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Country of Decision:

Hungary

Country of Applicant:

Somalia

Date of Decision:

10-03-2016

Citation:

5.K.30.385/2016

Court Name:

Metropolitan Court of Public Administration and Labour

Keywords:

Effective access to procedures

Effective remedy (right to)

Refugee Status

Subsidiary Protection

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 6](#) [2]

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1] > [Article 13](#) [3]

European Union Law > [EN - Charter of Fundamental Rights of the European Union](#) [4] > [Article 47](#) [5]

European Union Law > [EN - Recast Asylum Procedures Directive 2013/32/EU of the European Parliament and of the Council](#) [6] > [Article 31](#) [7]

Headnote:

In case of conflict between a domestic and international norm the Court is obliged to adhere to the latter and set aside the former. Given the well-established right to an effective remedy in

international and European instruments, an element of which relates to the remedy's timeliness, the court is obliged to remake the OIN's subsidiary protection decision and provide the applicant with refugee status. This conclusion applies notwithstanding that domestic legislation prohibits the Court from reforming an OIN decision. To abide by this legislation would result in a never-ending appeal procedure thereby rendering the remedy ineffective.

Facts:

The applicant was persecuted and repeatedly tortured by the Al-Shabab for working in a cinema broadcasting movies, which is against Islam, but he was only granted subsidiary protection. The court went beyond its powers and changed the decision to grant timely and effective remedy for a traumatised asylum seeker. The Office of Immigration and Nationality (OIN) rejected the application but granted subsidiary protection. The reasoning was that the applicant could only evoke his lower social status, coming from a minority tribe, which in itself does not qualify as persecution and there were no grounds from the Geneva Convention. Subsidiary protection was granted as the general security situation in Somalia is insufficient. The fact that Al-Shabab did not allow the applicant to work in a cinema cannot be considered persecution as this was a conflict within the same religion (Islam) therefore it is not persecution on religious grounds.

Decision & Reasoning:

Following the 15th September 2015 courts do not have reformatory power to change administrative decisions but the court in this case overruled the OIN's decision and recognised the applicant as a refugee based on the following arguments:

The judge firstly set forth that the Hungarian Fundamental Law (Constitution) acknowledges the supremacy of international law over domestic laws and in the case of conflict between the two the Constitutional Court is entitled and obliged to quash the problematic domestic provision. As Hungary ratified the ECHR it is part of domestic law as well. The court emphasised that timeliness is also an attribute of an effective remedy and given the circumstances that the legislator abolished the courts' power to change administrative decisions and address the violation of the rights of the applicant in a timely and direct manner it needs to disregard the latest legal modifications.

The court argued that as the ECHR and the Charter foresees that a remedy may only be effective if it is effectuated in a reasonable time, this is a requirement that Hungarian legislation must observe. Given the fact that asylum seekers are in a specifically vulnerable position within the host society they must have their rights protected in an effective manner as the ECtHR ruled in *MSS vs. Belgium and Greece*. The court also noted that Article 31 of the Asylum Procedures Directive (APD) foresees that the refugee status determination procedure should be completed within the shortest reasonable time.

Despite the fact that Hungarian legislation does not respect the above requirement of EU law the court needed to remedy the situation, otherwise asylum seekers risk being stuck in an endless court review procedure because the asylum authority continues to issue incorrect decisions and the court can only quash them but cannot award refugee status. Such a limbo may lead to endless insecurity, which is not permitted given the extreme vulnerability of traumatised asylum seekers.

The court ruled that remedy can only be regarded effective if it is able to rectify the situation and if the courts are not vested with reformatory power this may lead to the ineffectiveness of the remedy.

Outcome:

Appeal granted, refugee status granted.

Other sources cited:

Report of the Consular Services of the Hungarian Ministry of Foreign Affairs and Trade

National / Other Legislative Provisions:

- [Hungary - Act LXXX of 2007 on Asylum - Art 6\(1\)](#) [8]
 - [Hungary - Act LXXX of 2007 on Asylum - Art 7\(1\)](#) [9]
 - [Hungary - Act LXXX of 2007 on Asylum - Art 8\(1\)](#) [10]
 - [Hungary - Act LXXX of 2007 on Asylum - Art 60\(1\)](#) [11]
 - [Hungary - Act LXXX of 2007 on Asylum - Art 62](#) [12]
 - [Hungary - Act LXXX of 2007 on Asylum - Art 63](#) [13]
 - [Hungary - Act LXXX of 2007 on Asylum - Art 68\(5\)](#) [14]
 - [Hungary - Fundamental Law of Hungary - Art. Q \(2\) and \(3\)](#) [15]
 - [Article XIV \(3\)](#) [16]
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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_34
- [3] https://www.asylumlawdatabase.eu/node/195#toc_60
- [4] <https://www.asylumlawdatabase.eu/node/453>
- [5] https://www.asylumlawdatabase.eu/node/453#toc_198
- [6] <https://www.asylumlawdatabase.eu/node/3946>
- [7] https://www.asylumlawdatabase.eu/node/3946#toc_348
- [8] <https://www.asylumlawdatabase.eu/en/taxonomy/term/779>
- [9] <https://www.asylumlawdatabase.eu/en/taxonomy/term/788>
- [10] <https://www.asylumlawdatabase.eu/en/taxonomy/term/789>
- [11] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/hungary-act-lxxx-2007-asylum-art-601>
- [12] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/hungary-act-lxxx-2007-asylum-art-62>
- [13] <https://www.asylumlawdatabase.eu/en/taxonomy/term/1434>
- [14] <https://www.asylumlawdatabase.eu/en/taxonomy/term/792>
- [15] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/hungary-fundamental-law-hungary-art-q-2-and-3>
- [16] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/article-xiv-3>