

European Union, CJEU, ZZ, judgment of 4 June 2013

Deciding bodies and decisions

CJEU (Grand Chamber), judgment of 4 June 2013, Joined Case C-300/11, ZZ v. Secretary of State for the Home Department, ECLI:EU:C:2013:363

Area of law

Effective judicial protection

Subject matter

Fair trial guarantees - Immigration proceedings

Whether Article 47 CFR requires that an EU citizen, who is excluded from a EU Member State due to national security reasons, is entitled to be informed at least of the essence of the grounds on which the decision was made.

Summary Facts Of The Case

In 2005, ZZ, a French and Algerian citizen, who had permanently resided in the United Kingdom since 1990, was refused re-entry into the Country upon return from a trip to Algeria after the Secretary of State had cancelled his right of permanent residence in the UK on the ground that his presence in the Country was not conducive to the public good.

In 2006, ZZ tried once again to enter into the United Kingdom but was refused entry due to national security concerns and was eventually removed to Algeria.

ZZ lodged appeal against the Secretary of State's decision before the Special Immigration Appeals Commission (SIAC). During the proceedings, the Secretary of State objected to the disclosure of evidence to the appellant and required the application of a closed material procedure. The SIAC upheld the Secretary of State's request and, according to its rules of procedure, appointed two special advocates to represent ZZ's interests.

Evidence against ZZ was disclosed only to the special advocates, who were prevented from providing any information to or seeking instruction from the appellant. Furthermore, ZZ was not allowed to participate in person, or through his own legal advisers, to several hearings (including the one concerning the assessment of the Secretary of State's request for a closed material procedure).

The SIAC dismissed ZZ's appeal on the ground that it was satisfied that the appellant had been involved in some terrorist activities in 1995 and 1996. Part of the judgment, including the reasons leading to it, was also "closed" and, as such, transmitted only to the Secretary of State and to the

special advocates.

ZZ lodged an appeal against the SIAC's judgment before the Court of Appeal, which decided to refer to the CJEU the following question for a preliminary ruling:

“Does the principle of effective judicial protection, set out in Article 30(2) of Directive 2004/38, as interpreted in the light of Article 346(1)(a) [TFUE], require that a judicial body considering an appeal from a decision to exclude a European Union citizen from a Member State on grounds of public policy and public security under Chapter VI of Directive 2004/38 ensure that the European Union citizen concerned is informed of the essence of the grounds against him, notwithstanding the fact that the authorities of the Member State and the relevant domestic court, after consideration of the totality of the evidence against the European Union citizen relied upon by the authorities of the Member State, conclude that the disclosure of the essence of the grounds against him would be contrary to the interests of State security?”.

At the outset, the CJEU recalled that, according to Article 30(2) of Directive 2004/38, any EU citizen who is the addressee of a decision refusing entry into a Member State on the basis of public security concerns – taken pursuant to Article 27 of the same Directive –, must be informed, precisely and in full, of the grounds which constituted the basis of such a decision. Derogation from this rule is permitted only for protecting the interests of State security and must be interpreted strictly. Moreover, according to Article 31 of the same instrument, the citizen concerned must be able to seek redress, including a re-assessment of the legality of the decision, and of the facts and circumstances leading to it.

The Court also stressed that such provisions need to be interpreted in accordance to the guarantees provided for under Article 47 CFR. In this respect, the Court noted that, even if Article 52(1) CFR allows limitations on the rights provided by the Charter (including Article 47 CFR), any such restrictions must be proportionate and necessary to meet general interests of the EU, and cannot impinge on the essence of the right at stake. This means that *“the interpretation of Article 30(2) and 31 of Directive 2004/38, read in the light of Article 47 of the Charter, cannot have the effect of failing to meet [such] level of protection”* (para. 52).

Article 47 CFR, as interpreted in the CJEU's case law, guarantees the right of the person concerned by a certain decision to get to know the grounds that led to it as a pre-condition for exercising the right to defence and to seek a judicial remedy. The Court recalled, in particular, its previous case-law in which it held that, in judicial proceedings, the adversarial principle, which is a core part of the right to defence, requires that the parties of a case have the right to examine all the documents and observations submitted to the court and comment on them.

That notwithstanding, the CJEU admits that, under exceptional circumstances, it may be necessary not to disclose certain information to the person concerned, in particular when this may hinder State security. However, the court having jurisdiction *“must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations [...] and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle”* (para. 57).

Such guarantees include an effective judicial review of the reasons invoked by national authorities to prevent disclosure and the existence of specific procedures and techniques which are capable

of ensuring that the said judicial review does take into account both legitimate security considerations and the procedural rights of the person concerned. Judicial review must be undertaken with full independence by the national court with jurisdiction and may lead to two different scenarios. First, the Court may deny that national security considerations impede full and precise disclosure. In this case, the competent national authorities may disclose the relevant information to the person concerned and, in case they refuse to do so, the court shall examine the legality of such a decision taking into account solely the disclosed material. Second, it may happen that the Court finds that national security concerns do indeed prevent disclosure. In this case, the judicial review must be carried out with a procedure capable of striking an appropriate balance between the need to protect State security and the right to an effective judicial protection. Furthermore, any restriction to this right must be limited to what is strictly necessary.

The Court further specified in this respect that *“in light of the need to comply with Article 47 of the Charter, the procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defence. In particular, the person concerned must be informed, in any event, of the essence of the grounds on which a decision [...] is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress [...] ineffective”* (para. 65).

The CJEU also stressed that where the appropriate balance lies may vary based on the circumstances of each single case. Accordingly, the national court with jurisdiction is competent to assess, on a case-by-case basis, whether and to what extent the restriction to the rights of the person concerned may impact on the evidential value of the confidential evidence. It is also up to national courts to ensure that the person concerned is informed of at least the essence of the grounds on the basis of which a decision was made.

The Court concluded that Article 30(2) and 31 of Directive 2004/38, read in the light of Article 47 CFR, require competent national authorities having jurisdiction to assess whether any limitation to the full and precise disclosure of the grounds for a decision ex Article 27 of the said Directive is strictly necessary and to ensure that the person concerned is informed, at least, of the essence of those grounds.

Relation to the scope of the Charter

Article 47 of the Charter

The case fell within the scope of EU law because it required an interpretation of Articles 30(2) and 31 of Directive 2004/38 on the right of EU citizens and their family members to move and reside freely within the territory of EU Member States. As noted by the Court, such provisions must be interpreted *“in a manner which complies with the requirements flowing from Article 47 of the Charter”* (para. 50).

Relation between the Charter and EHCR

Article 47 (2) CFR enshrines a “corresponding right” within the meaning of Article 52(3) CFR,

which lays down the general rules concerning the interpretation of Charter provisions that protect fundamental rights already guaranteed by the ECHR.

Charter “corresponding rights” must be granted the same scope and meaning of their homologues under the ECHR, taking into account also the case law of the ECtHR. In addition, based on the explanation of Article 52(3) CFR, the parallel interpretation also extends to limitations, which, therefore, are the same allowed under the ECHR. At the same time, however, “corresponding rights” may be granted a broader protection under Union law.

Notes on the remedies dimension

Notes on the remedies dimension

Impact on Legislation / Policy

The ZZ judgment is an important milestone with respect to the use of secret evidence for national security purposes in judicial proceedings. In this respect, it is likely to serve as a relevant parameter for the adjudication of similar cases. Furthermore, its practical impact may extend even beyond national security cases, as it sets important general principles that may apply also in cases where non-disclosure is driven by other objectives (different from national security).

Moreover, it is worth stressing that, even if the CJEU did not clarify which techniques may strike an appropriate balance between the interests at stake (procedural fairness and national security concerns) and did not specify what the “essence of the grounds” amount to, some indications in this respect may come from other relevant case law of the CJEU and the ECtHR.

As far as the former aspect is concerned, for instance, the ECtHR held that, at least when the person concerned is provided with sufficient information relating to the allegations against him, the technique of special advocates may well counterbalance the lack of full disclosure (see again *A. and others v. United Kingdom*, cit., para. 219).

With specific reference to what constitutes the essence of the grounds, one could instead recall the CJEU’s finding in *Kadi II*, according to which details such as the links to terrorist activities and the time and location of a contested behaviour may prove enough specific to reach the “essence” threshold (see CJEU, Joined cases C-584/10 P, C-593/10 P, C-595/10 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, judgment of 18 July 2013, para. 141 ff).

Sources - EU and national law

National Law

The provisions in question are the UK Immigration (European Economic Area) Regulations 2006 (so-called “Immigration Regulations”). The case involves the provisions through which the UK legislator transposed into the domestic legal order Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (see the section “EU law sources and CJEU jurisprudence” below).

National cases falling within the scope of EU law

- *AF (No 3)* [2009] UKHL 28
- *Tariq* [2011] UKSC 35
- *Kiani* [2015] EWCA Civ 776
- *Bank Mellat* [2015] EWCA Civ 1052

EU Law

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda at OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34)

Sources - CJEU Case Law

Joined cases C-584/10 P, C-593/10 P, C-595/10 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, judgment of 18 July 2013.

Case T-284/08, *Organisation des Modjahedines du Peuple d'Iran v. Council*, judgment of 4 December 2008

Sources - ECtHR Case Law

ECtHR cases relevant to the interpretation of Article 47(2) CFR

Chahal v. UK [GC], App. No. 22414/93, 15 November 1996

Botmeh and Alami v. United Kingdom, App. No. 15187/03, judgment of 7 June 2007

Mirilashvili v. Russia, App. No. 6293/04, judgment of 11 December 2008

A and others v. United Kingdom, App. No. 3455/05, judgment of 19 February 2009 [GC]

Liu v. Russia (No. 2), App. No. 29157/09, judgment of 26 July 2011

Comments

The Court of Appeal (England and Wales) issued its follow-up judgment based on the CJEU decision in *ZZ* on 24 January 2014 (2014 EWCA Civ 7)

The Court of Appeal (England and Wales) delivered its judgment on 24 January 2014 (2014 EWCA Civ 7), holding that, in the proceedings before the SIAC, the appellant had not been given the minimum level of disclosure required by EU law (*i.e.*, be informed of the gist of the case). Accordingly, it remitted the case to SIAC for a new determination in light of the CJEU's decision in *ZZ*. The Court also stressed that, in rehearing the case, the SIAC must strike an appropriate balance between national security interests and individual rights, and adopt in this respect a more flexible approach to disclosure than it did in the past. Finally, the Court called for the SIAC to take into due account the negative impact that non-disclosure may have on the appellant.
