



INSIGHT

ASSESSING CREDIBILITY OF ASYLUM SEEKERS' STATEMENTS ON SEXUAL ORIENTATION: LIGHTS AND SHADOWS OF THE *F* JUDGMENT

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ABSTRACT: This *Insight* examines the judgment delivered by the Court of Justice on 25 January 2018 in the case *F* (C-473/16). This case concerns a very sensitive topic, as it relates to the admissibility of an expert's report and projective personality tests to assess the existence of a specific ground upon which international protection can be asked, namely sexual orientation. The Court lays down important criteria in a constant attempt to ensure the respect of the applicant's fundamental rights. The *F* judgement is likely to give an impetus to a new legal approach on the matter, even if some points of the Court's legal reasoning are not fully convincing.

KEYWORDS: asylum – homosexuality – credibility – expert's report – personality tests – Art. 4 of Directive 2011/95.

I. INTRODUCTION

In recent years, many concerns were raised regarding the ways in which certain States evaluate international protection applications lodged by people who are gay, lesbian, transgender or intersex ("LGBTI") and claim a risk of persecution in the country of origin due to sexual orientation or gender identity. The assessment of these applications touches upon very sensitive aspects of the applicant's intimate realm.

Tensions between States' powers and international protection seekers' fundamental rights tend to increase when the scope of the assessment is to verify the existence (or the lack) of the particular sexual orientation or gender identity declared by the individual.¹ That happens especially because the international protection seekers are al-

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¹ For an exhaustive large-scale legal perspective on the topic, see E. CONNELLY, *Queer, Beyond a Reasonable Doubt: Refugee Experiences of "Passing" into "Membership of a Particular Social Group"*, in *UCL Migration Research Unit Working Papers*, no. 3, 2014; N. LAVIOLETTE, *Sexual Orientation, Gender Identity and the Refugee Determination Process*, Report prepared for the Immigration and Refugee Board of

most never in a position to prove sexual orientation or gender identity, since they can just make personal statements on the point.

As to the EU, the applicable EU secondary law in general terms does not openly forbid Member States to task national authorities with the performance of exams on the applicant's sexual orientation and gender identity; moreover, Member States enjoy some leeway when dealing with credibility issues. Accordingly, no uniform practices have so far emerged across Europe, as the means employed by national determining authorities vary quite a lot from State to State; not by chance, cases of excessive interferences with LGBTI applicants' fundamental rights have been detected in several Member States.²

Within this fragmented scenario, it is even harder to envisage the limits that the staff appointed to this assessment is compelled to respect in the interest of LGBTI applicants. For sure, useful indications at the EU level could be offered by the Court of Justice, but its case law on this topic is poor (the most relevant judgments are *A, B and C*³ and, at least indirectly, *X, Y and Z*⁴) and has left most of the doubts unresolved. Therefore, a core question still remains: how far can national determining authorities go to figure out if the international protection seeker is, or is truly perceived to be, a member of a social group constituted in terms of sexual orientation or gender identity?

Bearing in mind the above, the Court's judgment of 25 January 2018 on the *F* case⁵ could mark a turning point, as it tackles some aspects of the procedures followed in a Member State, namely Hungary, with a view to reaching a decision on the homosexuality of an asylum seeker. Consequently, the very purpose of the present work is to examine and comment on the findings emerging from the *F* judgment. To do so, section II illustrates the facts of the case and explores the norms and questions at issue. In section III the conclusions of the Court are discussed. Section IV concludes.

Canada, 2013; Refugee Studies Centre, *Sexual Orientation in Refugee Status Determination*, Working Paper Series no. 73, 2011; M. BALBONI, *Protezione internazionale in ragione del genere, dell'orientamento sessuale e dell'identità di genere: aspetti di diritto internazionale e dell'Unione Europea*, Torino: Giappichelli, 2012, p. 118 *et seq.*, p. 245 *et seq.*; V. CHOI, *Living Discreetly: A Catch 22 in Refugee Status Determinations on the Basis of Sexual Orientation*, in *Brooklyn Journal of International Law*, 2010, p. 254 *et seq.*; J. MILLBANK, "The Ring of Truth": A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations, in *International Journal of Refugee Law*, 2009, p. 1 *et seq.*

² Fundamental Rights Agency (FRA), *Current Migration Situation in the EU: Lesbian, Gay, Bisexual, Transgender and Intersex Asylum Seekers*, March 2017, fra.europa.eu, p. 6; S. JANSEN, *Good Practices: Related to LGBTI Asylum Applicants in Europe*, May 2014, www.refworld.org, in particular p. 20 *et seq.*; S. JANSEN, T. SPIJKERBOER, *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, September 2011, www.refworld.org, p. 47 *et seq.*

³ Court of Justice, judgment of 2 December 2014, joined cases C-148/13, C-149/13, C-150/13, *A, B and C*.

⁴ Court of Justice, judgment of 7 November 2013, joined cases C-199/12, C-200/12 and C-201/12, *X, Y and Z*.

⁵ Court of Justice, judgment of 25 January 2018, case C-473/16, *F*.

II. THE CASE: FACTS AND LEGAL CONTEXT

The *F* case originated from an internal dispute, which arose in Hungary in April 2015. A Nigerian citizen (*F*) applied for asylum on account of his homosexuality. The competent authority decided to verify the veracity of the asylum seeker's statements on his alleged sexual orientation. To that end, *F* gave his consent to undergo some tests (an exploratory examination, an examination of personality and several personality tests) run by a psychologist. The expert's report concluded that the applicant's statements on his sexual orientation were not reliable.

Based on the conclusions of the psychologist, the Hungarian authority rejected the application for asylum submitted by *F*, who then challenged that decision before the Szeged Administrative and Labour Court. Above all, the applicant contended that the psychological tests leading to the expert's report seriously prejudiced his fundamental rights and were not suitable to confirm the plausibility of his sexual orientation.

During the main proceedings, doubts were raised on the compatibility between the activities conducted on behalf of the competent national authority and certain EU law obligations governing the assessment of asylum seekers' applications; more precisely, the norm invoked was Art. 4 of Directive 2011/95 (recast Qualification Directive).⁶

This norm, at paragraphs 1 and 2, provides for the possibility, for each Member State, to burden the applicant with the proof, by means of statements or documents, of all the elements needed to substantiate his or her request. In these cases, Member States have the duty to assess the relevant elements of the application, even though in cooperation

⁶ Directive 2011/95/EU 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 (recast). It replaces Directive 2004/83/EC of the Council of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. For information on the original version of the Qualification Directive, see, for example, F. CHERUBINI, *L'asilo dalla Convenzione di Ginevra al diritto dell'Unione europea*, Bari: Cacucci, 2012, p. 193 *et seq.* For in-depth considerations on Art. 4 of both Directives, see U. BERLIT, H. DOERIG, H. STOREY, *Credibility Assessment in Claims based on Persecution for Reasons of Religious Conversion and Homosexuality: A Practitioners Approach*, in *International Journal of Refugee Law*, 2015, p. 649 *et seq.*; K. HAILBRONNER, S. ALT, *Council Directive of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted*. Arts 1-10, in K. HAILBRONNER, D. THYM (eds), *EU Immigration and Asylum Law: Commentary on EU Regulations and Directives*, Munchen: Beck; Oxford: Hart, 2010, p. 1024 *et seq.* For exhaustive information on the recast Qualification Directive, see S. PEERS, V. MORENO-LAX, M. GARLICK, E. GUILD, *EU Immigration Law: Text and Commentary*, Leiden, Boston: Nijhoff, 2014, p. 65 *et seq.* The recast Qualification Directive has been criticized by some scholars, who think that it did not introduce relevant improvements. See for example H. BATTJES, *Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection*, in V. CHETAIL, P. DE BRUYCKER, F. MAIANI (eds), *Reforming the Common Asylum System the New European Refugee Law*, Boston: Brill Nijhoff, p. 221 *et seq.*

with the applicant. Besides that, Art. 4, para. 3, indicates the elements to be taken into account by the competent authorities in the examination of the application on an individual basis, including all relevant facts concerning the country of origin at the time of submission of the application, relevant information and documents submitted by the applicant, the individual's status and the his or her personal situation. At the same time, Art. 4, para. 5, lists some conditions that, if satisfied, relieve the applicant from the burden of proving elements that have not been confirmed, even when the individual is requested to submit those elements according to the law of the Member State. Among them is the fact that "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" and that "the general credibility of the applicant is established".

The Hungarian Court seized by *F* addressed a preliminary ruling to the Court of Justice to ask whether Art. 4 of Directive 2011/95 allows national authorities, in the context of the assessment of international protection applications, *a*) to rely on an expert's report for better determining the applicant's need for protection and *b*) to authorize the preparation and use of projective personality tests to verify the credibility of the claims made by the person with regard to his or her fear to be persecuted because of sexual orientation-related reasons.

III. FINDINGS AND COMMENT

The *F* case offered the Court the opportunity to provide important clarifications about the means that national determining authorities can or cannot employ in assessing the credibility of international protection seekers' statements on their sexual orientation aimed at claiming the fear to be persecuted on this ground in the country of origin.

In its answer to the first question, the Court holds that, as a general rule, resorting to an expert's report to examine an international protection application based on sexual orientation grounds does not constitute in itself a breach of Art. 4 of Directive 2011/95. Nonetheless, the Courts adds that an expert's report on the international protection seeker's sexual orientation must necessarily respect those limits established in favour of the person concerned, especially the rights enshrined in the Charter of Fundamental Rights of the European Union (Charter); the Court referred both to dignity (Art. 1 of the Charter) and respect for private and family life (Art. 7 of the Charter).

Instead, as to the second question, the Court rules that an expert's report based on projective personality tests like the ones endorsed by the Hungarian authority in the *F* case constitutes a breach of Art. 4 of the recast Qualification Directive, read in the light of Art. 7 of the Charter. The tests leading to the decisive expert's report determined a serious and disproportionate intrusion in the applicant's intimate sphere and were not necessary to reach the envisaged purpose; so, the methods contended by *F* cannot be justified even under Art. 52, para. 1, of the Charter.

III.1. FIRST QUESTION: ASSESSING SEXUAL ORIENTATION THROUGH EXPERTS' REPORTS

A preliminary aspect deserves to be pointed out before focusing on the reasoning of the Court of Justice concerning the first question. The admissibility of an expert's report as a means to evaluate the elements submitted by the international protection seeker to prove his or her sexual orientation had never been targeted by EU institutions and bodies prior to the *F* case.

In this regard, it should be recalled that prohibitions to Member States were stipulated for manifestly obnoxious practices, like medical treatments or phallometric tests.⁷ Similarly, it seems appropriate to look back to the *A, B and C* judgment⁸ (rather than *X, Y and Z*⁹), which can be seen as the forerunner of *F*. This judgment clarified that Art. 4 of Directive 2004/83, subsequently replaced by Directive 2011/95, precluded particularly explicit and intrusive activities aimed at determining the applicant's homosexuality. In the *F* case the situation was slightly different, since experts' reports do not necessarily own the same negative character as the means mentioned above and those adjudicated in *A, B and C*.

That said, in *F* the Court refers to *A, B and C* to affirm that statements made by international protection seekers on their sexual orientation shall represent just the starting point in the process of assessment of the facts and circumstances indicated in Art. 4 of Directive 2011/95. However, Art. 4 does not exclude that national determining authorities can order an expert's report to carry out the evaluation in question. In addition, Art. 10, para. 3, let. d) of Directive 2013/32 (known as "recast Procedures Directive"¹⁰) allows authorities involved in status determination procedures to consult external experts on particular aspects connected to the main features of target social groups. It has to be noted that, as opposed to the Advocate General,¹¹ the Court rightly omits to refer to Art. 18 of

⁷ For example, the case of phallometric tests in Czech Republic is well-known. In this respect, see Answer given by Ms Malmström on behalf of the Commission, 21 February 2011.

⁸ For comments on this judgement see E. GOMEZ, *The Post-ABC Situation of LGB Refugees in Europe*, in *Emory International Law Review*, 2015, p. 475 *et seq.*; S. CHELVAN, *C-148/13, C-149/13 and C-150/13, A, B and C v Staatssecretaris van Veiligheid en Justitie: Stop Filming and Start Listening – a judicial black list for gay asylum claims*, in *European Law Blog*, 12 December 2014, www.europeanlawblog.eu; S. PEERS, *LGBTI Asylum-Seekers: the CJEU Sends Mixed Messages*, in *EU Law Analysis*, 2 December 2014, eulawanalysis.blogspot.it.

⁹ For comments on this judgment, see M. DEN HEIJER, *Persecution for reason of sexual orientation: X, Y and Z*, in *Common Market Law Review*, 2015, p. 1217 *et seq.*; R. WINTEMUTE, *In Extending Human Rights, which European Court is Substantively "Braver" and Procedurally "Fitter"? The Example of Sexual Orientation and Gender Identity Discrimination*, in S. MORANO-FOADI, L. VICKERS (eds), *Fundamental Rights in the EU: A Matter for Two Courts*, Portland, Hart publishing 2015, p. 187 *et seq.*

¹⁰ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

¹¹ Opinion of AG Wahl delivered on 5 October 2017, case C-473/16, *F*. See also N. FERREIRA, D. VENTURI, *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*, in *EU Immigration and Asylum Law and Policy*, 24 November 2017, eumigrationlawblog.eu.

Directive 2013/32. In fact, Art. 18 of the Procedures Directive authorizes national determining authorities to arrange for a medical examination of the applicant upon his or her consent, but only in an attempt to detect signs that might indicate past persecution or serious harm. Notwithstanding, the controversial aspect of F's application was his homosexuality, not the presence of physical signs leading to conclude that past prosecution or harm had occurred. Apparently, there is no need to add Art. 18 of Directive 2013/32 to the legal background of the judgment and to infer by this norm the legitimacy of an expert's report on the determination of the applicant's sexual orientation.

With this in mind, the Court opens up to the possibility that an expert's report be provided for in the framework of Art. 4 of Directive 2011/95.¹² The Court also underlines that in those circumstances an expert's report might help establishing the real needs for international protection of the applicant.

However, the Court convincingly compresses the potential application of this rule by proposing a textual and teleological interpretation of Art. 4 of Directive 2011/95. Two limits to the preparation and use of an expert's report on the applicant's sexual orientation are thus set: such a report must be carried out in a way that it does not breach Arts 1 and 7 of the Charter and it cannot be the sole element behind the decision to be taken by the determining authority in cases like the one concerning F.¹³

III.2. SECOND QUESTION: ASSESSING SEXUAL ORIENTATION THROUGH PROJECTIVE PSYCHOLOGICAL TESTS

The subject of the second question is more specific. It is about the essence of projective personality tests, that is to say, the particular methods sometimes applied by psychologists to assess the international protection seekers' sexual orientation.

The decision of the Court on the point is certainly meaningful and at first glance can be seen as a fair one, but it also raises some controversial questions which should be discussed more in detail.

First of all, it is advisable to anticipate that a projective personality test is a type of personality test designed to reveal hidden emotions and internal conflicts basing on the subject's responses to ambiguous scenes, words, or images.¹⁴ In the present case, the determining authority took its decision by referring to the outcome of an exploratory examination, an examination of personality, and personality tests, such as the "Draw-A-Person-In-The-Rain" and the "Rorschach and Szondi".¹⁵

¹² F, cit., para. 34.

¹³ *Ibid.*, paras 35-38 and para. 42.

¹⁴ See the information provided here www.verywellmind.com and here psychcentral.com.

¹⁵ It appears that especially the Rorschach and Szondi test is quite often admitted by the Hungarian Office of Immigration and Nationality when the credibility of sexual orientation has to be verified; even more, this personality test was implemented also in cases where the applicant's declaration on sexual orientation was manifestly credible. See S. JANSEN, T. SPIJKERBOER, *Fleeing Homophobia*, cit., p. 50.

Turning now to the judgment, the preliminary observations made by the Court should be welcomed, as it refuses to consider the applicant's consent to undergo those personality tests a sufficient element to conclude that they are lawful. Indeed, the applicant is supposed to be deeply conditioned by the fact that the decision on his or her status would somehow depend on the performance of the personality test required or authorized by the determining authority. This means that the context surrounding the international protection seeker's position strongly affects the manifestation of his or her (truly) free consent to any personality test on sexual orientation.¹⁶

On the contrary, right after this clarification, the approach of the Court suddenly changes. The underlying problems are two and mainly revolve around paragraph 58 of the judgment, where the Court holds 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. [...] [I]t is not for the Court to rule on this issue, which is, as an assessment of the facts, a matter within the national court's jurisdiction".

First, the Court actually embarks on considerations of this kind: as a matter of fact, the *F* judgment criticizes projective personality tests by going into much detail. Second, the Court's negative opinion is not even the output of a robust legal reasoning.

In sum, after having duly considered the typical subjective and objective conditions that an international protection seeker normally faces when his or her application is examined in a Member State, the Court ceases to stick to the circumstances of the domestic case. In the Court's view, the methods illustrated in the main proceedings fail to satisfy the proportionality test, since they amount to disproportionate tools with respect to the very aim of the determining authority (checking the credibility of the applicant's statements on his fear to be persecuted on sexual orientation grounds). This might as well be right, but the Court does not rely on appropriate sources to draw such a conclusion on a scientific theory.¹⁷ It only calls into question Principle 18 of the Yogyakarta principles, which does not cover international protection¹⁸, while no references are

¹⁶ *F*, cit., paras 52-53.

¹⁷ *Ibid.*, paras 59-63. Quite the same did the Advocate General, who simply questioned the reliability of the test at issue.

¹⁸ *Ibid.*, para. 62. See also, International Commission of Jurists, Yogyakarta Principles – Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, March 2007. Principle 18 of the Yogyakarta Principles states that "[n]o person may be forced to undergo any form of medical or psychological treatment, procedure, testing [...], based on sexual orientation or gender identity". However, this principle is just intended to avoid that States address sexual orientation and gender identity as medical conditions to be "treated, cured or suppressed". That is not the case in *F*. Furthermore, the Court did not mention Principle 18 of the Yogyakarta principles in *A*, *B* and *C*.

made to dedicated studies, reports, texts or to legal interpretative guidelines or criteria, like the ones drafted by the UNHCR.¹⁹

Furthermore, the Court states that the projective personality tests at stake cannot be prepared or used in the procedures aimed at determining the ground of sexual orientation under Art. 4 of Directive 2011/95, because they would not give rise to any proof; conversely, they would just serve to give an indication of the applicant's sexual orientation, instead of determining it.²⁰ Again, the Court does not fully explain why the personality tests conducted upon F's consent are not useful to shed light on the sexual orientation of the international protection seeker. Moreover, their alleged limited probative value should not be deemed a decisive aspect, especially if one recalls that, given the Court's answer to the first question, it is now beyond dispute that status negative decisions cannot rest only on an expert's report. In the absence of a comprehensive scientific explanation of the substance of those tests, and pursuant to Art. 10, para. 3, let. d) of Directive 2013/32, nothing seems to exclude that they could be relied on to elaborate the fairest decision possible, provided that they (i) respect the applicant's fundamental rights, (ii) are meant to add helpful elements and (iii) are used in combination with other proofs and/or elements of proof. Therefore, this specific point raised by the Court lowers the degree of internal consistency of the whole judgment.

Ultimately, it is worth emphasizing that, unlike the Advocate General, the Court does not believe that Art. 1 of the Charter should serve as a further benchmark for the interpretation of Art. 4 of Directive 2011/95 in the present case.²¹ Also in *A, B and C* the Court did not refer to dignity when assessing the legitimacy of detailed questions on sexual habits of an asylum seeker. Thus, in the *F* judgment the Court does not expand its approach in *A B and C* by construing its legal reasoning on the basis of the respect of Art. 1 of the Charter, as some scholars wished before the judgment was published.²²

IV. CONCLUSIVE REMARKS

The *F* judgment witnesses the progressive evolution of the Court's jurisprudence on an urgent matter. Until this judgment, the Court had slowly moved on towards a more fundamental rights-oriented interpretation of the recast Qualification Directive; instead, *F* is a major twist.

¹⁹ See UNHCR, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, paras 62-63; Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, paras 195 *et seq.*, Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 21 November 2008, paras 35 *et seq.*

²⁰ *F*, cit., para. 69.

²¹ *Ibid.*, para. 70.

²² See N. FERREIRA, D. VENTURI, *Tell me What*, cit.

To sum up, in the *X, Y and Z* judgment the Court definitively confirmed the possibility of recognising LGBTI applicants as refugees. In *A, B and C* the Court excluded some of the worst means to determine sexual orientation; nevertheless, *A, B and C* did not indicate specific factual criteria. Accordingly, after this judgment national determining authorities (and national judiciaries) would still keep enjoying some freedom to decide on more dubious cases. Compared to *A, B and C*, the *F* judgment goes way beyond. In its first part, it contributes to filling some gaps by following a more proactive approach. In the second, it puts forward restrictions to the preparation and use of experts' reports and makes it clear that credibility about statements on sexual orientation made by international protection seekers shall not depend on projective personality tests (and experts' reports drafted by virtue of this type of tests).

F is likely to make a remarkable multilevel impact, but it cannot be overlooked that in the second part of the judgment the Court could have reached its conclusions through a more transparent argumentation and without surreptitiously replacing the referring judge (as for the assessment of the appropriateness and reliability of an expert's report like the one of the domestic case).²³ This judgment contains a sort of "subliminal message": the rule implied seems to be that statements on sexual orientation would generally fall under Art. 4, para. 5, of Directive 2011/95, which would finally tend to prevail over Art. 4, para. 1. If this is the case, most of the time those statements will not need confirmation as their coherence and plausibility shall be taken for granted.²⁴ In the end, the overall conclusion of *F* is that the Court has taken steps forward toward the construction of new harmonization patterns for the self-identification of sexual orientation within the norm regulating the assessment of facts and circumstances claimed in applications for international protection. Perhaps the idea of the Court is to render Art. 4 of the recast Qualification Directive more in line with the *joint burden of proof* and the *benefit of the doubt* criteria laid down by the UNHCR.²⁵ Unfortunately, because of the silence of the Court this can be nothing but mere supposition.

At this juncture, the impact of the jurisprudence of Court of Justice on LGBTI applicants may be twofold. On the one hand, it could hopefully pave the way for a considerable decrease in questionable practices that have been developed in many Member States. On the other hand, due to the new limits incumbent on the national determining

²³ Some critical remarks on the Court's approach can also be found in M. TAVERRITI, *Status di rifugiato e discriminazione di genere*, in *Immigrazione.it*, 1 aprile 2018, immigrazione.it.

²⁴ In this regard, Middelkoop suggests that verification may focus more on other aspects of the narrative than on whether the applicant is really gay; L. MIDDELKOOP, *Dutch Court asks Court of Justice to rule on the limits of verification of the sexual orientation of asylum seekers*, in *European Law Blog*, 23 April 2013, europeanlawblog.eu.

²⁵ UNHCR *Handbook* (2011), cit., paras 196, 203-204, 219; UNHCR *Guidance Note* (2008), cit., paras 35 and 41.

authorities (and national judiciaries), many applications might as well directly be dismissed for failure to demonstrate the membership in a protected group.