

1. CJEU (GRAND CHAMBER), JUDGMENT OF 29 JULY 2019, *TORUBAROV*, C-556/17, EU:C:2019:626

Rule of law concerns regarding systems of judicial review in asylum cases: on the binding effect of judicial decision and the fundamental right to an effective remedy

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A. Facts and Ruling

In recent times, Hungary has been in the spotlight of the European debate with regards to respect for the rule of law in the field of asylum and migration. This case-law commentary of the CJEU *Torubarov judgement* addresses the barriers to the right to an effective remedy in asylum procedures in light of Article 47 of the [Charter of Fundamental Rights of the EU](#) in conjunction with Article 46(3) of [Directive 2013/32/EU “Procedures for granting and withdrawing international protection”](#). The case highlights the considerable differences between Member States’ implementation of the Asylum Procedures Directive and the drawbacks with respect to national systems of judicial review wherein judicial decisions, which have found previous decisions given by an administrative authority rejecting an international protection application to be unlawful, are not complied with.

1. *Facts and circumstances of the case*

Mr. Alekzij Torubarov is a Russian national who sought asylum in Hungary in 2013 based on the fear of political persecution from the Russian government. He has been subject to criminal proceedings on account of his political opinion; Mr Torubarov has been politically active in the Russian opposition party and as a member of a non-governmental organisation. His asylum procedure is ongoing since 2013 when he first lodged an asylum application after having been arrested by the Hungarian police for illegally crossing the border.

What has hindered Mr Torubarov’s asylum claim from being definitely decided upon is what Advocate General Bobek refers to in his [opinion](#) as the “judicial ping-pong” between the Hungarian Immigration and Asylum Office (the administrative authority competent for asylum matters) and the Court to which Mr Torubarov brought an appeal against the decision rejecting his application for international protection (the Hungarian Administrative and Labour Court). The judicial ping-pong went back and forth several times: in total, three administrative decisions have been taken by the asylum authority (all three rejecting Mr Torubarov’s international protection application on different bases), two judicial decisions have been pronounced by the Hungarian Court (both confirming that the fear of persecution of Mr Torubarov is well founded) and a third is currently pending in the case in the main proceedings.

Before embarking on an analysis of the judgment, two clarifications are to be made about the circumstances of the case in order to better delineate the issue at stake. First, a series of reforms have occurred in the Hungarian judicial system whereby Courts have been deprived of the power to reform unlawful decisions taken by the administrative authority in cases related to asylum (but *not* in cases concerning personal status which also requires, in principle, a swift determination, e.g. adoption, parental custody). Since 2015, Hungarian Courts only had the power to annul the administrative decision on asylum and remit the case to the authorities through a referral

mechanism. In other words, in case of successful appeals against a decision denying international protection, Hungarian Courts cannot, after a full and *ex nunc* examination of all the relevant elements of fact and law submitted, overturn an unlawful asylum decision and determine that the applicant must be granted international protection. Second, the judicial decisions of the Court have not been complied with by the asylum authority in light of the referral mechanism. Instead, the authority, without establishing the emergence of new elements that justify a new examination of the applicant's international protection need, has adopted a contrary decision to the one taken by the judiciary even though the applicant, according to the Court, satisfied the conditions laid down in the [Qualification Directive 2011/95](#).

In the context of this dispute - the *third consecutive appeal* against the decision rejecting the application for international protection of Mr Torubarov - the Hungarian Court decided to stay the proceedings and refer the following question to the European Court of Justice:

Is Article 46(3) of [Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection](#), in conjunction with Article 47 of the [Charter of Fundamental Rights of the European Union](#), to be interpreted as meaning that the Hungarian courts have the power to amend administrative decisions of the competent asylum authority refusing international protection, and also to grant such protection?

2. Judgement and reasoning of the Court

The Grand Chamber of the CJEU ruled that Article 46(3) of the [Asylum Procedures Directive 2013/32/EU](#), read in conjunction with Article 47 of the [Charter of Fundamental Rights](#), must be interpreted, in circumstances such as those at issue in the main proceedings (a first-instance court has positively examined the international protection need of the applicant after which the administrative authority adopts a non-compliant opposite decision in absence of new elements that justify the rejection of the asylum claim), as meaning that the Court must alter that decision which does not comply with its previous judgment and substitute its own decision for it as to the application for international protection, disapplying as necessary the national law that would prohibit it from proceeding in that way (§79). National courts have therefore the power to do everything necessary "to set aside national legislative provisions that might prevent EU rules which have direct effect" (§73), such as Article 46(3) of the [Asylum Procedures Directive](#) in light of Article 47 of the [Charter](#).

B. Discussion

The CJEU [Torubarov ruling](#) is in continuity with the *Alheto* case-law ([Judgement of 25 July 2018, Alheto C-585/16](#)), rendered by the Court in 2018 upon request for a preliminary ruling by the Bulgarian Sofia Administrative Court. In that judgment, the Court has explained that Member States enjoy some discretion in the determination of the system of legal review concerning the power of Courts to overturn administrative decisions on international protection. Notwithstanding that discretion, Member States are required to comply with Article 47 of the [Charter of fundamental rights](#) "which enshrines the right to an effective remedy before a tribunal for everyone whose rights and freedoms guaranteed by EU law are infringed" (§55 *Torubarov*, see CJEU, judgment of 26 July 2017, [Sacko](#), C-348/16, §30 and the case-law cited).

Continuity with *Alheto* case-law: a matter of compliance

In *Alheto*, the Court clarified that, with the [Asylum Procedures Directive](#), the EU legislature did not intend to introduce any common procedural standards regarding the way the asylum claim is decided upon, following the annulment of an initial unlawful decision taken by an administrative authority. This means that Member States, while implementing Article 46(3) of the [Asylum Procedures Directive](#), may choose the type of judicial review of the administrative decision on international protection applications. Member States can do so establishing that, following such an annulment by the Court hearing the appeal, either the same Court annulling the first decision can alter it and immediately replace it or the international application claim should be referred back to that administrative body for a new decision.

In the *Alheto ruling*, the Court interpreted Article 46(3) of the [Asylum Procedures Directive](#), read in conjunction with Article 47 of the [Charter of fundamental rights of the EU](#), to mean that a Court seized of an appeal against a decision relating to an international protection application must examine all the relevant facts and points of law, including new evidence which might have arisen after the adoption of the decision, in an exhaustive and up-to-date manner. In cases where the national judicial review system requires the Court to refer the case back to the administrative authority, the latter must adopt a new decision within a short period of time and in compliance with the assessment contained in the judgement annulling the initial decision.

Those requirements concern two principles of primary relevance in European asylum law: on the one hand, the principle of the rapid processing of applications for international protection; on the other hand, an application of the principle of legal certainty and protection against arbitrariness, “where a person meets the minimum standards set by EU law to qualify for one of those statuses [refugee status or subsidiary protection status] because he or she fulfils the conditions laid down in [Directive 2011/95](#), Member States are required, subject to the grounds for exclusion provided for by that directive, to grant the international protection status sought, since those Member States have no discretion in that respect” (§ 50). In other words, courts have the power to formulate mandatory directions on the applicant’s needs for international protection with which the authority competent to adopt the relevant decision must comply (see point 71 *Opinion of Advocate General Mengozzi, delivered on 17 May 2018, Alheto, C-585/16, EU:C:2018:584*).

While Member States enjoy some discretion in the determination of the rules surrounding the implementation of the remedy provided for in Article 46 of [Directive 2013/12](#), the characteristics “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” (§55 *Torubarov*, see to that effect, § 114, *Alheto*).

Effectiveness of judicial protection

The effectiveness of judicial protection enjoyed by applicants for international protection is, therefore, at the core of the *Torubarov judgement*. The Hungarian administrative body, while (re)assessing the protection need of Mr Torubarov following the referral mechanism, “no longer has a discretionary power as to the decision to grant or refuse the protection” (§ 66) and shall comply with the assessment provided in the judicial decision annulling the first unlawful decision in absence of new elements that would justify the rejection of the asylum claim. If that were not the case,

“Article 46(3) of [Directive 2013/32](#), read in conjunction with Article 47 of the Charter, as well as Articles 13 and 18 of [Directive 2011/95](#), would be deprived of all their practical effect” (§ 66).

Advocate General Bobek specified the scope of the right to an effective remedy, which encompasses multiple stages of proceedings, including the execution of decisions. Thus, not only does the right to an effective remedy protect the mere access to Court and the conduct of proceedings leading to a decision, but it also includes the protection of the *execution* of judicial decisions. According to the Advocate General Bobek and referring to consolidated case-law of the ECtHR interpreting violations of Article 6(1) ECHR, the right to an effective remedy will be illusory if a legal system allowed a final binding decision to remain inoperative to the detriment of one party.

With the [Torubarov judgement](#), the Court therefore fleshes out the general requirements specified in [Alheto](#) concerning the effectiveness of the judicial remedy. It is in that context that the Court held that Article 46(3) of [Directive 2013/32](#) “would be deprived of any practical effect if it were accepted that, after delivery of a judgment in which the court or tribunal of first instance conducted, in accordance with that provision, a full and *ex nunc* assessment of the international protection of the applicant (...) the quasi-judicial or administrative body (...) could take a decision that ran counter to that assessment” (§58).

Structural and systemic rule of law concerns

While the Court remains neutral and does not issue any general statement regarding the overall system of judicial review in Hungary, Advocate General Bobek voices rule of law concerns related to systemic and structural issues with regards to judicial protection in Hungary. In a strong defence of effective judicial review as “the bedrock of the rule of law on which the European Union is based” (§49 of the Opinion), he recalls that the rule of law under Article 2 TEU is a value common to the Member States in a society in which justice prevails. Hence, the role of national courts is quintessential to ensure that “the law is observed and individual rights are protected” (§50): when national judges act as EU law judges within the scope of EU law, they have the same duty to ensure that “the law is observed and the rights of individuals which are derived from EU law are protected at national level” (§51). Recalling his previous opinions, Advocate General Bobek adds that “the power and the responsibility to ensure compliance with the law ultimately rests with the (national) court. Thus, the fact that certain elements of decision-making at national level are matters for administrative discretion cannot deprive the courts of the inherent role to protect individual rights” (see Opinion in [Klohn](#), [C-167/17](#), [EU:C:2018:387](#), points 127 to 129 and Conclusions in [Link Logistik N&N](#) [C-384/17](#), [EU:C:2018:494](#), point 112).

In the case of [Torubarov](#), the disregard shown by the Hungarian immigration authorities for the outcome of a judicial decision raises a systemic rule of law concern. With the words of Advocate General Bobek: “once a court has taken a position in a final decision, that decision must be followed and implemented by all parties to whom it is addressed, including of course the public administration. If, however, a final judicial decision is not complied with by the public administration, and if such non-compliance is not a single mishap, then that undermines the proper functioning of any society built upon the premises of the rule of law and the separation of the legislative, executive and judicial powers” (§58).

Rule of law concerns in Hungary have also been publicly raised by other European Institutions. The European Parliament, in particular, repeatedly expressed its serious concern about the overall situation of fundamental rights in Hungary and about the Hungarian government's hostile initiatives towards migrants and migrant-serving NGOs in a series of resolutions (2013, 2015, 2015bis, 2017) which have culminated in the [proposal](#) calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.

Disregard for judicial decisions: a worrisome trend

The concern for the rule of law which has materialised in the disregard for judicial decisions by administrative authorities is a worrisome trend that can be observed in other Member States of the European Union.

Another case on effective judicial review in asylum procedures is currently pending at the CJEU against the Slovak Republic ([Request for preliminary ruling lodged on 6 March 2017, QJ, C-113/17](#)); The questions referred by the Supreme Court of the Slovak Republic originate from "previous negative decisions of an administrative authority [which] have been repeatedly overturned, which has raised doubts about effectiveness of subsequent appeals".

By way of comparison, the problem of judicial ping-pong, originating from the refusal of public authorities to execute judicial decisions in asylum and immigration matters, is at the core of the humanitarian visa controversy in Belgium. A twin case to the one of *X and X* (CGEU, judgement of 7 March 2017, *X and X*, C-638/16 PPU [GC]) is currently pending before the ECtHR (*M.N. and Others v. Belgium*, application n. 3599/18 introduced on 10 January 2018). The facts and circumstances at the basis of the cases are very similar: there are multiple executive judicial decisions which order the Belgian authorities to issue humanitarian visas under Article 25 of the [Community Code on Visas](#) to Syrian nationals. Those decisions are motivated by the respect for Article 3 ECHR. In both cases, the Belgian authorities refused to issue the visa.

The rule of law concern of this unlawful governmental practice was passionately illustrated by one of the third party interventions at the Grand Chamber public hearing of *M.N. and Others v. Belgium*, held on 24 April 2019 (for preliminary commentaries see [here](#), [here](#) and [here](#)); Belgian lawyer Frédéric Krenc, representing the French-speaking and German-speaking Bars in Belgium, publicly appealed to the principle of subsidiarity underlying the ECHR. Faced with the [judicial passivism](#) of the CJEU, it is legitimate to ask whether the ECtHR which, with its case-law, monitors respect for human rights and contributes to consolidating the rule of law and democracy in Europe, will exercise similar prudence or adopt a new interpretative approach.

Conclusion

To conclude, with [Torubarov](#), following the Opinion of Advocate General Bobek and building on the *Alheto* judgement, the CJEU has ruled that a national provision should be disapplied if it impairs the effectiveness of EU law by preventing EU rules which have direct effect (such as Article 46(3) of Directive 2013/32 read in conjunction with Article 47 of the Charter) from having full force.

In circumstances such as those at issue, where the mechanisms of referral to the administrative authority renders the right to an effective remedy *de facto* ineffective, the Court must substitute its

own decision from the one of the administrative authorities as to the application for international protection, disapplying as necessary the national law that would prohibit it from proceeding in that way, thus granting protection. It is therefore not with inaccuracy that newspapers when covering the *Torubarov* case-law, titled it "Hungary: EU court gives back judges' power in asylum cases".

C. Suggested Reading

To read the case : CJEU (Grand Chamber), Judgement of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626

Opinion of Advocate General Bobek, delivered on 30 April 2019, *Torubarov*, C-556/17

Case law : CJEU (Grand Chamber), Judgement of 25 July 2018, *Alheto*, C-585/16, EU:C:2018:584

CGEU, Judgment of 26 July 2017, *Sacko*, C-348/16, EU:C:2017:591

Pending case: Request for a preliminary ruling from the Slovak Republic lodged on 6 March 2017 — *QJ*, C-113/17, OJ C 168, 29 May 2017

Doctrine :

J.-Y. CARLIER et S. SAROLEA, *Droit des étrangers*, Bruxelles, Larcier, 2016, p. 117-124

K. GUTMAN, "*The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?*", 2019, *German Law Journal*, 20(6), pp. 884-903. DOI:10.1017/glj.2019.67

M. RENEMAN, *Asylum and Article 47 of the Charter: Scope and Intensity of Judicial Review*, 2018, in *Asylum and the EU Charter of Fundamental Rights*, edited by A. Crescenzi, R. Forastiero, G. Palmisano, Editoriale Scientifica, Napoli, pp. 59-78

V. MICHEL, "*Directive procédure et pouvoirs du juge*", October 2018, *Europe*, Comm. n° 10 pp. 29-31

F.L. GATTA, "*Palestine refugees in the European Union: Member States must verify the effectiveness of the protection from UNRWA through an exhaustive and up-to-date examination*", *Cahiers de l'EDEM*, September 2018

B. NAGY, *Restricting access to asylum and contempt of courts: Illiberals at work in Hungary*, EU Migration Law Blog, September 2017

Other:

European Parliament, *The cost of non-Europe in Asylum Policy*, October 2018, European Parliamentary Research Service, EPRS, Brussels. DOI: 10.2861/760528

Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ C 303/17.

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