Italy, Tribunal of Milan, FR v. Ministero dell'Interno, ordinary instance, 9/5/2018

Member State
Italy

Topic

- Impartiality (Conflict of Interest)
- Rule of law (Fair Trial/ Access to Justice)

Deciding Court Original Language
Tribunale di Milano

Deciding Court English translation
Tribunal of Milan

Registration N
FR v. Ministero dell'Interno, R.G. 44718/2017

Date Decision
Pending

National Follow Up Of (when relevant)
The national case is a direct follow up of the CJEU order of 27 September 2018

EU legal sources and CJEU jurisprudence

- Article 4(3) TEU
- Article 19 TEU
- Article 47 CFR
- Article 52(3) CFR
- Articles 22 and 46 of Directive 2013/32/UE on common procedures for granting and withdrawing international protection

CJEU judgments in:

- Tall, C-239/14
- Abdida, C-562/13
- X, C?175/17

- AG Bot Opinion in C-175/17
- Makarubega, C-166/13
- Boudjlida, C-249/13
- N., C-604/12
- Mahdi, C-146/14 PPU
- Johnson, 222/84
- MRAX, C-459/99
- Pontin, C-63/08
- Rewe, 33/76
- Connect Austria, C-462/99
- Unibet, C-432/05
- VLK, C-243/15
- M, C-560/14
- San Giorgio, 199/82
- Courage, C-453/99
- Weber's Wine World, C-147/01
- Ordre des barreaux francophones and germanophone and Others, C-305/05
- Ortis and Others, C-199/11

ZZ, C-300/11

- Moussa Sacko, C-348/16
- OBB, C-417/13
- Levez, C-326/96

Preston, C-78/98

ECtHR Jurisprudence

- Article 3 ECHR
- Article 6 ECHR
- Article 13 ECHR

ECtHR judgments:

- Gebremedhin v. France of 26 April 2007
- Hirsi Jamaa v. Italy of 23 February 2012
- Krombach v. France of 13 February 2001

Annoni v. France of 14 November 2000

Subject Matter

Compliance with the principles of effective judicial protection, equivalence and effectiveness (Articles 4(3) TEU and 19(1) TEU, Article 47 CFR and Directive 2013/32/EU) of a national law providing that the suspensory effect of an adverse decision against an asylum application are possible solely on the basis of the validity of the grounds of the appeal brought against that decision.

Legal issue(s)

Impartiality of the judge deciding on the suspensive effect of the decision rejecting an asylum application.

Since the judge confirming the decision to reject an asylum application is the same who also rules on the request for suspension of the decision, his impartiality might be compromised.

Rule of law (Fair Trial/ Access to Justice)
Violation of the right to an effective remedy due to the fact that, in the absence if automatic suspensive effects of the decision rejecting an asylum application, the applicant could be returned to the country of origin before the starting of the appeal proceedings before the Court of Cassation.

Request for expedited/PPU procedures

Yes, the national court requested the CJEU to review the case under the urgent procedure as the questions raised concerned on one of the areas covered by Title V of Part Three of the TFEU. In support it stated that the applicant was due to leave at any moment the Italian territory and be returned to his country of origin where his personal safety was at risk. The CJEU decided to accept the request and deliver the ruling under the PPU.

Interim Relief

No

National Law Sources

- Article 19 (repealed) of Legislative Decree of 1 September 2011, no. 150
- Legislative Decree of 17 February 2017, no. 13 (repealing Article 19)
- Article 35 bis of Legislative Decree no. 25/2008, as modified by Decree 13/2017
- Articles 283 and 373 Code of civil procedure (c.p.c.)

Facts of the case

The applicant, a Nigerian citizen, appealed before the Court of Cassation the rejection of his application for international protection issued by the competent Territorial Commission and then confirmed by the Tribunal of Milan. He requested before the Tribunal of Milan the suspension of the decision of rejection, claiming that, if returned to his country of origin, he not only could not take part to the proceedings but also could face a serious risk for his personal safety. Yet, according to Article 35 bis of Legislative Decree no. 25/2008, appeals against the rejection of international protection before the Court of Cassation do not entail automatic suspensive effects of the decision rejecting the application. Such a suspension has to be requested on the basis of well-founded reasons. If this is not the case, the applicant has to be returned to his country of origin before the judgment of the Cassation is issued.

Reasoning (role of the Charter or other EU, ECHR related legal basis)

The Tribunal of Milan doubted the compatibility of the lack of an automatic suspension of the decision of rejection with EU law, in particular with the principles found in Articles 4(3) and 19(1) TEU, Article 47 CFR and Articles 22 and 46 of Directive 2013/32.
First, the national court feared a violation of the right to an effective remedy. It engaged with an assessment of the case-law of the CJEU concerning the right to effective judicial protection, firstly recognising that it acts as a limit to procedural autonomy and then stating that such a right is composed of various parts, including the rights of the defence, the principle of equality of arms, the right of access to the courts, and the right of access to a lawyer. For what concerns the rights of the defence, the Tribunal of Milan recalled that it requires the adversarial principle to be in place. Therefore, such a right could be infringed if a judicial decision was founded on facts and documents on which the parties were unable to state their views. Moreover, besides Article 47 CFR, the right to be heard is also entrenched in Articles 22 and 46 of Directive 2013/32/UE. According to the national court, in a case such as the one at issue, such a right would be infringed if the applicant was returned to the country of origin before the starting of the proceedings before

the Court of Cassation.
Secondly, the national court considered that, since the judge rejecting the application for international protection will be the one who will also rule on the request for suspension, his impartiality might be compromised. Indeed, the judge might be tempted to evaluate the validity of the appeal against his own judgment. In this respect, the court recalls that the standard of an independent and impartial judge entrenched in Article 47 CFR must always be ensured and, according to the case law of the ECtHR, such a right cannot be restricted by balancing it with other objectives.
Thirdly, the national court feared a possible breach of the principle of equivalence. While Article 35 bis of Legislative Decree no. 25/2008 does not require to the national court to assess a possible periculum in mora, such an assessment is required in the analogous remedy offered to the Italian citizens, namely Article 373 c.p.c..
Therefore, in light of those doubts, the Tribunal of Milan asked the CJEU whether Articles 4(3) TEU and 19 TEU, Article 47 CFR and Directive 2013/32/EU preclude a procedure where appeals against the rejection of international protection does not have automatic suspensory effect. The CJEU replied by order as the question referred was identical to the question on which it had already ruled in case C?175/17, X. The CJEU declared that EU law does not preclude the Italian legislation as the latter complies with the requirements of Directive 2013/32/EU and Article 47 CFR, which only requires one appeal against the rejection of a request for international protection, and the principle of effectiveness. As far as the principle of equivalence is concerned, the CJEU held that it was for the national court to examine whether that principle was complied with by identifying the comparable procedures or actions.

Relation of the case to the EU Charter
Article 47 of the EU Charter was invoked by the national court as a legally binding parameter for the right to effective judicial protection. In the order for a preliminary request the national court engages in a deep assessment of the right to an effective remedy in light of the case law of the CJEU and the ECtHR. However, since in the present case that right was reinforced in its content by Directive 2013/32/UE, the national Court also relied on this source.

Relation between the EU Charter and ECHR
The reasons behind citing the ECHR in the preliminary request were ornamental, as the national court recognises that Article 47 CFR and Article 6 ECHR have the same meaning.

Use of Judicial Interaction technique(s)
Preliminary reference to the CJEU as regards the interpretation of EU law. The Tribunal of Milan asked to the CJEU whether Articles 4(3) TEU and 19(1) TEU, Article 47 CFR and Directive 2013/32/EU have to be interpreted in the sense that they preclude a procedure, such as that under Article 35 bis of Legislative Decree 25/2008, under which the national court seized with an application for asylum – which was rejected by the competent administrative authority and by that court itself – can 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.

Horizontal Judicial Interaction patterns (Internal – with other national courts, and external – with foreign courts)
Not applicable

Vertical Judicial Interaction patterns (Internal – with other superior national courts, and external – with European supranational courts)
Preliminary reference to the CJEU (see above)

Strategic use of judicial interaction technique (purpose aimed by the national court)
Not applicable since the judgment of the Tribunal of Milan is currently pending

---

Impact on Legislation / Policy
No impact of national legislation/policy

Notes on the national implementation of the preliminary ruling by the referring court
In compliance with the order of the CJEU, the Tribunal of Milan rejected thee applicant's request to suspend the effects of the decision rejecting his application. With specific regard to the rights of the defence, the national court justified its decision stating that the applicant's claim did not take into account the guidance provided by the CJEU, notably the fact that "the introduction of an appeal in Cassation against decisions rejecting an application for international protection and the decision to give it automatic suspensory effect, fall, in the absence of harmonisation in EU law, within the procedural autonomy of the Member States, subject to compliance with the principles of equivalence and effectiveness".
Moreover, in a case similar to the one at issue, the Court of Cassation, ruling on judgments of a court of first instance dismissing an asylum application, implemented the CJEU judgment in C-422/18. For instance, in judgment 290/2019 the civil section of the Court of Cassation relied on the CJEU judgment to state that Article 35 bis of Legislative Decree 25/2008 complies with EU law. See also the judgment of the Court of Cassation no. 32319/2019.

Impact on national case law from the same Member State or other Member States
Other decisions that refer to this decision and/or to the CJEU's judgment which it implemented:

- Court of Cassation no. 290/2019
- Court of Cassation no. 32319/2019

(Link to) full text
https://www.questionegiustizia.it/data/doc/1677/ordinanza_trib_milano_rg_44718_2017.pdf

---

History of the case: (please note the chronological order of the summarised/referred national judgments.)

1. Rejection of the applicant's asylum application by the competent territorial commission (Commissione Territoriale per il riconoscimento della Protezione Internazionale presso la Prefettura U.T.G. di Milano) on 18 August 2017
2. Rejection of the appeal by the Tribunal of Milan on 5 March 2018
3. Appeal before the Court of Cassation brough by the applicant on 4 April 2018
4. Request by the applicant to the Tribunal of Milan to suspend the effects of the adverse decision of the territorial commission on 4 April 2018

5. Request for a preliminary ruling made by the Tribunal of Milan to the CJEU on 19 June 2018
6. Preliminary ruling of the CJEU delivered on 27 September 2018