Evropský veřejný ochránce práv

Rozhodnutí o odmítnutí Rady EU poskytnout veřejnosti přístup k dokumentům týkajícím se neformálních ujednání se zeměmi mimo EU o navracení migrantů (dohod o zpětném přebírání osob) (případ 815/2022/MIG)

Rozhodnutí
Případ 815/2022/MIG - **Otevřeno dne** 02/05/2022 - **Rozhodnutí ze dne** 01/09/2022 - **Dotčený orgán** Rada Evropské unie (Nebyl zjištěn nesprávný úřední postup) |

Případ se týkal žádosti dvou výzkumných pracovníků o přístup veřejnosti k dokumentům souvisejícím s neformálními dohodami o navracení a zpětném přebírání nelegálních migrantů, které EU uzavřela se šesti zeměmi mimo EU. Rada EU přístup odmítla s odůvodněním, že zpřístupnění dokumentů by mohlo ohrozit mezinárodní vztahy.

Tým veřejné ochránkyně práv, který prováděl šetření, nahlédl do dotčených dokumentů a získal od Rady doplňující vysvětlení, včetně důvěrných informací. Na základě toho a s ohledem na široký prostor pro uvážení, který mají orgány EU v případech, kdy se domnívají, že je ohrožen veřejný zájem v otázce mezinárodních vztahů, veřejná ochránkyně práv shledala, že rozhodnutí Rady odmítnout přístup nebylo zjevně nesprávné. Vzhledem k tomu, že dotčený veřejný zájem nemůže mít přednost před jiným veřejným zájmem, který je považován za důležitější, veřejná ochránkyně práv případ uzavřela a shledala, že nedošlo k nesprávnému úřednímu postupu. Je však třeba vyvinout veškeré úsilí a ujistit veřejnost, že jsou dodržována základní práva migrantů a že v tomto procesu jsou zavedeny odpovídající záruky.

Background to the complaint

1. The EU and its Member States have established common rules [1] for managing the return of irregular migrants to their country of origin. In this context, the EU cooperates with countries of origin of irregular migrants through readmission agreements. These are legally binding agreements that set out the obligations and procedures for both sides as regards the readmission of migrants who do not have a right to stay in the EU.

2. As some third countries seemed reluctant to conclude a formal readmission agreement, the EU - in 2016 - started to negotiate informal, non-binding ‘arrangements’ for return and readmission with non-EU countries. Since then, the EU has entered into six such arrangements.

[2]

3. In the time from February to April 2021, the complainants, two researchers, made a number of requests [3] for public access to documents to the Council concerning these informal readmission arrangements. The complainants sought access both to the arrangements and to documents related to the negotiations leading up to them.

4. The Council identified 42 documents as falling within the scope of the complainants' access requests. It gave the complainants access to 21 documents in full and to three documents in part and refused to give access to the remaining 18 documents (including seven classified documents). In refusing access, the Council invoked the need to protect the public interest as regards international relations **.** [4]

5. The complainants challenged the Council's refusal to give access to (parts of) the 21 documents in question (by making 'confirmatory applications').

6. Between May and July 2021, the Council issued five confirmatory decisions, confirming its refusal to give access.

7. Dissatisfied with this outcome, the complainants turned to the Ombudsman in April 2022.

8. In their complaint to the Ombudsman, the complainants also raised concerns about the lack of involvement of the European Parliament in the process of concluding informal readmission arrangements and about the lack of transparency of these arrangements − as compared to formal readmission agreements, which require Parliament's involvement and which are published in the official journal of the EU.

The inquiry

9. The Ombudsman opened an inquiry into the Council's refusal to give public access to (parts of) the 21 documents at issue.

10. In the course of the inquiry, the Ombudsman inquiry team reviewed the documents at issue and held a meeting with representatives of the Council to obtain further information on the context of the documents and on the detailed reasons as to why access had been refused. The Ombudsman then shared a report [5] on that meeting with the complainants and, subsequently, received the complainants' comments. During the meeting, the inquiry team also obtained information that the Council considered confidential and that could not be communicated to the complainants.

Arguments presented

11. In its confirmatory decisions, **the Council** argued that disclosure would reveal the EU's

strategic objectives in the area of readmission and the different approaches it takes with different countries, which would undermine both ongoing and future negotiations with non-EU countries in this area.

12. The Council also considered that disclosure would damage the climate of confidence with the non-EU countries concerned, thus weakening the EU's negotiating position and affecting non-EU countries' willingness to cooperate in the ongoing implementation of arrangements that have been concluded. The Council added that readmission arrangements are non-binding in nature, which means that their implementation depends largely on the non-EU countries' ongoing collaboration. They are not static but might be adjusted over time, in consultation with the respective non-EU country.

13. The **complainants** argued that the Council had applied the exception for the protection of the public interest as regards international relations too broadly, given that two of the arrangements at issue had already been disclosed by other EU institutions. They criticised that the Council had not considered the potential harm of disclosure to the public interest within a clear timeframe nor the possibility of re¤evaluating the risk of harm at a later stage.

14. The complainants also contended that the Council should have considered the documents at issue to be legislative in nature and thus, that they require an increased degree of transparency. [6]

15. The complainants stated that the Council gave access only to meaningless parts of the documents that do not allow for a substantive understanding of the arrangements.

16. The complainants claimed that the Council had refused access to some documents merely based on their designation as classified documents, which, they said, was incompatible with the EU legislation on public access to documents (Regulation 1049/2001).

17. Finally, the complainants stated that some documents are already in the public domain, so that the harm, which the Council was trying to avert, had already been done.

18. The Council stated that the EU Member States' return rate of migrants without a legal right to stay in the EU is low and even decreased during recent years. The reasons for this are, *inter alia* , that return and readmission is a very sensitive area and that there is a lack of cooperation on the side of the non-EU countries concerned. The conclusion of readmission agreements is therefore key to ensure effective returns.

19. The Council said that some of the documents at issue originated from the European Commission and the European External Action Service (EEAS). Both institutions had been consulted concerning the respective documents and had objected to disclosure, relying on the exception for the protection of international relations.

20. As regards the two informal arrangements that had been disclosed by the EEAS and the Commission respectively (the arrangement between the EU and Afghanistan and the one

between the EU and Bangladesh), the Council said that it was not aware of the reasons why they had been disclosed.

The Ombudsman's assessment

21. The EU institutions enjoy a wide margin of discretion when determining whether disclosing a document would undermine any of the public interests protected under Article 4(1)(a) of Regulation 1049/2001, such as the protection of international relations. [7]

22. As such, the Ombudsman's inquiry sought to determine if there was a manifest error in the Council's assessment on which it based its decisions to refuse access to the documents it had identified as falling under the scope of the complainant's request.

23. To that end, the Ombudsman inquiry team inspected the documents and obtained additional explanations from the Council, including information that the Council considers confidential and that could not be shared with the complainants so as not to undermine the very interest the Council aims to protect. On the basis of this information, the Ombudsman finds that it was not manifestly wrong for the Council to consider that disclosing the documents at issue could undermine the public interest as regards the EU's and the Member States' international relations.

24. Specifically, having reviewed the content of the documents, the Ombudsman can, for example, verify that the EU took a differentiated approach towards the various countries concerned. The Ombudsman therefore finds the Council's view reasonable that disclosure of the details of the negotiations and the arrangements would undermine the EU's negotiating position, both in ongoing and future negotiations, and that it would undermine return countries' willingness to cooperate.

25. In addition, as regards possible future negotiations, the Council can evaluate the potential harm that disclosure might cause only at the time it is dealing with an access request. That does not mean, however, that the harm referred to will materialise immediately once access is provided. It could arise at a later stage, for example, when the EU enters, at some future date, into negotiations with another non-EU country. If the Council were to release the documents now, that harm could materialise when those future negotiations begin.

26. Concerning the fact that some documents might have already been disclosed (unauthorised or not), this is irrelevant for the Council's own assessment. The Ombudsman considers it reasonable that disclosure of a document by the Council could be perceived as a breach of trust by the non-EU country concerned, thus undermining the international relations with that country.

27. The Ombudsman also notes that the Council assessed the classified documents at issue individually and that it gave specific reasons as to why each of these documents could not be disclosed. Given the sensitive nature of the information contained in the documents at issue, the Ombudsman also considers that the Council provided the complainants with sufficient reasons

for its decision to refuse access.

28. The public interests protected under Article 4(1)(a) of Regulation 1049/2001 cannot be superseded by another public interest that is deemed more important. This means that, if an institution considers that any of these interests could be undermined by disclosure, they must refuse to give access. Thus, whilst the complainants raised valid concerns, their arguments as regards a possible overriding public interest in disclosure could not be taken into account.

29. The same holds true as regards the nature of the documents at issue. Nevertheless, the Ombudsman notes that the document at issue in the case before the EU courts cited by the complainants related to an international agreement and therefore to an agreement with legally binding effect. However, the documents at issue here are non-binding in nature, which is clear from their content.

30. In light of all this, the Ombudsman finds that the Council was justified in refusing to grant public access to the documents at issue. That said, and as the Ombudsman had the opportunity to point out in her decision of the same day closing case 1271/2022/MIG, every effort should be made to reassure the public that the fundamental rights of migrants are respected and adequate safeguards are in place in this process.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following conclusion:

There was no maladministration by the Council of the EU in refusing access to the documents at issue.

The complainants and the Council of the EU will be informed of this decision **.**

Emily O'Reilly European Ombudsman

Strasbourg, 01/09/2022

[1] Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (the 'Return Directive'): https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008L0115&qid=1606153913679 [Odkaz].

[2] With Afghanistan, Bangladesh, Ethiopia, the Gambia, Guinea and the Ivory Coast.

[3] Under Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents:
https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001R1049 [Odkaz].

[4] In accordance with Article 4(1)(a), third indent of Regulation 1049/2001.

[5] The meeting report is available at:
https://www.ombudsman.europa.eu/en/doc/inspection-report/en/159838 [Odkaz].

[6] The complainants referred to the judgment of the General Court of 4 May 2012, *In't Veld v Council* , T-529/09, paragraph 89:

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009TJ0529&qid=1661340482177 [Odkaz].

[7] See, for example, judgment of the General Court of 11 July 2018, *ClientEarth v Commission* , T-644/16:
http://curia.europa.eu/juris/document/document.jsf?text=&docid=203913&pageIndex=0&doclang=EN&mode=lst&dir [Odkaz].