Triage in connection with accelerated asylum procedures

The Federal Administrative Court approves the appeal of an asylum seeker whose procedures were dealt with and decided on an accelerated basis. Despite the complexity of the case, the State Secretariat for Migration had not opted for extended procedures, resulting in only a short time limit of 7 working days to file an appeal instead of the standard 30 calendar days.

The amendment to the Swiss Asylum Act, which entered into force on 1 March 2019, aims to make asylum procedures more efficient and faster. In addition to the Dublin Regulation (which is concerned with responsibility for procedures), the legislator defined two new types of procedures: the processing of asylum applications by means of accelerated procedures and processing by means of extended procedures. The two differ in procedural terms and especially with regard to the time limit for appeal.

Landmark judgement of the Federal Administrative Court

In a landmark judgement1, the Federal Administrative Court (FAC) examined the conduct of procedures and the triage undertaken by the State Secretariat for Migration (SEM). The official legal representative had claimed that this specific case involved a complex procedure, shown by the fact that the SEM carried out two hearings after the initial questioning, which each lasted 6 hours, and the fact that the asylum decision, of wider than average scope, was only made after 89 calendar days and not within the 29 calendar days envisaged by law. The official legal representation argued that the SEM should have opted for an extended procedure, stating that the right of access to an effective appeal was infringed by the incorrect triage decision and the resulting short time limit of 7 working days to file an appeal.

The court follows this assessment. It finds that, although asylum-seekers are not entitled to have their asylum application processed in one of the two types of procedures, an infringement of the right to an effective appeal within the meaning of Article 29a of the Swiss Federal Constitution and Article 13 in relation to Article 3 ECHR may arise if, despite the complexity of the matter, a decision is made, incorrectly, not to opt for an extended procedure and therefore the short time limit for appeal applies instead of the standard one. This was the case here.

Incorrect triage by the SEM

The SEM had conducted extensive fact-finding, and the justification of the ruling was also very detailed. The law does indeed stipulate that the SEM may exceed the 29-day period for procedures by “a few days” in accelerated procedures. However, this leeway was massively exceeded in the present case. The SEM’s explanations regarding the failure to opt for an extended procedure did not convince the court. The legal representative had already drawn attention to the complexity of the procedure and the incorrect triage decision in the prior

procedure. She also showed in a transparent manner that it was not possible to properly challenge the SEM's decision within the short time limit for appeal. The court cannot remedy the effect of this kind of incorrect triage decision, which ultimately results in the short statutory time limit for appeal applying. It thus annuls the SEM's decision and returns it for reassessment by means of an extended procedure. Furthermore, the court points out that the legislative aim of accelerating matters by means of a fair procedure in accordance with the rule of law can only be guaranteed if the lower instance (SEM) carefully performs the triage provided for by law.

This judgment is final and may not be appealed to the Federal Supreme Court.

1 This judgment was coordinated by all judges from divisions IV and V and holds not only for this case but for many other procedures as well.

Source: Press release website Federal Administrative Court of Switzerland: https://www.bvger.ch/bvger/en/home/media/medienmitteilungen-2020/triagebeibeschleunigtenasylverfahren.html