ADiM BLOG

September 2020

CASE LAW COMMENTARY

Court of Justice of the European Union, judgment of 25 June 2020, *Ministerio Fiscal v. VL*, Case C-36/20

The determination of 'other authorities' and the status of applicant for international protection: the crossword puzzle

Emellin de Oliveira

Ph.D. Candidate in EU Migration Law
NOVA School of Law and Research Centre on Law and Society

Key Words

Other authorities - the status of applicant for international protection – Procedures Directive – Detention of applicant – Reception Conditions Directive

Abstract

In the case in question, the Court of Justice had to rule on whether a judicial authority should be regarded as one of the 'other authorities' likely to receive applications for international protection mentioned in Article 6(1) of Directive 2013/32, and whether that authority is required to provide an applicant with relevant information on the asylum procedure. These issues arose due to a decision to return a Malian national who had expressed his intention to apply for international protection before the referring court. The Court of Justice also determined the moment in which a third-country national acquires the status of applicant for international protection, as well as on the consequences of this status, such as the conditions and limits of detention.

A. FACTS AND RULING

1. *Background*

In December 2019, VL, a Malian national, was intercepted on a vessel by the Spanish Maritime Rescue service, having been rescued and disembarked at the Gran Canaria southern quayside. One day after his arrival, the Spanish government representation in Las Palmas ordered his removal. As this decision could not be enforced within the 72-hour period provided for under Article 6(6) of the Spanish Organic Law on the rights and freedoms of foreigners and their social inclusion, a request for placement in a detention centre was submitted to the District Court of San Bartolomé de Tirajana.

The judge of the District Court delivered three decisions on the case. The first decision granted VL the right to make a statement, in which he expressed his intention to apply for international protection. The second decision ordered to inform the national competent authorities about VL's statement and to accommodate him in a humanitarian reception centre. The third decision ordered VL to be placed in a detention centre, as there were no available places in the humanitarian one.

The Public Prosecution brought an appeal against the second decision arguing that the investigating magistrate had no power either to receive applications for asylum or to rule on the accommodation for applicants for international protection. VL's lawyer filed an appeal against the detention decision, considering it incompatible with Directives 2013/32 (the Procedures Directive) and 2013/33 (the Reception Conditions Directive). The investigating magistrate decided to stay the proceedings and to refer to the Court of Justice of the European Union (CJEU, or the Court) for a preliminary ruling on whether a judicial authority who is competent under national law to order the detention of third-country nationals should be regarded as one of the 'other authorities' likely to receive applications for international protection referred to in Article 6(1) of the Procedures Directive. In the affirmative, the Court would need to determine whether that authority is required to provide a foreigner with the relevant information, such as how to lodge the application, and when the status of applicant for international protection is granted and the consequences of such an acquisition.

2. *The ruling*

The Court considered that the expression "competent authority under national law", in the first subparagraph of Article 6(1) of the Procedures Directive, provides Member States with the possibility of designating the competent authority to register applications for international protection (§55). However, the second subparagraph of the same article does

not make any reference to national law and, therefore, it does not require Member States to designate who the "other authorities" are (§56). Since it is plausible for illegally staying foreigners to express their interest for international protection to a judicial authority called upon to rule on an application for detention lodged by the national authorities, in particular with a view to removal, the concept of "other authorities" within the meaning of the second subparagraph of Article 6(1) of the Procedures Directive must be seen as encompassing that judicial authority (§59).

In the light of the above, the judicial authority called upon to decide on the detention of an illegally staying third-country national in view of his return must comply with the second and third paragraphs of Article 6(1) and Article 8(1) of the Procedures Directive when taking the initiative to inform that national of his right to seek international protection. In addition, to ensure the efficiency and speed of the procedure for examining applications for international protection, this judicial authority shall forward the file in its possession to the competent authority under national law to register the application.

Regarding the reasons and limits of the detention, both Article 26(1) of the Procedures Directive and Article 8(1) of the Reception Conditions Directive provide that Member States may not hold a person in detention for the sole reason that he is an asylum seeker. According to Article 8(2) of the Reception Conditions Directive, an applicant can only be detained if detention is necessary and if less coercive alternative measures cannot be applied effectively. Therefore, the Court ruled that Article 26 of the Procedures Directive and Article 8 of the Reception Conditions Directive must be interpreted as meaning that an illegally staying third-country national who has expressed his intention to seek international protection before an "other authority" may not be detained for reasons other than those set out in Article 8(3) of the Reception Conditions Directive.

B. DISCUSSION

1. The meaning of 'other authorities'

The core question at stake, substantially, is the definition and the consequences of the concept of "other authorities" mentioned in Article (6)(1) of the Procedures Directive. From the outset, the Advocate General (AG) argued in his Opinion that the undefined term "other" reveals an intention to opt for an open definition of the authorities who can receive applications for international protection. Since judicial authorities would be likely to receive asylum applications when called upon to decide on the arrest and/or return of third-country nationals, they could be encompassed by the definition.

From our perspective, the importance of this assumption lies, on the one hand, in achieving the objectives of the Procedures Directive, which aims to ensure quick, easy and effective access to the international protection procedure; and, on the other hand, in ensuring the protection and effectiveness of fundamental and human rights, such as the right to asylum (Article 18 EUCFR), the right to protection in the event of removal, expulsion or extradition (Article 19 EUCFR), the right to an effective remedy (Article 13 ECHR), in addition to other procedural guarantees. This effectiveness had already been analysed in the Hasan case, in which the Court described the objective of the referred Directive as «an effective opportunity to lodge their application as soon as possible» (§ 76).

In VL's case, the judicial authority was the only authority before which VL had the opportunity to request international protection prior to being taken to the detention centre, since he had not been previously informed of the right to apply for asylum. We can infer from this that, in addition to causing a delay in receiving and, consequently, registering the request for international protection, the lack of information on the possibility of applying for asylum is an obstacle for a foreigner accessing the corresponding material reception conditions or, even, to remain on the territory of the Member State pending the examination of the asylum application (which Marcelle Reneman points out as an important right to applicants). Thus, a broad understanding of the concept of "other authorities" guarantees not only effective access to the asylum procedure but reaffirms also the principles and values on which the European Union itself is based, namely respect for human dignity.

Additionally, according to the AG, based on the interpretation of Recital 27 of the Procedures Directive, there would be two stages in the submission of an application for international protection: its making and its lodging (§§ 78-89). However, in our point-of-view, there are three stages involved in this procedure, as "the registration" should not be regarded as part of the first stage (as the AG sustains), but as a separate one.

Accordingly, the first stage is the *making of the application*, which takes place when the third-country national expresses his intention to apply for international protection to any authority (the competent one or the 'others'). The second stage is the *registration of the application* by the national competent authority, within either three or six working days from the expression of interest. The third stage is the *lodging of the application*, when the competent authority receives the complete asylum application (either a form submitted by the applicant or an official statement drawn up by the authorities, as ascertained by the Mengesteab case) to start the procedural part of the asylum process.

As a result, the acquisition of the status of applicant for international protection cannot be made conditional on the registration or lodging of the request. The moment that an authority (the competent one or the 'others') receives the statement from a third-country national

expressing his interest to apply for international protection marks the acquisition of the status of *applicant for international protection*.

The rights and duties that, according to Recital 27 of the Procedures Directive, are applicable to the asylum seeker arise from the acquisition of such a status. Thus, the applicant may no longer be detained for the purpose of removal pursuant to Directive 2008/115 (the Returns Directive), due to the limitation provided for in Recital 15 of the Reception Conditions Directive, which establishes: «[…] Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard both to the manner and to the purpose of such detention […]».

The *very clearly defined exceptional circumstances* are set out in the paragraphs of Article 8 of the Receptions Conditions Directive, which place significant limitations on the Member States' power to detain a person, with an exhaustive list of the various grounds for detention. Such an interpretation underlies the judgments of the K and N cases, in which, in dealing with Member States' discretion while transposing and implementing a directive, the Court stated they must do so by ensuring the objectives of that directive are achieved in such a way that they do not infringe fundamental rights and general principles of EU law.

In short, a strict definition of who the "other authorities" are would only serve to restrict access to the effective right of asylum. There is a clear importance in the understanding that, once these "other authorities" receive a request for international protection, the third-country national could be recognized as an applicant, even if they pursue other actions to formalise the request, since it implies the activation of rights and guarantees derived from such, notably the aforementioned material reception conditions and limits on detention.

2. *VL's detention and expulsion*

The VL case brings a factual duality: on the one hand, it reinforces the protection of asylum seekers' rights; and, on the other hand, it declares the failure of the application for international protection mechanism in VL's detention and consequent expulsion.

Since the clarification on the meaning of "other authorities", it became clear that the expression of the intention to apply for international protection before a judicial authority, for instance, corresponds to the making of the application, from which the status of applicant is granted. The EASO Manual points out that making an application triggers rights and obligations under both the Procedures Directive and the Reception Conditions Directive. This means that it is not only from the expression of interest for applying for international protection before a national competent authority that the status of applicant emerges, but

also when doing so before the "other authorities".

Nevertheless, in the case at hand, VL was returned to his country of origin despite having expressed his intention to request international protection at the first opportunity he had, when he was presented to a judicial authority. Even if any doubt remained as to whether the judicial authority could be considered as an "other authority" capable of receiving an application for international protection, VL's return should have been avoided until clarification of this topic as a consequence of the application of the principle of *non refoulement.*

VL's detention is also an issue in this case. Evangelia (Lilian) Tsourdi mentions that «the use of generalised detention as a migration management tool and the abuse of alternatives to immigration (asylum and pre-return) detention as a widespread control measure, in both the return and asylum frameworks, is undoubtedly on the rise in the EU». She calls into question the basic idea that detention, especially in relation to asylum, should be an exception and only be used in case less coercive alternative measures are unavailable to guarantee the objective of the international protection and return, if applicable.

Although in *Saadi v. United Kingdom* the ECtHR determined that the detention of asylum seekers *a priori* does not violate Article 5(1) ECHR, detention cannot be arbitrary and must therefore be justified and based on the reasons listed in Article 8(3) of the Reception Conditions Directive. In the case of VL, this is exactly what the AG alluded: «On the contrary, it is apparent from the order for reference that the sole ground on which the court of preliminary investigation ordered VL's detention was that no reception centre places were available. I must point out that this is not among the grounds in Article 8(3) of Directive 2013/33» (§ 113).

In conclusion, there is no doubt that administrative detention of asylum-seekers should be used as a last resort and only if necessary and proportional. However, as the AG elucidated in his opinion, «humanitarianism is not enough» (§ 1) to guarantee refugee rights.

3. SUGGESTED READING MATERIALS

To read the case:
Court of Justice of the European Union, Judgment of 25 june 2020, Case C-36/20 PPU, *Ministerio Fiscal v. VL*, ECLI:EU:C:2020:495

Opinion of Advocate General Szpunar, delivered on 30 April 2020, in Case C-36/20 PPU, Ministerio Fiscal v. VL, ECLI:EU:C:2020:331

Case Law:

CJEU, Judgment of 14 September 2017, *K, Case C-18/16*, EU:C:2017:680

CJEU, Judgment of 15 February 2016, *N., Case C-601/15 PPU*, EU:C:2016:84

CJEU, Judgment of 19 June 2018, *Gnandi, Case C-181/16*, EU:C:2018:465

CJEU, Judgment of 24 June 2015, *H. T., Case C-373/13*, EU:C:2015:413

CJEU, Judgment of 25 January 2018, *Hasan, Case C-360/16*, EU:C:2018:35

CJEU, Judgement of 26 july 2017, *Mengesteab, Case C-670/16*, EU:C:2017:587

ECrHR (Grand Chamber), *Saadi v. United Kingdom*, Judgment of 29 January 2008, Application No. 13229/03

Literature:

E. Tsourdi, *Alternatives to immigration detention in International and EU Law: control standards and judicial interaction in a heterarchy* in M. Moraru, G. Cornelisse & P. De Bruycker (Eds.). *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union*, Modern Studies in European Law, Oxford, 2020, pp. 262-297.

M. Reneman, *EU Asylum Procedures and the Right to an Effective Remedy*, Oxford, 2014.

European Asylum Support Office (EASO), *Judicial analysis - Asylum procedures and the principle of non-refoulement*. EASO Professional Development Series for members of courts and tribunals, 2018.

To cite this contribution: E. DE OLIVEIRA, *The determination of 'other authorities' and the status of applicant for international protection: the crossword puzzle,* ADiM Blog, Case Law Commentary, September 2020.