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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 applicant is a single mother from Syria who arrived on the island of Lesbos, Greece via Türkiye in March 2020 together with her then 3-year-old daughter. They were in Türkiye for around one and a half months, during which time they were detained for 40 days following a police control at a prison in Istanbul. The applicant was mistreated and forced to sign a document declaring that she is willing to return to Syria.

The applicant is a survivor of sexual violence and her daughter diagnosed with Spina Bifida, but the Greek Reception and Identification Service (RIS) failed to identify them as vulnerable persons upon arrival. As a result, they had to reside in the overcrowded Reception and Identification Centre (RIC) of Lesbos deprived of special procedural guarantees.

The Greek asylum service found their application for international protection inadmissible, after they assessed Türkiye to be a safe-third country for them. The applicant's appeal was also rejected based on a lack of proof of residence and the fact that they didn't appear in person before the Appeals Authority (which sits in Athens and they were restricted from leaving Lesbos). The applicant was not granted state legal aid not informed of the above conditions. The applicant was only handed a document where it was written that "*In this case his authorized attorney or other counsel can represent him before the Appeals Authority otherwise the Appeals Authority should receive a document certifying the applicant's residence by the head of the RIC, or the nearest police station or Citizens' Service Center (KEP)*". In addition COVID-19 regulations led to limited access to officials.

In January 2021 the applicant was notified of the rejection and given 10 days to voluntarily leave Greece.

The applicant lodged an annulment application against the second instance decision. This procedure is still pending. Later in 2021 they were allowed to travel to the mainland following a referral to a specialized children's hospital.

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.*



LEGAL ANALYSIS

1. Introduction

According to national legislation, the administrative review of negative first instance decisions is in principle a written procedure, and the examination of the appeal is based on the elements of the case file. Nevertheless, Articles 97(2) and 78(3) of the International Protection Act (IPA), L 4636/2019 (Gov. Gazette A' 69/1.11.2019), as amended by L 4686/2020 (Gov. Gazette A'96/12.5.2020), impose a general obligation on the appellant to appear in person before the Appeals Committee on the day of the examination of the appeal. However, residents of the RICs and applicants subject to a geographical restriction, are exempted from this obligation. According to Art. 78(3), applicants belonging to the abovementioned groups may either be represented by a registered lawyer, legal adviser or other person, or send a certificate of residence - dated not more than 3 and 2 days respectively before the date of the hearing of the appeal. If the certificate does not reach the Appeals Authority, the applicant is deemed to have implicitly withdrawn the appeal. In addition, Art. 97(2) stipulates that if the appellants are not represented and do not submit a certificate of residence to the Appeals Authority, "*the applicant shall be presumed to have lodged the appeal solely in order to delay or prevent the enforcement of a previous or imminent decision to expel or otherwise remove him or her and the appeal shall be dismissed as manifestly unfounded*".

2. EU Law arguments

The legal provision, which provides for the implicit withdrawal of appeals in the event that the certificates do not reach the appeal authority, falls within the scope of EU law and is contrary to Art. 46(11) and 28 of Asylum Procedures Directive (APD).

Art. 46(11) APD provides that Member States may lay down in national legislation the conditions under which an applicant is deemed to have implicitly withdrawn or abandoned his appeal. However, these conditions must comply with Art. 28 APD. In particular, they should objectively establish "*reasonable cause to consider that an applicant has implicitly withdrawn his application*", so as not to apply to applicants who do not intend to abandon the procedure but who may have failed to comply with procedural obligations for other reasons. The failure to submit a certificate of residence, within the very strict and short time limits provided for in the national legislation, cannot be considered as "*reasonable cause to consider that an applicant has implicitly withdrawn his application*", especially considering that the residence of the applicants is known to the authorities. Representation by a lawyer should also be taken into account, especially in cases where a legal memorandum in support of the appeal has been submitted to the Appeals Authority.

In view of the serious consequences that a rejection based on "*implicit withdrawal*" could have for the person concerned, Art. 28 APD also seems to impose an obligation on Member States to provide the applicant with the possibility to prove "*within a reasonable time*" that the failure to comply with his/her obligations is due to "*circumstances beyond his/her control*" before his/her application is discontinued or

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rejected. Art. 78(3) IPA does not provide for such a possibility. It should be noted that the rejection of an appeal amounts to a final decision against which no further appeal can be lodged.

At the same time, Art. 97(2) IPA is contrary to Art. 32(2) APD insofar as it provides that in all cases of non-submission of the certificate, it shall be presumed that the appeals have been lodged "*in order to delay or prevent the enforcement of a previous or imminent decision to expel or otherwise remove*" and should therefore be rejected as manifestly unfounded. The wording of Art. 97(2) IPA has led to the automatic rejection of appeals as manifestly unfounded in cases where no proof of residence is provided, without an "*adequate examination*" of the merits of the application as required by Art. 28 APD (C-348/16, 26.7.2017, paragraphs 46 and 49).

Furthermore, it must be stressed that the applicant was not informed of the strict requirement laid down in Greek legislation to avoid having her application for international protection rejected as manifestly unfounded on the basis of an implicit withdrawal. According to Article 12(1) (a) and (f) of the Directive 2013/32/EU, "*Member States shall ensure that all applicants enjoy the following guarantees: (a) they shall be informed in a language which they understand or are reasonably supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities. They shall be informed of the time-frame, the means at their disposal for fulfilling the obligation to submit the elements as referred to in Article 4 of Directive 2011/95/EU, as well as of the consequences of an explicit or implicit withdrawal of the application. That information shall be given in time to enable them to exercise the rights guaranteed in this Directive and to comply with the obligations described in Article 13;[...] f) they shall be informed of the result of the decision by the determining authority in a language that they understand or are reasonably supposed to understand when they are not assisted or represented by a legal adviser or other counsellor. The information provided shall include information on how to challenge a negative decision in accordance with the provisions of Article 11(2)*".

Finally, when an applicant is vulnerable, the APD obliges the Member State to "*create the conditions necessary for their effective access to procedures*" (recital 29) and to give priority to their application (pursuant to Articles 24 and 31(7)(b)), obligations which were not fulfilled in the present case. On the contrary, the Greek authorities failed to identify the applicant and her child as persons in need of special procedural guarantees, as required by Article 24 APD.

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

Article 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*

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and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union”.

According to UNHCR’s interpretation of the right to asylum, Art. 18 covers a wide range of guarantees and provisions including “(i) protection from refoulement, including non-rejection at the frontier; (ii) access to territories for the purpose of admission to fair and effective processes for determining status and international protection needs; (iii) assessment of an asylum claim in fair and efficient asylum processes (with qualified interpreters and trained responsible authorities and access to legal representation and other organizations providing information and support) and an effective remedy (with appropriate legal aid) in the receiving state; (iv) access to UNHCR (or its partner organizations); and (v) treatment in accordance with adequate reception conditions; (vi) the grant of refugee or subsidiary protection status when the criteria are met; (vii) ensuring refugees and asylum-seekers the exercise of fundamental rights and freedoms; and (viii) the attainment of a secure status.”²

Thus, the right to asylum provided by art. 18 is a complex entity that overlaps with the articles 1, 4, 19(2) and 47 of the EU Charter.

b. Article 47 – the right to an effective remedy and the right to a fair trial

The first paragraph of Article 47 of the Charter states that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions set down in that article. The second paragraph of Article 47 of the Charter provides that everyone has the right to a fair and public trial within a reasonable time by an independent and impartial tribunal and that everyone must have the possibility of being advised, defended and represented. The third paragraph of Article 47 of the Charter ensures that legal aid is to be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

In this case, the Greek legislation provides a bureaucratic condition that the beneficiary didn’t fulfil, leading to a disproportionate measure, rejecting her asylum application. The condition to present the residence certificate, under penalty of rejecting the asylum application, is totally disproportionate and unfounded. All the more so since the person in question was unable to obtain and send this document due to the lack of proper information on the asylum procedure and the lack of appropriate assistance, the assistance that the member states have the obligation to provide, particularly when it comes to vulnerable people in need of special procedural guarantees.

The hermetic national legislation of the member state, along with contradictory local practices and the lack of legal assistance granted to asylum seekers, makes the procedure very difficult to understand and to navigate. Greek authorities should have to take into consideration the special vulnerabilities of the main applicants and her child in the whole procedure for international protection, failure to which lead

² See <https://www.refworld.org/pdfid/5017fc202.pdf>



to the rejection on procedural and excessively formalistic grounds. All of the above results in a violation of art. 47 of the Charter and all the other provisions that are closely related as mentioned above.

In the present case, the main applicant and her child lack an effective remedy that grants them the identification and proper consideration of their vulnerabilities when appealing against the rejection of their international protection claims. This flagrant violation was all the more clear as their appeal was considered manifestly unfounded because the applicant failed to submit an attestation of residence prior to the hearing of the appeal, without a proper and effective information concerning this stringent requirement and the consequences in case of non-compliance, as well as without the possibility to demonstrate within reasonable time that the failure to comply with said requirement was due to circumstances beyond her control before the rejection of their applications.

Among the principles that substantiate the right to an effective remedy, based on the case law of the European Court of Human Rights and the Court of Justice, there is the principle of proportionality which forms part of the constitutional traditions common to the Member states. This principle has been frequently recalled by the Court of Justice in case of procedural flaws in the national proceedings and judicial procedures in the matter of international protection.

Analysed under the perspective of the principle of proportionality, the sanction provided for by the Greek law in case of non-compliance with the procedural rules in question (rejection of the application) is disproportionate, considering that the applicants in the case at stake, have argued that they didn't comply with the procedural obligations because of the inaccurate information provided by the Greek Authorities as to the steps to take and the lack of legal aid.

In this context, the procedural conditions to be complied with by an applicant in order to avoid a presumption of withdrawal may in most cases prove impossible to meet in practice and thus fail to guarantee the right of applicants for international protection to an effective remedy.

PRELIMINARY REFERENCE TO THE CJEU

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

1. Do Articles 46(11) and 28 2013/32 Directive of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, read in light of Articles 18 and 47 of the EU Charter of Fundamental Rights, preclude the legislation of a Member State which provides that an appeal against first instance rejection of an application for international protection is considered to be 'manifestly unfounded' in case the applicant does not attend the hearing and does not submit an attestation of residence without objectively establishing "reasonable cause to consider that an applicant has implicitly withdrawn his application"?

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2. If the above question is answered in negative (so that the Directive and the Charter do not preclude existing Greek legislation), then are there any exceptions that should be put in place, at least for vulnerable persons and persons with special needs, in accordance with Articles 24 and 31(7) of the 2013/32 Directive of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection read in conjunction with Articles 18 and 47 of the EU Charter of Fundamental Rights?

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