# LEGAL OVERVIEW

## LITHUANIAN CASE LAW IN 2022

#4

JUNE 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.

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# DECISION IN THIS OVERVIEW

Ruling of the Supreme Administrative Court of Lithuania (hereinafter referred to as the SACL) of 15 June 2022 in administrative case eA-2865-629/2022

**KEYWORDS**: confirmation bias, selective amnesia, restrictive interpretation of the law.

# RULING OF THE SACL OF 15 JUNE 2022 IN ADMINISTRATIVE CASE EA-2865-629/2022

**Unlike previous overviews, this time we will focus on the ruling of the SACL which does not constitute good practice. On the contrary, it shows tendencies one would not expect to encounter in the jurisprudence of the court, especially the court making "final and not-subject-to-appeal" decisions and shaping the case-law of other courts through legal precedent. Despite the general rule "not to deviate from SACL case-law", we hope that this practice will nevertheless not spread further.**

**CASE SUMMARY:** The applicant lodged an appeal against the decision of the Migration Department refusing to grant her asylum. The SACL acknowledged in principle that the applicant was at risk of domestic violence, but ruled that she could avail herself of the protection of her country of origin (Iraq).

## CONFIRMATION BIAS

"Confirmation bias" in psychology refers to the tendency to seek out and rely on information that confirms one's preconceptions, and to interpret equivocal information in a way that supports those preconceptions.

In paragraph 62 of its ruling of 15 June 2022, the SACL stated:

„*The defendant was justified in not considering the applicant's account as believable evidence in support of her asylum application.*"

Thus, according to the SACL, the applicant's account is not "believable" evidence. Consequently, as "evidence", the applicant's utterances are of extremely low probative value and do not prove facts relevant to the case. However, according to the logic of the SACL, the applicant's narrative is "unbelievable" only when it comes to substantiating her asylum application, whereas the same narrative is considered sufficiently "believable" when it is used as a basis for the SACL inferences, as, for example, in paragraph 64 of the decision:

„*It should be noted that the applicant herself stated during the interview that her parents would accept her back.*"

Thus, according to the practice developed by SACL, the same narrative, depending on the inferences it seeks to draw, can be both "unbelievable" and believable at the same time. If this narrative supports the court's inferences, it is deemed believable and can be relied upon (irrespective of the fact that it's only speculations about the future). If it supports the opposite position, it is unbelievable and should not be relied upon (though it's the applicant's testimony about her past experience).

## SELECTIVE AMNESIA

In this overview, we have chosen the term "selective amnesia" for the tendency to "forget" certain aspects and even deny them.

In paragraph 68 of its ruling of 15 June 2022, the SACL noted:

„*68. It should also be noted that the applicant has not substantially raised any arguments in its appeal as to the legality and reasonableness of the part of*

*the judgment of the Court of First Instance which deals with the part of the contested decision of the defendant concerning [...] the expulsion of [...] applicants [...].“*

Based on that, the SACL completely withdrawn from discussing the part of the defendant's decision concerning expulsion of the applicant from Lithuania. For, it should be understood, the applicant did not put forward any arguments in this regard. However, paragraphs 39-43 of the SACL's ruling state:

*„39. The applicant submits that, when deciding whether to apply expulsion, priority must be given to voluntary return, as provided for in Directive 2008/115/EC 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 (hereinafter Directive 2008/115/EC). In the present case, contrary to the Court's assessment, the application of the applicant and her children was not rejected as "manifestly unfounded". Article 32(2) of the Asylum Procedures Directive allows Member States to consider certain applications as "manifestly unfounded", provided it is defined as such in the national legislation. The national legislation of the Republic of Lithuania does not use the concept of a "manifestly unfounded" asylum application, so the defendant has no legal possibility to reject such an application as "manifestly unfounded". Accordingly, the Court's statement that the applicant's application was rejected as "manifestly unfounded" is not based on the facts or on an interpretation of the applicable legal provisions.*

*40. She notes that the defendant does not mention the "manifestly unfounded" element in the Decision and chooses to use another ground for not applying the voluntary return option to the applicant – the alleged risk of absconding. In stating such a "risk", the defendant does not even refer to the circumstances referred to in Article 113(5) of the Law of the Republic of Lithuania on the Legal Status of Aliens, which are to be assessed in order to decide whether there are grounds to believe that an alien may abscond, instead creating its own criteria in an improvised manner and applying them declaratively. The applicant does not contest the fact that the defendant has taken a decision not to grant her and her children asylum, but that decision has not become final and does not in itself constitute a legal or factual basis for applying the exceptions provided for in Article 7(4) of Directive 2008/115/EC.*

*41. With regard to the examination of the application under accelerated procedure, the applicant notes that she applied for asylum on 14 April 2021, while the defendant adopted the Decision only on 17 December 2021, i.e. more than 8 months later. In accordance with Article 81 of the Law, an application for asylum must be examined on the merits no later than within six months from the date of submission of the application for asylum or, in the case of an accelerated procedure, within 10 working days. It is therefore clear that the application was not in fact dealt with in an accelerated manner. However, this does not constitute a legal or factual basis for applying the exemptions provided for in Article 7 (4) of Directive 2008/115/EC. It is also unclear on what grounds the defendant, referring to its own actions, draws conclusions on the applicant's goals and intentions, stating that applying for asylum in Lithuania (and being granted asylum in Lithuania) was not and is not her goal.*

*42. The applicant did not apply for asylum before her contact with the officials of the Lithuanian authority authorised to accept such an application occurred. Until then, the applicant simply did not have the opportunity to make such an application. The defendant tendentiously distorts this circumstance, giving the impression that the applicant had a realistic opportunity to apply for*

*asylum earlier, but did not do so until she was "forced", without explaining what those opportunities were, what makes this situation exceptional in the general context of refugee law, or how this non-exceptional circumstance justifies the conclusion as to the applicant's goals and intentions. 43. According to the applicant, the defendant did not justify the application of the exceptions provided for in Article 7(4) of Directive 2008/115/EC to her, neither in terms of applicable legal provisions nor by logical reasoning, and baselessly adopted the decision to forcibly expel her and her children from the Republic of Lithuania. The Court of First Instance, by acceding to the defendant's reasoning, adopted an unfounded decision.*"

Thus, the applicant states that the defendant, when taking a decision to expel her from Lithuania, is referring to the alleged "risk of absconding", but does not even seek to link its inferences to the legal provision regulating the assessment of the "risk of absconding". The argument is simple: in order to apply forced expulsion (rather than voluntary return) to a person, it is necessary to establish, for instance, the risk of absconding (by the way, according to the earlier case-law of the same SACL). In order to establish the risk of absconding, it is necessary to refer to the exhaustive list of risk factors set out in the law. In the present case, the defendant did not refer to this list, but instead arbitrarily chose some other "factors" and established the risk of absconding based on those. The Court of First Instance, for its part, merely declaratively accepted the defendant's position. It should be noted that this kind of episodic legal nihilism is found in almost every similar decision of the defendant in a past year. A number of such decisions have already been reviewed by the SACL, which declaratively upheld them without going into the question of legal justification. What to do when the applicant insists on assessing this particular aspect and forces the court to rule on it? The SACL choses the rational, pragmatic solution of simply stating that this argument did not exist. Thus, this ruling of the SACL introduces new legal principle – if a certain issue is inconvenient for some reason, it can simply be "forgotten", and the not-subject-to-appeal decision can create an alternative reality where it never existed.

## RESTRICTIVE INTERPRETATION OF THE LAW

First of all, it should be noted that restrictive interpretation of the law is not an "improper" way of interpreting the law contra legem. When interpreting the law in this way, the interpreted meaning of a legal norm does not correspond to its literal meaning, it becomes narrower than the linguistic meaning, and the scope of application of the legal norm is consequently narrowed. However, it raises a few eyebrows when national courts narrow down the EU law provisions.

Relevant in the present case is Directive 2011/95/EU 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, in particular Articles 6, 7 and 8.

In paragraph 64 of its ruling of 15 June 2022, the SACL stated:

*„As is apparent from the data collected in the case, the Department does not deny the fact that the applicant has fear of experiencing violence on the part of her husband or his family members, but that violence, as the Department correctly pointed out, does not condition granting of international protection.*"

Despite the rather confusing wording, this sentence likely means that both the defendant and the courts are not contesting the threat of domestic violence in the present case. However, the SACL agrees with the Defendant's position that this threat does not condition granting of international protection. Different paragraphs of the judgment indicate different reasons why, in the opinion of the SACL, such a threat 'in itself' does not entail a need for protection, e.g. the circumstances mentioned in paragraph 60 of the judgment, such as: the actor of persecution is a non-state actor (although Article 6(c) of Directive 2011/95/EU refers to "non-state actors" among possible "actors of persecution"), the threat is not related to the applicant's race, religion, nationality, membership of a particular social group or political opinion (although violence against women, as the issue at hand is qualified by both the defendant and the SACL, may amount to persecution on the grounds of belonging to a particular social group). However, in paragraph 64 of the judgment, the SACL stops mentioning these circumstances and focuses on the "internal protection" aspect, essentially stating that in her country of origin the applicant can avail herself of the protection from the violence she is facing. And since she can avail herself of the protection, the SACL infers that her fear is not well-founded. In this respect, it should be noted that Article 8 of Directive 2011/95/EU makes a clear distinction between the well-foundedness of the fear and the availability of internal protection. Either the asylum seeker's fear is not well-founded (and he or she does not need internal protection) or the threat is present (and therefore the fear is well-founded), but he or she has access to internal protection. The Directive places the word "or" between these different situations, while the SACL somehow sees causality between them. However, the SACL diverges from the meaning of the provisions of Directive 2011/95/EU even further when interpreting the content of "internal protection". In particular, according to Article 7(2) of the Directive, such protection must be "effective and of a non-temporary nature". Both the defendant and the SACL ignore this requirement, limiting their assessment of the issue to the statement that "In Iraq, women can contact law enforcement". Can contact. In essence, the directive's requirement that there must be an **"effective legal system" for the detection, prosecution and punishment of acts constituting persecution** is reduced by the SACL to the individual's own ability to "contact" the institution. The SACL moves even further away from the meaning of the provisions of the Directive when it starts to list where else the applicant can turn for internal protection: "get help from NGOs, go to shelters". In this respect, it should be noted that, according to Article 7(1) of Directive 2011/95/EU, protection against persecution can only be provided by (a) the State or (b) parties or organizations, including international organizations, controlling the State or a substantial part of the territory of the State. According to the SACL, point (b) can be narrowed down to simply "groups and organizations" and include non-governmental organizations, shelters and even "family support networks" that do not control any territories. Since it is unlikely that the SACL actually considers that shelters and relatives have an "effective legal system" for the detection, prosecution and punishment of acts constituting persecution, we inevitably return to the issue of the content of internal protection.

To summarize the new legal principles introduced by the SACL, the fear of persecution is not considered well-founded if a persecuted asylum seeker can contact the authorities, non-governmental organizations or private persons. Whether he or she can actually expect protection

can be deduced from his or her own narrative, especially if it is not to be regarded as believable evidence.

**We would like to remind you that, despite the general rule "not to deviate from the case law of the SACL ", we hope that the case-law described in this review will not spread further.**

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