

- **Special procedural guarantees for vulnerable asylum seekers**

- **Cristina Correale**

*Judge in the Specialised department on migration and international protection - First Instance Court of Naples, Italy
EASO judicial trainer*

The interplay between Article 24(4), designed for administrative authorities, and Article 46(3) APD (recast), which refers to judicial proceedings, may be critical for vulnerable applicants. Even if a procedural rule is considered reasonable and proportionate generally, applying it in a particular case may nonetheless violate the right to an effective remedy in the light of a particular applicant's personal circumstances (see *EASO Judicial Analysis on Vulnerability in the context of applications for international protection*).

Identification of Vulnerable Person

Recital 29 APD (recast): *“Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence.”*

Art. 21 RCD - Vulnerability includes persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation

Article 24 APD (recast)

Applicants in need of special procedural guarantees

1. Member States shall assess, within a reasonable period of time after an application for international protection is made, whether the applicant is an applicant in need of special procedural guarantees.



2. The assessment need not take the form of an administrative procedure.



3. Member States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this Directive throughout the duration of the asylum procedure.

- Article 24 APD (recast) requires Member States to provide special procedural guarantees throughout the duration of the asylum procedure
- The provisions concerning special procedural guarantees in administrative procedures will be instructive for courts or tribunals when the need for special procedural guarantees becomes apparent at a later stage, in the context of an appeal/review (see case *Addis C-517/17*)

CJEU C-517/17

- The obligation to give asylum seekers the opportunity of a personal interview before a decision is taken on his or her application “forms part of the basic principles and guarantees” set out in the Procedures and Reception Conditions Directives, is “of a fundamental importance in the asylum procedure” (§59), and applies to decision on the admissibility of the application as well as to decisions on the substance (§47).
- Since the requirement for a full and ex nunc examination of both facts and points of law in an appeal may cover the grounds of inadmissibility referred to in Article 33(2) APD, a national legislation may dispense the determining administrative authority to conduct a personal interview before declaring an application for international protection inadmissible, only if the court or tribunal hearing the appeals against this decision conducts a hearing of the applicant in accordance with the conditions and fundamental guarantees applicable in the case in question (§68). Without such a hearing, the applicant’s right to a personal interview under conditions which ensure appropriate confidentiality and allow him or her to present the grounds for his or her application in a comprehensive manner, including considerations which support the admissibility of the application, would not be guaranteed at any stage of the asylum procedure, which would negate a safeguard that the EU legislature considered to be fundamental in that procedure.

Special guarantees in administrative procedures

The personal interview is the general rule in the administrative procedure

but, if an applicant in need of special procedural guarantees is considered unfit or unable to be interviewed (**Art. 14(2) APD**), reasonable adjustments should be made to enable the submission of further information by alternative means.

It has to be conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall: **(a) ensure that the person who conducts the interview is competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability; (...)** (**Art. 15(3)(a) APD (recast)**)

In addition, if an applicant has failed to appear at the personal interview, the personal circumstances of a vulnerable applicant should be taken into account when determining if there are 'good reasons for the failure to appear', as referred to in Article 14(5) APD (recast).

Vulnerability and late disclosure

- Where applicants base their fear of persecution or serious harm on their sexual orientation/gender identity, interviewer should bear in mind that intimate and private matters may be difficult to disclose. (CJEU *A, B and C* Joined Cases C-148/13, C-149/13 and 150/13 (par.69) “However, having regard to the **sensitive nature of questions relating to a person’s personal identity** and, in particular, his sexuality, it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset”.)
- Italian Cassation Court n.24573/2020: case of a Nigerian women, vulnerable applicant as potential victim of trafficking, who did not reveal that circumstance to the determining authority, but already showed multiples indicators to be such a victim.
- The Court quashed the first instance judgement, considering it necessary for the judge to hear the women in person, because although it appeared plausible that she had been victim of trafficking, during the administrative proceeding she was not recognized the proper procedural guarantees owed to vulnerable persons; in fact she did not receive proper information in her language about the possibility to be recognized a residence permit, as provided by art 10 d.lgs 24/14 (implementing DIR 2011/36 EU against human being trafficking and victims protection) and art. 18 d.lgs 286/98, and/or about the possibility to seek for international protection. According to the Court, this implies that the judge did not comply with the obligation to cooperate with the asylum seeker in the assessment of the relevant elements of the application

- *Is Article 46(3) of [Directive 2013/32], in conjunction with Article 47 of [the Charter], to be interpreted as meaning that national courts and tribunals have the power to vary administrative decisions of the competent asylum authority refusing international protection, and also to grant such protection?*

When Member States have not correctly implemented Article 46(3) APD (recast) in their national legislation, national courts and tribunals are nevertheless obliged to adhere to it because it has direct effect CJEU (GC), judgment of 29 July 2019, *Alekszij Torubarov* , C-556/17, EU:C:2019:626, para. 73, but also C-406/18).

CJEU (GC), *Torubarov*, C-556/17

- It follows that Member States are required, pursuant to Article 46(3) of Directive 2013/32, to order their national law in such a way that the processing of the appeals referred to includes an examination, by the court or tribunal, of all the facts and points of law necessary in order to make an up-to-date assessment of the case at hand, so that the application for international protection may be considered in an exhaustive manner without it being necessary to refer the case back to the determining authority. That interpretation furthers the aim pursued by Directive 2013/32 of guaranteeing that such applications are processed as rapidly as possible, without prejudice to an adequate and complete examination being carried out (see, to that effect, judgment of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584, paragraphs 109 to 112).

Italian Cassation Court n. 2453/2021

- Case of an appeal against a return decision based on the fact that the appellant, after the service of the return order, had filed a subsequent request for international protection claiming to be at risk in Gambia because he was accused to be homosexual. His subsequent request was declared inadmissible by the Questor without any preliminary examination of the determining authority, according to past art. 29 bis d.lgs 25/08 (now reformed by DL 130/20). The justice of peace uphold the decision and denied the suspensory effect, because the application was to be considered inadmissible, by presumption *iuris et de iure*, as lodged merely to delay his removal from Italy.
- Cassation Court, recalling art. 4 (responsible authorities) and 40 APD recast (subsequent request), quashed the justice of peace judgment stating that past art. 29 bis was to be interpreted in line with EU Law, so that the justice of peace should have conducted himself the omitted preliminary examination in order to establish if the subsequent request contained new elements or findings, or if it was presented only to delay the appellant's removal .

Other special guarantees in the administrative phase

- **Prioritisation**
- **Exemption from accelerated or border procedures** “Where adequate support cannot be provided to an applicant in need of special procedural guarantees” (Art. 24(3) and Recital 30 APD (recast))
- In Italy very recent Law 173/20 precludes the application of accelerated procedures to unaccompanied minors and vulnerable applicants in need of special reception measures, as defined by art. 17 d.lgs 142/15 (art. 21 RCD)
- For unaccompanied minors, Article 25(6) APD (recast) restricts the circumstances under which accelerated and/or border procedures under Article 31(8) may apply, because in these procedures child’s right to proper information, counselling and due time to prepare the case are restricted.

Special guarantees for minors

- Art. 10(3)(d) APD (recast): Decision makers may have recourse to expert evidence when considering child-related issues
- Art. 15(3)(e) APD (recast): Interviews with minors are to be conducted in a child-appropriate manner
- Art. 25(1) APD (recast): In the case of unaccompanied minors, a representative is to be appointed to represent and assist the minor with a view to their **best interest** and to inform and prepare the minor in relation to the personal interview
- Art. 25(3) APD (recast): Interviewers and decision makers in applications by unaccompanied minors should have particular knowledge of the special needs of minors
- Art. 25(4) APD (recast): unaccompanied minors and their representatives shall be provided, free of charge, with legal and procedural information

Procedural rights in judicial proceedings

Free legal assistance

- **Article 47, third subparagraph, EU Charter** : legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.
- National judges have to be extremely cautious that their interpretation of national procedural rules governing access to free legal assistance and representation does 'not render practically impossible or excessively difficult the exercise of rights conferred' by EU law (principle of effectiveness), and is in accordance with Article 47, third subparagraph, EU Charter
- When assessing whether or not the appeal has a tangible prospect of success, the applicant's special needs should be taken into account in order to assess if these needs, and any absence of the benefit of special procedural guarantees, should be taken into consideration in deciding whether or not there is a tangible prospect of success. (see EASO, JA on Vulnerability, 2021)

Time limits

- ART 46(4) APD (recast) MS shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy pursuant to paragraph 1. The time limits shall not render such exercise impossible or excessively difficult.
- As regards the fact that the time-limit for bringing an action is 15 days in the case of an accelerated procedure, whilst it is 1 month in the case of a decision adopted under the ordinary procedure, the important point is that the period prescribed must be sufficient in practical terms to enable the applicant to prepare and bring an effective action. It is for the national court to determine if a time-limit, in a given situation, proves to be insufficient in view of the circumstances of a vulnerable appellant (CJUE, Case C-69/10, Samba Diouf)
- This may be an issue when vulnerability was not identified or addressed with special procedural guarantees (see EASO, JA on Vulnerability, 2021)
- Also a time limit of 10 days may be sufficient, provided that procedural safeguards granted by EU law are ensured within that period (CJEU C-651/19) including the possibility to obtain legal advice from a specialist (see CJEU, C-63/08)

Right to remain during appeal procedure

- In some Member States, a return decision may be adopted following a negative decision on an application for international protection, but before any appeal in respect of that application is taken or concluded
- CGUE, *Gnandi*, C-181/16 ‘all the effects of the return decision must be suspended during the period prescribed for bringing that appeal and, if such an appeal is brought, until resolution of the appeal’
- CJEU in *Tall*, C 239/14, has decided that Article 46 APD (recast), ‘read in the light of Articles 19(2) and 47 of the Charter, must be interpreted as not precluding national legislation which does not confer suspensory effect on an appeal brought against a decision not to further examine a **subsequent** application for asylum’. The CJEU emphasised that this decision applies to cases in which the enforcement of that decision cannot, as such, lead to that national’s removal because no return decision had been issued

CJUE, C-36/20

- CJUE, C-36/20 «the protection inherent in the right to an effective remedy and in the principle of non-refoulement must be guaranteed by affording the applicant for international protection the right to an effective remedy which has automatic suspensory effect, before at least one judicial body, against a return decision or a possible removal decision, within the meaning of Directive 2008/115. It is for the Member States to ensure the full effectiveness of an appeal against a decision rejecting the application for international protection by suspending all the effects of the return decision during the period prescribed for bringing the appeal and, if such an appeal is brought, until resolution of the appeal (par. 97)
- *When does a third-country national acquire the status of an applicant for international protection?*

Within the meaning of Article 2(c) of Directive 2013/32, when he or she ‘makes’ such an application. “The act of ‘making’ an application for international protection does not entail any administrative formalities, as the Advocate General observes in point 82 of his Opinion, since those formalities must be observed when the application is ‘lodged’.” (see. Para 93). “The acquisition of the status of applicant for international protection cannot be subject either to the registration or to the lodging of the application and, second, that the fact that a third-country national has expressed his or her wish to apply for international protection before ‘other authorities’ within the meaning of the second subparagraph of Article 6(1) of Directive 2013/32, such as an examining magistrate, is sufficient to confer the status of applicant for international protection on that person and, accordingly, trigger the time limit of six working days within which the Member State concerned must register the application.”

- Suspensive effect, or its absence, under the APD (recast) may raise particular issues in respect of vulnerable applicants, eg. in the case of an unfounded/manifestly unfounded, where the person's having suffered human trafficking was not known; or **in the case of an 'inadmissibility'**, an adult dependant of an applicant may have consented to their case being lodged on their behalf and included in a parent's claim, notwithstanding that the dependant has a heightened individual risk of persecution or serious harm on account of a serious mental illness. (art. 40.6 APD recast; *see CJUE Ahmedbeckova C-652/16*)