



LEGAL OVERVIEW

LITHUANIAN CASE LAW IN 2022

#3

MAY 2022

Lithuanian Red Cross is a nongovernmental organization which has been providing social, humanitarian, and legal assistance to refugees, asylum seekers, stateless persons, and other migrants irrespective of their legal status for over 25 years.

Legal overviews have been prepared within the framework of the Lithuanian Red Cross initiative, which aims to monitor the practice of Lithuanian courts in the area of migration and asylum and to share information on some significant decisions. The overviews include relevant extracts from this year's case law and additional explanations that are not legally binding.

The commentaries provided in the overviews are intended to explain the wider context and potential impact of the judgements covered on the development of case law. In providing these commentaries, the lawyers of the Lithuanian Red Cross rely on their subject matter competency and long-term experience in the field of migration and asylum, as well as on case law of international courts, legal and scientific literature. We are grateful to our partners and colleagues for additional insights.

Legal overviews prepared by the Lithuanian Red Cross are for information purposes only, they do not create/entail in itself rights or legal obligations when considering individual cases. Reference to the source of the information is required for quotation or distribution of this Legal overview:

Lithuanian Red Cross. (May 2022). *Legal overview #3*

DECISIONS IN THIS OVERVIEW

I. Decision of the Supreme Administrative Court of Lithuania (hereinafter referred to as the SACL) of 20 April 2022 in administrative case eA-2036-492/2022

KEYWORDS: vulnerability.

II. Decision of the SACL of 27 April 2022 in administrative case eA-2184-502/2022

KEYWORDS: LGBTQI+ asylum seekers, credibility assessment, standard of proof, internal protection.

III. Decision of the SACL of 11 May 2022 in administrative case eA-2336-881/2022

KEYWORDS: duty to cooperate with the asylum seeker, admissibility of evidence.

I. DECISION OF THE SACL OF 20 APRIL 2022 IN ADMINISTRATIVE CASE EA-2036-492/2022

CASE SUMMARY: The applicant brought an action before the Court against the decision of the Migration Department refusing to grant him asylum. During the hearing, the representative of the Migration Department stated that the applicant's vulnerability does not affect the assessment of his asylum application.

In this case, the SACL ruled on the following aspects relevant to the asylum law:

- on assessing the vulnerability of an asylum seeker and its impact on the asylum procedure.

In paragraphs 37-41 of its decision of 20 April 2022, the SACL stated:

„37. *The Panel of Judges found that the applicant had indicated on the Vulnerable Persons Identification Sheet that he was a single man, a person suffering from chronic serious illnesses and in need of care (with the additional comment on a thyroid problem), but in the initial assessment of his vulnerability the checked answer to the question "Can the asylum seeker be classified as vulnerable?" is "No", which led to the applicant's asylum application being examined in substance under accelerated procedure. After examining the transcript of the interview, the Panel of Judges found that the applicant had already indicated to the civil servant assisting the Department during the interview that he had been beaten as a child; was adopted; has no relatives; has poor health; has psychological problems; contemplating suicide; sought psychological help.*

38. *Having considered the above, and having found that it cannot be established from the material submitted in the case file whether the Department's initial assessment of vulnerability included, for example, a clarification of the [...] issues [...]*

*identifying the person's vulnerability, the Panel of Judges concludes that **the Department's decision to conclude that the applicant is not vulnerable [...] is merely declaratory and was made, as determined, without a proper initial assessment of the person's vulnerability.***

39. *The case file also confirms that **the Court of First Instance did not examine the circumstances surrounding the applicant's vulnerability in the course of the procedure for assessing the applicant's application for asylum.***

*The applicant submitted to the Court of First Instance, among other evidence, a letter entitled 'Medical Examination Report', stating that the applicant had been examined between 4 September 2011 and 13 September 2011 and that his medical examination had revealed that 'violence and threats in the family have led to a serious psychological condition and that his [the applicant's] case is currently being assessed. The Commission concluded that he [the applicant] had been suffering from Autism Spectrum Disorder for a certain period of time.' Accordingly, the applicant stated at the hearing that he had psychological problems as a result of the violence he had experienced during his childhood, which could lead to unclear and inaccurate explanations during the interviews. Although the representative of the Department responded to the applicant's allegations of vulnerability at the hearing, **it is not clear from the motives of the judgment on what grounds the court concluded that the applicant was not a vulnerable person [...], as it appears that no independent legal and factual assessment of the situation on the aspect in question was carried out.***

40. [...]

41. *Having established that **in the case at hand the applicant's application for asylum was not***

assessed individually, the vulnerability of the applicant and its impact on the procedure for examining the applicant's application for asylum were not assessed in accordance with the procedure established by legal acts, the Panel of Judges cannot agree with the position of the Court of First Instance and the Department that the Department carried out the examination of the applicant's application for asylum in a proper manner."

Although the Court did not elaborate on the precise impact of the vulnerability assessment on the procedure, it recalled that an independent legal and factual assessment of this kind is an integral part of the asylum process and must be carried out in a proper manner, i.e. in accordance with the established procedures. Proper identification of an asylum seeker's vulnerability may lead to the application of appropriate procedural guarantees. Certain aspects directly related to a person's vulnerability (e.g. his state of health, psychological state) affect his ability both to understand the information provided to him and to provide the information expected of him. A proper assessment of a person's vulnerability should take this into account, both when asking questions during the interview and assessing the answers given. Failure to do so may give rise to

reasonable doubts as to the appropriateness of the procedure carried out and, where appropriate, the conclusions drawn therefrom.

In that regard, it should also be noted that a public administration entity is bound by the imperative of the principle of sound administration. This principle is enshrined in key national (Article 5(3) of the Constitution of the Republic of Lithuania, which states that all public authorities serve the people) and international documents. It follows from the principle of sound administration that public authorities must, when taking administrative decisions, act diligently and in such a way as to ensure that all the provisions of the legislation are complied with in the administrative procedure. In accordance with the principle of sound administration, public authorities must carry out the procedure impartially and objectively, taking into account all the circumstances relevant to the matter. The vulnerability of an asylum seeker, which affects his or her ability to duly substantiate his or her application for asylum, is a 'relevant circumstance' for the asylum procedure. If this material circumstance has not been ascertained or taken into account at the time of the decision, such a decision may be in breach of the principle of sound administration.

II. DECISION OF THE SACL OF 27 APRIL 2022 IN ADMINISTRATIVE CASE EA-2184-502/2022

CASE SUMMARY: The applicant brought an action before the Court against the decision of the Migration Department refusing to grant him asylum. The applicant based his asylum application on his fear of persecution in his country of origin on the grounds of homosexuality. After examining the asylum application, the Migration Department rejected it on the grounds, inter alia, that the homosexuality claimed by the applicant was fictitious and made up with the aim of substantiating the application for asylum.

In this case, the SACL ruled on the following aspects relevant to the asylum law:

- on the assessment of the credibility of an asylum seeker's claim to be a homosexual and the standard of proof to be applied to that assessment;
- on assessing the availability of protection against the risk of persecution in the country of origin in the context of the prevailing attitudes in the relevant society.

In paragraph 42 of its decision of 27 April 2022, the SACL stated:

„The applicant in the case presents himself as a homosexual person. The Department's interview with the applicant was based on the assumption that the asylum seeker's claimed homosexuality was a fabrication with the aim of substantiating the asylum application by relying on circumstances that could not be verified and, consequently, disproved. However, it should be stressed that, in order to rebut a well-founded fear, the defendant must, in deciding on the legal position of such persons, apply a standard of completeness and reliability of the evidence, the legal assessment of which should be based on the principle of 'fact established' rather

*than on the principle of 'less likely than not'. (see e.g. Decision of the Supreme Administrative Court of Lithuania of 14 March 2022 in administrative case eA-1480-415/2022). In the present case, this means that the inconsistencies in the applicant's account are essentially irrelevant, and the defendant's arguments that the asylum seeker's inability to tell more about his perception of himself as "different" supports the aforementioned presumption do not in themselves disprove the applicant's claim that he is a homosexual person. **It is unlikely, and from a legal point of view, in the context of the present case, that such statements by the applicant could, in principle, be disproved; therefore, it must be held that the asylum seeker's homosexuality in this case is an established fact.***

This interpretation essentially means that a person who claims to be homosexual should be regarded as such unless, in the context of a particular case, it is possible to disprove this claim. In this regard, it should be noted that "to disprove" means "to prove the contrary" and not merely to question, which is why the SACL refers to the applicable principle of "fact established". In order to justify the classification of a person's homosexuality as "fictitious", the institution must prove the competing claim, i.e. "establish the fact" that the person is heterosexual.

The interpretation of the SACL reflects the position that sexual orientation and gender identity are primarily the subject of a person's self-identification. Despite the need and attempts to develop a reliable model for "validation" of sexual orientation, it is acknowledged that there is no universal "standard" that an LGBTQI+ person should be

reasonably expected to meet. All relevant recommendations, including the DSSH model (Difference, Stigma, Shame and Harm), often mentioned in asylum decisions, are essentially limited to the identification of topics for conversation or relevant elements, but do not provide an unambiguous answer to the question “whether a person is really LGBTQI+”. According to the United Nations High Commissioner for Refugees, if a person identifies himself or herself as LGBTQI+, this is a primary indication of his or her sexual orientation and/or gender identity. Meanwhile, there are no reliable ways to prove or disprove a person's claims about how he or she identifies himself. Thus, a person's self-identification as LGBTQI+ is not at all, and cannot objectively be, the subject of a rational "credibility test". Credibility assessment can be applied to a person's account of autobiographical events, but not to his or her self-identification.

In paragraph 61 of its judgment of 27 April 2022, the SACL also addressed another issue of importance to asylum law:

„In this respect, the legal framework and case law relevant to the dispute presuppose that where sexual

*orientation or gender identity is criminalised in a State and/or the national society is highly homophobic/transphobic, LGBT asylum seekers **are not obliged to apply to the authorities for protection and/or should not have reasonable expectation of an alternative internal protection.**“*

Such an interpretation by the court essentially means that, in certain cases, a person who is unable or afraid to avail himself of the protection (against persecution) in the country of origin is not obliged to prove that he has actually sought such protection and has not received it. In some cases, not even necessarily the rules of law, but simply the rules prevailing in society, may constitute an obstacle which in itself prevents effective protection of the State from being reasonably expected. This interpretation of the court is significant in that it can potentially be extended to other situations and social groups of individuals, such as women living in traditional societies who have experienced or are at risk of sexual violence.

III. DECISION OF THE SACL OF 11 MAY 2022 IN ADMINISTRATIVE CASE EA-2336-881/2022

CASE SUMMARY: The applicant brought an action before the Court against the decision of the Migration Department refusing to grant him asylum. The court of first instance upheld the applicant's complaint and annulled the contested decision, holding that in this decision the defendant had only submitted abstract statements concerning the lack of detail in the applicant's narrative, had not analysed what details were missing from the narrative, what kind of doubts had been raised as to the veracity of the story told, whether the narrative could be substantiated by the information provided by the applicant, the reasons why the applicant's narrative was assessed as untrue, etc. According to the Court of First Instance, the applicant's interviews show that he gave a sufficiently detailed account of the circumstances which led him to leave the country, and that he answered questions put to him by the defendant's staff, i.e., he answered what he had been asked. The court noted that the additional documents submitted by the applicant should be subject to a reasoned assessment, both as regards the content and the authenticity of the data, also the documents issued in the applicant's country of origin shall be assessed in light of the country of origin information gathered by the defendant. Accordingly, in the court's view, the contested decision was adopted without having assessed and examined all the circumstances relevant to the examination of the applicant's application and the evidence submitted by him, and is based on arguments of an abstract nature, without providing a more detailed assessment of the individual circumstances and the evidence provided by the applicant. The Migration Department disagreed with the decision of the

Court of First Instance and appealed to the SACL, reiterating that the applicant had not substantiated his story with any objective information, the story he had told was abstract, inconsistent, general in nature and lacking specific details. The Migration Department did not dispute the fact that, after the adoption of the decision, the applicant had submitted additional documents and photos (a sales agreement confirming the transfer of ownership), which partially corroborated the circumstances of his story, but pointed out that it was not possible to examine these documents objectively, as they were not original documents.

In this case, the SACL ruled on the following aspects relevant to the asylum law:

- on the determining authority's duty to actively cooperate with the asylum seeker;
- on the admissibility of non-original documents as evidence.

In paragraphs 43-46 of the decision of 11 May 2022, the SACL stated:

*„43. Having reviewed the validity and legality of the decision of the Court of First Instance within the limits of the appeal, the Panel of Judges concluded that the Migration Department, having unreasonably de facto shifted the full burden of proof to the applicant, failed to properly examine his application for asylum: in accordance with paragraph 89 of the Description of the procedure for granting and withdrawing asylum in the Republic of Lithuania, approved by Order of the Minister of the Interior of the Republic of Lithuania No 1V-131 of 24 February 2016 (hereinafter also referred to as the Description of the procedure), **the determination and assessment of the data***

*necessary to substantiate the application for asylum shall be carried out in cooperation between the Migration Department and the asylum seeker. The Migration Department must provide the asylum seeker with adequate conditions to present all available information and other evidence necessary to substantiate his/her application for asylum, including explanations as to the missing information and/or inconsistencies or contradictions in his/her statements, and to gather all available additional information necessary to confirm or disprove the information provided by the asylum seeker. As is apparent from the sound recording of the applicant's interview, the applicant indicated to the representative of the Migration Department that he had evidence in his possession to substantiate the circumstances invoked in connection with the sale of the house, but that the documents sent by the applicant had not reached the defendant because of the Defendant's improperly indicated e-mail address. **The Migration Department did not take any steps to help the applicant to provide evidence, but simply adopted a decision in which it formally stated that the asylum seeker had not provided any evidence to support his story:** a medical certificate in case he was hospitalised after being tortured, an agreement for the sale of his house, a video sent to his family demanding ransom.*

44. The CJEU has noted in its jurisprudence that, although it is generally for the applicant to submit all elements needed to substantiate the application, **the fact remains that it is the duty of the Member State to cooperate with the applicant at the stage of determining the relevant elements of that application** (Judgment of the CJEU of 22 November 2012, *M.M. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, C-277/11). This requirement that the Member State cooperate therefore means, in practical terms, that **if, for any reason whatsoever, the elements provided by an applicant for international**

protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents. [...]

45. [...]

46. *The Panel of Judges is critical of the Defendant's arguments that the evidence submitted after the decision of the Migration Department is not relevant to the case at hand. As can be seen from the decision of the Migration Department, it found that the applicant had not provided evidence, although it had become apparent during the examination of the case that the applicant had an agreement for the sale of his house, and had also presented the court with a photo on his phone at the hearing, which, according to him, depicted a document allegedly confirming that he was wanted (the document had not been translated). **The mere fact that the documents submitted are non-original does not mean that their content and believability cannot be assessed.** [...] In the view of the appellate court, in the present case, there are too many circumstances which have not been assessed and discussed by the defendant, thus the Court of First Instance was therefore justified in deciding that all the uncertainties, as well as the newly submitted documents, should be reassessed by the defendant in the light of the relevant country of origin information. [...]"*

In this case, referring to the applicable legislation and the jurisprudence of the CJEU, the SACL recalled that, taking into account the specific situation of asylum seekers, the determining authority has a positive duty to actively cooperate with the asylum seeker and shares with him the obligation to collect all relevant

evidence and establish all relevant material facts. A situation in which the asylum seeker informs the determining authority of evidence which could potentially be relevant to corroborate his account, but the latter does not take any active steps to obtain such evidence, leads to a failure to comply with the above obligation to cooperate. In the present case, the failure to comply with this obligation is also aggravated by the fact that the Migration Department, without taking any active steps to obtain the relevant evidence itself, based its conclusions on the credibility of the asylum seeker's narrative, inter alia, on the fact that he did not provide such evidence, while, as observed by the SACL, effectively shifting the entire burden of proof to the asylum seeker.

Another important aspect mentioned by the SACL in the present case is the admissibility of evidence. According to the court, the mere fact that the documents submitted by the asylum seeker are not original (e.g., copies of documents, photos) does not affect their admissibility, i.e., the right of the asylum seeker to submit and rely on

such evidence and the duty of the determining authority to accept and assess such evidence. The admissibility of non-original documents as evidence does not imply that they are to be automatically regarded as "proof" of a particular material fact. The relevance, believability, and probative value of non-original documents, like any other evidence, must be determined by the adjudicating authority, which has them assessed and comments on them in its decision. The fact that the documents submitted by an asylum seeker are not original may be an obstacle to a full assessment of their authenticity (and, consequently, their believability), but not of their content (i.e., their relevance). The believability of such evidence might be assessed with caution, for example by stating that there is some doubt as to its authenticity but insufficient evidence to conclude that it is forged. The probative value of a non-original document, as a criterion summarising its relevance and believability, may be lower compared to the original document, however, such a document still potentially has some probative value and is not inadmissible.



**Lietuvos
Raudonasis
Kryžius**



**Konstitucijos pr. 7A, PC Europa, III a.
Vilnius, LT-09307
+370 659 71 598
info@redcross.lt**