



European Migration Network

Ad-Hoc Query on aspects of system of second instance in refugee cases

Requested by PL EMN NCP on 19th February 2007

Responses from CZ, DE, EE, IE, IT, CY, LV, HU, NL, AT, PL, PT, SV, SE, UK (15 in Total)

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1. Background Information

In the context of a planned amendments to Polish law on aliens, the following questions were posed by the Migration Policy Department of the Ministry of Interior and Administration to EMN NCPs, in order to obtain the feedback on some aspects of the second instance systems in refugee cases.

1. Is the second instance decision issued as a result of the court or administrative procedure?
2. Is there a specific body (authority) dealing with the second instance procedure? If so, what is its place within the national structures – is this body responsible (to which extent) in front of any higher level authority?

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2. Responses¹

		<i>[Ad-Hoc Query 1]</i>
	Belgium	
	Bulgaria	
	Czech Republic	<p>In the Czech Republic the Ministry of the Interior (the Department for asylum and Migration Policy) is responsible for the decision on asylum application in first instance. An appeal against the decision of the Ministry may be filed to the court - the second instance proceedings fall within the competence of the regional court in the jurisdiction of which the asylum applicant has the registered address. The court reviews the decision for legality - it does not decide on the asylum matter. Hence, the court can either confirm the decision of the administrative body or cancel it and refer it to new administrative proceedings.</p> <p>An extraordinary appeal remedy against the regional court decision is a cassation. Decision on cassation is in competence of the Supreme Administrative Court.</p>
	Denmark	
	Germany	<p>1. In Germany the decisions of the Federal Office for Migration and Refugees in refugee cases are subject to rehearing and rededecision by court procedure in general. If we classify the decision of the Federal Office first instance, the second instance would be the Administrative Courts (Verwaltungsgerichte). In the terms of German law, though, second instance means the Superior Administrative Courts (Oberverwaltungsgerichte, Verwaltungsgerichtshöfe). The third instance is the Federal Administrative Court (Bundesverwaltungsgericht).</p> <p>2. The Administrative Courts as specific bodies dealing with the reconsideration of decisions in refugee cases are not responsible to any higher level authority or subject to their directions, nor in first neither in second and third instance. According to the constitutional principle of the separation of powers and § 1 VwGO the jurisdiction in administrative cases is exercised by independent courts not linked to or connected with the administration as such in any way. Their decisions can of course be appealed against with the respective higher court. The decisions of the Federal Administrative Court are final and can only be contested by a complaint lodged with the Federal Constitutional Court (Bundesverfassungsgericht).</p>

¹ If possible at time of making the request, the Requesting EMN NCP should add their response(s) to the query. Otherwise, this should be done at the time of making the compilation.

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		<p>The possibilities of appeal (Berufung, Revision) are nevertheless limited. The Administrative Courts can not grant the appeal, it must be admitted by the Superior Administrative Court after an application. It will only be granted if the case is of general meaning or the decision of the lower court rests on diversions from the jurisdiction of the higher courts or severe procedural faults. The Superior Administrative Courts can grant the appeal against their own decisions (Revision) themselves, but they are not obliged to do so. The Federal Administrative Court (Bundesverwaltungsgericht) will then admit the appeal only after a complaint against the non-admittance of appeal if the case rests on a question of general legal meaning, a diversion from its own jurisdiction or that of the Federal Constitutional Court (Bundesverfassungsgericht) or severe procedural faults.</p> <p>In the Administrative and Superior Administrative Courts the refugee's case will be completely reviewed, reheard and redecided. The Federal Administrative Court, though, is only reconsidering the case on the grounds whether the decision of the Superior Administrative Court is in accordance to federal law.</p>
	Estonia	<p>To the refugee the Administrative courts are the second instance, after the competent authority (Estonian Citizenship and Migration Board www.mig.ee).</p> <p>Normally administrative courts hear administrative matters as courts of first instance. The authority of an administrative court, the procedure for having recourse to the court and the administrative procedure has been set out in the Code of Administrative Procedure (effective since 01.01.2000, only in Estonian language). There are two administrative courts in Estonia, the refugee can appeal to the Tallinn Administrative Court.</p> <p>The decisions of administrative courts are reviewed by courts of appeal in the second instance by way of appeal proceedings on the basis of an appeal, appeal against a ruling or a protest. In courts of appeal matters are reviewed collegially (conducted by a judicial panel comprising three judges).</p> <p>The Supreme Court is the court of the highest instance, which shall review decisions by way of cassation proceedings, i.e. the parties to the proceedings shall have the right to appeal to the Supreme Court against decisions of courts of appeal. The Supreme Court is also the constitutional review court.</p>
	Ireland	<p>In Ireland the first instance decision on an asylum application is made by the Office of the Refugee Applications Commission (ORAC). If the person decides to appeal they do so to the Refugee Appeals Tribunal (RAT). The RAT is a statutorily</p>

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		independent court of appeal under the aegis of the Department of Justice Equality and Law Reform. The RAT makes a decision in respect of the appeal which is forwarded to the Ministerial Decisions Unit (MDU). The MDU makes the official declaration of refugee status or denial of refugee status. The MDU is part of the Department of Justice, Equality and Law Reform. Concise information is available at www.orac.ie .
	Greece	
	Spain	
	France	
	Italy	According to the present legislation in Italy it's possible to appeal against the negative decision to the ordinary Court with territorial jurisdiction (even if you're abroad).
	Cyprus	<ol style="list-style-type: none"> 1. The second instance decision is a result of an administrative procedure. 2. The Refugee Reviewing Authority is an administrative body, dealing with the second instance procedure. During the examination of the appeal submitted by the applicant, (s)he should not be deported (the procedure has a suspensive effect). After a negative decision by the Reviewing Authority, the applicant may appeal to the High Court, however this does not have a suspensive effect.
	Latvia	<p>According to the amendments in the Asylum Law (came into force on 10 July 2006) the decision of the Department of Refugee Affairs of the Office of Citizenship and Migration Affairs (the first instance in the asylum procedure) can be appealed by asylum seeker to the District Administrative Court.</p> <p>The decision of the District Administrative Court is final and not subject to appeal except the cases of the loss or termination of refugee status.</p> <p>In case of the loss or termination of refugee status the decision of the District Administrative Court can be appealed to the Regional Administrative Court.</p>
	Lithuania	
	Luxembourg	
	Hungary	In Hungary the asylum procedure has two instances: one administrative and one judicial. This means that against the decision of

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		<p>the refugee authority (administrative instance) one can lodge an appeal to the Budapest Metropolitan Court, which has exclusive jurisdiction over asylum appeals.</p> <p>First/administrative instance: The Office of Immigration and Nationality is the only body responsible for deciding on asylum applications. This is an office under the professional direction of the Ministry of Justice and Law Enforcement which has country-wide jurisdiction. Within the Office the Directorate of Refugee Affaires is responsible for dealing with asylum cases and it has seven local offices.</p> <p>The Budapest Metropolitan Court is a normal judicial body (not an administrative court), but only one section of the this court trials asylum cases and there are special litigation rules for judging administrative procedures so asylum cases as well. The Budapest Metropolitan Court is entitled to alter the negative decision of the refugee authority so it has the competence to recognise an applicant as a refugee or a beneficiary of subsidiary protection. It can also agree with the decision or cease the decision of the refugee authority and order it to repeat its procedure.</p> <p>There is no such specific body) dealing with the second instance procedure. The Budapest Metropolitan Court deals with the second instance procedure. See description above under question 1.</p>
	Malta	
	Netherlands	<p>In the Netherlands we have a so called "intention procedure"; this means the following:</p> <ul style="list-style-type: none"> - first the Dutch Immigration and Naturalization Service (INS) makes a intentional decision; in the intentional decision we state what its view is on the case and the statements made by the asylum applicant. -then the asylum applicant is given the option to state his/her view on the intentional decision; usually he/she states why the Dutch authorities <i>should</i> grant him/her a residence permit - then the Dutch authorities make the formal decision in which they state their view and what the arguments are concerning the view of the asylum applicant. This decision is applicable. <p>Legal proceedings:</p>

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		<p>- When the asylum applicant does not agree with that formal decision he/she can appeal to court; some proceedings in asylum have suspensive effect and others don't. If not, then the applicant will also have to ask for a preliminary provision to the court. This is a procedure in which the asylum applicant will ask for a ruling by the court that will state the asylum applicant will not be expelled until his ruling in court has been finalised.</p> <p>- after the ruling in court, the asylum applicant will also be given the option to appeal to the High Court; this procedure has no suspensive effect; to be able to stay in the Netherlands to await the ruling in High court will require a preliminary provision as stated before.</p> <p>So, the INS will decide on the case; first by an intentional decision which is not applicable. The asylum applicant will be offered to state his/her view and then the INS will make the formal decision which is applicable in court.</p>
	Austria	<p>ad 1) The decision in second instance is subject to a procedure in front of the "independent asylum senate", which qualifies as a tribunal in the sense of Article 6 ECHR.</p> <p>ad 2) appeals against decision of the independent asylum senate to the Administrative High Court are eligible under certain conditions.</p> <p>The instances follow the following hierarchy: federal asylum office - independent asylum senate - administrative high court</p>
	Poland	<p>1 and 2)</p> <p>In Poland, the second instance decision in refugee cases belongs to the Council for Refugees. It is an <u>administrative</u> body processing appeals against decisions and complaints regarding rulings issued by the Chief of the Office for Foreigners (the first instance decision-maker).</p> <p>The Council has the rights of a higher level authority as defined in the wording of Polish Codex for Administrative Procedure. It is competent with regard to reopening of the procedures, overrides, changes or stating invalidity of the issued decisions. In addition, the Council analyses case law on granting/withdrawing refugee status, gathers information on refugees' countries of origin, cooperates with relevant national and international bodies in the field of migration and asylum and keeps registers of</p>

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		<p>complaints / appeals and also of decisions / rulings issued by the Council.</p> <p>The Council is composed of 12 members appointed by the Prime Minister for five year cadence, from among the persons possessing an outstanding knowledge and practical experience in the field of refugee matters, with at least half of them having higher educational background in law. Four members of the Council are appointed from among eight candidates presented by the Minister of Foreign Affairs and another four, from among eight candidates presented by the Minister of Justice. The Council enters judgments in configurations of three members (with an exception regarding manifestly unfounded applications where, in case of an appeal/complaint, only 1 member of the Council enters judgment). The decisions are taken by simple majority. While entering judgment, members of the Council are bound only by the law.</p>
	Portugal	<p>1. According to the Portuguese procedure on asylum, the decision in second instance is an administrative decision.</p> <p>2. The Serviço de Estrangeiros e Fronteiras (Aliens and Borders Service) is the authority responsible for the first instance decision of the asylum applications, according to the Portuguese Asylum Law (Law 15/98 of 26.03).</p> <p>The Law establishes a first phase for all applications during which a decision on the admissibility is taken, by the Director of the Aliens and Borders Office.</p> <p>If the decision is to admit the application, it moves to the second stage ("concession phase"). After its assessment by the Aliens and Borders Office, the case is submitted to the Minister for Internal Affairs, who decides to grant or refuse asylum, and that's the second instance decision.</p>
	Romania	
	Slovenia	<p>In the Republic of Slovenia asylum procedure is determined in the Law on Asylum. Currently we are drafting a new Law on International protection.</p> <p>Asylum procedure in the first instance is led by the Ministry of Interior (Section for Asylum). Against the decision of the Ministry of Interior, asylum seeker can appeal to the Administrative Court (second instance) and against decision of the Administrative Court to the supreme Court (third instance).</p> <p>All the evidences for the procedure in the Administrative Court against the first instance decision is prepared by the Ministry, as</p>

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		well as appeals to the Supreme Court , if Ministry disagrees with the Administrative Court decision.
	Slovak Republic	
	Finland	
	Sweden	<p>Please find attached information on the new appeal procedure in Sweden, where as of March 31 2006, appeals in aliens cases are transferred from the Aliens Appeal Board to Migration Courts. So, the short reply to your question is, second instance is subject of court procedure. The authorities are the three administrative courts of appeal in Stockholm, Gothenburg and Malmö; these have been designated as Migration Courts. An applicant who wishes to appeal against the decision of the Migration Courts does so to the Migration Court of Appeal, Stockholm.</p> <p>The attached information leaflet gives more information about the procedure.</p>
	United Kingdom	<ol style="list-style-type: none"> 1. The system in place for appeals of immigration decisions is governed by the Asylum and Immigration Tribunal (AIT). When a notice of appeal is served the AIT will list the case for a hearing. The appeal form gives an option for an appeal to be heard purely based on the papers submitted of the case or an oral hearing where witnesses can be questioned in court and given the opportunity to speak to the Immigration Judge. 2. The tribunal is governed by the Department of Constitutional Affairs. The Tribunal has powers to reconsider its own decisions or refer cases to the High court or Court of Appeal as higher courts of the land. <p>Please also find attached an 'appeal reconsideration process map' that you may find of interest.</p>
