



## Exclusion from being refugee under secret evidence

### *Findings of the Court of Justice of the European Union*

#### Response to question 1

In this case Article 47 of the Charter is applicable, in respect to the right to be heard.

It should be noted that Article 41 of the Charter (right to good administration) is not applicable in this case, although Mr A.B. may refer to the right to good administration as a general principle of the EU law.

In the judgment in Joined Cases C-141/12 and C-372/12, the Court of Justice of the European Union stated that: *It is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (...). Consequently, an applicant for a resident permit cannot derive from Article 41(2)(b) of the Charter a right to access the national file relating to his application (para 67).* In the same judgment the Court stated that the right to good administration, reflects a general principle of EU law (para. 68).

#### Response to question 2

In judgment in case C-300/11, ZZ v Secretary of State for the Home Department, the Court of Justice of the European Union stated that:

*53 According to the Court's settled case-law, if the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information (...), so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question (...).*

*54 Admittedly, it may prove necessary, both in administrative proceedings and in judicial proceedings, not to disclose certain information to the person concerned, in particular in the light of overriding considerations connected with State security (see, to this effect, Kadi and Al Barakaat International Foundation v Council and Commission, paragraph 342).*



55 *As regards judicial proceedings, the Court has already held that, having regard to the adversarial principle that forms part of the rights of the defence, which are referred to in Article 47 of the Charter, the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them (Case C-450/06 Varec [2008] ECR I-581, paragraph 45; Case C-89/08 P Commission v Ireland and Others [2009] ECR I-11245, paragraph 52; and Case C-472/11 Banif Plus Bank [2013] ECR, paragraph 30; see also, as regards Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, the judgment of the European Court of Human Rights in Ruiz-Mateos v. Spain, 23 June 1993, § 63, Series A no. 262). (...)*

65 *In this connection, first, in the light of the need to comply with Article 47 of the Charter, that procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defence. In particular, the person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress as provided for in Article 31 of that directive ineffective.*

This judgment was issued in different national legal framework (decision refusing an admission to a Member State by a family member of the citizen of the European Union), but in the judgment the CJEU interpreted the right to defence enshrined in the Article 47 of the Charter. Therefore it should be applicable to all cases based on EU law and involving security concerns.

In the light of the above judgment, it can be assumed that A.B. could not demand full information about the reasons for the decision (in particular he could not demand full access to the secret files). However, in the light of the judgment, he should be informed about the essence of the grounds on which a decision refusing the entry was taken.

Moreover, the Article 11 of the Procedures Directive contains no provisions that “*information on reasons in fact may be limited in order to safeguard national security*”. Therefore, there are serious doubts, whether national law permitting to do so properly implemented the Procedures Directive.

Article 23.1 of the Procedures Directive obliges Member States to establish in national law procedures guaranteeing that the applicant’s rights of defence are respected. In this regard, in cases involving national security, an access to classified information should be provided by a special representative of the foreigner, who has undergone a security check. Therefore, there are also serious doubts whether EU law was implemented properly in this respect

## *Follow-Up Question*

In your national context, do you have experience with similar cases? What are the relevant provisions of your national law? Does it implement the EU law properly?

## *Guidance for facilitators*

- The facilitator distributes pages with case description (fact, law, questions).
- The participants should read the background info and discuss the questions.
- After the participants have discussed the questions above, the facilitator should present the findings of the CJEU + the follow-up question and subsequently distribute the pages with case solution (findings of the CJEU).
- The participants should discuss the findings and the follow-up question.
- The results of the working group will subsequently be presented in the plenum.

***Note: Before starting, the participants should appoint one note taker and one person to present the results of their working group to the plenum.***