AEAJ Working Group Asylum and Immigration

Berlin 2022

Collection of Cases

(1) Austrian Case – The Afghan woman who defected from Islam and got westernized

(2) German Case - The Syrian who had not yet fulfilled the compulsory military service

(3) Lithuanian Case: The Man with double Nationality fearing return from Russia to Tajikistan

(4) German Case - The Iraqi claiming asylum in Germany after unsuccessful claim in Sweden

(5) EuAA Case - The Begali Activist who presented Documents in the appeals procedure

(6) German Reference to the CJEU of 16 August 2021 (ECJ Case C-497/21)

(1) Austrian Case – The Afghan woman who defected from Islam and got westernized

The two complainants are married to each other. They are Afghan citizens, entered Austrian territory irregularly and filed an application for international protection on 28 November 2015.

The main reason given for the escape was the planned forced marriage of the wife to a cousin on the father's side who collaborated with the Taliban. The Austrian Federal Office for Immigration and Asylum dismissed the application for international protection in its entirety and issued a return decision on July 17, 2020. An appeal against this decision was brought before the Austrian Federal Administrative Court.

The Federal Administrative Court as Administrative Court of first instance found the following facts without holding a hearing:

“The first complainant (husband) and the second complainant (wife) were married in Afghanistan at their own request with the consent of the second complainant's family members. The second complainant has not been engaged to another man against her will; she has not been threatened with forced marriage and has not resisted such a marriage. The first complainant and the second complainant have not (been) specifically and individually threatened or persecuted in Afghanistan, either because they have had extramarital sex or because they have resisted a forced engagement or marriage. In the event of their return to Afghanistan, the complainants are in all likelihood not subject to any persecution whatsoever.

The second complainant does not lead a self-determined life in Austria and does not aspire to lead one. The second complainant's way of life does not violate the social norms in urban centers in such a way that it would be perceived as violating social mores as well as religious and political norms and exposing the second complainant. The second complainant has not adopted a way of life that would reflect recognition, enjoyment, or exercise of her fundamental rights and that would represent a departure from the gender role prevalent in Afghanistan that would constitute a clear and sustained break with the generally held social values in Afghanistan. Such a way of life has not become part of the second complainant's identity.”

As a consequence of these facts the Federal Administrative Court dismissed the complaint as unfounded and issued its ruling on September 17, 2020. The Austrian Supreme Administrative Court rejected the appeal filed against this decision by the ruling of the February 9, 2021 (For the review of the decision of an Administrative Court of first instance by the Supreme Administrative Court, the factual and legal situation at the time of the issuance of the contested decision is decisive).

A subsequent application for international protection was filed on April 1, 2021.
The female applicant justified her application as follows: "I have fallen away from Islam and have no religious belief. I can no longer live in Afghanistan because of this. You are stoned to death and killed by your family for that. I want to live freely here in Austria and not wear a headscarf, I would not have these freedoms in Afghanistan. I want to continue my education here and live freely."

The Austrian Federal Office for Immigration and Asylum dismissed the application for international protection as far as the refugee status was concerned, but granted subsidiary protection on April 8, 2022. An appeal against this decision was brought before the Federal Administrative Court.

The Federal Administrative Court has held a hearing in July 2022, the following has been revealed: Both complainants have been working in a hotel part time, since March 2022 full time. The female complainant has obtained a German language certificate A2. She was able to communicate in German in the hearing, her husband could speak only little German. She did not wear a headscarf. She was wearing pants and a denim jacket. She credibly explained that she often goes with colleagues to a big city that is about 30 km away to go shopping. She also meets her friends at a café in the town where she is living and she also goes shopping there without her husband.

How would you decide on the appeal?

(2) German Case - The Syrian who had not yet fulfilled the compulsory military service

The applicant is a Syrian national born in 1997. He entered Germany in September 2015, where he applied for international protection on 23 December 2015. During his hearing at the German asylum authority, the Bundesamt für Migration und Flüchtlinge (BAMF), he claimed that he had not yet fulfilled the compulsory military service in Syria because his conscription call had been suspended until 20 April 2016. He also claimed that, as part of the Christian minority, he did not want to fight for the military.

On 17 February 2017, the BAMF granted the applicant subsidiary protection because of the general situation of violence in Syria. The application for refugee protection was rejected. The applicant filed an action against the administrative decision, which was rejected by the Administrative Court of Berlin with judgment of 13 January 2020. In this decision, the court held that, for the applicant, the risk of being enlisted to military service and / or to be subject to punitive measures for desertion did not result in a risk of persecution for political reasons.

On 20 December 2020, the applicant filed a subsequent application for the recognition as refugee. He claims that the legal situation has changed because of the judgment of the Court of Justice of the European Union (CJEU) of 19 November 2020 - C-238/19. In this decision, the Court ruled that “there is a strong presumption that refusal to perform military service under the conditions set out in Article 9(2)(e) of that directive relates to one of the five reasons set out in Article 10 thereof. It is for the competent national authorities to ascertain, in the light of all the circumstances at issue, whether that connection is plausible.”

With decision of 26 January 2021, the BAMF rejected the subsequent application as inadmissible, stating that the CJEU judgment did not change, but only clarify the material status of the law. In addition, it argued that a mere change of jurisprudence could not constitute “new elements or findings” in the sense of Art. 33 Section 1 lit. d of Directive 2013/32/EU.

The applicant turns to the competent Court with the aim of quashing the inadmissibility decision issued by the BAMF. How will the Court decide?

Modification:

How will the Court decide about the subsequent application if the applicant submits a penalty order for five years from the Syrian authorities because of his regime-critical activities? The applicant had access to the penalty order already during the original judicial asylum proceedings but failed to refer to it.

(3) Lithuanian Case: The Man with double Nationality fearing return from Russia to Tajikistan

On 26 October 2019, the applicant submitted the application No. 1 for the international protection to competent state authorities in Lithuania. The applicant is a national of Russia and Tajikistan. In his asylum application, the applicant submitted that he faced a risk of persecution in the countries of origin because of his brother's situation and his own political activities. He claimed to be a member of a political party which had been banned and declared a terrorist organization in Tajikistan. Criminal proceedings against him and his brother were started in Tajikistan and international arrest warrant issued. The application was examined in administrative and judicial proceedings and dismissed. On this point, the Supreme Administrative Court of Lithuania by the final ruling which was adopted on 10 June 2021 accepted the interpretation of the Court of First Instance. Having regard to the fact that the applicant had a double citizenship, administrative courts ruled that the applicant's return to Tajikistan would expose him to a risk of ill-treatment; however, the same assessment could not be applied to the decision to return the applicant to the Russian Federation.

On 23 June 2021, the applicant submitted the application No. 2 for the international protection, i.e., the subsequent application. The applicant submitted that the criminal proceedings started against his brother in Tajikistan were terminated after a bribe had been paid by their family. Since his brother was returned from Russia to Tajikistan, the applicant feared the same fate. It was also submitted that the applicant's family had no more money to arrange a bribe to terminate the criminal proceedings which had been started against him in Tajikistan. The Migration Office examined the subsequent application for asylum and, by decision of 20 November 2021, rejected it. The Office took the view that the applicant failed to present new information in support of his application. The applicant brought an action against that decision of the Migration Office before administrative courts.

In the light of those circumstances, the administrative courts upheld the decision of the Migration Office to dismiss the subsequent application. In examining the case, the courts referred to the Article 2(18)(1) and the Article 2(6)(4) of the Law on the Legal Status of Foreigners. Pursuant to Article 2(18)(1), a subsequent application for asylum means a foreigner's application for asylum lodged after a final decision has been taken on his previous application for asylum. Meanwhile, Article 2(6)(4) of the Law sets out that the "final decision" for the purposes of that Law means a decision taken in respect of a foreigner in accordance with the procedure established by this

Law and not appealed against within the time limit laid down by this Law or a decision regarding which all possibilities of appeal have been exhausted in accordance with the procedure established by law. In the context of that regulation, it was emphasized that the examination of a subsequent application for asylum was limited to the assessment of new material information that was not known during the examination of the previous application.

In assessment of relevant facts, administrative courts drew attention to the fact that the essential argument on which the applicant based his subsequent application was the fact that the Russian Federation would return him to Tajikistan, as was done with his brother. It was noted that the practice of Russia regarding the deportation to Tajikistan was not consistent and systematic (on the one hand, there was data that the majority of persons were not deported, and they actively use national and international measures in order to avoid deportation; on the other hand, there were reports of deportations of Tajik activists or intentions to carry them out). Therefore, it was necessary to assess the individual circumstances of the asylum seeker. Having reviewed the case material, it was not established that the charges against the applicant were politically motivated. In addition to this, from the applicant's explanations, it became known that the brother's case in Tajikistan was terminated. It was noted that although the applicant stated that he related his fear in the subsequent application to the fact that he might be deported to Tajikistan, as was done with his brother, he did not provide any new data in the file. In support of their rulings, the courts also referred to the circumstances established in the final judicial decision regarding the application No. 1 and noted that the applicant from 2015 until 2019 lived in Russia, had the citizenship of the Russian Federation, worked freely. Tajikistan authorities knew about his departure to Russia, since the applicant in 2016 applied to the Embassy of Tajikistan for the extension of the validity of the passport, as well as for the issuance of documents for the children and spouse. According to the data of the case, during this four-year period, no illegal actions were taken against the applicant in Russia.

How would you decide the case?

(4) German Case - The Iraqi claiming asylum in Germany after unsuccessful claim in Sweden

The applicant applied for a court order to establish the suspensive effect of the action that he filed against the decision of the Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge) of March, 2022, with which his asylum application was rejected as inadmissible.

The applicant, born in 1999, is an Iraqi national of Kurdish ethnicity and Islamic religion. According to his own admission, he left Iraq in 2015 and applied for asylum in Sweden in September 2015. He explained that he was from the Ninewa governorate in the northwest of Iraq. In August 2014, IS carried out attacks there and his father then decided that he and the entire family had to flee. With a decision of 2 August 2017, the Swedish Migration Board granted the applicant refugee status.

After committing deprivation of liberty, threats in paricularly serious case, attempted extortion in a particularly serious case and drug offenses of a minor nature, a

Swedish district court sentenced the applicant to one year and six months imprisonment for detention. The court also ordered the applicant's expulsion from Sweden and a ban on returning until March 2024.

In January 2020, the applicant informed the Swedish Migration Board for the first time that he was homosexual. After a hearing, the Swedish Migration Board decided on May 18, 2020, to revoke the refugee status granted to the applicant and to deny any other protection status. The Migration Board denied to examine the issue of the suspension of the expulsion decision and decided to expel the applicant from the country and to deport him to Iraq and ban him from returning to Sweden for four years. In justifying its decision, the Migration Office explained that the applicant can no longer invoke the threat of persecution by the IS, since the influence of the IS is no longer so strong. As far as the applicant claimed that he was homosexual as new circumstance, his statements were not credible.

The action brought against this decision by the Migration Office was dismissed by the Migration Court Stockholm with a judgment of June 18, 2020. As justification, the court stated that the applicant had not succeeded in the oral hearing to remedy the deficiencies in his history of persecution pointed out by the migration office.
By decision of August 31, 2020, the Court of Appeal Stockholm rejected the appeal made by the applicant.

The applicant then applied again for the annulment of the expulsion decision. He referred to a letter from his father, which stated that his father had worked as a security force in Iraq since 1996 and that he arrested the son of an influential and very powerful person. When the family was threatened and an assassination attempt was made on his father, the family left Iraq.

With a decision of December 16, 2020, the Stockholm Migration Office rejected a new examination and the suspension of the expulsion decision. The reason given was that the applicant had not presented any circumstances that he could not have presented at an earlier point in time. The Stockholm Migration Court dismissed the action brought against this decision by the Migration Office in a judgment dated January 25, 2021.

On June 23, 2021, the applicant was forcibly deported from Sweden to Iraq.
After leaving Iraq in October 2021, the applicant entered the Federal Republic of Germany on January 13, 2022 and applied for asylum on February 17, 2022.
In the hearings held on February 23, 2022, he stated to the Federal Office for Migration and Refugees that he had left Iraq because of his father's enemies. After his stay in Sweden and the deportation to Iraq in 2021, he was detained for two weeks in a prison at the Iraqi airport together with IS terrorists. He said that he was unable to sleep or eat and that he was also tortured. Because their connections, his father's ennemies knew he was in Iraq and wanted to kill him. Although he was not personally threatened during his stay in Iraq, the enemies wanted to destroy the whole family.

With a decision dated March 10, 2022, the German Federal Office for Migration and Refugees rejected the application as inadmissible, determined that there were no bans on deportation under § 60 para. 5 - 7 AufenthG, ordered the deportation to Iraq and limited the entry and residence ban to 30 months from the date of deportation.

The applicant filed an action on March 23, 2022, which has not yet been decided. At the same time, he applied for the suspensive effect of the action to be ordered. As justification, he explains that his submissions are new submissions within the meaning of § 51 para. 1 VwVfG. The merely superficial examination carried out by the respondent is not sufficient. In his opinion, the fact that he was arrested during his stay in Iraq points to the existence of new reasons for persecution, which the respondent did not investigate. Due to the difficult humanitarian situation in Iraq, he claims that there is also a ban on deportation.

1. How would you decide the case?
2. Would the outcome change if the first trial had taken place (a) in Norway or (b) in Denmark?

Note:
Key questions of the case:

(a) Is the withdrawal or revocation of an awarding status decision equivalent to the withdrawal or unchallengeable rejection of an earlier application for asylum?

(b) Is the rejection of cross-member state subsequent applications (= secondary applications within the meaning of § 71a AsylG) compatible with EU law?

(c) Is this also approved if the initial procedure was carried out in Norway or Denmark? This question refers to the EuGH of 20 Mai 2021, concerning associated third countries and to the problem whether the situation of Denmark, due to reservations in the ratification of the Union treaties, is comparable to that of associated third countries.

(5) EuAA Case: The Begali Activist who presented Documents in the appeals procedure

Mr Kavinda comes from the country of Begali, where a civil war is raging in the eastern part of the country. Mr Kavinda comes from the western part of the country. He is a member of a group of activists who have demonstrated against the election of the current leaders of the country. Although there is no fighting in the western part of Begali, since the country has entered into civil war, young men aged 18 to 45 years are being conscripted into the army to fight in the eastern parts of the country. The conflict-induced emergency in Begali has led to restrictions in political freedom in the country and political opponents of the current government are often detained. While Mr Kavinda was not a leader in the demonstrations, he claims to have been contacted by the police several times and fears he might be detained and face ill-treatment in detention on the ground of his political activities. His application has been rejected on the ground that as a regular member of demonstrations who was not ‘singled out’, he was unable to substantiate his fears that he might be detained or prosecuted for his political activities.

During the hearing of the first instance court dealing with his appeal, the appellant submitted two new documents in the Begali language which he claims

contain police protocols and photographs from the demonstration. According to Mr Kavinda the documents confirm his fear of being detained by the police. At the hearing, the judge of the first instance court considered the evidence submitted by the appellant. The documents were (a) photographs in which he was clearly visible as holding a banner at an unspecified demonstration in Begali; (b) a summons addressed to him issued by the Begali police in the course of criminal proceedings and dated 1 month before the first instance court hearing; and (c) a protocol from a police search of his home dated 1 week later.

The judge had ordered translation of the documents (b) and (c) into the language of the court proceedings. Both documents are dated after the decision on international protection by the determining authority. The appellant claims his parents sent him the documents. He already had the photographs at his disposal on his mobile phone during the administrative proceedings, but did not consider them relevant until his application for international protection was dismissed. The judge decided, in line with national procedural rules, that since the documents sent to the appellant related to new events occurring after the decision of the determining authority and were therefore not assessed by the determining authority, such evidence is inadmissible during the court proceedings. The judge considered that the appellant nevertheless has the possibility to present the new facts in a subsequent application for international protection, since these documents can be regarded as new elements presented by the applicant. With respect to the photographs, the judge considered that the appellant could have submitted them already during first-instance proceedings.

Moreover, the determining authority had not questioned Mr Kavinda's participation in the demonstrations, and therefore the photographs submitted would not have changed the conclusion on eligibility for international protection. In his request for judicial review by the high court of your Member State, Mr Kavinda claims that the procedure has breached Article 46(3) APD (recast). Moreover, he submits that it is not effective to require him to lodge a subsequent application for international protection. The appellant also submitted yet another document in the Begali language allegedly issued to a court in Begali which he says is hearing the criminal proceedings against him.

<u>Questions:</u>

(a) Does the APD (recast) deal with the translation of documents submitted in a foreign language in appeals procedures? What is the approach to the translation of such documents in your Member State?

(b) What are the options available to a first instance court or a tribunal in relation to the new evidence submitted by the appellant pursuant to Article 46(3) APD (recast)? Are you aware of any CJEU case-law that might be relevant?

(c) Having regard to the applicable EU law, how would you evaluate national rules set forth in the case which preclude taking into account new evidence submitted by the appellant during the court proceedings? What would be your approach if you find that the national procedural rules are or might be incompatible with the EU law? What would be the approach to such new evidence submitted in your Member State?

(d) The appellant also submitted photographs to the court, which he already had at his disposal during the administrative phase of the procedure. What could be a reaction of the court or tribunal if the applicant submits new evidence in the court's procedure that could have been submitted already before the administrative decision was taken?

(e) How would you approach the new evidence submitted by the appellant during the second instance court proceedings?

(6) German Reference to the CJEU of 16 August 2021 (ECJ Case C-497/21)

German law

The Asylgesetz (Law on asylum, 'the AsylG'):

Paragraph 26a of the AsylG (Safe third countries):

(1) A foreign national who has entered the federal territory from a third country within the meaning of the first sentence of Article 16a(2) of the [Grundgesetz für die Bundesrepublik Deutschland (Basic Law for the Federal Republic of Germany)] (safe third country), cannot rely on Article 16a(1) of the Basic Law for the Federal Republic of Germany. ...
(2) In addition to the Member States of the European Union, safe third countries shall be those listed in Annex I. ...'

Paragraph 29 of the AsylG (Inadmissible applications):

(1) An application for asylum shall be inadmissible if:
1. [...]
5. in the case of a subsequent application under Paragraph 71 or a second application under Paragraph 71a, a further asylum procedure need not be conducted.
...'

Paragraph 31 of the AsylG (Decisions by the Federal Office on asylum applications)

(1) [...]
(2) In decisions on admissible asylum applications and in decisions pursuant to Paragraph 30(5) it shall be expressly determined whether the foreign national is granted refugee status or subsidiary protection and whether he or she is granted asylum. [...]

Paragraph 71 of the AsylG (Subsequent application)

(1) If, after the withdrawal or unchallengeable rejection of a previous asylum application, the foreign national files a new asylum application (subsequent application), a new asylum procedure shall be conductedonly if the conditions of Paragraph 51(1) to (3) of the Law on administrative procedure are met; this shall be examined by the Federal Office. [...]

Paragraph 71a of the AsylG (‘Second application’):

(1) If the foreign national makes an asylum application (second application) in the federal territory following unsuccessful conclusion of an asylum procedure in a safe third country (Paragraph 26a) in which [EU] law on the responsibility for conducting asylum procedures applies or which has concluded an international agreement thereon with the Federal Republic of Germany, a further asylum procedure shall only be conducted if the Federal Republic of Germany is responsible for conducting the asylum procedure and the conditions of Paragraph 51(1) to (3) of the [Verwaltungsverfahrensgesetz (VwVfG) (Law on administrative procedure)] are met; this shall be examined by the Federal Office. ...’

The dispute in the main proceedings

The applicants, Georgian nationals, are seeking international protection status from the Federal Republic of Germany after having already unsuccessfully requested protection under asylum law in Denmark. The Federal Office for Migration and Refugees (‘the Federal Office’) conducted the procedure as a secondary application procedure.

At the hearing, the applicants stated that the reason why they could not return to their country of origin was because the first applicant had been stopped by the police in Georgia while working as a taxi driver, and his passengers, who had weapons in their backpacks, had been arrested. The applicants stated that the passengers’ family held him responsible for the arrest and were looking for him. The applicants had also already reported this in the asylum procedure in Denmark. However, according to the applicants, it was only after the conclusion of the court proceedings in that country that a vendetta was declared against the first applicant and his family.

The Federal Office rejected the asylum application as inadmissible. It justified the inadmissibility decision on the grounds that the asylum application is inadmissible under Paragraph 29(1), point 5, of the AsylG, as it is a secondary application, in relation to which a further procedure is not to be conducted. The new asylum application in the Federal Republic of Germany is a secondary application within the meaning of Paragraph 71a of the AsylG, as the applicant had already unsuccessfully pursued an asylum procedure in a safe third country – Denmark – pursuant to Paragraph 26a of the AsylG. A further asylum procedure is not to be conducted, as the requirements of Paragraph 51(1) to (3) of the Verwaltungsverfahrensgesetz (Law on administrative procedure; ‘the VwVfG’) have not been met.

A change in the factual situation within the meaning of Paragraph 51(1), point 1, of the VwVfG requires that the material facts on which the decision was based had in fact subsequently changed in favour of the persons concerned. There has not been a change in the factual situation. The proclamation of the vendetta is merely a product of the facts already pleaded without success in Denmark.

The applicants brougt an action against the decision before the Schleswig-Holsteinisches Verwaltungsgericht, seeking its annulment. The questions referred for a preliminary ruling In those circumstances, the Schleswig-Holsteinisches

Verwaltungsgericht decided to stay the proceedings and to refer the following **questions to the Court of Justice for a preliminary ruling:**

1. Is national legislation under which an application for international protection can be rejected as an inadmissible subsequent application compatible with Article 33(2)(d) and Article 2(q) of Directive 2013/32/EU if the unsuccessful initial asylum procedure was conducted in a different EU Member State?

2. If the answer to Question 1 is in the affirmative: Is national legislation under which an application for international protection can be rejected as an inadmissible subsequent application compatible with Article 33(2)(d) and Article 2(q) of Directive 2013/32/EU even if the unsuccessful initial asylum procedure was conducted in Denmark?

3. If the answer to Question 2 is in the negative: Is national legislation under which an application for asylum is inadmissible in the event of a subsequent application and which makes no distinction in that respect between refugee status and subsidiary protection status compatible with Article 33(2)[(d)] of Directive 2013/32/EU?