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Case C-159/21

Request for a preliminary ruling

Date lodged:

11 March 2021

Referring court:

Fővárosi Törvényszék (Budapest High Court, Hungary)

Date of the decision to refer:

27 January 2021

Applicant:

GM

Defendants:

Országos Idegenrendészeti Főigazgatóság (National Directorate-General of the aliens police, Hungary)

Alkotmányvédelmi Hivatal (Constitutional Protection Office, Hungary)

Terrorelhárítási Központ (Counterterrorism Centre, Hungary)

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Fővárosi Törvényszék (Budapest High Court, Hungary)

[…] In contentious administrative asylum proceedings […] between **GM** ([…] Budapest […]), applicant, […] and **Országos Idegenrendészeti Főigazgatóság** (National Directorate-General of the aliens police, Hungary) ([…] Budapest […]), **first defendant**, […] **Alkotmányvédelmi Hivatal** (Constitutional Protection Office, Hungary) ([…] Budapest […]), **second defendant,** […] and **Terrorelhárítási Központ** (Counterterrorism Centre, Hungary) ([…] Budapest […]), **third defendant**, the Fővárosi Törvényszék (Budapest High Court) made the following

decision:

This court hereby makes a reference to the Court of Justice of the European Union for a preliminary ruling on the interpretation of certain provisions 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 (‘Asylum Procedures Directive’) and of 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 (‘the Qualification Directive’).

This court refers the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Must Article 11(2), Article 12(1)(d) and (2), Article 23(1)(b) and Article 45(1) and (3) to (5) of the Asylum Procedure Directive – in the light of Article 47 of the Charter of Fundamental Rights of the European Union (‘Charter’) – be interpreted as meaning that, where the exception for reasons of national security referred to in Article 23(1) of that directive applies, the Member State authority that has adopted a decision to refuse or withdraw international protection based on a reason of national security and the national security authority that has determined that the reason is confidential must ensure that it is guaranteed that in all circumstances the applicant, a refugee or a foreign national beneficiary of subsidiary protection status, or that person’s legal representative, is entitled to have access to at least the essence of the confidential or classified information or data underpinning the decision based on that reason and to make use of that information or those data in proceedings relating to the decision, where the responsible authority alleges that their disclosure would conflict with the reason of national security?

2. If the answer is in the affirmative, what precisely should be understood by the ‘essence’ of the confidential reasons on which that decision is based, for the purposes of applying Article 23(1)(b) of the Asylum Procedure Directive in the light of Articles 41 and 47 of the Charter?

3. Must Articles 14(4)(a) and 17(1)(d) of the Qualification Directive and Article 45(1)(a) and (3) to (4) and recital 49 of the Asylum Procedure Directive be interpreted as meaning that they preclude national legislation according to which refugee or foreign national beneficiary of subsidiary protection status may be withdrawn or excluded by a non-reasoned decision which is based solely on automatic reference to the – likewise non-reasoned – binding and mandatory report of the national security authority and finds that there is a danger to national security?

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4. Must recitals 20 and 34, Article 4 and Article 10(2) and (3)(d) of the Asylum Procedure Directive and Articles 14(4)(a) and 17(1)(d) of the Qualification Directive be interpreted as meaning that they preclude national legislation according to which that national security authority examines the ground for exclusion and takes a decision on the substance in a procedure that does not comply with the substantive and procedural provisions of the Asylum Procedure Directive and the Qualification Directive?

5. Must Article 17(1)(b) of the Qualification Directive be interpreted as meaning that it precludes an exclusion based on a circumstance or crime that was already known before the judgment or final decision granting refugee status was adopted but which was not the basis of any ground for exclusion in relation to either the grant of refugee status or to subsidiary protection?

Grounds

I. Subject matter of the main dispute and relevant facts

The applicant, a Syrian national, applied for asylum in 2005 while serving a custodial sentence for improper use of a considerable quantity of drugs, imposed by a final judgment in 2002. The applicant was granted ‘accepted person’ [1] status but lost that status in 2010 when a review took place and was confirmed by a court decision. In 2011, the applicant filed a new application for refugee status, pursuant to which the Fővárosi Törvényszék (Budapest High Court), by judgment of 29 June 2012, granted him status as a refugee *sur place*. Subsequently, in 2019, an administrative procedure to withdraw his refugee status was initiated *ex officio*. An appeal against that administrative decision (decision […] of 15 July 2019) was heard by the referring court in administrative proceedings in which the applicant’s refugee status was withdrawn, although the court held that *non-refoulement* should apply. During the administrative proceedings, the third defendant and the second defendant in the present contentious administrative proceedings (the Counterterrorism Centre and the Constitutional Protection Office respectively) found in their reports that the applicant’s stay in Hungary constituted a danger to national security. On the basis of the foregoing, the competent asylum authority found that a ground for exclusion from being granted refugee or foreign national beneficiary of subsidiary protection status was established in the applicant’s case.

II. Key points of the parties’ submissions

At the start of the judicial proceedings, counsel for the **applicant** proposed that the referring court should make a referral to the Court of Justice of the European

[1] Translator’s note: a literal translation of ‘befogadott’, one of the statuses governed by the Hungarian Law on the right to asylum for precisely those persons who are not granted refugee status or subsidiary protection but to whom the principle of *non-refoulement* must apply.

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Union ('the Court of Justice') for a preliminary ruling. He submitted that, in essence, he was unable to gain access to the essence of the 'confidential' data relied upon in relation to the danger to national security and that, even if he was given access to them, under the legislation in force he could not use them in the judicial proceedings. He noted also that according to the relevant case-law of the Court of Justice, the competent asylum authority must assess applications individually and may not base its decision exclusively on the conclusions of the report by the specialised (national security) authority. Further, the applicant took the view that the Hungarian legislation – without any authorisation under EU law – has added a ground for exclusion, which is contrary to EU law, to the grounds for exclusion leading to withdrawal of the status.

The second and third **defendants**, as national security authorities, referred to the circumstances identified in the course of their own procedures and contained in the classified file, and maintained their conclusions in respect of the danger to national security.

The competent asylum authority, designated as the first defendant, emphasised the outcome of the work of the national security authorities, designated as second and third defendants, according to which the applicant's stay in Hungarian territory constitutes a danger to national security. In the light of the foregoing, the competent asylum authority takes the view that the applicant cannot be granted either refugee status or beneficiary of subsidiary protection status.

III. Relevant legislation:

EU law

EU law in respect of the first and second questions referred:

1. The Asylum Procedure Directive, in particular Article 11(2), Article 12(1)(d) and (2), Article 23(1)(b) and Article 45(1) and (3) to (5)

2. The Charter, in particular Articles 41 and 47

EU law in respect of the third and fourth questions referred:

1. The Qualification Directive, in particular Articles 14(4)(a) and 17(1)(d)

2. The Asylum Procedure Directive, in particular Article 4, Article 10(2) and (3)(d) and Article 45(1)(a), (3) and (4) and recitals 20, 34 and 49

EU law in respect of the fifth question referred:

The Qualification Directive, in particular Article 17(1)(b)

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Hungarian legislation:

Hungarian law in respect of the first and second questions referred:

Article 57 of the a menedékjogról szóló 2007. évi LXXX. törvény (Law No LXXX of 2007 on the right to asylum) ('Law on the right to asylum')

'(1) In procedures governed by this Law, the national security authority shall issue a report on any technical matters it is competent to assess. …

(3) The competent asylum authority may not depart from the report by the national security authority if decision-making on the matter stipulated in the report is not within its area of competence. …'

Article 3 of the a minősített adat védelméről szóló 2009. évi CLV. törvény (Law CLV of 2009 on the protection of classified information) ('Law on the protection of classified information')

'1. Classified information:

a) National classified information: any information falling within the scope of the public interests capable of being protected by classification, which bears the classification marking in accordance with the formal requirements specified in this Law or in any legislation adopted hereunder, in respect of which, irrespective of how it is presented, the classifier has established in the classification procedure that the disclosure, unauthorised acquisition, modification or use of that information, its provision to an unauthorised person or the fact of access to that information by the person entitled to access being prevented, during its validity period, would infringe or directly compromise (collectively, 'harm') any of the public interests capable of being protected by classification and, having regard for its contents, has limited the disclosure of and access to that information in the context of the classification; …

[…] [definitions that are not relevant to this request]'

Article 11 of the Law on the protection of classified information

'(1) Data subjects shall be entitled to have access to their personal data classified as national classified information on the basis of an access authorisation issued by the classifier and shall not require personal security clearance. Before gaining access to national classified information, the data subject must make a written confidentiality declaration and comply with the provisions governing the protection of national classified information.

(2) On request by the data subject, the classifier shall decide within 15 days whether to grant the access authorisation. The classifier shall refuse the access authorisation if access to the information harms the public interest on which the

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classification is based. The classifier shall state reasons for refusing access authorisation.

(3) Where access authorisation is refused, the data subject may appeal that decision in contentious administrative proceedings. If the court upholds the appeal, the classifier must grant the access authorisation. The court will hear the matter without the presence of the public. The proceedings may only be heard by a judge who has undergone a national security check in accordance with the Law on National Security Services. The applicant, a person participating as an interested party together with the applicant and their representatives shall not have access to the classified information during the proceedings. Other persons intervening in the proceedings and their representatives may only have access to the classified information if they have undergone a national security check in accordance with the Law on National Security Services.'

Article 12 of the Law on the protection of classified information

'(1) The controller of the classified information may deny the data subject the right to access his or her personal data if the public interest on which the classification is based would be compromised by exercise of that right.

(2) Where the rights of a data subject are relied upon before a court the provisions of Article 11(3) shall apply *mutatis mutandis* to the court hearing the matter and to access to classified information.'

Article 13 of the Law on the protection of classified information

'(1) Classified information may only be used by a person who has good reason to do so in the interests of performing a State or public function and who, without prejudice to the exceptions laid down by the Law, has:

a) valid personal security clearance corresponding to the level of classification of the information it is wished to use;

b) a confidentiality declaration; and

c) authorisation to use the information. ….

(5) Unless the Law provides otherwise, the court shall be responsible for exercising the decision-making powers necessary to determine the matters assigned to it in the order in which they are allocated, with no requirement for a national security check, personal security clearance, confidentiality declaration or authorisation to use the information.'

Hungarian law in respect of the third and fourth questions referred:

Article 8 of the Law on the right to asylum

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‘(4) A foreign national whose stay on national territory constitutes a danger to national security may not be granted refugee status.’

Article 15 of the Law on the right to asylum

‘Subsidiary protection status shall not be granted to a foreign national …

(4) whose stay on national territory constitutes a danger to national security.’

Hungarian law in respect of the fifth question referred:

Article 15 of the Law on the right to asylum

‘Subsidiary protection status shall not be granted to a foreign national …

ab) in respect of whom a ground of exclusion under Article 8(5) applies;’

Article 8 of the Law on the right to asylum

‘(5) Refugee status shall not be granted to a foreign national on whom a court

a) has imposed a definitive custodial sentence of five years or more for an intentional crime;

b) has imposed a definitive custodial sentence for a crime committed as a repeat offender, multiple repeat offender or multiple repeat violent offender;

c) has imposed a definitive custodial sentence of three years or more for a crime against life, physical integrity or health, a crime endangering health, a crime of deprivation of liberty, sexual crimes, a public order crime, a crime against public security or a crime against the public administration.’

IV. Grounds for the request for a preliminary ruling

First and second questions referred

According to the relevant case-law of the Kúria (Supreme Court, Hungary), the procedural rights of the persons concerned are safeguarded by the mere fact that the court reviewing an administrative decision based on classified information is able to inspect the documents of the national security authority that contain the classified information. There is therefore no requirement that the person concerned should be able to know and use the information in question or at least the essence of that information.

The case-law of the Court of Justice on the restriction of rights in relation to decisions based on confidential information can be found, in particular, in Cases C-300/11 and C-593/10.

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As regards the applicant, the decision by the competent asylum authority to exclude him from international protection is based solely on the fact that the two national security authorities that participated in the procedure (the second and third defendants) declared in their reports that the applicant's stay in Hungary 'constitutes a danger to national security'. The competent asylum authority did not examine the reasons on which the national security authority based its report, including the classified information.

Neither the applicant nor his legal representative were able to make submissions on the non-reasoned report of the national security authority, obtained by the competent asylum authority in the administrative proceedings, or to challenge the basis for that report at the stage of the administrative proceedings. The applicant is able to request access to classified information about him under the Law on the protection of classified information but, even if he were granted access to the classified information, he would not be able to use it in either the administrative or the judicial proceedings. (According to their replies to the request for information in the public interest by the Magyar Helsinki Bizottság (Hungarian Helsinki Committee), the defendants in the main proceedings, the Constitutional Protection Office and the Counterterrorism Centre, did not grant the data subjects concerned any permission for access to the classified information about them in any of the requests they received in 2019 and the first half of 2020).

The fact that there is no right to use the information means that even if the confidential information is available to him, the applicant cannot make submissions on the reasons underlying the decision taken in the asylum procedure or, in consequence, put forward arguments to support a claim that the ground of exclusion does not apply.

Under the Law on the protection of classified information, the national security authority that takes the decision on access authorisation is not entitled to grant the application for access only in part, by disclosing the essence of the reasons on which that authority's report is based.

Although the court reviewing the lawfulness of an asylum decision and of the report of the national security authority on which it is based (as the referring court is doing here) is entitled to access confidential or classified information, it cannot use that information at any point, even in the main proceedings, and the court cannot make any pronouncement or finding in relation to it, either in the judicial proceedings or in its judgment. The court's judgment therefore inevitably lacks any facts and circumstances on which it can base its assessment of that aspect.

The court is required to review the administrative decision and rule at last resort on whether the ground for exclusion based on the confidential or classified information applies, in a situation in which neither the applicant nor the applicant's representative has been able to present a defence or any arguments or facts to establish that the ground at issue does not apply in that individual case. The court is only able to decide, without stating reasons for its decision, whether

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the classified information on which the authority relies justifies the finding made by the national security authority.

The court is unable to guarantee that the applicant in the main proceedings is, in any event, provided with the essence of the reasons underlying the national security authority's report and the substantive asylum decision being reviewed by the court.

Article 23(1)(b) of the Asylum Procedure Directive has not been transposed into Hungarian law, thereby creating a further exception in addition to the explicit exception established in that article. Nevertheless, neither that directive, Article 72 TFEU nor any other provision of EU law allows this.

As explained, it is therefore unclear whether the Hungarian legislation relied upon guarantees the fundamental procedural rights of applicants enshrined in the Asylum Procedure Directive and Article 47 of the Charter, or the right to an effective remedy.

The provisions of the Asylum Procedure Directive cited above must be interpreted precisely, because in the event of an unfounded decision on international protection a restriction or denial of access to confidential information that impairs procedural rights and the right to an effective remedy may, ultimately, give rise to infringement of the right to asylum (Article 18 of the Charter) and of other fundamental rights that, in part, enjoy a prohibition on restriction (Articles 2, 4, 6 and 19 of the Charter).

Third and fourth questions referred

The Court of Justice has held in Case C-369/17 that the competent asylum authority must take decisions on grounds for exclusion on an individual basis, examining and weighing the substance of each available fact. The judgments in Cases C-715/17 and C-380/18 likewise contain guidance on that evaluation.

Under the Hungarian legislation, the national security authority must issue a non-reasoned binding report on whether or not there is a 'danger to national security', from which the competent asylum authority may not depart, which means that, on that point, the asylum authority's decision contains only a reference to the report of the national security authority and a reference to the legislation. The effect of the Hungarian legislation is therefore that the substantive decision on international protection is adopted in a decision by the competent asylum authority – which likewise does not know the reasons on which the national security authority's report is based – in which, ultimately, it cannot thoroughly examine whether the ground for exclusion exists and applies to the individual case, take into account individual circumstances or evaluate whether application of the ground is necessary and proportionate. It emerges from the directives and the relevant judgments of the Court of Justice that, even where a specialised (national security) authority is involved, the responsible authority cannot adopt a decision on the

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substance of an asylum application (that is to say, on whether to grant or withdraw refugee or foreign national beneficiary of subsidiary protection status) where that decision is exclusively and automatically based on the decision of a different authority – which is competent to give an opinion on a specialised constituent issue – and does not itself carry out the assessment required under Article 4 of the Qualification Directive.

Accordingly, the Hungarian legislation has the effect that it is not the competent asylum authority that examines the substance of the application for international protection and ultimately takes the corresponding decision, but rather two national security authorities that neither satisfy the requirements nor have power under the Asylum Procedure Directive to carry out that examination and take that decision and that do not conduct their procedures in accordance with the substantive and procedural provisions of the relevant directives. That misappropriation of power, which seemingly conflicts with EU law, may undermine the procedural safeguards laid down in EU law.

As regards subsidiary protection, although Article 17(1)(b) of the Qualification Directive is a mandatory provision, in order for it to be applied there must likewise be an individual assessment, a thorough examination and a weighing of the facts by the competent asylum authority. First, that article itself signals that there must be ‘serious reasons’ underpinning any finding that the danger to security required for that ground for exclusion is present. Second, Article 19(4) expressly establishes that the Member State is to demonstrate on an individual basis that the person concerned is not or has ceased to be eligible for subsidiary protection in accordance with Article 19(3) (that is to say, where it is claimed that there is a danger to security).

Fifth question referred

The competent asylum authority, relying on the ground for exclusion under Article 15(ab) of the Law on the right to asylum, held that the applicant cannot be granted the status of a foreign national beneficiary of subsidiary protection. It did so on the basis of the applicant’s conviction of 6 June 2002, which became final 18 years ago, for a crime which, in its view, was ‘serious’.

The applicant completed the custodial sentence imposed in that judgment in 2004, 16 years ago, and the crime in question was already known at the time the applicant was granted refugee status, which was granted notwithstanding, and neither the authority nor the court that ruled on the grant of refugee status applied the ground of exclusion relating to that crime.

Final part

[…] [procedural considerations of domestic law]

Budapest, 27 January 2021.

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[…] [signatures]

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