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IS THERE A SECOND CHANCE TO ASYLUM IN ROMANIA IF THE CRIMINAL CHARGE RISK ALLEGED WITHIN FIRST SET OF PROCEEDINGS DENYING THE ASYLUM CAN BE SUBSTANTIATED?

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Abstract

Structured on the Q&A model, the present study aims at analyzing several key legal issues stemming from the procedure of granting access to a new asylum procedure based on a criminal charge letter issued by prosecuting agent from country-of-origin existent but not known by the asylum seeker at the material time of first round of proceedings, seen as a “new element” within the meaning of Romanian Law on asylum, accompanied by a legal opinion on the legal consequences of such. Requirements for accessing a new asylum procedure in five European jurisdictions are analyzed and compared. Following the overview of the legal framework from Romania, 6 questions are raised: (i) is there a difference between „new elements” and „new reasons”? (ii) is it compulsory for the asylum seeker to not raise the criminal charge issue during

the first asylum procedure? (iii) is the asylum seeker entitled to a second procedure if the criminal charge existed before the first round of procedures? (iv) would aggravating of punishment reasons be analyzed for the purpose of opening access to a second asylum procedure? (v) can the authenticity of the “new element” be called into question? (vi) is personal situation and professional trajectory relevant for getting access to a second asylum procedure? Each question receives a reasoned answer according to the law, the Romanian case-law and the legal experience of the author. The article naturally ends with specific conclusions calibrated to Romanian law particularities.

Keywords:

Asylum, Romania, Access to Second Asylum Procedure, Official Criminal Charge, New Elements

1. Getting Started: The Hypothesis of the Article and Questions

There may be times when asylum seekers' access to a first asylum procedure is denied by means of a final binding decision of the Romanian Courts. The first set of questions arises: is this the end of the asylum seeker's journey? Can the asylum seeker get access to a second procedure? If so, under what conditions?

Following the answers to the above the intriguing question arises. Would it be possible to be granted access to a second asylum procedure in case the risk of criminal charges alleged and rejected in the first set of asylum procedure can be substantiated?

To be clearer, it is possible to only allege criminal charge risk (*i.e.* imprisonment for 3 years) and not be able to prove such during the first set of asylum proceedings. Under these conditions the first asylum proceedings will be more likely rejected.

Once the applicant gains access to the official legal charges letter brought by the authorities from the country of origin is the asylum seeker in the position to rely on such for the purpose of granting access to a new asylum procedure?

The hypothesys is as follows: the asylum seeker didn't initially know and didn't actually had access to the proof of the alleged criminal charges of national authorities from the country of origin during the first set of (asylum) finalized procedures, criminal charge where the punishment of imprisonment is expressly stated for the avoidance of military service (in the country of origin).

Additionally, the asylum seeker prevails on a legal opinion regarding the concrete legal negative consequences of the criminal charge letter stating the possible aggravating of the penalty based on the fact the asylum seeker didn't return to the country of origin during military conflict, taking advantage of military conditions.

Now when he or she is in possession of such proof can he or she be granted access to a second asylum procedure? Is this a „*new element*” in the view of Romanian law on asylum?

Would the legal opinion explaining the legal consequences of the official charges have any legal consequences as regards the expected punishment for the offence?

These are some of the questions this article aims to answer below.

2. Legal Framework and Clarifications

According to Romanian legislation there are two sets of requirements to be met: (2.1) the first ones for submitting the new application and the second ones (2.2) to be granted access to a new asylum procedure.

2.1 Which are the Requirements to be Met when Applying for Access to a New asylum procedure?

If the first set of proceedings is final and the asylum seeker is denied any form of international protection, the latter still has the possibility to apply for a new asylum request. The reason behind this is to ensure the effectiveness of non-refoulement principle. There must be a second chance for the asylum seeker. But in all jurisdictions there are some requirements that need to be met.

A ‘subsequent application’ as defined by art. 2 point q) as of the Directive 2013/32/EU of the European Parliament and of the Council, 26.06.2013 on common procedures for granting and withdrawing international protection (recast) (the ‘Directive’) is a new application for international protection lodged further to the final decision on a previous application, including situations in which the asylum seeker expressly withdrawn the application and situations in which deciding authority has rejected an application following its implicit withdrawal according to Article 28(1) as from the Directive.

Under the marginal heading "*Requirements for submitting an application for access to a new asylum procedure*" art. 88 para. (1) from Law No. 122/2006 on asylum in Romania transposing the Directive (‘Romanian Assylum Law’) provides for the personal submission of the application to gain access to a second asylum procedure and for the completion of the former asylum procedure.

Neither personally submission of the request nor finalizing the initial procedure poses any difficulties.

However, a clarification may be useful; the meaning of the second condition is that (i) either General Inspectorate for Immigration („GII”) denied the asylum request, and no judicial procedure was undertaken or (ii) the rejection of the asylum request by GII was challenged and final Court decision was to deny such challenge.

2.2 Which are the Requirements to be Met for Granting Access to a Second Asylum Procedure?

2.2.1 Other European Jurisdiction's Perspectives

According to Section 71 para (1) from *German Assylum Law* a new asylum application can be brought before Federal Office if the foreigner provides '*new elements or findings*', these are likely to support the case in view of a favourable outcome and the applicant was unable, for external reasons, to raise the grounds for the new application in the previous asylum procedure.

In *France*, two requirements must be met in the preliminary assessment of the admissibility of a subsequent request: (i) the alleged facts or circumstances must be "new" and (ii) their corresponding evidentiary value must determine a change on the assessment of the well-founded nature of the claim.

In *United Kingdom*, a 'fresh claim' can be composed of a supplementary submission enough different from the previous one if taken together with the previous one create a 'realistic prospect of success'.

In *Netherlands*, a new asylum application will be admissible if there are '*new elements or findings*' (so-called *nova criterion*).

In *Moldova*, Art. 78 para. 2 as from Law No. 270/18.12.2008 provides that a new request for asylum will be accepted if the following requirements are alternatively met: (i) new circumstances have arisen which could not have been presented by the asylum seeker in the previous examination of the application for reasons beyond his control, provided that these reasons are not the result of actions taken with the aim of obtaining a form of protection and (b) political, military, legislative or social changes have occurred in the country of origin which render the life or freedom of the asylum seeker in danger.

2.2.2 Romanian Law

According to art. 88 para. (2) from *Romanian Asylum Law* granting access to a fresh asylum procedure is dependent on:

- a) invoking new elements, not provided for external reasons and which appeared during or after the former procedure;
- b) after the moment former asylum procedure ended, "*there have been political, social, military, or legislative changes in the country of origin that are likely to have serious consequences for the applicant*".

The present article aims at and is limited to clarifying specific questions concerning the first alternative condition mentioned at point a) above.

Only if the access to the second procedure is granted – either by the Romanian authority *i.e.* GII, or by the Court seized with challenge against the decision given by GII – a fresh analysis on the merits of the new elements is to be checked by GII.

2.2.3 Comparison between Romanian and Moldavian Specific Regulation

It is easy to see that Romanian and Moldavian legislation are quite similar in regulating the requirements for granting access to a second procedure and even in the wording of corresponding legal provisions: (i) ‘new elements’ in Romanian law and ‘new circumstances’ in Moldavian law that should have arised; (ii) such were not presented for reasons ‘not attributable’ to the applicant and in Romanian law and for reasons ‘beyond his/her control’ in Moldavian law and (iii) political, military, legislative or social changes have occurred in the country of origin that are likely to have serious consequences for the applicant in Romanian law and which render the life or freedom of the asylum seeker in danger in Moldavian law. In this last sense, from the asylum seeker’s perspective, Romanian regulations seem to be more abstract and wider as opposed to Moldavian perspective which is more concrete and narrower.

2.2.4 Common Denominators of Examined Jurisdictions

At the first estimation level, access to another asylum procedure doesn’t seem to be natural. There has been the chance for the asylum seeker to ask for asylum in a first round of proceedings. However, access to a second procedure is a common place on every analized jurisdiction, rule which, most likely, originates from the Directive.

As each asylum procedure is generated by an asylum request, access to a subsequent procedure is subject to a request from the foreigner.

Something has to be new so that to be granted access to a new asylum procedure; (a) ‘alleged facts or circumstances’ under France jurisdiction; (b) ‘elements of findings’ under German and Netherlands jurisdiction; (c) ‘circumstances’ under Moldavian law; (d) ‘representations’ under UK law; (e) “*elements*” under Romanian law.

2.2.5 Major Differences Between Analized Jurisdictions

Up to a point, the requirements from all analized European jurisdictions are related.

However, some differences are also in place:

(i) Unlike Romanian legislation, the requirements provided by the legislation from France and from United Kingdom are linked with the perspectives of success of the second asylum request. This is a major discrepancy between analyzed jurisdictions; such criteria is sound and aimed at filtering claims with no chance or little chances of success; however, this kind of criteria doesn't exist under Romanian law, and I believe this is for the best; Romania doesn't have a tradition in such respect and, therefore, there are strong chances such a criterion would be construed in a very subjective and unpredictable manner by the Romanian Courts that would become easily used as a tool for rejecting requests for granting access to a second procedure.

(ii) In some jurisdictions the law expressly provides the requirement that the new elements are likely to bring the asylum seeker closer to a favourable decision (German law) and in other jurisdiction such is not provided by the law but is somehow implicitly, inherent to granting access to a second procedure (Romanian law).

(iii) The reasons for which that something new was not subject to first asylum request are outside foreigner's will. Some jurisdictions expressly provide such (i) '*unable, through no fault of their own*' (German law), (ii) '*reasons beyond his/her control*' (Moldavian law), (iii) '*reasons not attributable to him/her*' (Romanian law). However, some jurisdictions do not provide such (France and UK law).

3. Q&A's

3.1 Is there a Difference between 'New Elements' and 'New Reasons'?

As we've already seen, when it comes to the requirement of access to a second procedure, Romanian asylum law refers to '*new elements*' (very similar to Moldavian legislation which refers to '*new circumstances*', in fact synonymous phrases); the word '*elements*' is a much broader concept that includes "reasons" without being limited to such. Therefore, it is not necessary for the application's reasons itself to be new; what is crucial for gaining access to a second procedure is that something happened, in the meantime, and that something supports the reasons previously raised and which would have the potential — even if only theoretical — to lead to a change in the status of the asylum seeker.

According to Para. 36 as of the Directive, in lack of producing new elements tailored to the personal data of the asylum seeker, the existing *statu quo* will lead to a rejection of the application based on *res judicata* principle.

In the case at hand, the ‘new elements’ consists of the criminal charge brought by persecuting agent of the state of origin substantiated in an official document issued by the authorities of the origine state.

Therefore, the asylum seeker may still be granted access to a second procedure even though he or she states the same reasons as in first procedure but, additionally, produces new concrete evidence supporting such reasons. Such evidence should produce an impact on the eligibility for international protection.

Thus, in the hypothesis above, the Court's analysis must focus on the legal consequences that the new element has on the legal order laid down by the Court's decision in the first asylum procedure.

Under these circumstances, returning to the country of origin will not mean protection of such a country, but certain, real, concrete and imminent risk of imprisonment.

3.2 Is it Compulsory for the Asylum Seeker to not Raise the Criminal Charge Issue During the First Asylum Procedure?

From my previous experience, in this kind of cases with GII, this authority would argue that the reason why the asylum seeker could not return to his country of origin was already addressed during the first asylum procedure, such reason was directly or indirectly answered and, therefore, there is no reason to grant access to a second procedure.

Based on the explanations from previous division of this paper the law clearly allows the asylum seeker to use the fear of charge in first round of procedure and, afterwards, to bring the proof of such charge in the second procedure of asylum without the possibility of *res judicata* being applied.

Such proof was by hypothesis never analyzed either directly or indirectly in the first round of proceedings, given that the proof itself was not in fact produced as evidence.

The asylum seeker's fear of persecution by a government agent if returned to his or her country of origin becomes, considering the new circumstances sufficiently substantiated, both subjectively and objectively, to justify at least an examination of the asylum application, the principle of *rebus sic stantibus* being applicable to the asylum procedure.

Therefore, the proof of the criminal charge may open access to the second procedure even if the charge itself was already addressed during previous asylum procedure.

3.3 Is the Asylum Seeker Entitled to a Second Procedure if the Criminal Offence Existed Before the First Round of Procedures?

To answer this question, it is essential to make the crucial distinction between existence and knowledge of the existence of the criminal charge at the material time.

It is possible to be prosecuted without knowing it. For an asylum seeker who left the country of origin for years and who didn't return to the country of origin at all so that to be tracked by national authorities this appears to be even more conceivable and plausible.

Therefore, mere existence of a criminal charge during the first asylum procedure is not sufficient in itself to deny access to a second procedure based on concrete criminal charges.

What is important is that the asylum seeker didn't know that it even existed. It is all about the subjective nature of the circumstance (unknown or unavailable at the material time of the first set of proceedings) and not about the objective nature of such (circumstance).

If he or she didn't know, then there are grounds for a second procedure to be granted. On the contrary, if he or she knew that it existed, then access to a second procedure cannot be granted. Here there is similarity with Netherlands system of law where access to a subsequent procedure of asylum is admissible if relevant documents on which subsequent request is based became available after previous decision.

What happens if the criminal charge existed prior to the first asylum procedure? The question arises because of the wording of the Romanian Law on asylum which refers to "*new elements*" [...] 'which arose' strictly '*during or after the previous procedure*'.

It is where Court of Justice of the European Union's decision in case *XY v Bundesamt für Fremdenwesen und Asyl* should be brought to light. Mentioned European Court decided that Article 40(2) and (3) of Directive 2013/32 must be construed as meaning that the concept of '*new elements or findings*' which '*have arisen or have been presented by the applicant*', comprises elements or findings which arose subsequent to the moment when the previous application procedure became final and elements or findings which already existed before the procedure was concluded, but on which the applicant didn't prevail.

As already stated in official guides, it may be the case to be granted access to a second procedure should a relevant event took place during pending initial asylum procedure, but the foreigner became aware of such only after such procedure ended.

This was particularly addressed in Romanian case-law, where the Court essentially held that, even though the criminal charge existed well before first legal procedure (the official letter specified the date when the charge was brought, and, therefore, such existed during first set of asylum proceedings), the asylum seeker still doesn't know about such criminal charge so that to have the opportunity to present it as a reason of awarding international protection during first legal proceedings. Therefore, from this point of view, the asylum seeker is entitled to a second procedure.

By hypothesis, at the material time of the first asylum procedure, the applicant was not aware about being officially prosecuted for any crime. A new element was brought to substantiate a previous material fact.

To illustrate the above, in a case, in first round of proceedings the Court already examined asylum seeker's situation from the perspective of the risk of being incarcerated for a period of 3 years for not carrying out the compelling military service and, therefore, held that mere fear of persecution was unsubstantiated because it was not based on concrete facts that could give rise to a relevant fear from the perspective of asylum law, the asylum seeker not being accused and not providing evidence of such.

Once criminal investigation comes to light and is even officially confirmed in a document issued by the authorities of the country of origin, things radically change: these "new elements" worsen the asylum seeker's situation; therefore, it's clearly necessary to have a fresh review of the new situation.

The pre-existence of the criminal charge does not, in concrete terms, constitute an impediment in granting access to a new asylum procedure if it has not come to the attention of the applicant so that he can rely on it, for reasons not attributable to him or her.

It is worth mentioning that proving the moment when the asylum seeker became aware of the official charge is not that easy: it poses real difficulties in practice. This is because of the specific of such case: by hypothesis, the asylum seeker left his country of origin for a long time and, therefore, serving such a charge to him or her by prosecuting authorities from the country of origin appears to be or is rather impossible in practice. Frequently, such charges are served to a family member of the asylum seeker, which, in turn, informs the asylum seeker on such. The asylum seeker is faced with an indirect learning about the criminal charge. In this kind of case the standard of proof should be more relaxed and, therefore, mere facts presented by the asylum seeker

in the absence of elements that would affect overall credibility, be deemed as full proof. Prevailing on presumptions as means of proof is crucial.

3.4 Would Aggravating of Punishment Reasons be Analysed for the Purpose of Opening Access to a Second Asylum Procedure?

In practice, in this kind of cases, usually an asylum seeker would produce a legal opinion supporting the official criminal charge, showing that such may be aggravated, as reason for granting access to a second procedure.

Such may explain, according to the law in force in the state of origin, that criminal punishment can be aggravated by personal circumstances. For example, given the fact that the asylum seeker was not present on the territory of the state of origin during a military conflict may aggravate the punishment of such.

Would that count as reason for granting access to a second asylum procedure?

Romanian case-law is favorable to such; Courts held that knowing about the criminal charge in the context of the military events in country of origin and of not returning in the country of origin give the possibility of analyzing hypothetical incidence of aggravating circumstances raised through legal opinion filed by the asylum seeker. This does not mean that the gravity itself of an aggravating circumstance can be examined on the merits during this procedure, but only that the appearance of such can open access to a second procedure of asylum.

Therefore, the asylum seeker may only refer to the possible aggravating issue as a hypothesis having as support the legal opinion for the Court to realize that these arguments must be analyzed on the merits by GII.

The pertinence of such would be analyzed by IGI in the second asylum request.

3.5 Can the Authenticity of the “New Element” be called into Question?

Usually, the credibility of the asylum seeker and the authenticity of the documents will be checked based on a mix of (i) facts, (ii) timing, (iii) assumptions, (iv) and overall credibility of the asylum seeker.

Mere challenge of the authenticity of the official criminal charge letter is not enough; any such objection must be firmly and strongly challenged; pure speculations should not be enough in the context in which GII has the possibility to obtain information from the country of origin; therefore, authenticity should be called into question only if there are persuasive and compelling arguments and only after a good understanding of the legislation from the country of origin.

To illustrate this, in one case, Romanian Courts held that access to a second asylum procedure should be granted given that:

- (i) The criminal charge letter was produced in the original language of the country of origin (accompanied by translation of such having the notarised signature of the translator, in accordance with Romanian Civil Procedural Code rules),
- (ii) there were no specific elements raised by GII that would undermine the authenticity of the document,
- (iii) there were no reasons to assume that the lawyer would have issued the legal opinion based on an nonexistent letter of criminal charge, the law firm itself being credible given that the existence of the law firm in question was proved (*i.e.* by means of except concerning the lawyer's firm in public registry) and
- (iv) the application for granting access to a new asylum procedure was brought relatively short period of time after being aware of the charges brought against the asylum seeker and obtaining legal advice to understand the legal consequences of such.

3.6 Is Personal Situation and Professional Trajectory Relevant for Getting Access to a Second Asylum Procedure?

In practice, requests for access to second asylum procedure are substantiated by specifying the background of the asylum seeker and his professional evolution.

It is constant practice of the Romanian Courts that personal situation and professional trajectory cannot be deemed relevant for the purpose of accessing a new asylum procedure but can be used only as criteria for analyzing the overall credibility of the asylum seeker.

The explanation of such is that the conditions for granting access to a new asylum procedure are expressly provided by the law, and these elements are not part of such.

4. Conclusions

Present study revealed and reviewed several key legal issues stemming from the procedure of granting access to a subsequent asylum procedure based on a criminal charge letter issued by prosecuting agent from country-of-origin, preexistent but unknown at the material time of first round of asylum proceedings.

To be granted access to a second asylum procedure it is not necessary for the application's reasons itself to be new, but it is crucial that something happened after the previous proceedings ended to support the reasons previously raised and which would have the potential — even if only theoretical — to lead to a change in the status of the asylum seeker.

The asylum seeker's fear of persecution by a government agent if returned to his country of origin becomes — considering the new circumstances — sufficiently substantiated by proof of official charges became available, both subjectively and objectively, to justify at least an examination of the asylum application.

Given that the asylum seeker frequently gains access to the criminal charges indirectly from a family member (which was previously served with such by national authorities) the standard of proof in such respect should be more relaxed.

The pre-existence of the criminal charge does not, in concrete terms, constitute an insurmountable obstacle in granting access to a new asylum procedure if it has not come to the attention of the applicant so that he can rely on it, for external reasons.

Aggravating of the punishment may justify access to a fresh asylum procedure as a potentiality based on the appearance of such but the merit of such argument will be reviewed by GII only after the access to the second procedure is granted and, of course, only if it is granted.

Authenticity of the documents provided by the applicant will be checked based on a mix of (i) facts, (ii) timing, (iii) assumptions, and can be subject only to a firm and strong challenge based on persuasive and compelling arguments (and not based on pure speculations) and after a good understanding of the legislation from the country of origin.

Personal situation and professional trajectory of the asylum seeker is not relevant *per se* for getting access to a second asylum procedure, though could be used as criteria for analyzing the overall credibility of the asylum seeker.

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