



NEWS, LATEST, CURRENT TOPICS

RULING OF THE SUPREME ADMINISTRATIVE COURT OF 6TH JUNE 2024 ON THE PROTECTION OF THE RIGHTS OF UNDOCUMENTED IMMIGRANT CITIZENS CONSIDERING THE INERTIA OF THE AGENCY FOR INTEGRATION, MIGRATION AND ASYLUM, I.P. (AIMA)

“The Court (...) acknowledged that the inertia of the Public Administration undermines fundamental personal and social rights, formally recognised in the Constitution of the Portuguese Republic and in International Conventions (...)”

On 6th June 2024, the Supreme Administrative Court (STA) handed down a ruling acknowledging the proceedings of summons for the protection of rights, freedoms and guarantees as an appropriate court proceeding to protect the rights of foreigners seeking a residence permit in Portugal, given the inertia on the part of the public authorities in issuing a decision.

In the case at hand, the Applicant, a foreign national, submitted an expression of interest with a view to obtaining a residence permit in 2020, but has so far not received a response from the competent authorities, namely the Aliens and Borders Service (SEF), currently the Agency for Integration, Migration and Asylum, I.P. (hereinafter "AIMA"), and is therefore in an irregular situation in Portugal.

However, in fact, when he applied for a residence permit to carry out a subordinate professional activity, through an expression of interest, submitted online, the Claimant sent all the documents necessary to support his application for a residence permit, namely the employment contract, proof of registration with the Tax Authorities and Social Security, proof of accommodation and means of subsistence, among other documents required by law.

In the present case, the Applicant claimed that, while awaiting a response from the competent authorities in relation to his application,

AUTHORS



MÁRCIA FARIAS
Lawyer



MARTA VERA-CRUZ
Trainee

he remains in a situation of clandestinity, despite meeting all the requirements necessary to obtain a residence permit. Consequently, without a residence card, the Claimant is deprived of exercising his citizenship rights, such as signing contracts, and free movement, including the possibility of visiting his relatives in his country of origin, as well as limited access to social benefits and healthcare.

Faced with this situation of precariousness and vulnerability, the foreign national decided to start legal proceedings as summons for the protection of rights, freedoms and guarantees before the competent Administrative Court.

It is true that, at first instance, the request for summons for the protection of rights, freedoms and guarantees was rejected outright, on the grounds that the court considered that the summons for the protection of rights, freedoms and guarantees is urgent and exceptional in nature, and therefore did not consider the necessary requirements to be met, namely urgency and subsidiarity in relation to injunction proceedings, a decision that was later confirmed by the Central Administrative Court of the South on appeal.

Moreover, the Courts of First Instance and Appeal considered that the Claimant should have filed injunction proceedings and the respective main action in good time, which was not the case, therefore *“the summons for the protection of rights, freedoms and guarantees is not intended, nor does it aim, to make up for the inertia of the interested party when they have failed to react, when they could have, in a timely manner against a negative act by the Administration or even against a failure to fulfil their duty to decide, to which must be added that the interested party in these cases always has the possibility of renewing their claim, at any time, without any right being curtailed”*.

In fact, this has been the decision taken by many courts of first instance and even on appeal.

It should be clarified that a summons for the protection of rights, freedoms and guarantees is a type of legal proceeding through which the Court can impose on the Public Administration the obligation to adopt a conduct that proves indispensable to ensure the timely exercise of a right, freedom or guarantee - provided that,

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for this purpose, in the specific case, recourse to injunction proceedings is not possible or sufficient. The law does not set any time limit for initiating these proceedings in court. On the other hand, the injunction proceedings are a procedural mechanism, also of an urgent nature, which only aims to take a provisional decision until a final decision is made in the main proceedings. In these cases, the law sets out specific time limits for initiating the injunction proceedings and the main proceedings, which must be respected, under penalty of being rejected outright.

On appeal, the Supreme Administrative Court analysed whether the «appropriate proceedings to react against the situation in which the Claimant finds himself is the urgent main procedure of "Summons for Protection of Rights, Freedoms and Guarantees" provided for and regulated in articles 109 to 111 of the applicable code. The Court of First Instance considers that this mechanism cannot be used in these situations, as there is another means of ensuring the protection sought by means of administrative proceedings and injunction proceedings for the provisional granting of a residence permit».

After analysing the case, in its ruling, the Supreme Administrative Court accepted the grounds invoked by the Claimant in support of his request and considered that the «urgent nature of obtaining a residence permit is undeniable and current» and that «the need for the urgent issuance of a decision on the merits is indispensable» in order to guarantee rights, freedoms and guarantees, particularly in a situation such as the one in this case. Therefore, the process of summons for the protection of rights, freedoms and guarantees is accepted in this case.

The Court also acknowledged that the inertia of the Public Administration undermines fundamental personal and social rights, formally recognised in the Constitution of the Portuguese Republic and in International



Conventions, including the right to work, freedom, security, personal identity, health and family, considering that, until a residence permit is granted, the undocumented immigrant citizen “remains vulnerable to abuse, particularly in terms of employment, subject to undue exploitation of their illegal status, and it is undeniable that there is an immediate need (...) to hold a permit or authorisation so that he can remain legally resident in Portugal and continue to live and work as a foreigner with a legal residence permit and for a period that he knows what it is, in order to plan his life project, such as applying for family reunification, without the fear of being surprised at any moment by an unfavourable judicial or administrative decision.”

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This decision seems to be extremely important at a time when AIMA is unable to respond in a timely manner to the various pending residence permit applications that, in some cases, have been awaiting decisions for more than two (2) years.

However, in view of the reasoning set out in the judgement in question, it is important to consider whether this decision, particularly as regards the type of proceedings to be commenced in court to protect the rights of immigrants, will apply to all types of cases pending before AIMA. In fact, it will be more difficult to justify the urgency of the decision, particularly in the case of foreign citizens applying for a Residence Permit for Investment (Golden Visa) since, in these situations, they only have to comply with minimum stay requirements in Portugal of 7 (seven) days per year and may not be working or actually residing in Portugal. We believe that these situations should be analysed on a case-by-case basis, in order to confirm if the legal requirements for each type of legal proceedings have been met.