

Italy - Tribunal of Milan, 9 May 2018, CJEU Preliminary Reference

Country of Decision:

Italy

Country of Applicant:

Nigeria

Date of Decision:

09-05-2018

Citation:

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Court Name:

Tribunal of Milan ? Specialised Section on immigration, international protection and free circulation of the EU citizens

Keywords:

Effective access to procedures

Effective remedy (right to)

Inadmissible application

Procedural guarantees

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 13](#) [3]European Union Law > [EN - Recast Asylum Procedures Directive 2013/32/EU of the European Parliament and of the Council](#) [4] > [Article 22](#) [5]European Union Law > [EN - Recast Asylum Procedures Directive 2013/32/EU of the European Parliament and of the Council](#) [4] > [Article 46](#) [6]**Headnote:**

The Court submitted a request for a preliminary ruling to the Court of Justice of the European

Union on the requirement of an automatic suspension of the execution of a negative decision on applications for international protection under EU law.

Facts:

The case originates in an application for international protection made by a Nigerian citizen, which was rejected by the competent Territorial Commission. The applicant appealed against the negative decision before the Court of First Instance, and further on before the Court of Cassation. The applicant requested the suspension of the decision that was issued by the Territorial Commission and then confirmed by the Court of First Instance.

Decision & Reasoning:

The Court structures its reasoning starting with an examination of relevant EU law provisions, moving then on to national law and discussing whether the two are compatible with each other.

On this issue, the CJEU clarified in *Tall, C-239/14* that an appeal must have a suspensive effect when it is issued against a decision to return someone who would face a severe risk of being subject to death penalty, torture or inhuman and degrading treatment. A similar standpoint has been proposed by the European Court of Human Rights, which has illustrated that during an appeal procedure applicants must be guaranteed *ex lege* the right to a suspensive effect of the decision to return them.

As far as domestic law is concerned, the legal procedure of appeal on the subject of international protection has recently been subject to significant modifications, with the entry into force of the D.L. 13/2017, converted into law 46/2017. The new law establishes that an appeal against the Territorial Commission negative decision will have an automatic suspensive effect, until the appeal is examined and rejected. A further appeal against that rejection before the Court of Cassation will not have an automatic suspensive effect. The suspension will have to be requested on the basis of well-founded reasons.

In this specific case, the judge questioned the compatibility of the appeals procedure, as stated in Law 46/2017, with EU law and has therefore decided to suspend the execution of the decree pending the interpretation by the CJEU on the lack of an automatic suspension following an appeal of second instance. The idea behind it is that the lack of such a guarantee could lead to violations of the rights of the applicant to an effective remedy and to a third and impartial authority.

Some past decisions of the CJEU set out the general principle according to which member states' national authorities should always guarantee an effective judiciary protection on those domains that are regulated by the EU law. Consequently, this applies to immigration and asylum law as well. Such a principle works as a limit to the procedural autonomy of the Member states when applying the EU law.

An integral part of the right to an effective remedy is the right of the applicant to contribute to the procedure by presenting elements that will help the judge reach a conclusion. The guarantees provided by APD, art. 22 and art. 46 -right to consult a legal adviser and right to remain in the territory- allow the applicant to be an active part in the process. According to the Court, the applicant should be given the right to consult his legal adviser and to present new elements and information to the authorities, until a very final decision is reached. This is clearly not possible in the event of a return of the applicant to their country of origin because of the lack of suspensive effect.

The second issue raised by the Court deals with the right of the applicant to be judged by a third and impartial authority. This appears incompatible with the Italian procedure, insofar as the judge that ruled on the first appeal will be the one that will also rule on the request for suspension. Such a procedure interferes with the aforementioned right, as the judge could easily be influenced by the decisions that they had previously made.

Outcome:

Preliminary reference submitted to the Court of Justice of the EU with the following question:

Are the principles of sincere cooperation and of the equivalence and effectiveness of judicial protection, referred to in Articles 4(3) TEU and 19(1) TEU, Article 47, first and second paragraphs, of the Charter of Fundamental Rights of the European Union and Directive 2013/32/EU 1 (in particular, Articles 22 and 46), to be interpreted in the sense that (a) European Union law requires that, where national law provides for a right of appeal in proceedings concerning the rejection of an application for the grant of international protection, such an appeal should automatically have suspensory effect, and that (b) those principles preclude a procedure, such as that under Italian law (Article 35a(13) of Legislative Decree 25/2008, as amended by Legislative Decree 13/17, converted into Law No 46/17), under which the court seized by an asylum applicant ? one whose application for asylum has been rejected by the competent administrative authority and by a court of first instance ? is permitted to dismiss an application for the suspension of the adverse decision solely on the basis of the validity of the grounds of the appeal brought against that decision, where that decision has been given by the same court as is asked to rule on the suspension thereof, without any consideration of the risk of serious and irreparable harm?

Observations/Comments:

The preliminary reference has been registered with the Court of Justice of the EU as: [Case C-422/18](#) [7], Request for a preliminary ruling from the Tribunale di Milano (Italy) lodged on 28 June 2018 ? FR v Ministero dell'interno ? Commissione Territoriale per il riconoscimento della Protezione Internazionale presso la Prefettura U.T.G. di Milano. Proceedings are still pending as of January 2020.

The case summary was written by Ilaria della Moretta.

Attachment(s):

 [CJEU reference asylum procedures 9 May.pdf](#)[8]

Other sources cited:

Domestic Case Law

Supreme Court decisions 18737/2017, 699/2018 and 9357/2018

National / Other Legislative Provisions:

[D.lgs. 142/2015](#) [9]

[D.lgs. 25/2008](#) [10]

[D.lgs. 150/2011](#) [11]

[as modified by D.lgs. 142/2015](#) [12]

[D.lgs. 286/1998 \(Italian Immigration Act\)](#) [13]

[D.l. 13/2017](#) [14]

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_60
- [4] <https://www.asylumlawdatabase.eu/node/3946>
- [5] https://www.asylumlawdatabase.eu/node/3946#toc_254
- [6] https://www.asylumlawdatabase.eu/node/3946#toc_511
- [7] <http://curia.europa.eu/juris/document/document.jsf?text=&docid=205288&pageIndex=0&docid=205288&pageIndex=0>
- [8] <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CJEU%20reference%20asylum%20procedures>
- [9] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/dlgs-1422015>
- [10] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/dlgs-252008>
- [11] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/dlgs-1502011>
- [12] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/modified-dlgs-1422015>
- [13] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/dlsg-2861998-italian-immigration-act>
- [14] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/dl-132017>
- [15] <https://www.asylumlawdatabase.eu/en/national-and-other-legislation/converted-law-462017>