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Challenges when judging immigration cases: the Belgian example

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Judging individual immigration cases presents several challenges, which are mainly due to the impact of substantial and procedural safeguards imposed by EU human rights law and by the European Convention of Human Rights. These requirements are not always reconcilable with more traditional approaches to litigation in matters of administrative law. To highlight some of these challenges, the Belgian developments in individual immigration dispute settlement will be looked at.[1] These developments are the result of, on the one hand, the wish of the government and legislator to put an efficient mechanism for dispute resolution into place, and, on the other, the critical analysis of these measures by the European Court of Human Rights and the Belgian Constitutional Court. This paper shall look at the lessons to be drawn from these developments.

Immigration Litigation in Belgium: A Cocktail of Procedural Ingredients

Up until the coming into effect of legislative changes to the immigration procedures in 2006, jurisdiction in immigration cases was divided between two administrative courts. Appeals in refugee status determination cases were heard by a specialized administrative court, with full jurisdiction to recognize refugee status *ex nunc*.[2] Full jurisdiction means that the court could examine and judge the asylum application on the merits, resulting in a judicial decision of recognition or of refusal of recognition of refugee status. The Council of State[3] heard all other immigration appeals, including the appeals against removal decisions taken against rejected asylum seekers, under the standard review for annulment *ex tunc* as commonly applied for judicial review procedures in Belgian administrative law.

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[1] Individual dispute settlement refers to the legal challenges of an individual decision on admission, stay, residence or removal before the competent administrative courts. The review of administrative detention measures before the criminal court or actions for damages or injunctions before the civil courts are not dealt with.

[2] Vaste Beroepscommissie voor Vluchtelingen; Commission permanente de recours aux réfugiés.

[3] Raad van State – Conseil d'Etat.

The steep increase of the number of appeals, especially with the Council of State (up to 90 percent of the cases on the court's docket), lead to a backlog. The introduction of an appeal was often seen as a means to extend the stay of aliens in Belgium.

The demands for an efficient dispute resolution in the field of immigration and the substantial requirements in this increasingly complicated domain of administrative law, brought the Belgian legislator to the creation of a new administrative court: the Aliens Litigation Council[4]. This administrative court hears all individual first instance appeals, both in matters of immigration and asylum, with a possibility for further appeal in *cassation* to the Council of State.

Notwithstanding the creation of this single immigration court, the pre-existing differences in the nature of the procedures remained. Hence, the Aliens Litigation Council determines refugee and subsidiary protection status in a procedure of so-called 'full jurisdiction' allowing the court to determine on an *ex nunc* basis the fear of persecution or risk of serious damage at the moment of the judicial decision. On the basis of the available information the court can confirm or amend the asylum authority's decision or it can annul its decision and return the case to the asylum authority for further examination and reconsideration.[5] The asylum appeal automatically stays the execution of the decision.

All other immigration appeals are heard through a procedure of review for annulment *ex tunc*, on the basis of the facts on file at the moment of the administrative decision by the immigration authorities. This appeal does not suspend the challenged decision, with the exception of decisions taken against some privileged categories of immigrants (e.g. EU citizens). Claimants can however apply for and obtain a stay of execution pending the appeal for review if they can demonstrate that the execution of the decision can cause irreparable harm. In exceptionally urgent cases, the introduction of such a request within five days following the notification of the challenged decision had an automatically suspending effect on that decision.

[4] Raad voor Vreemdelingenbetwistingen – Conseil du contentieux des étrangers.
[5] Volle rechtsmacht – plein contentieux.

In the following years, additional legislation was introduced that limited the right of appeal for certain categories of asylum seekers, whom the authorities believed to have little chance of being granted protection status. Such was the case for repetitive asylum claims, claims from applicants coming from a EU Member State or from a safe country of origin. Their right to appeal was limited to the annulment review as well, and no longer a full examination *ex nunc*.

The legislator believed that this two-fold system of appeals met all the requirements of due process. For refugee and subsidiary protection status determination, cases are heard *ex nunc* with the claimant having the possibility – under certain conditions – to introduce new elements at the appellate level. The judicial review annulment procedure in all other immigration cases was comparable to the general method of judicial review in administrative law, with even an automatic suspending effect for certain categories of aliens when required (e.g. appeals by EU citizens) and the possibility to apply for a stay of execution in other cases.

The Evaluation by the European Court of Human Rights and the Constitutional Court

This conviction that due process is guaranteed, has been seriously disturbed by a series of judgments by both the Belgian Constitutional Court and the European Court of Human Rights, assessing the compatibility of the Belgian procedure with constitutional and international standards of fair procedures and due process. These decisions seem to set out a number of standards to be taken into account if and when immigration decisions may have a detrimental effect on human rights.

The common ground for these requirements is the right to an effective remedy to persons whose rights and freedoms are violated. This right is laid out in Article 13 ECHR and Article 47, paragraph 1 of the EU Charter of Fundamental Rights. Article 13 requires that the remedy be guaranteed by "a national authority", whereas Article 47 specifies that it must be "a tribunal". The right to an effective remedy has played an important role in immigration law, given the fact that the European Court of Human Rights has determined that the right to a fair trial in civil and criminal cases under Article 6 is not applicable to immigration decisions. It is worth noticing that Article 47, paragraph 2 of the Charter, that confirms the fair trial principle in the EU Charter, has omitted the reference to civil and criminal cases. Hence the right to a fair trial is also to be guaranteed in immigration matters, making the ECtHR's case law also applicable *mutatis mutandis* in immigration cases.

Under the "effective remedy requirement", the European Court of Human Rights has set out a number of criteria to be met in the event of a possible violation of one of the rights and freedoms under the Convention. In its judgment in *De Souza Ribeiro v. France* (2012), the Grand Chamber of the ECtHR set out the conditions. In order to be effective, the remedy "must be available in practice as well as in law"[6] and speedy, in the sense that "the adequate nature of the remedy can be undermined by its excessive duration".[7] Since the right to an effective remedy must be guaranteed in connection with one of the fundamental rights and freedoms protected by the Convention, the Court has also taken the nature of that right into its evaluation of the criteria and distinguishes, in matters of immigration and asylum, between the two rights most commonly called upon in migration cases before the Court: the protection from torture, inhuman or degrading treatment or punishment (Article 3) and the right to personal and family life (Article 8).

Where a complaint concerns allegations that the person's expulsion would expose him or her to a real risk of suffering due to a treatment contrary to Article 3 of the Convention, the effectiveness of the remedy "requires imperatively that the complaint be subject to close scrutiny by a national authority", "independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3", "reasonable promptness" and "access to a remedy with automatic suspensive effect".[8] To this must be added an implicit requirement following from the Court's evaluation of the real risk under Article 3. In the event that a person has been expelled, the Court will examine the risk at that moment.[9] If the person has not yet been expelled, the Court will examine the existing risk at the moment of its judgment.[10] This implies that national authorities, to prevent infringements of Article 3 and later convictions by the Strasbourg Court, should at a minimum examine the risk present at the moment of their decision, requiring an *ex nunc* review.

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[6] ECtHR (GC), *De Souza Ribeiro v. France* (2012), para. 80.
[7] ECtHR (GC), *De Souza Ribeiro v. France* (2012), para. 81.
[8] ECtHR (GC), *De Souza Ribeiro v. France* (2012), para. 82. The Court added that the same principles apply in case of a violation of the right to life (Article 2) and of the prohibition of collective expulsion (Article 4 of Protocol 4).
[9] ECtHR, *Chahal v United Kingdom* (1996), para. 86.
[10] ECtHR, *Saadi v. Italy* (2008), para. 133.

In the event of alleged interference with private and family life (Article 8), "it is not imperative, in order for a remedy to be effective, that it should have automatic suspensive effect". Nevertheless, also there States must make available to the individual concerned "the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality".[11]

Building on the principles of the ECtHR's case law, the Belgian Constitutional Court has further clarified these requirements. For an appeal to be an effective remedy, it should have a suspensive effect,[12] include the possibility for the applicant to submit new evidence and include an examination of the facts at the moment of the judicial authority's decision.[13]

Both the ECtHR and the Belgian Constitutional Court have come to the conclusion that the existing Belgian framework of immigration litigation warrants the required level of effective remedy insufficiently when claims of violation of human rights are presented. Four lessons can be drawn from these decisions.

Lesson 1: Give Suspensive Effect to the Appeal

The basic Belgian asylum procedure meets the criteria of an effective remedy. Upon a decision of the asylum authority on the recognition of refugee status or of status in need of subsidiary protection,[14] an appeal with suspensive effect is open to the Aliens Litigation Council. The Council will re-examine the case on the basis of the elements on file and on the basis of additional new elements that the claimant wishes to submit. Although the introduction of new elements was originally subject to strict requirements, the Aliens Litigation Council applied them more leniently, as suggested by the Constitutional Court.[15]

[11] ECtHR (GC), *De Souza Ribeiro v. France* (2012), para. 83.
[12] Const.Ct. (Belgium), N° 1/2014, 16 January 2014, para. B.6.1.
[13] Const.Ct. (Belgium), N° 1/2014, 16 January 2014, para. B.6.2.
[14] Commissioner general for Refugees and for Stateless Persons (Commissaris-generaal voor de vluchtelingen en de staatlozen; Commissaire-général aux réfugiés et aux apatrides).
[15] Const.Ct. (Belgium), N° 81/2008, 27 May 2008.

The legislation was later amended this way. The Aliens Litigation Council can review the decision, confirm it or, if additional elements are needed, annul the decision and refer back to the asylum authority.

Problems have arisen following the (final) rejection of an asylum application. The decision on the removal of the rejected asylum seeker is not made by the asylum authority, but by the Immigration Service. Claims with regard to violations of Articles 3 and 8 ECHR may still be raised at that level. However, appeals against those decisions are only subject to *ex tunc* review for annulment, with no automatic staying effect.

Similarly, the legislator has introduced a number of instances in which the asylum application is not subject to an examination on the merits, with a full appeal to the Council of Aliens Litigation. Decisions on the application of the Dublin Regulation, applications from persons coming from EU Member States or safe countries of origin or repetitive applications are dealt with in summary proceedings, with no full appeal to the Council.

The same goes for appeals against turned down applications for a non-asylum residence permit (e.g. on the basis of medical conditions). Even though they are not asylum-related, those decisions may also engender risks of violations of fundamental rights.

Against the actual decision of removal in the aforementioned instances, an appeal for judicial review is possible, again with the Aliens Litigation Council. This appeal does not have suspensive effect, but applicants can apply for a stay of execution if they demonstrate that they will suffer irreparable damage. The application for stay of execution does not, however, have suspensive effect by itself. Because Belgium had been convicted in both the Conka[16] and Mubilanzila[17] case by the ECtHR for the lack of suspensive effect of this appeal (and pending the appeal period), the legislator had added a second type of procedure for stay of execution, in case of 'extremely urgent necessity'. If the applicant demonstrates that the normal application for stay of execution will not prevent the damage from happening, usually because he or she will already be removed pending that appeal, he or she can apply for this expedited procedure. A standstill obligation for the Immigration Service was added: during a period of

[16] ECtHR, *Conka v. Belgium* (2002).
[17] ECtHR, *Mubilanzila v. Belgium* (2006).

five working days after the notification of the negative immigration decision, the claimant could not be removed from Belgium. If an application for stay of execution in extremely urgent necessity was introduced, that period was extended with the time needed for the Aliens Litigation Council to decide.[18]

This measure proved, however, once again to be insufficient to pass the Strasbourg Court's scrutiny. In *M.S.S.* the Court found it problematic that the examination in practice by the Aliens Litigation Council was insufficiently thorough.[19]

In reaction, the Council interpreted the Aliens Act very broadly and stated that even appeals for stay of execution under extreme urgency beyond the initial five days, had a suspensive effect pending the examination of the claim and on the condition that an arguable claim under Article 3 ECHR was raised.[20] However, there was no legal basis to this.
Furthermore, the argument was made that even when an ordinary application for stay of execution was introduced, claimants could always ask the Council for provisional measures in extreme urgency, should these become necessary, e.g. when a deportation becomes imminent. Applying for these measures also stays the execution.

Earlier this year, the Strasbourg Court has once again rejected this approach in *Josef v. Belgium*.[21] The Court observed that neither measure fulfilled the criteria of Article 13.[22] The extreme urgency application requires a situation of constraint, with the removal being imminent, which is not always the case. The combination of a normal application for stay of execution with an application for provisional measures later, was considered to be too complicated. The Court indicated how Belgium may amend its procedures:[23] all aliens confronted with an order to leave the country should have the possibility, as soon as the execution of that measure is possible or at the latest at the moment of the forced execution, to introduce an application for stay of execution, with automatic suspensive effect and without the obligation to first introduce another appeal on the merits. The delay for the introduction of

[18] Originally the procedure provided that the suspensive effect ended after 72 hours, but the Constitutional Court held that the effect was to continue until the Council actually took its decision.
[19] ECtHR, *M.S.S. v. Greece and Belgium.*
[20] RVV/CCE, 17 February 2011, nos 56.201 to 56.205.
[21] ECtHr, *Josef v. Belgium* (2014).
[22] ECtHr, *Josef v. Belgium* (2014), para 106.
[23] ECtHr, *Josef v. Belgium* (2014), para 156.

this application must be sufficient and the execution must be stayed until the competent authority has proceeded to a complete and rigorous examination of the merits of the application in light of Article 3 ECHR. The Court also remarked that this advice does not concern cases where an applicant has already had the possibility to have all of his or her claims under Article 3 examined by a court in proceedings that meet the requirements of Article 13 ECHR.

Prior to the Court's decision in *Josef*, the Belgian Constitutional Court had already come to a similar conclusion with regard to the limited possibilities of appeal against the rejection of asylum applications by asylum seekers coming from a safe country of origin. As mentioned, they can only file for an application of judicial review, with an additional possibility to apply for stay of execution under the normal or extreme urgency procedure. The Constitutional Court observed that an application for annulment, which is non-suspensive and only allows for an *ex tunc* examination without possibility of adding new evidence, is not an effective remedy by itself. The staying effect of the introduction of an application under extreme urgency beyond the five initial days, did not follow from the Immigration Act but was a judicial construction.[24] Furthermore, since the applicant cannot introduce new elements, the appeal does not meet the required standards of an effective remedy.[25]

Lesson 2: Examine *Ex Nunc*

The ECtHR has emphasized that claims under Article 3 ECHR must be examined thoroughly. When hearing complaints against States on the basis of Article 3 in expulsion cases, the Court itself will observe if the authorities have taken into account all the information available at the moment of the effective expulsion (where an expulsion took place) or it will examine the risk on the basis of all the available information at the time of the Court's judgment (where no expulsion has yet been carried out). Implicitly this requires the States to evaluate the risk of serious harm as meant by Article 3 by using the latest available information as well: if States want to avoid a conviction for violation of Article 3 in the case of expulsion, they should at a minimum take into consideration the available information at the time of decision-making. Even though this may not prevent a later conviction, namely in the event that new information

[24] Const.Ct. (Belgium), N° 1/2014, 16 January 2014, para. B.8.3.
[25] Const.Ct. (Belgium), N° 1/2014, 16 January 2014, para. B.8.5.

has come up between the decision and the effective expulsion or – in case of a still pending execution – the ECtHR's judgment, it acknowledges the duty of all State authorities to prevent a person from being expelled to a State where a treatment forbidden under Article 3 ECtHR is awaiting him or her. This will add to the effectiveness of the remedy.

Admittedly, the ECtHR has not yet been explicit on the States' obligations to make the review *ex nunc*. However, in Belgium the Constitutional Court has left no doubt. It has observed that for an appeal to be effective, the examination should be done at the moment of the decision making on the appeal.

Lesson 3: Allow New Evidence

The third lesson follows from the previous one. If an appeal has to be *ex nunc*, it is also necessary that parties and even the court can use new evidence. The 2006 procedural rules tightened the possibility to introduce new evidence in the full asylum hearings with the Aliens Litigation Council. The new elements should be genuinely new, with proof that the applicant had not been able to introduce them any sooner and should contribute to demonstrate that the asylum claim was well-founded. Although the Constitutional Court approved these measures, it indicated that this should not inhibit a claimant to prove the well founded nature of his or her claim.

In annulment reviews for judicial review however, which are *ex tunc* reviews on the basis of the information on file at the time of the decision by the immigration authority, the introduction of new evidence is not possible at all. Hence, in most expulsion cases, it is not possible for the claimant to introduce new evidence and – consequently - for the court to decide on the basis of new information.

In 2014 the Constitutional Court pronounced itself more clearly and stated that an effective remedy requires the possibility of introducing new evidence. This means that not only in asylum hearing cases but also in the judicial review cases, claimants must have the possibility to present new evidence. This will require a change in the procedural rules.

Lesson 4: Keep It Simple

The merger of the two different types of administrative review procedures in immigration law (full review in asylum cases; annulment review in other immigration cases) in 2006 has resulted in a rather complex framework. The creation of the new administrative court incorporated the pre-existing procedures. Whilst this was understandable in terms of the then existing practices, it has become clear that such framework is not fully reconcilable with the demands imposed by contemporary international human rights law. Although the ECtHR has indicated in *Josef* that a combination of measures may meet the requirements of Article 13 (the combination of a full review procedure of the Article 3 claim, with a later limited review of plain execution measures), it has been less willing to accept the plethora of review procedures in all other instances. In *Josef* the Court indicated that whenever an arguable claim under Article 3 is present, a construction whereby a claimant must combine an application for judicial review with an application for stay of execution and later an application for provisional measures in extreme urgency, is too complex. It could end up in situations whereby the claimant, even when assisted by specialized counsel, ends up with no appeal possibility or must introduce applications *in* extremis, thus burdening his or her already vulnerable position.[26] The Court then indicated what the procedure should look like.
This is certainly an invitation for Belgium to rethink its procedures in immigration litigation, but also for other States to reconsider theirs.

Conclusion

The Belgian legislator will have to come up with a new answer to the aforementioned critiques of the European Court of Human Rights and the Constitutional Court. This will require a choice about the type of administrative procedure. Belgium has predominantly used the French type of judicial review by annulment for the dispute settlement in administrative law. But this is not an absolute requirement. Administrative decisions in the field of social security law are usually settled in a classical litigation context before the Social Courts, using standard methods of civil litigation. The same applies for fiscal matters, tried in the Courts of First Instance. Asylum appeals know a similar (though not identical) type of full jurisdiction.

[26] ECtHR, *Josef v. Belgium* (2014), paras 103-104.

It is conceivable to introduce this also for other immigration cases, with more diversity in terms of remedies. Also the use of one single procedure, whereby ordinary immigration issues are treated along with possible human rights violations upon removal, could at least simplify matters for all parties involved, with the judge ultimately maintaining the overview over all aspects of the case.

On the other hand there is also the legitimate concern of policy makers that human rights violations may be invoked simply to stall the removal. This is a genuine risk that should and can be covered. Under the ECtHR's caselaw, only arguable claims merit an effective remedy, making it possible for States to reject other claims in a more expedient manner.