European Union, CJEU, C?239/14, Tall, Judgement of 17 December 2015

Subject matter

Core issues:

Suspensive effect of appeals in asylum and return proceedings

Interpretation of Article 47 CFR requirements in these fields

The Belgian Constitutional Court recognised the amended judicial practice and required the legislator to intervene and codify it in legislative provisions.

The repeated preliminary references sent by the Belgian Labour courts asking for the recognition of uniform minimum procedural guarantees for appeal procedure in all asylum and return proceedings also forced the CJEU to consider adapting its previous *Diouf* practice.

Although the *Tall* judgment reinstates the standards set in *Diouf*, it represents a step forward for fundamental rights of migrants as Article 47 CFR is recognised a reinforced status when Article 19(2) CFR circumstances are applicable.

Summary Facts Of The Case

After final rejection of his first asylum application, Mr. Tall, a Senegalese national, introduced a second asylum claim, which was not taken into consideration by the Belgian immigration authorities and the ‘Commissioner general for refugees and stateless persons’. Following this refusal, his access to social assistance was terminated. He was then ordered to leave the territory. Several days after, Mr. Tall lodged two appeals: one before the ***Council of Aliens Law litigation*** (hereafter, the CALL) against the decision refusing to take into consideration his second application for asylum; another before the ***Labour court (Liège)*** concerning withdrawal of his social assistance. Similarly to the *Abdida* case, only the Labour court addressed preliminary questions to the CJEU[1].

The referring court asked the CJEU whether the Asylum Procedure Directive, read in conjunction with Article 47 CFR, prohibits Belgian law (the one existing before the entry into force of Law 10 April 2014) which limits the examination that national courts can undertake under an appeal in subsequent asylum application, deprives the appeal of suspensive effect, and the individual of access to social benefits pending the appeal. The Belgian Government and the European Commission argued the preliminary question should be dismissed as inadmissible since the recent legislative amendment solved this issue by recognizing equal procedural treatment between the first application of asylum and subsequent asylum applications.[2] In support of their claim they argued that the ***Belgian Constitutional Court*** recognized retroactive application of the Law, at

least in regard to pending subsequent asylum application, as was the case of Mr. Tall.[3]

1. *a. Reasoning of the CJEU*

The CJEU held the preliminary reference admissible on the ground that it does not have competence to pronounce on the transitional application of the national law; secondly on the presumption of relevance of the preliminary reference of which national courts benefit under Article 267 TFEU, but also under the duty of sincere cooperation (Article 4(3) TEU).

At issue is, in essence, the conformity of a “fast track” or accelerated asylum proceeding with the requirements of Article 47 CFR. In particular, the CJEU was asked to assess whether Article 47 CFR requires, within the fast track asylum procedure, a suspensory effect of the appeal, regardless of the number of asylum application made; unlimited jurisdiction of the court hearing the appeal, and access to social benefits pending the appeal. It was thus an opportunity for the CJEU to clarify the *Diouf* case,[4] which dealt with similar issues.

Although the CJUE upheld the discretion recognised to the Member States in *Diouf*, whereby they are not required to confer a full examination and suspensive appeal in accelerated procedure, where the applicant submits new asylum application without presenting new evidence, It enhanced the protection of the right to an effective remedy by restating the conclusions reached in the *Abdida* preliminary ruling delivered a year before the *Tall* judgment. [5]

Regardless of the type and number of asylum applications submitted, the follow-up return proceedings need to offer an appeal with suspensory effect, “when it is brought against a return decision whose enforcement may expose the third-country national concerned to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, thereby ensuring that the requirements of Articles 19(2) and 47 of the Charter are met in respect of that third-country national.”[6]

[1] CJEU, *Abdida*, C-562/13, 18 December 2014, EU:C:2014:2453, where the Higher labour Court of Brussels requested for a preliminary ruling.

[2] Law of 10 April 2014 laying down various provisions concerning the procedure before the Council of Aliens law litigation and before the Conseil d’État, amending the Law of 15 December 1980, *Mon. B.,* 21 mai 2014 (see CJEU, *Tall*, C-239/14, EU:C:2015:824, par. 30-34).

[3] Constitutional Court of Belgium, Judgment No 56/2015 of 7 May 2015.

[4] CJEU, *Samba Diouf*, C?69/10, 28 July 2011, EU:C:2011:524.

[5] CJEU, *Abdida*, C-562/13, 18 December 2014, EU:C:2014:2453, para. 40-45.

[6] CJEU, *Tall*, C-239/14, para. 58. See, to that effect, CJEU, *Abdida*, para. 52 and 53.

Relation to the scope of the Charter

- Article 19(2) - Protection in the event of removal, expulsion or extradition (Principle of non-refoulement)
- Article 47 - Right to an effective remedy and to a fair trial

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Impact on Jurisprudence

1. *a. Outcome at national level*

Following the CJEU ruling in *Abdida*, the ***Belgian CALL*** recognised that an automatic suspensive effect should be available to appeals against orders to leave the territory when the applicant's illness is that serious that a removal might amount to a *refoulement,* prohibited by Article 3 ECHR. [1] Suspensive effect, however, is not available against decisions refusing the right or authorization to stay in Belgium.[2]The automatic suspensive effect was initially recognised in the absence of national legislation, and directly on the basis of the CJEU *Abdida* preliminary ruling. Belgian courts notably considered that applicable procedure, where the suspensive effect could be sought through the introduction of a request for suspension, complied with the CJEU jurisprudence.[3] Whilst the ***Constitutional Court*** welcomed this judicial practice[4], it also stressed the need for a legislative amendment introducing the guarantees under the right to an effective remedy.[5] On 10 of April 2014, a legislative amendment was brought to the Aliens Law, whereby an automatic suspensive effect is recognised to the request for suspension, which need to be introduced within the 10 days of the notification of the order to leave the territory. On the 19 January 2016, the ECtHR issued two important decisions regarding the effectiveness of legal remedies in Belgium. In *Sow*, the Court explicitly recalled that, when article 3 ECHR is at stake, only the remedies with automatic suspensive effect are deemed effective, "given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialized."[6] The Court reiterated the same requirement in *M.D*. and *M.A.*, where It called upon the Belgian authorities to examine attentively the risk faced by the applicant in the light of the documents submitted in support of his/her asylum request, and to provide for automatic suspensive remedies.[7] Although the Court did not conclude to the violation of Article 13 in those cases, it previously ruled that the Belgian 'extremely urgent procedure' for applying for a stay of execution, as it was before the Law of 2014, did not meet the standards provided by the Convention.[8]

[1] CALL, 156.951, 25 November 2015. See REDIAL Belgian report on Procedural Safeguards (package II), available here.

[2] *E.g.* for humanitarian and medical reasons, according to Article 9ter of the Belgian Aliens Law; see CALL, 159.427, 28 December 2015, REDIAL Belgian report, p. 6.

[3] CALL, 151.686, 3 September 2015.

[4] Initiated after the M.S.S. Judgment by the CALL in a judgment dated the 17 February 2011, where the Council referred to article 13 ECHR to improve the effectiveness of remedies against orders to leave the territory

[5] Constitutional Court, 1/2014, 16 January 2014.

[6] ECtHR, *Sow v. Belgium*, App. 27081/13, 19 January 2016, para. 47. See also Jabary v. Turkey, App. 40035/98, 11 July 2000, para. 50.

[7] ECtHR, *M.D. and M.A. v. Belgium*, App. 58689/12, 19 January 2016.

[8] ECtHR, *Singh v. Belgium*, App. 33210/11, 2 October 2012 ; *M.S.S. v. Belgium*, App. 30696/09, 21 January 2011, paras 386-390.

Comments

1. *a. Role of the Charter*

While certain national courts are very mindful of the requirement of Article 47 CFR and promote it equally in proceedings regarding EU citizens, asylum seekers or even irregular migrants, other national courts seem to be more hesitant and refer only to the Convention standards on the right to fair trial and effective remedy (articles 6 and 13 ECHR). Since their choices for Article 13 ECHR instead of Article 47 CFR are never expressly motivated, it is hard to conclude that it is because they consider the Convention as conferring a broader and more adequate protection or because they are more familiar with this legal instrument. In any case, the CJEU reiterated in *Tall* that Article 47 CFR constitutes “a reaffirmation of the principle” of effective judicial protection and “provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article”. It results from the explanations relating to Article 47 of the Charter that the first subparagraph of that article is based on Article 13 ECHR. Explicitly relying on the relevant case law of the ECtHR, pursuant to Article 52(3) of the Charter, the Court interprets Article 19(2) CFR in the light of the Strasbourg Court’s jurisprudence on Article 3 CEDH: where there are substantial grounds for believing that the returnee (asylum seeker or not) will be exposed to a real risk of ill-treatment in the country of destination, the right to an effective remedy requires that a remedy enabling suspension of enforcement of the measure authorising removal should, *ipso jure*, be available to that foreign national. The CJEU thus clearly incorporates and appropriates in the EU legal order the key principles consecrated by the European Court of Human Rights.[1]

[1] ECtHR, *?onka v. Belgium*, ECHR (2002), App. 51564/99, para. 79, *Gebremedhin [Gaberamadhien]* v. *France*, no. 25389/05, § 67, ECHR 2007-II, and *Hirsi Jamaa and Others* v. *Italy*

, 27765/09, § 200, ECHR 2012-II.