

Case C-662/23 [Izmir]ⁱ**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:**

9 November 2023

Referring court:

Raad van State (Netherlands)

Date of the decision to refer:

8 November 2023

Applicant:

State Secretary for Justice and Security

Defendant:

X

Subject matter of the main proceedings

Appeal by the State Secretary for Justice and Security (the competent determining authority in Dutch immigration law ('the State Secretary')) against a judgment of the court in which an appeal by a third-country national against the failure of the State Secretary to decide on his application for international protection was upheld.

Subject matter and legal basis of the request

Interpretation of point (b) of the third subparagraph of Article 31(3) 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 referring court wishes to know how the phrase 'a large number of third-country nationals or stateless persons simultaneously apply for international protection' is to be interpreted, how it relates to the phrase 'making it very difficult in practice

ⁱ This is a fictitious name, and does not correspond to the actual name of any party to the proceedings.

to conclude the procedure within the six-month time limit’, and whether any other circumstances may be taken into account in its assessment.

Questions referred for a preliminary ruling

Question 1a

Can the determining authority make use of its power to extend the 6-month decision period, in the event of a large number of applications for international protection being lodged at the same time, within the meaning of point (b) of the third subparagraph of Article 31(3) of the Procedures Directive, if the increase in the large number of applications for international protection occurs gradually over a certain period of time and, as a result, it is very difficult in practice to conclude the procedure within the 6-month time limit? How should ‘simultaneously’ be interpreted in this context?

Question 1b

What criteria should be used to assess whether there is a ‘large number’ of applications for international protection, as referred to in point (b) of the third subparagraph of Article 31(3) of the Procedures Directive?

Question 2

Is there a time limit on the period during which there must be an increase in the number of applications for international protection in order still to fall within the scope of point (b) of the third subparagraph of Article 31(3) of the Procedures Directive? And, if so, how long might this period last?

Question 3

When assessing whether it is very difficult in practice to conclude the procedure within the 6-month time limit referred to in point (b) of the third subparagraph of Article 31(3) of the Procedures Directive – partly in the light of Article 4(1) of the Procedures Directive – may account be taken of circumstances that cannot be traced back to the increase in the number of applications for international protection, such as the circumstance that the determining authority has to deal with backlogs that already existed before the increase in the number of applications for international protection or with a lack of staff capacity?

Provisions of European Union law relied on

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) (OJ 2013 L 180, p. 60) ('the Procedures Directive'): Recital 18, Article 1, Article 4, Article 31(2) and Article 31(3), third subparagraph, point (b)

Provisions of national law relied on

Vreemdelingenwet 2000 (Aliens Act 2000) ('Vw 2000'): Article 42(4), preamble and point (b)

Wijzigingsbesluit Vreemdelingencirculaire (Amendment Order on the Aliens Act Implementation Guidelines) of 21 September 2022 ('WBV 2022/22')

Succinct presentation of the facts and procedure in the main proceedings

- 1 By WBV 2022/22, effective from 27 September 2022, the State Secretary extended the statutory 6-month decision period for granting a temporary asylum residence permit by 9 months. This decision applies to all requests whose statutory decision period had not yet expired on 27 September 2022. The decision was taken on the basis of Article 42(4), preamble and point (b) Vw 2000, transposing point (b) of the third subparagraph of Article 31(3) of the Procedures Directive into Dutch law. This provision allows Member States to extend the 6-month decision period by up to 9 months if there is a large number of third-country nationals or stateless persons applying for international protection at the same time, making it very difficult in practice to conclude the procedure within the 6-month time limit.
- 2 This decision period was extended due to an unexpectedly large increase in asylum applications in the second half of 2021 and in 2022. The State Secretary also faces backlogs in the examination of initial asylum applications, leading him to decide on a significant proportion of these applications outside the 6-month decision period. Partly due to inadequate staff capacity, the State Secretary is in practice no longer able to assess asylum applications diligently within 6 months, according to the explanatory memorandum to WBV 2022/22.
- 3 On 10 April 2022, X, a Turkish national, lodged an application for asylum in the Netherlands. The State Secretary failed to make a decision on the asylum application within 6 months. X therefore served notice of default on the State Secretary by letter dated 13 October 2022. The State Secretary then failed to make a decision within 2 weeks. Consequently, X appealed to the court against the failure to make a timely decision.
- 4 On 6 January 2023, the court ruled that the State Secretary had not lawfully extended the decision period for asylum applications with WBV 2022/22. It is true that there was an increase in asylum applications from the second half of 2021, but not a situation as referred to in Article 42(4), preamble and point (b) Vw 2000. The court therefore upheld X's appeal.

- 5 According to the court, this article must be interpreted as meaning that there must be such a rapid increase (‘spike’) in the number of asylum applications submitted simultaneously that the State Secretary is no longer able to make a decision on these applications within the decision period in a diligent manner. There is no such spike at present because there has only been a gradual increase in the number of asylum applications and not a situation where a large number of third-country nationals apply for international protection simultaneously.
- 6 According to the court, the Procedures Directive does not provide scope to extend the decision period if the number of asylum applications only increases gradually. This is because in such a case, the State Secretary has ample time and opportunity to increase the decision-making capacity. This interpretation is in line with the purpose of the Procedures Directive for the determining authority to take decisions on asylum applications as soon as possible, but in a diligent manner.
- 7 The State Secretary appealed against this ruling to the Administrative Law Division of the Council of State (‘the Division’), the referring court.

The essential arguments of the parties in the main proceedings

- 8 On appeal, the State Secretary argues that the court erred in considering that he had not lawfully extended the statutory decision period with WBV 2022/22. According to the State Secretary, the court misinterpreted Article 42(4), preamble and point (b) Vw 2000 and point (b) of the third subparagraph of Article 31(3) of the Procedures Directive. In light of the purpose and useful effect of the Procedures Directive, these provisions should not be interpreted restrictively but broadly. According to the State Secretary, the article of law and the Directive do not show that there must be a ‘spike’ in the number of asylum applications being lodged simultaneously. The determining authority may also extend the decision period in the event of a more gradual increase in the number of asylum applications, and in combination with other circumstances, in order to ensure a diligent and adequate examination of asylum applications as required by Article 31(2) of the Procedures Directive.
- 9 According to the State Secretary, figures on the number of asylum applications show that he cannot cope with the increase in asylum applications with the current decision-making capacity. Time is needed to increase that decision-making capacity. Point (b) of the third subparagraph of Article 31(3) of the Procedures Directive provides scope for this, according to the State Secretary, because in the current situation he is no longer able to ensure an adequate and complete examination in due time and that interest, in the light of Article 31(2) of the Procedures Directive, takes precedence over speed in making decisions. According to the State Secretary, he may additionally consider existing backlogs in the examination of asylum applications when considering whether to extend the decision period. This is because these take up decision-making capacity and

contribute to making it very difficult in practice to conclude the procedure in a diligent manner within 6 months.

Succinct presentation of the reasoning in the request for a preliminary ruling

Statistics

- 10 The Division provides an overview of the statistics of the total number of asylum applications in the Netherlands between 2014 and 2022, with a focus on 2021 and 2022, and the forecasts for these with which the State Secretary works. It also provides figures for the number of staff available to the State Secretary. The overview shows that a total of around 36 620 asylum applications were made in 2021. There were 47 991 asylum applications in 2022, whereas the State Secretary's forecast for 2022 in September 2021 was 34 370 asylum applications. The number of asylum applications thus increased by 24% in 2022 compared with 2021, and was 28% higher than expected in that year. In 2021, the State Secretary's workforce consisted of 4 120 FTEs and 849 external staff, and in 2022, 4 558 FTEs and 835 external staff.

Questions on the scope of point (b) of the third subparagraph of Article 31(3) of the Procedures Directive

- 11 It is not clear from point (b) of the third subparagraph of Article 31(3) of the Procedures Directive whether there can be a large number of third-country nationals or stateless persons simultaneously applying for international protection in the case of a gradual increase in the number of asylum applications over a period of time. And if a gradual increase over a period of time falls within the scope of point (b) of the third subparagraph of Article 31(3) of the Procedures Directive, it is not clear what the maximum length of this period may be. In addition, the question arises whether, given the words 'making it' (translated by 'waardoor' in the NL version of the Directive), circumstances other than the large number of asylum applications simultaneously may also be included in the application of this provision, such as the fact that the determining authority is already dealing with backlogs independent of the increase in the number of asylum applications ('autonomous backlogs').
- 12 Moreover, Article 31(2) of the Procedural Directive stipulates that the examination procedure shall be completed as soon as possible, without prejudice to an adequate and complete examination. Both a restrictive and a non-restrictive interpretation of point (b) of the third subparagraph of Article 31(3) of the Procedures Directive will create a certain tension between the speed and diligence of the examination procedure. According to the Division, the wording, purpose and legislative history, as well as the systematics of point (b) of the third subparagraph of Article 31(3) of the Procedures Directive do not offer conclusive guidance on how that provision is to be interpreted.

Wording

- 13 Point (b) of the third subparagraph of Article 31(3) of the Procedures Directive does not define or further interpret the wording ‘a large number of third-country nationals or stateless persons simultaneously apply for international protection’ and its relationship with the phrase ‘making it very difficult in practice to conclude the procedure within the six-month time limit’. In particular, the Division is faced here with the question of how the words ‘simultaneously’ and ‘a large number’ are to be interpreted.
- 14 The word ‘simultaneously’ lends itself on the one hand to a strict interpretation, namely in the same time, at the same time, concomitantly, at the same moment. On the other hand, a slightly broader interpretation of the word ‘simultaneously’ is conceivable, especially considering that in practice asylum applications are rarely actually filed at exactly the same time. In this context, the word ‘simultaneously’ can also be understood as ‘within a short period of time’. This could mean that point (b) of the third subparagraph of Article 31(3) of the Procedures Directive could also be applied in the case of an aggregation of asylum applications lodged over a short period of time, as a result of which the State Secretary is faced at some point with a large number of asylum applications on which he has to take a decision in a limited period of time and as a result of which it is very difficult in practice to conclude the examination within 6 months.
- 15 In addition, it is also insufficiently clear what exactly is meant by ‘a large number’. The question is how many asylum applications together constitute a ‘large number’ and whether this should be determined in absolute terms or also measured against, for example, structural intake figures in a Member State.
- 16 A textual interpretation of the provision is thus inconclusive as to how point (b) of the third subparagraph of Article 31(3) of the Procedures Directive should be interpreted.

Objective and legislative history

- 17 The objective of Article 31 of the Procedures Directive also does not clarify how point (b) of the third subparagraph of Article 31(3) of the Procedures Directive is to be interpreted. From the proposal and the amended proposal by the European Commission for the recasting of the Procedures Directive [see COM(2009) 554 final, p. 8, and COM(2011) 319 final, Annex, pp. 11 and 12] and Recital 18 of the Directive, it is clear that Article 31 of the Procedures Directive pursues several objectives. On the one hand, the general time limit of 6 months is intended, in the interest of both Member States and applicants, to allow a decision on an application for international protection as soon as possible. The recasting of the Procedures Directive also explicitly chose to maintain this 6-month time limit. This may indicate that the exceptions in Article 31(3) of the Procedures Directive formulated to this general rule should be interpreted strictly. On the other hand, it could be that the possibilities for extension set out in Article 31(3) of the

Procedural Directive should not be seen as exceptions to a main rule, but as special situations justifying a longer decision period. This is supported by the fact that the possibilities for extension were introduced to give more flexibility to Member States, for example when there is a sudden increase in applications for international protection. This flexibility may be impaired by a strict interpretation of those provisions.

Systematics

- 18 The systematics of Article 31 of the Procedures Directive are also inconclusive as to how point (b) of the third subparagraph of Article 31(3) of the Procedures Directive should be interpreted. Under Article 31(2) of the Procedural Directive, the Member State should complete the examination procedure as soon as possible, without prejudice to an adequate and complete examination. It seems to follow from this provision that while the speed of the examination procedure is important, it should not be at the expense of the diligence of the asylum procedure. In the light of this, a broader interpretation of point (b) of the third subparagraph of Article 31(3) of the Procedures Directive is conceivable, whereby this power could also be used where an extension of the decision period due to a large number of asylum applications is necessary in order to ensure the diligence of the asylum procedure, even where those applications have not all been made within a short period of time, but the State Secretary is required to take a decision on a large number of asylum applications simultaneously. On the other hand, point (b) of the third subparagraph of Article 31(3) of the Procedures Directive appears to be an exception to the main rule that the State Secretary must complete the procedure within 6 months. If this is assumed, it is arguable that point (b) of the third subparagraph of Article 31(3) of the Procedures Directive should be interpreted restrictively. In that case, the determining authority would be able to extend the decision period when there are a large number of asylum applications made within a short period of time and would thus assume a slightly broader interpretation of ‘simultaneously’.

Relationship between Article 31 and Article 4(1) of the Procedures Directive

- 19 The phrase ‘making it very difficult in practice to conclude the procedure within the six-month time limit’, and in particular the words ‘making it’, raises the question of whether circumstances other than the large number of asylum applications simultaneously may also play a role in the application of point (b) of the third subparagraph of Article 31(3) of the Procedures Directive, for example the fact that the determining authority is already facing autonomous backlogs. Article 4(1) of the Procedures Directive also obliges Member States to ensure that the determining authority has, inter alia, a sufficient number of staff competent to perform their duties in accordance with this Directive. In the light of this provision, it is conceivable that, in deciding to apply point (b) of the third subparagraph of Article 31(3) of the Procedures Directive, a Member State may not rely on the fact that it faces autonomous backlogs.

Provisional opinion

- 20 In view of the above, it is not clear to the Division how point (b) of the third subparagraph of Article 31(3) of the Procedures Directive is to be interpreted. For the time being, it considers that the word ‘simultaneously’ in this provision cannot literally mean ‘at the same time’, because in practice asylum applications are rarely actually filed at the same time. But even with a broader interpretation of the word ‘simultaneously’, this concept will have to be delimited in time.
- 21 Point (b) of the third subparagraph of Article 31(3) of the Procedures Directive appears to be an exception to the main rule that the Secretary of State must complete the procedure within 6 months. The Division considers it conceivable that this provision could be interpreted broadly, given the purpose and useful effect of Article 31(3) of the Procedures Directive. In that case, the power to extend the decision period could also be used in the event of a more gradual increase in the number of asylum applications over a longer period of time.
- 22 This interpretation need not conflict with Article 4(1) of the Procedures Directive, which presupposes that the determining authority ensures that certain fluctuations in the number of asylum applications can be accommodated. It does not seem to follow from Article 4(1) of the Procedures Directive that the State Secretary only meets this obligation if, regardless of the size of the number of asylum applications, he can always decide within 6 months. After all, increasing decision-making capacity takes time and, in practice, will not easily synchronise with forecasts.
- 23 Finally, it seems to follow from point (b) of the third subparagraph of Article 31(3) of the Procedures Directive that no circumstances other than the large number of asylum applications lodged at the same time should be taken into account when answering the question of whether the large number of asylum applications simultaneously has made it very difficult to conclude the examination procedure within 6 months. The wording of this provision seems to oppose an interpretation that takes into account other causes of failure to make a decision on time. For example, if autonomous backlogs in the processing of applications for international protection were allowed to be taken into account when deciding on the extension of the decision period under point (b) of the third subparagraph of Article 31(3) of the Procedures Directive, this could prejudice the Member State’s obligation to ensure that the determining authority has adequate resources.

Relevance of the questions referred for a preliminary ruling

- 24 Following the court’s ruling, the State Secretary issued a decision on X’s asylum application on 14 April 2023. Nevertheless, under domestic law, he still has an interest in his appeal against the court’s ruling that, by WBV 2022/22, he did not lawfully extend the decision period in asylum cases, and thus in answering the questions referred for a preliminary ruling, because of the precedential effect of that ruling. In addition, several similar appeals are pending before the Division in

which the State Secretary refers to the contents of the appeal in this case. Finally, the court in The Hague is waiting for an answer to the question of the legality of WBV 2022/22, as it involves many appeals against the failure to decide on asylum applications in time.

WORKING DOCUMENT