



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

ASSESSMENT OF THE CREDIBILITY OF ASYLUM-SEEKERS: THE BURDEN OF PROOF AND THE LIMITS OF THE ECHR'S EXAMINATION

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The assessment of credibility and the burden of proof are core issues in asylum cases. They raise very concrete questions that national courts have to deal with, being assisted and guided in this task by the European Court of Human Rights.

In the first part of my contribution, allow me to briefly outline the Court's recent case-law in this field (I). Moreover, the Strasbourg case-law is of course far from being self-sufficient: it has to be seen in a more global context involving other important players. The other European court, the ECJ, has also developed a significant body of case-law in the field of asylum as part of the creation of an EU area of freedom, security and justice, interpreting instruments such as the EU Qualification Directive. Most importantly, it remains for the national authorities and, in the last instance, the national courts to decide directly on asylum claims. So in the second part of my contribution, I will deal with the problems that arise when national courts implement in practice the case-law of both European courts (II).

I. The current case-law concerning the assessment of asylum-seekers' credibility

The Strasbourg Court has, during the past year, delivered two Grand Chamber judgments in asylum matters, with extended reasoning on the precise issue of the assessment of credibility and the burden of proof. Those cases are *F.G. v. Sweden* and *J.K. and Others v. Sweden*, handed down in March and August 2016 respectively. I will not explain in detail the contents of the two judgments – they have been made available in the background papers for today's seminar – but instead will limit myself to their salient features on the subject of interest to us today.

Very briefly, the facts of these cases were as follows:

- *F.G. v. Sweden* was about an Iranian national who had applied for asylum in Sweden on the grounds that he had worked with known opponents of the Iranian regime and had been arrested and held by the authorities on at least three occasions between 2007 and 2009, notably in connection with his web publishing activities. He alleged that he had been forced to flee after discovering that his business premises, where he kept politically sensitive material, had been searched and documents were missing. After arriving in Sweden, he converted to Christianity, which he subsequently claimed put him at risk of capital

punishment for apostasy in the event of his return to Iran. His request for asylum was rejected by the Swedish authorities, which made an order for his expulsion.

- The *J.K. and Others* case concerned an Iraqi family. They applied for asylum in Sweden on the grounds that they risked persecution in Iraq by al-Qaeda, as the husband and father had worked for American clients and operated out of a US armed forces base in Iraq for many years. They had been the subject of serious threats and violence, including attempts on their lives, physical injury and kidnapping, during the period from 2004 to 2008. When the daughter was killed and the father seriously injured in an attack in 2008, the father stopped working and the family moved to different locations in Baghdad. Although his business stocks were attacked four or five times by al-Qaeda members, he stated that he had not received any personal threats since 2008 as the family had repeatedly moved around. However, he criticised the State authorities for not being able to protect him and his family and consequently left Iraq in 2010. He was followed by the other members of his family in 2011. His asylum request was also rejected.

In both cases, the applicants claimed that removal to their country of origin would expose them to a real risk of treatment contrary to Articles 2 and 3.

In both cases the Grand Chamber addressed a number of issues. Concerning more specifically the assessment of credibility and the burden of proof, the following principles were either reiterated or established:

- the *subsidiary role of the Court*: the Court repeated that it was not its task to substitute its own assessment of the facts for that of the domestic courts and that, as a general rule, it was for those courts to assess the evidence before them since they were best placed to do so. However, the Court must be satisfied that the assessment made by the national authorities is adequate and sufficiently supported by domestic materials, as well as by materials originating from other reliable and objective sources;
- *risk assessment and burden of proof*: in relation to this issue, the Court formulated two *general rules*: 1. it is, in principle, for the individual to submit, as soon as possible, his or her asylum claim together with the reasons and evidence in support of that claim; and 2. "*it is the shared duty of an asylum-seeker and the immigration authorities to ascertain and evaluate all relevant facts of the case in the asylum proceedings*".¹

Beyond these general rules, the Court made a clear distinction between:

- *general and individual risks*:
 - * When an asylum claim was based on a "*well-known general risk, when information about such a risk is freely ascertainable from a wide number of sources*", the Article 2 and 3 obligations on the State are such that the authorities are required to carry out an assessment of that general risk of their own motion.
 - * As regards asylum claims based on individual risk, the Court, although recognising that it is important to take into account all of the difficulties which an asylum-seeker may encounter in collecting evidence, held that Articles 2 and 3 did not require a State to discover a risk factor to which an asylum-seeker had not even referred. As a general rule, "*an asylum-seeker cannot be seen as having discharged the burden of proof until he or she provides a substantiated account of an individual, and thus a real, risk of ill-treatment upon deportation that is capable of distinguishing his or her situation from the general perils in the country of*

¹ See *J.K. and Others v. Sweden*, § 96.

destination". The Court's clarification is based on its own case-law, relevant UNHCR² materials and the EU Qualification Directive.³ The Court added, however, that if the State had been "*made aware of facts, relating to a specific individual*" that could expose him or her to a relevant risk of ill-treatment on expulsion, the authorities were required to carry out an assessment of that risk of their own motion.

* There are special considerations regarding *past ill-treatment*: the Court considered that established past ill-treatment contrary to Article 3 would provide a "*strong indication*" (in French: "*un indice solide*") of a future, real risk of ill-treatment, although it made that principle conditional on the applicant's having made "*a generally coherent and credible account of events that is consistent with information from reliable and objective sources about the general situation in the country at issue*". In such circumstances, the burden shifts to the Government "*to dispel any doubts about that risk*".⁴

- Another issue addressed by the Court concerns *ex nunc* assessment: the relevant point in time for the assessment is that of the Court's consideration of the case. A full and *ex nunc* evaluation is required where it is necessary to take into account information that has come to light after the final decision by the domestic authorities was taken.

This leads me to the criticisms directed at the Court's findings:

- a highly problematic issue for a Court that consistently emphasises its subsidiary role and claims not to be a court of fourth instance is the fact that it performs an *ex nunc* assessment, having regard to new facts that have not even been presented before the national courts;
- the most common point in the *dissenting opinions* is criticism of the majority for considering it sufficient that, in the event of previous mistreatment, there is a "*strong*" indication of subsequent abuse if the applicant provides a "*generally*" credible and consistent report in line with general information and objective sources concerning the general situation in the country of origin. In this case, the Government are responsible for dispelling "*any*" doubts about the risk of mistreatment. This goes further than what the Qualification Directive says (it speaks about "*serious*" indications – in French: "*indices sérieux*");
- furthermore, the reference to a shared duty to both *ascertain and evaluate* facts could be regarded as problematic from the perspective of domestic and EU law. In accordance with EU law as interpreted by the ECJ, the shared responsibility is limited to the determination of the facts, responsibility for their assessment and evaluation lying solely with the authorities⁵;
- a further perhaps problematic issue lies with the statement by the Court that the Qualification Directive reflects implicitly or explicitly a *benefit of the doubt* principle. It is debatable whether such a principle can be read into the Directive.

After this little excursion into the recent case-law of the Strasbourg Court, let us have a look at how the national courts receive and apply the Court's jurisprudence on Article 3 in asylum cases.

² Such as the UNHCR 1998 Note on Burden and Standard of Proof in Refugee Claims; the UNHCR's Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status; or the position of the Office of the United Nations High Commissioner for Refugees on returns to Iraq.

³ See, in particular, Article 4(4) and (5) of the EU Qualification Directive.

⁴ See *J.K. and Others v. Sweden*, § 102.

⁵ Article 4(1) of the EU Qualification Directive provides that "*Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member to assess the relevant elements of the application.*" In a judgment of 2012 the ECJ made a clear distinction, as regards the Article 4(1) duty to cooperate, between the determination of facts and the evaluation or assessment by the authorities. As regards the latter: "*Such an examination of the merits of an asylum application is solely the responsibility of the competent national authority; accordingly, at that stage in the procedure, a requirement that the authority cooperate with the applicant – as laid down in the second sentence of Article 4(1) of Directive 2004/83 – is of no relevance*" (*M.M. v. Minister for Justice, Equality and Law Reform and Others*, C-277/11, EU:C:2012:744, paragraphs 66-70).

II. The implementation of general principles stated by the European courts

Various factors contribute to making it far from easy for asylum courts to implement the Court's case-law.

- First, as the Court frequently emphasises, it is not an immigration or asylum court, since these areas are outside its competence. However, it is only too well known that this disavowal is highly contested. Let me quote, for example: "*within as little as two decades, [the Court has become], if not the highest asylum court, the highest European court in refugee questions, without being entitled to grant asylum strictly speaking*", mainly by applying and interpreting Articles 2 and 3 of the Convention.⁶ Bearing in mind the well-established principle that any person, regardless of nationality, can claim the benefit of the provisions of the Convention as soon as he or she is under the jurisdiction of a Contracting State, the Court's case-law implies that, in practice, the values enshrined in the Convention are exported to the entire world and are applicable not only to 800 million people, but to 7 billion.

If the principles established by the Court have to be applied by an asylum judge, there is a kind of asymmetry, not because a national court has to apply principles developed by a European court but because of the consequences of that application. It is possible that a person does not at all fulfil the legal criteria for being granted asylum (if the Geneva Convention criteria are not met) but that the person's expulsion would constitute a violation, for example of Article 3. The asylum judge is then caught in a dilemma as he or she cannot apply the normal asylum criteria but is nevertheless forced, especially by the recent Grand Chamber judgments, to apply the Convention criteria in the assessment of the applicant's claim for asylum.

- Secondly, as already mentioned, the Court makes an *ex nunc* assessment of the facts in asylum cases. Beyond the fact that this can hardly be considered *not* to be the behaviour of a fourth-instance court, the assessment of concrete evidence by the Court is highly problematic. As the Court itself recognises, the national courts are better placed to carry out the assessment of evidence, being closer to the parties and the facts. The Court does not see the parties in person, and the evidence produced is normally sparse. It simply does not have the tools available to the national courts to establish the facts in all their complexity.

- Thirdly, although any judgment of the Court refers to a concrete factual situation, it is, of course, the general principles going beyond the specific case that are important for the national courts, which then have to apply these general principles to concrete issues. In that sense, the role of the Court, although being in theory very different from that of the ECJ – the other European court that also has jurisdiction in asylum matters – is very similar. The ECJ gives general rulings when preliminary questions are referred to it by a national court but the Strasbourg Court also gives general rulings when it states general principles – indeed, the Grand Chamber always does this. There is no need, in that sense, for the entry into force of Protocol No. 16.

In this regard, in the context of today's topic, two problems have to be highlighted: first, it is quite problematic to state general rules in a highly specific area such as that of adducing evidence, and secondly, little imagination is needed to figure out that there may be potential conflicts between the theoretical solutions adopted by the two European courts.

⁶ A. Nußberger, "Flüchtlingsschicksale zwischen Völkerrecht und Politik", *NVwZ* 12/2016, p. 820.

Allow me to illustrate the combination of these two problems by providing a concrete example of a case a national court had to deal with: an Algerian national was applying for asylum in an EU Member State. He claimed to be at risk of prosecution and imprisonment for homosexuality in his home country. He referred to the case-law of the ECJ, according to which the sexual orientation of a person is such a substantial part of the person's identity that he or she cannot be expected to live without manifesting it.⁷ According to this case-law, persecution occurs as soon as the person's sexual orientation can lead to criminal prosecution and actual imprisonment. The Luxembourg Court has stated in another judgment that applicants should not be subjected to tests or hearings to establish their actual sexual orientation.⁸ By the way, similar principles have been affirmed by the ECJ with reference to religious beliefs. It has made it clear that a person cannot be asked not to practise his or her religion openly.⁹

In the specific case I am referring to, the national court felt unable to apply what it saw as a principle of almost automatic entitlement to asylum for people who claimed to be persecuted because of their sexual orientation or their religious beliefs. The court in question emphasised, *inter alia*, that this principle could lead to reverse discrimination ("*discrimination à rebours*") in the sense that there was a difference in treatment concerning the burden of proof where politically persecuted individuals were required to adduce concrete evidence, compared to those who claimed to be persecuted on sexual or religious grounds, who were allowed simply to allege such persecution. Consequently, the national court found it problematic to apply abstractly formulated rules for the assessment of the facts in a specific case. It also discussed whether a certain degree of self-restraint could be expected on the part of persons with particular religious beliefs or a particular sexual orientation in problematic countries of origin. In this specific case, the national court ruled that the applicant had not proved that the Algerian authorities usually imprisoned homosexuals, but only those who were very exposed. The asylum application was therefore rejected.¹⁰

Let us tackle the problem a bit further: a *Köbler* problem could arise if the national court disregarded EU law as interpreted by the ECJ: the State's civil liability could be engaged as a result of the failure of the national authorities, including the courts, to comply with their EU law obligation. Firstly, however, this problem is solved by the national courts themselves (so the remedy risks being merely theoretical), and secondly, the establishment of State liability cannot, in practice, lead to what the asylum-seeker tried to achieve, namely the suspension of deportation to the country of origin.

Having had his case dismissed at national level, the applicant might then turn to Strasbourg. He could obviously rely on Article 3 and apply for an interim measure under Rule 39 of the Rules of Court. He would, however, not be obliged to do so and, at any rate, the Court could reject his application for an interim measure. As to the merits of the complaint alleging a violation of Article 3 of the Convention, the Court would examine whether there had been previous persecution and, in particular, whether there was a real danger that the applicant would be subjected to inhuman or degrading treatment in the event of his return (it may be the case that the expulsion had already taken place and that the Court would assess whether there had actually been a violation of Article 3).

⁷ ECJ, 7 November 2013, C-199/12, C-200/12 and C-201/12.

⁸ ECJ, 2 December 2014, C-148/13 and C-150/13.

⁹ ECJ, 5 September 2012, C-71/11 and C-99/11.

¹⁰ Supreme Administrative Court of Luxembourg, 6 February 2014, no. 33641C, published on www.justice.public.lu

Unlike the ECJ, the Strasbourg Court would examine the judgment of the national court in the specific case. It would probably do two things. It would state general principles and apply them to the specific case. One can of course only speculate as to what the Court would say. I am, however, only interested in the “technical” consequences of its judgment.

Two types of outcome of the dispute are conceivable.

It may be that the Court would find a violation in this specific case, since the national court imposed an undue burden of proof on the applicant. By the way, this is the most likely finding, in the light of the principles recently affirmed in the *F.G. v. Sweden* judgment. The Court would then indirectly become the “secular arm” of the ECJ, a role in which the latter does not like to see the Court...

It could also hold that the asylum-seeker could be expected to bear a certain burden of proof in the specific case. In that case, we would have an even greater problem, namely a contradiction between the positions taken by the two European courts. In such cases, the national courts have to face almost insoluble problems and despite the “assistance” from the two European courts, they may feel very lonely in the accomplishment of their task.

I turn to my colleague from the French National Asylum Tribunal and ask her if she feels lonely...