Reports of Cases

OPINION OF ADVOCATE GENERAL
MEDINA
delivered on 6 February 2025 [1]

Case C-610/23 [Al Nasiria] [i]

FO
v
Ypourgos Metanastefsis kai Asylou

(Request for a preliminary ruling from the Dioikitiko Protodikeio Thessalonikis (Administrative Court of First Instance, Thessaloniki, Greece))

(Reference for a preliminary ruling – Asylum policy – International protection – Directive 2013/32 – Common procedures for granting and withdrawing international protection – Article 46 – Right to an effective remedy – Full and *ex nunc* examination of the appeal – Decision to dismiss the appeal without examining the merits – Failure of the applicant to appear in person during the examination of his appeal before the responsible body)

I. Introduction

1. The present case concerns the right to an effective remedy for applicants for international protection set out in Article 46 of Directive 2013/32/EU [2] against a decision rejecting their application. More particularly, it raises the question whether that provision precludes national legislation which establishes the presumption that an applicant who does not appear in person before the court or tribunal examining his or her appeal has brought the appeal improperly, leading to the dismissal of the appeal as manifestly unfounded without examination as to its merits.

[1] Original language: English.

[i] The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

[2] Directive of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

II. Legal context

A. European Union law

2. Chapter V of Directive 2013/32, entitled 'Appeals Procedures', comprises one article, namely Article 46. That article, entitled 'The right to an effective remedy', is worded as follows:

'1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:

(i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;

…

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, [3] at least in appeals procedures before a court or tribunal of first instance.

4. Member States shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy pursuant to paragraph 1. The time limits shall not render such exercise impossible or excessively difficult.

…

11. Member States may also lay down in national legislation the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his or her remedy pursuant to paragraph 1, together with the rules on the procedure to be followed.'

B. National law

1. Law 4375/2016

3. Article 4(1) of Nomos 4375/2016, Organosi kai leitourgia Ypiresias Asylou, Archis Prosfygon, Ypiresias Ypodochis kai Taftopoiisis, systasi Genikis Grammateias Ypodochis, prosarmogi tis Ellinikis Nomothesias pros tis diatakseis tis Odigias 2013/32/EE tou Evropaikou Koinovouliou kai tou Symbouliou 'schetika me tis koines diadikasies gia ti chorigisi kai anaklisi tou kathestotos diethnous prostasias (anadiatyposi)' (EE 2013 L 180), diatakseis gia tin ergasia dikaiouchon diethnous prostasias kai alles diatakseis (Law 4375/2016 on the organisation and operation of an asylum service, refugee authority and reception and identification service, establishing a General Secretariat for Reception and harmonising Greek legislation with the provisions of [Directive 2013/32], provisions governing the work of beneficiaries of international protection

[3] Directive of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

and other provisions) (FEK A' 51/3.4.2016), as amended by Nomos 4399/2016 (Law 4399/2016) ('Law 4375/2016'), establishes the Independent Appeals Committees. Those committees have their seat in Athens and territorial jurisdiction over Greece.[4] They are competent to hear appeals by applicants for international protection, in order to review, in law and in substance, decisions of the Ypiresia Asylou (Asylum Service, Greece) rejecting their application at first instance. A ministerial decision fixes the number of those committees.

2. Law 4636/2019

4. Directives 2011/95 and 2013/32 were transposed into the Greek legal system by Nomos 4636/2019, Peri Diethnous Prostasias kai alles diatakseis (Law 4636/2019 on international protection and other provisions; 'Law 4636/2019') (FEK A' 169/1.11.2019), applicable at the time in the main proceedings.

5. Pursuant to Article 92(1)(a) of Law 4636/2019, an applicant for international protection has the right to lodge an administrative appeal[5] before the Independent Appeals Committees against a decision rejecting an application for international protection at first instance as unfounded.

6. Furthermore, Article 97(2) of Law 4636/2019 provides that, during the procedure before the Independent Appeals Committees, the applicant must be present in person. The only cases in which the applicant is not required to appear in person are those listed in Article 78(3). Those are cases in which the applicant for international protection is staying at a reception or hosting centre or has been subject to a restriction on movement or an obligation to stay in a particular place. In such cases, the applicant may either be represented by a lawyer or may send an attestation signed by the supervisor of the reception facility or accommodation. If the applicant for international protection does not appear in person despite having been duly summoned, or does not send the attestation referred to in Article 78(3) of Law 4636/2019, it is presumed that the applicant brought the appeal merely in order to delay or frustrate the enforcement of an earlier or imminent decision to expel or otherwise remove him or her. In such a case, his or her appeal is dismissed as manifestly unfounded.

III. The dispute in the main proceedings and the questions referred for a preliminary ruling

7. On 28 February 2019, FO, a third-country national, lodged an application for international protection with the Perifereiako Grafeio Asylou Samou (Regional Asylum Office, Samos, Greece), on the ground that his life was in danger in his country of origin.

8. After it was established that he had been the victim of serious physical violence, FO appeared before the Perifereiako Grafeio Asylou Thessalonikis (Regional Asylum Office, Thessaloniki, Greece), on 24 February 2020. He stated that he was the subject of a tribal decision requiring him to be put to death and produced a document in support of his claim.

[4] It follows from Article 4(2) of Law 4375/2016 that a ministerial decision may establish Independent Appeals Committees in other regions of Greece and determine their territorial jurisdiction. However, there is no information in the national file before the Court to suggest that such a ministerial decision has been adopted.

[5] In Greek 'endikofanis prosfygi' (*ενδικοφανής προσφυγή*).

9. By decision of 18 May 2020, that regional asylum office rejected FO's application for international protection on the ground that his claims were considered unreliable. The document produced was not admitted as evidence due to the vague character of the statements made therein and the impossibility of verifying its authenticity.

10. On 27 August 2021, FO lodged an appeal against that decision with the responsible Independent Appeals Committee. At that time, he was informed that the date set for the examination of his appeal was 11 October 2021. He was also informed that, even if he were not summoned to a hearing, he would be obliged to appear in person on the date of the examination of his appeal, unless he was lawfully staying at a reception and identification centre or was subject to a restriction on movement or residence in a place outside the region of Attica (Greece).

11. FO did not appear in person before that committee on the date of the hearing. Therefore, after verifying that the applicant was not staying at a reception and identification centre and was not subject to a restriction on movement, and that there were no *force majeure* grounds, that committee dismissed the appeal as manifestly unfounded, on the basis of Article 97(2) of Law 4636/2019, without examining it as to its merits. In addition, pursuant to Article 22(4) of Nomos 3907/2011,[6] it imposed a return measure without voluntary departure from the country.

12. FO brought an action for annulment before the Dioikitiko Protodikeio Thessalonikis (Administrative Court of First Instance, Thessaloniki, Greece), which is the referring court, against that decision of the responsible Independent Appeals Committee, arguing that his appeal was unlawfully dismissed on the sole ground that he was absent from the hearing and without a sufficient examination having been carried out of the appeal on its merits, even though he was unable to attend the hearing due to financial difficulties which prevented him from travelling from Thessaloniki, where he resides, to Athens (Greece).

13. The referring court notes, as a preliminary point, that the purpose of the establishment of the Independent Appeals Committees was to guarantee the right to an effective remedy as provided for in Article 46 of Directive 2013/32 and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

14. In order to provide for the required procedural guarantees, the majority of those committees, described in the explanatory memorandum of Law 4399/2016 as 'quasi-judicial bodies', are composed of judges of the ordinary administrative courts. The members of those committees enjoy personal and functional independence in the performance of their duties.

15. In addition, the principle of impartiality is guaranteed, since those committees have third-party status in relation to the parties involved and do not represent the administration.

16. Moreover, the decisions given by those committees on administrative appeals, following a thorough examination of the law and substance of the contested administrative decisions and on the basis of a comprehensive, specific and precise statement of reasons, are binding on the parties, since they may be overturned only by means of legal proceedings, namely an action for annulment before an administrative court.

[6] Nomos 3907/2011, Idrysi Ypiresias Asylou kai Ypiresias Protis Ypodochis, prosarmogi tis ellinikis nomothesias pros tis diatakseis tis Odigias 2008/115/EK schetika me tous koinous kanones kai diadikasies sta krati-meli gia tin epistrophi ton paranomos diamenonton ypikoon triton choron kai loipes diatakseis (Law 3907/2011 establishing an Asylum and First Reception Service, harmonising Greek legislation with the provisions of Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals and other provisions (FEK A' 7/26.1.2011) ('Law 3907/2011').

17. In view of the above, while the Independent Appeals Committees are not courts or tribunals within the meaning of the Syntagma (Constitution of Greece), they are nevertheless committees exercising judicial functions within the meaning of Article 89(2) of the Syntagma (Constitution of Greece).

18. The referring court observes that Directive 2013/32 does not contain any specific rules on the appearance of applicants before the body examining the effective remedy referred to in Article 46 of that directive or the consequences of failure to comply with such a procedural obligation. It could therefore be concluded that the obligation to appear in person laid down in national law and the provision for the dismissal of the appeal as manifestly unfounded in the event of non-compliance are covered by the principle of the procedural autonomy of Member States, subject, however, to the principles of equivalence and effectiveness.

19. As regards the principle of equivalence, the referring court seeks to ascertain whether the proceedings at issue are to be compared with proceedings before administrative authorities hearing administrative appeals or with the procedure applicable to an appeal on the merits or an action for annulment before an administrative court. In those other administrative or judicial proceedings, appearance in person is not mandatory and a lawyer may represent the applicant.

20. As regards the principle of effectiveness, the referring court notes that it could be argued that Article 97(2) of Law 4636/2019 is justified on grounds of the orderly and expeditious conduct of the procedure for the examination of applications for international protection. The requirement provided for therein ensures that applicants for international protection retain an interest in the outcome of their appeal and are still present in Greek territory.

21. On the other hand, it could also be argued that that provision makes the application of EU law impossible or excessively difficult. First, it imposes a disproportionate burden on applicants for international protection, since they are required (unless they fall within one of the exceptions provided for in Article 78(3) of Law 4636/2019) to travel to the seat of the Independent Appeals Committees in Athens merely in order to register their presence and not to be heard. A lawyer or other authorised person cannot represent the applicants for that purpose. Second, it provides that, as a consequence of failure to comply with that procedural requirement, there is a presumption that the appeal has been improperly brought and, therefore, that it must be dismissed as manifestly unfounded.

22. The referring court further observes that Directive 2013/32 provides that failure to comply with communication obligations may lead to a presumption that the application is withdrawn, but not that it is rejected as unfounded. Such a rejection presupposes a prior examination of the request. The referring court also observes that rejecting an application as manifestly unfounded has serious consequences, namely the preclusion of a period of voluntary departure and the imposition of a ban on entry.

23. Lastly, the factual basis of the presumption in Article 97(2) of Law 4636/2019 does not appear to correspond to common experience or logic. Indeed, failure to appear in person before the responsible Independent Appeals Committee may be due to reasons unconnected with an intention to frustrate or delay the enforcement of a previous or imminent expulsion order or removal of the applicant. The referring court notes that the decisions of the relevant committees are not taken on the same day and that, consequently, the appearance of applicants for international protection before them on the day of the hearing does not facilitate the enforcement of the return order if the appeal is dismissed.

24. In those circumstances, the Dioikitiko Protodikeio Thessalonikis (Administrative Court of First Instance, Thessaloniki, Greece) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Given the importance of the remedy referred to in Article 46 of Directive 2013/32, may the legislature infer a presumption that the appeal has been improperly brought and, as a consequence, dismiss the appeal, without a full and *ex nunc* examination of the case, as manifestly unfounded (which also results in the period for voluntary departure referred to in Article 22(4) of Law 3907/2011 and Article 7 of Directive 2008/115[7] not being granted) on the ground that the applicant [for international protection] did not appear in person before the committee examining the case?

(2) (a) If it were to be held that this matter is covered by the principle of the procedural autonomy of the Member States, should the comparable national procedural rules, in the context of the examination of the principle of equivalence, be considered to be those governing proceedings before administrative committees hearing appeals under national law or the procedural rules governing the bringing of substantive actions (or applications for annulment) before administrative courts?

(b) Is it consistent with the principle of effectiveness of EU law and, in particular, the effective exercise of the right to an effective remedy to lay down an obligation to appear in person (or to send the attestation referred to in Article 78(3) of Law 4636/2019 in the cases provided for)? In that context, furthermore, is it relevant whether the presumption that the right of appeal has been improperly brought, provided for in Article 97(2) of Law 4636/2019, corresponds to the lessons of general experience and, in the context of the examination (at first instance) of applications for international protection, that the same conduct would lead to a presumption of implicit withdrawal rather than a rejection of the application as manifestly unfounded?'

25. Written observations were submitted to the Court by the Greek Government and the European Commission.

IV. Assessment

A. Preliminary observations on the categorisation of the Independent Appeals Committees as 'court[s] or tribunal[s]'

26. The questions of the referring court concern the national legislation implementing Article 46 of Directive 2013/32 providing for a procedure of appeal against the decisions of the determining authority.[8]

27. Article 46(1)(a) provides that Member States must ensure that applicants have the right to an effective remedy before a court or tribunal against, in particular, a decision taken on their application for international protection.

[7] Directive of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

[8] Point (f) of Article 2 of Directive 2013/32 defines the 'determining authority' as any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases.

28. Recital 50 of Directive 2013/32 states that it reflects a basic principle of Union law that, inter alia, the decisions taken on an application for international protection must be subject to an effective remedy before a court or tribunal.

29. It follows that the right to an effective remedy provided for in Article 46 must be exercised before a 'court or tribunal'.

30. The national legislation applicable in the case in the main proceedings establishes the Independent Appeals Committees, which have jurisdiction to hear appeals brought by applicants for international protection in order to review, in law and in substance, decisions rejecting their applications at first instance. [9]

31. Before examining specific elements of the national legislation in view of Article 46 of Directive 2013/32, I consider it important to ascertain whether the Independent Appeals Committees can be regarded as 'court[s] or tribunal[s]' within the meaning of paragraph 1 of that article such as to guarantee the right to an effective remedy. [10]

32. In order to determine whether a body is a 'court or tribunal' for the purposes of the exercise of an effective remedy against a decision taken on an application for international protection, the Court has referred to the same criteria as those developed in the context of determining whether a body making a reference is a 'court or tribunal' for the purposes of Article 267 TFEU. [11]

33. According to the Court's settled case-law with regard to that issue, which is a question governed by EU law alone, the Court takes account of a number of factors, such as, inter alia, whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. [12]

34. More particularly, in the judgment in *D. and A.*, the Court examined whether the Refugee Appeals Tribunal (Ireland) satisfied the abovementioned criteria and found that the national legal system in question in that case provided for an effective remedy for applicants for asylum. In that regard, the Court took particular account of the fact that the decisions of the Refugee Appeals Tribunal could be appealed before the High Court (Ireland). [13]

35. In the present case, the referring court explains, at length, the procedural guarantees provided for in the national legislation establishing the Independent Appeals Committees, namely Law 4375/2016. The referring court considers that those committees satisfy all the criteria referred to in point 33 of the present Opinion in order to be considered as 'court[s] or tribunal[s]'.

36. There is nothing in the file before the Court to raise any doubts as to the fulfilment of those criteria.

[9] See point 3 of the present Opinion.

[10] Indeed, if the body in question could not be categorised as a 'court or tribunal' for the purposes of Article 46(1), there would be no need to examine the specific aspects of the remedy set out in national law.

[11] See, to that effect, judgment of 31 January 2013, *D. and A.* (C-175/11, EU:C:2013:45, paragraph 83). In that judgment, the Court interpreted the predecessor to Article 46 of Directive 2013/32, namely Article 39(1)(a) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13). That provision governed the right to an effective remedy before a 'court or tribunal'. The first sentence of recital 27 of Directive 2005/85 stated that the decisions taken on, inter alia, an application for asylum must be subject to an effective remedy before '*a court or tribunal within the meaning of [Article 267 TFEU]*' (emphasis added).

[12] Judgment of 7 May 2024, *NADA and Others* (C-115/22, EU:C:2024:384, paragraph 35 and the case-law cited).

[13] Judgment of 31 January 2013, *D. and A.* (C-175/11, EU:C:2013:45, paragraph 103).

37. As regards, in particular, the criterion of independence, the referring court explains that the preamble to Law 4375/2016 categorises the Independent Appeals Committees as 'quasi-judicial' bodies which are composed primarily of judges and whose members enjoy personal and functional independence. [14] It also points out that the decisions of those committees are subject to judicial review before the ordinary administrative courts. The referring court concludes that, while the Independent Appeal Committees are not courts or tribunals within the meaning of the Syntagma (Constitution, Greece) they are nevertheless committees exercising judicial functions within the meaning of Article 89(2) of the Syntagma (Constitution, Greece). [15]

38. In view of the above, there is nothing capable of questioning the categorisation of the Independent Appeals Committees as 'courts or tribunals' for the purposes of Article 46 of Directive 2013/32.

B. The questions referred for a preliminary ruling

39. By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 46 of Directive 2013/32, read in the light of the principles of equivalence and effectiveness, and Article 47 of the Charter, must be interpreted as precluding national legislation which, in case of failure of an applicant for international protection to comply with a procedural obligation to appear in person before the body examining his or her appeal brought against a decision taken on his or her application, establishes a presumption that the appeal has been improperly brought and that the appeal must be dismissed as manifestly unfounded, without examination of the case as to its merits.

40. The national legislation applicable in the case in the main proceedings sets out an obligation for applicants for international protection to appear in person before the body examining their appeal, namely the Independent Appeals Committees. The order for reference indicates that the obligation to appear in person before those committees does not mean that the latter will hear the applicant.

41. That national legislation provides for certain exceptions to the obligation to appear in person, namely when the applicant is staying at a reception or hosting centre or when he or she has been subject to a restriction on movement. In those cases, the obligation to appear in person is replaced by the obligation to be represented by a lawyer or to send the attestation provided for in that legislation. Moreover, the obligation to appear in person is suspended in case of *force majeure* such as serious illness or serious physical invalidity or insurmountable circumstances. [16] Save for those exceptions, if the applicant does not comply with the obligation to appear in person, the national legislation provides for the presumption that the appeal has been improperly brought merely in order to delay or frustrate the enforcement of an earlier or imminent decision to expel or remove the applicant. The consequence of that presumption is that the appeal is dismissed as manifestly unfounded without examination as to its merits.

[14] I note that following the amendment of Article 5 of Law 4375/2016, currently all members of the Independent Appeals Committees are judges.

[15] See judgment of the Symvoulio tis Epikrateias (Council of State, Greece) (plenary) No 1580/2021, EL:COS:2021:1008A1580.20ED312, paragraph 14.

[16] In such a case, the obligation to appear is suspended for as long as the relevant situation persists. The relevant provision, namely the second paragraph of Article 78(3) of Law 4636/2019, is included in the submissions of the Greek Government.

42. In accordance with its title, Article 46 of Directive 2013/32 concerns the right to an effective remedy for applicants for international protection. Article 46(1) thereof guarantees that right for applicants in challenging decisions taken on their application, including a decision considering an application to be unfounded.

43. Article 46(3) of that directive defines the scope of the right to an effective remedy by specifying that Member States bound by that directive must ensure that the court or tribunal before which the decision relating to the application for international protection concerned is contested carries out 'a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive [2011/95]', at least in appeals procedures before a court or tribunal of first instance. [17]

44. It should also be recalled that it is apparent from the case-law of the Court that the characteristics of the remedy provided for in Article 46 of Directive 2013/32 must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection. Article 47 of the Charter is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to confer on individuals a right which they may rely on as such. The same must hold true for Article 46(3) of that directive, read in the light of Article 47 of the Charter. [18]

45. That said, Article 46(4) of Directive 2013/32 leaves to Member States the task of providing the necessary rules for applicants for international protection to be able to exercise their right to an effective remedy. [19]

46. It is worth noting that Article 46 makes no provision for an obligation for applicants to appear in person before the court or tribunal having jurisdiction to hear their appeal. What Article 46(4) does confer is discretion on Member States to establish the necessary rules for the exercise of the right to an effective remedy of applicants for international protection, which may include such a procedural obligation.

47. While the Commission and the Greek Government agree on that statement, they have diverging views as to whether Article 46 allows Member States to provide for the specific consequences set out in the national legislation in the event of infringement of the obligation to appear in person, namely the presumption that the appeal has been improperly brought and the dismissal of the appeal as manifestly unfounded, without examination as to the merits.

48. The Commission argues, essentially, that such consequences are contrary to Article 46(3) of Directive 2013/32. The Commission also maintains that the dismissal of an appeal as manifestly unfounded without an examination of the appeal as to its merits is contrary to Articles 13 and 18 of Directive 2011/95. It argues that it follows from those provisions that Member States must grant the applicant refugee status or the status of subsidiary protection when he or she qualifies for that status in accordance with that directive. They do not have the discretion to refuse that status on the ground that the applicant did not appear in person on the day of examination of his or her appeal.

[17] Judgment of 4 October 2024, *Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky* (C-406/22, EU:C:2024:841, paragraph 85).

[18] Judgment of 4 October 2024, *Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky* (C-406/22, EU:C:2024:841, paragraph 86).

[19] Judgment of 9 September 2020, *Commissaire général aux réfugiés et aux apatrides (Rejection of a subsequent application – Time limit for bringing proceedings)* (C-651/19, EU:C:2020:681, paragraph 33).

49. By contrast, the Greek Government submits, essentially, that the presumption provided for by national legislation that the appeal has been improperly brought, with the consequence that it must be dismissed as manifestly unfounded in the event of failure to appear in person, is based on Article 46(11) of Directive 2013/32. That government argues that it follows from the latter provision that Member States may lay down not only the conditions under which it can be presumed that an applicant has implicitly withdrawn or abandoned his or her remedy but also the rules on the procedure to be followed in such cases.

50. In order to assess those positions, I will first examine whether Member States are allowed to provide for a presumption that an appeal has been improperly brought before examining the presumption set out in the national legislation applicable.

1. The possibility for Member States to provide for a presumption that an appeal has been improperly brought

51. In the first place, it follows from Article 46(3) of Directive 2013/32 that the court or tribunal hearing the appeal has an obligation to carry out a full and *ex nunc* examination required by that provision of both facts and points of law, at least in appeals procedures before a court or tribunal of first instance. [20]

52. However, Article 46(3) must be read together with Article 46(4) and Article 46(11).

53. As pointed out above, [21] it follows from Article 46(4) that Member States establish the rules for the exercise of the remedy, which may include an obligation to appear in person. The possibility for a Member State to provide for time limits or other necessary rules for the applicant to exercise his or her remedy entails the possibility of providing for the consequences of a failure to comply with those time limits or other rules.

54. In the second place, Article 46(11) of Directive 2013/32 allows Member States to lay down the conditions under which it can be presumed that an applicant has 'implicitly withdrawn or abandoned his or her remedy … together with the rules on the procedure to be followed'.

55. For the purpose of interpretation of that provision, it is important, at the outset, to clarify the relevance of Article 28(1) and Article 32 of Directive 2013/32. Article 28(1) provides for the procedure to be followed in the event of implicit withdrawal or abandonment of the application. In that event, Member States must ensure that the determining authority takes a decision either to discontinue the examination or, provided that the determining authority considers the application to be unfounded on the basis of an adequate examination of its substance, to reject the application. Article 32(1) provides that Member States may only consider an application to be unfounded if the determining authority has established that the applicant does not qualify for international protection pursuant to Directive 2011/95.

[20] See, to that effect, judgment of 26 July 2017, *Sacko* (C-348/16, EU:C:2017:591, paragraph 44).

[21] Points 45 and 46 of the present Opinion.

56. Article 32(2) provides that, in cases of unfounded applications in which any of the circumstances listed in Article 31(8) apply (including when the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his or her removal [22]), Member States may also consider an application to be manifestly unfounded, where it is defined as such in the national legislation.

57. However, as observed, in essence, by the Greek Government and the Commission, Article 28(1) and Article 32 of Directive 2013/32 concern the procedures for the examination of the application *at first instance by the determining authority*. Article 46 concerns *the appeal procedure before a court or tribunal* against a decision of the determining authority. Those two procedures are distinct.

58. Thus, the rules laid down in Directive 2013/32 with regard to manifestly unfounded applications and the presumptions to be established before the determining authority do not concern judicial procedures. This can also be confirmed by the absence of any reference in Article 46 to Article 28(1) and Article 32. In the procedure before a court or tribunal hearing an appeal, Article 46(11) allows Member States to provide for a presumption that an applicant has implicitly withdrawn or abandoned his or her remedy, the conditions for those presumptions and also the rules on the procedure to be followed.

59. That clarification being made, the next issue is whether a Member State may establish a presumption that an appeal has been improperly brought merely in order to delay or frustrate the enforcement of an earlier decision to remove him or her. While it is true that Article 46(11) does not refer specifically to such a presumption, it does not preclude Member States from providing for presumptions that pursue similar objectives with a presumption of implicit withdrawal or abandonment of the remedy. As observed, in essence, by the Greek Government, a presumption that an appeal has been improperly brought is intended to ensure that applications for international protection are dealt with expeditiously and to safeguard the efficiency of the judicial system, so that it can concentrate on those applicants who have a genuine interest in the outcome of their appeal. The smooth and efficient progress of the procedure of examination of applications for international protection and the expeditious processing of applications is in the interests of both the Member States and the applicants for such protection. [23]

60. Thus, where so provided by national law, the scope of a presumption of implicit withdrawal or abandonment may encompass a presumption that the appeal is improperly brought. In accordance with Article 46(11), Member States may then determine the conditions for that presumption to be established and the rules on the procedure to be followed.

61. In that regard, in accordance with the Court's settled case-law, in the absence of EU rules on the matter, it is for the national legal order of each Member State to establish procedural rules for actions intended to safeguard the rights of individuals, in accordance with the principle of procedural autonomy, on condition, however, that those rules are not less favourable than those governing similar domestic situations (the principle of equivalence) and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness). [24]

[22] See Article 31(8)(g) of Directive 2013/32.

[23] See, to that effect, judgment of 9 September 2020, *Commissaire général aux réfugiés et aux apatrides (Rejection of a subsequent application – Time limit for bringing proceedings)* (C-651/19, EU:C:2020:681, paragraphs 54 and 55).

[24] Judgment of 9 September 2020, *Commissaire général aux réfugiés et aux apatrides (Rejection of a subsequent application – Time limit for bringing proceedings)* (C-651/19, EU:C:2020:681, paragraph 34).

62. Moreover, in accordance with the case-law referred to in point 44 above, the conditions under which such a presumption can be established and the rules on the procedure to be followed must be determined in a manner that is consistent with Article 47 of the Charter.

63. It is in the light of those considerations that I will examine the presumption provided for in the national legislation.

2. The presumption provided for in the national legislation in the light of the principles of equivalence and effectiveness and of Article 47 of the Charter

64. In the present case, the necessary and sufficient condition to infer the presumption that the appeal has been improperly brought is the failure of the applicant to appear in person before the responsible Independent Appeals Committee. [25] The procedure to be followed in such a case is the dismissal of the appeal as manifestly unfounded without examination as to its merits and the imposition of a return measure without voluntary departure.

65. It follows from the observations above that the conditions for a presumption that an appeal has been improperly brought and the rules on the procedure to be followed fall within the scope of the procedural autonomy of the Member States, subject to regard for the principles of equivalence and effectiveness and observance of Article 47 of the Charter. [26]

66. As regards, first, the principle of equivalence, in accordance with the Court's settled case-law, regard for that principle requires equal treatment of claims based on a breach of national law and of similar claims based on a breach of EU law. [27]

67. It is therefore appropriate, on the one hand, to identify the comparable procedures or actions and, on the other hand, to determine whether the actions based on national law are handled in a more favourable manner than comparable actions concerning the safeguarding of the rights which individuals derive from EU law. [28]

68. With regard to the comparability of actions, it is for the national court, which has direct knowledge of the detailed procedural rules applicable, to ascertain whether the actions concerned are similar as regards their purpose, cause of action and essential characteristics. [29]

69. So far as concerns the similar handling of the actions, it must be borne in mind that every case in which the question arises as to whether a national procedural rule governing actions based on EU law is less favourable than those governing similar domestic actions must be analysed by the national court taking into account the role played by the rules concerned in the procedure as a whole, as well as the operation and any special features of those rules before the various national bodies. [30]

[25] Unless one of the exceptions set out under Article 78(3) of Law 4636/2019 applies.

[26] See points 60 to 62 above.

[27] Judgment of 9 September 2020, *Commissaire général aux réfugiés et aux apatrides (Rejection of a subsequent application – Time limit for bringing proceedings)* (C-651/19, EU:C:2020:681, paragraph 36).

[28] Ibid., paragraph 37.

[29] Ibid., paragraph 38.

[30] Ibid., paragraph 39.

70. In this instance, the referring court seeks to ascertain whether the proceedings before the Independent Appeals Committees must be compared with the procedure before administrative bodies examining administrative appeals or with the procedural rules governing an appeal on the merits or an action for annulment before an administrative court. The referring court notes that, in those other appeals or actions, the physical presence of the applicant is not mandatory and representation by a lawyer is possible.

71. The Greek Government submits that the appeal before the Independent Appeals Committees is specific to applicants for international protection and that the proceedings at issue may not be compared to other procedures before the administrative authorities or other jurisdictions. That government also observes that the objective of the requirement to appear in person is not the same as to the rules that provide for the representation of an applicant by a lawyer. The objective of the requirement to appear in person consists in proving the physical presence of applicants on the national territory.

72. Although it is for the national court to assess the comparability and the similar handling of the actions, it can be noted that the appeal before the Independent Appeals Committees can only be brought at the seat of those committees, which is in Athens. The obligation to comply with the procedural obligation to appear can only be fulfilled by appearing before the latter. Subject to verification by the national court, it appears that the obligation of an applicant to appear exclusively before one court or tribunal in the capital of the country does not apply in other administrative or judicial procedures. The specificity of the appeals of applicants for international protection invoked by the Greek Government does not appear to explain why the requirement to appear in person can be fulfilled only before one court or tribunal in the capital of the country. The national court can, thus, also assess from that perspective whether the actions are comparable in order to conclude whether the principle of equivalence has been observed.

73. As regards, second, the question whether national legislation such as that at issue in the main proceedings complies with the condition inherent in the principle of effectiveness, it must be borne in mind that, in accordance with the Court's settled case-law, every case in which the question arises as to whether a national procedural provision renders the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary, inter alia, to take into consideration, where relevant, the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure. [31]

74. It is clear from the order for reference and from the observations of the Greek Government that the reasons for the mandatory physical presence of the applicant are linked, first, to ensuring that the applicants bringing the appeal have a genuine interest in the appeal and are still in national territory when the appeal is heard. The Greek Government maintains, more particularly, that the aim is to prevent 'asylum shopping' by applicants. Second, those reasons relate, more generally, to the sound administration of justice, in order to ensure that appeals brought improperly do not become an obstacle to the effective handling of genuine appeals.

75. It follows from the observations above that it is legitimate for a Member State to seek to ensure that applicants have a genuine interest in the appeal. [32]

[31] Judgment of 9 September 2020, *Commissaire général aux réfugiés et aux apatrides (Rejection of a subsequent application – Time limit for bringing proceedings)* (C-651/19, EU:C:2020:681, paragraph 42 and the case-law cited).

[32] See point 59 of the present Opinion.

76. However, the disputed national rule provides for a presumption to be inferred that an appeal is improperly brought on the basis of a mere failure to comply with a rule of appearance in person before the court or tribunal hearing the appeal, without ensuring that applicants have a genuine possibility of complying with that requirement.

77. The order for reference indicates that the Independent Appeals Committees are based in the capital of the country, Athens. An applicant who does not reside in Athens (and unless one of the exceptions set out in the relevant legislation applies) must travel to the seat of those committees by his or her own financial means, merely in order to appear in person and not to be heard. There is no indication in the file before the Court that the material means to travel are provided to applicants or that the relevant costs of travelling are covered. However, for an applicant for international protection, the cost of travelling from his or her place of residence to the capital [33] and the cost of accommodation in Athens can be significant. Moreover, subject to the exceptions set out in national law, [34] and unless there is a situation of *force majeure*, [35] national legislation does not provide for alternative methods allowing applicants to prove that they are present in Greek territory and retain an interest in their appeal.

78. Under those conditions, an applicant who fails to appear in person before the responsible Independent Appeals Committee due to financial hardship bears the severe consequences of the presumption that the appeal is brought improperly, even though the reasons for the failure to appear are unrelated to an improper exercise of the remedy.

79. Moreover, applicants falling under the exceptions of Article 78(3) of Law 4636/2019 are permitted to prove their presence by alternative means.

80. The Greek Government explains that the applicants falling under those exceptions do not have an obligation to appear in person and that that obligation is replaced by the obligation to send the attestation provided for by the legislation. This, in my view, does not sufficiently explain, however, why applicants under an obligation to appear in person are not allowed to make use of alternative means of proving their presence in Greek territory and the genuineness of their appeal.

81. The exceptions laid down in Article 78(3) of Law 4636/2019 show that there are other ways for an applicant to prove his or her presence in the country, such as appearing before an official authority (such as the police station or another authority or nearby jurisdiction) in the place where he or she resides.

82. The order for reference further indicates that the obligation to appear in person is not an appropriate means of ensuring that the applicant is not applying merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his or her removal. In that regard, the referring court states that account must be taken of the fact that the decisions of the Independent Appeals Committees are not adopted on the same day and that the physical presence of the applicant does not facilitate the enforcement of the return measure in the event that the application is rejected.

[33] The distance can be considerable; in the case of the applicant in the main proceedings who resides in Thessaloniki, the distance for him to travel to Athens is approximately 500 km.

[34] Point 6 of the present Opinion.

[35] The obligation to appear is suspended for as long as the situation of *force majeure* persists.

83. In such circumstances, a presumption that the appeal is improperly brought by an applicant who fails to appear in person, without providing for alternative means of proving the applicant's presence in the territory and without providing for the material means to enable compliance with the requirement of physical presence, appears to render the exercise of the remedy excessively difficult.

84. The procedural rule in question does not, therefore, appear to be compatible with the principle of effectiveness.

85. Moreover, the establishment of a presumption that an appeal has been improperly brought and its dismissal as manifestly unfounded might prejudice the right to effective judicial protection in accordance with Article 47 of the Charter. In that regard, it must be recalled that the principle of effective judicial protection of the rights which individuals derive from EU law comprises various elements, in particular the right of access to a court or tribunal. [36]

86. According to the Court's settled case-law, fundamental rights, such as the right of access to a court, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not entail, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed. [37]

87. In the present case, as already pointed out, [38] the aim of the presumption established by national legislation is to ensure that applicants for international protection are present in the territory and that they retain a genuine interest in the appeal and, more broadly, to safeguard the efficiency and expediency of judicial proceedings for all applicants for international protection.

88. However, in the light of the proceedings taken as a whole and all the relevant circumstances developed above, [39] the establishment of a presumption that an appeal has been improperly brought in case of failure to comply with the obligation of the applicant to appear in person appears disproportionate in relation to the objectives pursued. Indeed, the applicants for international protection who do not reside in the capital of the country are not provided with the material means to enable them to travel to the seat of the Independent Appeals Committees, which is in in that capital, so as to comply with the requirement of physical presence. Moreover, unless they fall under one of the exceptions restrictively set out in national law, the applicants have no alternative means of proving their presence in the territory and the genuineness of their appeal. In those circumstances, the establishment of a presumption that an appeal is improperly brought on grounds of failure to comply with the obligation to appear in person disproportionately affects those applicants for international protection who are in a precarious financial situation or are experiencing other difficulties in relation to the attempt to appear in person. [40]

89. Thus, the right of access to a court or tribunal and the right to an effective remedy for applicants for international protection appears to be disproportionately hindered.

[36] See, to that effect, judgment of 26 July 2017, *Sacko* (C-348/16, EU:C:2017:591, paragraph 32).

[37] See, to that effect, judgment of 26 July 2017, *Sacko* (C-348/16, EU:C:2017:591, paragraph 38).

[38] See points 74 and 75 of the present Opinion.

[39] Points 76 to 82 of the present Opinion.

[40] To the extent that those difficulties do not amount to a situation of *force majeure*, which the applicant has to prove.

90. In view of the above, I take the view that Article 46 of Directive 2013/32, read in the light of the principles of equivalence and effectiveness and Article 47 of the Charter, must be interpreted as precluding national legislation which, in case of failure by an applicant for international protection to comply with a procedural obligation to appear in person before the body examining his or her appeal against a decision taken on his or her application, establishes a presumption that the appeal has been improperly brought and that the appeal should be dismissed as manifestly unfounded, without examination of the case as to its merits, to the extent that it does not provide for alternative means of proving the applicant's presence in the territory.

V. Conclusion

91. In view of all of the above, I propose that the Court answer the questions referred by the Dioikitiko Protodikeio Thessalonikis (Administrative Court of First Instance, Thessaloniki, Greece) as follows:

Article 46 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, read in the light of the principles of equivalence and effectiveness and Article 47 of the Charter of Fundamental Rights of the European Union,

must be interpreted as precluding national legislation which, in case of failure by an applicant for international protection to comply with a procedural obligation to appear in person before the body examining his or her appeal against a decision taken on his or her application, establishes a presumption that the appeal has been improperly brought and that the appeal should be dismissed as manifestly unfounded, without examination of the case as to its merits, to the extent that it does not provide for alternative means of proving the applicant's presence in the territory.