



Verifying sexual orientation of asylum seekers?

Findings of the Court of Justice of the European Union

In reference to the **applicability of the Charter** – the answer would be yes, Article 1 and Article 7.

The Court notes that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive 2004/83 (the Qualification Directive - recitals 3, 16 and 17 in the preamble to Directive 2004/83) and the content thereof were adopted to guide the competent authorities of the Member States in the application of that Convention on the basis of common concepts and criteria. It highlights that Directive 2004/83 must, therefore, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU as well as the Charter.

- **in terms of methods of assessing the credibility of a declared sexual orientation and the limits to these methods?**

Rejecting the submission by the applicants that assessments of sexual orientation should be based solely on the applicants' declarations, the CJEU note that Article 4 of Directive 2004/83 read in light of the Charter places certain limits on authorities when assessing the facts and circumstances concerning the applicants declared sexual orientation. The Court highlights that whilst Article 4 of the Qualification Directive is applicable to all claims of international protection, it is necessary that the competent authorities modify their methods of assessing evidence so as to comply with requirements of the Charter. This is particularly pertinent for the two stage assessment procedure advocated in C-277/11 whereby after the establishment of factual circumstances a legal appraisal of the evidence must take place.

With regards to the present proceedings the Court surmises that the assessment of asylum applications "solely on the basis of stereotyped notions" does not satisfy the individualised assessment needed to comply with Article 4(3) of the QD and Article 13(3)(a) of the Procedures Directive. It is important to note that the Court when referring to "stereotyped notions" seems only to include questions relating to the applicant's knowledge of local NGOs advocating LGBTI rights, thus restricting itself solely to the facts of the referred cases. The Court notes that while questions based on stereotyped notions may be a useful element at the disposal of competent authorities for the purposes of the assessment, the assessment of applications for the grant of refugee status on the basis solely of stereotyped



Co-funded by the Justice Programme
of the European Union



Ludwig Boltzmann Institute
Human Rights



CENTRE FOR
EUROPEAN
CONSTITUTIONAL
LAW
Transnational and European Justice Programme



INPRIS



National Research Council of Italy
ISGI
Institute for International Legal Studies



REPUBLIC OF AUSTRIA
FEDERAL MINISTRY OF JUSTICE



REPUBLIKA HRVATSKA
Pučki pravobranitelji

notions associated with homosexuals does not satisfy the requirements of the provisions as it does not allow those authorities to take account of the individual situation and personal circumstances of the applicant for asylum concerned.

The Court continues its assessment by noting that questions by authorities relating to the details of the applicant's sexual practices are contrary to the respect for private and family life enshrined in the Charter and that the submission of tests or evidence to demonstrate homosexuality (such as films of their intimate acts) have no probative value and would infringe Article 1 (human dignity) of the Charter. In this manner the Court states that the conclusion would still be the same if the applicant voluntarily produced such evidence. The CJEU states that this may also lead to inciting other applicants to submit similar evidence.

Finally, the Court holds that not declaring homosexuality at the outset to the relevant authorities can not result in a conclusion that the individual's declaration lacks credibility. In this regard, the Court notes that even though it is clear from Article 4(1) of Directive 2004/83 that the applicant should submit 'as soon as possible' all elements needed to substantiate their application for international protection, it is incumbent on the national authorities to cooperate with the applicant when assessing the relevant elements of the case and to have regard to the sensitive nature of the claim. In this manner the applicant's reluctance to detail aspects of his/her personal life should not be taken as a lack of credibility. Instead, national authorities are obliged, in light of the Qualification and Procedures Directives, to conduct the interview taking account of the personal or general circumstances surrounding the application, in particular, the vulnerability of the applicant, and to carry out an individual assessment of the application, taking account of the individual position and personal circumstances of each applicant.

Follow-Up Question

- In your national context, how do you deal with such situations?

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

- *The Article claims that the judgments provide only guidance on prohibited steps in determining an asylum claim based on sexual identity, but does not provide a guidance on how to prove asylum claim – what would be your view on this?*

<http://europeanlawblog.eu/2014/12/12/c-14813-c-14913-and-c-15013-a-b-and-c-v-staatssecretaris-van-veiligheid-en-justitie-stop-filming-and-start-listening-a-judicial-black-list-for-gay-asylum-claims/>

See: *A, B, C vs Staatssecretaris van Veiligheid en Justitie*, Joined cases C-148/13 to C-150/13, Judgment of 02.12.2014.