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Justiciable rights stemming from delays in first instance determination decisions

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Introduction

Delays in issuing first instance decisions are becoming part and parcel of Member States asylum procedures. As the recent AIDA briefing on the length of asylum procedures [1] has pointed out States often exceed prescribed deadlines by a considerable amount of time. Ultimately lengthy waiting times lead to precarity and uncertainty for individuals given that rights associated with international protection are effectively stalled. As aptly pointed out by the Court of Justice of the European Union (CJEU) in the recent Danqua [2] case, examination of an application for asylum is crucial since it enables applicants to ?safeguard their most basic rights by the grant of such protection.? With this in mind this contribution will focus on the justiciable rights arising out of delays in issuing first instance decisions in the regular procedure. Its aim is to provide argumentation for litigants when faced with lengthy first instance determination procedures and in doing so will pray aid to recent domestic jurisprudence and practice alongside European standards. It will look primarily at two cases, the first where an applicant has waited for more than 6 months for a decision on their application without any information being provided on delays, as provided for in the 2013 Asylum Procedures Directive, and the second where the applicant was duly informed about the prolongation of the decision making process.

Time limits to issue a first instance decision as specified by European and Human Rights Law

Both the 2005 [3] and 2013 [4] Asylum Procedures Directive prescribe that a decision on an asylum claim is to be made as soon as possible. Article 31(3) of the recast Asylum Procedures Directive (rAPD) specifies that first instance examination procedures should be concluded within six months of lodging an application. This may be extended by a further nine months in certain circumstances, namely where the facts and /or law in a particular case is complex; where a large number of persons simultaneously apply for international protection; or where the delay is clearly due to the non-compliance of the applicant with his/ her obligations under Article 13 of the rAPD. This may be extended exceptionally by an additional three months where it is necessary to ensure an adequate and complete examination of the application. A postponement is allowed in the case of ?an uncertain situation in the country of origin which is expected to be temporary.? However, a maximum time limit for the conclusion of the examination procedure is fixed at 21 months from the moment of lodging an international protection application. Whilst the deadline for transposition of Articles 31(3),(4) and (5) is 20 July 2018, the majority of Member States [5] have laid out in their domestic legislation a deadline of 6 months or less for the duration of the regular procedure. In cases where the deadlines in Article 31 have not been transposed, for example in Germany or the UK (which is only bound by the 2005 APD), domestic civil law (section 75 of the Code of Administrative Procedure

[6]) and common law ((Saadi) v Secretary of State for the Home Department [7]; Lafarge Redland Aggregates Limited v The Scottish Ministers) both specify that administrative and judicial decisions must be made within a suitable period or reasonable time. Where decisions are not made within this time frame applicants have successfully challenged delays in the form of action for performances (*Untätigkeitsklage*) or judicial review.

Additionally, the CJEU has determined [8] that the entire procedure for considering an application for international protection should not exceed a reasonable period of time and that it is both in the interests of the State and the applicant that an application for asylum is decided upon as soon as possible [9]. Indeed the general principles of EU law regarding the right to good administration and legal certainty require an individual?s affairs to be handled within a reasonable period of time and the Court has accepted time limits to bring proceedings where it is in the interest of legal certainty to do so [10]. Moreover, whilst the procedural and substantive content of Article 18 of the Charter [11] has yet to be addressed by the CJEU (C-391/16 [12] will hopefully give the Court an opportunity to rule on its substance) recent national jurisprudence has analysed the constituent elements of Article 18. To illustrate in the UK Upper Tribunal judgment R (Hassan) [13] the Tribunal, whilst allowing a Dublin transfer to Malta, does accept that the right to asylum comprises of the right to have an asylum application determined within a reasonable time and for the applicant not to be subject to an indefinite limbo.

As for the ECHR [14], whilst it is well known that the European Court of Human Rights (ECtHR) cannot rule on the substance of an asylum application, the Court has held that, within the context of Article 3, asylum applications must be decided upon promptly so as to reduce the amount of uncertainty and precariousness for asylum seekers (MSS v Belgium and Greece [15], Application No. 30696/09 para 37 and 262). More recently the ECtHR has linked substantially long waiting times for asylum decisions with the procedural rights under Article 8 of the Convention. In B.A.C v Greece [16] the First Section found that a 12 year delay in receiving an asylum decision impacted the applicant?s access to work, studies, a bank account and legal status with his partner. As a consequence the State?s positive obligations under Article 8 to provide an effective and accessible procedure in order to protect the right to private life had been breached. Both cases serve to highlight that substantive Convention rights (namely 3 and 8) can ?be breached by the State?s inactivity in respect of an asylum application [17].?

Litigating delays in first instance decisions

On the basis of the above then let us first examine the case of an applicant who has not received a first instance decision within 6 months and no information has been given to the applicant on the delay. One may question whether there is a legally enforceable right under the APD against the State?s failure to provide a decision, especially where no procedural consequences flow from non-compliance with the deadlines. Whilst it is debatable as to whether there is a right to receive a decision within 6 months from Article 31, given that the article does provide extensions where the circumstances so merit, it is arguable that the applicant has an enforceable right to be informed of a delay and to receive a decision within a reasonable time. Indeed, a plethora [18] of recent German jurisprudence has confirmed just this. Referring to Article 23(2) of the 2005 Asylum Procedures, which has been transposed into German legislation, the German Courts state that the applicant has a right to be informed of the delay [19] where the decision has not been given within 6 months. Crucially the German Courts have held that as a consequence of the delay the applicant, by virtue of the right of asylum in Article 16a of the German Basic Law [20], has a justiciable claim and that they have a subjective right to receive a decision on his or her application within a reasonable time. Indeed, the right of asylum can only be adhered to when there is a positive action on the part of the State. Whilst the German judiciary refers to the extension times in Article 31(3) rAPD, the 6 month deadline appears to be the yardstick by which to assess what is a

reasonable time and what is not. In all cases assessed, the judiciary require the first instance decision to be given within 3 months of the judgment, a time frame which according to the German Courts balances the requirements of issuing a decision as soon as possible alongside an adequate and complete examination of an application for international protection as per Recital 11 APD.

Interestingly, the majority of German cases are those where a decision on prolongation has not been given yet the Court provides insight, albeit indirectly, into the interpretation of Article 31(3)(b) in advancing that administrative burdens on the State resulting from increased numbers of asylum applications is not a legitimate justification for extending deadlines for decisions. Indeed, a steady rise of applications has led to a lasting effect on the administration which must be resolved by an increase in staff and organisational reshuffling. To do otherwise would be to leave asylum applicants waiting for an indefinite amount of time for their decision. This conclusion is reminiscent of a judicial review in Salih v Secretary of State for the Home Department [21] where a lack of resources and manpower in the scheme of asylum support could not justify delays in applications for and actual receipt of support. Therefore, in cases where no information on the delay has been given or there is instead a reliance on administrative overburdening, the German Courts have read into the right of asylum, a legally enforceable right to a decision when 6 months or more have passed.

Even where the applicant is informed of the delay there may be justiciable rights stemming from an applicant?s vulnerability when a decision is taken to prolong assessment of the claim. Where the applicant is vulnerable, pursuant to the definition in Article 22 of the recast Reception Conditions Directive, or is in need of special procedural guarantees, Member States may prioritise the examination of their application (Article 31(7)). In light of Danqua, which reiterates that national procedural provisions must be assessed in light of their conduct and special features within the examination procedure as a whole, it is argued that the prolongation of a first instance decision may well impinge upon the effectiveness of assessing whether a person is in need of particular procedural support and accommodating for this in the asylum procedure. Indeed this argument has been made by Marcelle Reneman [22] who refers to the Dutch Secretary of State?s policy of this year automatically extending time limits for receipt of decisions from 6 months to 15. As is further noted by Reneman prolonging times to receive a first instance decision may give rise to tensions with the right to family reunification and the best interests of the child where the sponsor is an unaccompanied minor. Delays in receiving a decision may mean that the child turns 18 in the interim with the risk that rather than accepting the age of the applicant when they made the asylum application national authorities only take into account the age when the family reunification application was made, thereby reducing the chances of reunification with parents to narrow cases of ?special dependency.? It is to be noted that the important consequences of such an interpretation, not least for the principle of effectiveness, procedural fairness and the proper conduct of a procedure, has led to a recent reference by the Regional Court of the Hague [23] to the CJEU on the interpretation to be given to the definition of an unaccompanied minor in Article 2(f) of the Family Reunification Directive [24].

Conclusion

In Danqua the CJEU referred to the difficult human and material situation which asylum seekers find themselves in. Such precariousness is clearly drawn out where there are lengthy waiting times for a first instance decision and can be even more nefarious where the applicant is a minor or is otherwise vulnerable. Additionally, delays are all the more deleterious when one considers the primary waiting times for registration of claims in many countries. By way of example delays in registration in France [25] and Greece [26] or complete suspension in the Police Headquarters of Rome [27]serve to top up the later delays in receiving a decision. In the face of such State

passivity the above blog has argued that where no first instance decision is given within a reasonable time, a violation of substantive rights, namely the right to asylum, the right not to be exposed to inhumane treatment and the right to family life can ensue.

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(This journal entry is an expression of the author?s own views, and not those of EDAL or ECRE).

Keywords:
Effective access to procedures
Inhuman or degrading treatment or punishment
Family unity (right to)
Best interest of the child
Delay

Links:
[1] http://www.ecre.org/wp-content/uploads/2016/10/AIDA-Brief-DurationProcedures.pdf
[2] http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&text=&pageIndex=0&amp
[3] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF
[4] http://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013L0032
[5] http://www.ecre.org/new-aida-briefing-on-the-length-of-asylum-procedures/
[6] https://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html
[7] http://www.refworld.org/docid/3dc7b1647.html
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[18] https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=VG%2520Dresden&Datum=13.02.201
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[22] http://www.asielenmigrantenrecht.nl/inhoudsopgave.cfm?jr=2016&&nr=6-7
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[24] http://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32003L0086
[25] http://www.asylumineurope.org/news/07-06-2016/france-authorities-under-court-order-register-asylum-applications
[26] http://www.gcr.gr/index.php/en/news/press-releases-announcements/item/554-adynamia-prosvasis-sto-asylo
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