

ASYLUM AND REFUGEE ISSUES IN THE CASE LAW OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SLOVENIA

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ABSTRACT

This study examines the role of the Constitutional Court of the Republic of Slovenia in addressing asylum and refugee issues. It examines the constitutional and statutory regulations surrounding international protection, the procedure for the recognition of and statistical data on international protection, and the legal remedies available in asylum and refugee cases, with a particular focus on petitions for reviewing the constitutionality of laws and constitutional complaints. Further, it presents a comprehensive analysis of the relevant Constitutional Court's case law, specifically concerning refugees, asylum seekers and individuals seeking subsidiary international protection. The findings reveal that the relevant case law can be categorised into two segments: those that deal with the successful challenges of statutory provisions, and those that pertain to the constitutional complaints of asylum seekers. Additionally, the Court frequently cites decisions from the European Court of Human Rights, however, less frequently the case law of the Court of Justice of the European Union. However, mentioning the case law of other countries is extremely rare. None of the Constitutional Court's decisions concerning Slovenian constitutional identity are directly linked to refugee, asylum, or international protection issues. Nonetheless, it is plausible that the Court may change its approach to these areas in the near future.

KEYWORDS

*asylum
refugees
international protection
constitutional court
case law
Slovenia*

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1. Introduction

The 1963 constitution introduced the Constitutional Court of the Republic of Slovenia. The new Constitution of the Republic of Slovenia³ (hereinafter: Constitution), adopted in 1991, acquired new important competences and a stronger position as the highest body of the judicial branch of power for the protection of constitutionality, legality, and human rights.⁴ The Constitutional Court is regulated by the Constitution in an independent chapter (Articles 160–167), separate from the chapter on state regulation and the chapter on the judiciary. The Constitutional Court comprises nine judges who are elected on the proposal of the president of the Republic by secret ballot through a majority vote of all members of the National Assembly. They are elected for nine years and may not be re-elected. Although listed in the Constitution, the Constitutional Court's powers are determined in detail by the Constitutional Court Act⁵ (hereinafter: CCA) adopted in 1994. The most important powers of the Slovenian Constitutional Court are reviewing the constitutionality of laws and the constitutionality and legality of other general acts (e.g. sub-statutory acts) and deciding constitutional complaints regarding violations of fundamental rights.⁶ As a guardian of human rights and fundamental freedoms, the Constitutional Court plays an important role in protecting the rights of those seeking international protection and in shaping asylum and refugee policies within the country.

Article 48 of the Constitution stipulates the right to asylum. Within the limits of the (statutory) law, this right shall be recognised for foreign nationals and stateless persons who are subject to persecution for their commitment to human rights and fundamental freedoms.⁷ The fundamental/constitutional right of asylum includes the right to ask for and obtain asylum, provided that the applicant meets

3 | The Constitution of the Republic of Slovenia (Ustava Republike Slovenije [Constitution]), Official Gazette of the Republic of Slovenia No. 33/91, 42/97, 66/00, 24/03, 69/04, 68/06, 47/13, 47/13, 75/16.

4 | The judiciary of the Republic of Slovenia comprises general and specialised courts. General courts operate at four levels: local and district courts (first-instance courts), higher courts, which allow appeals against first-instance courts, and the Supreme Court, which is the highest court in the country. Specialised courts are divided into labour courts, which are competent to reach decisions on labour-law disputes and disputes arising from social security, and the Administrative Court, which provides judicial protection in administrative matters and has the status of a higher court. Owing to the special powers of the Constitutional Court, this court has a unique position in the judicial system of the Republic of Slovenia.

5 | The Constitutional Court Act (Zakon o ustavnem sodišču [CCA]), Official Gazette of the Republic of Slovenia No. 64/07 – official consolidated text, 109/12, 23/20.

6 | The competences of the Constitutional Court also include deciding on (a) the constitutionality of the international treaties prior to their ratification, (b) disputes regarding the admissibility of a legislative referendum, (c) jurisdictional disputes, (d) the impeachment of the president of the Republic, the president of the government, and individual ministers, (e) the unconstitutionality of the acts and activities of political parties, (f) disputes on the confirmation of the election of deputies of the National Assembly, and (g) the constitutionality of the dissolution of a municipal council or the dismissal of a mayor. It also decides on several other matters vested in it by the CCA and other laws.

7 | Constitution, Article 48.

the constitutional criteria, the criteria under the Geneva Convention⁸ and the Protocol Relating to the Status of Refugees,⁹ and all legal criteria in accordance with established national judicial practice.¹⁰ The Constitution explicitly stipulates that competent state authorities, including courts, must decide the right to asylum within the limits set by statutory law. The latter has been amended several times since the creation of the new legal system for independent Slovenia. The current valid law is the International Protection Act¹¹ (hereinafter: ZMZ-1), which formulates the right of asylum as the right to international protection. It encompasses two types of international protection for asylum seekers: refugee status and subsidiary protection (see the section on the legal and material background).

As the right to international protection is a fundamental (constitutional) right, when deciding on legal remedies against competent authorities, the competent court must also consider the standards of fair trial from Article 23 of the Constitution and Article 6 of the European Convention on Human Rights (ECHR),¹² and focus on possible connections with other international conventions that regulate the enforceable rights of individuals. During the procedure, if the criteria for recognising the right to asylum are not met, certain other human rights may be relevant in the decision-making process on international protection from the Constitution, the ECHR, the International Covenant on Civil and Political Rights,¹³ the UN Convention on the Rights of the Child,¹⁴ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁵ and the European Convention on the Exercise of Children's Rights.^{16,17}

The competent state authority and court must focus on the protection of absolute and non-absolute rights, should a party in the proceedings assert this,

8 | The *Convention* relating to the Status of *Refugees* (189 U.N.T.S. 150, entered into force 22 April 1954). United Nations, 1951.

9 | The Protocol Relating to the Status of Refugees (A/RES/2198, entered into force 31 January 1967). United Nations, 1960 [Online]. Available at: <https://www.refworld.org/docid/3ae6b3ae4.html> (Accessed: 8 August 2023).

10 | Decision of the Constitutional Court of the Republic of Slovenia No. Up-78/00, dated 10 March 2000.

11 | The International Protection Act (Zakon o mednarodni zaščiti [ZMZ-1-UPB1]), Official Gazette of the Republic of Slovenia, Nos. 16/17 – officially consolidated text, 54/21.

12 | Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950.

13 | UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

14 | UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

15 | UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

16 | Council of Europe, European Convention on the Exercise of Children's Rights, 25 January 1996, ETS 160.

17 | Šturm et al., 2010. The competent state authority and the court must focus on the protection of absolute and non-absolute rights, should a party in the proceedings assert this, or if there is a real risk of their violation when returning or handing over a person to another country, clearly evident from data available.

or if there is a real risk of violation when returning or handing over a person to another country, clearly evident from data available. If the competent authority or court rejects the request and orders the person to leave Slovenia within a certain period, this decision must contain an assessment that, owing to the rejection of the request, his or her absolute rights from the aforementioned international conventions are not at any real risk of being violated in that other country.¹⁸

As non-absolute rights, provisions of the ECHR on the right to personal security and liberty, Article 5; the right to respect for family life, Article 8; the right to equality (prohibition of discrimination), Article 14; and the right to an effective legal remedy, Article 13; and provisions of Article 1 of Protocol No. 1 to the ECHR,¹⁹ Article 4 of Protocol No. 4 to the ECHR,²⁰ and Articles 2, 3, and 4 of Protocol No. 7 to the ECHR may be considered in the asylum procedure.²¹ In such cases, when a competent authority or court checks the (in)admissibility of a violation of a non-absolute right, it must apply the constitutional principle of proportionality (Article 2 in relation to Article 15, Paragraph 3 of the Constitution).²²

After exhausting all legal remedies, the asylum seeker has the opportunity to file a constitutional complaint regarding the violation of a constitutional right. The nature of the right to international protection also imposes positive obligations on the state in relation to ensuring the possibility of effective enforcement of this right and the legal basis for obtaining certain social and economic rights.²³

This article provides an overview of the legal framework governing asylum and refugee matters in Slovenia and examines the jurisprudence of the Constitutional Court on international protection issues. The primary thrust of the relevant decisions is summarised and a developmental arc of the case law is provided, which reveals that the majority of the Constitutional Court's decisions concern either the abrogation of challenged statutory legal provisions or constitutional complaints of asylum seekers. With its decisions, the Court prompted legislative changes, clarified legal standards, and addressed gaps in the protection of fundamental rights. Considering that Slovenia, as other countries, faces challenges in balancing national security interests with the protection of human rights in the context of asylum and refugee matters, the authors examined the Court's approach to strike this delicate balance. Regarding this particular issue, they explore whether the Constitutional Court has linked asylum and refugee issues with constitutional

18 | Ibid.

According to the Constitutional Courts' case law, in such disputes, state authorities and courts must focus on Article 3 of the ECHR (see *Soering v. the United Kingdom*, *Vilvarajah and others v. the United Kingdom* and *Chahal v. United Kingdom*).

19 | Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9.

20 | Council of Europe, Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, 16 September 1963, ETS 46.

21 | Council of Europe, Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, ETS 117.

22 | Šturm et al., 2010. See also Avbelj et al., 2019.

23 | Ibid.

identity. Finally, the authors explore whether the Constitutional Court considers the Constitutional Courts' case law of other countries, in particular EU Member States, or the documents and decisions of international organisations when developing relevant case law.

The issue of boundaries of competences between the European Union (EU) and Slovenia as a Member State, regarding asylum and other migration issues is prescribed in Paragraph 3 of Article 3a of the Slovenian Constitution: 'Legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations'. This implies that the Constitutional Court has the competence to decide on the conformity of 'implementation provisions' of Slovenian legislation with the Constitution. These are legal provisions that transform EU laws (Directives or Regulations) into Slovenian national laws. However, as the Court ruled in a landmark case, in instances when implementation provisions simply copy *verbatim* the wording of a Directive, this competence belongs solely to the Court of Justice of the European Union (CJEU), considering that the claimant alleged the non-conformity of a Directive with higher EU documents (e.g. Treaty on the Functioning of the European Union,²⁴ Charter of Fundamental Rights of the European Union²⁵).²⁶ In other landmark cases, the Court further clarified that implementation provisions cannot be simply any provision; the goal which a Directive prescribes can only be reached by legal means which conform to the Slovenian Constitution.²⁷ (None of these landmark cases was related to issues of migration or asylum.) However, this is only relevant in petitions for constitutionality reviews which challenge certain legal provisions by alleging their unconstitutionality. However, the situation is entirely different in the case of constitutional complaints. As explained below, all relevant EU Directives and Regulations were implemented within the Slovenian national law. According to an explanation published on the Constitutional Court website, a constitutional complaint can only claim violation of human rights and fundamental freedoms. A constitutional complaint cannot be lodged owing to the erroneous application of substantive or procedural law or an erroneously established state of facts in proceedings before courts.²⁸ Since EU law is either substantive or procedural, the Constitutional Court cannot decide on it in cases of constitutional complaints. It can only decide whether a provision of national law violates the Constitution or if a human right is violated during asylum proceedings.

24 | European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01.

25 | European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

26 | Decision of the Constitutional Court of the Republic of Slovenia No. U-I-113/04, dated 4 July 2004.

27 | Decision of the Constitutional Court of the Republic of Slovenia No. U-I-37/10, dated 18 April 2013.

28 | The Constitutional Court of the Republic of Slovenia, 2020.

2. An outline of the legal and material background

Slovenia is party to the 1951 Geneva Convention regarding the status of refugees²⁹ and the 1967 New York Protocol supplementing the Geneva Convention, succeeded by the notification of succession with respect to United Nations Conventions. The asylum system in Slovenia was originally governed by the Asylum Act adopted by the National Assembly on 8 July 1999.³⁰ This was replaced by the ZMZ-1, which came into force on 4 January 2008.³¹ The relevant domestic legal basis is currently the ZMZ-1, in force since 24 April 2016 which implements the following EU rules: Regulation (EC) No. 1030/2002, Regulation (EC) No. 2252/2004, Regulation (EC) No. 767/2008, Directive 2011/95/EU, Directive 2013/32/EU, Directive 2013/33/EU, and Regulation (EU) No. 603/2013.

According to ZMZ-1, refugee status is granted to a person who provides justifiable and authentic proof that he/she is endangered in his/her home country owing to race or ethnicity, religion, nationality, political opinion, or membership of a particular social group.³² Subsidiary protection status shall be granted to a third-country national or stateless person who does not qualify for refugee status, but with respect to whom substantial grounds have been indicated to believe that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to the country of his or her former habitual residence, would face a real risk of suffering serious harm. The latter entails the death penalty or execution; torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.³³ Refugee status is granted for an indefinite period and can only be revoked for specific reasons, as stipulated in Paragraph 1 of Article 67.³⁴ However, subsidiary protection is temporary.

29 | *Convention* relating to the Status of *Refugees* (189 U.N.T.S. 150, entered into force 22 April 1954). United Nations, 1951.

30 | The Asylum Act (Zakon o azilu [ZAzil]), Official Gazette of the Republic of Slovenia, No. 51/06 – officially consolidated text.

31 | International Protection Act (Zakon o mednarodni zaščiti [ZMZ]), Official Gazette of the Republic of Slovenia, No. 11/11 – officially consolidated text.

32 | ZMZ-1, Article 20, Paragraph 2.

33 | ZMZ-1, Article 20, Paragraph 3.

34 | As stipulated in ZMZ-1, Article 63, Paragraph 1, a refugee's status shall cease if:

- they voluntarily accept the protection of the country of which they are a national;
- they voluntarily regain their citizenship after losing it;
- they acquire a new citizenship and enjoy the protection of the country that granted it;
- they voluntarily resettle in the country that they left and did not return to for fear of persecution;
- the circumstances owing to which they have been granted refugee status cease to exist and they can no longer refuse the protection of the country of which they are a national;
- as a stateless person, they are able to return to their former country of habitual residence, because the circumstances owing to which they were granted refugee status have ceased to exist.

The competent body deciding on applications for international protection is the International Protection Procedures Division³⁵ (*Sektor za postopke mednarodne zaščite*) of the Migration Directorate (*Direktorat za migracije*), at the Ministry of the Interior (*Ministrstvo za notranje zadeve*, hereinafter: MI).³⁶

Foreigners in the Republic of Slovenia or at a border crossing point may express the intent to file an application for international protection with any state body (in practice, intent is usually communicated to a border control police officer). The intent should be expressed without undue delay, 'in the shortest time possible after entering the Republic of Slovenia'. He (or she) is then processed by the police, who establish his identity and the route of entry into the Republic of Slovenia, before transferring him to the competent authorities at the Asylum Home (*Azilni dom*) where he files an application for international protection in the presence of a state-appointed translator.³⁷

Administrative laws govern the first stage of the asylum process. The deciding authority performs a personal interview with the applicant to establish the identity, grounds on which the application is based, and all other facts or relevant circumstances.³⁸ If the application is rejected, the applicant has the right to judicial protection. A lawsuit in an administrative dispute (*upravni spor*) decided before the Administrative Court must be filed within 15 days of the service of the administrative decision. If this decision is made by using an expedited procedure (*pospešeni postopek*), a lawsuit must be filed before the Administrative Court within three days.³⁹ An appeal to the Supreme Court (*Vrhovno sodišče*) is allowed against judgements issued by the Administrative Court.⁴⁰ A petition for constitutionality review or a constitutional complaint, decided by the Constitutional Court, is also allowed to every person in Slovenia, including asylum seekers. The deadline for filing a constitutional complaint is only 15 days, which is much shorter than the general deadline of 60 days.⁴¹

Few applicants in Slovenia have been awarded international protection. The duration of this process is one of the most significant shortcomings of the Slovenian asylum system.⁴² More detailed data is presented in Table 1 and Graph 1.

35 | The translations are in the Slovene language.

36 | Ministry of Interior, Republic of Slovenia, 2023a.

37 | Prior to filing this application, the foreigner must be duly informed of the procedure and his rights in a language he understands. Such cases shall not be regarded as an illegal crossing of the state border (Government, Republic of Slovenia, 2023b).

38 | ZMZ-1, Article 45. See also Pravno informacijski center (hereinafter referred to as 'PIC'), 2023.

39 | ZMZ-1, Article 70, Paragraph 1.

40 | ZMZ-1, Article 70, Paragraph 4.

41 | ZMZ-1, Article 72.

42 | PIC, 2023. It is often said, that Slovenia is not really the applicants' 'desired destination'. Many applicants for international protection leave the Asylum Home, abscond, before a final decision is reached, which causes the procedure to be stopped. In 2023, the trend of arbitrarily leaving Slovenia continued, 89% of applicants for international protection leave the country on average in 15-16 days. Moreover, as the MI notes, in 2022, 31.447 people declared to the police their intent to file an application for international protection. Of these almost half 'arbitrarily left the Asylum Home' before even actually applying for international protection (Government, Republic of Slovenia, 2023a).

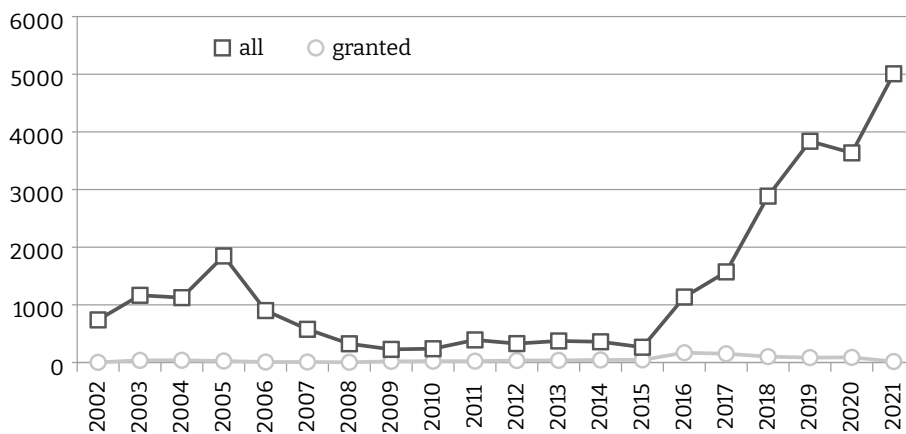
Table 1. Statistical data on international protection, reports, decisions in procedures to grant international protection status, Data for May 2023

YEAR	NUMBER OF ALL APPLICATIONS	APPLICATION – FOR RESTART OF PROCEDURE	PROCEDURE RE-STARTED	APPLICATIONS SOLVED	STATUS GRANTED	APPLICATION DENIED	TERMINATION OF PROCEEDINGS	APPLICATION REJECTED	SAFE THIRD COUNTRY	REFUGEE CRISIS	RESETTLEMENT	RELOCATION
1995	6	/	/	17	2	4	10	1	/			
1996	35	/	/	26	0	0	5	21	/			
1997	72	/	/	51	0	8	15	28	/			
1998	337	/	/	82	1	27	13	41	/			
1999	744	/	/	441	0	87	237	117	/			
2000	9244	/	/	969	11	46	831	0	81			
2001	1511	/	/	10042	25	97	9911	9	0			
2002	640	/	60	739	3	105	619	12	0			
2003	1101	35	45	1166	37	123	964	17	25			
2004	1208	35	70	1125	39	317	737	20	12			
2005	1674	77	160	1848	26	661	1120	38	3			
2006	579	61	339	901	9	561	228	43	0			
2007	434	39	56	576	9	276	238	53	0			
2008	260	18	52	325	4	145	164	12	0			
2009	202	15	22	228	20	89	96	23	0			
2010	246	35	31	239	23	55	120	27	14			
2011	358	51	19	392	24	78	177	40	73			
2012	304	43	21	328	34	75	110	57	52			
2013	272	31	23	374	37	82	177	59	19			
2014	385	27	23	360	44	51	216	49	0			
2015	277	18	22	265	46	87	89	44	0	141		
2016	1308	7	44	1136	170	96	621	249	0	1184		124
2017	1476	20	51	1572	152	89	949	382	0	0		108

YEAR	NUMBER OF ALL APPLICATIONS	APPLICATION – FOR RESTART OF PROCEDURE	PROCEDURE RE-STARTED	APPLICATIONS SOLVED	STATUS GRANTED	APPLICATION DENIED	TERMINATION OF PROCEEDINGS	APPLICATION REJECTED	SAFE THIRD COUNTRY	REFUGEE CRISIS	RESETTLEMENT	RELOCATION
2018	2875	40	27	2886	102	135	2372	277	0	0	40	21
2019	3821	39	56	3838	85	128	3273	352	0	0	0	2
2020	3548	54	29	3636	89	215	2875	457	0	0	0	0
2021	5301	40	23	5008	17	151	3445	1390	0	0	0	5
2022	6787	34	24	6900	203	141	3983	2573	0	0	0	0
2023	2521	14	13	2089	32	110	1009	938	0	0	0	0

[Statistični podatki o mednarodni zaščiti, Poročila, Odločanje v postopkih za priznanje mednarodne zaščite, podatki za maj 2023]⁴³

Graph 1. Number of applications (presented and granted)



[Število prošelj za azil (skupaj in ugodene)]⁴⁴

43 | Ministry of the Interior, Republic of Slovenia, 2023.

44 | SURS, 2023.

3. Analysis of case law

This section presents a detailed analysis of the relevant Constitutional Court case law related to refugees, asylum seekers, seekers of subsidiary international protection, and foreigners. These case law were found in the online database of the Constitutional Court of the Republic of Slovenia using three search methods: 1. by clicking on category 'administrative law – other personal statuses' (*upravno pravo – druga osebna stanja*) (103 results); 2. by using search string 'Asylum Act' (*Zakon o azilu*) (117 results), and 3. by using search string 'International Protection Act' (*Zakon o mednarodni zaščiti*) (8 results). The irrelevant results were filtered and the remaining results were cross-referenced.

The relevant case law can be divided into two segments. The first deals with the successful abrogation of challenged statutory legal provisions. Every person in Slovenia, including foreigners, has the right to file a petition for constitutionality review (*pobuda za presojo ustavnosti*) against a part of a statute (usually one or a few articles or parts of an article, be it a paragraph, a point, or only part of a sentence), if he or she can demonstrate a valid legal interest.⁴⁵ Most petitions are rejected, however, a few are successful and result in the unconstitutional statutory text being abrogated. A constitutional complaint (*ustavna pritožba*), is a legal remedy (*pravno sredstvo*), allowed to every physical and legal person in Slovenia, including foreigners, if an individual act of the state (usually an administrative decision or judgement) infringed upon his or her human rights (s), protected by the Constitution. A constitutional complaint cannot be filed against a wrong or incomplete establishment of facts in the case or against the wrong or incomplete use of material law. In principle, it can only be filed after all other legal remedies, both regular and extraordinary, have been exhausted. However, it can also be filed before the exhaustion of such legal remedies if an alleged violation of human rights is evident, and if the execution of the challenged decision would result in irreversible damage.⁴⁶ In cases related to refugees and international protection, constitutional complaints are always filed against the judgement of the Supreme Court which rules against the applicant in an appeal against the Administrative Court.

| 3.1. Constitutional Court's abrogation of statutory provisions

In 2006, a provision of the Asylum Act was successfully challenged. It stipulated (more precisely, it was so interpreted in practice), that the deadline to appeal an administrative decision shall begin from the moment the administrative decision (written only in Slovene, not translated) is served to the asylum applicant and not from the moment it is served to their refugee counsellor or legal guardian (in cases of minor applicants). When in fact, both of them should have been served. According to the unclear wording of said provision (the Slovenian conjunction *oziroma* which can mean and or depending on the context), which in practice was, for the most part, misinterpreted to mean *or*. Therefore, only asylum applicants

45 | For more details see Sladič, 2012.

46 | Articles 50–52 of the Constitutional Court Act. See also Mavčič, 2010.

were served. With Decision no. U-I-176/05 of 8 September 2005⁴⁷ the Constitutional Court ruled that such a provision (the unclear wording of said provision) violated basic human rights, particularly the right to an effective legal remedy provided by Article 25 of the Constitution. The reason for this decision lay in establishing that such a deadline was different from the general rules of administrative procedures, which clearly state that the deadline for appeal begins only when the decision in question has been served to the representing attorney, counsel, or legal guardian. No special reason was found as to why serving decisions to asylum applicants should be any different. The applicants often neither understood the decision nor were they familiar with how to appeal (considering that they did not speak Slovene), leading to the loss of their right to appeal and subsequent prompt deportation. Therefore, the second sentence in Paragraph 2 of Article 32 of the Asylum Act was declared unconstitutional and abrogated.

The Asylum Act was further successfully challenged (Article 45b), together with an almost identical provision of the subsequent ZMZ-1 (Article 83), in a decision of 15 October 2008, Case No. U-I-95/08, Up-1462/06.⁴⁸ In both acts, the provision stated that the applicant was allowed to live outside of the Asylum Home at a private address, only, if (first line of cited Article) ‘the Asylum Home is unable to provide appropriate living conditions’ (e.g. owing to overcrowding). Furthermore, Article 45b of the Asylum Act (second line) stipulated an additional condition that ‘the applicant had already been questioned in a regular procedure’. This line was slightly modified with Article 83 of the ZMZ-1, ‘that a personal interview had been already conducted with the applicant’. Both conditions had to be met, one alone did not suffice. In practice, this meant a *de facto* mandatory pre-approval by the MI for applicants who intended to live on a private address (with their relatives, coworkers, friends, fiancé, or simply friends), an approval which was almost uniformly denied. This provision was found in conflict with Article 32 of the Constitution, which ensures freedom of movement, which, according to the Commentary of the Constitution, implies that one can move freely in Slovenia without any additional administrative permission. The Constitutional Court conducted a strict proportionality test. Freedom of movement can be curtailed for four reasons: 1. to ensure criminal proceedings (detention), 2. to prevent the spread of communicable disease, 3. to protect public order, 4. in the interests of national defence. The only relevant reason could be the protection of public order. Interestingly, the Court ruled that the obligation to conduct an interview and pre-approval were proportional limitations of the right to freedom of movement, since it was necessary to establish that the living conditions at a proposed private address were satisfactory. The Court overruled the claims of the MI that residing at a private address would compromise the efficiency of the asylum procedure. The MI could always deny pre-approval, after which the applicant was entitled to a legal remedy. The situation with the first line of Articles 45b and 83 was entirely

47 | U-I-176/05, Official Gazette of the Republic of Slovenia, No. 85/05, dated 8 September 2005.

48 | U-I-95/08, Up-1462/06, Official Gazette of the Republic of Slovenia, No. 111/2008, dated 15 October 2008.

different. According to these provisions, the limitation of freedom of movement was automatic, as it depended on vacancies within the Asylum Home. Only if there were no vacancies and overcrowding became an issue, was it possible to consider residence at a private address. The Court ruled that this was disproportional, and thus, unconstitutional. Thus, the first lines of both Articles under review were found to be unconstitutional, and the National Assembly (*Državni zbor*) instructed to remedy this unconformity within 10 months.

The ZMZ-1 was successfully challenged in connection with the principle of 'general trustworthiness' (*splošna verodostojnost*) in Case No. U-I-292/09 and Up-1427/09 of 20 October 2011⁴⁹ concerning anonymous complainants (presumably citizens of the People's Republic of China). The challenged provision, Paragraph 3 of Article 22 of the newly amended ZMZ-1, stipulated: 'If general trustworthiness of the applicant is not established, the competent organ does not consider any information about the country of origin'. The complainants presented no personal documents and refused to reveal any personal information, however, their ethnicity was established to be most probably Chinese and therefore return to the People's Republic of China was imminent. The complainants were apparently untrustworthy, as they provided many contradictory statements during their personal interviews. Untrustworthiness can be either inner, where the applicant states contradictory facts during a single interview or during subsequent phases of the asylum procedure; or exterior, where the applicant's statements are inconsistent with objective knowledge about the country of origin, for example, the applicant claims persecution in a country which is known to be safe.⁵⁰ The challenged Paragraph 3 created a 'legal automatism', which was in the opinion of the Court, contrary to the principle of non-refoulement. This principle implies that the applicant should not be returned, directly or indirectly (through a third country), to a country where he or she could face death, torture, or other types of degradation and inhumane treatment. Since the People's Republic of China is notorious for human rights violations on a massive scale, applicants – even if completely untrustworthy – should at least be allowed to propose evidence of the type of persecution they would face if returned to China. As legal automatism made this impossible, the Court found that the challenged provision could potentially violate the principle of non-refoulement, and therefore violate Article 18 of the Constitution, which prohibits torture. This prohibition is absolute: in contrast to the majority of human rights in the Slovenian Constitution it cannot be limited in any way by any other right, state of emergency, public safety and order, or public interest.⁵¹ Thus, the Court abrogated Paragraph 3 of Article 22 of the ZMZ-1. The lower judgements of the Administrative and Supreme Court were also abrogated as they were based on this unconstitutional provision.

In the Case No. U-I-155/11 of 18 December 2013 the Constitutional Court ruled that the applicant should have an effective option to challenge the assumption of a

49 | U-I-292/09, Up-1427/09, Official Gazette of the Republic of Slovenia, No. 98/2011, dated 20 October 2011.

50 | Thomas, 2006, p. 81.

51 | Avbelj et al., 2019.

safe third state.⁵² The wording of the provisions which defined ‘the third country’ was abstract, vague and incomprehensible. A third country was defined as the country where the applicant was located (*se je nahajal*) before arriving to Slovenia. Illegal aliens usually travel across many countries before entering Slovenia, and rarely take a direct flight into the country. No criteria were set to identify this third country. Furthermore, the ZMZ-1 of the time lacked provisions defining a procedure on what was to be done if said third country simply refused entry. For these reasons, the Court abrogated the relevant statutory provisions (Article 60 and Paragraph 1 of Article 62 of the ZMZ-1), as being contrary to the rule of law defined by Article 2 of the Constitution. In the same case, the Court also ruled on the issue of an effective legal remedy. If the applicant had arrived from a country deemed as a ‘safe third country’ his application for international protection was, according to Article 63, rejected by an administrative order (*sklep o zavrženju*), meaning it was never even considered on merit. The applicant was prevented from stating any facts to support his case. Legal remedies for administrative rejection includes lawsuits for administrative disputes (*upravni spor*) before the Administrative Court. However, only lawsuits against administrative denials suspend the execution of decisions – deportation in this case. Lawsuits against the rejection did not have this effect. The applicants would find themselves in a position where they would be unable to state the facts of their case, and they could only file this lawsuit in an administrative dispute when they were already in another country (which may have also initiated and even finished their deportation to the country of origin). The Court ruled that such a legal remedy was ineffective, and therefore, unconstitutional. The chief, and often the only, source of evidence in the procedure for obtaining international protection is the applicants themselves. To ensure fair procedure, they must be present in person in the territory of the country where they submit their applications. This is the only way they can answer questions and clarify matters. Although the procedure for an administrative dispute in Slovenia provides the possibility of separately requesting a suspension (delay) of administrative execution (*zahteva za zadržanje izvršitve*), which is then rapidly decided in a separate procedure, this is insufficient according to case law of the ECHR. Only a legal remedy which suspends execution is considered effective in cases of international protection. When implementing Directive 2013/32/EU (Procedural Directive),⁵³ Slovenia was not required to make legal remedies non-suspensive. This characteristic can neither be justified by the requirement that a procedure should be economic and prompt – not on account of basic human rights. The challenged article was found to violate both Articles 23 (Right to Judicial Protection) and 25 (Right to Legal Remedies). Therefore, it was abrogated.

In Case No. U-I-189/14 and Up-663/14 of 15 October 2015, the Court reviewed the constitutionality of the challenged provision (Paragraph 1 of Article 106 of the

52 | U-I-155/11, Official Gazette of the Republic of Slovenia, No. 114/2013, dated 18 December 2013.

53 | 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, *OJ L 180*, 29.6.2013, pp. 60–95.

ZMZ-1) which stipulated that ‘application for the extension of international protection can only be considered for reasons which the applicant originally claimed’.⁵⁴ In practice, this meant that although applicants claimed numerous reasons for their applications, protection was granted for only one reason, one type of persecution. Furthermore, if the applicant had to apply for an extension of subsidiary protection, he or she had to claim the same reason for the persecution as originally claimed. All other reasons were deemed to have been already denied as insufficient. Such practice ignored real-life and changing situations on the ground in the countries of origin (e.g. armed conflict may have ended but persecution and hatred remained, the applicant could be further threatened by terrorism, organised crime, or religious intolerance). In this case, the applicant applied for an extension of subsidiary protection; however, he provided reasons different from those in his original application. Based on Article 106, his application was denied. He filed a lawsuit with the Administrative Court and lost.⁵⁵ His appeal to the Supreme Court was unsuccessful.⁵⁶ Finally, the Constitutional Court determined that an application for the extension of international protection was essentially the same as a new application for international protection. The Court overruled the objections made by the government that such a procedure would violate the principle of economy, that is, to save time and costs in the procedure, and that the applicant could always submit a new application. The latter places an excessive burden on applicants. An applicant has the constitutional right that an administrative organ and court of law address all claims for international protection, be it old claims as stated in previous application(s) or newly raised claims. By legally limiting the possibility of submitting such claims, the law established legal automatism which deprived applicants of proper legal protection. The Court also dismissed the government’s argument that the denial of international protection did not imply an automatic return to the country of origin. Such a denial meant a loss of the right to reside within the territory of Slovenia, placing the applicant into potential danger, even if he or she left voluntarily. Arbitrary limitation of reasons to extend international protection could result in the applicant being exposed to torture or cruel and inhumane treatment upon returning to his or her country of origin. This violates the prohibition of torture (Article 18 of the Constitution). This human right is absolute and cannot be limited for various reasons. The applicant has the absolute right to claim the possibility, danger, and threat of torture for any reason, even if he or she may not succeed in proving it. By depriving him of this right, the challenged provision opened up the possibility of torture, which is unacceptable in the Slovenian constitutional order. Originating from Article 18, the Court abrogated the challenged provisions and erased them. The constitutional complaint was also successful, resulting in vacating the annulments of the judgements by the Supreme and Administrative Courts. Moreover, the Court instructed the Administrative Court to decide on the case again based on this changed provision.

54 | U-I-189/14, Up-663/14, Official Gazette of the Republic of Slovenia, No. 82/2015, dated 15 October 2015.

55 | Case of the Administrative Court, reference No. I U 544/2014, dated 4 June 2014.

56 | Case of the Supreme Court, reference No. I Up 245/2014, dated 30 July 2014.

In Case No. U-I-59/17, concluded on 18 September 2019,⁵⁷ the Slovenian Ombudsman successfully challenged Article 10b of the Foreigners Act,⁵⁸ which is related to rights of asylum and international protection. The challenged provision provided a special and rather controversial regime with a temporary limitation on the right to apply for international protection. This regime, called 'complex crisis of migration' (Article 10a, *kompleksna kriza na področju migracij*) could be invoked by the Government of Slovenia for a period of no more than six months and on a certain territory which the act does not specify, but logically it could apply only to Slovenian border areas, not to the entire country. The state legislature, the National Assembly, could extend this measure each time for no more than six months (but without any limitation on the number of extensions), by a vote of the absolute majority of all members of the parliament, at least 46 out of 90. *De facto* this special regime clearly constituted a state of emergency, although with a different name. It was included in the Aliens Act following the experience with massive waves of Syrian refugees crossing Slovenia in 2015 and 2016, often accompanied by economic migrants from other countries. Slovenia was logistically poorly prepared for this challenge.⁵⁹ (Despite this, the fear of chaos and heightened crime was entirely unfounded, as several refugees and migrants did not have any statistical significance in crime rates. Contrary to expectations, crime rates in 2015 and 2016 were significantly lower than those in previous years, clearly following a downward trend since 2013, when the peak was reached.⁶⁰) Contested Article 10b of the Aliens Act specified special measures. An illegal alien was prevented entry and could be immediately returned to a neighbouring country. If he had already entered, the police would only take his personal data, and regardless of the laws regulating international protection, could reject his application as inadmissible with a police order (*sklep*) on the condition that the neighbouring country where the illegal alien was being promptly deported did not have any systemic deficiencies in the asylum procedure and could not lead to the danger of being tortured or otherwise mistreated. The alien was allowed to appeal to the MI. However, this appeal did not suspend the execution of the police order. He or she would need to wait for the result of the appeal (with a high probability of failure) in another country, provided that this country would not initiate deportation. *De facto*, this provision legalised the mass expulsion of foreigners, which was at the time (and remains) prohibited by the Constitution and ECHR. It deprived potential applicants for international protection of their right to an effective legal remedy. There were a few exceptions to this rule. It was not allowed to be used for aliens in bad health, their family members or unaccompanied minors (Paragraph 3). Minor family members of otherwise healthy illegal aliens could be subject to automatic mass deportation. The Court began its analysis by establishing that a violation of the principle of

57 | U-I-59/17, Official Gazette of the Republic of Slovenia, No. 62/2019, dated 18 September 2019.

58 | The Foreigners Act (Zakon o tujcih [Ztuj-2]), Official Gazette of the Republic of Slovenia, No. 91/21.

59 | Ladić and Vučko, 2016, pp. 16–23.

60 | Republic of Slovenia, Ministry of Interior, Police, 2016, p. 18.

non-refoulement can be either direct, deporting the alien in danger directly to their country of origin; or (more commonly) indirect, removing them to a third country, usually a neighbouring country, where they faced an imminent and real danger of being deported to the place of persecution. Every automatic removal of a person who claims to be in need of protection violates protection from torture as guaranteed by Article 18 of the Constitution. Referring to the substantial case law of the European Court of Human Rights (ECtHR) and the CJEU, the Constitutional Court has stated that circumstances in another EU country that could constitute inhumane treatment must reach a threshold of seriousness.⁶¹ The latter is also reached if the negligence and apathy of state agencies cause applicants to become destitute and unable to fulfil their basic needs, such as food, hygiene, and shelter, resulting in danger that their physical and mental health would deteriorate and in other circumstances which seriously violate human dignity. However, such a threshold is not reached if living in another EU country is burdened with extreme uncertainty and serious deterioration in material well-being. This is also not possible if another EU country is significantly poor.⁶² Nevertheless, the applicant should maintain the right to state his facts and special circumstances, and state why the country in question should not be considered safe. There are further conditions: the third country agrees to accept the applicant and provides for a fair procedure to apply for international protection. The government defended the challenged provision as a means of defending public order and, as a lesser measure, to prevent a state of emergency. However, it was clear that the provision aimed to legally establish a *sui generis* situation which would be somewhere between a normal situation and a state of emergency, perhaps a minor state of emergency. There is no such option in the Constitution, and it cannot be circumvented in such a manner. Therefore, the Court determined that it should use the general rules for limiting human rights under normal circumstances (Article 15 of the Constitution). The prohibition of torture in Article 18 is absolute and cannot be limited to any case. Article 16 of the Constitution clearly states that declaring a state of emergency cannot suspend or limit the prohibition of torture. By preventing potential applicants from arguing their case on merit and presenting circumstances in neighbouring EU states as potentially dangerous and harmful to them, the challenged provisions violated Article 18 and were therefore abrogated.

61 | To this end, the Constitutional Court cited more than 20 ECHR and CJEU judgements in footnotes, which had reached such a conclusion. For example, from the ECHR: *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011; *Tarakhel v. Switzerland*, Application No. 29217/12, 4 November 2014. From CJEU: *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011.

62 | To explain this, the Constitutional Court based its reasoning on this reasoning, found in a few judgements of the CJEU, for example CJEU Case C-163/17/ Judgement *Abubacarr Jawo v Bundesrepublik Deutschland*; CJEU Joined Cases C-297/17, C-318/17, C-319/17, C-438/17/ Judgement *Bashar Ibrahim (C 297/17) Mahmud Ibrahim, Fadwa Ibrahim, Bushra Ibrahim, Mohammad Ibrahim, Ahmad Ibrahim (C 318/17), Nisreen Sharqawi, Yazan Fattayrji, Hosam Fattayrji (C 319/17) v Bundesrepublik Deutschland and Bundesrepublik Deutschland v Taus Magamadov (C 438/17)*.

In this landmark case, the Court also clarified issues pertaining to EU law on human rights (migration and asylum cases). When the Constitutional Court concretises the content of human rights and fundamental freedoms, it must consider the primary law of the EU, particularly the Charter of Fundamental Rights and the case law of the CJEU. In such cases, the Constitutional Court can adhere to national standards for protecting human rights if their use neither endangers the level of protection provided by the Charter, as explained by the CJEU, nor interferes with the primacy, unity, or efficiency of EU Law.⁶³ This implies that Slovenian standards for protecting human rights can be used if the level of protection is equal to or higher than the protection offered by the Charter and CJEU case law.

| 3.2. **Constitutional complaints**

The legal journey of an applicant before filing the constitutional complaint can comprise two possible paths.

The first path is a 'denied-approved-denied' by the MI, the Administrative Court and the Supreme Court, respectively. The application is denied or rejected by the MI, followed by a lawsuit before an Administrative Court. The latter often rules against the MI, annuls its decision, and demands that a new one be issued (procedure re-initiated). The rulings of the Administrative Court are often discussed in detail and are familiar with human rights law, ECHR case law, and so on. The MI then appeals the ruling of the Administrative Court to the Supreme Court, which most often sides entirely with the appellant (MI). These judgements often have problems with due process as many claims of the asylum seeker are left unaddressed, violating Article 22 of the Constitution.

The second path is that of uniform denial: 'denied-denied-denied'. If the applicant's lawsuit is denied by the Administrative Court, his or her appeal to the Supreme Court is unsuccessful. The chances of succeeding with a constitutional complaint are usually slim in this case; however, it is possible, has occurred, that the legal provision on which both courts based their legalistic rulings is found to be unconstitutional.

In procedures before the Constitutional Court, many complaints are rejected by a court order (*sklep*) for failing to adhere to procedural conditions as stipulated in Paragraph 1 of Article 55b of the CCA. The most common reason for rejection was 'the lack of legal interest'. This implies that the Court found that even if the constitutional complaint succeeded, it would not result in any legal or tangible benefits for the complainant. In asylum-related cases, such rejections were issued primarily for the following reasons: because the complainant(s) had left the Asylum Home (for a period of more than three days and had not returned),⁶⁴ had moved to another

63 | Decision of the Constitutional Court of the Republic of Slovenia No. U-I-59/17, 25 May 2017, Paragraph 25.

64 | This is understood to mean the complainant(s) have arbitrarily absconded, and have withdrawn their application for international protection, thus the entire procedure is stopped, as stipulated in Article 50 of the ZMZ-1. The same applies, if an applicant 'sleeps somewhere else', spends the night outside the Asylum Home without a permit, and does not provide a reasonable explanation for doing so (also see Article 50 of the ZMZ-1).

country, or decided to return to their country of origin. For example, in 2014, out of 385 requests for international protection, 216 were considered automatically withdrawn for these reasons.⁶⁵ Other rejections were issued because complaints were late (violating the 15-days deadline and of insufficient importance to override this rule)⁶⁶ or for other reasons (the representative attorney did not possess the required qualifications).

If the Constitutional Court accepted an asylum-related complaint, there was an adequate chance that it would succeed. From 2005 to 2021, the Court ruled on various asylum-related complaints. Topics of persecution, relevant for granting subsidiary protection, included, harassment of political dissidents in the Russian Federation, 'mystical persecution' by witchcraft in Cameroon, state of war in Afghanistan, political persecution of an applicant from the Tamil minority in Sri Lanka in relation with the principle of non-refoulement, and violence against people with homosexual orientation in an unnamed (anonymised) country. Other interesting issues which had to be solved by the Court included, for example, the right of a minor sister of a refugee to be considered a member of her immediate family (right to family reunification); the issue of new evidence, emerging in a procedure to grant refugee status; the obligation to verify the situation in the country of origin, even when the applicant for subsidiary protection did not provide credible and consistent information; extension of subsidiary protection, owing to new circumstances; the possibility of challenging the presumption of safety in an EU country.

In the case of an immigrant with mental-health problems, Case No. Up-771/06-15 of 15 June 2006 the Court established a violation of human rights.⁶⁷ The complainant clearly stated completely wrong information while claiming to be a refugee; however, in the procedure for subsidiary protection, he proposed that a forensic psychiatrist be appointed as expert witness. The MI summarily denied this proposal in an expedited procedure, without even explaining the reasons for the denial. The complainant's attorney filed an administrative lawsuit and won the case before the Administrative Court. However, the Supreme Court agreed with the MI and ruled against the complainant, ordering him to leave Slovenia within one day of the final judgement. The Court found that the Supreme Court completely ignored the complainant's statements about being mentally ill and having problems perceiving reality, and therefore proposing an examination by a forensic psychiatrist. Thus, the Supreme Court deprived the complainant of the right to a fair trial, which clearly violated Article 22 of the Constitution. The judgement was annulled.

The Court established a violation of human rights, Article 22 of the Constitution (equal protection of rights), in Case No. Up-2214/06, of 20 September

65 | Ramšak, 2015, p. 232.

66 | According to Paragraph 3 of Article 50 of the Constitutional Court Act: 'In especially well-founded cases, the Constitutional Court may exceptionally decide on a constitutional complaint which has been lodged after the expiry of the time limit referred to in paragraph one of this Article'.

67 | Up-771/06, Official Gazette of the Republic of Slovenia, No. 66/2006, dated 15 June 2006.

2007.⁶⁸ The complainants (Mr. Abdulahi and others) were of Roma ethnicity. They claimed persecution by members of the Albanian ethnic majority in the Republic of Kosovo. Their request was denied in an expedited procedure, because their case was considered 'manifestly unfounded' (*očitno neutemeljna*). They lost their appeal to the MI and filed an administrative lawsuit before the Administrative Court, which they won. However, upon appeal of the MI to the Supreme Court (*Vrhovno sodišče*), the latter sided with the ministry and summarised and repeated the previous administrative decision. The chief reason for denying the asylum request was that the complainants failed to notify law enforcement in their country of origin, Kosovo. The MI and Supreme Court were also of the opinion that the persecution was not intensive, because the complainants were subjected only to numerous verbal-only threats, but only one actual physical assault (although this one-time assault resulted in the death of the complainant's father). Persecution must have represented a systematic and persistent violation of human rights, resulting in incessant torture or serious mistreatment known to the authorities, who refused to act and offered protection. To this end, the complainants claimed that there were no police in their region because the police had escaped and the only protection was provided by international peacekeeping units of KFOR; however, it was inadequate, as they had many other concerns. The Constitutional Court ruled that the MI abused the provisions of the expedited procedure, which should always be interpreted only as a benefit for an asylum applicant. Evidently, no persecution occurred only in cases which could not possibly under any circumstances be considered persecution (if the complainant claims no violence whatsoever, neither verbal nor psychological). As soon as an asylum applicant claims that she or he has suffered violence, the expedited procedure cannot be invoked. The MI and Supreme Court argued that (non-) existence of persecution could be inferred simply from the applicant's request for asylum and that it was possible to ascertain from the application that there, in fact, was no violence at all. Thus, they violated the equal protection of rights stipulated in Article 22 of the Constitution, and the judgement of the Supreme Court was annulled.

In 2009, the Court revisited the question of the intensity of persecution in Case No. U-I-50/08 and Up-2177/08, of 26 March 2009.⁶⁹ The complainants (Krishtof and Krishtof) claimed persecution owing to various events which had happened in the Russian Federation: denial of issuing an interior passport to one spouse, refusal to register with the Society of Old Austrians, membership in the organisation Memorial (exposing and honouring the victims of Stalinism), denial of request to access archival data, circumstances regarding possible infringement of religious freedom, and dismissal from work without explanation. The MI rejected all these

68 | In contrast to the established practice at the ECtHR, the Supreme Court of the United States and many other supreme courts, Slovenian cases before the Constitutional Court do not have official designation by the family name of the plaintiff, only a serial number. When available, we nevertheless informally state the family name of the plaintiff to make reading and analysis easier to follow. For details on this judgement, see: Up-2214/06, Official Gazette of the Republic of Slovenia, No. 89/2007, dated 20 September 2007.

69 | U-I-50/08, Up-2177/08, Official Gazette of the Republic of Slovenia, No. 30/2009, dated 26 March 2009.

claims as insufficient to grant asylum, which was later confirmed by both the Administrative and Supreme Court. The complainants failed to establish any unfavourable circumstances which would appear to threaten their well-being upon returning to the Russian Federation. The Court ruled that, in this case, the lower decisions were legal, explained in sufficient detail, and consistent, thus not violating the Constitution. The complaint also claimed other violations, such as wrong service of the decision (to the complainants instead of their attorney) and wrong use of language (only essential parts of the decisions were translated into Russian); however, these were denied as minor procedural infractions, not actually violating their human rights.

The Case No. Up-2963/08 of 5 March 2009,⁷⁰ involved highly unusual events. The complainant, named Boby Talle, a citizen of Cameroon, claimed to extremely fear returning to his country of origin, because he had been subject to 'mystical persecution' by his many uncles, participating in some type of witchcraft, who desired him dead or insane to claim his substantial inheritance. He applied for subsidiary protection on the grounds that his physical and mental well-being could be in serious danger, up to the point of being killed, if he returned to Cameroon. The MI denied his request by ignoring the fact that he had applied for subsidiary protection. The administrative lawsuit to the Administrative Court against the MI was successful, however the MI appealed to the Supreme Court, which sided with its arguments, although the complainant repeatedly argued that he had indeed applied for subsidiary protection. In this context, it could be understood that his application was disregarded by the MI, as the claims were unusual, even bizarre. The Supreme Court disregarded the application. The Court ruled that such persistent ignorance clearly violated the right to a fair trial provided for by Article 22 (2) of the Constitution. Thus, the judgement of the Supreme Court was annulled.

A case similar to Case No. Up-2214/06⁷¹ was decided in the Case No. Up-96/09 (complainants anonymous for their protection), of 9 July 2009.⁷² It involved members of the Ashkali minority in an unnamed country, who claimed to have been persecuted and beaten on two occasions by ethnic Albanians. As in *Abdulahi*, the MI used the expedited procedure to deny the asylum applications, arguing that 'there was obviously not any persecution'. The complainants again won their case in the Administrative Case, only losing in the Supreme Court against the appeal of the MI. The Court found that the expedited procedure was unjustified. As soon as an asylum applicant claims violence, the expedited procedure cannot be implemented. The Constitutional Court established a violation of Article 22 (3) and annulled the judgement of the Supreme Court.

Concerning a citizen of Sri Lanka, Case No. Up-763/09 of 17 September 2009 (the complainant stayed anonymous for his protection),⁷³ the Court ruled on the

70 | Up-2963/08, Official Gazette of the Republic of Slovenia, No. 22/2009, dated 5 March 2009.

71 | *Abdulahi et al.*, see above.

72 | Up-96/09, Official Gazette of the Republic of Slovenia, No. 57/2009, dated 9 July 2009.

73 | Up-763/09, Official Gazette of the Republic of Slovenia, No. 80/2009, dated 17 September 2009.

principle of non-refoulement. The complainant had lived in the United Kingdom (UK) for six years, before he was detained in Slovenia. Employees of MI consistently misinformed him that he would be deported back to the UK, resulting in his inability to submit applications for international protection. Only later was he informed by an immigration inspector that he would be deported to Sri Lanka. As a member of the Tamil minority, he faced potentially fatal danger when returning to the country of origin. The MI denied his application for international protection. This decision was reversed by the Administrative Court only to be reversed again by the Supreme Court, which sided with the MI and ordered the complainant to leave Slovenia immediately after the final judgement. One of the arguments of the Supreme Court was that the civil war in Sri Lanka had ended and that the Tamil minority was no longer in danger. The Supreme Court completely neglected many arguments backed by media reports and the applicant's documentation that Tamils were being violently persecuted. The Constitutional Court used Articles 18 (Prohibition of Torture) and 22 to annul the Supreme Court decisions. The Court stressed that every decision to deny an asylum request must, by its very nature, include a factual assessment that the applicant's life and health would not be in danger or face any threats owing to torture, mistreatment, or similar actions. Therefore, establishing facts on what was really happening in the applicant's country remained the most crucial and important, albeit also the most difficult, task for the MI organs. They should not simply waive it away from general explanations and naive assumptions that the civil war had ended. The Court also based its decision on the ECHR and related case law of the ECHR by citing the following cases in its footnotes: *Soering v. The United Kingdom*,⁷⁴ *Vilvarajah and Others v. The United Kingdom*,⁷⁵ *Ahmed v. Austria*,⁷⁶ *Salah Sheekh v. The Netherlands*,⁷⁷ *Saadi v. Italy*.⁷⁸ Rigorous scrutiny required that (1) there were circumstances which justified the hypothesis that torture and similar practices occurred in the country in question, and (2) the applicant was a member of a relevant group of people. Citing *NA vs United Kingdom*,⁷⁹ a case also related to Sri Lanka, the Constitutional Court found for the complainant. He succeeded in proving both the conditions of rigorous scrutiny. Thus, the Supreme Court's decision violated the constitutional prohibition of torture in Article 18, which included the prohibition of deportation to countries where nobody could be subjected to torture or cruel or inhumane treatment. For these reasons, the challenged decision was abrogated.

74 | *Soering v. The United Kingdom*, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989.

75 | *Vilvarajah and Others v. The United Kingdom*, 45/1990/236/302-306, Council of Europe: European Court of Human Rights, 26 September 1991.

76 | *Ahmed v. Austria*, 71/1995/577/663, Council of Europe: European Court of Human Rights, 17 December 1996.

77 | *Salah Sheekh v. The Netherlands*, Application No. 1948/04, Council of Europe: European Court of Human Rights, 11 January 2007.

78 | *Saadi v. Italy*, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008.

79 | *NA. v. The United Kingdom*, Appl. No. 25904/07, Council of Europe: European Court of Human Rights, 17 July 2008.

In Case No. Up-1116/09 of 3 March 2011 the complainant was detained by oral order at the Centre for Foreigners for a period of three months on the suspicion that he would mislead the authorities and abuse the asylum procedure.⁸⁰ He received a written decision only after being detained six days. At the time of the oral order, his constitutional 'Miranda' rights were not respected,⁸¹ because the authorities considered that such detention for foreigners was not a deprivation of liberty. The regime at the centre was strict: the complainant was often not allowed to leave his block, his cell was tiny, he had limited freedom of movement, he had the right to walk outside only for two hours a day (within the premises of the centre), he was constantly supervised by officials, he had to obey the daily schedule of activities, and he was not allowed to wear his own clothes, only grey sweatpants were provided by the institution. The complainant appealed his case first to the Administrative⁸² Court and then to the Supreme Court,⁸³ but lost before both. In deciding on his constitutional complaint, the government claimed in its defence that such detention was not a deprivation of liberty but constituted only a restriction or limitation. The Court found the measure of detention in the case of the applicant to be completely illegitimate, and disproportional; suspicion of potentially misleading the authorities and abusing the asylum procedure somewhere in the future could not possibly constitute a valid reason to deprive anyone of liberty for a period of three months. Therefore, Article 19 (Protection of Personal Liberty) was violated. This was one of the rare constitutional complaints regarding asylum that succeeded despite both lower courts ruling against.

The Court addressed the question of relevant evidence in the asylum procedure in Case No. Up-958/09 and U-I-199/09 of 15 April 2010 (complainants remained anonymous).⁸⁴ The complainants applied for a new procedure to be granted asylum. The MI rejected their application on procedural grounds that simply an oral statement about a different situation than before cannot be considered proper evidence. The complainants won the lawsuit before the Administrative Court,⁸⁵ which was then reversed by a Supreme Court judgement,⁸⁶ siding, as usual, with MI. However, the Supreme Court did not provide any relevant evidence. Therefore, the Constitutional Court established a violation of Article 22 (4), annulled the judgement of the Supreme Court and remanded it to the Supreme Court for further consideration.

80 | Up-1116/09, Official Gazette of the Republic of Slovenia, No. 22/2011, dated 3 March 2011.

81 | According to the Constitution, Paragraph 3 of Article 19: 'Anyone deprived of his liberty must be immediately informed in his mother tongue, or in a language which he understands, of the reasons for being deprived of his liberty. Within the shortest possible time thereafter, he must also be informed in writing of why he has been deprived of his liberty. He must be instructed immediately that he is not obliged to make any statement, that he has the right to immediate legal representation of his own free choice and that the competent authority must, on his request, notify his relatives or those close to him of the deprivation of his liberty'.

82 | Case of the Administrative Court, Ref. No. I U 1199/2009, dated 15 July 2009.

83 | Case of the Supreme Court, Ref. No. I Up 313/2009, dated 27 August 2009.

84 | Up-958/09, U-I-199/09, Official Gazette RS, No. 37/2010, dated 15 April 2010.

85 | Case of the Administrative Court, Ref. No. I U 861/2009, dated 1 June 2009.

86 | Case of the Supreme Court, Ref. No. I Up 264/2009, dated 29 July 2009.

In Case No. Up-150/13-21 of 23 January 2014 brought by a citizen of Afghanistan, the Court addressed issues of arbitrary violence and individual threat.⁸⁷ In his asylum request to the MI, the complainant's claims about Taliban violence in the Afghan province of Nangarhar were rejected as unconvincing. The complainant won a subsequent lawsuit to the Administrative Court upon which the MI changed its decision and suggested that the complainant could benefit from the institute of 'internal resettlement', that is, in his case he need not return to his home province which was dangerous, however, he could stay in Kabul, the capital city, deemed relatively safe. In another lawsuit to the Administrative Court, the complainant strenuously objected to the idea of resettlement, claiming that his life in Kabul would be spent in abject poverty, as he would need to live in tents, suffer from a lack of proper hygiene, and face chronic unemployment, while facing danger from arbitrary violence owing to frequent terrorist attacks within the city. This time, even the Administrative Court denied his lawsuit and his subsequent appeal to the Supreme Court was unsuccessful. Citing the precedent *Meki Elgafaji and Noor Elgafaji vs Staatssecretaris van Justitie, C-465/07* before the Court of the EU, which interpreted the meaning of Point (c) of Article 15 in connection with Point (e) of Article 2 of the Qualification Directive,⁸⁸ the Constitutional Court ruled that the legal term 'serious harm' did not require that an individual applicant was facing such a harm owing to his personal circumstances. Serious harm could also be considered when arbitrary violence that accompanies an armed conflict reaches levels such high that the applicant may suffer serious harm only by being present in such a country or territory. Moreover, interior settlement can only be achieved if two criteria are met: first, the protection test which refers to the fact that the relevant part of the country is safe from persecution and danger of suffering serious harm, and second, the reasonable expectation test – can the applicant be expected to live there (having no relatives or friends). The Court established that both the Administrative⁸⁹ and Supreme Courts⁹⁰ failed to sufficiently determine the terms of serious harm and arbitrary violence⁹¹ that infringed upon the complainant's right to a fair trial, as required by Article 22 (5) of the Constitution. Judgements of both courts were annulled.

In the Case No. U-I-309/13 and Up-981/13, of 14 January 2015, brought by a female citizen of Somalia, the Court affirmed the right to family reunification, even with relatives who were not recognised as family members, according to Article 16b of the ZMZ-1.⁹² The petitioner, who had a valid refugee status, applied for

87 | Up-150/13, Official Gazette of the Republic of Slovenia, No. 14/2014, dated 23 January 2014.

88 | 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, *OJ L 337, 20.12.2011, pp. 9–26.*

89 | Case of the Administrative Court, Ref. No. I U 1703/2012, dated 28 November 2012.

90 | Case of the Supreme Court Ref. No. I Up 12/2013, dated 24 January 2013.

91 | For problems with translation of these terms into Slovenian, see Zagorc and Stare, 2018, p. 813.

92 | U-I-309/13, Up-981/13, Official Gazette of the Republic of Slovenia, No. 6/2015, dated 14 January 2015.

family reunification with her younger sister, a minor. As the article did not explicitly mention brothers and sisters as family members, the application was denied by the MI. The administrative lawsuit against the Administrative Court failed, and the appeal to the Supreme Court was unsuccessful. The MI and both courts interpreted Article 16b in a strictly legalistic and grammatical manner. The Court did not agree with this. It based its decisions on various conceptions of the protection of the family and family life, as found in the Universal Declaration of Human Rights,⁹³ the International Covenant on Civil and Political Rights,⁹⁴ and Article 8 of the ECHR. The Court reinforced its argument by citing dozens of ECHR judgments (in footnotes), explaining that, according to ECHR case law,⁹⁵ the concept of family essentially refers to the primary family (spouse and underage children); however, it is not limited to it. Relations with other relatives can be considered family bonds if they exhibit further elements of dependence that surpass normal emotional connections. The Constitutional Court stressed that the EU Charter on Fundamental Rights⁹⁶ states in its Article 52 (Paragraph 1), subject to the principle of proportionality, that limitations to those rights may be made only if they are necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. The limitations of family reunification with underage brothers and sisters do not meet this objective. Article 53 of the Constitution ensures the protection of family life. In addition to conventional primary families (communities of spouses with underage children), other family forms are possible if they live in a common household and have authentic emotional, financial, or other bonds that make them social units similar to primary families. Article 17 of the ZMZ-1 stipulates that the decision-making organ must respect the principles of family reunification. By contrast, Article 16b enumerated a list of relatives that could be considered family members. This arbitrary limitation meant an infringement on the right to family life, as guaranteed by Article 53 of the Constitution. A subsequent proportionality test revealed that this limitation was not proportional. Humanity, sovereignty, and the right of the state to control foreigners in its territory are insufficient reasons to prevent refugees' right to family life, which is next to impossible to nurture in the country of their origin. The intention of the legislature was to allow the reunification of all families which (in our culture) resemble a primary family. The law cannot predict

93 | UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

94 | UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

95 | The Court cited, among dozens of other cases, also: *Boultif v. Switzerland*, 54273/00, Council of Europe: European Court of Human Rights, 2 August 2001; *Gül v. Switzerland*, Application No. 23218/94, Council of Europe: European Court of Human Rights, 19 February 1996; *Ahmut v. The Netherlands*, 73/1995/579/665, Council of Europe: European Court of Human Rights, 26 October 1996; *Sen v. the Netherlands*, Application No. 31465/96, Council of Europe: European Court of Human Rights, 21 December 2001; *K. and T. v. Finland*, Application No. 25702/94, Council of Europe: European Court of Human Rights, 12 July 2001; etc.

96 | European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

the variety of family units in advance. Legally relevant family bonds should be considered on a case-by-case basis. Article 16b arbitrarily excluded sisters from such family bonds and thus automatically prevented many potential applicants for family reunification from even submitting evidence in their favour. Therefore, Article 16b was rendered as unconstitutional. By the time of the Court's decision, they had been replaced. The Court also annulled the judgements of the Supreme Court,⁹⁷ the Administrative Court,⁹⁸ and the decisions of the MI.⁹⁹

Despite Article 16b being abrogated and replaced, it still caused problems for recognition of family members. In Case No. U-I-68/16 and Up-213/15, of 16 June 2016 the Court further extended the circle of legally recognised family members to the homosexual partners of applicants.¹⁰⁰ The Court began its analysis based on Article 14 of the Constitution, which prohibits discrimination owing to personal circumstances. Article 14 (Equality before the Law) explicitly refers to national origin, race, gender, language, religion, political or other convictions, material standing, birth, education, social status, and disability. Homosexual orientation is not (yet) explicitly mentioned; however, it is no doubt covered by 'any other personal circumstance'. As applicants for international protection enjoy the full right to family life provided by Article 53 of the Constitution, in practice, meaning the right to be reunified with family members, this right also includes same-sex spouses, officially registered or married in another country, or living in a common-law marriage. The family law which was valid at the time was the Marriage and Family Relations Act¹⁰¹ (MFRA, later replaced by the more liberal Family Code¹⁰²) which stipulated that only persons of the opposite sex could get married or form a common-law marriage. The challenged Article 16b of the ZMZ-1 simply refers to the provisions of the MFRA, which contradicts the established case law that states that the existence of a family should be considered in terms of the strength of familial bonds. If the latter strongly resembles the bonds of a primary family (spouses or parent and child) for reasons of intimacy, trust, economic (co-)dependence, and so on, they should be acknowledged as a family. Therefore, Article 16b was found to be unconstitutional.

In the case of anonymous Complaint No. Up-229/17 and U-I-37/17, of 21 November 2019 the Court addressed the issue of persecution based on homosexual orientation.¹⁰³ The complainant, from an unnamed country, claimed to have been persecuted and even raped once, as he reported on social media. However, he only

97 | Case of the Supreme Court, Ref. No. I Up 423/2013, dated 14 November 2013.

98 | Case of the Administrative Court, Ref. No. I U 1295/2013, dated 11 September 2013.

99 | Decision of the Ministry of the Interior, Ref. No. 2142-276/2010/14 (1312-04), dated 5 July 2013.

100 | U-I-68/16, Up-213/15, Official Gazette of the Republic of Slovenia, No. 49/2016, dated 16 June 2016.

101 | Marriage and Family Relations Act (Zakon o zakonski zvezi in družinskih razmerjih [ZZZDR]), Official Gazette of the Republic of Slovenia RS, No. 69/04 – officially consolidated text.

102 | Family Code (Družinski zakonik [DZ]), Official Gazette of the Republic of Slovenia, No. 15/17.

103 | Up-229/17, U-I-37/17, Official Gazette of the Republic of Slovenian, No. OdlUS XXIV, 20, dated 21 November 2019.

contacted the police once. He insisted that reporting assaults and other crimes to the police was useless, and that the police were unable and unwilling to offer him protection. The complainant was refused subsidiary protection by the MI,¹⁰⁴ lost the administrative lawsuit before the Administrative Court,¹⁰⁵ and lost his appeal to the Supreme Court.¹⁰⁶ The chief issue in this case was the duty of the persecuted person to report the acts of persecution to domestic law enforcement. If such a report is not completed, the applicant for asylum carries a heavier burden of proof: he or she must prove that law enforcement in the country of origin cannot provide protection. This can be so for various reasons, such as law enforcement itself is actively involved in persecution, it is corrupt and inefficient. The Court found that both the Administrative and Supreme Courts cited ample evidence that the police in the country of origin were (despite the social climate of extreme hatred towards the LGBT community) accepting criminal complaints and investigating such crimes. Moreover, many active non-governmental organisations (NGOs) and other organisations have been dedicated to helping homosexuals. The complainant was unable to prove whether police assistance was denied in his specific case. The Court found that the lower judgements were well argued and addressed all complainants' claims and concerns in detail; therefore, Article 22 of the Constitution was not violated. The complaint was denied and the judgement of the Supreme Court was affirmed.

3.3. Analysis of the developmental arc and use of foreign case law

The issues of the developmental arc and use of foreign case law were analysed together because they were observed to be related. A schematic table (Table 2) is presented for a better overview.

Table 2. Developmental arc and use of non-domestic sources in the case law of the Constitutional Court of Slovenia

Case Ref. No. and date	Type of argumentation and court majority	Article of the Constitution found to be violated	Use of non-domestic sources	
			Documents of int. organisations	Case law of int. organisations or foreign countries
Petitions for the review of constitutionality of laws (all resulting in abrogation):				
U-I-176/05 8 September 2005	<i>Merit</i> Unanimous	Article 23 – Right to Judicial Protection Article 25 – Right to Legal Remedies	N/A	N/A

104 | Decision of the Ministry of the Interior, Ref. No. 2142-21/2015/19 (1312-15), dated 25 November 2015.

105 | Unfortunately, in this case, the Constitutional Court did not cite the reference number nor date of the decision adopted by the Administrative Court.

106 | Case of the Supreme Court, Ref. No. I Up 240/2016, dated 10 February 2017.

Case Ref. No. and date	Type of argumentation and court majority	Article of the Constitution found to be violated	Use of non-domestic sources	
			Documents of int. organisations	Case law of int. organisations or foreign countries
U-I-95/08 and Up-1462/06 15 October 2008	<i>Merit</i> Unanimous	Article 32 – Freedom of Movement	N/A	N/A
U-I-292/09 Up-1427/09 20 October 2011	<i>Merit</i> 7:1 (one concurring separate opinion)	Article 18 – Prohibition of Torture	Geneva Convention, Article 33 ECHR, Article 3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	N/A
U-I-155/11 18 December 2013	<i>Procedural</i> (unclear formulation of statutory provision) 5:3	Article 2 (rule of law – rules must be precise)	Directive 2013/32/EU (<i>Procedural Directive</i>)	<i>Gebremedhin vs France, Muminov vs Russia, Abdolkhani and Karimnia vs Turkey, M. S. S. vs Belgium and Greece</i> (ECHR, footnote); <i>European parliament vs Council of the EU</i> (CEU), <i>BVerfGE 94, 49</i> (German Const. Court)

Case Ref. No. and date	Type of argumentation and court majority	Article of the Constitution found to be violated	Use of non-domestic sources	
			Documents of int. organisations	Case law of int. organisations or foreign countries
U-I-309/13 and Up-981/13 14 January 2015	<i>Merit</i> Unanimous	Article 53 – Marriage and the Family	Universal Decl.; International Covenant on Civil and Polit. Rights; ECHR, Article 8 EU Charter	Dozens of ECHR judgements (in footnotes)
U-I-68/16 and Up-213/15 16 June 2016	<i>Merit</i> Unanimous	Article 53	ECHR, Article 8	<i>Schalk and Kopf vs Austria, P. B. and J. S. vs Austria, Pajić vs Croatia, Vallianatos and others vs Greece</i> (in footnotes)
U-I-59/17 18 September 2019	<i>Merit</i> 8:1 (4 concurring separate opinions)	Article 18	ECHR, Article 3	More than 25 ECHR and CJEU judgements cited in footnotes
Constitutional complaints (some finding a violation, others no violation)				
Up-771/06 15 June 2006	<i>Procedural</i> Unanimous	Article 22 – Equal Protection of Rights	N/A	N/A
Up-2214/06 20 September 2009	<i>Procedural</i> Unanimous	Article 22	N/A	N/A
U-I-50/08 and Up-2177/08 26 March 2008	<i>Merit, denied</i> Unanimous	no violation	N/A	N/A
Up-2963/08 5 March 2009	<i>Procedural</i> 6:1	Article 22	N/A	N/A

Case Ref. No. and date	Type of argumentation and court majority	Article of the Constitution found to be violated	Use of non-domestic sources	
			Documents of int. organisations	Case law of int. organisations or foreign countries
Up-96/09 9 July 2009	<i>Procedural</i> 5:2	Article 22	N/A	N/A
Up-763/09 17 September 2009	<i>Merit</i> 7:1	Article 18 – Prohibition of Torture	ECHR, Article 3 Directive 2004/83/EC	<i>NA vs The United Kingdom</i> (and many in footnotes)
Up-958/09 U-I-199/09 15 April 2010	<i>Procedural</i> 6:2	Article 22	N/A	N/A
Up-150/13 23 January 2014	<i>Procedural</i> 5:3	Article 22 (complainant invoked EU Directive and case law, but his claims were unanswered)	2011/95/EU (Qualification Directive)	<i>Meki Elgafaji in Noor Elgafaji vs Staatssecretaris van Justitie</i> (CJEU)
Up-229/17 and U-I-37/17 21 November 2019	<i>Merit, denied</i> 7:2	no violation	N/A	N/A

In cases ending with an abrogation, the red line of the Court's decisions can be observed in arguing strongly against any legal automatism. When finding certain statutory provisions to be unconstitutional, the Court argued its decisions on different legal grounds (violations of the freedom of movement (U-I-95/08 and Up-1462/06), the right to judicial protection (U-I-176/05), the prohibition of torture (U-I-292/09 and Up-1427/09, U-I-59/17), and the right to family (U-I-309/13 and Up-981/13, U-I-68/16, and Up-213/15)). Despite this diversity, the overall logic for decision making remains remarkably similar. The Court has been consistently strongly opposed to any legal automatism and consistently strongly in favour of each case being considered on an individual basis, not grouped together by simplifications, generalisations, or abstractions of migrant issues. Despite massive migration crisis (see U-I-59/17), applicants for protection should maintain their basic right to argue their cases and retain their right to challenge legal assumptions (as in the case of a safe third country, see U-I-155/11). In two cases related to the issue of family members (U-I-309/13 and Up-981/13, U-I-68/16, and Up-213/15), the Court also convincingly argued on merit, presenting detailed arguments as to why the issue of family bonds should not be explicitly limited by statutory law, but decided on a case-by-case basis. In both cases

concerning family reunification, the Court embraced progressive social trends in the EU: First, the multicultural nature of the concept of family because families do vary across different cultures (implying that the controversial Article 16b was clearly based on Eurocentric traditional concepts), and second, the rising recognition of same-sex partnerships as equal to spouses of different sexes.

In cases of successful constitutional complaints, the Court almost always used procedural argumentation from Article 22 – Equal Protection of Rights (Up-771/06, Up-2214/06, Up-2963/08, Up-96/09, Up-958/09, U-I-199/09, Up-150/13), meaning that the complainant was not provided a chance to argue his or her case. The only exception is Case No. Up-763/09, based on Article 18 of the Prohibition of Tortures. The reason for such decisions is that successful constitutional complaints are often lodged together with petitions for review of constitutionality, and the Court notices that the challenged provision is indeed against the Constitution. Lower courts, particularly the Supreme Court, often follow such provisions in the letter and decide in an excessively formalistic manner.

In the relevant case law of the Constitutional Court that was analysed, only two instances were observed where the Court cited the case law of another country. In the first instance, that is, Case No. U-I-155/11 of 18 December 2013 the Court cited a decision by the Constitutional Court of the Federal Republic of Germany regarding the criteria for a safe third country: BVerfGE 94, 49. However, this citation did not appear to bear any significant merit, was mentioned only in a footnote. In Case No. U-I-59/17 of 18 September 2019 the Court cited the same decision in the same context.¹⁰⁷

However, the Court frequently cited cases from the ECtHR and the CJEU. It routinely used the ECHR, particularly Articles 3 and 8. Other international documents (the Geneva Conventions; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the International Covenant on Civil and Political Rights) were also cited, however, no argument was developed on them. The Constitutional Court frequently appeared to reinforce its reasoning in a specific case by citing numerous judgements of the ECHR and the CJEU in which similar decisions had been reached or arguments spelled out. However, these citations do not refer to the use of this case law as a precedent, but rather strengthen the argument, particularly when the Court is bitterly divided (see Case No. U-I-155/11). The final reasoning is always based on the Slovenian Constitution.

It appears that the Court has so far wanted to remain 'on the safe side' by citing a veritable abundance of cases, even dozens of them, so its case law would not be considered radically progressive or conservative and antagonistic to the EU (or to the Council of Europe). In matters of migration and asylum, the Slovenian Constitutional Court is neither an innovator nor a dissident within the EU and the Council of Europe but a slow and cautious follower. Moreover, contrary to expectations, in cases concerning migration or asylum, the judges often did not divide ideologically (although their worldviews are well known to the public and some judges tend to be

107 | BVerfGE 94, 49, dated 14 May 1996. The Court cited this judgement in a footnote to prove that Slovenia has similar criteria for determining a third safe state as Germany, that is, ratification of Geneva Convention and ECHR is insufficient, these criteria must be also obeyed in practice.

more conservative). For example, in Case No. U-I-309/13 and Up-981/13, regarding the right of a Somali refugee to be reunited with her sister as a family member, the decision was reached unanimously. This is perhaps unsurprising, but also in Case No. U-I-68/16 and Up-213/15, regarding the right of a homosexual partner to be recognised as a family member, the Court was unanimous, even conservative Catholic judges voted for such a decision.

| 3.4. *Issue of constitutional identity*

The concept of constitutional identity (*ustavna identiteta*) has only begun to develop in Slovenian constitutional theory and remains modest. Jacobsohn,¹⁰⁸ the modern pioneer of the concept, argues that constitutional identity is at its core a legal expression of a nation's political past (history and culture) and a desire to transcend this past. It can be changed but not destroyed. However, constitutional identity is not national identity and would cease to have an identity of its own if it could simply be folded into the latter.¹⁰⁹

Bardutzky specifies the Slovenian constitutional identity in four distinct categories: 1. essentially, the European constitutional tradition; 2. right to language (Slovenia as a nation is mostly defined by language); 3. pacifism and distrust of the military; and 4. gender equality and reproductive rights.¹¹⁰ Similarly, Mežnar observes constitutional identity as a strong commitment to human rights – a commitment which is often left wanting, because Slovenia remains a young state with fragile institutions. Nevertheless, Slovenia's historical experience should prioritise human rights over state interests.¹¹¹

108 | Jacobsohn, 2010, p. 355. Jacobsohn's examples in addition to the United States, Ireland, Israel and India, include Kemalist secularism in Turkey and Confucianism as the core ideology of South Korean legal system, although it is not explicitly mentioned. Perhaps the most famous is the pacifist spirit of the post-war Constitution of Japan, enshrined in the almost mythical Article 9, rejecting war and maintaining only self-defence forces.

109 | Rosenfeld, 2009, p. 30.

110 | Bardutzky, 2022, pp. 190–191. Bardutzky also critically notices that some political decisions went against the core areas of Slovenian constitutional identity. For example, membership in the NATO alliance which has often participated in military (mis)adventures in countries far away (in Iraq, Afghanistan, Libya) that had no relation to Slovenia whatsoever has gone strongly against the pacifist commitments that our army can only be used for defence. Providing the army, a limited authorisation to conduct police work on the border during the Syrian refugee crisis of 2015 clearly violated at least the spirit of the Constitution. Reproductive rights of women suffered limitations by a national referendum which prohibited biomedical assisted procreation to single women although such procreation had been legally possible before (Ibid.).

111 | Mežnar, 2019. Our comment is that Slovenia is perhaps the only country in the world which experienced three different types of totalitarianism: south of Slovenia was part of fascist Italy from 1920 to 1943, the north was occupied by Nazi Germany from 1941 to 1945, and after the war a Stalinist-type of socialism initially prevailed until political reforms in 1953. Then the political system became milder and more pluralistic, albeit within the framework of a single-party socialist state where only limited dissent was allowed. Such a unique historical experience should logically result in rejecting much state power and embracing human rights. For discussions of (non-) totalitarian aspects of Yugoslavian political system see: Flere and Klanjšek, 2014; Mastnak, 2016; Kodelja and Kodelja, 2021.

The basis for development of constitutional identity in Slovenia is the concept of '*samobitnost slovenskega naroda*' in the Preamble of the Constitution, which is officially translated as 'national identity' or as it appears in the Court's judgements as 'the identity of the Slovenian people'.¹¹² So far, seven judgements of the Constitutional Court have mentioned this concept, but only in *obiter dicta*, not in *rationes decidendi*.¹¹³ None of these judgements relate to the problems of refugees, asylums, or international protection. The two most important of these seven judgements concerned the issue of potential discrimination against a Muslim religious minority in a predominantly Catholic and atheist country: the issue of state holidays¹¹⁴ which are mostly set on the dates of Catholic holidays (Christmas and Easter), and the issue of ritual slaughter.¹¹⁵

No issues of constitutional identity arising in the Court's case law regarding refugees, asylum seekers, or foreigners were observed. However, as Mežnar emphasises strong protection of human rights and fundamental freedoms as one of potential future aspects of Slovenian constitutional identity, it is possible that such a constitutional theory will develop in the future.

4. Conclusion

Considering asylum and refugee issues in the case law of the Slovenian Constitutional Court, this study elucidates several critical issues and dilemmas, offering valuable insights and clarifications.

112 | This translation can be criticised to be limited, and therefore, inadequate. The archaic term '*samobitnost*' means much more than only identity. If only the latter had been meant by the Constitutional Assembly, there would be other more suitable synonyms available. Literal translation of *samobitnost*, being by itself, implies a sort of 'self-essence', a set of special characteristics which are unique to the Slovenian people, culture and history. It also means independence, originality and creativity. The dictionary definition gives 'something that comes into being or develops without outside influence or assistance'. See *Slovar slovenskega knjižnega jezika*.

113 | Mežnar, 2019. See also: U-I-370/96, dated 5 June 1997; Rm-1/97, dated 5 June 1997; U-I-266/04-105, dated 9 November 2006.

114 | The Court ruled that the Muslim minority was not discriminated even if Muslims had to take special leave of absence to celebrate Muslim holidays for 'holidays and non-working days are the exterior expression of citizen identity. The dates express traditionally accepted values, historically connected with living on the territory of the present Republic of Slovenia'. See Mežnar, 2019, and Decision of the Constitutional Court of the Republic of Slovenia No. U-I-67/14, dated 19 January 2017.

115 | This case was decided on different grounds. The Court ruled that freedom of religion for Muslims who wanted to consume halal beef, that is, slaughter must be performed on sober, fully conscious animals, thus violating the Animal Protection Act, was in fact infringed upon. However, this infringement was proportional to the constitutional value of well-being of animals. The key factor for such a decision was the fact that Muslims in Slovenia were able to access halal meat through import and they were not deprived of it. See Decision of the Constitutional Court of the Republic of Slovenia No. U-I-140/14, dated 25 April 2018, Official Gazette of the Republic of Slovenia, No. 35/2018.

The Court has succinctly addressed the jurisdictional boundaries between the EU and Slovenia as a Member State. It asserted its competence in adjudicating implementation provisions that transpose EU Directives into national law to achieve specific objectives. However, these provisions must adhere to the principles outlined in the Slovenian Constitution and the pursuit of European goals cannot justify indiscriminate means. Moreover, the Constitutional Court retains the authority to uphold national standards for safeguarding human rights and fundamental freedoms, provided that such standards neither jeopardise the protection guaranteed by the Charter of Fundamental Rights, as articulated by the CJEU, nor disrupt the primacy, unity, and efficacy of EU law. Thus far, the Constitutional Court's perspective on maintaining a higher human rights standard than that of the EU has remained unchallenged in matters of migration and asylum in Slovenia. Nevertheless, it raises the intriguing prospect that the Court's stance may be tested should the EU encroach upon other freedoms enshrined in the Slovenian Constitution, such as by imposing stricter media censorship regulations that impinge on freedom of expression. Whether the Court's resolve holds under such circumstances remains to be seen. Notably, the entirety of EU law pertinent to migration and asylum has been effectively incorporated into the national legal framework, and instances have arisen in which certain statutory provisions have been deemed incompatible with the Constitution, necessitating their nullification. The Constitutional Court has also intervened in constitutional complaints, addressing violations of basic human rights, albeit rights already protected by the Slovenian Constitution rather than by European instruments.

The Constitutional Court has yet to deliberate explicitly on constitutional identity in the context of migration and asylum. Nonetheless, the Court's consistent emphasis on robustly safeguarding the human rights of migrants in its rulings suggests that elements of Slovenia's constitutional identity, rooted in the resolute protection of human rights and fundamental freedoms for all individuals against undue state intervention, may indeed be discerned in these decisions.

In the realms of migration, asylum, and refugee claims, the Constitutional Court plays a pivotal role in upholding human rights and ensuring due process in asylum procedures. Its recurrent affirmation of the right for asylum seekers to be heard and present their cases contrasts with the practices of lower courts and administrative authorities, including the Supreme Court, the highest judicial body in Slovenia. The latter often appears to mirror bureaucratic decision-making by the MI, frequently lacking comprehensive justification. As Slovenia evolves into an increasingly international and culturally diverse society, an optimistic outlook hinges on the anticipation that other echelons of the judiciary will emulate the Constitutional Court's lead. Exemplified by its flagship decisions, the Court has safeguarded progressive social trends such as multiculturalism and equality for same-sex spouses, and acted as a basis for these causes.

The jurisprudential evolution in the Constitutional Court's case law (the developmental arc of its decisions) reveals important developmental trajectories. Cases that culminate in the abrogation of provisions reveal Court's consistent aversion to legal automatism. During periods of pronounced migration crises, the Court resolutely upheld the principle that applicants for international protection must retain

their fundamental right to present their arguments and contest legal assumptions. The Court's earlier judgements on successful constitutional complaints predominantly focused on severe procedural violations, refraining from delving into the substantive merits of a case. Subsequently, a perceptible shift occurred, with the Court assuming a more assertive stance – facilitated by references to precedents established by the ECHR and CJEU – enabling the articulation of more comprehensive arguments. Recent years have witnessed an expansion of the Court's purview to encompass procedural aspects and the augmentation of specific human rights pertinent to asylum seekers.

Although the Constitutional Court has sparingly drawn inspiration from foreign case law, instances of such an influence are rare. Only two instances were identified in which the Constitutional Court of the Federal Republic of Germany was cited, albeit fleetingly and devoid of substantial explication, thus indicating a limited source of inspiration. Conversely, citations of case law from the ECtHR were more prevalent, with over 25 instances. A comparable pattern emerges with respect to citing case law from the CJEU, albeit in a specific context.

In future, it is conceivable that a cultural conflict may materialise between traditionalist factions within constitutional law, including the Court, and the deeply ingrained Slovenian sympathies for individuals who endure human rights violations, particularly those associated with harbouring separatist ideals – a sentiment rooted to some extent in Slovenia's historical experience.

This study aimed at providing an in-depth exploration of pivotal dimensions concerning the Constitutional Court's role in the domain of migration, asylum, and refugee matters, and revealed that the Court's unwavering commitment to human rights and nuanced jurisprudential evolution collectively underscore its significance as a guardian of fundamental freedoms within Slovenia's legal landscape.

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