Ex Officio Responsibility in Asylum-Related Cases

Constitutional Perspective

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- Croatian Legislative Context
  - Act on Administrative Judical Proceedings - Art 33 - 34
  - Act on Civil Procedure -

  - Possible for national administrative law judge to act ex officio
  - It is a judical power; could it also be a duty

  - Constitution of the Republic of Croatia
    - Art 29 (Fair Trail Guarantee) in relation to Art 33 (Access to Asylum Protection)
    - Art 141c – Duty to Ensure Full Effectivnes of EU Law

      "*All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union acquis communautaire.*

      Croatian courts shall protect individual rights based on the European Union acquis communautaire."

- Article 2 TEU

  The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

- Article 19 TEU

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

- Article 78 TFEU

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

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The Charter of Fundamental Rights of the Europen Union

- The peoples of Europe, in creating an ever closer union among them, are resolved to **share a peaceful future based on common values**.
- **Conscious of its spiritual and moral heritage**, the Union is founded on the **indivisible, universal values** of **human dignity, freedom, equality and solidarity**; it is based on the principles of **democracy** and **the rule of law**.
- It **places the individual at the heart of its activities**, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.
- This Charter reaffirms …the rights as they result, in particular, **from the constitutional traditions and international obligations common to the Member States**, **the European Convention** for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and **the case-law of the Court of Justice** of the European Union and of the European Court of Human Rights

- **<u>Ex officio responsibilities as constitutional law requirement</u>**
  - The constitutional ideal of the **rule of law in not value neutral**
    - Positive legal provisions serve and facilitate fundamental values that are the cornerstone of the particular legal system
      - values of fundamental/constitutional importance “radiate” through all parts of the legal system
    - The principle of **judicial independence does not tolerate “blind indifference”**
      - Judges are loyal to impartial enforcement of positive law - including the inherent hierarchy of legal provision
        - Positive legal provisions ought to be interpreted and applied in a manner that serves and facilitates fundamental/constitutional values
    - **Distrust of State Power** as key normative feature of Constitutional Democracies
      - The basic task of the Constitution: protect an individual against the misuse of power by Government (in all its forms)
        - Two main mechanisms of protection
          - Basic (Human) Rights
          - Separation of State Powers + Checks and Balances
        - Inherent imbalance of power in the relation - protect a weaker side
          - **Normative responsibility of judiciary to compensate for (inherent) imbalances in power between and an individual and a Government**
            - especially when an individual facing a Government is in a particularly vulnerable position, such as a position of refuge

- EUCFR Title I – **Dignity** (Art 1-5)
  - Human Dignity
  - Right to Life
  - Right to Integrity of the person
  - Prohibition of torture and inhuman or degrading treatment or punishment
  - Prohibition of slavery and forced labour

- Art 18 – the **Right to Asylum**
- Art 19 – **Prohibition of Refoulement**

- Art 47 - **Right to an effective remedy and to a fair trial**

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 this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

- C-176/08 Salahadin Abdullah

  “(asylum procedure)…carried out with vigilance and care, since what is at issue are issues relating to the integrity of the person and to individual liberty, issues which relate to the fundamental values of the Union”

- C-411/10 N.S.

  “According to settled case-law, the Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they **do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights** protected by the European Union legal order **or with the other general principles of European Union law**”

- **The Principle of Effectiveness of EU law**

- C- 924/19 PPU FMS

"…although it is for the domestic legal system of every Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, the Member States are, however, to **ensure compliance in every case with the right to effective judicial protection** of those rights as enshrined in Article 47 of the Charter (judgment of 19 November 2019, A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paragraph 115).

…although EU law does not, in principle, require Member States to establish before their national courts, in order to ensure the safeguarding of the rights which individuals derive from EU law, remedies other than those established by national law (see, to that effect, judgments of 13 March 2007, Unibet, C-432/05, EU:C:2007:163, paragraph 40, and of 24 October 2018, XC and Others, C-234/17, EU:C:2018:853, paragraph 51), the position is otherwise **if it is apparent from the overall scheme of the national legal system in question that no legal remedy exists that would make it possible to ensure, even indirectly, respect for the rights that individuals derive from EU law,** …

It is therefore for the national courts to declare that they have jurisdiction to determine the action brought by the person concerned in order to defend the rights guaranteed to him by EU law if the domestic procedural rules do not provide for such an action in such a case (see, by analogy, judgments of 3 December 1992, Oleificio Borelli v Commission, C-97/91, EU:C:1992:491, paragraph 13, and of 19 December 2018, Berlusconi and Fininvest, C-219/17, EU:C:2018:1023, paragraph 46).

Thus, **the absence, in the laws** of the Member State concerned, of a judicial remedy permitting a review of the lawfulness, under EU law, of an administrative return decision, such as that described in paragraph 123 of this judgment, **cannot relieve the national court of its obligation to ensure the full effectiveness** of Article 13(1) of Directive 2008/115 which, having direct effect, may constitute in itself a directly applicable basis for jurisdiction, when it has not been properly transposed into the national legal order.

It follows that the principle of primacy of EU law and the right to effective judicial protection, guaranteed by Article 47 of the Charter, require the referring court to declare that it has jurisdiction to hear the actions brought by the applicants in the main proceedings against the decisions of the asylum authority rejecting their objections to the administrative decisions ordering them to return to their countries of origin and to disapply, if necessary, any national provision prohibiting it from proceeding in that way (see, by analogy, judgment of 29 July 2019, Torubarov, C-556/17, EU:C:2019:626, paragraph 74 and the case-law cited).

- persons facing risk of refoulement
- children in asylum related proceedings
- systemic discrimination of minority groups
  - sex/gender; ethnicity/race, sexual orientation, religious believes, political convictions
- persons in a vulnerable situation
  - victims of torture, violence or human trafficking, persons with health issues
- depravation of liberty

- **CCC U-III-557/2019 A.B. (09/19)**

“The Constitutional Court cannot agree with the court's conclusion that the applicant's claims of fear are unconvincing because she was instructed in the procedure about the confidentiality of the information she presents, and even less can the Court accept the conclusion that the applicant could have spoken about domestic physical and sexual violence earlier because only women participated in the procedure.

First of all, this latter conclusion is wrong because it follows from the MUP minutes of March 8, 2016 that the applicant submitted her initial application for international protection, when she entered the territory of the Republic of Croatia, in front of two male persons (see point 2.1. explanations of this decision). Therefore, not only was she not provided with a translator of the same gender in order to ensure a complete explanation of the request or other justified reasons, as required by Article 14, paragraph 3 of the Act on Temporary and International Protection (see point 4.4 of the explanation of this decision), but and the leading officer of the proceedings was a man.

Neither the Ministry of Internal Affairs nor the administrative courts have taken into account, nowadays, the well-known fact that physical and especially sexual violence, i.e. rape, is an extremely traumatic experience that leaves severe, devastating and long-lasting consequences in the life of every victim. This is precisely why rape is qualified as abuse according to ECtHR practice (see, for example, the case of D.J. v. Croatia, No. 42418/10, judgment of July 24, 2012, § 83 and Aydin v. Turkey, No. 23178/94 , judgment of September 25, 1997, § 86). A strong sense of shame and fear and still numerous prejudices against victims of this type of violence prevent victims from reporting such violence and seeking help.

Therefore, in such situations, conversations with victims of domestic violence require, from those conducting these conversations, great sensitivity and understanding of the complexity of the psychological effects of such abuse. When the aforementioned facts are cumulated with the cultural context of the applicant's situation and the environment she comes from, in which women are treated differently than men, which is indicated, among other things, by the genital mutilation that the applicant suffered and which makes her a "vulnerable group" from Article 4, paragraph 1, point 14 of the Act on International and Temporary Protection (see point 4.4 of the explanation of this decision), then it is completely unreasonable to consider that there were no reasons why the applicant could not speak openly about her psychological trauma earlier, and in front of two men. The competent courts, therefore, were obliged to put the evaluation of her testimony in the context of all these facts, with the benefit of the doubt.

In addition, the applicant proposed a whole series of evidence on the circumstances of her personal situation, including the credibility of the statement. However, the Administrative Court in Zagreb rejected all her evidentiary proposals, which made it completely impossible to prove the merits of her request. In this way, the applicant was deprived of effective guarantees of a fair procedure that protect applicants for international protection from arbitrary expulsion, which resulted in her rights, as an applicant for international protection, protected by Article 23, Paragraph 1 of the Constitution, i.e. Article 3 of the Convention. became completely ineffective (see point 5.8 of the explanation of this decision).”

- **Risk of Refoulement**
  - the burden of proof *shifts to the State* if an applicant provides credible and coherent account of her situation indicating with *fair probability* that depravation of life, torture or other degrading inhuman treatment could occur (***probability standard)***
  - Ex Officio Responsibilities of the court:
    - legal classification of a particular practices as inhuman treatment (point of law)
      - not allowing women to leave the house without male “chaperon” or permission
        - clearly discrimination on grounds of sex (Art 18 in relation to 21,23 EUCFR);
        - BUT likely inhuman treatment (Art 4, 19 EUCFR) and depravation of liberty (Art 6 EUCFR) as well
    - expertise (independent reports, expert witnesses) regarding general context in the state of origin relevant to practice of unfavourable treatment of this type (point of facts)
      - examine to which extent was Qualification Directive Art 4(1) implemented
        - “complete, up-to-date or relevant” data (C-277/11 M.M.)
      - objective sociological analysis of dominant social traditions
      - objective account of dominant institutional policies regarding such traditions

- Ex Officio Responsibilites in relation to administrative procedure
  - strict scrutiny of the adherence to key procedural safeguards by a State authority body
    - Legal Representation / Legal Aid
    - The right to personal interview (language of the interview, free and competent interpreter, the right to comment on the written report)
    - Qualification Directive Art 4(1)
    - Time Limits

- C-411/10 N.S.

  It follows from the foregoing that in situations such as that at issue in the cases in the main proceedings, to ensure compliance by the European Union and its Member States with their obligations concerning ***the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not*** *transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003* ***where they cannot be unaware that systemic deficiencies*** in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

- **C-233/19 CPAS**

"…Directive 2008/115/EC (the Returning Directive) read in the light of Article 19(2) and Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that a national court, hearing a dispute on social assistance, the outcome of which is linked to the possible suspension of the effects of a return decision taken in respect of a third-country national suffering from a serious illness, must hold that an action for annulment and suspension of that decision leads to **automatic suspension of that decision**, even though suspension of that decision does not result from the application of national legislation, where:

> that action **contains arguments** seeking to establish that the enforcement of that decision would expose that third-country national to a **serious risk of grave and irreversible deterioration in his or her state of health**, **which does not appear to be manifestly unfounded**, and that
>
> that legislation does not provide for any other remedy, governed by precise, clear and foreseeable rules, which automatically entail the suspension of such a decision."