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7.9 Procedures at second instance

The EU level legislative framework of appeals procedures is outlined in the Asylum Procedures Directive, Chapter V. Article 46 obliges Member States to ensure that applicants have the right to an effective remedy before a court of a tribunal with regard to a decision issued on first instance application. The right to an effective remedy includes not only decisions on the merits of the claim (e.g. decisions rejecting the case as unfounded or granting subsidiary protection, which the applicant may wish to appeal claiming refugee status) but also decisions on inadmissibility, taken at the border or transit zones, applying the concept of a European safe third country, as well as decisions refusing to re-open a case which was discontinued or withdrawing international protection.

The main areas of second instance procedures in which developments took place in 2019 include the suspensive effect of appeals against first instance decisions, changes regarding time limits for appeals, institutional changes establishing the authority responsible for appeals, managing a backlog of cases pending on appeal, safeguards provided to applicants and measures to improve the efficiency of second instance procedures.

7.9.1 Legislative changes

In 2019, Greece and Switzerland adopted changes to their second instance procedures and Bulgaria drafted proposals for amendments to second instance procedures on the automatic suspensive effect of appeals against negative asylum decisions.

Among the most notable developments in 2019 was the new asylum law adopted by Greece on 1 November 2019. For second instance procedures, this asylum law provides new time limits to submit appeals, schedule the hearings on appeal depending on the day of the submission of an appeal, and issue appeals decisions. It provides for the suspensive effect of appeals for deportation, readmission and return procedures. With regard to the time limits to issue a decision on appeal, civil society organisations noted that the Greek Appeals Committees did not issue decisions within the deadlines provided in the Asylum Law.[532]

In Switzerland, a new Asylum Act entered into force in March 2019. For second instance procedures, the new legislation shortened time limits for appeals, with new time limits ranging from 5 working days
(for inadmissibility decisions for instance) to 30 days (for substantive decisions), depending on the type of procedure.[533]

Bulgaria drafted amendments to the Law on Foreigners based on the judgment *C.G. and Others v. Bulgaria* issued by the ECtHR, in which it was held that Bulgarian authorities failed to

provide adequate procedural safeguards relating to expulsion. The proposed amendments to the Law on Foreigners include the introduction of the automatic suspensive effect of appeals against expulsion orders on the ground of public order and a proposed reduction of the time limits for examining appeals against orders for compulsory accommodation in a special home (under the Law on Foreigners in the Republic of Bulgaria, Article 46a(2)).[534]

In February 2019, Poland presented draft amendments to the Law on Protection (PL LEG 01), including a border procedure and appeals before the administrative court. The Polish Helsinki Foundation for Human Rights criticised these draft amendments as they do not provide sufficient safeguards and effective remedies against negative asylum decisions.[535] The work on this draft amendment is now discontinued.

7.9.2 Institutional changes

In 2019, institutional changes took place as EU countries established new branches or chambers within their appeals authorities. In addition, previously-established appeals authorities started operating in 2019.

As part of the changes introduced in December 2019, Greece established the Thessaloniki branch of the Appeal Authority. The new branch reviews appeals against first instance decisions issued by the Regional Asylum Offices and Asylum Units operating in the Ionian Islands, Ipeiros, West Macedonia, Central Macedonia, East Macedonia and Thrace.

In Malta, a new chamber was created within the Refugee Appeals Board in April 2019 due to the increased backlog of asylum cases at the appeals stage.

The new Administrative Court for International Protection in Cyprus began operating as of 18 June 2019 and appeals were submitted before the court as of July 2019. They have suspensive effects and both facts and points of law are examined. In addition, all appeals decisions can be further appealed before the Supreme Court; they will not have a suspensive effect and only points of law are examined.[536] With regard to the appeals already submitted to the Refugee Reviewing Authority, they remained to be examined by them to the end of 2020, when it will cease operations.[537]

7.9.3 Backlogs and length of proceedings on appeal

The backlog of appeals cases and the length of proceedings remained two notable aspects for procedures at second instance in 2019. Due to an increase in the appeals backlog, EU+ countries took measures to reduce the number of pending appeals.

From March 2019, Austria took measures aimed at accelerating asylum procedures and reducing the number of appeals against first instance decisions. France increased the CNDA’s budget in 2019 and continued to increase it in 2020, seeking to reduce the length of procedures at second instance (usually lasting for seven months and five days on average in 2019) (FR LEG 13).

7.9.4 Assessment of the case and safeguards on appeal

The length of proceedings on appeal have influenced the scope of an appeal and the provision of an effective remedy for the applicant. In the Netherlands, new reasons for requesting asylum or reasons that have been withheld in the first instance and invoked on appeal might be taken into consideration if this does not result in an impermissible delay in disposing of the case. This change comes as a result of judgments from the Administrative Jurisdiction Division of the Council of State.

7.9.5 Use of electronic means for more efficient second instance procedures

In 2019, some EU+ countries transferred to electronic means in order to increase the efficiency of second instance procedures. Since July 2019, France introduced the possibility to lodge appeals electronically to the CNDA. Lawyers who are signed up for the CNDém@t system can submit appeals, briefs and other procedural documents electronically. In addition, interviews by videoconference are possible even without the consent of the applicant, which is already possible in overseas territories. In practice, such videoconferencing were used in 2019 only for appeals lodged overseas.[538]

Likewise, Sweden allowed the submission of appeals to the Migration Court digitally through a secure portal. In addition, Latvia continued to reduce the use of files and documents in hard copy kept by authorities involved in the asylum procedure, including the courts on appeal.

7.9.6 Jurisprudential developments

Procedural aspects of second instance applications were revised in some countries. For instance, the Supreme Court in Slovakia ruled that a lack of interpreters or time constraints were not sufficient to limit an applicant's right to be heard during court proceedings.

The Council of State in France ruled that CNDA has no obligation to grant a request to postpone an oral hearing (except when there are exceptional reasons which require a contradictory debate), and its refusal to grant a request for a joinder has no effect on the regularity of its decisions. In another case, it clarified that the request for legal aid within 15 days from the notification of the OFPRA decision interrupts the time limit to file an appeal. The French Council of State also ruled on error of law in the notification of decisions as a letter containing the OFPRA decision had been presented to the address indicated by the person but given to a third person with the same name. Consequently, the time limit for appeal could not be triggered.

In Austria, the Supreme Administrative Court ruled on the suspensive effect of a remedy in an accelerated asylum procedure, while the Dutch Council of State addressed the suspensive effect in asylum cases brought before it.

Following the CJEU judgement on the request for a preliminary ruling (C-180/17) stating that the recast Asylum Procedures Directive and the Return Directive do not stipulate that a further appeal must have a suspensive effect '*ipso jure*' (by the law itself), the Court noted that third country nationals do not automatically have to be given the possibility to await their appeal in

the Netherlands. Notwithstanding, this does not prevent the interim relief judge of the court from granting the third country national the possibility to await their appeal in the Netherlands in cases that an 'arguable claim' under ECHR, Article 3 is raised. This is acknowledged in the judgment as an established practice since December 2016.

With regard to the scope of an appeal, the Council of State in the Netherlands, following, ECJ jurisprudence linked to cases C-652/16 and the withdrawal of the request for preliminary ruling in case
C-586/17, assessed the requirements for asylum grounds invoked for the first time in appeal.

Higher courts ruled on the assessment of an application of international protection under second instance procedures. In this regard, the Dutch Council of State referred a case back to the Administrative Court as it failed to examine whether different infringements on the female applicant's rights were sufficient to consider a fear of persecution upon returning to Surinam. It also noted that those occurrences can actually be a reason to grant her protection in the Netherlands.

Similarly, in Italy the Supreme Court recognised that the Court of Appeal did not verify *ex officio* the situation in the country of origin in light of accurate and up-to-date information, nor include any source to support the findings as required by law.

With regard to the application of exclusion clauses, the French Council of State asserted that the threshold of gravity required is serious reasons to believe there has been a serious crime of ordinary law or acts contrary to the purposes and principles of the United Nations. It also held that *res judicata* arising from an international criminal jurisdiction (or indeed from a French criminal jurisdiction) only applied to the findings of fact and not to the reasoning behind a judgement of dismissal or acquittal stemming from an inability to substantiate the allegations or assuage doubts as to their veracity. Similarly, in the investigative process to end international protection, the Administrative Court has a duty to approach the Ministry of the Interior instead of the abstract use of a *Note Blanche* from the intelligence services tendered in the course of adversarial proceedings.

532 Danish Refugee Council Greece. (2020). Input to *"EASO Asylum Report 2020: Annual Report on the Situation of Asylum in the European Union"*. https://www.easo.europa.eu/sites/default/files/easo-annual-report-2019-Danish-Refugee-Council-contribution.pdf

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534 ECHR. (n.d.). *C.G. and Others v. Bulgaria: Status of execution. Retrieved 20 May 2020*, from http://hudoc.exec.coe.int/eng?i=004-3769

535 Helsinki Foundation for Human Rights. (2019, February 19). *Uwagi HFPC do projektu nowelizacji ustawy o udzielaniu cudzoziemcom ochrony.* http://www.hfhr.pl/uwagi-hfpc-do-projektu-nowelizacji-ustawy-o-udzielaniu-cudzoziemcom-ochrony/

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