persecution. Article 9(1)(a) of the QD states that the relevant acts must be ‘sufficiently serious’ by their nature or repetition as to constitute a ‘severe violation of basic human rights’. The Court concludes from this that not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness. Therefore, **the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution.** The Court says it is for the national authorities to undertake an examination of all the relevant facts concerning the country of origin including its laws and regulations, particularly looking into if the term of imprisonment provided for by such legislation is applied in practice.



Finally, the referring court asked essentially whether Article 10(1)(d) of the Directive, read together with Article 2(c) thereof, must be interpreted as meaning that it is unreasonable to expect that, in order to avoid persecution, an asylum seeker must conceal his homosexuality in his country of origin or exercise restraint in expressing it. **The court ruled that an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution.**

The Court notes that it is important to state that requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it. Furthermore, the fact that he could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account.

### *Follow-Up Question*

- In your national context, how would you deal with such situations? Have you ever had cases where you had to assess if foreign nationals form a social group?