The Republic of Slovenia
The Constitutional Court

Number: U-I-221/00-6
Date: 9.11. 2000

DECISION

The Constitutional Court, in the proceeding initiated on the basis of the second section of Art. 59 and Art. 30 of the Law on the Constitutional Court (Official Gazette of the Republic of Slovenia, no. 15/94), on the session of 9 November 2000

HELD:

I. The second paragraph of the second section of Art. 40 of the Law on Asylum (Official Gazette of the Republic of Slovenia, no. 61/99) is hereby annulled.

II. The Supreme Court must decide on the appeal filed against a judgement of the administrative court that decided on the action filed against a decision issued in the asylum procedure, within 15 days from the time of service.

REASONING

A.

1. The Constitutional Court, in the proceeding to review the constitutional complaint no. Up-78/2000 on the basis of the second section of Art. 59 and Art. 30 of the Law on the Constitutional Court (hereinafter referred to as: LCC), initiated the proceeding to review the constitutionality of the second paragraph of the second section of Art. 40 of the Law on Asylum (hereinafter referred to as: LA). In the ruling of 29.6. 2000 (Official Gazette of the Republic of Slovenia, no. 66/2000) it stated that it shall, in the proceeding, review whether the challenged decision violated the right to appeal from Art. 25 of the Constitution and whether such an arrangement conforms to the principles of the rule of law from Art. 2 of the Constitution.

2. The National Assembly did not state its opinion concerning the ruling to initiate the proceeding to review the constitutionality of the mentioned provision of LA.

B. I

3. In accordance with the second section of Art. 40 of LA, the proceeding is completed and final with the service of the judgement of the administrative court. Considering the accepted methods of interpretation of legal rules, it is impossible to arrive at another interpretation except that the provision excludes an appeal against a judgement of the administrative court. According to the fifth section of Art. 39 of LA, the Law on Administrative Dispute (Official Gazette of the Republic of Slovenia, no. 50/97 and no. 70/00, hereinafter referred to as: LAD) is applicable only if LA does not provide otherwise. The second section of Art. 40 of LA cannot be understood otherwise except that it provides a different moment of finality, in a manner distinct from the LAD. The aforementioned meaning is furthermore supported by a systematic interpretation. The LA, in the provisions of Art. 38., 39. and 40., regulates the procedure of decision-making in an action against a decision issued on the first instance, i.e. a decision of the Ministry of Interior Affairs as the competent administrative authority. The administrative court is, in all provisions, and in most cases, explicitly mentioned exclusively in connection with the jurisdiction to decide on the appeal. That the legislator, in the LA, regulated the administrative dispute with a single instance at the court level also follows from the first draft of the Law on Asylum in the first reading. The explanation of the draft states that it provides for a principle of two instances and guarantees judicial protection at the same time (The Reporter of the National Assembly, no. 78/98, p. 40/41). The comment by the Secretariat of Legislation and Legal Affairs of the National Assembly of 26.5.1999, that the system of appeal provided in the LAD has to be taken into account when regulating the time of finality under the LA, was not accepted.

4. The second paragraph of the second section of Art. 40 of LA is in contravention of the right to a legal remedy (Art. 25 of the Constitution). Art. 25 of the Constitution guarantees everyone the right to appeal or other legal remedy against decisions of courts and other state authorities, local community authorities and entities with public authority, when these authorities decide on rights, duties or legal interests. According to the established constitutional case-law, this right guarantees the principle of multiple instances for decision-making by courts and other authorities, i.e. review by second-instance authorities of all questions important for determination of a right or duty. (decision no. U-I-34/95 of 29.10.1997, Official Gazette of the Republic of Slovenia, no. 73/97 and OdlUS VI, 138). The second paragraph of the second section of Art. 40 of LA, which excludes an appeal against the Administrative Court seen as the first instance at the court level, therefore represents an infringement of the aforementioned constitutional right.

5. According to the established constitutional case-law, limitations of constitutional rights are permissible if they conform to the principle of proportionality. This means that the limitation is necessary and unavoidable for the accomplishment of the desired constitutionally permissible goal and in proportion to the importance of that goal (the third section of Art. 15 of the Constitution).

6. The materials considered in the legislative procedure make it possible to conclude that the legislator, when deciding to adopt the contested provision, took into

consideration the basic rationale of preparing the LA, i.e. making this field of regulation conform to the obligations arising under international conventions and other documents the country has ratified, and acquis communautaire. When determining the authorities competent for deciding on granting asylum, it considered the Resolution of the EU Council on minimal safeguards in the asylum procedure of 20.6.1995 (Draft Law on Asylum, Reporter of the National Assembly no. 78/98, p. 29). The resolution grants states a wide margin of appreciation when specifying the first-instance authority that will adopt decisions concerning requests for granting asylum, but it does require judicial review or review of a body that has the power to independently decide an appeal against a negative decision (point 8). However, this fact does not by itself justify a necessity of infringement of a constitutional right, in particular because the mentioned resolution is not an instrument binding under international law. In addition, this resolution does not prevent a state from providing a higher standard of rights, exceeding the ones laid down by the resolution as minimal. Another possible reason for an arrangement of the administrative judicial procedure differing from the one stipulated by the LAD, is to fasten the asylum procedure. A more speedy completion of the procedure should shorten the period of the asylum seeker's uncertainty, while decreasing the costs to the state related to asylum-seekers' accommodation. The interest to make the procedure speedy is a constitutionally legitimate one and the chosen means are necessary and unavoidable for its achievement. The exclusion of the second instance at the court level shortens the procedure, and it is the only way in which it can be achieved. However, the desired goal to shorten the procedure does not outweigh the seriousness of the infringement of the right to appeal. The person concerned will be able to decide her/himself whether it is a speedy completion or a higher probability of a lawful decision that matters more to her/him. The financial interest of the state cannot, likewise, justify the exclusion of the appeal and therefore a higher risk that the issued negative decision would be unlawful. This is why the exclusion of appeal in the second paragraph of the second section of Art. 40 of LA is not permissible.

7. Because of the established contravention of the Constitution, the Constitutional Court annulled the second paragraph of the second section of Art. 40 of the LA. In doing so, it did not consider the question whether a different limitation of appeal against an administrative decision concerning the (non)granting of asylum is constitutionally permissible.

8. Since the Constitutional Court annulled the aforementioned provision because of its contravention of Art. 25 of the Constitution, it did not have to consider the question whether the provision was also in contravention of principles of the rule of law (Art. 2 of the Constitution).

9. Since the aforementioned provision, which represents an exception from the general rule provided in the Law on Administrative Dispute (LAD), is annulled, the provision of the LAD shall become applicable also in the asylum procedures. Therefore, if an appeal is properly filed, the asylum procedure becomes final when the appeal against a decision which was issued by the first instance at the court level (Administrative Court) is exhausted and served.

10. On the basis of the second section of Art. 40 of the LCC, the Constitutional Court also specified a time limit in which the Supreme Court shall decide about the appeal.

By setting a shorter time limit for the filing of an action in the administrative court and setting a time limit for the administrative court to decide the case, the legislator clearly expressed a legitimate intent that the asylum procedure should be completed and final as quickly as possible. In cases where the LAD, as the statute laying down a framework of regulation of the administrative dispute, provides a time limit for the decision of the first-instance administrative court, it also provides a time limit representing half of that period for the decision on the appeal (the fourth and fifth sections of Art. 69 of the LAD). Having in mind this particular legislator intent, the Constitutional Court establishes that in asylum cases, in which the administrative court has a duty to decide within 30 days, the decision (by the second instance at the court level) has to be taken in 15 days. Given the nature of the decision adopted on the basis of the second section of paragraph of Art. 40 of LCC, this rule is binding until statutory regulation stating otherwise is passed.

C.

11. The Constitutional Court adopted this decision on the basis of Art. 30, the second section of Art. 40, Art. 43 and the second section of Art. 59 of LCC, in a panel composed of president Franc Testen and judges dr. Janez Èebulj, dr. Zvonko Fišer, Lojze Janko, Milojka Modrijan, dr. Mirjam Škrk and dr. Dragica Wedam Lukiè. The decision was adopted with six votes against one. Judge Fišer voted against the decision and wrote a dissenting opinion.

No. U-I- 221/00-6
Ljubljana, 9. November 2000

President
Franc Testen