

Elsbeth Guild, Jean Monnet Professor *ad personam*
Radboud University Nijmegen

**The pushing upwards of non-
refoulement cases into UN ‘soft’
Treaty Bodies**
28 June 2021

Jean Monnet Professor *ad personam*
Elsbeth Guild



ELA v France CED 12 November 2020

Asylum applications:

24 Sept 2003: rejection, appeal rejection;

4 May 2006: rejection, appeal, rejection;

5 Feb 2009: rejection, appeal, rejection;

10 March 2011: rejection, appeal, rejection

26 May 2016: inadmissible, appeal rejection

28 Feb 2017: expulsion order, appeal,
rejection not appealed to 2nd instance.



Why the CED?

- Why a fear of disappearance?
- 19 Dec 2000: death of a close friend by army;
- 9 May 2004: brother kidnapped and disappeared by army;
- 3 Feb 2008: body of a family member (arrested) discovered;
- Feb 2009: evidence of uncle's murder and brother's disappearance;
- 2010: sister killed by army;
- 2011: medical report on scars consistent with torture;
- ELA: Sri Lankan Tamil, Christian, male, born 1982.



An effective remedy before the national courts?

- 10 considerations and reconsiderations of his asylum applications;
- 5 appeals heard by national asylum courts;
- Problem: evidence rejected on flimsy grounds, eg a document not translated in time; a minor difference in writing of name etc; previous evidence never considered in subsequent review of applications;
- 2nd instance appeal against expulsion order not pursued;
- State argument: no exhaustion of national remedies;
- Problem: short time limit, no legal aid and destitution;



CED: what went wrong?

7.6 The Committee considers that the risk of enforced disappearance must be examined by the domestic courts in a comprehensive manner. In this respect, domestic courts must meticulously examine the essential issues before them, rather than merely giving formal answers to the arguments raised by the author or simply endorsing the conclusions of a lower court or both. In the present case, the mere fact that the courts of appeal endorsed the decisions adopted in this case by the French Office for the Protection of Refugees and Stateless Persons and the arguments on which they were based could not release them from their obligation to examine the merits of the issues raised in the author's appeals.



The CEAS Procedures Directive 2013/32

- Article 33: inadmissible applications
- (d) the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of Directive 2011/95/EU have arisen or have been presented by the applicant;



CEAS Procedures Directive (2)

Article 40: subsequent applications

- (2) For the purpose of taking a decision on the admissibility of an application for international protection pursuant to Article 33(2)(d), a subsequent application for international protection shall be subject first to a preliminary examination as to whether new elements or findings have arisen or have been presented by the applicant which relate to the examination of whether the applicant qualifies



CEAS Procedures Directive (3)

Article 40

(4) Member States may provide that the application will only be further examined if the applicant concerned was, through no fault of his or her own, incapable of asserting the situations set forth in paragraphs 2 and 3 of this Article in the previous procedure, in particular by exercising his or her right to an effective remedy pursuant to Article 46.

(CJEU pending case: C-18/20 XY).



CJEU - C-921/19 LH 10 June 2021

(1) Article 40(2) of Directive 2013/32/EU... read in conjunction with Article 4(2) of Directive 2011/95/EU... must be interpreted as precluding national legislation under which any document submitted by an applicant for international protection in support of a subsequent application is automatically considered not to constitute a ‘new element or finding’, within the meaning of that provision, when the authenticity of that document cannot be established or its source objectively verified.



CJEU – C-921/19 LH 10 June 2021 (2)

2. Article 40 of Directive 2013/32, read in conjunction with Article 4(1) and (2) of Directive 2011/95, must be interpreted as meaning, first, that the assessment of the evidence submitted in support of an application for international protection cannot vary according to whether the application is a first application or a subsequent application and, second, that a Member State is required to cooperate with an applicant for the purpose of assessing the relevant elements of his or her subsequent application, when that applicant submits, in support of that application, documents the authenticity of which cannot be established.



New Pact on Migration and Asylum amending the directive

...many Member States stressed the challenges posed by subsequent applications by persons not in need of international protection and by ineffective appeal procedures, both issues which seriously hamper return efforts. This proposal therefore makes targeted amendments...to address these specific challenges which will further the objectives and put in place, together with the proposal for a Regulation introducing a screening, a seamless link between all stages of the migration process, from arrival to processing of asylum requests and, where applicable, return. (sec. 1)