

Speech by Thomas Besson, vice-president of the CNDA, at the IARMJ conference, Brdo, Slovenia, September 11, 12 and 13, 2022

*Session 6 : Limits of the principle of abuse of rights in migration and asylum disputes with regard to the standards of European law*

In paragraphs 70, 71 and 72 of its decision C 116/16 and C 117/16 of 26 February 2019, the Court of Justice of the European Union recalls that it is settled case law that there is, in the law of Union, a general principle of law according to which litigants cannot fraudulently or improperly rely on the norms of Union law. Compliance with this general principle of law is binding on litigants. It follows from this principle that a Member State must refuse the benefit of the provisions of EU law when those provisions are invoked not with a view to achieving the objectives of those provisions, but with the aim of obtaining an advantage Union law when the conditions for benefiting from this advantage are only formally fulfilled.

In paragraph 91 of its decisions C-322/19 and C-385/19 of February 4, 2021, the Court of Justice of the European Union also recalls that proof of an abusive practice requires, firstly, a set of objective circumstances from which it follows that, despite formal compliance with the conditions laid down by the Union rules, the objective pursued by those rules has not been achieved and, secondly, a subjective element consisting in the desire to obtain an advantage resulting from the Union rules by artificially creating the conditions required for obtaining it.

I will talk about the fraudulent asylum application and other forms of abusive asylum applications in French law and case law.

If according to 3 of article 5 of directive 2011/95/EU, « *without prejudice to the Geneva Convention, Member States may determine that an applicant who submits a subsequent application is not normally granted the status of refugee, if the risk of persecution is based on circumstances which the applicant has created of his own doing since his departure from the country of origin* », the option thus open to the member States has not been transposed into French law (CE, December 21, 2021, 445688).

The French asylum code (code for the entry and stay of foreigners and the right to asylum) mentions the case of an applicant who presents false identity or travel documents, provides false information or conceals information or documents concerning his identity, nationality or the terms of his entry into France, in order to mislead the administrative authority, or who has submitted several asylum applications under different identities (articles L. 531-26, 1° and L. 531-27, 2°). Fraud implies an intention to deceive the administration or the asylum judge by lying, for example, about one's nationality or identity, by making several requests under different identities, by lying about one's sexual orientation, by invoking facts that occurred in one country while the applicant was in another country at the same time... It is up to the administration to establish the fraud.

The consequence of the fraud is that the asylum application is processed according to the accelerated procedure (fifteen days with the OFPRA (article R. 531-23) instead of six months and five weeks with the CNDA (article L. 532-6) instead of five months.

OFPRA can also withdraw its protection decision at any time after having allowed the fraudster to submit written or possibly oral observations (articles L. 562-1 and L. 562-2, directive 2013/32/EU of 26 June 2013, article 45). Indeed, if article 1 of the Geneva Convention lists the grounds allowing the withdrawal of refugee status, this measure is also possible, pursuant to the general rules for the withdrawal of administrative acts, if the asylum application was fraudulent (Conseil d'Etat, December 12, 1986, 57214;57789). This possibility of withdrawal for fraud is now provided for in the French asylum code (articles L. 511-8 and L. 512-3).

And according to article 44 of Directive 2013/32/EU of 26 June 2013: « *Member States shall ensure that an examination with a view to withdrawing international protection from a given person can be initiated as soon as new elements or facts indicating that the validity of his international protection should be reviewed* ». This may be the revelation of a fraud.

The asylum judge, who must rule on all the factual and legal circumstances of the case, must assess whether the applicant, who had been granted refugee status on the basis of fraudulent declarations, is still able to put forward sufficiently credible elements, relating to his personal background and the threats likely to weigh on him in the event of a return to his country, in order to be able to maintain his refugee status (CE, November 28, 2016, 389733 (refugee under the identity of his brother)). And the asylum judge cannot consider that the fraud committed during a second asylum application has the effect of depriving the applicant of any right to protection, without determining whether his first application was itself fraudulent (Conseil d'Etat, December 12, 1986, 57214; 57789).

When the recognition of refugee status or the granting of subsidiary protection results from a decision of the asylum judge (CNDA or Council of State (Conseil d'Etat)), the court may be seized by the OFPRA or by the minister responsible for asylum for ending refugee status (articles L. 511-9 and L. 512-4). The appeal is exercised within two months after the observation of the facts likely to justify the exclusion of refugee status or the benefit of subsidiary protection or to characterize fraud (article R. 562-2).

Other cases of abusive but not necessarily fraudulent requests :

The applicant only submits an asylum application for defeating an expulsion measure (article L. 531-27, 4°).

The applicant has invoked in support of his application only questions that are irrelevant to the asylum application he is making (article L. 531-26, 2°).

The applicant has made manifestly inconsistent and contradictory, manifestly false or implausible statements which contradict verified information relating to the country of origin (article L. 531-26, 3° and directive 2013/32/EU of June 26, 2013, article 31, 8).

The OFPRA can also take a decision of inadmissibility, without verifying whether the conditions for granting asylum are met, when the applicant benefits from effective protection under asylum in a Member State of the European Union or under refugee status in a third country and is effectively re-admissible there and also in the event of a request for re-

examination without new fact or evidence (article L. 352 1 and directive 2013/32/EU of June 26, 2013, article 33).

The fact that an asylum seeker would have resorted to a fraudulent maneuver to enter France is not sufficient to establish that his asylum application was based on deliberate fraud (Conseil d'Etat, October 2, 1996, 152338).

But the decision to refuse entry into France to a foreigner who presents himself at the border and asks to benefit from the right of asylum can be taken if the asylum request is inadmissible or if the asylum request is manifestly unfounded, that is to say if, in the light of the statements made by the applicant and the documents produced, it is manifestly irrelevant with regard to the conditions for granting asylum or manifestly devoid of any credibility with regard to the risk of persecution or serious harm (article L. 352 1). Appeal possible within 48 hours before the administrative court which rules in 72 hours (article L. 352-4), appeal within fifteen days before the president of the administrative court of appeal (article L. 352-9) (directive 2013/32/EU of June 26, 2013, articles 8 and 43).

Finally, the material reception conditions (social assistance) from which the applicant benefits may be terminated if he has concealed his financial resources, provided misleading information relating to his family situation or submitted several asylum applications under different identities. (article L. 551 16). The decision is taken after the person concerned has been given the opportunity to present his written observations.

*Brief biography :*

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