
CONDENSED

Since the initiative taken in 1968 by the Italian Council of State, it has become a regular practice to hold symposiums every two years in each of the European capitals in turn. These symposiums comprise the supreme administrative courts of the Member states of the European Community. Initially limited to the six States of the original Community, these meetings have gradually been extended to incorporate the new Member States, including countries like Denmark, Ireland and the United Kingdom which do not possess separate administrative jurisdictions. Due to the enlarged membership, the Madrid meeting in 1990 was the twelfth of the first series. In 1992, Rome inaugurated the "second round" of these meetings, followed, in 1994, by Paris. In 1996, it will be the turn of Brussels. Subsequently, the three additional members of the Union may in turn bring about changes in the order of the host countries⁽¹⁾.

Following an already proven method, the twelve supreme administrative authorities concerned, together with the Court of Justice of the European Communities, held a preparatory meeting in Paris a year before the symposium to choose the theme and lay down the agenda for the preparatory work. It was then decided to adopt the French delegation's proposal, which, as in 1970, during the previous Paris Symposium, suggested studying two concrete cases liable to arise in all the Member States of the EC. It was agreed to select two topics related to immigration problems and, more precisely, to deal with cases concerning the reunification of families on the one hand, and applications for asylum on the other. Since active immigration of salaried workers was halted in 1974, these have been the two main channels of permanent entry, and often the only ones, for nationals of Third Countries in most of the Member States of the EC.

Inspired by two cases already solved by the jurisprudence of the French Council of State (*Avis de Section* of 9 October 1992 - *ABIHILALI* - Rec. p. 363 and Assembly decisions of 13 December 1991 - *NKODIA* - Rec. p. 439 and *Préfet de l'Hérault versus DAKOURY* - Rec. p. 441), questionnaires were distributed as early as the summer of 1993 to the Rapporteurs of the various countries represented⁽²⁾. A general report was drawn up and distributed just over a month before the holding of the symposium⁽³⁾. This report was based on the reports submitted by each delegation, and which had been simultaneously distributed to each Member state.

Thanks to this preparatory work during the four half days of the symposium, it was possible to avoid a repetition of the subjects appearing in the national reports, or even a comparative study of each country's extremely varied experiences in the light of their respective historical and legal traditions, and to reach effective conclusions⁽⁴⁾. The latter were obviously drafted with all the necessary care by the delegations of the member countries in view of the highly sensitive nature of the problems discussed. These conclusions nevertheless reflected a desire to preserve the establishment of a common area of freedom, whatever reforms might be considered necessary, in order to combat certain abuses.

The aim of the present Synthesis is to recall the main themes of the discussion leading to these conclusions and to classify them into three groups of questions :

- Issues of procedure applying to both cases
- Issues of substance raised by Case n° 1
- Issues of substance raised by Case n° 2

(1) See here after. Listing the previous symposiums and the themes discussed.

(2) See above. Questionnaires distributed.

(3) See above. General report and tables showing the systematic analysis of the replies (Tables prepared by T. GIRARDOT, Auditeur au Conseil d'Etat).

(4) See above. Conclusions reached by the symposium.

I - ISSUES OF PROCEDURE COMMON TO BOTH CASES

These can be classified under two headings :

- Access to the judge
- Suspensive or non-suspensive nature of the procedure

I.1 - Access to the judge

An initial series of questions discussed centred around the existence of one or several levels of preliminary administrative jurisdiction. It was discovered that, when it came to examining applications for refugee status, the situation of the various member countries showed a considerable range of differences. The discussion revealed that, in many cases, preliminary administrative recourse was a useful device for counterbalancing the limits imposed upon the control of the judge. The more this control is confined to the examination of purely legal questions, and even questions of formal compliance with procedure, the more useful administrative recourse will be to allow further examination of the application, not only from a purely legal point of view, but also for a more accurate definition of the facts. Conversely, it was stressed that these pre-litigation procedures could give rise to costs not covered by the legal aid system.

Problems relating to the cost of legal procedures have been discussed on more than one occasion. There again, a perusal of the answers to the questionnaire revealed a certain number of different situations. This was emphasized by the representatives of the Court of Justice. The latter, when confronted with the problem of the refund of costs as applied by lawyers of the different bar associations in accordance with the rules in force in their respective countries, realize the magnitude of the differences existing from one country to another. However, in many countries, there are, in addition to official legal aid systems, networks of private associations that are extremely active in providing aid to foreigners, and, in particular, to asylum seekers. Obviously, the number of levels at which legal recourse can be sought, generally from one to three according to the country concerned, also has a direct incidence on the cost of legal procedures.

A third factor to be taken into account in assessing the degree of facility of access to the judge depends on the latter's personal conception of his role. It can be facilitated to a greater or lesser extent depending on whether or not the judge agrees to attempt to interpret the case, often awkwardly presented by the petitioner, especially when the assistance of a lawyer is not specifically required. Another factor is whether or not he considers it his duty to provide active assistance in seeking the elements of proof. Several countries, in particular Portugal, have indicated that their supreme administrative courts have censored decisions rendered by subordinate courts that had failed to take sufficient steps to establish the truth.

Generally speaking, all the participants showed that they were fully aware that the right to effective access to court was guaranteed not only by article 13 of the European Convention for the safeguard of human rights and basic freedoms but also by the jurisprudence of the Court of Justice of the Communities (Judgment in the Marguerite JOHNSTON case, 15 May 1986 - Rec. p. 1694).

I.2 - Suspensive or non-suspensive nature of the procedure

Certain countries have emphasized that, for them, the problem raised by each of the two cases was fundamentally different insofar as the second case involved the refusal of refugee status. Thus the judge could not demand the suspension of a negative decision, namely the suspension of a measure denying an advantage but not entailing a change in the de facto or de jure status of the person concerned. On the other hand, in all countries the judge can, in one form or another, though sometimes subject to certain procedures, suspend the effect of a measure causing a direct change in the situation of the person concerned, for example a decision to order an individual to be escorted to the frontier or expelled.

Nevertheless, there is great diversity in the means of applying these suspensive decisions. In certain countries, a mere gentlemen's agreement can be reached between the administration and the court. The former can refrain from applying a measure to accompany an individual to the frontier until the courts have given their opinion, providing however that the judgment is rendered within a precise time limit not exceeding a few months. In other countries it is the judge who decides to grant a stay of execution under a precise procedure which is sometimes strictly limited in time. No doubt an example of the widest powers that can be assumed by a jurisdictional authority in this field is provided by the recent jurisprudence of the House of Lords (*M versus Home Secretary* 27 July 1993) stipulating that a minister can be held personally responsible if he fails to comply with a court order staying the execution of an expulsion measure.

However it is not in all countries that the government and parliament have accepted this interference on the part of the judge in procedures closely related to problems of public order. Several delegations have pointed out that recent legislative reforms had been instrumental in certain cases in ruling out the possibility of a stay of execution or emergency proceedings. Certain delegations however have mentioned out that such interventions on the part of the legislator had become necessary due to the flooding of the courts with an number of cases involving pleas increasing for delay. This phenomenon is particularly noticeable in countries with several possibilities of access to court, among which only one can lead to a stay of execution. In that case petitioners obviously tend to choose the latter.

Whatever the fundamental reasons for these recent reforms, they have, in many countries, given rise to heated political discussions which have often been extended to the level of the constitutional courts. Thus, in 1987, a Spanish law removing the possibility of a stay of execution was declared unconstitutional. In Germany, this had even resulted in the initiation of a constitutional reform that was considered necessary. The problem was still under consideration in certain constitutional courts at the time of the present symposium

II - ISSUES OF SUBSTANCE RAISED BY CASE N° 1

In view of the fact that this problem has a bearing upon marriage and its effects on the entitlement to residence permits, the discussion went further than pathological cases of unconsummated marriage effectively existing in many countries, and centred around two main themes :

- diversity and convergence of national legislations applicable to the case,
- but a wide consensus on the recognition of higher constitutional or conventional norms.

II1 - Diversity and convergence of legislations

The answers to the questionnaire had already revealed that, according to the country, marrying a national of the country concerned may or may not have an incidence on the right to reside and work in that country. It may however have an incidence only on the acquisition of nationality. In certain countries on the other hand a relatively stable union may be sufficient even without marriage. In Denmark it was even suggested that a homosexual relationship might be sufficient to obtain a residence permit. Finally, the requirements of national legislations concerning the duration and effectiveness of a matrimonial link vary, and have moreover very frequently been modified in the recent past in some countries such as France.

The second factor of diversity that mainly emerged from the discussions is, in most countries, a combination of written regulations and regulations based on jurisprudence. To a certain extent one can even speak of a sort of counterbalance between the legislator and the judge. The latter allows the administration to prevent certain cases of fraud even in the absence of written references, but, on the contrary, adopts a more liberal attitude when the legislator has intervened to put an end to such attempts to get around the law.

Nevertheless comparison between the experience in different countries has brought out certain paradoxes, namely the existence of written rules in common law countries, for example Regulation 131 in the case of the UK, at a time when certain countries such as France, where written law prevails, possessed only rules of jurisprudence on the same matter.

Finally the Danish delegation drew attention to an extreme case of jurisdictional intervention to safeguard the right of a family to live together. This referred to the suit filed against the Ministry and actually before the court at the time of the symposium. The Ministry had been accused of preventing certain Tamoul families from exercising this right. The investigation was conducted by Supreme Court judges and members of parliament.

II.2 - Consensus on the principles derived from constitutional or conventional measures

In a certain number of countries, the right to a normal family life or the principle of the protection of the family are incorporated in the Constitution. This is the case even in certain common law countries like Ireland.

Other countries are more inclined to base the right to lead a normal family life on international agreements and, notably, on article 8 of the European Convention for the safeguard of human rights and basic freedoms. The Netherlands delegation emphasized the importance its country attached to the jurisprudence of the Court of Strasbourg, and to the "autonomous" character it conferred to the concept of the family under article 8 of the Convention, as compared with that to be found in the legal systems of individual countries. It was widely agreed that the recognition in each country of this concept of the family, as defined by a legal authorities by all members of the union, would make a welcome contribution towards harmonising the rules adopted by each.

Moreover the application of Community regulations might give rise to another factor of hermonisation. The country that at present seems to have drawn the most far-reaching consequences from these rules is undoubtedly Belgium, to the extent that, by considering spouses of Belgian citizens as spouses of Community nationals, this country has evolved towards a system of rules favourable to the reunification of members of the same family. Similarly, another matter under consideration in the Netherlands is whether a higher tax on foreigners residence permits, as compared with national identity cards, might not be contrary to the rules of free circulation within the Community. However the question of the reunification of families in the case of Community nationals had already been submitted to the Court of Justice of the Communities, as the representatives of the latter pointed out, recalling that, by its decisions (*KUS* of 7 July 1992 - Rec. 1 - 4265 and *SINGH* of 16 December 1992 - Rec. 1 - 6781), it had already imposed its own conception of the family and matrimony on certain member states. Further harmonisation in the field of justice and home affairs, and notably of article K 1 of the Treaty of Union, could also contribute to greater conformity in the regulations of individual states.

III - ISSUES OF SUBSTANCE RAISED BY CASE N° 2

The above seem much more serious than those raised by Case n° 1.

- On the one hand, indeed, much remains to be done to reach agreement on all the higher constitutional or conventional principles applying to the question of asylum ;
- On the other hand, lawmakers from different countries had recently made frequent but uncoordinated attempts to deal with certain abuses ;
- Finally, there is no international jurisdictional authority responsible for the enforcement of uniform compliance with the Geneva Convention.

III.1 - Absence of uniformity in the field of supra-legislative norms

Obviously all the countries taking part in the symposium have ratified the Geneva Convention and apply its rules as far as refugee status is concerned. But it has been frequently observed that the Convention has remained practically silent concerning the status of asylum seekers while a decision on their refugee status is pending.

Naturally, most member states have also ratified the European Convention, article 3 of which stipulates that "no individual can be submitted to torture or to inhuman and degrading forms of punishment or treatment". There is however abundant jurisprudence from the Commission and the Court of Strasbourg on the obstacles imposed by this stipulation on the expulsion of, or refusal of entry to, certain foreigners. The UK however has not incorporated the European Convention into its internal legal system, even if it attempts to apply its principles. Even in a country like France, where the Convention has been fully incorporated into the legal system, the fact that it is impossible to return asylum seekers to their country of origin is the result, according to internal jurisprudence, of a general principle and not of the application of article 3 (Assembly - 1 April 1988 - *BERECIARTUA - ECHARRI* - Rec. p. 135).

On the one hand, however, constitutional rules concerning the right to asylum are formulated in somewhat different terms. Certain constitutional texts (France and Greece for example) refer to the concept of "freedom fighters" that is far from covering the same area as that of the concept of "reasonable fear of persecution for reasons of race, religion, nationality, identification with a particular social group or political opinions" as defined by the Geneva Convention. Other constitutional texts, as in the case of Italy, retain, on the contrary the concept of "persons refused the effective exercise of such democratic liberties as are guaranteed by the Italian constitution", a concept that goes far beyond the Geneva text. Finally, other texts, as in the case of the Federal Republic, confine themselves, insofar as the constitutional definition of persecutions is concerned, to those that can be attributed directly or indirectly to the state authorities, while other countries have a wider conception.

On the other hand, only certain member countries have accepted the Dublin and Schengen agreements providing for cooperation in the study of applications for asylum. The combining of these agreements with constitutional principles has, incidentally, in the case of France, called for a reform of the Constitution.

III.2 - Numerous and unrelated legislative reforms

Three types of problem have been dealt with recently in one way or another, but rarely in the same manner, by national lawmakers, since, in certain countries, such as Luxembourg, there is no autonomous legislation applying to asylum seekers.

In the first place, many countries have adopted a specific and generally faster method for dealing with applications that are obviously unfounded. But the very content of this notion differs from one country to another. In some, there is a tendency to include in this category applications that are either late or that have not been submitted upon entering the territory. Other countries are more flexible in considering the circumstances put forward by asylum seekers after entering the national territory. It was nevertheless pointed out that even when there was a text transferring this decision to a minister (the new Asylum Act 1993), the High Court in London had considered that, as far as it was concerned, it was in no way bound by the Minister's appreciation. Finally, the abolition of a delay in this type of obviously unjustified application gave rise to constitutional discussions in many countries.

Several member states sought to give an objective basis to this concept by retaining among the criteria for obviously unfounded applications, in addition to dilatory or repeated applications, the arrival of the person concerned from "a safe Third Country". Certain of them, like Germany, have even attempted to draw up a complete list of such "safe Third Countries". In the case of Belgium, the Court of arbitration censured a legislative clause that aimed at using statistical information to determine what actually constituted a "safe Third Country", such statistics being based on the very high percentage of over 95 % of rejected applications. In other countries,

such as France or Greece, where the notion of a "safe Third Country" had seen rejected for reasons of jurisprudence, the rejected concept was reintroduced by the legislators but without any definition or list in support, with the result that the decision was actually once again placed in the hands of the judge. In Italy, on the other hand, it seems that the Council of State considers that it is for the authorities of the Third Country concerned to indicate through diplomatic channels whether the asylum seeker is entitled to benefit from their protection. It finally appeared that, even if the problem was of a different nature, the notion of a "safe Third Country" would necessarily have a bearing on the division of labour introduced by the Dublin and Schengen agreements. The Netherlands delegation had pointed out that it would be difficult for any court in the country to accept that, under these agreements, an application could be returned to a neighbouring country for action if the country concerned held an opinion incompatible with the law of the Netherlands on what constituted a "safe Third Country".

The third type of problem dealt with, as it arose, by the national legislative bodies concerns the returning of refused applicants to the frontier. The practices that have been frequently modified in recent years seem to vary considerably between countries that accept a de facto situation, whereby refused applicants become clandestine immigrants with the possibility of subsequently regularizing their position, and those that subject them to administrative measures restricting their movement. Apart from the country of destination already mentioned, there is also the very frequent problem of the means used to ensure their return, notably by the airlines. Nevertheless, all the delegations agreed that the difficulty of ensuring their actual return would vary according to the length of the administrative and contentious procedures involved.

III3 - Absence of international jurisdiction

The common body of law applied throughout the Union is constituted by the Geneva Convention. What characterizes this Convention is that there is no supreme international court to supervise its application. No doubt many states invite the representative of the High Commission for Refugees to participate in the preliminary investigation of applications for refugee status, either at the stage of administrative procedure or at that of specialized legal proceedings. But this is not the case everywhere, and it is obviously not sufficient to ensure unity in the application of the Convention. In any case, the representatives of the CJEC attending the symposium wished to recall that admission to refugee status was not included in the field of application of Community law and that the Schengen and Dublin agreements did not grant the court of Luxembourg any competence in this respect.

Nevertheless those attending the symposium noted almost unanimously that the problems relating to the admission of refugees were henceforth obviously beyond the competence of individual nations. Even before the Schengen agreements it was already clear that the flow of asylum seekers tended to be towards the countries that seemed likely to offer the best chances of a prolonged stay while waiting for a negative decision. The Schengen agreements revealed the need for coordinated action, but several delegations, notably those of Germany, Belgium and the Netherlands, mentioned the problems that were liable to result if the basic law applied in each of the signatory countries had not been previously unified.

CONCLUSION

Thus, while realizing that it might be unrealistic to attach prior conditions to the standardisation of domestic legal systems before undertaking any cooperation whatsoever in the examination of applications for asylum, the members of the symposium came to the unanimous conclusion that the harmonisation of such legal systems was, in any case, the aim to be achieved, and that meetings such as the one just held were a very important step towards this goal. Reciprocal knowledge must necessarily precede any effort to draw closer together.

It is therefore hardly surprising to find among the proposals made at the end of the symposium :

- on the one hand, the publication of the present condensed report, and
- on the other hand, the desire to hold further meetings of the same type in order to exchange information of reciprocal nature and make further progress in this field.

In this respect, Lord CLYDE indicated that the authority responsible for dealing with applications for asylum in the UK, that is, the adjudicator, would take the initiative in proposing a similar meeting in 1995 to his colleagues from other countries legal systems. This was accepted with the greatest interest⁽¹⁾.

The delegates of the legal systems represented at the Symposium, particularly those which, unlike the Councils of State, are responsible neither for advising their governments nor for submitting proposals to them, did not however consider it possible to make further progress in suggesting reforms in the legislative, regulatory or even, on occasion, in the constitutional fields.

(1) A first meeting of this type was held in London in January 1995.