Funded by the European Union's Justice Programme (2014-2020).

The content of this publication represents the views of the author only and is his sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

Practical exercise and group work:

Application of EU secondary law in light of the Charter procedural provisions in CJEU preliminary ruling proceedings

Case-study

A Facts:

Mr. XY comes from Strangia a third State which is not a member of the EU. In August 2018, after violent attacks were perpetrated in Strangia against the ethnic minority to which Mr. XY is a member, he fled the country and presented himself at the border of the Kingdom of Fingrelia, an EU country. When he was checked at the border, he did not have any documents, and he immediately submitted an application for international protection on account of the alleged risks to his life in his country of origin.

In January 2019, Fingrelian administrative authorities, after having found the application of Mr. XY for international protection admissible, rejected it on the grounds that, due to recent developments in Strangia, it was unlikely that he would be the subject of persecution in the future. The administrative authorities included in the decision a return decision ordering the applicant to return to his country of origin and banning him from coming back to and from residing in the Kingdom of Fingrelia during the next two years (the first administrative decision).

In February 2019, Mr. XY lodged an appeal against the first administrative decision with the Fingrelian first instance administrative court. That court annulled the administrative decision by judgement of 15 June 2019 and ordered the administrative authorities to conduct a new procedure and take a new decision (the first judgement). That judgement was based on procedural defects, lack of motivation, as well as on a different material assessment of the developments in Strangia.

Following the first judgement, the administrative authorities adopted again an almost identical administrative decision in December 2019 (the second administrative decision). The applicant lodged an appeal against the second administrative decision. Due to the COVID pandemic, the examination of his case was put on hold until September 2020. Then, once more, the applicant won the case, having the second administrative decision annulled by the first instance administrative court by judgement of 3 October 2020. Following that second judgement, the administrative authorities adopted on 15 March 2021, for the third time, an administrative decision with a content materially identical to the first administrative decision, and included an order to remove the applicant from the Fingrelian territory (the third administrative decision).

Mr. XY has lodged an appeal against the third administrative decision which is now pending before the Fingrelian first instance administrative court (the referring court).

The referring court is examining, for the third time, the appeal lodged by the applicant. There are new procedural provisions that apply to the proceedings, due to newly applicable procedural provisions. First, the national legislation mandates the referring court to take a decision in 20 days. Second, the national legislation allows the national court only to review manifest errors of formal character in the administrative decision. Third, the appeal of the applicant now does not have suspensive effect, and he may be removed from Fingrelian territory even when court proceedings are still pending. Fourth, there is only the possibility to appeal against the decision of the referring court during a period of 8 days after the decision has been taken.

In those circumstances, the referring court is considering the possibility to ask for a preliminary ruling to the Court of Justice. However, the referring court has doubt as to the practical effects that that preliminary ruling could have, given that, under national law, administrative courts do not have the power to vary the decisions of administrative authorities, but can only order them to reexamine the issue and make a new decision. In the present case, the referring court has already referred back the case to administrative authorities twice, and they always come back with an almost identical decision.

B EU secondary law:

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 (OJ 2013 L 180, p. 60)

- Recitals :

"(18) It is in the interests of both Member States and applicants for international protection that a decision is made as soon as possible on applications for international protection, without prejudice to an adequate and complete examination being carried out.

…

(50) It reflects a basic principle of Union law that the decisions taken on an application for international protection … are subject to an effective remedy before a court or tribunal.

…

(60) This Directive respects the fundamental rights and observes the principles recognised 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.'

- Article 46: The right to an effective remedy

1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:
(i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;
(ii) considering an application to be inadmissible pursuant to Article 33(2);

…

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and ex nunc examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance.

4. Member States shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy pursuant to paragraph 1. The time limits shall not render such exercise impossible or excessively difficult.

…

5. Without prejudice to paragraph 6, Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.

…

8. Member States shall allow the applicant to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory, laid down in paragraphs 6 and 7.

10. Member States may lay down time limits for the court or tribunal pursuant to paragraph 1 to examine the decision of the determining authority.

…"

C Questions for discussion:

1. <u>Identification of problems and applicable rules:</u>

   a) Which are the different aspects that may be problematic in terms of "effective judicial protection"?
   b) Why may those aspects pose problems with regard to the standards of the Charter?

2. <u>Justification and balancing:</u>

a) Which are the different interests/principles at issue, to be taken into account in the assessment of the potential limitations of Charter rights and the balancing exercise?
b) How could the national authorities try justify the national procedural rules at issue?
c) Would any of those justifications be admissible and what would be your normative framework for assessing those justifications?

3. <u>Articulating the legal problems:</u>

   Which questions could the Administrative Court pose to the Court of Justice? (Each group to propose at least 3 questions)

4. Remedies and practical solution to the case:

a) How would you resolve the case?
b) Which role would the Charter have regarding the interpretation of the provisions of secondary law?
c) Would you leave any of the national provisions disapplied, and on the basis of which rule of EU law?