



IARMJ

Ex officio powers / responsibilities in
Italian practice based on
EU law and case law of the ECtHR

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Starting point:

- EUROPEAN COURT OF JUSTICE – case C-429/2015
- → conclusions of the General Advocate Yves Bot (par. 70 and 75):
- those who legitimately seek international protection are in extremely difficult human and material conditions and, consequently the procedure initiated by them with the competent national authorities must guarantee their maintenance of essential rights (paragraphs 70 and 75).

THE DUTY OF JUDICIAL COOPERATION IS PART OF THE MOST GENERAL DUTY OF COOPERATION OF THE STATE:

CJUE, sent. 22 novembre 2012, case
n. C-277/11:

APPLICANT

→ All the elements

STATE

→ ACTIVE COOPERATION

+

PRIVILEGED POSITION



DUTY OF COOPERATION AND JUDICIAL AUTHORITY

COORDINATION with the respect of :

- The institutional role of **IMPARTIALITY** of the judge
- The **PRINCIPLES** that rule **CIVIL** trials in the national system

NATIONAL PROCEDURAL SYSTEM



1) PRINCIPLE OF THE «TRIAL AT DISPOSAL OF PARTIES»

- 2) PRINCIPLE OF CORRESPONDENCE BETWEEN THE APPLICANT'S REQUESTS AND THE FINAL JUDICIAL DECISION
- [Article 112 civil procedural code]

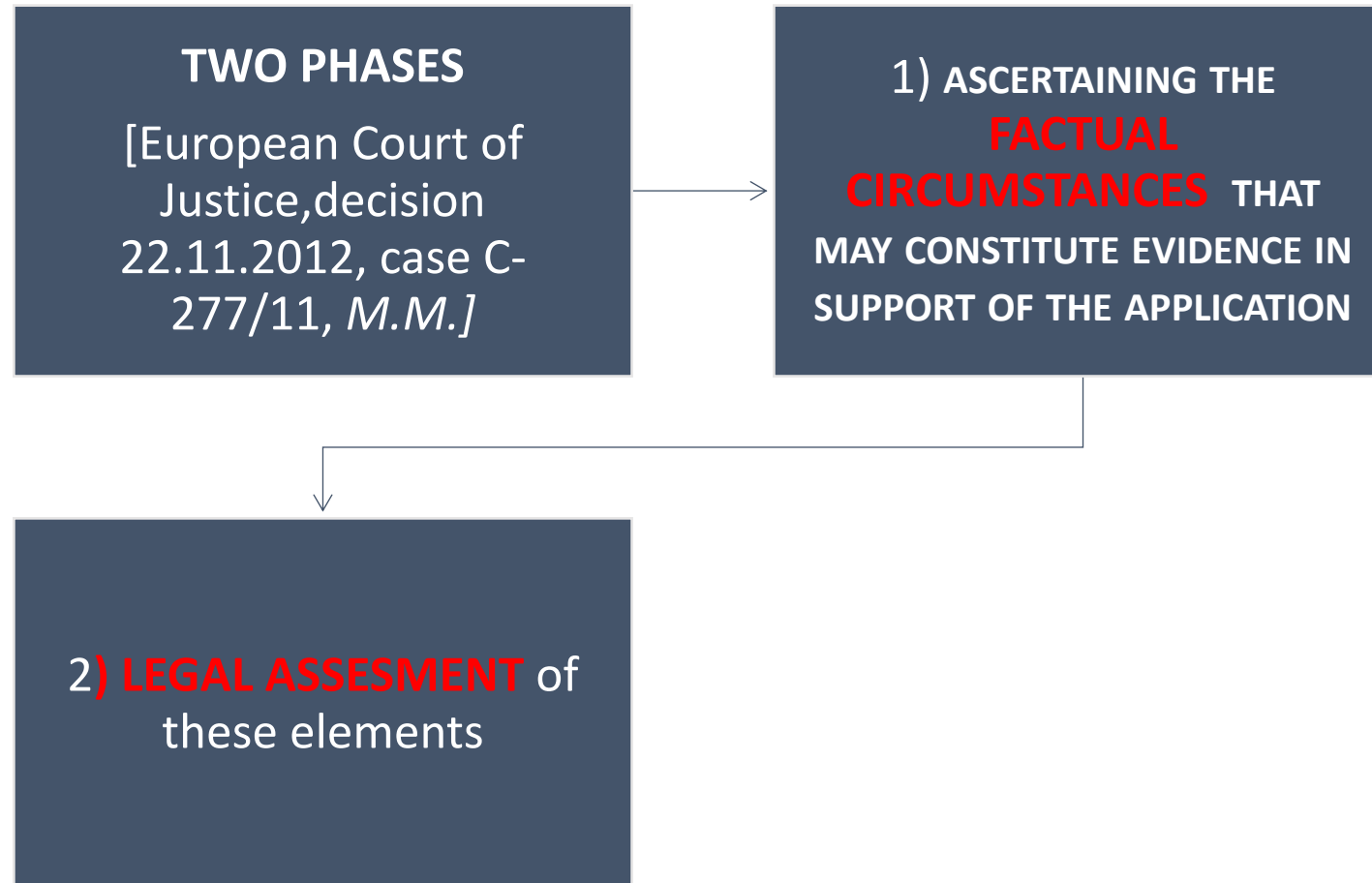
Article 115 civil procedural code → SPECIFIC FACTS IN THEIR INDIVIDUALITY

- **JUDGE**: bound to
 - Allegation of facts
 - Proofs offered by the parties
 - No “extra petita”!

Q: does duty of cooperation apply on behalf of the judge **despite the lack of allegation** on behalf of the applicant?



EXAMINATION OF FACT AND CIRCUMSTANCES



WHERE IS DUTY OF COOPERATION PLACED?

Case M.M. → ONLY
IN PHASE N. 1)



Member State: active
cooperation in collecting
all the elements to
support application
Ex: art. 10 comma 3 lett.)
Procedure Directive.

Burden of allegation of facts and evidence

International protection
application → STORY →
allegation of the relevant facts
+
proof of those facts
(Supreme Court of Cassation –
29056/2019)

→ CONSTITUTIVE FACTS →
content and object of the process

→ article 3 Legislative Decree 251/2007 →
duty of cooperation **on the applicant**

. → specific allegation in order to allow a
“complete examination of the
application”.

THEMA DECIDENDUM:

→ it is outlined by the applicant → WHEN? PROCEDURAL LIMITS? → NO → article 35 bis legislative decree n. 25/2008 and article 47 Fundamental Rights Charter and article 46, par. 3, Directive 2013/32/UE

→ NO EX OFFICIO POWER ON THEMA DECIDENDUM

→ THE APPLICANT MUST OFFER ALL THE **RELEVANT ELEMENTS** OF THE CASE

(Supreme Court of Cassation, 5973/2019)

QUESTION:

using ex officio powers, MUST the judge investigate on the reasons of persecution not specifically contained in the application but that 1) arise during the audition of the applicant or in written defences drafted during the trial?

- **THE DIFFERENT POINTS OF VIEW OF :**
- **THE EUROPEAN COURT OF JUSTICE** → cases M.M., Ahmedbekova, Alheto
- **THE EUROPEAN COURT OF HUMAN RIGHTS** → cases *F.G. v. Sweden*, 23.3.2016, n. app. 43611/11, F.G; *J.K. v. and Others v. Sweden*, Application No. 59166/12, 23 August 2016; *Ilias and Ahmed v. Hungary*, 21.11.2019, Application No. 47287/15

NATIONAL solution:

- Applicant does not have the burden of giving the correct “**nomen iuris**” to the request of the type of international protection (Court of Cassation, 14998/2015),
 - Duty of judicial cooperation only if the applicant respected its own duty of allegation of the relevant facts (Court of Cassation, 16925/2018; 17069/2018)
- example: **victims of traffic** → applying duty of cooperation, the Judge **defines and qualifies** an applicant as victim of human traffic → see ECtHR – V.C.L. and A.N. v. The United Kingdom, Applications nos. 77587/12 and 74603/12, 16 February 2021



OPEN QUESTION:

- **IS NATIONAL SYSTEM** (ART. 35 bis – comma 13 legislative decree n. 25/2008) **compatible with article 46 par. 3 DIRECTIVE 2013/32/EU and the principles enlighthend by «Ahmedbekova» (Court of Justice – C-652/2016) ?**
- - national system does not foresee the possibility for the procedure to regress from the appeal phase to the administrative phase → > national legislator chose to empower the judge to decide the appeal against a decision of the administrative authority.
- **CONSEQUENCE:** breach of principle of **effective protection?** → The Administrative Authority should demonstrate, in this case, an interest to lament such breach.

Possible solution:

- **Tribunal of Milan** → application of article 3 comma 1 legislation n. 251/2007 → applicant must offer all the elements at disposal as soon as possible and, in any case, “as soon as they are at his disposal”; art. 35 bis comma 13 → complete and ex nunc examination
- Supreme Court, United Sections, 11.12.2018 n. 32046: judicial authority doesn't examine the legitimacy of the Administrative Authority's solution but verifies the right to obtain international protection → ok new elements in front of the Court



**EXAMPLES OF
THE DUTY OF
COOPERATION**

DUTY OF COOPERATION AND BREACH OF PROCEDURAL GUARANTEES



During administrative procedure

- Example: lack of translation of ways or time limits to appeal against a decision → Court of Cassation: need of specific reasons of violation of the right of defence regarding specifically the duty to appeal promptly (“rimessione in termini”)



GENERAL REMEDY → Duty to grant a COMPLETE INTERVIEW →
vulnerable cases → victims of human trafficking

- **Case of Malian child soldier (Tribunal of Milan 20 January 2021)**




- **Breach of procedural guarantees in case of an unaccompanied child**

- **OBJECT OF DISCUSSION: THE adversarial principle on COI**
- → Burden of allegation and of proof on the applicant in front of the Supreme Court when he laments that the judge of first instance
- A) didn't respect "duty of cooperation" (totally inactive)
- B) respected such duty in an uncomplete way, not respecting legal framework (mainly article 14 lett. C) legislative decree 251/07)
- (no indication of the sources of COI)

BREACH OF DUTY OF JUDICIAL COOPERATION: the question raised by the Public Prosecutor of the Supreme Court of Cassation (vs Court of Appeal of Trieste)

- **TWO INTERPRETATIONS:**

- 1) **absence or radical insufficiency of the information** relating to the sources consulted by the judge → NO OBLIGATION FOR THE APPLICANT TO INDICATE THE SOURCES ALTERNATIVELY PROPOSED
- 2) **burden of attaching that there are updated and reliable COI demonstrating the existence, in the region of origin, of a situation of indiscriminate violence deriving from armed conflict**



SOLUTION:
SUPREME
COURT 14th July
2022 n. 25445

- → the current jurisprudential conflict, concerning rulings issued at the outcome of chamber proceedings, **does not currently need to be referred to the United Sections of this Court**, as it can be resolved in application of the guiding principles of the procedural and substantive discipline, on the subject of international protection, to be interpreted consistently with the founding features of the harmonized regulation of the Union and also with the principles dictated by the ECHR.
- → solution n. 1



DECISION OF THE SUPREME COURT

OTHER QUESTION: THE SAFE COUNTRIES AND EX OFFICIO POWERS


- ES: Ucraina was included in the list of safe countries.
- Q: **CONSIDERING THAT THE EXHISTANCE OF THE WAR IS A NEWS WILDLY KNOWN, CAN THE JUDGE, EX OFFICIO, DEAL WITH SUCH MATTER AND CONSIDER NOT SAFE SUCH COUNTRY?**

→ Case C-406/22- Czech Republic- (preliminary ruling *ex art. 267 TFUE*), Directive 2013/32/UE

→ **MOLDOVA CASE** → safe country exept from Transnistria

→ Judge (Regional Court of BRNO) considering that in the meanwhile the situation in the Country had completely changed and Moldavia declared emergency state due to the energetic crisis and in February 2022 sent a notice to the European Council regarding the temporary derogation to the obligations provided by articles 10 and 15 of the European Convention Humar Rights, until June 2022

- If **art. 46, paragraph 3, of the procedures directive**, in conjunction with **art. 47 of the EU Charter of Fundamental Rights**, must be interpreted as meaning that a judge, called to decide on the appeal of a rejection decision for manifest groundlessness, pursuant to art. 32, paragraph 2, of the same directive, issued as part of one of the procedures provided for by art. 31, paragraph 8, letter b), **must take into account ex officio**, even in the absence of an objection by the applicant, the fact that **the designation of a country as safe for the reasons indicated is contrary to European Union law** .



Among the
questions raised
by the Regional
Court:

ITALIAN PERSPECTIVE

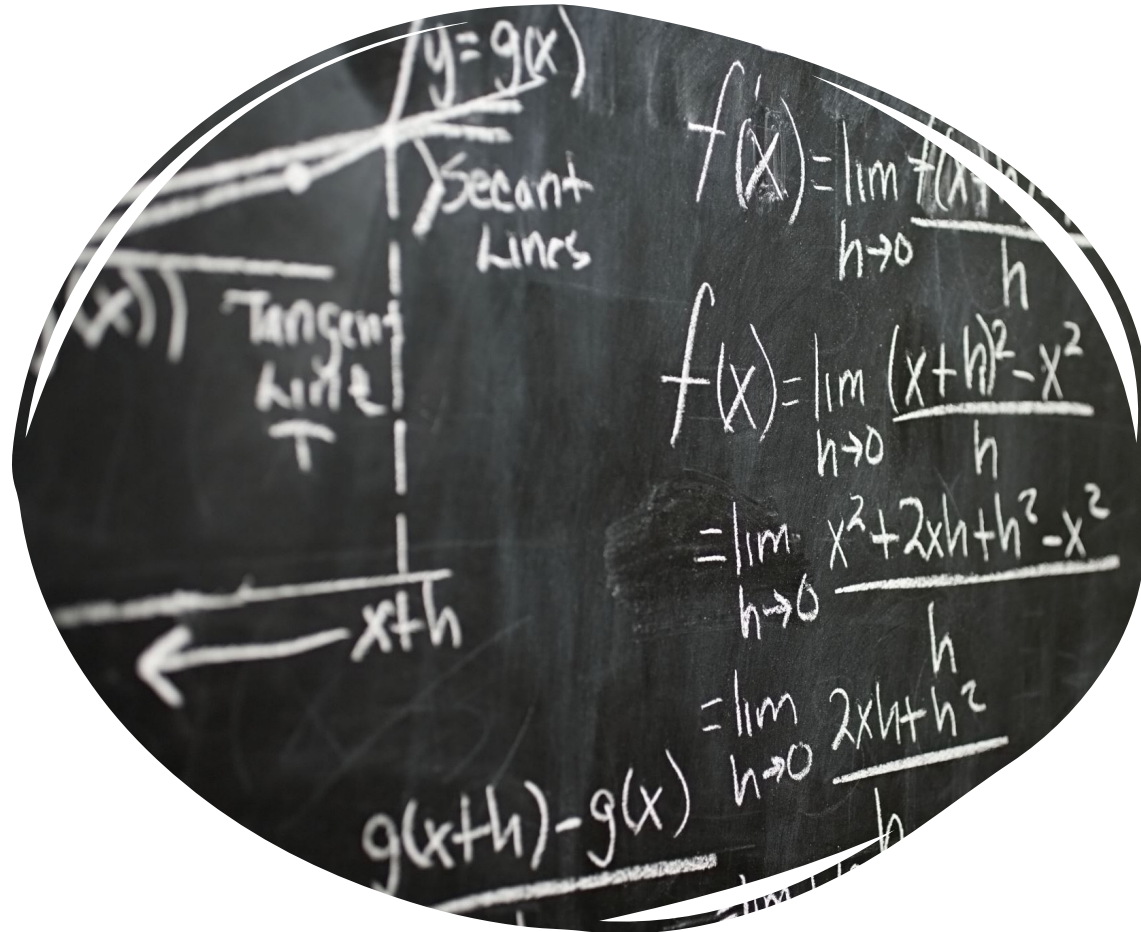
→ absence of jurisprudence at the moment

→ possible consequence of a positive answer → uneven application on the national territory of the conditions of access to the accelerated procedure.

LAST BUT NOT LEAST QUESTION:

CAN THE PRINCIPLE OF
COOPERATION BE EXTEND
TO OTHER FIELDS, NOT
INDICATED BY THE
DIRECTIVE, SUCH AS THE
DUBLIN RULE?

Preliminary ruling question raised
by The Netherlands → C-392/2022





THANK
YOU!

