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Judgment of the Court in Case C-159/21 | Országos Idegenrendeszeti Főigazgatóság and Others

Withdrawal of international protection further to a danger to national security: EU law precludes Hungarian legislation which provides that the person concerned or his or her legal representative can access the case file only after obtaining authorisation to that end, and without being provided with the grounds of the decision

EU rules do not allow the authority responsible for examining applications for international protection systematically to base its decisions on a non-reasoned opinion issued by bodies entrusted with specific functions linked to national security which have found that a person constitutes a danger to that national security

In 2002, GM was given a custodial sentence by a Hungarian court for a drug trafficking offence. Having lodged an application for asylum in Hungary, GM was granted refugee status by judgment delivered in June 2012 by the Fővárosi Törvényszék (Budapest High Court, Hungary; 'the referring court'). By decision adopted in July 2019, the Országos Idegenrendészeti Főigazgatóság (National Directorate-General for Aliens Policing, Hungary) withdrew his refugee status and refused to grant him subsidiary protection status governed by Directives 2011/95 [1] and 2013/32, [2] while applying the principle of non-refoulement to GM. That decision was taken on the basis of a non-reasoned decision issued by two Hungarian specialist bodies, the Alkotmányvédelmi Hivatal (Constitutional Protection Office) and by the Terrorelhárítási Központ (Counter-terrorism Centre), in which those two authorities concluded that GM's stay constituted a danger to national security. GM brought an appeal against that decision before the referring court.

The referring court is uncertain, in particular, as to the compatibility of Hungarian legislation on access to classified

[1] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

[2] 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).

information with Article 23 of Directive 2013/32, [3] which lays down the scope of the legal assistance and representation to which an applicant for international protection is entitled. The referring court also seeks to ascertain whether the Hungarian rule requiring that the determining authority base its decision on a non-reasoned opinion of the aforementioned specialist bodies, without itself being able to examine the application of the ground for exclusion from the protection at issue, is in compliance with EU law.

The Court holds, inter alia, that **Directive 2013/32**,, [4] read in the light of the general principle relating to the right to sound administration and of Article 47 of the Charter of Fundamental Rights of the European Union, **precludes national legislation which provides that**, where a decision refusing an application for international protection or withdrawing that protection is based on information the disclosure of which would jeopardise the national security of the Member State in question, **the person concerned or his or her adviser can access that information only after obtaining authorisation to that end, without being provided with the grounds on which such decisions are based;** such information cannot be used for the purposes of subsequent administrative procedures or judicial proceedings. The Court also states that **Directives 2013/32 and 2011/95** [5] **preclude national legislation under which the authority responsible for examining applications for international protection is systematically required,** where bodies entrusted with specialist functions linked to national security have found, by way of a non-reasoned opinion, that a person constituted a danger to that security, **to refuse to grant that person subsidiary protection, or to withdraw international protection previously granted to that person**, on the basis of that opinion.

Findings of the Court

As regards, in the first place, the question of the compatibility with EU law of national legislation which limits the access of the persons concerned or of their representative to the confidential information on the basis of which decisions to withdraw or refuse to grant international protection have been adopted on grounds of national security, the Court recalls that, in accordance with Directive 2013/32, [6] where Member States restrict access to information or sources the disclosure of which would jeopardise, in particular, national security or the security of those sources, the Member States must not only make access to such information or sources available to the courts having jurisdiction to rule on the lawfulness of the decision on international protection, but also establish in national law procedures guaranteeing that the rights of defence of the person concerned are respected. [7] Although the Member States may, in that connection, grant access to such information to an adviser of the person concerned, such a procedure is not the only option available to the Member States to comply with that obligation. The practical arrangements of the procedures established to that end are a matter for the domestic legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States, provided that these are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not

[3] Pursuant to paragraph 1 of that provision: 'Member States shall ensure that a legal adviser or other counsellor admitted or permitted as such under national law, who assists or represents an applicant under the terms of national law, shall enjoy access to the information in the applicant's file upon the basis of which a decision is or will be made.
Member States may make an exception where disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications for international protection by the competent authorities of the Member States or the international relations of the Member States would be compromised. In such cases, Member States shall:
(a) make access to such information or sources available to the authorities referred to in Chapter V; and
(b) establish in national law procedures guaranteeing that the applicant's rights of defence are respected. .
In respect of point (b), Member States may, in particular, grant access to such information or sources to a legal adviser or other counsellor who has undergone a security check, in so far as the information is relevant for examining the application or for taking a decision to withdraw international protection.'

[4] More specifically, Article 23(1) of Directive 2013/32, read in conjunction with Article 45(4) of that directive.

[5] More specifically, Article 4(1) and (2), Article 10(2) and (3), Article 11(2) and Article 45(3) of Directive 2013/32, read in conjunction with Article 14(4)(a) and Article 17(1)(d) of Directive 2011/95.

[6] Points (a) and (b) of the second subparagraph of Article 23(1).

[7] The latter obligation is based on point (b) of the second subparagraph of Article 23(1) of Directive 2013/32.

make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the European Union legal order (principle of effectiveness).

The Court also recalls that the rights of the defence are not absolute rights, and the right of access to the file, which is the corollary thereto may therefore be limited, on the basis of a weighing up, on the one hand, of the right to sound administration and the right to an effective remedy of the person concerned and, on the other hand, the interests relied on in order to justify the non-disclosure of an element of the file to that person, in particular where those interests relate to national. Although that weighing up cannot lead, in the light of the necessary observance of Article 47 of the Charter, to depriving the rights of defence of the person concerned of all effectiveness and to rendering meaningless the right to a remedy provided for in the directive itself, [8] it may, however, result in certain information in the file not being disclosed to the person concerned, where disclosure of that information is likely to jeopardise the security of the Member State concerned in a direct and specific manner.

Consequently, the second subparagraph of Article 23(1) of Directive 2013/32 **cannot be interpreted as allowing the competent authorities to place that person in a situation where neither he or she nor his or her representative would be able to gain effective knowledge**, where applicable in the context of a specific procedure designed to protect national security, **of the substance of the decisive elements contained in that file.** The Court states in that connection that where the disclosure of information placed on the file has been restricted on grounds of national security, **respect for the rights of defence of the person concerned is not sufficiently guaranteed by the possibility for that person of obtaining, under certain conditions, authorisation to access that information, together with a complete prohibition on using the information thus obtained for the purposes of the administrative procedure or any judicial proceedings**. Furthermore, in ensuring that the rights of the defence are sufficiently guaranteed, the power of the court having jurisdiction to have access to the file cannot replace access to the information placed on that file by the person concerned or his or her adviser.

As regards, in the second place, the compliance with EU law of the national legislation at issue, which confers a leading role on specialist national security bodies in the context of the procedure for adopting decisions to withdraw or refuse to grant international protection, the Court holds that **it is for the determining authority alone to carry out**, acting under the supervision of the courts, **the assessment of the relevant facts and circumstances**, including those relating to the application of those articles of Directive 2011/95 relating to revocation of, ending of or refusal to renew refugee status [9] and those relating to exclusion from such status. [10] That determining authority must, moreover, state in its decision the reasons which led it to adopt that decision. **It cannot confine itself to giving effect to a decision, adopted by another authority, which is binding on the former authority under national legislation, and to take, on that basis alone, the decision not to grant subsidiary protection or to withdraw international protection previously granted. The determining authority must**, on the contrary, **have available to it all the relevant information and**, in the light of that information, **carry out its own assessment of the facts and circumstances with a view to determining the tenor of its decision and providing a full statement of reasons for that decision**. Although some of the information used by the competent authority in conducting its assessment may in part be provided by specialist bodies responsible for national security, the scope of such information and its relevance to the decision to be taken must be freely assessed by that authority. **The latter cannot therefore be required to rely on a non-reasoned opinion given by such bodies, based on an assessment the factual basis of which has not been disclosed to that authority.**

[8] That right is provided for by Article 45(3) of Directive 2013/32.

[9] Article 14 of Directive 2011/95.

[10] Article 17 of Directive 2011/95.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

The full text of the judgment is published on the CURIA website on the day of delivery.

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