Anonymised version

Case C-651/19

Request for a preliminary ruling

Date lodged:

2 September 2019

Referring court:

Conseil d'État (Belgium)

Date of the decision to refer:

1 August 2019

Appellant:

JP

Defendant:

Commissaire général aux réfugiés et aux apatrides

[...]

I. Subject matter of the appeal

1. By appeal lodged on 18 October 2018, JP requests that the Conseil d'État (Council of State, Belgium) quash the judgment [...] of 9 October 2018 delivered by the Conseil du contentieux des étrangers (Council for asylum and immigration proceedings, Belgium) [...] ('the judgment under appeal').

II. Procedure before the Council of State

2. [...] **[Or. 2]** [...]

III. Facts relevant to the examination of the matter

3. After his initial application for asylum was rejected [...], the appellant lodged a second application for international protection, which was declared inadmissible by a decision taken on 18 May 2018 by the Commissaire général aux réfugiés et aux apatrides (Commissioner General for Refugees and Stateless Persons) under the first subparagraph of Article 57/6/2(1) of the Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers (Law of 15 December 1980 on entry to the territory, residence, establishment and removal of foreign nationals). According to the wording of the judgment under appeal, that decision was notified 'by registered post to the appellant's elected domicile, that is to the Commissariat general aux réfugiés et aux apatrides (Office of the Commissioner General for Refugees and Stateless Persons)'.

The judgment under appeal dismisses the action brought by the appellant on 7 June 2018 against the decision, referred to above, declaring his application inadmissible on the ground that it was late, since the appellant could not 'rely on any ground of force majeure constituting, in its own right, an insurmountable obstacle to him bringing his action within the statutory 10-day time limit'. **[Or. 3]**

IV. Single ground of appeal, first part of the argument of the appellant

4. The appellant puts forward a single ground of appeal alleging infringement of Articles 3, 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 47 of the Charter of Fundamental Rights of the European Union, 10, 11 and 13 of the Belgian Constitution, 39/2, 39/57, 39/65, 39/77/1, 48/3, 48/4 and 57/6 of the Law of 15 December 1980 on entry to the territory, residence, establishment and removal of foreign nationals, read in conjunction with Article 46 and Recital 25 of 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), the principles of equality and non-discrimination, and the principles of respect for the rights of the defence.

5. [...] The appellant criticises the judgment under appeal for having held that, on the day on which he became aware of the administrative act at issue, a time limit 'of three working days or five calendar days' was available to him, which was a period that reasonably allowed him to bring his action within the time limit prescribed by Article 39/57 of the Law of 15 December 1980, referred to above, and that it was possible to derogate from that time limit only in a situation of force majeure, which was a matter of public policy.

He responds that respect for the rights of the defence is also a matter of public policy, that the provisions referred to in the ground of appeal guarantee a right to an effective remedy and that reasonable time limits must be provided for which do not render the exercise of his right to an effective remedy 'impossible or excessively difficult'. He refers to the wording of Recital 25 of Directive

2013/32/EU of 26 June 2013, referred to above, and relies on the case-law of the European Court of Human Rights (see ECtHR, 31 January 2012, *Assunção Chaves v. Portugal*, paragraph 80, CE:ECHR:2012:0131JUD006122608) and of the Court of Justice of the European Union (judgments of 28 July 2011, C-69/10, *Diouf*, paragraphs 67 and 68; and of 20 October 2016, C-429/15, *Danqua*, paragraph 49) to claim that the time limits in question in the present case are 'well below the 15 working days referred to by the [Court of Justice], are manifestly unreasonable and rendered the exercise by the applicant of his rights of defence and the bringing of an action as provided for by Article 39/2 of the Law of 15 December 1980 excessively difficult', taking into account the specific circumstances of the present case, which he sets out as follows:

'No reception facilities were provided to the applicant while his new application was being examined; **[Or. 4]**

– his elected domicile was presumed to be the [defendant's] official address; the notification by post was not therefore made to the applicant's place of residence;

– The applicant had no material support, a fortiori financial, to travel to the [defendant's] official address or to contact the defendant in order to be kept informed of the development of his file and of any decision, nor did he have first-line social or legal support in the absence of reception facilities;

– The applicant was not heard in the presence of his lawyer before the decision was taken [by the defendant];

– The applicant's current lawyer is not the lawyer that assisted the applicant in his first application for asylum with the result that it cannot be presumed that his current lawyer was particularly familiar with the applicant's background or his file'.

The appellant requests that a question be referred to the Court of Justice of the European Union concerning the interpretation of Article 47 of the Charter of Fundamental Rights of the European Union, referred to above, and Articles 20 and 46 of Directive 2013/32/EU, referred to above, read in conjunction with Recitals 25 and 50 of that directive.

Argument advanced by the defendant

6. The defendant submits that the time limit prescribed by Article 39/57 of the Law of 15 December 1980, referred to above, is a matter of public policy with the result that it is only possible to derogate from it in the event of force majeure, *quod non* in the present case, and that the administrative court was fully entitled to hold that the action was not brought within the time limit.

The defendant refers to the parliamentary documents relating to the Loi du 17 décembre 2017 modifiant la Loi du 15 décembre 1980 sur l'accès au territoire, le

séjour, l'établissement et l'éloignement des étrangers (*Doc. parl.*, Chambre, sess. ord., 2016-2017, Doc 54 No 2549/001) (Law of 17 December 2017 amending the Law of 15 December 1980 on entry to the territory, residence, establishment and removal of foreign nationals), which set out the grounds for accelerated processing of applications in the situations referred to, 'while continuing to guarantee access to an effective remedy'.

The defendant adds that the fact that the appellant's current lawyer is not the lawyer that assisted him in his first application for asylum and that the appellant was not heard in the presence of his new lawyer does not affect the effectiveness of the action. In that regard, the defendant submits that applicants for international protection have the possibility of appointing a lawyer after they have lodged their application, whether for a first application or for a subsequent application, and that, therefore, the fact that the applicant did not make use of the possibility afforded to him by the law of appointing his current lawyer after he had lodged his subsequent application is his responsibility and has no significance for the effectiveness of the action provided for in Article 39/57 of the Law. **[Or. 5]**

Decision of the Council of State

7. The Law of 15 December 1980 on entry to the territory, residence, establishment and removal of foreign nationals provides, inter alia, as follows [...]:

'Article 39/2(1). The Council for asylum and immigration proceedings, gives its decisions, by way of judgments, on actions brought against decisions of the Commissioner General for Refugees and Stateless Persons.

[...]

Article 39/57(1). The actions referred to in Article 39/2 shall be brought by way of an appeal [...] [generally within a time limit of 30 days, but within a time limit of 10 days in the following circumstances:]

[...]

1° [...]

2° [...]

3° where the action is brought against a decision declaring the application inadmissible, referred to in the first subparagraph of Article 57/6(3). The action shall, nonetheless, be brought within five days of the notification of the decision against which it is brought where that decision concerns a decision declaring an application inadmissible, taken on the basis of 5° of the first subparagraph of Article 57/6(3), and the foreign national finds himself or herself, at the time of his or her application, in a specific place referred to in Articles 74/8 and 74/9 or is put at the disposal of the Government.

[...]

§ 2. The time limits for bringing an action referred to in § 1 shall start to run: **[Or. 6]**

[...]

2° where the notification is made by registered post or by ordinary post, on the third working day following that on which the letter was handed to the postal service, unless evidence to the contrary is adduced by the recipient;

[...]

The time limit shall include the day on which it expires. However, where that day is a Saturday, a Sunday or a public holiday, the day on which the time limit expires shall be the next working day.

[...]

Article 51/2. The foreign national who lodges an application for international protection under Article 50(3) shall elect a domicile in Belgium.

If no domicile is elected, the applicant shall be deemed to have elected a domicile at the Office of the Commissioner General for Refugees and Stateless Persons.

[...]

Any change in the elected domicile must be communicated by registered post to the Office of the Commissioner General for Refugees and Stateless Persons and to the Minister.

Without prejudice to a notification in person, all notifications are validly made to the elected domicile by registered post or by hand with acknowledgement of receipt. Where the foreign national has elected a domicile at his or her lawyer's official address, the notification may also be validly sent by fax or by any other means of notification authorised by Royal Decree.

[...].

Article 57/6. [...]

§ 3. The Commissioner General for Refugees and Stateless Persons may declare an application for international protection inadmissible where:

[...]

5° the applicant lodges a subsequent application for international protection for which no new elements or findings within the meaning of Article 57/6/2 arise or are presented by the applicant;

[...]

Article 57/6/2(1). After receipt of the subsequent application transmitted by the Minister or his or her deputy on the basis of Article 51/8, the Commissioner General for Refugees and Stateless Persons examines as a matter of priority whether any new elements or findings arise or are presented by the applicant that significantly increase the probability that he or she can claim recognition as a refugee within the meaning of Article 48/3 or as a person entitled to subsidiary protection within the meaning of Article 48/4. In the absence of those elements or findings, the Commissioner General for Refugees and Stateless Persons declares the application inadmissible. [...]'.

8. The judgment under appeal states that the act originally contested was notified by registered post on Tuesday 22 May 2018 to the appellant's elected domicile, namely the Office of the Commissioner General for Refugees and Stateless Persons; that that notification, validly made, triggered the start of the 10-day time limit for bringing an action against the decision declaring an application inadmissible taken under the first subparagraph of Article 57/6/2(1) of the Law of 15 December 1980; that, under Article 39/57(2)(2) of that law, the time limit for bringing an action started to run on the third working day following **[Or. 7]** the day on which the letter was handed to the postal service, namely — without prejudice to evidence to the contrary, which was not adduced in the present case — Friday 25 May 2018; that, given that the day on which the time limit expired was a Sunday, it was extended to Monday 4 June 2018; and, lastly, that the appellant reported on Wednesday 30 May 2018 to the Office of the Commissioner General for Refugees and Stateless Persons and, on that date, acknowledged receipt of the registered letter containing the decision taken against him.

9. The rules on the admissibility of legal actions, inter alia *ratione temporis*, are a matter of public policy. In the present case, the Council for asylum and immigration proceedings rightly decides that the notification of the administrative act to the address where the appellant is deemed to have elected a domicile, namely the Office of the Commissioner General for Refugees and Stateless Persons, was valid and triggered the start of the time limit for bringing the action; that the fact that the applicant was given the envelope when he reported to the Office of the Commissioner General for Refugees and Stateless Persons on 30 May 2018 did not have 'the effect of triggering the start of a new 10-day time limit from that date'; and that, with no situation of force majeure having been invoked, the action brought by registered letter on 7 June 2018, exceeding the prescribed 10-day time limit which expired on 4 June 2018, was not brought within the time limit.

10. In his appeal on a point of law, the appellant submits that the general legal principle of respect for the rights of the defence is also a matter of public policy. He does not submit that the delivery of the envelope for which he gave an acknowledgement of receipt on 30 May 2018 triggered the start of a new time

limit nor does he question the decision of the judge dismissing the matters relied on and referred to in paragraph 7.2.1. of the judgment as having the character of a force majeure situation 'constituting, in its own right, an insurmountable obstacle to bringing his action within the statutory time limit'.

However, he submits that, taking into account the circumstances, the time limit for bringing an action as provided for in the present case by national legislation is contrary to several provisions of EU law which guarantee him a right to an effective remedy.

He relies on Article 47 of the Charter of Fundamental Rights of the European Union which provides 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' and on Recital 25 and Article 46 of 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) which are worded as follows: **[Or. 8]**

'[...]

(25) In the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention or as persons eligible for subsidiary protection, every applicant should have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his or her case and sufficient procedural guarantees to pursue his or her case throughout all stages of the procedure. Moreover, the procedure in which an application for international protection is examined should normally provide an applicant at least with: […] the right to appropriate notification of a decision and of the reasons for that decision in fact and in law; the opportunity to consult a legal adviser or other counsellor; the right to be informed of his or her legal position at decisive moments in the course of the procedure, in a language which he or she understands or is reasonably supposed to understand; and, in the case of a negative decision, the right to an effective remedy before a court or a tribunal.

[...]

Article 46. 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 [...]

[...]

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.

[...] '.

11. The right 'to a fair trial' enshrined in Article 47 of the Charter referred to above is a particular aspect of the right to a fair trial also guaranteed by Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

According to the case-law of the European Court of Human Rights, to which reference can be made for the interpretation of Article 47, referred to above, since that Article draws on Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the right to a fair trial is subject to limitations permitted by implication, in particular as regards the conditions of admissibility of an action, since by its very nature it calls for regulation by the State, which enjoys, in that regard, a certain margin of appreciation. However, those limitations must not restrict or reduce a litigant's access in such a way or to such an extent that the very essence of that right is impaired (ECtHR, 18 October 2016, *Miessen v. Belgique*, CE:ECHR:2016:1018JUD003151712). **[Or. 9]**

12. The plea in cassation essentially raises the question of whether the Council for asylum and immigration proceedings, Belgium has infringed the right to an effective remedy and to a fair trial enshrined inter alia in Article 47 of the Charter of Fundamental Rights of the European Union by declaring the appellant's action inadmissible on the ground referred to in the judgment under appeal, namely that it was not brought within the time limit, and by basing its decision on a legal provision, even if it is a matter of public policy, which establishes a time limit, within which the foreign national must bring his or her action, of 10 calendar days from the notification of the decision against which the action is brought, in particular where the notification is made to an address where the appellant is deemed by law to have elected a domicile, which may be of such a nature to, in practice, shorten that time limit.

[…] [stay of proceedings]

ON THOSE GROUNDS,

THE COUNCIL OF STATE HEREBY ORDERS:

[...]

In accordance with Article 267(3) of the Treaty on the Functioning of the European Union, the following question is referred to the Court of Justice of the European Union for a preliminary ruling:

‘Must Article 46 of 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), by virtue of which applicants must be given a right to an effective remedy against decisions ‘taken on their application for international protection’, and Article 47 of the Charter of Fundamental Rights of the European Union be interpreted as precluding a rule of national procedure, such as **[Or. 10]** Article 39/57 of the Law of 15 December 1980 on entry to the territory, residence, establishment and removal of foreign nationals, read in conjunction with Article 51/2, 5° of the first subparagraph of Article 57/6(3) and Article 57/6/2(1) of that law, establishing a time limit of 10 ‘calendar’ days, starting from the notification of the administrative decision, for bringing an action against a decision declaring a subsequent application for international protection lodged by a third-country national inadmissible, in particular where that notification was made to the Office of the Commissioner General for Refugees and Stateless Persons where the applicant is ‘deemed’ by law to have elected a domicile?’

[...]

Delivered [...] on 1 August 2019[...]

[Signatures]