



Exclusion from being refugee under secret evidence

Fact of the case:

Mr A.B. is a citizen of Iraq. He made an application for international protection in one of the EU states. In his application he stated that he is Sunni and during his stay in Iraq he was persecuted by Shia militia.

The 1st Instance Administrative Authority issued a decision refusing international protection. The reasoning of the decision stated that A.B. should be excluded from being refugee as there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations, which involved i.a. terrorism activities.

The refusal was based on classified materials produced by the Security Agency. The information on reasons was limited in order to safeguard national security. Also nor Mr A.B., neither his lawyer, had access to classified case materials. Therefore they had no information about reasons why A.B. was refused international protection.

Mr. A.B. lodged an appeal against the decision to the Administrative Court, stating that he was not involved in any activities which may exclude him from being refugee. He also argued, that his right to defence was violated as he couldn't present his point of view. In particular he argued, that his right to good administration was violated as he had no access to his case files and the administration did not given reasons for its decision.

In the response to the appeal The 1st Instance Administrative Authority stated, that the Administrative Court has access to all case files and conducts independent review of all aspects of the case. Therefore there was no violation of the procedural rights of the applicant.

According to the domestic law, in such cases the applicant has no access to secret files also during the pending court proceedings.

Arguments to be considered

EU law provides possibility of limitation of the procedural rights of the asylum applicants in cases involving national security.

There is a question, whether the national legislation properly transposed the EU Procedures Directive and whether procedural rights of the applicant under the EU law were violated.

Two aspects of the case should be taken into consideration: lack of access to case files for the applicant and his lawyer and limitation of the reasoning of the decision (no information about reasons why A.B. was refused international protection).



Legal Framework

Relevant European Law

Directive 2011/95/EU (recast Qualification directive)

Article 12 Exclusion (...)

2. A third-country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that: (...)

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

Directive 2013/32/EU (recast Procedures directive)

Article 11 Requirements for a decision by the determining authority

1. Member States shall ensure that decisions on applications for international protection are given in writing.

2. Member States shall also ensure that, where an application is rejected with regard to refugee status and/or subsidiary protection status, the reasons in fact and in law are stated in the decision and information on how to challenge a negative decision is given in writing. (...)

Article 22 Right to legal assistance and representation at all stages of the procedure

1. Applicants shall be given the opportunity to consult, at their own cost, in an effective manner a legal adviser or other counsellor, admitted or permitted as such under national law, on matters relating to their applications for international protection, at all stages of the procedure, including following a negative decision.

2. Member States may allow non-governmental organisations to provide legal assistance and/or representation to applicants in the procedures provided for in Chapter III and Chapter V in accordance with national law.

Article 23 Scope of legal assistance and representation

1. Member States shall ensure that a legal adviser or other counsellor admitted or permitted as such under national law, who assists or represents an applicant under the terms of national law, shall enjoy access to the information in the applicant's file upon the basis of which a decision is or will be made.

Member States may make an exception where disclosure of information or sources would jeopardise national security, the security of the organisations or person(s) providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications for international protection by the competent authorities of the Member States or the international relations of the Member States would be compromised. In such cases, Member States shall:

- (a) make access to such information or sources available to the authorities referred to in Chapter V [the authorities mentioned here are court or tribunal considering appeal against decision]; and*
- (b) establish in national law procedures guaranteeing that the applicant's rights of defence are respected.*

In respect of point (b), Member States may, in particular, grant access to such information or sources to a legal adviser or other counsellor who has undergone a security check, insofar as the information is relevant for examining the application or for taking a decision to withdraw international protection. (...)

Relevant National Law

The Law on granting protection to foreigners (hypothetical)

Art. 5

- 1. The decision on application for international protection is given in writing.*
- 2. Where an application is rejected with regard to refugee status and/or subsidiary protection status, the reasons in fact and in law are stated in the decision.*
- 3. The information on reasons in fact may be limited in order to safeguard national security, defence and public security.*

Art. 10

- 1. The applicant enjoys access to the information in the applicant's file upon the basis of which a decision is or will be made.*
- 2. Paragraph 1 is not applicable where disclosure of information or sources would jeopardise national security, defence and public security.*

Questions

1. Is the Charter applicable in this case? Which provisions exactly?
2. Did A.B. have the right to be informed about the grounds for which he was considered a threat to security? Was the information given to him sufficient? Was his lawyer lawfully deprived of the right to access the case files?