



## Reports of Cases

Case C-473/16

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v

**Bevándorlási és Állampolgársági Hivatal**

(Request for a preliminary ruling from the Szegedi Közigazgatási és Munkaügyi Bíróság)

(Reference for a preliminary ruling — Charter of Fundamental Rights of the European Union — Article 7 — Respect for private and family life — Directive 2011/95/EU — Standards for granting refugee status or subsidiary protection status — Fear of persecution on grounds of sexual orientation — Article 4 — Assessment of facts and circumstances — Recourse to an expert's report — Psychological tests)

Summary — Judgment of the Court (Third Chamber), 25 January 2018

1. *Border controls, asylum and immigration — Asylum policy — Refugee status or subsidiary protection status — Directive 2011/95 — Procedure for examining an application for international protection — Assessment of facts and circumstances — Fear of persecution on grounds of sexual orientation — No obligation to consider that sexual orientation is an established fact solely on the basis of the applicant's declarations — Consequences*

*(European Parliament and Council Directive 2011/95, Art. 4)*

2. *Border controls, asylum and immigration — Asylum policy — Refugee status or subsidiary protection status — Directive 2011/95 — Procedure for examining an application for international protection — Assessment of facts and circumstances — Fear of persecution on grounds of sexual orientation — No need for a systematic assessment of the credibility of the sexual orientation*

*(European Parliament and Council Directive 2011/95, Arts 2(d), 4 and 10(1)(d) and (2))*

3. *Border controls, asylum and immigration — Asylum policy — Refugee status or subsidiary protection status — Directive 2011/95 — Procedure for examining an application for international protection — Assessment of facts and circumstances — Fear of persecution on grounds of sexual orientation — Assessment by means of an expert's report expertise — Lawfulness — Conditions*

*(European Parliament and Council Directive 2011/95, Art. 4)*

4. *Border controls, asylum and immigration — Asylum policy — Refugee status or subsidiary protection status — Directive 2011/95 — Procedure for examining an application for international protection — Assessment of facts and circumstances — Fear of persecution on*

*grounds of sexual orientation — Assessment by means of a psychologist's expert report based on projective personality tests — Breach of the right to respect for private and family life — Not permissible*

*(Charter of Fundamental Rights of the European Union, Art. 7; European Parliament and Council Directive 2011/95, Art. (4))*

1. It must be noted that the statements made by an applicant for international protection relating to his sexual orientation constitute, having regard to the particular context in which applications for international protection are made, merely the starting point in the process of assessment of the facts and circumstances envisaged under Article 4 of Directive 2011/95 (see, by analogy, judgment of 2 December 2014, *A and Others*, C-148/13 to C-150/13, EU:C:2014:2406, paragraph 49). It follows that, although it is for the applicant for international protection to identify his sexual orientation, which is an aspect of his personal identity, applications for international protection on the basis of a fear of persecution on grounds of that sexual orientation may, in the same way as applications based on other grounds for persecution, be subject to the assessment process provided for in Article 4 of that directive (see, by analogy, judgment of 2 December 2014, *A and Others*, C-148/13 to C-150/13, EU:C:2014:2406, paragraph 52).

(see paras 28, 29)

2. In that regard, it must be recalled that 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. It follows nevertheless from Article 10(2) of that directive that, when the Member States assess whether an applicant has a well-founded fear of being persecuted, it is immaterial whether he actually possesses 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.

Accordingly, it is not always necessary, in order to adjudicate on 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.

(see paras 30-32)

3. 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 seised, 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.

It cannot be ruled out that, in the specific context of the assessment of statements made by an applicant for international protection relating to his sexual orientation, certain forms of expert reports may prove useful for the assessment of the facts and circumstances and may be prepared without prejudicing the fundamental rights of that applicant. However, it should be noted, first, that it follows both from Article 4(1) and Article 8(2) of Directive 2005/85 and from Article 4(1) and Article 10(3) of Directive 2013/32 that the determining authority is responsible for carrying out an appropriate examination of applications, at the end of which it will take a decision regarding them. It is, therefore, for such authorities alone to carry out, acting under the supervision of the courts, the assessment of the facts and circumstances laid down in Article 4 of Directive 2011/95 (see, to that effect, judgment of 26 February 2015, *Shepherd*, C-472/13, EU:C:2015:117, paragraph 40). It follows that the determining authority cannot base its decision solely on the conclusions of an expert's report and that that authority cannot, a fortiori, be bound by those conclusions when assessing the statements made by an applicant relating to his sexual orientation.

As regards the possibility, for a court or tribunal seised of an action against a decision of the determining authority rejecting an application for international protection, of ordering that an expert's report be obtained, it should be added that both Article 39(1) of Directive 2005/85 and Article 46(1) of Directive 2013/32 provide that the applicant is to have the right to an effective remedy before a court or tribunal against that decision but do not specifically delimit the measures of inquiry that that court is entitled to order. Although those provisions do not therefore preclude a court or tribunal from ordering that an expert report be obtained for the purpose of an effective review of the decision of the determining authority, the fact remains that, in the light of (i) the specific role assigned to the courts and tribunals by Article 39 of Directive 2005/85 and Article 46 of Directive 2013/32 and (ii) the considerations relating to Article 4 of Directive 2011/95 set out in paragraph 41 of the present judgment, the court or tribunal seised cannot base its decision solely on the conclusions of an expert's report and cannot, a fortiori, be bound by the assessment of the applicant's statements relating to his sexual orientation set out in those conclusions.

(see paras 37, 40, 42, 43, 45, 46, operative part 1)

4. 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.

In this regard, 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. 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 (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). In those circumstances, as the Advocate General noted in point 43 of his Opinion, the preparation and use of a psychologist's expert report such as that at issue in the main proceedings constitutes an interference with that person's right to respect for his private life.

In this context, although interference with an applicant's private life can be justified by the search for information enabling his 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 commission or wishes to take into account is appropriate and necessary in order to achieve that objective. In this respect, 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 sufficiently

reliable methods and principles in the light of the standards recognised by the international scientific community. 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 disproportionate to the aim pursued, since the seriousness of the interference with the right to privacy it constitutes cannot be regarded as proportionate to the benefit that it may possibly represent for the assessment of the facts and circumstances set out in Article 4 of Directive 2011/95.

(See paras 51, 53, 54, 57-59, 71, operative part 2)