

Judgment no. 3-19-990/30 of the Administrative Law Chamber of the Supreme Court of
5 November 2020

Directive 2011/95/EU – Standards for qualification for refugee status or subsidiary protection status – Fear of being persecuted for the reason of sexual orientation – Assessment of facts and circumstances – Oral hearing

In this matter, an applicant for asylum who came from Uganda and applied for international protection because of their fear of being persecuted for the reason of sexual orientation in their home country had contested a decision made by the competent authority of Estonia in which it was not considered plausible that the applicant is a homosexual. After questioning the applicant in an oral hearing, the administrative court annulled the decision and found that the applicant meets the standards for the qualification for refugee status, but the district court reached another conclusion in written proceedings. The matter reached the Supreme Court on the basis of an appeal in cassation filed by the applicant.

In its decision, the Supreme Court first explained the general rules for the taking and assessment of evidence as arising from Article 4 of Directive 2011/95/EU and the case law of the Court of Justice which are to be followed in examining an application for international protection in matters concerning persecution for the reason of sexual orientation.

In the particular matter, the Supreme Court considered problematic, among other things, the fact that the applicant was reproached for having given insufficient testimony on some issues about which no questions had been asked from the person – an applicant for asylum indeed has the obligation to contribute to the proceedings, but the competent authority must draw the attention of the applicant to the circumstances that still need to be proved or explained (C-277/11: *M*, paras. 65 and 66; C-148/13-C-150/13: *A*, para. 56); officials must have appropriate training and ability to use questioning techniques in order to provide a person with guidance on which information of importance in the matter the person should give, including also the necessary details on issues on which it could be difficult for a person to open themselves to a stranger at their own initiative. The ability of a person to give testimony might have been affected by the fact that, regardless of the person's request, the person had not received psychiatric care by the time the conversation was held in the competent authority.

In addition, the Supreme Court considered it important that the administrative court had assessed the credibility of the testimony given by the applicant relying to a large extent on the testimony given by the latter at the hearing, including on the body language and visual image of the person, due to which, upon adopting a different position, the district court should also have considered the need for the holding of a hearing. The result of the proceedings is of vital importance for the appellant and the higher the risk of persecution threatening the appellant should their claimed sexual orientation prove to be true, the more careful the court must be upon assessment of facts and circumstances when deeming the reason for persecution proved. The plausibility of the testimony given by a person and conclusion on their credibility may also depend, in addition to the content of the testimony, on how the person behaves when giving the testimony and it might not be possible to assess the same on the basis of an audio recording and minutes of the hearing (see also the judgment of the European Court of Human Rights of 6 November 2018 in Case no. 55391/13, 57728/13, 74041/13, *Ramos Nunes de Carvalho e Sá v. Portugal*, § 191).

Due to the procedural deficiencies, the matter was referred to the district court for a new hearing.