Tell me what you see and I'll tell you if you're gay: Analysing the Advocate General's Opinion in Case C-473/16, F v Bevándorlási és Állampolgársági Hivatal

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Hungary in the spotlight again

Hungary has been in the spotlight for all the wrong reasons for quite a while. From legislation targeting 'foreign-operating universities' to border walls to keep refugees from entering Hungarian territory, the populist right-wing government of Viktor Orban has been sparking outrage in many sectors of Hungarian society, and the European institutions. The most recent reason for alarm again relates to migration and refugees, an area of widespread criticism of Hungarian authorities. Building on extremely hostile policies towards refugees that have been admonished by both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), Hungarian authorities now intend to resort to highly dubious means to assess the applications of individuals claiming asylum on grounds related to their sexual orientation. It was already public knowledge that this category of claimants was subjected to poor treatment by the Hungarian authorities, but recent events suggest that the authorities have reached a new low.

The most recent incident came to the public knowledge through a reference for a preliminary ruling to the CJEU by the Hungarian Administrative and Labour Court Szeged on 29 August 2016 in the Case C-473/16, *F v Bevándorlási és Menekültügyi Hivatal* (the 'F case'). The case concerns a Nigerian national who had submitted an application for international protection in Hungary based on his sexual orientation, and dealt with the use of projective personality tests and other means for 'proving' sexuality. The Hungarian domestic court posed two questions to the CJEU, essentially asking whether the application of Article 4 of Council Directive 2004/83/EC, in the light of Article 1 of the Charter of Fundamental Rights of the European Union (EU Charter), precludes forensic psychologists' expert opinions based on projective personality tests from being used in asylum adjudication relating to LGBTI (lesbian, gay, bisexual, trans and intersex) claimants. Should that possibility be precluded, the referring Court then asks whether the asylum authorities are prevented from examining by expert methods the truthfulness of these claims.

The questions thus refer to the interpretation of particular provisions of Council Directive 2004/83/EC. Yet, the material facts under analysis in the case referred to the CJEU occurred in April 2015, so the law that applies to the facts and that needs to be interpreted in this case is the successor to Council Directive 2004/83/EC – Directive 2011/95/EU of 13 December 2011 (the recast Qualification Directive) – in force since 22 December 2013.

Following the hearing on 13 July 2017, Advocate General Wahl delivered his Opinion on 5 October 2017. The focus of our analysis will be on this Opinion, but first it is important to recall the case law the CJEU has already produced on sexual orientation and gender identity (SOGI) claims of asylum. Indeed, this is the third case the CJEU has dealt with on SOGI-related asylum claims, and we expect this third case to better reflect international standards than the previous two, particularly in the light of the EU Charter and UNHCR Guideline No. 9.

Third time lucky?

The CJEU dealt with Sexual Orientation and Gender Identity (SOGI) asylum claims for the first

time in the joined cases C-199/12 to C-201/12, X, Y and Z v. Minister voor Immigratie en Asiel. Despite some shortcomings, this decision expressly recognised that persecution on the basis of sexual orientation can give rise to refugee status under the 'particular social group' ground of the 1951 Refugee Convention. It was however one year after *X, Y and Z* that the CJEU was called to provide guidance on evidentiary standards in SOGI asylum claims in another case concerning three gay men seeking asylum on the basis of their sexual orientation, who were not deemed credible (Joined Cases C-148/13 to C-150/13, A, B and C v Staatssecretaris van Veiligheid en Justitie, 2 December 2014). The CJEU was asked whether the Charter, in particular Articles 3 (right to the integrity of the person) and 7 (respect for private and family life), as well as Article 4 recast Qualification Directive posed certain limits on national authorities when verifying an asylum seeker's sexual orientation.

This judgment is important as it establishes some core principles on credibility and evidence assessment; however, the Court could have offered more positive guidance in that regard. At the outset, the CJEU found that although the applicants' mere declarations are not sufficient *per se* to establish their sexual orientation, authorities are bound by certain limits when assessing a SOGI asylum application. Notably, such assessment must be conducted on an individual basis and must not be based merely on stereotypes, which is a mistake too often committed by decision-makers in SOGI cases. Nonetheless, the CJEU did not completely overrule the use of stereotyped notions, but considered them a useful element in the overall assessment. As for evidence, the Court precluded the recourse to detailed questions on sexual practices and to 'tests to establish applicants' sexual orientation in light of Articles 1 (human dignity) and 7 of the EU Charter. It also banned the production in evidence of films showing the applicant's engagement in same-sex activities. Finally, the CJEU also affirmed that late disclosure of an applicant's sexual orientation as the main reason for the asylum claim, does not *per se* impinge on the applicant's credibility.

In a nutshell, the Court gave a 'black list' of what authorities cannot do, but it did not provide any clear guidelines of what, they should do to assess SOGI asylum claims. Notably, the Court made it clear that there is no room for evidence that, by its nature, infringes human dignity and which does not have any probative value. This prohibition, the Court argued, cannot be circumvented even if it is the applicant's choice to submit such evidence, as this would incite other applicants to do the same, creating a *de facto* requirement. While the Court's judgement in *X, Y and Z* fully establishes the possibility of recognising SOGI applicants as refugees, the Court's findings in *A, B and C* constitute the backdrop against which the *F* case will ultimately be decided.

'Tell me what do you see… is it gay enough?'

The *F* case has put back on the CJEU's agenda the evidentiary standards to be applied in SOGI asylum cases. Several contentious practices have been criticised throughout the years in this context, from the use of stereotyped questioning to authorities resorting to practices of no medical or psychological value such as phallometry, whereby reactions of gay male asylum claimants to watching pornography were supposed to indicate their sexual preferences. Despite such practices having been highly criticised both by the UNHCR and NGOs, the *F* case makes it clear that they persist in different ways.

The precise tests in question in this case are the 'Draw-a-Person-in-the-Rain' test, Rorschach test and Szondi test. Such projective, drawing tests attempt to elicit information that 'patients' may struggle or prefer not to verbalise otherwise, helping psychologists to form an opinion about individuals' personality, emotional well-being and mental health. These tools are generally contentious, even if they go on being used by psychologists routinely in most countries. Their use to determine one's sexuality is fundamentally abhorrent, thus simply not considered by the relevant literature or reputable professionals.

AG Wahl recognises how scientifically discredited such tests are in relation to sexual orientation

matters, citing an American Psychological Association 2009 report. The question of whether one is gay or not is, itself, poorly framed, as one's sexual orientation can lie somewhere along a complex continuum and change overtime. Attempts to determine one's sexuality objectively have invariably been held to be 'junk science', for relying on baseless stereotypes. As Weber has rightly stated in the context of the recent debates around using Artificial Intelligence (AI) to determine one's sexuality on the basis of one's face, such pseudo-scientific efforts are attempts to impose coherence on individuals and fail to recognise that the 'homosexual' and the 'heterosexual' are historically constructed figures. Crucially, Weber worries that such type of AI 'junk science' will be used in the West in the context of SOGI asylum.

The tests in question in the *F* case assume that individuals with a particular sexual orientation have certain personality traits, which not only is patently false, but also runs against the prohibition on stereotypical decision-making established by *A, B and C*. At the oral hearing in this case, the Hungarian authorities tried to justify the use of these tests with the *A, B and C* judgment. The argument ran as follows: as the judgment precluded questions about claimants' sexual orientation, the authorities had to resort to tests. The problem with this assertion is that it is based on a false premise: the judgment in *A, B and C* did not prevent authorities from asking any questions about claimants' sexual orientation, but simply precluded certain questions and practices that clearly breach the dignity of the individual.

Although both the Commission and the Hungarian authorities suggested in the oral hearing that these tests should be allowed because they only constitute an element of the overall assessment of the asylum claim and may lead to the confirmation of the credibility of the applicant, the exact opposite happened in this case. Indeed, the test was used by the Hungarian authorities to discredit the applicant's account and deny him international protection (par. 10-11 of the Opinion). In other words, a 'junk science' approach to decision-making was used to prevent the claimant from being recognised as refugee. Unfortunately, AG Wahl's Opinion fell far short from precluding such tests.

The Advocate General's Opinion

In his Opinion, AG Wahl rightly frames this case as one that is very clearly about using psychologists' expert opinions in assessing the credibility of claimants. The provision at the centre of this debate – as framed by the referring questions – is Article 4(5) of the recast Qualification Directive, which discharges applicants from the need to prove their asylum claims through documentary or other evidence when a range of conditions is fulfilled, including the applicants having made a genuine effort to substantiate their claims, having offered a satisfactory explanation for the lack of further evidence, and having provided an overall credible account. Based on this provision, the applicant used the oral hearing to highlight that there was no need for any further tests in his case, because there were no inconsistencies. The Hungarian authorities counter-argued that there were contradictions in the applicant's statement (without specifying exactly which contradictions), so it was necessary to probe its veracity.

Another EU law instrument turns out to play a more important role in this Opinion, namely Directive 2013/32/EU (the recast Asylum Procedures Directive). Indeed, the Qualification Directive establishes the general rules to follow in terms of evidentiary standards in asylum cases, in particular Article 4, but it is Article 10(3) of the Asylum Procedures Directive that determines that Member States' asylum authorities should reach individual, objective and impartial decisions, and that they have the possibility to seek expert advice to assist in their decision-making. On this basis, AG Wahl proceeds by considering the benefits of involving psychologists in the adjudication process (para. 33-34), but is also very clear about the impossibility of a psychologist determining an applicant's sexual orientation based on personality tests (par. 36). Nonetheless, AG Wahl goes on to analyse under which circumstances such tests can nevertheless be admitted, thus effectively accepting them.

AG Wahl tries to soften the blow of admitting the tests in question by stating that consent is required, and that the tests need to be carried out in a way that is compatible with the rights to dignity and to respect for private and family life (Articles 1 and 7 of the EU Charter and Article 8 of the European Convention on Human Rights). Although AG Wahl expressly acknowledges the difficulties in withholding consent in the context of an asylum claim, he does not seem to find it problematic that – in his own words and in a likely violation of the applicant's rights under EU law – the 'applicant's refusal [to consent to the tests] may have certain consequences that the applicant himself has to bear' (par. 45). In other words, refusing a test with no probative value that could violate applicants' rights may lead to the refusal of their asylum claim – a highly disproportional and unfair outcome, we would argue.

The Opinion goes on to further qualify the admissibility of such tests by questioning the probative value of examinations based on dubious science or used in the wrong context (par. 48). And yet, AG Wahl also offers domestic courts a wide margin of appreciation in this regard, by stating that it is not for the CJEU to assess such tests. Having seen how the tests in question had been used in relation to a gay male applicant to deny him asylum, it is patently unwise to offer domestic authorities such leeway in asylum cases relating to sexual orientation. The fact that AG Wahl refers to the right to an effective remedy (Article 47 of the EU Charter) and to the freedom of domestic courts to depart from the 'findings of the expert' (par. 50) may be an implicit suggestion that the domestic court in this case should differ from the experts' opinions and feel free to grant asylum to the applicant. Yet, that is clearly insufficient to appease the legitimate concerns of asylum seekers in similar situations, since they will be at the mercy of (administrative and judicial) authorities who may happily offer probative value to 'junk science' detrimental to their asylum claims.

AG Wahl's Opinion accepting in principle the use of projective personality tests in cases involving asylum claims on the basis of sexual orientation is deeply disconcerting. On the one hand, he clearly doubts the usefulness or appropriateness of such tests (even referring to Principle 18 of the Yogyakarta Principles protecting individuals from medical abuses based on sexual orientation or gender identity), and he alerts domestic courts to the possibility of disregarding them even when they are carried out. On the other hand, he does recommend that such tests should be allowed (even if with a range of supposedly helpful caveats), thus abandoning claimants to the mercy of potentially unsympathetic domestic authorities. Equally disconcerting is the fact that nowhere in the AG's Opinion is there a reference to the principle of the benefit of the doubt: although it may not be strictly necessary to refer to this principle in this context, its absence is striking for leaving out of the equation an essential element of the evidentiary standards in refugee law (para. 203-204 of the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status). It is submitted that the focus of the Opinion should have been on the line of questioning that should have been used, such as per UNHCR Guideline No. 9.

he Opinion in this case could have much more simply asserted, as AG Sharpston did in her Opinion in *A, B and C* (largely followed by the CJEU), that 'medical [or psychological, we would add] tests cannot be used for the purpose of establishing an applicant's credibility, as they infringe Articles 3 and 7 of the Charter' (par. 61), and that applicants' consent is both essentially irrelevant and questionable (par. 67). Instead, AG Wahl offers poor guidance to the CJEU.

'Projecting' this Opinion onto the CJEU's Judgment

In the *F* case, the CJEU will be called upon to interpret EU law with regard to the evidentiary assessment of SOGI asylum cases in a more targeted way than it did in *A, B and C*. Predicting a Court's verdict is something one should try to avoid; however, the relevance of the issues at stake in the *F* case allows us to contemplate some potential scenarios. First, the CJEU has the option to build on and expand its approach in *A, B and C* and therefore construe its whole reasoning on the basis of respect for the EU Charter, particularly Article 1. In this sense, psychological personality

tests to evaluate sexual orientation would be precluded, as the prohibition set forth by the CJEU in *A, B and C* is arguably not limited to physical examination, but extends more generally to all '"tests" with a view to establishing […] homosexuality'. Secondly, should the CJEU follow the AG's opinion, it would need to carefully construe how it is possible to ensure that psychologists' expert opinions are truly limited to an evaluation on the general credibility, and not just a loophole to pave the way to unreliable psychological assessments of sexual orientation.

Further, the Court should make sure that any such expert opinions on credibility are not used as 'lie detectors' based on preconceived assumptions – otherwise we could well resort to Harry Potter's veritaserum for all asylum claims. Moreover, the CJEU would need to explain how genuine consent can be sought, since the option of taking tests that are not compulsory but seen as useful for credibility assessment would put pressure on other applicants to take the tests, thus undermining the validity of any consent obtained. Finally, should the CJEU agree with the use of projective personality tests in SOGI asylum claims, it would compromise the progressive steps previously taken in this area – a slippery slope we strongly hope the Court will not enter. The CJEU has already spelled out, in *A, B and C*, some of the crucial elements for deciding the present case; now, it is a matter of entrenching those elements, so as not to leave room for ambiguity or for the use of evidentiary means that are in breach of asylum seekers' dignity and fundamental rights.

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