Case C-406/22

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

20 June 2022

Referring court:

Krajský soud v Brně (Czech Republic)

Date of the decision to refer:

20 June 2022

Applicant:

CV

Defendant:

Ministerstvo vnitra České republiky (Ministry of the Interior of the Czech Republic)

Subject matter of the main proceedings

Action challenging the defendant's decision rejecting the applicant's application for international protection as manifestly unfounded.

Subject matter of the decision to refer

The referring court seeks an 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 ('the Directive').

Questions referred for a preliminary ruling

1. Should the criterion for the designation of safe countries of origin for the purposes of Article 37(1) [of the Directive] in Annex I(b) to the Directive – i.e., that the country concerned provides protection against persecution and ill

treatment through observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular the rights from which derogation cannot be made under Article 15(2) of that convention – be interpreted as meaning that, if the country withdraws from its commitments under the Convention for the Protection of Human Rights and Fundamental Freedoms in time of emergency under Article 15 of the Convention, it no longer meets the criterion for being designated as a safe country of origin?

2. Should Articles 36 and 37 [of the Directive] be interpreted as meaning that they prevent a Member State from designating a country as a safe country of origin only in part, with certain territorial exceptions, to which the assumption that that part of the country is safe for the applicant will not apply, and if the Member State does designate a country with such territorial exceptions as safe, then the country concerned as a whole cannot be deemed a safe country of origin for the purpose of the Directive?

3. If the reply to either of these two questions referred is affirmative, should Article 46(3) [of the Directive], in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that a court deciding about an appeal challenging the decision on the manifestly unfounded nature of the application, pursuant to Article 32(2) [of the Directive], issued in proceedings conducted pursuant to Article 31(8)(b) [of the Directive], must take into account *ex officio* that the designation of the country as safe is contrary to EU law, due to the reasons stated above, without requiring an objection on the part of the applicant?

Applicable provisions of European Union law and international law

Articles 18 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

Recitals 11, 12, 40 to 42, and 46 and Articles 1, 31(8), 32(2), 36, 37, 46, and Annex I to the **Directive**.

Protocol No 24 on asylum for nationals of Member States of the European Union ('**Protocol No 24**').

Article 15 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('**the Convention**') and Article 3 of the Geneva Convention Relating to the Status of Refugees.

Applicable provisions of Czech legislation

Pursuant to **Paragraph 16(2) and (3)** of zákon č. 325/1999 Sb., o azylu (Law 325/1999 on asylum; 'the Law on Asylum') application for international

protection shall also be rejected as manifestly unfounded if the applicant arrives from a state which the Czech Republic regards as a safe country of origin, unless the applicant proves that, in his or her case, the state in question cannot be considered to be such a country. If reasons exist for such rejection, no assessment shall be made as to whether the applicant satisfies the criteria for being granted asylum or subsidiary protection and as to whether the applicant submits information testifying to the fact that he or she might be exposed to persecution or that he or she is under threat of serious harm.

Pursuant to **Paragraph 3d** of the Law on Asylum, an applicant for foreign international protection is entitled to remain in the Czech Republic, but this does not give rise to his or her right to a residence permit. Pursuant to **Paragraph 2(1)(b),** a foreign national shall also have the status of an applicant for international protection for the period during which an appeal may be made and for the duration of legal proceedings on an appeal, pursuant to the Soudní řád správní (Code of Administrative Justice, against a decision of the Ministry, if such appeal has suspensory effect, or until the issuance of a ruling of a regional court concerning refusal to grant suspensory effect, if the foreign national has applied for such. Pursuant to **Paragraph 32(2)** of the Law on Asylum, the lodging of an appeal against a decision pursuant to Paragraph 16(2) of the Law on Asylum shall not have suspensory effect. Pursuant to **Paragraph 85b(1)** of the Law on Asylum, the Ministry shall issue a departure order *ex officio*, with a maximum deadline of 1 month, to a foreign national, after a decision to reject an application for international protection as manifestly unfounded, unless such decision is overturned by the court, or after a resolution of a regional court not to grant suspensory effect.

Pursuant to **Paragraph 2(1)(k)(3)** of the Law on Asylum, a safe country of origin means a country that has ratified and observes international conventions on human rights and fundamental freedoms, including laws relating to effective remedial measures. Pursuant to vyhláška č. 328/2015 Sb., kterou se provádí zákon o azylu a zákon o dočasné ochraně cizinců (Decree Implementing the Law on Asylum and Temporary Protection of Foreign Nationals, '**the Decree**'), Moldova is regarded as a safe country of origin, with the exception of Transnistria.

Pursuant to **Paragraph 73** of zákon č. 150/2002 Sb., soudní řád správní (Law 150/2002, Code of Administrative Justice, 'Code of Administrative Justice'), at the complainant's request, after hearing the defendant's opinion, the court shall by resolution award suspensory effect to the complaint, providing that the execution of the decision or other legal consequences of the decision would result in disproportionately greater harm to the complainant than that which may be caused by the granting of the suspensory effect to third persons, provided it is not contrary to an important public interest.

Pursuant to **Paragraph 76(1)(c)** of the Code of Administrative Justice, the court shall revoke the contested decision for procedural faults for substantial breach of

the regulations on proceedings before an administrative authority, if it could result in an unlawful decision on the matter itself.

Brief description of the facts of the case and the original proceedings

1 On 9 February 2022, the applicant, who is from Moldova, lodged an application for international protection in the Czech Republic ('CZ'). The grounds stated were threats he had received from unknown persons. In 2015, he witnessed an accident in which a car ran over a person on the pavement, killing that person. The applicant witnessed everything. The perpetrator drove away from the accident. The applicant called the ambulance and the police. That same night, some people called by his home. They were wearing balaclavas. They took him into the woods and beat him up. The applicant then ran away. He returned home, took his daughter to an acquaintance's house to be looked after temporarily, and contacted the police. The daughter then went to be with her mother in Kazakhstan, to be safe. The police said that they would investigate the matter, but that they did not know the perpetrator and could not help the applicant. The applicant did not return home out of fear. He hid at his friends' homes. Two days later, he did return home, to discover that his house had burnt down. The applicant then fled Moldova. An acquaintance arranged for him to obtain a Romanian passport. Using that passport, he went to the Czech Republic. He returned to Moldova in 2016 and 2019. However, he tried not to let anyone know of that, other than his cousins. The police have been investigating the entire matter for seven years. They have not, however, found the perpetrator. [1] The applicant never complained about the steps taken by the police.

2 The applicant lodged an application for international protection ('the applicant's application') in order to legalise his stay in CZ. He admitted that, in 2016, he had been subject to administrative expulsion for two years, because he had been working under a false Romanian passport. In 2020, he received a departure order, which was reissued on 23 January 2022.

3 By its decision of 8 March 2022, the defendant rejected the applicant's application as manifestly unfounded under Paragraph 16(2) of the Law on Asylum ('the rejection decision'), on the grounds that CZ considers Moldova, with the exception of Transnistria, to be a so-called safe country of origin, as set out in the Decree. The defendant had also gathered information from various sources about the political and security situation in Moldova and about the state of adherence to human rights.

4 If the offender comes from a safe country of origin, he bears the burden of proof to show that, in his case, the country concerned cannot be regarded as safe, which the applicant has failed to do for the following reasons:

[1] Reportedly, the police do know who committed the murder, but are unable to prove anything against the person concerned, for whom they have been reportedly searching for 25 years.

1) At the time of the decision, there were no reports of the armed conflict spreading from the neighbouring Ukraine to Moldova.

2) Even though the existence of cases of persecution,[2] in particular discriminatory criminal prosecution and punishment, of persons who oppose the state regime cannot be ruled out, the applicant does not fall into the category of such persons.

3) As for the threats from unknown persons – they are to have happened back in 2015, and since then the applicant has returned to the country twice, not taking advantage of all forms of protection available (e.g., of an ombudsman or an independent organisation).

4) The applicant's application is purely self-serving, aimed at legalising his further stay in CZ.

5 The applicant brought an action against the defendant's decision, claiming that the defendant had failed to properly establish the facts of the case, had failed to assess the applicant's application comprehensively in light of the applicant's subjective concerns, and had failed to take into account the consequences of the rejection decision.

6 On 9 May 2022, the Krajský soud (Regional Court) granted the Applicant's application[3] for his application to be granted suspensory effect for the following reasons:

1) in Moldova, the applicant would face the risk of serious harm from private individuals who have previously harmed him;

2) on 8 May 2022, pro-Russian separatist troops in Transnistria were put on combat readiness;

3) Moldova has withdrawn from its commitments arising from the Convention.

7 In January 2022, Moldova declared a state of emergency due to the energy crisis. In that context, it notified the Council of Europe on 25 February 2022 that it was withdrawing from its commitments under Article 15 of the Convention, including the right to freedom of expression under Article 10. One day before, the Moldovan Parliament had declared a state of emergency of siege and war in response to Russia's invasion of Ukraine. On 3 March 2022 – that is, five days

[2] Within the meaning of Article 9 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 ('Directive 2011/95').

[3] Had the applicant not filed this application, he would have ceased being an applicant for international protection who can lawfully remain in the territory of the Czech Republic.

before the issuance of the defendant's decision, which does not take that fact into account – Moldova again derogated from its obligations under the Convention, pointing to this new security threat. On 28 April 2022, it again announced an extension of that withdrawal, as on 21 April 2022, the Moldovan Parliament had extended the state of emergency until 23 June 2022.

Analysis of the questions referred

The referring court asks what implications there are, in terms of considering a country to be a safe country of origin, if:

> (a) the country withdraws from the Convention in time of emergency;
>
> (b) a Member State designates a country as safe only in part of its territory, not in its entirety;

and, if at least one of those problems results in the country ceasing to be a safe country of origin, whether

> (c) an administrative court must, in proceedings concerning an application challenging a decision to reject an application for international protection, take that fact into account *ex officio*.

First question referred (withdrawal from the Convention pursuant to Article 15)

8 The referring court emphasises the rebuttable nature of the presumption of adequate protection in the country of origin, arising from Articles 36 and 37 of the Directive, due to urgent grounds. In doing so, a Member State must ensure that the rules of the Directive are implemented in their entirety.[4] It follows that, when reviewing a decision rejecting an application based on the concept of a safe country of origin, an EU court must, in the context of the right to an effective remedy, consider not only whether that presumption has been successfully rebutted by the applicant, but also whether the general inclusion of the country on the list of safe countries of origin was made in accordance with the Directive.

9 Adherence to the rights and freedoms set out, inter alia, in the Convention, in particular those rights from which derogation is not possible pursuant to Article 15(2) of the Convention,[5] is set out in Annex I of the Directive, as one of the criteria for determining a safe country of origin.

4 See judgment of the Court of Justice of 25 July 2018, *A.* v *Migrationsverket*, C 404/17, paragraphs 25 to 26 and 31.

5 These include the right to life, with the exception of death resulting from lawful acts of war, prohibition of ill-treatment, prohibition of slavery and servitude, and prohibition of penalty without law.

10 Withdrawal from the commitments that arise from all so-called 'derogable' rights under the Convention of course does not mean that the rights would 'cease to apply', but, by withdrawing, the state gains greater freedom to restrict them:

> a) national authorities of the State concerned gain wide discretion to interfere with these rights, as opposed to a regular, non-emergency situation. [6]
>
> b) interference with these rights must be assessed differently, in terms of two criteria: (i) compliance with the scope strictly required by the urgency of the situation; and (ii) compatibility with other obligations under international law (e.g., the International Covenant on Civil and Political Rights or the UN Convention against Torture, to which Moldova is a party; or the Geneva Conventions). [7]

11 A linguistic interpretation could lead to the conclusion that, by withdrawing under Article 15 of the Convention, the State in question does indeed cease to be a safe country. By doing so, it declares that it will no longer protect the rights and freedoms under the Convention, as it had done up to that point. A reference should be made here to recital 42 of the Directive, according to which the designation of a third country as a safe country of origin cannot establish an absolute guarantee of safety for nationals of that country, and to Annex I, which lays down respect for derogable rights as a basis, and then adds only an emphasis on non-derogable rights. By analogy, reference may also be made to Protocol No 24, which provides that, if a Member State withdraws from its obligations under the Convention, it results in an obligation on the other Member States to accept for further processing an application for international protection lodged by a national of the State concerned. The withdrawing Member State thus ceases to be a safe country of origin for the other Member States; according to the referring court, this conclusion should apply all the more if the withdrawing country is a third country.

12 The second way of interpretation offers an approach according to which a State does not cease to respect the rights and freedoms arising from the Convention even after withdrawal. The withdrawal itself does not in reality mean a complete 'abandonment' of the Strasbourg mechanism for the protection of human rights. It is not a denunciation of the Convention, pursuant to its Article 58, but rather, an 'emergency regime' of respect for these rights, with the proviso that the State in question cannot withdraw from certain rights even under this regime.

6 See judgment of the plenary of the European Court of Human Rights of 18 January 1978 in the case *Ireland v United Kingdom*, No. 5310/71, paragraph 207

7 See, e.g., judgement of the European Court of Human Rights of 20 March 2018 in the case *Mehmet Hasan Altan v Turkey*, No 13237/17, paragraph 94, and in the case *Şahin Alpay v Turkey*, paragraph 78)

13 The referring court is inclined to prefer the interpretation according to which withdrawal pursuant to Article 15 of the Convention automatically means that the country in question can no longer be regarded as a safe country of origin.

Second question referred (designation of only a part of a country of origin as safe)

14 Territorial exceptions [8] for specific geographic areas and personal exceptions [9] for applicants from safe countries of origin can be found in Member States' practice: Cyprus, Denmark, and France consider Moldova a safe country of origin as a whole. CZ is the only country to designate Moldova as a safe country of origin with the exception of Transnistria.

15 In the view of the referring court, the designation of a country as safe must meet the requirements laid down by EU law. Council Directive No 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, [10] which preceded the present Directive, explicitly provided for the option of territorial and personal limitations; however, the present Directive does not explicitly regulate that option. The Explanatory Memorandum to the draft of the present Directive states that the optional provision that allows Member States to apply the term safe country of origin to a part of a country is being omitted. Hence, if the Directive, which, unlike its predecessor, regulates common, not only minimum standards for asylum proceedings, does not contain such a provision, a country in which any territory does not meet the conditions set out in Annex I to the Directive cannot be designated as a safe country of origin.

16 A conclusion to the contrary would contravene Article 36(1) and Article 37(1) of the Directive and introduce a different procedural treatment for (i) a person coming from a part of the state in question designated as safe, who must rebut the presumption of safety, and if unsuccessful, he/she faces the risk of an departure order regardless of the specific reasons for the person's asylum, and (ii) a person from the country in question to which the territorial exception applies, who may rely on a full review of his or her application and an automatic suspensive effect

8 For example, the Czech Republic, Denmark, and Finland designate Georgia as a safe country of origin, except for South Ossetia and Abkhazia. Similarly, Cyprus and the Czech Republic continue to make an exception for Ukrainian applicants from the Crimean Peninsula and the Donetsk or Luhansk regions. Hungary identifies the USA as a safe country of origin, but only in relation to states that do not apply the death penalty.

9 Luxembourg has designated Benin and Ghana as safe countries of origin, but only for men. In the case of Russia, Denmark applies exceptions for ethnic Chechens, LGBTI applicants, Russian Jews, and politically active persons who have faced abuse by the authorities. Denmark also applies a general exemption for LGBTI applicants. The Netherlands, too, has exceptions for specific groups of persons in Armenia, Morocco, and Tunisia.

10 See Article 30(1) of the Directive.

of any subsequent action.[11] Such differential treatment also leads to adverse differences in treatment in comparison with applicants from those countries that are not on the list of safe countries at all. Differential treatment on the basis of the criterion of the country of origin is contrary to Article 3 of the Geneva Convention Relating to the Status of Refugees. Furthermore, territorial exceptions adversely affect assessment of applications for international protection under Article 8 of Directive 2011/95/EU.

17 The concept of safe countries of origin is intended to constitute a certain procedural simplification for the administrative authority conducting the assessment; however, Member States should be able to apply this procedural simplification only in the case of 'trouble-free' countries that (similarly to EU Member States) are genuinely unlikely to produce refugees or persons eligible for subsidiary protection. However, this trouble-free aspect is not present in those countries in which the state does not exercise effective control over part of their territory. Ukraine can be cited as an extreme example.

18 On the other hand, the referring court understands that the view just descried is not unambiguous – as is, after all, documented by the practice of certain Member States that continue to designate certain countries as safe with territorial or personal exceptions – and it allows that the non-existence of an explicit reference to the option to apply territorial exceptions can also be read as meaning that the Directive does not rule them out absolutely (even though the intention of the EU legislator was clearly different).

Third question referred (review *ex officio*)

19 Article 46(3) of the Directive[12] plays a major role in the sphere of a common European asylum system, giving every applicant a right to *an effective remedy* against a decision rejecting his or her application for international protection. An effective remedy must – at least in a court of first instance – include a complete and *ex nunc* examination of both facts and points of law. The question arises in the case at hand whether the court deciding pursuant to this provision must examine *ex officio* whether the designation of a certain country as safe complies with Annex I to the Directive. The provision does not make an explicit reference to the possibility of an *ex officio* decision .[13]

11 The implications of this differential treatment are illustrated in a judgment of Canada's Federal Court of 23 July 2015 in *Y. Z.* v. *Canada (Citizenship and Immigration)*, 2015 FC 892 (https://bit.ly/3yAfhzx)

12 The Czech legislature has not yet implemented this provision in the Czech legal system. Hence, it has direct effect.

13 The Directive explicitly refers to *ex officio* review in other situations covered by Article 46(4) and Article 46(6).

20 The issue in the Czech context is whether a court should examine, of its own initiative and without the applicant's objection, whether the designation of a safe country of origin enshrined in the Decree complies with the Directive. And whether the court should decide that the defendant cannot render a decision pursuant to Paragraph 16(2) of the Law on Asylum, should it find that the Decree contravenes the Directive in that regard.

21 According to national practice, an administrative court must *ex officio* take into account a defect in proceedings consisting of an administrative authority's issuance of a decision that is precluded by the procedural framework of a particular case .[14] This could be hypothetically applied to a situation in which an authority deciding on an application for international protection conducts proceedings pursuant to Article 31(8)(b) of the Directive, applying the concept of safe country of origin, and decides that it is manifestly unfounded under Article 32(2) of the Directive, even though the country did not meet the conditions set out in Annex I to the Directive.

22 If Article 46(3) of the Directive did not give the court the right to examine the Decree's compliance with Annex I to the Directive *ex officio*, what else could effective review of the legal aspects of the case entail? The provision itself does not state that the review should be conducted only to the extent delimited by the applicant's objection, hence not explicitly ruling out an *ex officio* review. Support for this argument can also be inferred from the principle of sincere cooperation, under Article 4(3) of the Treaty on the European Union. [15]

23 Hence, the referring court takes the view that, pursuant to Article 46(3) of the Directive, the said examination must be carried out *ex officio*, including the question whether an accelerated procedure under Article 31(8)(b) of the Directive should take place at all in the case at hand.

[14] See judgment of the Nejvyšší správní soud (Supreme Administrative Court) of 10 May 2017, ref. No. 2 As 163/2016-27.

[15] See Opinion of the Court of Justice 1/09, of 8 March 2011 (paragraphs 68 and 69).