

Belgium - Council of State, 8 March 2016, Nr. 234.074

Country of Decision:

Belgium

Country of Applicant:

Togo

Date of Decision:

08-03-2016

Citation:

CE 8 March 2016, Nr. 234.074, X v. Belgium State

Court Name:

State Council, Administrative Jurisdiction Division, Chamber XIth

Keywords:

Effective access to procedures

Effective remedy (right to)

Final decision

Non-refoulement

Procedural guarantees

Return

Right to remain pending a decision (Suspensive effect)

Relevant Legislative Provisions:

European Union Law > Treaty on the Functioning of the European Union 2010/C 83/01

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1] > [Article 3](#) [2]Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1] > [Article 8](#) [3]European Union Law > [EN - Reception Conditions Directive, Directive 2003/9/EC of 27 January 2003](#) [4]European Union Law > [EN - Recast Asylum Procedures Directive 2013/32/EU of the European Parliament and of the Council](#) [5]European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [6] > [Article 5](#) [7]European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [8] > [Article 47](#) [9]European Union Law > [EN - Returns Directive, Directive 2008/115/EC of 16 December 2008](#) [6] > [Article 6](#)

Headnote:

The Council of State requested a preliminary ruling from the Court of Justice of the European Union (CJEU) on the compatibility of Belgian Law with Article 5 of Directive 2008/115/EC (the ? **Directive?**). The Directive requires Member States to respect the principle of non-refoulement, as well as ensure that there is a right to an effective remedy.

Under Belgian Law, the Commissioner-General for Refugees and Stateless Persons (the ? **Commissioner?**) can dismiss an asylum application and issue an order to leave the territory (? **Return Order?**), *before* any judicial appeals or other asylum procedures have been exhausted.

The question in the current case was whether the relevant Belgian legislative provisions were contrary to the Directive. The proceedings were suspended pending a preliminary ruling by the CJEU (C-77/17 and C-78/17).

Facts:

On 14 April 2011, the applicant, a Togolese national, filed an application for asylum. On 23 May 2014, the Commissioner rejected this request.

On 23 June 2014, the applicant appealed to the Council of Aliens Law Litigation (the ?**Council?**) against the original decision. On the same date, the applicant applied for the annulment and suspension of the original decision where the Return Order had been issued.

On 31 October 2014, the Council dismissed the appeal. On 19 November 2014, the applicant appealed against the Council's judgment.

On 18 May 2015, the applicant applied for a residence permit. On 19 May 2015, the Council dismissed the appeal against the issue of the Return Order.

On 10 November 2015, the State Council quashed the judgment of 31 October 2014 and referred the case back to the Council.

Decision & Reasoning:

Admissibility:

Memorandum for Applicant

It did not appear either from the Regulation or from the report to the King that the applicant was obliged to formally reply to all the arguments of the respondent concerning the grounds of appeal, provided that his memorandum was complete and that he adequately structured his arguments.

Legal Interest to appeal

The respondent argued that the applicant had no interest in the appeal because the annulment of the judgment under appeal cannot afford an advantage to the appellant.

The respondent argued that because the Return Order could not be enforced until the Council had ruled on the appeal against the Commissioner's decision, the complainant had no grounds for grievance and thus no legal interest to appeal.

Conversely, the applicant argued that the obligation to leave the territory ? although not yet enforceable ? caused him grievance.

It was argued that the annulment of the judgment under appeal, which rejected the action for annulment brought against the Return Order, was sufficient to establish legal interest in the appeal.

Exception of inadmissibility raised by the respondent

The applicant submitted that issuing a Return Order after rejecting the asylum application but prior to exhausting all judicial and legal avenues of appeal was contrary to EU law. Issuing the Return Order at this time violated the applicant's right to have an effective remedy and the principle of non-refoulement, as required by the Directive.

If the Directive prevented the issue of a Return Order prior to exhausting judicial and other remedies against the decision of the Commissioner, the applicant would have sufficient legal interest to quash the judgment under appeal.

The Council of State suspended the proceedings pending the preliminary ruling by the CJEU. Once rendered, the Auditor General would consider its impact on the admissibility of the appeal.

The Council of State referred the following preliminary question to the CJEU:

Are Articles 5 of Directive 2008/115 / EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in the Member States for the return of illegally staying third-country nationals, which requires Member States to comply with the principle of non-refoulement when implementing that directive, as well as the right to an effective remedy provided for in Article 13.1. of the Directive and Article 47 of the Charter of Fundamental Rights of the European Union, to be interpreted as precluding the adoption of a return order as provided for in Article 6 of Directive 2008/115 / EC, cited above, in Article 52/3 (1) of the Law of 15 December 1980 on access to the territory, residence, establishment and removal of aliens and Article 75 (2) of the Royal Decree of 8 October 1981 on access to the territory, residence, establishment and removal of aliens, as soon as the Commissioner-General for Refugees and Stateless Persons has rejected the application for asylum, and thus before the judicial remedies against this rejection decision can be exhausted and before the asylum procedure can be finalised?

Outcome:

The State Council suspended the proceedings pending the preliminary ruling by the CJEU.

Observations/Comments:

This case summary was completed by Linklaters LLP.

Attachment(s):



[Council of State 31.03.2016 effective remedy return decision CJEU prelim ref.pdf](#)[12]

National / Other Legislative Provisions:

[Belgium - Belgian Aliens Law 15-12-1980 \(Articles 39/70 \(1\) and 52/3 \(1\)\(2\)\)](#) [13]
[Belgium - Belgian Aliens Law 15-12-1980 \(Articles 39/70 \(1\) and 52/3 \(1\)\(2\)\) Belgium - Royal Decree on Aliens Law 8-10-1981 \(Article 75\(2\)\)](#) [14]
[Belgium - Royal Decree on cassation procedure before the State Court 30-11-2006 \(Article 14\(3\)\)](#) [15]

Links:

- [1] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>
- [2] https://www.asylumlawdatabase.eu/node/195#toc_12
- [3] https://www.asylumlawdatabase.eu/node/195#toc_46
- [4] <https://www.asylumlawdatabase.eu/node/353>
- [5] <https://www.asylumlawdatabase.eu/node/3946>
- [6] <https://www.asylumlawdatabase.eu/node/1306>
- [7] https://www.asylumlawdatabase.eu/node/1306#toc_77
- [8] <https://www.asylumlawdatabase.eu/node/453>
- [9] https://www.asylumlawdatabase.eu/node/453#toc_198
- [10] https://www.asylumlawdatabase.eu/node/1306#toc_86
- [11] https://www.asylumlawdatabase.eu/node/1306#toc_145
- [12] <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/Council%20of%20State%2031.03.2016%20e>
- [13] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/belgium-belgian-aliens-law-15-12-1980-articles-3970-1-and-523-12>
- [14] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/belgium-belgian-aliens-law-15-12-1980-articles-3970-1-and-523-12-0>
- [15] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/belgium-royal-decree-cassation-procedure-state-court-30-11-2006>