



An Binse um Achomhairc i dtaobh Cosaint Idirnáisiúnta

The International Protection Appeals Tribunal

Procedural Rights of Asylum Seekers:

The Right to an Effective Remedy – Art. 46 APD II

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FRICoRE Roundtable

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International Protection: Key Legal Instruments

- The UN 'Refugee Convention' 1951 plus 1967 Protocol (also known as the 'Geneva Convention')
- Qualification Directive 2011/95/EU (recast - 2011) ['QD II']: seeks to achieve approximation of the rules on the recognition and content of international protection
- Asylum Procedures Directive 2013/32/EU (recast - 2013) ['APD II']: seeks to establish common procedures for granting and withdrawing international protection pursuant to the QD

Useful Resources

European Asylum Support Office:

‘Judicial Analysis on Asylum Procedures and the Principle of Non-Refoulement, 2018’

- https://easo.europa.eu/sites/default/files/asylum-procedures-ja_en.pdf (English)
- <https://easo.europa.eu/sites/default/files/Asylum-Procedures-JA-FR.pdf> (French)

Quarterly Newsletter (NEAIS), Centre for Migration Studies, Radboud University:

- <https://cmr.jur.ru.nl/neais/>

The Role of Courts and Tribunals: APD II

Chapter
V

Appeals Procedures

Article 46: The Right to an Effective Remedy

The Role of Courts and Tribunals: Antecedents to Article 46 APD II

APD I (2005), Article 39:

- Article 39 didn't contain any definition of the contents of the effective remedy

- However, CJEU Case C-69/10 *Samba Diouf* [2011] developed criteria of 'a thorough review' [para. 56] 'as regards both the facts and the law' [para. 57]

The Role of Courts and Tribunals

Article 46 of APD II

Article 46 is quite different from previous APD I Article 39, principally in specifying the **scope and intensity of the review** that must take place at the appeal stage: **Article 46(3)**

The Influence of Article 47 of the Charter on the Shaping of Art.46

The text of Article 46 of APD II can be seen as a response to CJEU jurisprudence, particularly the *Samba Diouf* case, but the *Samba Diouf* case can also be seen to be, in turn, a recognition of the centrality of the Article 47 right to an effective remedy set out in the EU Charter.

The Role of Courts and Tribunals

CJEU Case C-348/16 *Sacko* [2017], para. 31:

‘the characteristics of the remedy provided for in Article 46 of the APD(recast) must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection’.

What Types of Decisions Does Article 46 Apply To?

Article 46(1)-(2) of APD (recast)

1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:
 - (a) a decision taken on their application for international protection, including a decision:
 - (i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;
 - (ii) considering an application to be inadmissible pursuant to Article 33(2);
 - (iii) taken at the border or in the transit zones of a Member State as described in Article 43(1);
 - (iv) not to conduct an examination pursuant to Article 39;
 - (b) a refusal to reopen the examination of an application after its discontinuation pursuant to Articles 27 and 28;
 - (c) a decision to withdraw international protection pursuant to Article 45.

Implications of Article 46(3) APD II

‘In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and ex nunc examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to [the Qualification Directive (recast)], at least in appeals procedures before a court or tribunal of first instance.’

What Information Must Courts and Tribunals Have Before Them?

Article 10(3)(b) requires Member States to ensure that “precise and up-to-date information is obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of applicants and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions”.

Article 10(4) ‘The authorities referred to in Chapter V shall, through the determining authority or the application or otherwise, have access to the general information referred to in paragraph 3(b) necessary for the fulfilment of their task’

How is the Information Put Before the Court or Tribunal?

- Power to Obtain Evidence *proprio motu* (of one's own motion)
- Contrast between systems that have an **inquisitorial approach** (courts/tribunals more likely to actively engage in fact-finding and research) and those that have an **adversarial approach** (courts/tribunals usually rely on evidence submitted by appellants and determining authorities)



EFFICIENCY

FAIRNESS



ARTICLE 46 APD II

CONSIDERATIONS OF FAIRNESS

Most Important Fairness-Related Guarantee: Right to Remain

Article 46(5):

‘Without prejudice to paragraph 6, Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.’

Other Fairness-Related Features of Article 46

Article 10(3) – regard shall be had to relevant, up-to-date information

Article 12(2):

“With respect to the procedures provided for in Chapter V, Member States shall ensure that all applicants enjoy guarantees equivalent to the ones referred to in paras 1(b) to (e)”

Article 12(2)

‘With respect to the procedures provided for in Chapter V, Member States shall ensure that all applicants enjoy guarantees equivalent to the ones referred to in paragraph 1(b) to (e).’

Four guarantees of Article 12 (b)-(e):

- Provide interpreter services (b);
- Afford an opportunity to communicate with legal advisers; (c);
- Ensure access to information in the file and any information provided by experts (d),
- and it must send a notice of its decision (e).

Reasonable time limits and 'other necessary rules'

Article 46(4)

“Member States shall provide for reasonable time limits **and other necessary rules** for the applicant to exercise his or her right to an effective remedy (...)”

ARTICLE 46 APD II

CONSIDERATIONS OF EFFICIENCY

Article 46(6) Exceptions to the Right to Remain

‘A court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon the applicant’s request or acting *ex officio*, if such decision results in ending the applicant’s right to remain in the Member State and where in such cases the right to remain in the Member State pending the outcome of the remedy is not provided for in national law.’

Article 46(6) APD (recast)

- ❖ Manifestly unfounded
- ❖ Accelerated procedures
- ❖ Inadmissible
- ❖ Rejected reopening
- ❖ European safe country

Article 46 APD II: Key Decisions of the CJEU

- CJEU Case C-348/16 Sacko [2017]
- CJEU Case C-585/16 Alheto [2018]
- CJEU Case C-180/17 X & Y [2018]
- CJEU Case C-56/17 Fathi [2018]
- CJEU Case C-556/17 Torubarov [2019]
- CJEU Case C-406/18 P.G. [2020]
- CJEU Case C-651/19 J.P. [2020]

Thank you for Listening!