Case C-610/23 [Al Nasiria] [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:

3 October 2023

Referring court:

Dioikitiko Protodikeio Thessalonikis (Greece)

Date of the decision to refer:

30 June 2023

Applicant

FO

Defendant:

Ypourgos Metanastefsis kai Asylou

Subject matter of the main proceedings

Application for annulment of the decision of the Anexartiti Epitropi Prosfygon (Independent Appeals Committee) of the Ypourgeio Metanastefsis kai Asylou (Ministry of Migration and Asylum) dismissing as manifestly unfounded the applicant's appeal against the decision rejecting his application for international protection.

Subject matter and legal basis of the request

Interpretation of Article 46 of Directive 2013/32 – in conjunction with the provisions of Directive 2008/115 and in the light of Article 47 of the Charter of Fundamental Rights of the European Union – and of the principles of the procedural autonomy of the Member States, equivalence and effectiveness – Article 267 TFEU.

[i] The name given to the present case is fictitious. It does not correspond to the real name of any party to the proceedings.

Questions referred for a preliminary ruling

1. Given the importance of the remedy referred to in Article 46 of Directive 2013/32, may the legislature infer a presumption that the appeal has been improperly brought and, as a consequence, dismiss the appeal, without a full and *ex nunc* examination of the case, as manifestly unfounded (which also results in the period for voluntary departure referred to in Article 22(4) of Law 3907/2011 and Article 7 of Directive 2008/115 not being granted) on the ground that the applicant [for international protection] did not appear in person before the committee examining the case?

2. (a) If it were to be held that this matter is covered by the principle of the procedural autonomy of the Member States, should the comparable national procedural rules, in the context of the examination of the principle of equivalence, be considered to be those governing proceedings before administrative committees hearing appeals under national law or the procedural rules governing the bringing of substantive actions (or applications for annulment) before administrative courts?

(b) Is it consistent with the principle of effectiveness of EU law and, in particular, the effective exercise of the right to an effective remedy to lay down an obligation to appear in person (or to send the attestation referred to in Article 78(3) of Law 4636/2019 in the cases provided for)? In that context, furthermore, is it relevant whether the presumption that the right of appeal has been improperly brought, provided for in Article 97(2) of Law 4636/2019, corresponds to the lessons of general experience and, in the context of the examination (at first instance) of applications for international protection, that the same conduct would lead to a presumption of implicit withdrawal rather than a rejection of the application as manifestly unfounded?

Provisions of European Union law and case-law relied on

Treaty on the Functioning of the European Union: Article 78

Charter of Fundamental Rights of the European Union ('the Charter'): Article 47

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: Articles 28, 31(8), 32(1) and (2), 46 and 47.

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): Article 4.

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98): Articles 7(4) and 11(1).

Judgments of 6 October 1982, *Cilfit and Others* (283/81, EU:C:1982:335); of 21 December 2011, *NS* (C-411/10 and C-439/10, EU:C:2011:865); of 31 January 2013, *D. and A.* (C-175/11, EU:C:2013:45); of 7 November 2013, *X and Others* (C-199/12 to C-201/12, EU:C:2013:720); of 17 December 2015, *Tall* (C-239/14, EU:C:2015:824); of 26 February 2015, *Shepherd* (C-472/13, EU:C:2015:117); of 18 October 2018, *E. G.* (C-662/17, EU:C:2018:847); of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal (Tompa)* (C-564/18, EU:C:2020:218); and of 9 September 2020, *Commissaire général aux réfugiés et aux apatrides* (Rejection of a subsequent application – Time limit for bringing proceedings) (C-651/19, EU:C:2020:681).

Provisions of national law relied on

Syntagma tis Elladas (Constitution of Greece): Articles 8, 20(1), 87 and 89(2).

Nomos 4636/2019, Peri Diethnous Prostasias kai alles diatakseis (Law 4636/2019 on international protection and other provisions) (Government Gazette I/169 of 1.11.2019): Articles 2, 4, 5(1), 9(1), 15, 78(3) and (9), 81, 92, 95(1) and 97(2).

Nomos 4375/2016, Organosi kai leitourgia Ypiresias Asylou, Archis Prosfygon, Ypiresias Ypodochis kai Taftopoiisis, systasi Genikis Grammateias Ypodochis, prosarmogi tis Ellinikis Nomothesias pros tis diatakseis tis Odigias 2013/32/EE tou Evropaikou Koinovouliou kai tou Symbouliou ‘schetika me tis koines diadikasies gia ti chorigisi kai anaklisi tou kathestotos diethnous prostasias (anadiatyposi)’ (EE 2013 L 180), diatakseis gia tin ergasia dikaiouchon diethnous prostasias kai alles diatakseis (Law 4375/2016 on the organisation and operation of an Asylum Service, Refugee Authority and Reception and Identification Service, establishing a General Secretariat for Reception and harmonising Greek legislation with the provisions of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast) (OJ 2013 L 180), provisions governing the work of beneficiaries of international protection and other provisions (Government Gazette, I/51 of 3.4.2016) as amended by Nomos 4399/2016 (Law 4399/2016): Article 4(1).

Nomos 3907/2011, Idrysi Ypiresias Asylou kai Ypiresias Protis Ypodochis, prosarmogi tis ellinikis nomothesias pros tis diatakseis tis Odigias 2008/115/EK schetika me tous koinous kanones kai diadikasies sta krati-meli gia tin epistrophi ton paranomos diamenonton ypikoon triton choron kai loipes diatakseis (Law 3907/2011 establishing an Asylum and First Reception Service, harmonising Greek legislation with the provisions of Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-

country nationals and other provisions (Government Gazette, I/7 of 26.1.2011): Article 22(4).

Brief summary of the facts and procedure

1 On 28 February 2019, the applicant in the main proceedings, an Iraqi national, lodged an application for international protection with the Samos Regional Asylum Office, stating that he had left his country of origin because his life was threatened by the militia due to a sectarian conflict.

2 After it was established that he had been the victim of a serious physical violence, the applicant met with the Thessaloniki Regional Asylum Office on 24 February 2020. There he stated, with regard to the reasons that had forced him to leave his country of origin, that he had been having a sexual relationship with a girl and that this put his life at risk, since a tribal decision had been taken that he should be killed. For that reason, the applicant left Iraq, flew to Türkiye and from there entered Greece.

3 During the administrative procedure for examining his application, the applicant produced a document addressed to all the tribes ordering his death for misconduct involving the tribe. The applicant indicated that he did not wish to return to his country of origin because, if he returned, he would be killed.

4 His application was rejected by decision of the Thessaloniki Regional Asylum Office of 18 May 2020, because his claims were considered unreliable, and the abovementioned document was not admitted as full evidence.

5 On 27 August 2021, the applicant lodged an administrative appeal with the Independent Appeals Committee against that decision. When he lodged the appeal, he was informed that the date set for its examination was 11 October 2021 and that he would have to appear in person on that date before the competent Independent Appeals Committee, unless he was lawfully staying in a Reception and Identification Centre (Kentro Ypodochis kai Taftopoiisis, 'KYT') or had been subject to a restriction on movement or an obligation to stay in a place outside the region of Attica.

6 However, the applicant did not appear in person before the committee on the date of the hearing. Therefore, after verifying that the applicant was not staying in a KYT, and had not been subject to a restriction on movement and that there were no force majeure grounds, the committee adopted a decision dismissing the appeal as manifestly unfounded, without examining the substance of the case, and imposed on him a return order without voluntary departure from the country.

7 The applicant brought an action for annulment before the referring court against the decision of the Independent Appeals Committee (‘the contested decision’).

The essential arguments of the parties in the main proceedings

8 The applicant claims, in particular, that the contested decision was adopted without a lawful and sufficient statement of reasons. Specifically, he submits that his application was unlawfully rejected on the sole ground that he was absent from the hearing and that the substance of the application was not adequately examined, since he was unable to appear at the hearing for reasons of force majeure, namely financial hardship that prevented him from travelling from Thessaloniki, where he lives, to Athens.

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

9 Directives 2011/95 and 2013/32, which form part of the Common European Asylum System, were transposed into the national legal system by Law 4363/2019. Pursuant to Article 92 of that law, which corresponds to Article 46 of Directive 2013/32 on the right to an effective remedy before a court or tribunal, an applicant for international protection has the right to lodge an administrative appeal against a decision rejecting an application for international protection at first instance.

10 Article 4(1) of Law 4375/2016, as amended by Law 4399/2016, established the Independent Appeals Committees, which are competent to hear appeals by applicants for international protection, in order to review, in law and in substance, decisions rejecting them at first instance.

11 In order to provide the required procedural guarantees, provision was made for the majority of those committees, described as ‘quasi-judicial bodies’, to be composed of judges currently in office (judges of the ordinary administrative courts). The members of the committees are to enjoy personal and functional independence in the performance of their duties.

12 In addition, the principle of impartiality is guaranteed, since committees have a third-party status in relation to the parties involved and do not represent the administration.

13 The decisions given by those committees on administrative appeals, following a thorough examination of the law and substance and on the basis of a comprehensive, specific and precise statement of reasons, are binding on the parties, since they may only be overturned by means legal proceedings, namely an action for annulment before an administrative court.

14 In view of the above, while the Independent Appeals Committees are not courts or tribunals within the meaning of the Constitution, they are nevertheless committees exercising judicial functions within the meaning of Article 89(2) of the Constitution.

15 Furthermore, Article 97(2) of Law 4636/2019 provides that, during the procedure before the Independent Appeals Committees, the applicant must be present in person. The only cases in which the applicant is not required to appear in person are listed in Article 78(3). These are cases in which the applicant for international protection is staying in a reception or hosting centre or has been subject to a restriction on movement or an obligation to stay in a particular place, in which case he or she may either be represented by a lawyer or may send an attestation stating that one of these cases applies. If the applicant for international protection does not appear in person (or does not send the attestation referred to in Article 78(3) of the law), his or her appeal is dismissed as manifestly unfounded, since it is presumed that the applicant brought the appeal merely in order to delay or frustrate the enforcement of an earlier or imminent decision to expel or otherwise remove him.

16 In that regard, the referring court points out that, according to settled case-law, the characteristics of the remedy provided for in Article 46 of Directive 2013/32 must be determined in a manner that is consistent with Article 47 of the Charter, which states 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 in compliance with the conditions laid down in that article (judgment of 18 October 2018, *E.G.*, C-662/17, EU:C:2018:847, paragraph 47 and the case-law cited).

17 Moreover, in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy, on condition, however, that those rules are not less favourable than those governing similar domestic situations (the principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (the principle of effectiveness) (judgments of the Court of Justice of 19 March 2020, *Bevándorlási és Menekültügyi Hivatal (Tompa)*, C-564/18, EU:C:2020:218, paragraph 63, and of 9 September 2020, *Commissaire général aux réfugiés et aux apatrides* (Rejection of a subsequent application – Time limit for bringing proceedings) C-651/19, EU:C:2020:681, paragraph 34).

18 Directive 2013/32 does not contain any specific rules on the appearance of applicants before the body examining the effective remedy referred to in Article 46 of the Directive or to the consequences of failure to comply with that procedural obligation. It may therefore be concluded that the obligation to appear in person laid down in Article 97(2) of Law 4636/2019 (or to send the attestation referred to in Article 78(3) of that law) and the provision for the dismissal of the action as manifestly unfounded in the event of non-compliance is encompassed by the principle of the procedural autonomy of Member States and may be examined further only as regards compliance with the principles of equivalence and effectiveness.

19 Pursuant to Article 32 of Directive 2013/32, a prerequisite for a finding that an application for international protection is manifestly unfounded is that it be declared to be unfounded, that is to say, the application must be examined on its merits. However, for the purposes of Article 97(2) of Law 4636/2019, if the applicant does not appear in person at the hearing of the appeal, the application is rejected as manifestly unfounded, but the merits of the application are not examined. Furthermore, according to a combined reading of Article 46(1) and (3) of Directive 2013/32 and Article 97 of Law 4636/2019, the effective remedy provided for by Greek law, by means of an administrative appeal, must ensure a full and *ex nunc* examination of both facts and points of law. That is not the case where the applicant does not appear in person before the appellate body, namely the Independent Appeals Committee. It is therefore necessary to consider whether Article 97(2) of Law 4636/2019 is compatible with Article 46 of Directive 2013/32.

20 With regard to compliance with the principle of equivalence, it should be noted that, in so far as the Independent Appeals Committees exercise judicial powers but are not recognised as courts or tribunals within the meaning of the Constitution, it is necessary to consider the determination of the comparable procedure under national law with which the procedure at issue before those committees are to be compared.

21 Specifically, the question arises as to whether the rules at issue will be reviewed in relation to the procedure before other administrative authorities dealing with administrative appeals (where there is no uniform framework of procedural rules, but different rules for each institution, and where, in any event, the applicant does not have to appear in person at the appeal hearing, but may be represented by a lawyer or a third party), or in relation to the procedure for bringing an appeal on the merits or an action for annulment before an administrative court (a procedure in which, on the one hand, the party does not have to appear in person but may be represented by an authorised lawyer and, on the other hand, as regards an appeal on the merits, a second appeal may be brought, under certain conditions, if the first is dismissed).

22 That question comes down to the interpretation of Article 46 of Directive 2013/32, that is to say, to a judgment as to the true nature of the procedure for examining the effective remedy provided for in that article, and not to a simple examination of the similarity of the corresponding procedural rules, which is a matter for the referring court (see judgment of the Court of Justice of 9 September 2020, *Commissaire général aux réfugiés et aux apatrides* (Rejection of a subsequent application – Time limit for bringing proceedings) (C-651/19, EU:C:2020:681, paragraphs 37-38)).

23 Moreover, as regards compliance with the principle of effectiveness, it may be argued that the contested provision of Article 97(2) of Law 4636/2019 is justified on grounds of the orderly and expeditious conduct of the procedure for the examination of applications for international protection, since it ensures that

applicants for international protection are still interested in the fate of their application and are still on Greek territory, so that valuable time is not spent on the substantive examination of applications that are not of interest to the applicants themselves, thus speeding up the examination of other appeals.

24 On the other hand, it may also be argued that that provision makes the application of EU law impossible or excessively difficult. First, it imposes a disproportionate burden on applicants for international protection, since they are required (unless they fall within one of the exceptions provided for in Article 78(3) of Law 4636/2019) to travel to the headquarters of the Independent Appeals Committees in Athens merely in order to register their presence and not to be heard, and cannot be represented by a lawyer or other authorised person for that purpose. Second, it provides that, as a consequence of failure to comply with that procedural requirement, there is a presumption that the action has been improperly brought and, therefore, that the appeal must be dismissed as manifestly unfounded.

25 As regards, in particular, the dismissal of the appeal as manifestly unfounded without an examination of the merits of the case, it should be noted, first, that under Directive 2013/32 failure to comply with an obligation to communicate with the authorities is linked to the presumption of implicit withdrawal of the application for international protection and not to the rejection of the application as manifestly unfounded.

26 Second, according to the express wording of Article 32(2) of Directive 2013/32, a precondition for the rejection of an application for international protection as manifestly unfounded is that the application is, at least, unfounded. Such a precondition does not appear in Article 97(2) of Law 4636/2019, which governs only the procedure before the Independent Appeals Committees and provides for the appeals referred to in Article 46 of Directive 2013/32 to be dismissed as manifestly unfounded. That consequence entails the dismissal of appeals under national law as inadmissible, that is to say, for formal reasons, without any examination of the substance of the case.

27 Third, the rejection of an application as manifestly unfounded has broader consequences, since it results in third-country nationals not being granted a period for voluntary departure and having an entry ban imposed on them (see Articles 7(4) and 11(1)(a) of Directive 2008/115).

28 Fourth, the factual basis of the presumption in Article 97(2) of Law 4636/2019 does not appear to correspond to common experience or logic, since failure to appear in person before the Independent Appeals Committee may be due to reasons unconnected with an intention to frustrate or delay the enforcement of a previous or imminent expulsion order or removal of the applicant in another manner, in particular in view of the fact that the decisions of the committees are not taken on the same day and that, consequently, the appearance of applicants for

international protection before them on the day of the meeting does not in any way facilitate the enforcement of the return order if the appeal is dismissed.

29 Fifth, and lastly, Article 46(11) of Directive 2013/32 provides that Member States may lay down the conditions for presuming the implicit withdrawal or abandonment of the appeal and the procedure to be followed, whereas it does not contain any rules on the possibility of dismissing appeals as manifestly unfounded.

30 Therefore, it is not clear whether what has been said above regarding the possibility of presuming an implicit withdrawal or rejection as manifestly unfounded of an application for international protection applies either directly or by analogy to appeals.

31 In view of the foregoing difficulties of interpretation as to the meaning of the relevant provisions of EU law, the referring court considers that it is necessary to refer the questions to the Court of Justice for a preliminary ruling.