

European Union, CJEU, C-429/15, Danqua, Judgement of 20 October 2016

Subject matter

Core issues

- Whether the principle of equivalence applies between procedures for an application for asylum and an application for subsidiary protection and if so if a 15 day time limit in respect of an application for subsidiary protection is lawful where a similar time limit is not applied in the case of asylum applications.
- Whether the Court of Appeal was bound to apply a finding of the Court of Justice in relation to an issue that was not raised in previous proceedings before the national court and did not form part of the reference.

Summary Facts Of The Case

The applicant made an application for asylum upon arrival from Ghana claiming she would be subject to the Trokosis practice whereby certain family members are pledged to a shrine in indentured service in order to atone for the family's past sins. The application was rejected given the circumstances, especially the age of the applicant, implying it would be unlikely she would be subject to the practice.

The applicant was functionally illiterate and did not understand English. An attempt was made to find a translator for the applicant's native language in the UK or Ireland but was unsuccessful.

The Refugee Legal Service declined to represent the applicant in any application for subsidiary protection or for a judicial review of the decision to refuse her asylum status as it did not believe such applications would have a likelihood of success. It later transpired the Refugee Legal Service systematically refused to represent applicants on appeal in instances where an initial application was rejected on credibility grounds. The applicant received a letter informing her of her right to make an application for subsidiary protection within 15 days. One and a half years later, through private solicitors, she made such an application which was rejected for being outside the time limit.

She claimed the imposition of the 15 day time limit breached the principle of equivalence, drawing a comparison with the procedure for the application for asylum, in which there is no time limit to make an application.

The High Court had rejected the application, noting that since the Court of Justice decision in Case C-604/12 *HN* EU:C:2014:302 applications for subsidiary protection could be made at the same time as an application for asylum or up to 15 days after a rejection. It was therefore equivalent or

in fact a longer period in which to make an application for subsidiary protection.

The Court of Appeal believed a valid issue was raised but was unsure whether the principle of equivalence in fact applied. On the one hand it noted that the two procedures are clearly comparable, both operating within an overall system of international protection and being in fact complementary and connected. On the other hand it noted that the purpose of the principle of equivalence was to ensure equivalence between procedures for the protection of rights derived from Union law and rights derived from national law and yet asylum procedure was substantially, if not wholly, derived from Union law. The issue therefore was whether the principle of equivalence applies between procedures both of which are governed by Union law. It made reference to the UK Supreme Court case of *FA (Iraq) v Secretary of State for the Home Department* [2011] UKSC 22, [2011] 4 All ER 503, in which the issue of the application of the principle of equivalence between asylum and subsidiary protection procedures had been raised, there in respect of the right to asylum. A reference to the Court of Justice had been made in that case, but had been withdrawn after the issue was resolved.

In *Danqua* the Court of Appeal decided to make a reference to the Court of Justice asking if the principle of equivalence applied between asylum and subsidiary protection procedures. It also posed subsidiary questions asking if the fact that the time limit was imposed by administrative rather than legislative means was relevant and if the fact that the time limit pursued a legitimate of minimising delays was also relevant to assessing its lawfulness.

Reasoning of the CJEU

In its judgment the Court of Justice found firstly that the principle of equivalence was not applicable in the present case. The principle of equivalence operates to ensure that procedures designed to protect EU law rights were equivalent to comparable national law procedures. In the present case both procedures, namely asylum applications and applications for subsidiary protection, were based on Union law.

However, the Court of Justice considered it necessary to give the national court as full an answer as possible in order to provide it with the all the materials necessary to decide the case. Prompted by a submission of the Commission, it assessed the 15 day limitation period in light of the principle of *effectiveness*. Considering the limitation period in light of the specific human and material circumstances it found that it was too short in order to ensure that an individual could make effective use of her Union law right to apply for subsidiary protection.

Relation to the scope of the Charter

- Art. 18 - Right to asylum

The judgment is decided on the principle of equivalence and effectiveness rather than the Charter itself.

Impact on Jurisprudence

Outcome at national level (follow-up judgment of the referring court)

In its application of the judgment of the Court of Justice, the Court of Appeal found that it flowed unambiguously from the judgment of the Court of Justice that the 15 day limitation period breached the principle of equivalence and should be set aside. Counsel for the State argued that as the issue had not been raised in prior proceedings and did not form part of the reference to the Court of Justice that its finding on that issue was not binding on the Court of Appeal. The Court of Appeal rejected this argument, finding that it was bound to apply the finding of the Court of Justice and set aside the offending national law in line with the principle of primacy established in *Simmenthal*. It based this finding primarily on the duty of loyal cooperation found in Article 4(3) TEU. Relying on the judgment of the Court of Appeals of England and Wales in *Arsenal FC v Reed* [2003] EWCA Civ 696, the Irish Court of Appeal found that only where the Court of Justice had clearly misunderstood or misconstrued the underlying factual circumstances could a national court not apply the findings of the Court of Justice in the context of a preliminary reference.

The initial administrative decision rejecting Ms Danqua's application for subsidiary protection was quashed on judicial review.

Impact on Legislation / Policy

The legislative and regulatory framework has largely overtaken the specific factual circumstances. Regulations were firstly amended in 2006 to allow subsidiary protection applications to be made at the same time as asylum applications. The procedures were later merged in the International Protection Act 2015.
