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Strategic Litigation for Rights in Europe: Building Knowledge, Skills and Connections for Legal Practitioners to Use the EU Charter of Fundamental Rights
(STARLIGHT)

LEGAL CLINIC ARGUMENTS
ASYLUM AND MIGRATION

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The Legal Clinics are a core part of the STARLIGHT programme, where all participants worked in groups to develop legal arguments on a real or potential case. Groups were mentored by their course leads and one case per thematic stream selected for publication.[1]

LEGAL ARGUMENTS

FACTS OF THE CASE

The applicants are a Syrian family of six who arrived in Lesvos, Greece, in June 2022 and applied for asylum. Their application was only assessed on admissibility and rejected on the grounds that Turkey was a safe third country (STC) for them. They received a final (second instance) rejection in December 2022, which ordered their readmission to Turkey, resulting in them no longer having access to material reception conditions.

They submitted a subsequent asylum application in January 2023, claiming health issues of one of the children as a new element and requesting an examination on the merits. Their subsequent application received a final (second instance) rejection on admissibility grounds in April 2023 as the Asylum Service did not consider their health issues a new substantial element relevant to the designation of Turkey as a STC.

It should be noted that, as Turkey has not accepted any readmission from Greece since March 2020, their readmission to Turkey was not possible during all this time.
In June 2023 the family asked to apply for a second subsequent application on the basis that Turkey had refused their readmission for one year and they were requested to pay a fee of 100 euros per person for their application to be registered, as per article 94 (10) International Protection Act (IPA). The family did not have the financial means to pay this fee and the Regional Asylum Office of Lesvos dismissed them, without allowing them to submit their application.

The family then submitted an annulment application before the Administrative Court of Athens, against the refusal of the Greek Asylum Service to register their subsequent asylum application.

[1] The final legal arguments have been lightly edited but are the work of the group. Experimental legal arguments were encouraged. Readers are encouraged to draw inspiration from the work but should note that there may be some legal inaccuracies.

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LEGAL ANALYSIS

1. Introduction

According to national legislation, each subsequent application after the first one is subject to a fee amounting to € 100 per application (Article 94 (10) of the International Protection Act, L. 4939/2022, Gov. Gazette A' 111/10.6.2022). The above provision was first introduced to the Greek legislation under article 89 par. 10 of L. 4636/2019 (Gov. Gazette A' 69/1.11.2019), which has been replaced by Law 4939/2022.
According to the Joint Ministerial Decision 472687/21-12-2021 (Gov. Gazette B' 6246/27.2.2021) of the Ministers of Finance and Migration and Asylum regulating details regarding the payment of the fee, if the application is submitted on behalf of several members of the applicant's family, the fee is required for each applicant separately, including minor children. By way of illustration, for a family of six the fee is 600 euros.
Asylum applicants belong to a particularly disadvantaged and, inter alia, economically vulnerable group of the population. The unconditional submission of a €100 fee for the second subsequent applications raises issues regarding the effective access to the asylum procedure since it effectively makes it impossible or excessively difficult for those who do not have the financial means to pay the fee of €100 per person/family member. Especially in view of the fact that no exemptions are envisaged for particularly vulnerable applicants such as children, unaccompanied children etc.

2. EU law

The legal provision, based on which the payment of the fee constitutes a prerequisite for the submission of a subsequent application, falls within the scope of EU law and is contrary to the objective and to Article 6 (1) and 42 (2) of Asylum Procedures Directive (2013/32/EU) (APD).

One of the objectives pursued by Directive 2013/32 is to guarantee effective access, namely access that is as straightforward as possible, to the procedure for granting international protection, as follows, inter alia, from recitals 8, 20, 25 and 26 of that directive (ECLI:EU:C:2020:495, C-36/20 PPU, para 63).
For the purposes of ensuring such access, Article 6 APD provides that Member States must ensure that every person, whether adult or child, has the right to make an application for international protection.
The lodging of an application for international protection is exhaustively regulated in Article 6 APD with no distinction whatsoever between an initial and a subsequent application for international protection.
Art. 40 ADP exclusively concerns the regulation of the examination of the subsequent application for international protection.

It must be noted that the CJEU has considered that Member States are to deal with a subsequent application constituting, in itself, an application for international protection in accordance with the basic principles and guarantees of Chapter II of the APD (C-921/19, ECLI:EU:C:2021:478).

As per Art. 42(2) APD, Member States enjoy limited discretion in laying down, in national legislation procedural rules on the preliminary examination of the subsequent application pursuant to Article 40, not on the lodging of the application. Furthermore, Art 42(2) states that "*those rules shall not render impossible the access of applicants to a new procedure or result in the effective annulment or severe curtailment of such access*".

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It is clear from the above that Member States may introduce rules on the preliminary examination of subsequent asylum application, which is a stage of the procedure that takes place after submitting ("making an application"), after registering and after lodging the application.

Consequently, according to the APD, the manifestation of a person's will to submit an asylum application ("make an application") is sufficient for the application to be considered submitted and its registration ("registration") is further required as soon as possible. It is clear from the wording of the provision that the EU legislator's intention is not to leave the member states with any margin of discretion, or any right to provide for additional conditions for submitting the request. Examination and preliminary examination of the asylum claim only comes after the submitting (manifestation of will), registering, and lodging the application. The distinction between the three stages of submission, registration and lodging an asylum claim, and the essential and decisive importance of the first stage was also highlighted by the CJEU in Case C-36/20 PPU.

It is clear from all the above that there is a violation of article 42 in combination with article 6 of the Asylum Procedures Directive, as the right to asylum (the right to submit an asylum application and to have it examined) is subject by national law to conditions not provided by the Directive, conditions which, taking into account the vulnerability and the financial circumstances of the applicants, make access to the asylum procedure impossible for them.

Art 38(4) APD states that "4. Where the third country does not permit the applicant to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II".

In this particular case, Turkey has refused the applicants readmission to Turkish territory for more than one year. Greece however insists on examining their asylum claim not on the merits, but on admissibility criteria as per the concept of Turkey as a safe third country, in direct violation of the above-mentioned EU legislation.

Furthermore, Recital 60 APD states that *"this Directive respects the fundamental rights and observes the principles recognized by the Charter. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 18, 19, 21, 23, 24, and 47 of the Charter and has to be implemented accordingly."*

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3. EU Charter of Fundamental Rights (CFR)

When read in conjunction with the above EU laws there are several violations of the CFR:

a. Article 18 – The right to asylum

Art. 18 of the CFR states that *"the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union".* The legal provision based on which the payment of the fee constitutes a prerequisite, for the lodging of a subsequent application, and therefore constitutes an obstacle to the lodging of the application, taking into account the disadvantaged and economically vulnerable position of asylum seekers. As a result, this condition undermines the right of access to asylum, as enshrined in Article 18 CFR, as it makes it impossible for applicants to have access to a new procedure and leads to the cancellation of, or to a serious restriction of such access.

b. Article 52 – Scope of guaranteed rights

Art. 52 states that **"***1. Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.* (…) *5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality."*

According to the CJEU, "*it is settled case-law that the principle of proportionality, which is one of the general principles of European Union law, requires that measures implemented by acts of the European Union are appropriate for attaining the objective pursued and do not go beyond what is necessary to achieve it"* (C-92/09 and C-93/09 para 74, C-309/14, para 23-24). In other words, limitations must be proportionate and respect the essence of the right.

Asylum applicants belong to a particularly disadvantaged and, inter alia, economically vulnerable group of the population. In view of their specific characteristics, the requirement to pay a fee for the lodging of a subsequent asylum application, set in Article 94(10) IPA with no exemptions, e.g. for persons belonging to vulnerable groups, such as unaccompanied minors, or no provision for the possibility of reimbursement in case the application is admissible, or international protection status is granted, is contrary to the principle of proportionality and impedes the exercise of the rights provided for in APD, and in particular access to the asylum procedure and the right to submit a new application for international protection.
It is also contrary to the objective of the ADP of ensuring effective, easy and rapid access to the procedure for granting international protection, and would seriously undermine the practical effectiveness of the right to seek asylum.
In similar cases, the CJEU has already considered that the imposition of fees on third country nationals for the exercise of rights enshrined in Union law may hinder access to those rights, in breach of Union law. In

Case C-309/14 (ECLI:EU:C: 2015:523) the Court considered that national legislation imposing on third-country nationals the obligation to pay a fee of between EUR 80 and EUR 200 for the issue/renewal of a long-term resident's residence permit was contrary to Union law. The CJEU pointed out that EU Member States do not enjoy unlimited discretion in levying fees on third country nationals when issuing a residence permit and that EU Member States are not allowed to set charges that might create an obstacle to the exercise of the rights enshrined in the Long-Term Residence Directive. The CJEU concluded that the fees are disproportionate to the objective pursued by the directive and can create an obstacle to the exercise of the rights under the directive.

CONCLUSION AND RECOMMENDATIONS

Consequently, the requirement to pay a fee for the lodging of a subsequent asylum application after the first one, taking into account the inherently disadvantaged and economically vulnerable position of asylum seekers, makes it impossible for applicants to have access to a new procedure and leads to the cancellation, or to a serious restriction of such access, in breach of Article 6(1) and 42(2) APD.

Considering the above violations of EU law and of the CFR the following questions should be referred to the CJEU:

1. Do Articles 6(1) and 42 (2) APD, read in light of Articles 18 and 52 of the EU Charter of Fundamental Rights, preclude rules of national law, such as those laid down in Article 94(10) of the International Protection Act, L. 4939/2022, Gov. Gazette A' 111/10.6.2022), in that they provide that *"for the submission of each subsequent application after the first, the applicant shall pay a fee of one hundred (100) euros per application"?*

2. If the above question is answered in negative, then are there any exceptions that should be put in place for vulnerable people and those lacking sufficient resources, in accordance with Article 24 APD read in conjunction with Articles 18 and 52 CFR?

3. Must Article 6 and Article 38(4) APD, read in the light of Article 18 of the Charter, be interpreted as meaning that, when an application for international protection is, under the law of a Member State, declared inadmissible, on the ground that the applicant arrived on the territory of that Member State via a third country in which he or she was not exposed to persecution or to a risk of serious harm, or in which he or she was guaranteed a sufficient degree of protection, and that, subsequently, the latter country decides not to readmit the applicant to its territory, that application must be re-examined *ex officio* by the 'responsible authority', within the meaning of Article 2(f) of Directive 2013/32, instead of the applicants being obliged to submit a subsequent application?

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