The Case Law of the European Regional Courts: the Court of Justice of the European Union and the European Court of Human Rights

Refugees, asylum-seekers, and stateless persons

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UNHCR
The UN Refugee Agency

Outline table of contents

Additional chapters for the European Court of Human Rights are planned for the second edition of this manual. They will cover the following topics: detention, family unity, and statelessness.

Preface

This manual is a thematic guide to the case law of the European Court of Human Rights (ECtHR) and of the Court of Justice of the European Union (CJEU) that is of relevance to refugees, asylum-seekers and stateless persons. It summarizes and analyses the key case law on each issue covered, with the aim of providing a quick reference for legal practitioners who need to familiarize themselves with the relevant rulings of the CJEU on European Union (EU) law, and/or with the relevant rulings of the ECtHR on the European Convention on Human Rights (ECHR).

The particular relevance of the ECHR for the protection of persons of concern to the Office of the UN High Commissioner for Refugees (UNHCR) first became apparent in the late 1980's to early 1990's. In particular, judgments of the ECtHR that were ground-breaking at the time established that the ECHR prohibits the expulsion of an individual to a country where there are substantial grounds for believing that he or she faces a real risk of ill-treatment.[1] In the ensuing decades, the ECtHR has developed a vast body of jurisprudence confirming and elaborating upon those original judgments, and also highlighting other areas in which the ECHR can support the particular protection needs of persons of concern to UNHCR. For example, in the last fifteen years the ECtHR has developed a body of case law establishing the requirements that need to be met in order for a national asylum procedure to be considered an effective remedy against *refoulement* within the meaning of the ECHR. Other areas in which the ECtHR has developed case law of particular relevance to persons of concern to UNHCR include, for example, immigration detention and family unity.

The role of the CJEU in protecting persons of concern to UNHCR is much more recent than that of the ECtHR and began as a result of the decision by the EU to establish a Common European Asylum System (CEAS) based on the "full and inclusive" application of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. A set of EU directives and regulations was accordingly adopted over the period 2000 – 2005, marking the first phase in the creation of the CEAS. The first cases decided by the CJEU in relation to the CEAS were actions for infringement brought by the European Commission against certain EU Member States in response to their failure to transpose a directive into national law within the deadline required.[2] In another early case, the CJEU was called upon to decide an action for annulment brought by the European Parliament against the Council of the European Union concerning the legislative procedure set out in the Asylum Procedures Directive (2005/85/EC) for the adoption by the EU of a minimum common list of "safe countries of origin" and a common list of "European safe third countries".[3] However, the principal rulings of the CJEU with which this manual is concerned are those made under the Court's preliminary reference procedure, in which the CJEU delivers a ruling on the interpretation or validity of a provision of EU law when requested to do so by a court or tribunal of an EU Member State. While the CJEU has not so far been requested to deliver a preliminary ruling on the validity of a CEAS legal provision, it has already delivered a significant number of preliminary rulings on the interpretation of CEAS legal provisions, the first of which was in 2009 and concerned the eligibility criteria for "subsidiary protection status" under the Qualification Directive (2004/83/EC).[4]

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[1] ECtHR, *Soering v. the United Kingdom*, No. 14038/88, Judgment of 7 July 1989; ECtHR, *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, Judgment of 30 October 1991; ECtHR, *Cruz Varas and Others v. Sweden*, No. 15576/89, Judgment of 20 March 1991.

[2] CJEU, *European Commission v. Austria*, C-102/06, Judgment of 26 October 2006; CJEU, *European Commission v. Greece*, C-72/06, Judgment of 19 April 2007; CJEU, *European Commission v. Finland*, C-102/06, Judgment of 5 February 2009; CJEU, *European Commission v. the United Kingdom*, C-72/06, Judgment of 5 February 2009; CJEU, *European Commission v. Sweden*, C-322/08, Judgment of 14 May 2009; CJEU, *European Commission v. Spain*, C-272/08, Judgment of 9 July 2009; CJEU, *European Commission v. Ireland*, C-431/10, Judgment of 7 April 2011. The Commissiom also initiated infringement actions for the same reasons against other EU Member States, which it subsequently withdrew after the Member States concerned ultimately complied with their transposition obligations.

[3] CJEU, *European Parliament v. Council of the European Union*, C-133/06, Judgment [GC] of 6 May 2008.

[4] CJEU, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, C-465/07, Judgment of 17 February 2009.

Neither the CJEU nor the ECtHR exercise jurisdiction over the international conventions that are at the heart of UNHCR's mandate, namely the 1951 Refugee Convention and its 1967 Protocol, the 1954 Convention relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness. However, as regards EU law, Article 78 of the Treaty on the Functioning of the European Union (TFEU) [ex Article 63 of the Treaty establishing the European Community (TEC)] requires that the CEAS must be in accordance with the Refugee Convention and Protocol (and "other relevant treaties"). Similarly, Article 18 of the EU Charter of Fundamental Rights provides that the right to asylum shall be guaranteed with due respect for the 1951 Refugee Convention and 1967 Protocol. Thus, even though the CJEU does not have the jurisdiction to directly interpret the Refugee Convention and its Protocol, which do not form part of EU law, the CJEU may nevertheless need to interpret those treaties when ruling on the interpretation or the validity of a provision of EU law. In particular, as of the end of 2013, the CJEU had delivered six preliminary rulings interpreting the criteria for refugee status as defined in the Qualification Directive. Each contained, with minor variations in wording, the following preliminary observations:[5]

> "… One of the legal bases for Directive 2004/83 [the Qualification Directive] was point (1)(c) of the first paragraph of Article 63 EC, under which the Council was required to adopt measures on asylum, in accordance with the 1951 Geneva Convention and other relevant treaties, within the area of minimum standards with respect to 'the qualification of nationals of third countries as refugees'.
>
> … Recitals 3, 16 and 17 to Directive 2004/83 state that the 1951 Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the directive for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria …
>
> … *Directive 2004/83 must for that reason be interpreted in the light of its general scheme and purpose, and in a manner consistent with the 1951 Geneva Convention and the other relevant treaties* referred to in point (1) of the first paragraph of Article 63 EC, now Article 78(1) TFEU. As is apparent from recital 10 to that directive, *Directive 2004/83 must also be interpreted in a manner consistent with the fundamental rights and the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union* …" (emphasis added).

In two of the abovementioned cases, both concerning the application of the Qualification Directive to Palestinian refugees, CJEU was called upon to interpret the 1951 Refugee Convention in order to be able to interpret the Qualification Directive.[6]

The CJEU held in a another case, this time concerning the application of the Dublin II Regulation, that the CEAS is based on a principle of mutual confidence making it possible to assume that all participating States observe fundamental rights "including the rights based on the [1951 Refugee]

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[5] CJEU, *Bundesrepublik Deutschland v. B and D*, Joined Cases C-57/09 and C-101/09, Judgment [GC] of 9 November 2010, paras. 76-78. See also CJEU, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Judgment [GC] of 2 March 2010, paras. 51-54; CJEU, *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, Judgment [GC] of 17 June 2010, paras. 36-38; CJEU, *Bundesrepublik Deutschland v. Y and Z*, Joined Cases C-71/11 and C-99/11, Judgment [GC] of 5 September 2012, paras. 47-48; CJEU, *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, C-364/11, Judgment [GC] of 19 December 2012, paras. 42-43; CJEU, *X, Y and Z v. Minister voor Immigratie, Integratie en Asiel*, Joined Cases C-199/12, C-200/12 and C-201/12, Judgment of 7 November 2013, paras. 39-40.

[6] CJEU, *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, Judgment of 17 June 2010; CJEU, *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, C-364/11, Judgment of 19 December 2012.

Convention and the 1967 Protocol, and on the ECHR".[7] But that presumption is not conclusive and must be rebuttable by evidence to the contrary, as the CJEU pointed out had been illustrated only months earlier in a case in which the ECtHR had held that the transfer under the EU Dublin Regulation of an asylum-seeker from one EU Member State to another had subjected the individual concerned to a real risk of ill-treatment in violation of Article 3 ECHR.[8]

The ECHR has a particular influence on the CEAS not only because of the reference to "other relevant treaties" in Article 78 TFEU, but also by virtue of the fact that the fundamental rights guaranteed by the ECHR form part of the general principles of EU law.[9] Moreover, as stipulated in Article 52(3) of the EU Charter on Fundamental Rights: "Insofar as this Charter contains rights which correspond to rights guaranteed by [the ECHR], the meaning and scope of those rights shall be be the same as those laid down by [the ECHR]. This provision shall not prevent Union law providing more extensive protection." Article 6(2) of the Treaty on European Union (TEU) also provides that the EU should accede to the ECHR, which had previously been amended by ECHR Protocol No. 14 to allow for this eventuality.

In 2011, a Joint Communication from the Presidents of the CJEU and the ECtHR highlighted the importance of ensuring the "greatest coherence" between the Charter and the ECHR insofar as the former contains rights that correspond to the latter, and stated that a "parallel interpretation" of the two instruments could prove useful in this regard.[10] While the two courts had already been looking to each other's jurisprudence before 2011, it would seem that this trend will now only accelerate in years to come.

The interplay between the case law of the CJEU and the ECtHR is one of the reasons why UNHCR has chosen to publish a single manual covering both courts, rather than a separate manual for each court. However, it should be borne in mind that the two courts have very different functions and very different jurisdictions. In particular, whereas the principal function of the ECtHR is to decide complaints from individuals that their rights under the ECHR have been violated by a Contracting State, the principal function of the CJEU with which this manual is concerned is to issue rulings on the interpretation or validity of a provision of EU law when requested to do so by a court or tribunal of an EU Member State.[11] Additionally, whereas EU law binds the twenty-eight States that are members of the EU, the ECHR binds the forty-seven States that are members of the Council of Europe (the twenty-eight EU Member States plus another nineteen States as well).

This first edition of the manual covers the case law of the CJEU and ECtHR, and related legislative developments, **up until the end of 2013**. It does not take into account any developments after that date.

It is planned that the manual will be periodically updated. Time and resource constraints have meant that three chapters originally planned for inclusion in this first edition have had to be deferred until

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[7] CJEU, *N.S. v. Secretary of State for the Home Department (United Kingdom) and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform (Ireland)*, Joined Cases C-411/10 and C-493/10, Judgment [GC] of 21 December 2011, para.78.

[8] ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011.

[9] Article 6(3) of the Treaty on European Union.

[10] Joint Communication from Presidents Costa and Skouris, 24 January 2011 [Link].

[11] As is evident from the above, the CJEU has other important functions as well, two of which have a bearing on the protection of persons of concern to UNHCR: (i) to decide actions for annulment of a provision of EU law, brought by an EU institution or EU Member State; (ii) to decide actions for infringement of a provision of EU law by an EU Member State, brought by the European Commission against the Member State concerned. The CJEU does not have an individual complaints procedure whereby an individual can complain that a Member State has violated his or her rights under EU law.

the second edition: a chapter on the case law of the ECtHR on detention, a chapter on the case law of the ECtHR on family unity; and a chapter on the case law of the ECtHR and statelessness.

UNHCR Bureau for Europe, June 2015

Disclaimer

The interpretations of and references to the case law and legal provisions surveyed in this manual do not bind UNHCR in any way. While every effort has been made to ensure a balanced and accurate coverage, this manual is only intended to serve as a guide for further research and is not a substitute for relying on the official texts of the judgments and legal instruments themselves.

This manual does not set out UNHCR's own positions on the legal issues that are discussed.

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Detailed table of contents

Additional chapters for the European Court of Human Rights are planned for the second edition of this manual. They will cover the following topics: detention, family unity, and statelessness.

Table of cases

Court of Justice of the European Union (CJEU)

Judgments (Court of Justice and General Court)

Abdoul Khadre Mbaye (Italy), C-522/11, Order of 21 March 2013 [Link: Order (French)]

Advocaten voor de Wereld VZW v. Leden van de Ministerraad (Netherlands), C-303/05, Judgment [GC] of 3 May 2007 [Links: Judgment | Case summary | Advocate General's opinion]

Alexandre Achughbabian v. Préfet du Val-de-Marne (France), C-329/11, Judgment [GC] of 6 December 2011 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion]

Amministrazione delle finanze dello Stato v. Denkavit italiana Srl (Italy), C-61/79, Judgment of 27 March 1980 [Links: Judgment | Case summary | Advocate General's opinion]

Amministrazione delle finanze dello Stato v. Simmenthal SpA (Italy), C-106/77, Judgment of 9 March 1978 [Links: Judgment | Case summary | Advocate General's opinion]

Antonio Muñoz y Cia SA and Superior Fruiticola SA v. Frumar Ltd and Redbridge Produce Marketing Ltd (United Kingdom), C-253/00, Judgment of 17 September 2002 [Links: Judgment | Case summary | Advocate General's opinion]

Åklagaren v. Hans Åkerberg Fransson, C-617/10, Judgment [GC] of 26 February 2013 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion]

Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration (Luxembourg), C-69/10, Judgment of 28 July 2011 [Links: Judgment | Case summary | Advocate General's opinion | UNHCR statement]

Bundesrepublik Deutschland v. B and D (Germany), Joined Cases C-57/09 and C-101/09, Judgment [GC] of 9 November 2010 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR statement]

Bundesrepublik Deutschland v. Kaveh Puid (Germany), C-4/11, Judgment [GC] of 14 November 2013 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion]

Bundesrepublik Deutschland v. Y and Z (Germany), Joined Cases C-71/11 and C-99/11, Judgment [GC] of 5 September 2012 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR statement]

CILFIT and Others (Italy), C-283/81, Judgment of 6 October 1982 [Links: Judgment | Case summary | Advocate General's opinion]

Cimade, Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration (France), C-179/11, Judgment of 27 September 2012 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR statement]

CNL-SUCAL v. HAG, C-10/89, Judgment of 17 October 1990 [Links: Judgment | Case summary | Advocate General's opinion]

Commission v. Italy, C-129/00, Judgment of 9 December 2003 [Links: Judgment | Case summary | Advocate General's opinion]

Commission v. Spain, C-154/08, Judgment of 12 November 2009 [Link: Judgment (French)]

European Commission v. Austria, C-102/06, Judgment of 26 October 2006 [Link: Judgment (French)]

European Commission v. Finland, C-102/06, Judgment of 5 February 2009 [Link: Judgment (French)]

European Commission v. Greece, C-72/06, Judgment of 19 April 2007 [Link: Judgment (French)]

European Commission v. Ireland, C-431/10, Judgment of 7 April 2011 [Link: Judgment]

European Commission v. Spain, C-272/08, Judgment of 9 July 2009 [Link: Judgment (French)]

European Commission v. Sweden, C-322/08, Judgment of 14 May 2009 [Link: Judgment (French)]

European Commission v. the United Kingdom, C-72/06, Judgment of 5 February 2009 [Link: Judgment (French)]

European Parliament v. Council of the European Union, C-133/06, Judgment [GC] of 6 May 2008 [Link: Judgment | Case summary | CJEU press release | Advocate General's opinion]

European Parliament v. Council of the European Union, C-540/03, Judgment [GC] of 27 June 2006 [Links: Judgment | Case summary | Advocate General's opinion]

Foglia v. Novello, C-244/80, Judgment of 16 December 1981 [Links: Judgment | Case summary | Advocate General's opinion]

Foto-Frost v. Hauptzollamt Lübeck-Ost (Germany), C-314/85, Judgment of 22 October 1987 [Links: Judgment | Advocate General's opinion]

France v. Commission, Joined Cases 15/76 and 16/76, Judgment of 7 February 1979 [Links: Judgment | Case summary]

G. Seguela and A. Lachkar and others v. Administration des impôts (France), Joined Cases C-76/87, C-86/87 to C-89/87 and C-149/87, Judgment of 28 April 1988 [Links: Judgment | Case summary | Advocate General's opinion]

GISTI v. European Commission, C-408/05 P, Judgment of 6 April 2006 [Link: Order (French)]

H.I.D. and B.A. v. Refugee Applications Commissioner and Others (Ireland), C-175/11, Judgment of 31 January 2013 [Links: Judgment | Case summary | Advocate General's opinion]

Hassen El Dridi (Italy), C-61/11 PPU, Judgment of 28 April 2011 [Links: Judgment | Case summary | CJEU press release | Advocate General's view]

Hoekstra v. Bestuur der Bedrijfsvereniging voor Detailhande (Netherlands), C-75/63, Judgment of 19 March 1964 [Links: Judgment | Case summary | Advocate General's opinion]

I.B. (Belgium), C-306/09, Judgment of 21 October 2010 [Links: Judgment | Case summary | Advocate General's opinion]

Inasti and Others (Belgium), Joined Cases C-393/99 and C-394/99, Judgment of 19 March 2002 [Links: Judgment | Case summary | Advocate General's opinion]

Inuit Tapiriit Kanatami v. European Parliament and Council, T-18/10, Order of 6 September 2011 [Links: Order | Case summary]

J. van der Weerd and others (Netherlands), Joined Cases C-222/05 to C-225/05, Judgment of 7 June 2007 [Links: Judgment | Case summary | Advocate General's opinion]

Janko Rottmann v. Freistaat Bayern (Germany), C-135/08, Judgment [GC] of 2 March 2010 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion]

Joseph Trinon (Belgium), C-12/82, Judgment of 30 November 1982 [Links: Judgment | Case summary | Advocate General's opinion]

K v. Bundesasylamt (Austria), C-245/11, Judgment [GC] of 6 November 2012 [Links: Judgment | Case summary | Advocate General's opinion]

KappAhl Oy (Austria), C-233/97, Judgment of 3 December 1998 [Links: Judgment | Case summary | Advocate General's opinion]

Krüger GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas, C-334/95, Judgment of 17 July 1997 [Links: Judgment | Case summary | Advocate General's opinion]

M.G. and N.R. v. Staatssecretaris van Veiligheid en Justitie (Netherlands), C-383/13 PPU, Judgment of 10 September 2013 [Links: Judgment | Case summary | CJEU press release | Advocate General's view]

M.M. v. Minister for Justice, Equality and Law Reform, Ireland and Attorney General (Ireland), C-277/11, Judgment of 22 November 2012 [Links: Judgment | Case summary | Advocate General's opinion]

MA, BT and DA v. Secretary of State for the Home Department (United Kingdom), C-648/11, Judgment of 6 June 2013 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | Order]

Marks & Spencer PLC v. Commissioners of Customs and Excise (United Kingdom), C-62/00, Judgment of 11 July 2002 [Links: Judgment | Case summary | Advocate General's opinion]

Marleasing SA v. La Comercial Internacional de Alimentación SA (Spain), C-106/89, Judgment of 13 November 1990 [Links: Judgment | Case summary | Advocate General's opinion]

Marshall v. Southampton and SW Hampshire Area Health Authority (United Kingdom), C-152/84, Judgment of 26 February 1986 [Links: Judgment | Case summary | Advocate General's opinion]

Md Sagor (Italy), C-430/11, Judgment of 6 December 2012 [Link: Judgment | Case summary | CJEU press release]

Mehmet Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie (Czech Republic), C-534/11, Judgment of 30 May 2013 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion]

Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie (Netherlands), C-465/07, Judgment [GC] of 17 February 2009 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR statement]

Migrationsverket v. Edgar Petrosian and Others (Sweden), C-19/08, Judgment of 29 January 2009 [Links: Judgment | Case summary]

Migrationsverket v. Nurije Kastrati and Others (Sweden), C-620/10, Judgment of 3 May 2012 [Links: Judgment | Case summary | Advocate General's opinion]

Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal (Hungary), C-364/11, Judgment [GC] of 19 December 2012 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR written submission | UNHCR oral submission]

N.S. v. Secretary of State for the Home Department (United Kingdom) and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform (Ireland), Joined Cases C-411/10 and C-493/10, Judgment [GC] of 21 December 2011 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion in *N.S.* | Advocate General's opinion in *M.E.* | UNHCR written submission | UNHCR oral submission | Order in *N.S.*]

Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal (Hungary), C-31/09, Judgment [GC] of 17 June 2010 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR statement]

Orsolina Leonesio v. Ministero dell'agricoltura e foreste (Italy), C-93/71, Judgment of 17 May 1972 [Links: Judgment | Case summary | Advocate General's opinion]

Robert Bosch GmbH v. Hauptzollamt Hildesheim (Germany), C-135/77, Judgment of 16 March 1978 [Links: Judgment | Case summary | Advocate General's opinion]

Ruth Hünermund and others v. Landesapothekerkammer Baden-Württemberg (Germany), C-292/92, Judgment of 15 December 1993 [Links: Judgment | Case summary | Advocate General's opinion]

Safalero Srl v. Prefetto di Genova (Italy), Case C-13/01, Judgment of 11 September 2003 [Links: Judgment | Case summary | Advocate General's opinion]

Said Shamilovich Kadzoev (Huchbarov) (Bulgaria), C-357/09 PPU, Judgment [GC] of 30 November 2009 [Links: Judgment | Case summary | Advocate General's view]

Salahadin Abdulla and Others v. Bundesrepublik Deutschland (Germany), Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Judgment [GC] of 2 March 2010 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR statement]

Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Germany), C-16/62, Judgment of 1 December 1965 [Links: Judgment | Case summary | Advocate General's opinion]

Shamso Abdullahi v. Bundesasylamt (Austria)), C-394/12, Judgment [GC] of 10 December 2013 [Links: Judgment | Case summary | Advocate General's opinion | Order (French)]

SpA International Chemical Corporation v. Administrazione delle finanze dello Stato (Italy), C-66/80, Judgment of 13 May 1981 [Links: Judgment | Case summary | Advocate General's opinion]

Stefano Melloni v. Ministero Fiscal (Spain), C-399/11, Judgment [GC] of 26 February 2013 [Links: Judgment | Case summary | | CJEU press release | Advocate General's opinion]

Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v. European Commission, Joined Cases T-213/95 and T/18/96, Judgment of 22 October 1997 [Link: Judgment | Case summary]

Textilwerke Deggendorf GmbH (TWD) v. European Commission and Federal Republic of Germany, C-355/95 P, Judgment of 15 May 1997 [Links: Judgment | Case summary | Advocate General's opinion]

The Queen v Ministry of Agriculture, Fisheries and Food, ex parte H. & R. Ecroyd Holdings Ltd and John Rupert Ecroyd (United Kingdom), C-127/94, Judgment of 6 June 1996 [Links: Judgment | Advocate General's opinion | Case summary]

Unibet v. Justitiekanslern (Sweden), C-432/05, Judgment [GC] of 13 March 2007 [Links: Judgment | Case summary | Advocate General's opinion]

Wolfgang Oehlschläger v. Hauptzollamt Emmerich, C-104/77, Judgment of 16 March 1978 [Links: Judgment | Case summary | Advocate General's opinion]

Wünsche Handelsgesellschaft GmbH & Co.v. Federal Republic of Germany, C-69/85, Order of 5 March 1986 [Links: Order | Case summary]

X, Y and Z v. Minister voor Immigratie, Integratie en Asiel (Netherlands), Joined Cases C-199/12, C-200/12 and C-201/12, Judgment of 7 November 2013 [Links: Judgment | CJEU press release | Advocate General's opinion | UNHCR written submission | UNHCR oral submission]

Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet (Bulgaria), C-528/11, Judgment of 30 May 2013 [Links: Judgment | Case summary | UNHCR statement]

Cases pending before the CJEU at the end of 2013

A, B and C v. Staatssecretaris van Veiligheid en Justitie, Joined Cases C-148/13, C-149/13 and C-150/13, Raad van State (the Netherlands) of 25 March 2013 [Links: Questions (same in all three cases)]

Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides, C-285/12, Reference from Conseil d'État (Belgium) of 7 June 2012, Opinion of Advocate General Mengozzi delivered on 18 July 2013 [Links: Questions | Advocate General's opinion | UNHCR Note (French)]

Adala Bero v. Regierungspräsidium Kassel, C-473/13, reference from Bundesgerichtshof (Germany) of 3 September 2013 [Link: Questions]

Andre Lawrence Shepherd v. Federal Republic of Germany, C-472/13, Bayerisches Verwaltungsgericht München (Germany) of 2 September 2013 [Links: Questions]

Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida (Belgium), C-562/13, Reference from Cour du travail de Bruxelles of 31 October 2013 [Link: Questions]

Ettayebi Bouzalmate v.Kreisverwaltung Kleve, C-514/13, reference from Landgericht München I (Germany) of 26 September 2013 [Link: Questions]

Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri and Others (Belgium), C-79/13, Reference from Arbeidshof te Brussel of 15 February 2013 [Link: Questions]

H.N. v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (Ireland), C-604/12, Reference from Supreme Court of 27 December 2012, Opinion of Advocate General Bot delivered on 7 November 2013 [Link: Questions | Advocate General's opinion]

H.T. v Land Baden-Württemberg, C-373/13, Reference from Verwaltungsgerichtshof Baden-Württemberg (Germany) of 2 July 2013 [Link: Questions]

Khaled Boudjlida v Préfet des Pyrénées-Atlantiques, C-249/13, reference from Tribunal administratif de Pau (France) of 6 May 2013 [Link: Questions]

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Table of abbreviations

APD Asylum Procedures Directive
AFSJ Area of Freedom, Security, and Justice
CEAS Common European Asylum System
CJEU Court of Justice of the European Union
EC European Community
ECHR European Convention on Human Rights
ECmHR European Commission of Human Rights
ECtHR European Court of Human Rights
EU European Union
IHL International Humanitarian Law
QD Qualification Directive
RCD Reception Conditions Directive
TEC Treaty establishing the European Community
TEU Treaty on the European Union
TFEU Treaty on the Functioning of the European Union
UN United Nations
UNHCR Office of the United Nations High Commissioner for Refugees
UNRWA United Nations Relief and Works Agency for Palestine Refugees in the Near East

Part 1:
The Court of Justice of the European Union

1.1 Introduction

A. Protection of refugees, asylum-seekers and stateless persons under EU law

1. The EU legal order

To understand the protection that the law of the European Union (EU) accords to refugees, asylum-seekers and stateless persons, it is necessary first to have an understanding of the EU legal order.

The present legal order of the EU was established by the Treaty of Lisbon, which entered into force on 1 December 2009.

The Treaty of Lisbon amended the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC), and renamed the latter the Treaty on the Functioning of the European Union (TFEU).[1]

The EU has twenty-eight Member States,[2] the most recent of which, Croatia, joined on 1 July 2013. Pursuant to Article 1 of the amended TEU, the Member States confer competences upon the EU ("the Union"), which replaced and succeeded to the European Community, to attain objectives that they have in common. The EU has seven main institutions to that end.[3] One institution is judicial, namely the Court of Justice of the European Union (CJEU) which "shall ensure that in the interpretation and

[1] References to TEU and TFEU in this manual are to the consolidated versions of those Treaties [Links: TEU | TFEU].
[2] Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom.
[3] Article 13(1) TEU.

application of the Treaties the law is observed".[4] Three institutions *inter alia* exercise legislative functions: the European Parliament, the Council of the European Union ("the Council") and the European Commission ("the Commission"). A fifth institution, the European Council, sets the EU's overall political direction, which can include legislative priorities.[5] The remaining two institutions serve other purposes.[6]

When the EU succeded to the European Community, "Community law" merged with and became "EU law". The main sources of EU law in hierarchical order of precedence are:

(i) TEU and TFEU ("the Treaties") including the Protocols thereto, and the Charter of Fundamental Rights of the European Union ("the Charter");[7]

(ii) Unwritten general principles of EU law, including fundamental rights;[8]

(iii) International agreements entered into by the Union with third countries (i.e. non-Member States) or international organizations;[9]

(iv) Secondary legislation, namely:

- "Regulations",[10] "directives"[11] and "decisions"[12] that are "legislative acts";[13]
- Regulations, directives and decisions that are "non-legislative acts".[14]

[4] Article 19(1) TEU.
[5] Note Article 68 TFEU: "The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice." The area of freedom, security and justice (AFSJ) is the area into which asylum falls.
[6] These two institutions are the Court of Auditors and the European Central Bank
[7] Article 1(2) TFEU and Article 1 TEU specify that the Treaties have the same legal value. Article 6(1) TEU specifies that the Charter has the same legal value as the Treaties.
[8] General principles of EU law are developed by the CJEU from a variety of sources, including, in particular, international law, the EU legal order, and the laws of the Member States. Note also Article 6(3) TEU: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."
[9] Under EU law, international agreements concluded by the EU are binding on the EU institutions and on the Member States, as stipulated in Article 216(2) TFEU. That is different from the position in international law, according to which international agreements to which the EU is party do not bind the Member States unless they too are party to the agreement. Where the founding Treaties confer on the EU exclusive competence in a specific area, only the EU can enter into an international agreement; but where the EU shares competence with the Member States, both the EU and the Member States can enter into an international agreement. Pursuant to Article 4(2)(j) TFEU, shared competence between the EU and the Member States applies in the area of freedom, security and justice, into which asylum falls.
[10] Article 288 TFEU.
[11] *Ibid.*
[12] *Ibid.*
[13] Legislative acts are adopted under either the ordinary legislative procedure or a special legislative procedure (Article 289 TFEU). Under the ordinary legislative procedure, legislative acts are adopted jointly by the European Parliament and the Council, on a proposal from the Commission. Under a special legislative procedure, legislative acts are adopted by the Council, with the participation of Parliament, or by the latter with the participation of the Council.
[14] Non-legislative acts are adopted on the basis of legislative acts and are of two kinds: "delegated acts" and "implementing acts". Delegated acts are defined in Article 290(1) TFEU, according to which "a legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act." Implementing acts are defined in Article 291(2) TFEU, which stipulates that "[w]here uniform conditions for implementing legally binding Union acts [i.e. regulations, directives or decisions] are needed, those acts shall confer implementing powers on the Commission, or, in [special cases], on the Council."

EU legislation of general application must be drafted in all the official languages of the Union,[15] which were twenty-four in number as of the end of 2013.[16] The different language versions of each legislative text are equally authentic, meaning that none has priority over the other.[17]

Rules of EU law established by sources lower in the hierarchy must be consistent with, and be interpreted in light of, rules of EU law established by sources higher in the hierarchy. The legality of binding EU acts – including legislative and non-legislative acts – may be reviewed by the CJEU, which has the power to declare an act "void",[18] "invalid",[19] or "inapplicable",[20] in whole or in part. The courts of the Member States do not have that power.[21] However, when a question regarding the validity of an EU act is raised in a case pending before a national court or tribunal, that court or tribunal is entitled (if it is a lower court or tribunal) – or obliged (if it is a court or tribunal of last instance) – to make a reference to the CJEU for a preliminary ruling on the matter.[22]

As of the end of 2012, EU law comprised *inter alia* of 9,576 regulations and 1,989 directives.[23] Regulations are directly applicable in all of the Member States as soon as they enter into force.[24] Directives are binding, as to the result to be achieved, on all Member States to which they are addressed, but leave to the national authorities of each Member State the choice of form and methods.[25] The transposition of a directive into national law must be completed within the deadline stipulated, failing which, wherever the provisions of the directive appear as regards their subject matter to be unconditional and sufficiently clear and precise, they may be relied upon directly by individuals in cases before the courts of the defaulting Member State.[26] Such provisions may similarly be relied upon if, after the deadline for transposition has expired, they have been incorrectly transposed or they have been correctly transposed but the relevant national implementing measures are not being applied in such a way as to achieve the result sought by the directive.[27]

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[15] See Article 342 TFEU and Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community. The latter regulation was amended by subsequent Acts of Accession to include the languages of new Member States.
[16] Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, and Swedish.
[17] See, for example, CJEU, *CILFIT and Others (Italy)*, C-283/81, Judgment of 6 October 1982, para. 18.
[18] An act may be declared void pursuant to an action for annulment brought against the EU institution, body, office or agency which adopted it (Articles 263 and 264 TFEU). See further footnote 104 below.
[19] An act may be declared invalid pursuant to a request from a national court or tribunal for a preliminary ruling on the matter (Article 267 TFEU). See further section B below.
[20] An act of general application may be declared inapplicable further to a plea of illegality raised in any direct action before the CJEU (Article 277 TFEU). The objection of illegality does not constitute an independent right of action, and as such may only be raised indirectly when contesting another measure. An act that is declared inapplicable is only inapplicable for purposes of the proceedings in which the objection of illegality is raised.
[21] CJEU, *Foto-Frost v. Hauptzollamt Lübeck-Ost (Germany)*, C-314/85, Judgment of 22 October 1987, paras. 11-20.
[22] Article 267 TFEU. There are three exceptions to the obligation of a court or tribunal of last instance to make a reference to the CJEU for a preliminary ruling: see section B.2.c below.
[23] European Commission, *Report from the Commission: 30th Annual Report on Monitoring the Application of EU Law*, COM(2013) 726 final, 22 October 2013, footnote 1 [Link].
[24] Article 288 TFEU.
[25] *Ibid.*
[26] Such provisions have only "vertical direct effect", meaning that they may only be relied upon by an individual in relation to the State: see CJEU, *Marshall v. Southampton and SW Hampshire Area Health Authority (United Kingdom)*, C-152/84, Judgment of 26 February 1986, paras. 48-49. On the other hand, regulations can have both "vertical" and "horizontal" direct effect: see CJEU, *Orsolina Leonesio v. Ministero dell'agricoltura e foreste (Italy)*, C-93/71, Judgment of 17 May 1972, regarding vertical direct effect; CJEU, *Antonio Muñoz y Cia SA, Superior Fruiticola SA v. Frumar Ltd, Redbridge Produce Marketing Ltd (United Kingdom)*, C-253/00, Judgment of 17 September 2002, regarding horizontal direct effect, i.e. a provision that may be relied upon by an individual in relation to another individual.
[27] CJEU, *Marks & Spencer PLC v. Commissioners of Customs and Excise (United Kingdom)*, C-62/00, Judgment of 11 July 2002, paras. 24-27, and the case law cited therein.

Questions about the applicability and interpretation of EU law frequently arise in the national courts. As with questions concerning the validity of provisions of EU law, the national courts may, and sometimes must, make a reference to the CJEU for a preliminary ruling on the interpretation of the legal provisions concerned (see section B.2.c below).[28]

The national courts must, in so far as possible, interpret national law in conformity with EU law;[29] where this is not possible, they must "set aside" the national legal provisions concerned and apply the overriding EU law.[30]

2. EU law and the 1951 Refugee Convention

a) Introduction

While all EU Member States are party to the 1951 Refugee Convention and its 1967 Protocol (referred to jointly hereinafter as "the 1951 Refugee Convention"), the EU is not.[31] Nor could the EU become a party to the Convention as it stands,[32] since the Convention is only open to accession by States.[33]

Although the 1951 Refugee Convention is therefore not formally part of EU law,[34] it occupies a special position in relation to EU law by virtue of the fact that:

(i) Article 18 of the Charter provides that "[t]he right to asylum shall be guaranteed with due respect for the rules of the [1951 Refugee Convention] and in accordance with [the Treaties]";

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[28] Article 267 TFEU.

[29] See, for example, CJEU, *Marleasing SA v. La Comercial Internacional de Alimentación SA (Spain)*, C-106/89, Judgment of 13 November 1990, para. 8.

[30] See, for example, CJEU, *Amministrazione delle finanze dello Stato v. Simmenthal SpA (Italy)*, C-106/77, Judgment of 9 March 1978, para. 24. The obligation to set aside the national legal provisions concerned does not require that they be annulled, but only that they be disapplied in the case.

[31] The European Council agreed in the Stockholm Programme, covering the period 2010 – 2014, that "subject to a report from the Commission on the legal and practical consequences, the Union should seek accession to the Geneva Convention and its 1967 Protocol." The Stockholm Programme was adopted pursuant to Article 68 TFEU, which provides: "The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice." As of the end of 2013, the Commission had not published its report.

[32] Compare with the European Convention on Human Rights (ECHR), Article 59 of which was amended by Protocol No. 14 to the ECHR to allow for the planned accession of the EU, which is foreseen by means of a separate international agreement to be concluded between the EU and the States Parties to the ECHR. In July 2013, the Commission submitted a request to the CJEU for an opinion pursuant to Article 218(11) TFEU on the compatibility of the draft international accession agreement with the Treaties. Article 218(11) TFEU provides: "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised." As of the end of 2013, the CJEU's opinion remained pending.

[33] Compare, for example, with the UN Convention on the Rights of Persons with Disabilities, to which the EU is a party. Article 42 of that Convention provides: "The present Convention shall be open for signature by all States and *by regional integration organizations* at United Nations Headquarters in New York as of 30 March 2007" (emphasis added). Article 44(1) of the Convention further stipulates: "'Regional integration organization' shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention. Such organizations shall declare, in their instruments of formal confirmation or accession, the extent of their competence with respect to matters governed by this Convention. Subsequently, they shall inform the depositary of any substantial modification in the extent of their competence."

[34] Note that in September 2013 a reference was made to the CJEU for a preliminary ruling on the interpretation of Article 31 of the 1951 Refugee Convention, without any mention of a rule of EU law on which the requested interpretation might have a bearing: see CJEU in *Mohammad Ferooz Qurbani*, C-481/13, Reference from the the Oberlandesgericht Bamberg (Germany), 9 September 2013. As of the end of 2013, the ruling was still pending, so it remains to be seen whether the CJEU will decide that it has the jurisdiction to interpret Article 31 directly.

(ii) Article 78(1) TFEU provides that "[t]he Union shall develop a common policy on asylum, subsidiary protection and temporary protection … [which] must be in accordance with [the 1951 Refugee Convention], and other relevant treaties";

(iii) the fundamental rights forming part of the general principles of EU law arguably include rights based on the 1951 Convention, amongst other international sources.

The 1951 Refugee Convention previously occupied a special position in relation to Community law, since:

(i) Article 63 TEC, as inserted into TEC by the 1997 Treaty of Amsterdam, provided that "[the Council shall adopt] measures on asylum, in accordance with [the 1951 Refugee Convention] and other relevant treaties";

(ii) the fundamental rights forming part of the general principles of Community law already arguably included rights based on the 1951 Convention, amongst other international sources.

Article 63 TEC established the basis for the secondary legislation comprising the "first phase" of the Common European Asylum System (CEAS), whereas Article 78 TFEU provided the basis for the "recast" legislation that has subsequently been adopted in the "second phase" of the CEAS. Article 78 TFEU also provides the continuing legal basis for the first-phase acts until their repeal, as applicable, by the second phase acts.[35]

As was also the case with Article 63 TEC, Article 78 TFEU only concerns "third-country nationals",[36] namely persons – including stateless persons[37] – who are not nationals of the Member States. The position of EU citizens is regulated by the "Protocol on asylum for nationals of Member States of the European Union" (commonly referred to as the "Aznar Protocol"), which was first annexed to TEC by the Treaty of Amsterdam, and is now annexed to TFEU and TEU.[38]

[35] The position regarding repeal of the first-phase acts is as follows: (i) the initial Dublin Regulation (343/2003/EC) was repealed by the recast Dublin Regulation (604/2013/EU) with effect from 19 July 2013 for all Member States; (ii) the initial Qualification Directive (2004/83/EC) was repealed by the recast Qualification Directive (2011/95/EU) with effect from 21 December 2013 for all participating Member States except for Ireland and the United Kingdom, which will continue to remain bound by the initial directive; (iii) the initial Asylum Procedures Directive (2005/85/EC) is repealed by the recast Asylum Procedures Directive (2013/32/EU) with effect from 21 July 2015 for all participating Member States except for Ireland and the United Kingdom, which will continue to remain bound by the initial directive; (iv) the initial Reception Conditions Directive (2003/9/EC) is repealed by the recast Reception Conditions Directive (2013/33/EU) with effect from 21 July 2015 for all participating Member States except for the United Kingdom, which will continue to remain bound by the initial directive; (v) the initial Eurodac Regulation (2725/2000/EC) is repealed by the recast Eurodac Regulation (603/2013/EU) with effect from 20 July 2015 for all Member States; (vi) the Temporary Protection Directive (2001/55/EC) has not been replaced by a recast directive and therefore remains in force for all participating Member States. On "participating Member States", see further section A.3.b below regarding the special posiition of Denmark, Ireland, and the United Kingdom.

[36] Further to Article 61(b) TEC and Article 67(2) TFEU respectively.

[37] As regards stateless persons, Article 67(2) TFEU provides that "[f]or the purpose of this Title, stateless persons shall be treated as third-country nationals." No such express provision was made in TEC, but the EU legislator nevertheless took it for granted that the personal scope of the measures adopted pursuant to Article 63 TEC must extend to stateless persons. Note also that the Returns Directive (2008/115/EC), which was adopted on the basis of Article 63(3)(b) TEC [now Article 79(2)(c) TFEU)], was interpreted by the CJEU in the case of a stateless person while TEC was still in force: see CJEU, *Said Shamilovich Kadzoev (Huchbarov) (Bulgaria)*, C-357/09 PPU, Judgment [GC] of 30 November 2009. Had the CJEU considered that the Returns Directive does not apply to stateless persons, it would have had no jurisdiction to give a preliminary ruling in the case.

[38] The Protocol on asylum was annexed to TEU and TFEU by the Treaty of Lisbon, which made technical modifications to the Protocol.

A more detailed discussion now follows.

b) Article 18 of the Charter of Fundamental Rights ('Right to asylum')

The Charter only became a legally-binding instrument with the entry into force of the Treaty of Lisbon on 1 December 2009.[39] It was first drawn up and adopted in 2000 by a specially established "Convention", and was proclaimed in December of that year by the Council, the European Parliament, and the Commission. It was later slightly revised and proclaimed again by the Council, the European Parliament and the Commission in December 2007 when the Treaty for Lisbon was adopted, in order to accommodate the new EU legal order introduced by that Treaty.[40] Aside from necessary technical modifications, the rights in the revised Charter remained the same, although more significant changes were made to Articles 51 and 52 comprising part of the Charter's "horizontal provisions".

According to its preamble, the Charter reaffirms existing rights and aims to make them more visible:

> "… it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.
>
> This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights ..."

The preamble of Protocol No 30 to the Treaties adds that the Charter "does not create new rights or principles".[41]

The EU legislature acknowledged the Charter's importance long before it became a legally binding instrument, which explains why, for example, Article 18 of the Charter is referred to in the preambles of several of the "first-phase" instruments of the CEAS that were adopted pursuant to Article 63 TEC.[42] For example, the tenth recital of the "Qualification Directive" (see below) states:

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[39] See footnote 7 above.

[40] A slightly different revised version of the Charter was incorporated into Part II of the abortive 2004 Treaty establishing a Constitution for Europe, which was signed by the then twenty-five Member States but failed to be ratified by all of them.

[41] Protocol (No 30) on "The application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom", annexed to TEU and TFEU by the Treaty of Lisbon. Note that the Protocol does not simply represent the position of Poland and the United Kingdom, since as an integral part of the Treaties it has been agreed by all Member States.

[42] This was in accordance with a standard formula introduced by the Commission into the recital of any legislative proposal or draft instrument to be adopted by it that had a specific link to fundamental rights: "This [act] respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union". In appropriate cases a second sentence was added: "In particular, this [act] seeks to ensure full respect for [right XX] and/or to promote the application of [principle YY] / (Article XX and/or Article YY of the Charter of Fundamental Rights of the European Union)": see Communication from the Commission, "Compliance with the Charter of Fundamental Rights in Commission legislative proposals", COM(2005) 172 final, 27 April 2005, para. 1 [Link]. On the evolution of this methodology, including as regards the CEAS instruments which the Commission described as a particularly suitable "case study", see COM(2009) 2005 final, 29 April 2009 [Link]. The methodology was also carried over into the Commission's legislative strategy post-Lisbon: see COM(2010) 573 final, 19 October 2010 [Link].

> "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members."

Judgments of the CJEU also began to take note of the Charter before it became legally binding.[43]

Article 18 of the Charter enshrines the right to asylum as follows:

> **Article 18 EU Charter of Fundamental Rights**
> **('Right to asylum')**
>
> *The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').*

Pursuant to Article 51 of the Charter, Article 18 of the Charter, like other Charter provisions, is addressed to the Member States "only when when they are implementing EU law", i.e. whenever their action falls within the scope of EU law:[44]

> **Article 51 EU Charter of Fundamental Rights**
> **('Field of application')**
>
> *1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*
>
> *2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.*

As regards the scope and interpretation of Article 18 of the Charter, Article 52 of the Charter provides *inter alia* that "[t]he explanations drawn up as a way of providing guidance in the interpretion of this Charter shall be given due regard by the courts of the Union and of the Member States."[45] The explanation on Article 18 states:

[43] See, for example, CJEU, *European Parliament v. Council of the European Union*, C-540/03, Judgment [GC] of 27 June 2006, paras. 38 and 58, referring to Articles 7 and 24 of the Charter; CJEU, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad (Netherlands)*, C-303/05, Judgment [GC] of 3 May 2007, para. 46, referring to Articles 20, 21 and 49 of the Charter; CJEU, *Migrationsverket v. Edgar Petrosian and Others (Sweden)*, C-19/08, Judgment of 29 January 2009, para. 4, referring to Article 18 of the Charter.

[44] See, for example, CJEU, *Åklagaren v. Hans Åkerberg Fransson*, C-617/10, Judgment [GC] of 26 February 2013, paras. 17 to 20.

[45] See also to the same effect Article 6(1) TEU.

Explanation on Article 18 – Right to asylum[46]

The text of the Article has been based on TEC Article 63, now replaced by Article 78 of the Treaty on the Functioning of the European Union, which requires the Union to respect the Geneva Convention on refugees. Reference should be made to the Protocols relating to the United Kingdom and Ireland, annexed to the Treaties, and to Denmark, to determine the extent to which those Member States implement Union law in this area and the extent to which this Article is applicable to them. This Article is in line with the Protocol on Asylum annexed to the Treaties.

As of the end of 2013, although various Advocates General had expressed an opinion on the matter,[47] the CJEU had not pronounced itself on the scope or content of the right to asylum, having seen no need to answer a question in that regard that had been referred to it by the Sofia Administrative Court (Bulgaria),[48] and having merely touched upon an answer in response to an earlier question that had been referred to it by the Court of Appeal of England and Wales (United Kingdom).[49] That answer is discussed in chapter 1.5,[50] and concerns whether, or to what extent, Article 18 of the Charter may preclude the transfer of an asylum-seeker from one Member State to another if there are substantial grounds for believing that transfer would expose the asylum-seeker to a real risk of being treated in a manner incompatible with his or her fundamental rights, or with the measures adopted pursuant to Article 63 TEC (now Article 78 TFEU).

It should be noted that the Charter contains both “rights” and “principles”. Article 51(1) of the Charter provides that rights shall be “respected”, whereas “principles” shall be observed. As stated in the Explanations to the Charter, principles do not give rise to direct claims for positive action by the EU institutions or the Member States, since Article 52(5) of the Charter provides:

Article 52(5) Charter of Fundamental Rights
(‘Scope and interpretation of rights and principles’)

The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when

[46] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02) [Link]. The introductory paragraph to the Explanations states: “These explanations were originally prepared under the authority of the Praesidium of the Convention which drafted the Charter of Fundamental Rights of the European Union. They have been updated under the responsibility of the Praesidium of the European Convention, in the light of the drafting adjustments made to the text of the Charter by that Convention (notably to Articles 51 and 52) and of further developments of Union law. Although they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.”

[47] See CJEU, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie (Netherlands)*, C-465/07, Opinion of Advocate General Maduro, 9 September 2008, paras. 21, 26-30 and 33 (delivered before the Charter became legally binding); CJEU, *N.S. v. Secretary of State for the Home Department (United Kingdom)*, C-411/10, Opinion of Advocate General Trstenjak, 22 September 2011, paras. 113-115 and 152-154; CJEU, *M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform (Ireland)*, C-493/10, Opinion of Advocate General Trstenjak, 22 September 2011, paras. 62 and 65; CJEU, *Cimade, Groupe d’ínformation et de soutien des immigrés (GISTI) v. Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration (France)*, C-179/11, Opinion of Advocate General Sharpston, para. 56; CJEU, *Bundesrepublik Deutschland v. Kaveh Puid (Germany)*, C-4/11, Opinion of Advocate General Jääskinen, 18 April 2013, paras. 48-49; CJEU, *H.N. v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (Ireland)*, C-604/12, Opinion of Advocate General Bot, 7 November 2013, paras. 53 and 78. As discussed below, the opinions of the CJEU Advocates General are non-binding recommendations which the CJEU may or may not follow.

[48] CJEU, *Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet (Bulgaria)*, C-528/11, Judgment of 30 May 2013, paras. 40-42.

[49] CJEU, *N.S. v. Secretary of State for the Home Department (United Kingdom) and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform (Ireland)*, Joined Cases C-411/10 and C-493/10, Judgment [GC] of 21 December 2011, paras. 109-115.

[50] See section B.5.b of chapter 1.5.

> *they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.*

As the Explanations also state, some Articles of the Charter contain both elements of a right and of a principle. Whether that may be the case with Article 18 of the Charter was not, as of the end of 2013, a question that had arisen before the CJEU.

It should be noted that Article 18 of the Charter is by no means the only provision in the Charter that is of relevance to refugees and asylum-seekers. Like other third-country nationals or stateless persons, refugees and asylum-seekers benefit from all of the rights, freedoms and principles recognized in the Charter except for those – limited in number – that are restricted to EU citizens.

c) Article 78 TFEU (ex Article 63 TEC)

The "first phase" legislative acts of the CEAS were planned for in the European Council's "Tampere programme" covering the period 1999 – 2004, according to which the CEAS should be based on the "full and inclusive" application of the 1951 Refugee Convention. The acts were adopted on the basis of Articles 61 and 63 TEC, as inserted into TEC by the 1997 Treaty of Amsterdam,[51] in accordance with the legislative procedure in Article 67 TEC, as inserted into TEC by the Treaty of Amsterdam and subsequently amended by the 2001 Treaty of Nice:[52]

> **Article 61 TEC**
>
> *In order to establish progressively an area of freedom, security and justice, the Council shall adopt:*
>
> *(a) within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of of Article 62(2) and (3) and Article 63(1)(a) and (2)(a), and measures to prevent and combat crime in accordance with the provisions of Article 31(e) of the Treaty on European Union;*
>
> *(b) other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63;*
>
> *[…]*

> **Article 63 TEC**
>
> *The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:*

[51] The Treaty of Amsterdam entered into force on 1 May 1999. Declaration No. 17 annexed to the Final Act of the Conference that adopted the Treaty of Amsterdam stated as regards Article 63 TEC that "[c]onsultations shall be established with the United Nations High Commissioner for Refugees and other relevant international organisations on matters relating to asylum policy." Note that, unlike the Protocols, which are annexed to the Treaties themselves, the Declarations are not a source of EU law. See recital 11 of the preamble to the Temporary Protection Directive (2001/55/EC), which states that "effect should be given" to Declaration No 17, following which Article 3(2) of that directive provides: "The establishment, implementation and termination of temporary protection shall be the subject of regular consultations with the Office of the United Nations High Commissioner for Refugees (UNHCR) and other relevant international organisations."

[52] The Treaty of Nice entered into force on 1 February 2003. Some of the first-phase instruments of the CEAS were adopted prior to the entry into force of that Treaty, whereas others were adopted afterwards. One instrument adopted afterwards was the Asylum Procedures Directive (2005/85/EC), certain provisions of which were subsequently annulled by the CJEU on the grounds that the Council, acting alone, had not proceeded in compliance with the "co-decision" procedure required by Article 67(5) TEC further to the Treaty of Nice: see CJEU, *European Parliament v. Council of the European Union*, C-133/06, Judgment [GC] of 6 May 2008, discussed below in chapter 1.4, section B.3.c.

(1) measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties,within the following areas:

- *(a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,*
- *(b) minimum standards on the reception of asylum seekers in Member States,*
- *(c) minimum standards with respect to the qualification of nationals of third countries as refugees,*
- *(d) minimum standards on procedures in Member States for granting or withdrawing refugee status;*

(2) measures on refugees and displaced persons within the following areas:

- *(a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,*
- *(b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons;*

[…]

The first legislative proposals for the "second phase" legislative acts of the CEAS were made on the basis of Article 63 TEC, under the European Council's "Hague Programme" covering the period 2005 – 2009. However, the second-phase acts were ultimately adopted under the European Council's "Stockholm Programme", covering the period 2010 – 2014, on the basis of Articles 67(2), 78 and 80 TFEU:

Article 67 TFEU

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

[…]

Article 78 TFEU

1. The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:

- *(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;*
- *(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;*
- *(c) a common system of temporary protection for displaced persons in the event of a massive inflow;*
- *(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;*
- *(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;*
- *(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;*

> *(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.*
>
> *3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.*

> **Article 80 TFEU**
>
> *The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.*

As of the end of 2013, the CJEU had not been called upon to rule on whether any of the provisions of the first- or second-phase instruments of the CEAS are incompatible with the requirement, initially in Article 63 TEC and now in Article 78 TFEU, that they be in accordance with the 1951 Refugee Convention.[53] However, the Court had delivered numerous rulings on the interpretation and application of the first-phase instruments. In particular, many provisions of the Qualification Directive are based on, refer to and/or interpret provisions in the 1951 Convention, and the CJEU consistently highlighted that the provisions concerned "were adopted to guide the competent authorities of the Member States in the application of [the 1951 Convention] on the basis of common concepts and criteria" and that the directive must be interpreted "in a manner consistent with the [1951 Convention] and the other relevant treaties referred to in point (1) of the first paragraph of Article 63 EC, now Article 78(1) TFEU."[54]

d) Protocol on asylum for nationals of the EU Member States

As noted above, the Protocol on asylum for nationals of Member States of the European Union was first annexed to TEC by the Treaty of Amsterdam, and is now annexed to TFEU and TEU. According to its preamble, the Protocol purports to respect "the finality and the objectives of the Geneva Convention of 28 July 1951 relating to the status of refugees".[55] The Protocol forms an integral part of the Treaties,[56] and, as such, the CJEU can interpret it but cannot review its legality.

> **Protocol (No. 24) on asylum for nationals of Member States of the European Union**
>
> *The. THE HIGH CONTRACTING PARTIES,*
>
> *WHEREAS, in accordance with Article 6(1) of the Treaty on European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights,*
>
> *WHEREAS pursuant to Article 6(3) of the Treaty on European Union, fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, constitute part of the Union's law as general principles,*
>
> *WHEREAS the Court of Justice of the European Union has jurisdiction to ensure that in the interpretation and application of Article 6, paragraphs (1) and (3) of the Treaty on European Union the law is observed by the European Union,*

[53] However, the CJEU had been called upon to review the compatibility of the Asylum Procedures Directive with other requirements under EU law. See footnote 52 below.
[54] See, for example, CJEU, *Bundesrepublik Deutschland v. B and D*, Joined Cases C-57/09 and C-101/09, Judgment [GC] of 9 November 2010, paras. 76-78. The principles for the interpretation of the Qualification Directive are discussed in chapter 1.2, section B.1
[55] The preamble does not also refer to the 1967 Protocol relating to the Status of Refugees.
[56] Article 51 TEU.

> *WHEREAS pursuant to Article 49 of the Treaty on European Union any European State, when applying to become a Member of the Union, must respect the values set out in Article 2 of the Treaty on European Union,*
>
> *BEARING IN MIND that Article 7 of the Treaty on European Union establishes a mechanism for the suspension of certain rights in the event of a serious and persistent breach by a Member State of those values,*
>
> *RECALLING that each national of a Member State, as a citizen of the Union, enjoys a special status and protection which shall be guaranteed by the Member States in accordance with the provisions of Part Two of the Treaty on the Functioning of the European Union,*
>
> *BEARING IN MIND that the Treaties establish an area without internal frontiers and grant every citizen of the Union the right to move and reside freely within the territory of the Member States,*
>
> *WISHING to prevent the institution of asylum being resorted to for purposes alien to those for which it is intended,*
>
> *WHEREAS this Protocol respects the finality and the objectives of the Geneva Convention of 28 July 1951 relating to the status of refugees,*
>
> *HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:*
>
> *Sole Article*
>
> *Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible for processing by another Member State only in the following cases:*
>
> *(a) if the Member State of which the applicant is a national proceeds after the entry into force of the Treaty of Amsterdam, availing itself of the provisions of Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to take measures derogating in its territory from its obligations under that Convention;*
>
> *(b) if the procedure referred to Article 7(1) of the Treaty on European Union has been initiated and until the Council, or, where appropriate, the European Council, takes a decision in respect thereof with regard to the Member State of which the applicant is a national;*
>
> *(c) if the Council has adopted a decision in accordance with Article 7(1) of the Treaty on European Union in respect of the Member State of which the applicant is a national or if the European Council has adopted a decision in accordance with Article 7(2) of that Treaty in respect of the Member State of which the applicant is a national;*
>
> *(d) if a Member State should so decide unilaterally in respect of the application of a national of another Member State; in that case the Council shall be immediately informed; the application shall be dealt with on the basis of the presumption that it is manifestly unfounded without affecting in any way, whatever the cases may be, the decision-making power of the Member State.*

The Protocol's sole Article provides that "[g]iven the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters." Accordingly, any application for asylum made by a national of a Member State may be taken into consideration or declared admissible only in the cases defined in paragraphs (a) to (d) of that Article.

Paragraphs (a) to (c) presumably mean that there is no obligation to regard a Member State of origin as safe in the cases listed therein, namely if:

(i) the Member State of origin has taken emergency measures derogating from its obligations under the European Convention on Human Rights (ECHR); or

(ii) the Council is in the course of determining whether, or has already determined that, there is a clear risk of a serious breach by the Member State of origin of the values on which the EU is founded;[57] or

(iii) the European Council is in the course of determining, or has already determined, the existence of a serious and persistent breach by the Member State of origin of the values on which the EU is founded.

If none of the above conditions are satisfied, the Member State where asylum has been sought may examine an asylum application only in accordance with the conditions specified in paragraph (d) of the sole Article, namely:

(i) the Council shall be immediately informed; and

(ii) the application shall be dealt with on the basis of the presumption that it is manifestly unfounded.

However, as also stipulated in paragraph (d) of the sole Article, the decision-making power of the Member State examining the application remains unaffected, meaning presumably that the Member State is not obliged to reject the application as unfounded.

Although not themselves a source of EU law, two declarations were made when the Protocol on asylum was adopted. Declaration No. 48 annexed to the Final Act of the Conference that adopted the Treaty of Amsterdam states that the Protocol "does not prejudice the right of each Member State to take the organisational measures it deems necessary to fulfil its obligations under the Geneva Convention of 28 July 1951 relating to the status of refugees." The second declaration was made unilaterally by Belgium, and was taken note of by the Conference: "In approving the Protocol on asylum … Belgium declares that, in accordance with its obligations under the 1951 Geneva Convention and the 1967 New York Protocol, it shall, in accordance with the provision set out in point (d) of the sole Article of that Protocol, carry out an individual examination of any asylum request made by a national of another Member State."

Although such declarations are not a source of EU law, they "have to be taken into consideration as being instruments for the interpretation of the [Treaties], especially for the purpose of determining the ambit ratione personae of [the Treaties]".[58] This is provided that "neither individual statements of position nor joint declarations of the Member States may be used for the purpose of interpreting a provision where … their content is not reflected in its wording and therefore has no legal significance".[59]

Case law on the Protocol: As of the end of 2013, the CJEU had not been asked to interpret the Protocol on asylum. However, it had referred to the Protocol in two cases: first in *I.B.*,[60] and later in *N.S. and M.E.*[61]

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[57] The EU's founding values are stated in Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

[58] CJEU, *Janko Rottmann v. Freistaat Bayern (Germany)*, C-135/08, Judgment [GC] of 2 March 2010, para. 40.

[59] CJEU, *KappAhl Oy (Austria)*, C-233/97, Judgment of 3 December 1998, para. 40.

[60] CJEU, *I.B. (Belgium)*, C-306/09, Judgment of 21 October 2010.

[61] CJEU, *N.S. v. Secretary of State for the Home Department (United Kingdom) and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform (Ireland)*, Joined Cases C-411/10 and C-493/10, Judgment [GC] of 21 December 2011.

In *I.B.*, a Romanian national who had applied for refugee status in Belgium was the subject of a European arrest warrant under which Romania sought his surrender by Belgium for purposes of the execution of a sentence imposed *in absentia*. The Belgian Constitutional Court accordingly referred a number of questions to the CJEU, concerning in essence whether the surrender of a person in I.B.'s situation could be made subject to certain conditions by Belgium, or, if not, then refused.

The CJEU held that for purposes of answering the questions raised it was not relevant that I.B. had applied for refugee status:

> "… It should be recalled … that the grounds for non-execution of a European arrest warrant … do not include an application for asylum or an application for the grant of refugee status or subsidiary protection.
>
> …With regard, more particularly, to a request for asylum submitted to the competent authorities of a Member State by a national of another Member State, the sole article of Protocol No 29 on asylum for nationals of member states of the European Union annexed to the EC Treaty (now Protocol No 24 annexed to the TFEU) provides inter alia that, given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States are to be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters.
>
> … Similarly, it should be pointed out that a request for the grant of refugee status or subsidiary protection by a national of a Member State does not fall within the scope of the international protection mechanism established by Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [i.e. the Qualification Directive].
>
> … Therefore, the fact that I.B. lodged a request with the competent Belgian authorities for the grant of refugee status or subsidiary protection within the meaning of Directive 2004/83 cannot be considered relevant, for the purpose of the answers to be given to the questions raised by the referring court." (paras.43-46)

Taken at face value, the CJEU's reasoning implies that a European arrest warrant always prevails over an asylum application, even when the asylum-seeker whose surrender is requested would be returned to the Member State of his or her nationality. However, it is notable that the CJEU did not need to consider the exceptional circumstances listed in paragraphs (a) to (c) of the sole Article of the Protocol on asylum, which did not arise in *I.B.* But supposing that surrender may be precluded if any of those circumstances obtain, it does seem that the CJEU considers that at least in any other circumstances a European arrest warrant would prevail over an asylum application.

In the later case of *N.S. and M.E.*, which is discussed in detail in chapter 1.5, the CJEU was effectively called upon to determine the circumstances in which a Member State may not be regarded as a safe country of *asylum,* as opposed to a safe country of *origin*. The question before the Court was whether, when a Member State is identified as responsible for examining the asylum application of a third-country national who is present in another Member State, there are any circumstances under which the asylum-seeker's transfer by the latter Member State to the former Member State for the examination of his or her asylum application is precluded by EU law. In setting out the legal context for its ruling, the CJEU summarized the CEAS and referred in passing to the Protocol on asylum "according to which [the Member States] are to be regarded as constituting safe countries of origin in respect to each other for all legal and practical purposes in relation to asylum matters" (para.8). At a later point in its judgment the CJEU then said that the CEAS "was conceived in a context making it possible to assume that all the participating States … observe fundamental rights …, and that the Member States can have confidence in each other in that regard" (para.78). However, the Court then went on to say that the presumption that a Member State complies with fundamental rights must be regarded as rebuttable (para.104), and that in certain exceptional circumstances – namely if there are systemic deficiencies in the asylum system of that Member State – transfer would indeed be precluded if the asylum-seeker concerned would thereby face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter (para.106).

As noted above, the CJEU's mention in *N.S. and M.E.* of the Protocol on asylum was made only in passing, but it is significant that both the Court's ruling and the Protocol on asylum place heavy emphasis on the principle of mutual trust between Member States, which is of fundamental importance in EU law, particularly in the area of freedom, security and justice.[62]

e) General principles of EU law

In addition to the protection accorded to fundamental rights by the Charter, it is well-established in the CJEU's case law that fundamental rights form part of the general principles of EU law:[63]

> "Fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories."[64]

As regards the guidelines supplied by the international human rights instruments from which the CJEU draws inspiration, the ECHR has special significance.[65] However, the Court has drawn inspiration from other international human rights instruments as well, including, for example, the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.[66]

As regards the 1951 Refugee Convention, the CJEU held in *N.S. and M.E.*[67] that:

> "… According to settled case-law, the Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation *which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law* …

[62] See, for example, CJEU, *Stefano Melloni v. Ministerio Fiscal*, C-399/11, Judgment [GC] of 26 February 2013, paras. 37 and 63, concerning how the system of European arrest warrants is predicated on the principle of mutual trust. As stated at para. 63 of that judgment: "allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299 [concerning the European arrest warrant and surrender procedures between Member States], in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision."

[63] See also Article 6(3) TEU: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

[64] See, for example, CJEU, *European Parliament v. Council of the European Union*, C-540/03, Judgment [GC] of 27 June 2006, para. 35.

[65] Article 6(3) TEU and, for example, C-540/03, footnote 64 above.

[66] See, for example, C-540/03, footnote 64 above, at para. 37.

[67] CJEU, *N.S. v. Secretary of State for the Home Department (United Kingdom) and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform (Ireland)*, Joined Cases C-411/10 and C-493/10, Judgment [GC] of 21 December 2011.

> … Consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe *fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol*, and on the ECHR, and that the Member States can have confidence in each other in that regard." (emphasis added) (paras.77-78)

This implies that the CJEU considers that the fundamental rights forming part of the general principles of EU law include rights based on the 1951 Refugee Convention. The Court has not spelled out what those rights are, but it should be noted that for purposes of its ruling in *N.S. and M.E.* the Court referred to the prohibition of *refoulement* in Article 33(1) of the 1951 Refugee Convention,[68] according to which "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

3. Common European Asylum System (CEAS)

a) The CEAS instruments[69]

The first-phase legislative acts of the CEAS were adopted over a five-year period between December 2000 and December 2005, and are listed in Table 1 below.

Table 1: Scope of each CEAS legislative act

CEAS legislative act	Scope
Qualification Directive[70]	Sets minimum standards for the recognition of refugee status and subsidiary protection status, and for the protection to be accorded to beneficiaries of one of those statuses.
Asylum Procedures Directive[71]	Sets minimum standards for national procedures for granting and withdrawing refugee status (and subsidiary protection status, in the case of Member States which establish a single procedure for examining eligibility for both refugee status and subsidiary protection).
Dublin Regulation[72]	Establishes the criteria and mechanisms for determining which Member State is responsible for examining an asylum application lodged on the territory of one of the Member States.[73]

[68] CJEU, *N.S. v. Secretary of State for the Home Department (United Kingdom) and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform (Ireland)*, Joined Cases C-411/10 and C-493/10, Judgment [GC] of 21 December 2011, para. 5.

[69] In addition to the CEAS instruments, the EU legislator has adopted other legislative acts in the area of asylum, such as: (i) Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office [Link]; (ii) Decision No 573/2007/EC of the European Parliament and of the Council establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows' and repealing Council Decision 2004/904/EC [Link].

[70] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [Link].

[71] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [Link].

[72] Council Regulation 343/2003/EC establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

[73] In addition to the Member States, the following States also participate in the "Dublin system": Iceland, Liechtenstein, Norway and Switzerland. For details, see chapter 1.5.

CEAS legislative act	Scope
Eurodac Regulation[74]	Facilitates the application of the Dublin Regulation by establishing a centralized system for collecting and comparing the fingerprints of asylum-seekers and of aliens apprehended in connection with the irregular crossing of an "external border" of a Member State.[75]
Reception Conditions Directive[76]	Sets minimum standards for the reception conditions of asylum-seekers, including as regards detention and freedom of movement, and access to housing, food, clothing, healthcare, employment and education.
Temporary Protection Directive[77]	Sets minimum standards for granting immediate and temporary protection, to be activated by a Council Decision, in the event of a mass influx of persons forcibly displaced from their country of origin.

The second-phase legislative acts were adopted between December 2011 and June 2013. Each act is a "recast" of a first-phase act:[78] it includes unchanged provisions of the first-phase act, amended provisions of the first-phase act, and also completely new provisions. Certain provisions in the recasts codify rulings of the CJEU on the interpretation of provisions of the first-phase acts.[79]

Table 2: Date of adoption of each CEAS legislative act and deadline for transposition (directives) / date from which applicable (regulations)

CEAS legislative act	Initial act	Recast act
Qualification Directive	29 Apr 2004; 10 Oct 2006	13 Dec 2011; 21 Dec 2013
Asylum Procedures Directive	01 Dec 2005; 01 Dec 2007[80]	26 Jun 2013; 20 Jul 2015[81]
Dublin Regulation	18 Feb 2003; 01 Sep 2003	26 Jun 2013; 19 Jul 2013 / 01 Jan 2014[82]
Eurodac Regulation	11 Dec 2000; 15 Jan 2003	26 Jun 2013; 20 Jul 2015
Reception Conditions Directive	27 Jan 2003; 06 Feb 2005	26 Jun 2013; 20 Jul 2015
Temporary Protection Directive	20 Jul 2001; 31 Dec 2002	No recast

Table 3: Legal basis of each CEAS legislative act, as stated in its preamble

CEAS legislative act	Initial act: legal basis in TEC	Recast act: legal basis in TFEU
Qualification Directive	63(1)(c), 63(2)(a) and 63(3)(a)	78(2)(a) and (b)
Asylum Procedures Directive	63(1)(d)	78(2)(d)

[74] Council Regulation (EC) No 2725 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [Link].
[75] See footnote 73 above.
[76] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [Link].
[77] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [Link].
[78] On the recasting technique in general, see: European Parliament, Council, Commission, "Interinstitutional Agreement of 28 November 2001 on a more structured use of the recasting technique for legal acts" (2002/C 77/01) [Link].
[79] See, for example, the second indent of Article 3(2) of the Dublin III Regulation (604/2013/EU), codifying the CJEU's ruling in *N.S. and M.E.*
[80] This is with the exception of Article 15 of the directive, for which the deadline for transposition was 1 December 2008.
[81] This is with the exception of Article 31(3), (4) and (5) of the recast directive, for which the deadline for transposition is 20 July 2018.
[82] Part of the recast Dublin regulation became applicable on 19 July 2013, whereas the recast criteria for determining the Member State responsible for examining an application for international protection only applied to applications lodged as from 1 January 2014.

CEAS legislative act	Initial act: legal basis in TEC	Recast act: legal basis in TFEU
Dublin Regulation	63(1)(a)	78(2)(e) and 80
Eurodac Regulation	63(1)(a)	78(2)(e), 87(2)(a) and 88(2)(a)
Reception Conditions Directive	63(1)(b)	78(2)(f)
Temporary Protection Directive	63(2)(a) and (b)	No recast[83]

In accordance with Article 63 TEC, each of the initial CEAS directives established "minimum standards" to be implemented in the national asylum systems of the Member States. The recast directives are more ambitious: their aim is to "ensur[e] improved reception conditions";[84] to "achieve a higher level of approximation of the rules on the recognition and content of international protection on the basis of higher standards";[85] and to "further develop standards … with a view to establishing a common asylum procedure in the Union".[86] But the recast directives do not fully harmonize the national asylum systems of the Member States, and, like the initial directives, they expressly allow Member States to introduce or retain "more favourable" provisions or standards, insofar as those provisions or standards are "compatible" with the directive concerned.[87]

In the event that full harmonization is ever achieved, it would significantly decrease the extent to which the Member States share competence with the EU in the area of asylum,[88] and would mean that the Member States could no longer grant more favourable protection than that provided for by EU law.[89] However, that is not an issue at present. In fact, a Member State is not precluded from granting more favourable protection even when the protection concerned is *incompatible* with the Qualification Directive, provided that the specific form of protection granted is clearly distinguished from protection under the directive. This follows from the CJEU's ruling in *B and D*,[90] according to which Member States may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to Article 12(2) of the Qualification Directive, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive.[91]

For further information on the recast CEAS instruments, see: UNHCR, *Moving Further Toward a Common European Asylum System: UNHCR's statement on the EU asylum legislative package*, June 2013 [Link]

[83] Article 78(2)(c) TFEU provides the legal basis for the continuing validity of the Temporary Protection Directive that was adopted in the first phase of the CEAS.
[84] Recital 7 of the recast Reception Conditions Directive.
[85] Recital 10, recast Qualification Directive.
[86] Recital 12 of the recast Asylum Procedures Directive.
[87] Article 3 of the initial and recast Qualification Directive, referring to more favourable "standards"; Article 4 of the initial and recast Reception Conditions Directive, referring to more favourable "provisions" as opposed to "standards"; Article 5 of the initial and recast Asylum Procedures Directive, referring both to "provisions" and "standards".
[88] See Article 2(2) TFEU: "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence." As mentioned in footnote 9 above, shared competence between the EU and the Member States applies in the area of freedom, security and justice, into which asylum falls. The degree to which the EU may itself exercise that competence is governed by the principles of subsidiarity and proportionality: see Article 5 TEU.
[89] See, for example, CJEU, *Stefano Melloni v. Ministero Fiscal (Spain)*, C-399/11, Judgment [GC] of 26 February 2013, paras. 62 – 63.
[90] CJEU, *Bundesrepublik Deutschland v. B and D (Germany)*, Joined Cases C-57/09 and C-101/09, Judgment [GC] of 9 November 2010, paras. 113 – 121.
[91] See further chapter 1.2, section B.5.

b) Participation by Denmark, Ireland and the United Kingdom

The participation of the United Kingdom and Ireland in the CEAS is governed by a Protocol that was annexed to TEC and TEU by the Treaty of Amsterdam,[92] and that was subsequently amended and annexed to TFEU and TEU by the Treaty of Lisbon.[93] Under that Protocol, the United Kingdom and Ireland are exempt from applying measures adopted *inter alia* in the area of asylum, unless they opt to take part in the adoption of a particular measure, or unless, not having taken part in a measure's adoption, they later opt to apply it.

A separate Protocol governs the position of Denmark,[94] according to which Denmark is not bound by any measures adopted *inter alia* in the area of asylum unless it decides that it no longer wishes to avail itself of the Protocol, or at least of that part of the Protocol which establishes the exemption. Denmark has not expressed such a wish, but in 2006 entered into a separate international agreement with the then European Community in order to be able to participate in the "Dublin system" established by the Dublin and the Eurodac Regulations.[95]

Table 4: Opt-ins/participation by Denmark (DK), Ireland (IE) and the United Kingdom (UK)

CEAS legislative act	Initial act	Recast act
Qualification Directive	UK, IE	None participating
Asylum Procedures Directive	UK, IE	None participating
Dublin Regulation	UK, IE, DK	UK, IE, DK
Eurodac Regulation	UK, IE, DK	UK, IE, DK
Reception Conditions Directive	UK	None participating
Temporary Protection Directive	UK, IE[96]	No recast

As can be seen from Table 4 above, neither Ireland, Denmark nor the United Kingdom are bound by any of the recast directives. However, Ireland and the United Kingdom will continue to remain bound by the initial directives that they opted in to, since the initial directives that have been recast are only repealed for the Member States bound by the recasts.

c) Participation by non-Member States

Iceland, Liechtenstein, Norway and Switzerland all participate in the Dublin system, based on international agreements entered into with the then European Community and with each other. See chapter 1.5.

The above four countries also participate in the so-called "Returns Directive".[97] That directive is not part of the CEAS but is discussed in chapters 1.7 and 1.8.

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[92] Protocol (No 4) on the position of the United Kingdom and Ireland.
[93] Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.
[94] Protocol (No 5) on the position of Denmark, annexed to TEC and TEU by the Treaty of Amsterdam; subsequently amended and annexed as Protocol No 22 to TFEU and TEU by the Treaty of Amsterdam.
[95] See chapter 1.5.
[96] Whereas the United Kingdom opted to participate in the adoption of the Temporary Protection Directive, Ireland did not. However, Ireland later opted to apply the directive: see Commission Decision of 2 October 2003 on the request by Ireland to accept Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (notified under document number C(2003) 3428) [Link].
[97] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

4. Stateless persons

Under EU law, there is no system for the identification and protection of stateless persons. The Treaties do not explicitly foresee the establishment of such a system, although legislative measures in that regard could conceivably be taken under Article 79 TFEU. In any event, the absence of a dedicated protection system does not mean that stateless persons are at present without any form of protection under EU law. For example, they benefit from the safeguards governing detention for purposes of removal under the Returns Directive, as discussed in chapter 1.8.

Secondly, EU law is not directly concerned with the prevention and reduction of statelessness, since, as the CJEU has consistently held, the rules for the acquisition and loss of nationality fall within the competence of the Member States. However, as the CJEU has also consistently held, the Member States must exercise that competence with due regard to EU law. The prevention and reduction of statelessness may therefore potentially be indirectly regulated by EU law in certain situations. This is discussed further in chapter 1.9.

5. Scope of this manual

This manual covers the case law of the CJEU on: (i) the different thematic areas covered by the CEAS instruments (chapters 1.2 to 1.7); (ii) detention for purposes of removal under the Returns Directive (chapter 1.8), as opposed to asylum-related detention as regulated by the CEAS instruments (chapter 1.7); (iii) deprivation of the nationality of an EU Member State resulting in loss of EU citizenship (chapter 1.9). Chapters 1.2 to 1.8 are of relevance to refugees and asylum-seekers, whereas chapters 1.8 and 1.9 are of relevance to stateless persons.

This first edition of the manual covers the case law of the CJEU until the end of 2013. As of that date, all of the case law on the CEAS instruments concerned the initial versions of those instruments. However, nearly all of that case law will remain of relevance to the interpretation of the recast instruments, given that the recasts build on the provisions of the initial instruments.

B. The Court of Justice of the European Union

1. Introduction

> **Article 19 TEU**
>
> *1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.*
>
> *Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.*
>
> *2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.*
>
> *The General Court shall include at least one judge per Member State.*
>
> *The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.*
>
> *3. The Court of Justice of the European Union shall, in accordance with the Treaties:*
>
> *(a) rule on actions brought by a Member State, an institution or a natural or legal person;*
>
> *(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;*
>
> *(c) rule in other cases provided for in the Treaties.*

Functions of the Court: The CJEU has its seat in Luxembourg and is comprised of three courts: the Court of Justice;[98] the General Court;[99] and one specialised court, the Civil Service Tribunal, which has jurisdiction in staff cases.[100]

The court that is of relevance to the protection of refugees and asylum-seekers is the Court of Justice, which *inter alia* has jurisdiction for:[101]

(i) Preliminary rulings on the interpretation of EU primary or secondary law (at the request of a national court or tribunal);[102]

(ii) Preliminary rulings on the validity of EU secondary law (at the request of a national court or tribunal);[103]

(iii) Actions for the annulment of EU secondary law (brought by an EU institution or a Member State against the EU institution(s) that adopted the legislation);[104]

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[98] Created in 1952 and initially called the "Court of Justice of the European Coal and Steel Communities" (1952 – 1957), and then the "Court of Justice of the European Communities" (1957 – 2009).
[99] Created in 1989 and initially called the "Court of First Instance" (1989 – 2009).
[100] Created in 2004.
[101] For a comprehensive overview of the jurisdiction of the Court of Justice, see Lenaerts, Maselis, Gutman, Nowak (ed.), "EU Procedural Law", Oxford University Press, 2014, pages 42 – 43.
[102] Article 267 TFEU.
[103] *Ibid.*
[104] Articles 263 to 264 TFEU. There is a two-month time limit for bringing the action, following which the legality of the act concerned may only be reviewed by the CJEU in the context of a reference from the national courts for a preliminary ruling on its validity, or when an ancillary plea of illegality is raised in any direct action before the CJEU (see footnote 20 above). The consequences of an act being declared void are *ex tunc*, i.e. the act is removed retroactively from the legal order of the EU and is deemed never to have existed. Exceptionally the CJEU may, if it considers this necessary, declare

(iv) Infringement actions, i.e. an action against a Member State for failure to fulfil its obligations under EU law (generally brought by the Commission, but may also be brought by another Member State).[105]

Individuals cannot bring an action against a Member State before the Court. [106] They can complain to the Commission that a Member State has failed to fulfil its obligations under EU law, but any decision to initiate infringement proceedings against the Member State is entirely at the discretion of the Commission,[107] which has no legal obligation to act on the complaint.[108]

Typically infringement proceedings may be initiated where a Member State has failed to transpose or incorrectly transposed a directive, or where national law or an administrative practice, by action or omission, conflicts with EU law. A rule established in national case law that conflicts with EU law may also in principle constitute an infringement, in particular if it has been confirmed by the national Supreme Court.[109]

If infringement proceedings are initiated, they begin with an administrative stage, which may or may not resolve the matter.[110] If the matter is not resolved, the Commission is then entitled, but not obliged, to bring an action for infringement before the Court of Justice. The action is for the purpose of obtaining a declaration from the Court that the conduct of the Member State infringes EU law and of terminating that conduct.[111] If the Court rules against the Member State, it may impose a lump sum and/or daily penalty payment if the Member State fails to put the infringement to an end.[112]

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that some or all of the "effects" of the annulled act shall be considered as "definitive", meaning that action or decisions already taken on the basis of the annulled act still stand; alternatively, the Court may exceptionally declare that, until a new act has been adopted by the EU legislature, future action or decisions may also be taken on the basis of the annulled act.

[105] Articles 258 to 260 TFEU.

[106] On the other hand, individuals can bring certain kinds of action against the EU or an EU institution. The actions concerned fall within the jurisdiction of the General Court, or, in staff cases, the Civil Service Tribunal.

[107] See, for example, CJEU, *GISTI v. European Commission*, C-408/05 P, Order of 6 April 2006, in which the Court of Justice upheld the decision of the then Court of First Instance (now the General Court) not to annul a decision of the Commission refusing to launch infringement proceedings against Italy. This was after GISTI and nine other NGOs had complained to the Commission that Italy had allegedly violated the rights of 1,500 migrants and potential asylum-seekers by deporting them from the island of Lampedusa to Libya.

[108] Note, however, that a complaint can be lodged with European Ombudsman about any alleged maladministration by the institutions, bodies, offices or agencies of the EU (Article 228 TFEU). See, in particular, the Decision of the European Ombudsman of 14 June 2010 concerning complaint 953/2009/(JMA)MHZ, which found maladministration by the Commission in the way that it had handled a complaint about an alleged infringement of EU law by Spain [Link].

[109] See CJEU, *Commission v. Italy*, C-129/00, Judgment of 9 December 2003, para. 32: "[I]solated or numerically insignificant judicial decisions in the context of case-law taking a different direction, or still more a construction disowned by the national supreme court, cannot be taken into account. That is not true of a widely-held judicial construction which has not been disowned by the supreme court, but rather confirmed by it." See also CJEU, *Commission v. Spain*, C-154/08, Judgment of 12 November 2009, paras. 124 – 127, finding that a ruling of the Supreme Court of Spain constituted a failure of Spain to fulfil its obligations under EU law.

[110] The administrative stage of the procedure is usually preceded by informal contacts between the Commission and the Member State, often by means of an informal letter to the Member State setting out the reasons why the Commission believes there may be an infringement. If the Commission is not satisfied with the Member State's response, it may decide to initiate the formal administrative stage of the procedure laid down in the first paragraph of Article 258 TFEU. That stage is comprised of the following steps: (i) a letter of formal notice from the Commission to the Member State identifying the alleged infringement; (ii) the submission of observations by the Member State; (iii) the issuance of a reasoned opinion by the Commission describing the infringement and prescribing a reasonable period of time for the Member State to terminate it. Most infringement cases are closed by the Commission by the end of this administrative stage.

[111] CJEU, *France v. Commission*, Joined Cases C-15/76 and C-16/76, Judgment of 7 February 1979, para. 27.

[112] Article 260 TFEU.

For further information on infringement proceedings, see:

1. European Commission, *Exercise your rights* [Link]
2. European Commission, *Infringement procedure* [Link]
3. European Commission, *How to submit a complaint to the Commission* [Link]
4. EU Law Monitoring, *List of infringement procedures on asylum* [Link] (continuously updated)
5. EU Law Monitoring, *List of infringement procedures on borders and return policy* [Link] (continuously updated)

Just as individuals cannot bring an action against a Member State before the Court of Justice, they also cannot bring an action before the Court of Justice for the annulment of EU secondary legislation.[113]

On the other hand, when a national court or tribunal requests the Court of Justice to give a preliminary ruling on the validity of a provision of EU secondary legislation, the parties to the "main proceedings" (the case before the national court or tribunal) are entitled to submit observations to the Court of Justice on the validity of the provisions concerned. Equally, they have a right to submit observations to the Court when the request from the national court or tribunal is for a preliminary ruling on interpretation.

Composition of the Court of Justice: The Court of Justice is comprised of 28 Judges, one from each Member State, each fully independent and sitting in their individual capacity. They are appointed for a six-year period, which may be renewed. The Court sits in various formations: Chambers consisting of three or five Judges, a Grand Chamber of fifteen Judges, or, exceptionally, the Full Court (the most junior Judge not sitting in order to ensure an odd number of Judges).[114] All cases are decided by consensus, with no dissenting or concurring opinions being issued by individual Judges.

Cases are assigned to different formations of the Court in accordance with Article 60 of the Court's Rules of Procedure read in conjunction with Article 16 of the CJEU Statute:

Article 60, Rules of Procedure of the Court of Justice
Assignment of cases to formations of the Court

1. The Court shall assign to the Chambers of five and of three Judges any case brought before it in so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber, unless a Member State or an institution of the European Union participating in the proceedings has requested that the case be assigned to the Grand Chamber, pursuant to the third paragraph of Article 16 of the Statute.

2. The Court shall sit as a full Court where cases are brought before it pursuant to the provisions referred to in the fourth paragraph of Article 16 of 32 the Statute. It may assign a case to the full Court where, in accordance with the fifth paragraph of Article 16 of the Statute, it considers that the case is of exceptional importance.

3. The formation to which a case has been assigned may, at any stage of the proceedings, request the Court to assign the case to a formation composed of a greater number of Judges.

[113] Under certain narrowly defined conditions (which are not satisfied by the CEAS instruments) an individual can bring an action for annulment before the General Court. The act whose annulment is sought must either be "addressed to that person" or be "of direct and individual concern to [that person]", or it must be "a regulatory act which is of direct concern to [that person] and does not entail implementing measures": see the fourth paragraph of Article 263 TFEU. For further explanation, see for example, CJEU, *Inuit Tapiriit Kanatami v. European Parliament and Council*, T-18/10, Order of 6 September 2011, paras. 41 – 46.

[114] Article 251 TFEU; Article 16 of the CJEU Statute.

> *[…]*

> **Article 16, Statute of the CJEU**
>
> *[…]*
>
> *The Court shall sit in a Grand Chamber when a Member State or an institution of the Union that is party to the proceedings so requests.*
>
> *The Court shall sit as a full Court where cases are brought before it pursuant to Article 228(2), Article 245(2), Article 247 or Article 286(6) of the Treaty on the Functioning of the European Union.*
>
> *Moreover, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate-General, to refer the case to the full Court.*

It is noteworthy that, as of the end of 2013, the Court of Justice had sat as a Grand Chamber in five out of the six cases in which it had delivered a preliminary ruling on the interpretation of the criteria for refugee status in the Qualification Directive.[115]

Advocates General: The Court of Justice is assisted by nine Advocates General.[116] As provided by Article 252 TFEU "[i]t shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which … require his involvement." Each case is assigned to one Advocate General.[117]

The role of the Advocate General is to give an "opinion" on how a case should be decided. The opinion does not bind the Court of Justice, nor is it legally binding in any other way. The Court may or may not refer to the opinion in its judgment, and when it does refer to the opinion this may be either to agree or disagree with a particular point. Even where the Court comes to the same conclusions as the Advocate General in a particular case, it may be through a different route; therefore, unless the judgment explicitly applies the same reasoning as the opinion, it should not be assumed that the Court agrees with what the Advocate General has said.

Opinions of the Advocates General are often more detailed and more discursive than the Court's actual judgments, which can come across as terse or even cryptic at first reading. Hence, notwithstanding what has been said above, an opinion can provide valuable insights even after judgment has been delivered in a case, including as to how future cases may be decided as regards points that were not addressed in the judgment itself.

Official languages: The language arrangements applicable at the Court of Justice are governed by special rules.[118] A case is in principle conducted in a *single* language, the "language of the case", which must be one of the twenty-four official languages of the Union. The rules for determining the language of a case are set out in the Court's Rules of Procedure. For example, in preliminary ruling proceedings the language of the case is that of the referring court or tribunal.[119] Although Member States are entitled to use their official language in both their written and oral submissions to the Court,[120] the parties to the main proceedings before the national court or tribunal must use the

[115] See chapter 1.2.
[116] Article 252 TFEU (referring to eight Advocates-General); Council Decision 2013/336/EU of 25 June 2013 increasing the number of Advocates-General of the Court of Justice of the European Union (increasing the number of Advocates-General to nine with effect from 1 July 2013, and to eleven with effect from 7 October 2015).
[117] Article 16(1) of the Rules of Procedure of the Court of Justice.
[118] Article 64 TEU; Articles 36 to 42 of the Rules of Procedure of the Court of Justice [Link].
[119] Article 37(3) of the Rules of Procedure of the Court of Justice.
[120] Article 38(4) of the Rules of Procedure of the Court of Justice.

language of the case when participating in preliminary ruling proceedings,[121] with the possibility of an exception being granted for the oral part of the procedure.[122]

Judgments that are published must be translated into all the official languages of the Union,[123] but the only authentic text of a judgment is the one in the language of the case.[124] The Court's internal working language is French, including for the deliberations between the Judges and for the drafting of judgments before they are translated into the language of the case. It can therefore be helpful to examine the French text if there is any ambiguity about the meaning of a judgment.

For obvious practical reasons, this manual quotes from the English-language texts (when available) of the Court's judgments, irrespective of the language of the case.

Workload of the Court of Justice: In 2013, the Court of Justice completed 701 cases and received 699 new cases. 884 cases were pending before the Court of Justice at the end of the year.[125]

Of the 699 cases brought before the Court of Justice in 2013, 450 were references for a preliminary ruling, 161 were appeals against decisions of the General Court, 72 were direct actions, and 16 were of another nature.[126]

Of the 450 references for a preliminary ruling in 2013, nine concerned the interpretation of the CEAS instruments, and a further five concerned the interpretation of the detention provisions in the Returns Directive.[127] This represents a significant percentage of the Court's workload, particularly given the vast body of EU law coming within the Court's jurisdiction. The percentage is even higher if all cases in the field of migration are taken into account.

For further information on the CJEU, see:

1. CJEU, *The Court of Justice: Composition, jurisdiction and procedures*, December 2010 [Link]

2. CJEU, *The General Court*, February 2011 [Link]

3. CJEU: *Your questions on the Court of Justice of the European Union*, September 2010 [Link]

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[121] Article 38(1)-(3) of the Rules of Procedure of the Court of Justice.
[122] Article 37(3) of the Rules of Procedure of the Court of Justice.
[123] Article 40 of the Rules of Procedure of the Court of Justice.
[124] Article 41 of the Rules of Procedure of the Court of Justice.
[125] CJEU, Annual Report for 2013, p. 83 [Link]. The figures given in the report represent the total number of cases, without account being taken of the joinder of cases on grounds of similarity. This means, for example, that the number of rulings given in a year is less than the number of cases completed in that year.
[126] CJEU, Annual Report for 2013, p. 84.
[127] Figures are based on the calculations of the author.

2. Preliminary ruling procedure[128]

a) Jurisdiction of the Court of Justice

> **Article 267 TFEU**
>
> *The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*
>
> *(a) the interpretation of the Treaties;*
>
> *(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*
>
> *Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.*
>
> *Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.*
>
> *If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.*

Rulings on the interpretation and validity of, inter alia, EU law: Article 267 TFEU confers jurisdiction on the Court of Justice to give preliminary rulings concerning:

(a) the interpretation of "the Treaties", meaning (most notably) [129] EU primary law, including TEU and TFEU and the Annexes and Protocols thereto, the Treaties and Acts of accession of new Member States, the Charter of Fundamental Rights, and the general principles of EU law;

(b) the validity and interpretation of "acts of the institutions, bodies, offices or agencies of the Union", which include, but are by no means limited to, acts laying down EU secondary legislation.

In other words, the Court of Justice has jurisdiction to give preliminary rulings *inter alia* concerning the interpretation of EU primary and secondary law, and the validity of EU secondary law.

The preliminary ruling procedure operates as follows. First a national court or tribunal submits an "order for reference" to the Court of Justice for a preliminary ruling on a question, or series of questions, concerning EU law; then the Court of Justice decides that question; then finally the referring national court or tribunal uses the Court's ruling to help it to give judgment in the proceedings that gave rise to the question. The preliminary ruling procedure is thus a mechanism through which the Court of Justice, in cooperation with the courts and tribunals of the Member States, ensures the uniform interpretation and application of EU law.

Content of the order for reference: Article 94 of the Rules of Procedure of the Court of Justice provides that in addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

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[128] This following publication was of particular help in the preparation of this section, and it is recommended that the reader consult it for a much more in-depth treatment than is possible here: Lenaerts, Maselis, Gutman, Nowak (ed.), "EU Procedural Law", Oxford University Press, 2014, chapters 3, 6, 10 and 24. Another particularly helpful publication is Broberg and Fenger, "Preliminary References to the European Court of Justice", Oxford University Press, 2014.

[129] The reference in Article 267 TFEU to "the Treaties" is not only to the treaties on which the EU is founded (TEU and TFEU) but also to the Treaty Establishing the European Atomic Energy Community (EURATOM). EURATOM is distinct from the EU, but has the same membership and shares the same institutions.

(a) a summary of the subject matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;

(b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case law;

(c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of EU law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

Admissibility of the questions referred: The question on which a ruling is sought from the Court of Justice must be one on which a decision is *necessary* to enable the referring court or tribunal to give judgment in the main proceedings: hence the Court does not have jurisdiction to deliver an advisory opinion on general or hypothetical questions.[130] In principle it is for the national court or tribunal to determine the relevance of a question, but the Court of Justice must also ensure that the question does not exceed the limits of its jurisdiction.[131] As the Court has often stated:

> "… according to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling …
>
> … It follows that questions concerning European Union law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of European Union law that is sought is unrelated to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it …"[132]

The Court of Justice can take account of provisions of EU law that have not been mentioned by the referring court or tribunal,[133] and, in order to provide an answer which will be of use in giving judgment in the main proceedings, can also reformulate the questions that have been asked.[134] Such reformulations, which must not subvert the questions in the order for reference, are frequently along the following lines: "in essence, the question is …" Where several questions have been asked, the Court may combine two or more of them into a single question for the purpose of examining them together.[135]

In principle the Court of Justice may, although asked for a ruling on validity, deliver a ruling on interpretation if it considers that the question from the referring court was based on an incorrect interpretation of the provision of EU law in issue.[136] Contrariwise, the Court may deliver a ruling on

[130] CJEU, *Foglia v. Novello*, C-244/80, Judgment of 16 December 1981, para. 18.
[131] CJEU, *Foglia v. Novello*, C-244/80, Judgment of 16 December 1981, para. 19.
[132] CJEU, *Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet (Bulgaria)*, C-528/11, Judgment of 30 May 2013, paras. 28 – 29. The same points have been made by the CJEU in numerous other cases.
[133] See, for example, CJEU, *Joseph Trinon (Belgium)*, C-12/82, Judgment of 30 November 1982, para. 5.
[134] CJEU, *Marks & Spencer PLC v. Commissioners of Customs and Excise (United Kingdom)*, C-62/00, Judgment of 11 July 2002, para. 32.
[135] See, for example, CJEU, *I.B. (Belgium)*, C-306/09, Judgment of 21 October 2010, para. 48.
[136] CJEU, *Krüger GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas*, C-334/95, Judgment of 17 July 1997, paras. 20 – 35.

validity despite being asked for a ruling on interpretation, if it appears from the questions submitted that the underlying concern of the referring court relates to the validity of the provision in issue.[137] However, the fact that the Court has already delivered a ruling on the interpretation of a particular provision of EU law does not mean that it accepts the provision as valid and that a future question about the validity of the provision will be inadmissible. As stated in *Inasti and Others*,[138] a case in which the Court was requested to rule on the validity of provisions of a regulation on social security that it had already interpreted in two previous references for a preliminary ruling:

> "… Inasti, the Belgian Government and the Council dispute the admissibility of the questions referred. In essence, they argue that the Court interpreted Article 14c(b) of and Annex VII to the Regulation [on social security] in its [judgments in the two earlier cases] without declaring them invalid, although the Advocate General had urged it to do so and it could have done so of its own motion. The Court thus accepted the validity of those provisions and, in the absence of any new matters coming to light in the meantime, the questions of the Tribunal du travail, Tournai, amount to calling into question decisions which are *res judicata*.
>
> … Those arguments must be rejected. If the Court, when dealing with a question referred to it for a preliminary ruling, does not rule on a point of law on which no question has been referred and which, moreover, has not been raised by the parties or other participants in the proceedings before it, that does not mean that it has given a definitive ruling on the point in question. Moreover, nothing prevents the Court, at the request of a national court and in the context of the Court's collaboration with that court pursuant to [Article 267 TFEU], from ruling on the validity of a measure taken by the [Union] institutions, which it has already had occasion to interpret." (paras. 26 – 27)

Preliminary rulings on interpretation or validity are final and cannot be appealed. The preliminary ruling procedure may be used to ask the Court of Justice to interpret its own preliminary rulings, which constitute an act of an EU institution within the meaning of Article 267 TFEU, but cannot be used to contest the validity of those rulings.[139] If the Court has declared a provision of EU law invalid, it can nevertheless rule on a question concerning that provision once again at a later date "if questions arise as to the grounds, the scope and possibly the consequences of the invalidity established earlier".[140]

A national court or tribunal may submit more than one order for reference for a preliminary ruling during the course of the main proceedings:

> "… the authority of a preliminary ruling does not preclude the national court to which it is addressed from properly taking the view that it is necessary to make a further reference to the Court of Justice before giving judgment in the main proceedings. According to well-established case-law, such a procedure may be justified when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law to the Court, or again when it submits new considerations which might lead the Court to give a different answer to a question submitted earlier. However, it is not permissible to use the right to refer further

[137] CJEU, *Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, C-16/62, Judgment of 1 December 1965, p. 885.
[138] CJEU, *Inasti and Others (Belgium)*, Joined Cases C-393/99 and C-394/99, Judgment of 19 March 2002.
[139] CJEU, *Wünsche Handelsgesellschaft GmbH & Co.v. Federal Republic of Germany*, C-69/85, Order of 5 March 1986, para. 15.
[140] CJEU, *SpA International Chemical Corporation v. Administrazione delle finanze dello Stato (Italy)*, C-66/80, Judgment of 13 May 1981, para. 14.

questions to the Court as a means of contesting the validity of the judgment delivered previously …"[141]

Scope of the ruling of the Court of Justice: In the preliminary ruling procedure, the jurisdiction of the Court of Justice extends only to answering a question concerning EU law, not to deciding the actual case in the main proceedings, which falls within the exclusive jurisdiction of the referring court or tribunal. The Court is empowered to give rulings on the interpretation of EU law only on the basis of the facts which the referring court or tribunal puts before it, and to verify whether such facts are correct is not within its competence.[142] Nor can the Court rule on the interpretation of national law,[143] or on the compatibility of national law with EU law.[144] That being said, a ruling on the interpretation of EU law may be designed to assist the referring court or tribunal itself to decide on the compatibility of national law with EU law.[145]

The Court's rulings on interpretation are very exact, being limited to those points that, based on the information provided in the order for reference, are necessary for the referring court or tribunal to give judgment in the main proceedings. Where several questions have been asked, the Court generally will not answer a question if it sees no need to do so in light of its answer to another question.

Even though the Court does not decide the case in the main proceedings, a ruling on the interpretation of EU law may nevertheless refer generically to the facts that were put before the Court. In such cases, the ruling employs formulations like the following: "in circumstances such as those in the main proceedings"; "a person in the situation of the applicant in the main proceedings"; etc.

b) Consequences of the preliminary ruling

Binding effects: A judgment in which the Court of Justice gives a preliminary ruling on interpretation or validity "conclusively determines a question or questions of [EU] law and is binding on the national court for the purposes of the decision to be given by it in the main proceedings." [146] In the case of a preliminary ruling on interpretation, it is not only the "operative part" (the ruling at the end of the judgment) that is binding, but the main body of the judgment as well, since the operative part must be understood in the light of the grounds on which it is based.[147] As regards preliminary rulings on validity, an act or part thereof that is declared invalid is not formally annulled in the EU legal order,[148] but may not be applied by the referring court or tribunal. It should be noted in that regard that, if the act declared invalid is a directive, it does not automatically follow that national legislation and administrative measures which were adopted to implement the directive are themselves incompatible with EU law. Whether there is any such incompatibility is a question that must be examined in relation to EU law as it stands in the light of the ruling on invalidity.[149]

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[141] CJEU, *Wünsche Handelsgesellschaft GmbH & Co.v. Federal Republic of Germany*, C-69/85, Order of 5 March 1986, para. 15.

[142] CJEU, *Wolfgang Oehlschläger v. Hauptzollamt Emmerich*, C-104/77, Judgment of 16 March 1978, para. 4

[143] CJEU, *Hoekstra v. Bestuur der Bedrijfsvereniging voor Detailhande (Netherlands)*, C-75/63, Judgment of 19 March 1964, p. 186.

[144] Compare with actions for infringement, where the Court of Justice may be called upon to rule upon the compatibility of national law with EU law.

[145] See, for example, CJEU, *Ruth Hünermund and Others v. Landesapothekerkammer Baden-Württemberg (Germany)*, C-292/92, Judgment of 15 December 1993, para. 8.

[146] CJEU, *Wünsche Handelsgesellschaft GmbH & Co.v. Federal Republic of Germany*, C-69/85, Order of 5 March 1986, para. 13.

[147] CJEU, *Robert Bosch GmbH v. Hauptzollamt Hildesheim (Germany)*, C-135/77, Judgment of 16 March 1978, para. 4.

[148] Compare with actions for annulment, footnote 104 above.

[149] This follows from CJEU, *The Queen v. Ministry of Agriculture, Fisheries and Food, ex parte H. & R. Ecroyd Holdings Ltd and John Rupert Ecroyd (United Kingdom)*, C-127/94, Judgment of 6 June 1996, para. 58: "it is not necessary to enlarge upon the consequences for the national administrative authorities required to act in the area concerned of a ruling

Note: The points of law discussed in this manual are taken from both the operative part and the grounds of the Court's judgments. The manual is structured according to those points of law on a thematic basis. The alternative would have been to structure the manual according to the specific questions asked in each order for reference, which would have been much less informative.

Although a preliminary ruling on validity is directly addressed only to the referring court or tribunal "it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give".[150] Preliminary rulings on interpretation have similarly binding effect on all national courts and tribunals before which the same questions are raised.[151] However, this is without prejudice to the right of any national court or tribunal to make another reference to the Court of Justice. If there are any new factors that the Court needs to take into account, including relevant developments in its case law, the Court may distinguish, add to, qualify – or even reconsider – the interpretation given in a previous ruling.[152] Where there are no such factors, Article 99 of the Court's Rules of Procedure provides that:

> "Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, [or] where the reply to such a question may be clearly deduced from existing case-law … the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order."

Temporal effects: Preliminary rulings on interpretation and validity are declaratory and in principle have *ex tunc* (i.e. retroactive) effect.[153] For preliminary rulings on interpretation, this means that "[t]he interpretation which … the Court of Justice gives to a rule of [EU] law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force".[154] For preliminary rulings on validity, it means that the act or provision concerned never came into force.

c) Duty to request a preliminary ruling

Courts and tribunals of last instance: Article 267 TFEU provides that a national court or tribunal has an *obligation* to request a preliminary ruling if it is a "court or tribunal … against whose decisions there is no judicial remedy under national law" and it considers that a decision on a question concerning the interpretation or validity of EU law is necessary to enable it to give judgment.[155] As the Court of Justice stated in *CILFIT*,[156] there are three exceptions to this obligation:

> "… [In an earlier judgment] the Court ruled that: 'Although the third paragraph of [Article 267 TFEU] unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law . . . to refer to the Court every question of interpretation

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by the Court under [Article 267 TFEU] that a measure adopted by an institution is wholly or partially invalid. The conclusions which may be drawn in the national legal systems from such a ruling of invalidity depend, on any view, directly on [EU] law as it stands in the light of that ruling."

[150] CJEU, *SpA International Chemical Corporation v. Administrazione delle finanze dello Stato (Italy)*, C-66/80, Judgment of 13 May 1981, para. 18(a).

[151] See, for example, CJEU, *G. Seguela and A. Lachkar and others v. Administration des impôts (France)*, Joined Cases C-76/87, C-86/87 to C-89/87 and C-149/87, Judgment of 28 April 1988, paras. 11 – 14.

[152] See, for example, CJEU, *CNL-SUCAL v. HAG*, C-10/89, Judgment of 17 October 1990, para. 10.

[153] In very exceptional cases, the Court has limited the retroactive effect of its rulings.

[154] CJEU, *Amministrazione delle finanze dello Stato v. Denkavit italiana Srl (Italy)*, C-61/79, Judgment of 27 March 1980, para. 16.

[155] If this obligation is not respected, the Commission may in principle launch infringement proceedings against the Member State concerned.

[156] CJEU, *CILFIT and Others (Italy)*, C-283/81, Judgment of 6 October 1982.

> raised before them, the authority of an interpretation under [Article 267] already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.'
>
> … The same effect, as regards the limits set to the obligation laid down by the third paragraph of [Article 267], may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.
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> […]
>
> … Finally, the correct application of [EU] law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it." (paras. 13-16)

Lower courts and tribunals: Lower courts and tribunals have a *right*, but not an obligation, to request a preliminary ruling if a decision concerning the interpretation or validity of EU law is necessary to enable it to give judgment.[157] Where a lower court or tribunal chooses not to exercise that right, it may take a decision on interpretation itself; additionally, if it considers that the grounds put before it by the parties in support of the invalidity of a provision of EU law are unfounded, it may reject those grounds and conclude that the provision is valid.[158] However, as mentioned above, only the Court of Justice can determine that a provision of EU law is *not* valid.

Parties to the main proceedings: The right or obligation to make a reference for a preliminary ruling is a right or obligation of the national court or tribunal, not a right or obligation of the parties to the proceedings before that court or tribunal. A court or tribunal may seek the views of the parties in formulating an order for reference, but the decision on whether to make the order and on its content belongs to the court or tribunal alone.

d) Procedural steps

Standard preliminary ruling procedure: When requesting a preliminary ruling, the referring court or tribunal may state its views on the answer to be given by the Court of Justice to the questions that are referred.[159] Additionally, given that a preliminary ruling of the Court is binding on the courts and tribunals of all the Member States, all the Member States – including the Member State from which the reference was made – are entitled to submit "observations" to the Court on the answer that it should give.[160] Other "interested persons" entitled to submit observations include the Commission

[157] Prior to the entry into force of the Treaty of Lisbon, lower courts and tribunals could not make a reference for a preliminary ruling concerning the provisions falling within Title IV ("Visas, asylum, immigration, and other policies related to free movement of persons") of the former TEC, and of acts adopted on the basis of those provisions: see Article 68(1) TEC, as inserted by the Treaty of Amsterdam. This meant that only courts and tribunals of last instance could request preliminary rulings concerning the CEAS acts.

[158] CJEU, *Foto-Frost v. Hauptzollamt Lübeck-Ost (Germany)*, C-314/85, Judgment of 22 October 1987, para. 14.

[159] CJEU, "Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings", 6 November 2012 (2012/C 338/01), para. 24.

[160] Article 96(1)(b) of the Rules of Procedure of the Court of Justice. Article 96(2)(f) of the aforementioned Rules adds that the following non-Member States may also submit observations: "non-Member States which are parties to an agreement relating to a specific subject-matter, concluded with the Council, where the agreement so provides and where

and the EU institution which adopted the act whose validity or interpretation is in issue.[161] Lastly, the parties to the main proceedings before the national court or tribunal – including any third party interveners, such as UNHCR (see below) – are themselves "interested persons" entitled to submit observations.[162] However, other legal or natural persons are not permitted to submit observations.

After the order for reference has been received by the Court, it is translated into all the official EU languages, following which it is notified to the parties to the main proceedings and to the other interested persons mentioned above.[163] The interested persons receive a copy and a translation of the order for reference,[164] but not of any documents that have been annexed to it.

The questions contained in the order for reference are published in the Official Journal of the European Union (OJ) and on the CJEU's website <curia.europa.eu>. Since it is only the questions that are published, and not also the sections of the order for reference that set out the legal and factual context of the case, it is often not possible to clearly ascertain the meaning and intent of the questions without first obtaining a copy of the order.

The procedure before the Court of Justice consists of two parts: a written part, followed usually by an oral part.

Upon being notified of the order for reference, the interested persons have two months within which to submit written observations to the Court of Justice, if they so wish.[165] A Member State is entitled to submit written observations in its official language,[166] but the other interested persons must submit their written observations in the language of the case.[167] It should be noted that no useful purpose is served by seeking to dispute the facts of the main proceedings, since, as mentioned above, they fall within the exclusive jurisdiction of the referring court or tribunal.

At the close of the period for the submission of written observations, a copy of any written observations received by the Court is forwarded to all the interested persons, including those who did not submit written observations. The interested persons then have three weeks within which to make

a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of that agreement." This enables Iceland, Liechtenstein, Norway and Switzerland to submit observations in references for a preliminary ruling that include questions concerning the Dublin Regulation, the Eurodac Regulation, and the Returns Directive (see section A.3.c above).

161 Article 96(1)(c) and (d) of the Rules of Procedure of the Court of Justice.

162 Article 96(1)(a) of the Rules of Procedure of the Court of Justice. As stated in Article 97(1) of the Rules of Procedure, the parties to the main proceedings are "those who are determined as such by the referring court or tribunal in accordance with national rules of procedure." Note that Article 97(2) of the Rules of Procedure allows that parties admitted to the main proceedings after the reference has already been made to the CJEU may submit observations in the preliminary ruling procedure: "Where the referring court or tribunal informs the Court that a new party has been admitted to the main proceedings, when the proceedings before the Court are already pending, that party must accept the case as he finds it at the time when the Court was so informed …". However, the CJEU will reject an application of a party to the main proceedings to participate in the preliminary ruling proceedings if it is apparent that that party joined the main proceedings only with a view to participating in the preliminary ruling proceedings, without intending to play an active part in the main proceedings: see *Football Association Premier League Ltd and Others*, Joined Cases C-403/08 and C-429/08, Order of the President of the Court, 16 December 2009 [Link].

163 First paragraph of Article 23 of the CJEU's Statute; Article 98(1) of the Rules of Procedure of the Court of Justice.

164 Article 98(1) of the Rules of Procedure of the Court of Justice. The Member States receive a translation of the order for reference into their official language. The translation will only be of a summary of the order if the original version is too long.

165 Second paragraph of Article 23 of the CJEU's Statute.

166 Article 38(4) of the Rules of Procedure of the Court of Justice.

167 Article 38(1) of the Rules of Procedure of the Court of Justice.

a reasoned request for an oral hearing.[168] If such a request is made, the Court may nevertheless decide to dispense with an oral hearing if it considers that it already has sufficient information to give a ruling.[169] However, the Court cannot turn down a request for an oral hearing submitted by an interested person who did not take part in the written part of the procedure.[170]

If an oral hearing is organized, all interested persons are permitted to take part, including those who did not submit written observations.[171] After the hearing, the Advocate General is required to deliver his or her Opinion,[172] unless the Court took a decision earlier on to dispense with an Opinion.[173] It usually takes several months before the Opinion is delivered, at which point the Court will then close the oral part of the procedure.[174] The interested parties are not able to submit any observations on the Opinion, the purpose of which is to assist the Court on the basis of the submissions that have already been made in the written and the oral part of the procedure.

After deliberating on the case, which usually takes several more months, the Court will deliver its judgment.[175] Alternatively, the Court may at any point in the proceedings decide to rule by reasoned order[176] "where a question referred … for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law, or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt".[177] The Court may also at any time decide to give a decision by reasoned order where a request for a preliminary ruling is "manifestly inadmissible".[178] This may be because the request has not been submitted by a "court or tribunal" within the meaning of Article 267 TFEU, or because the questions themselves are manifestly inadmissible. Where the request is not "manifestly" inadmissible, issues of admissibility may still need to be decided in the ensuing judgment.

Urgent preliminary ruling procedure: According to the fourth paragraph of Article 267 TFEU, if a question referred for a preliminary ruling regards a person in custody, the Court of Justice "shall act with the minimum of delay". The Court's Statute and Rules of Procedure provide more generally that questions concerning provisions falling within the area of freedom, security and justice – which includes the CEAS instruments – may, if necessary, be dealt with under an urgent preliminary ruling procedure.[179] The Court will decide whether to apply that procedure either at the request of the referring court or tribunal, or, exceptionally, in *prima facie* cases, at the request of the President of the Court.[180]

The urgent preliminary procedure derogates from the requirements of the standard procedure. In particular, only the following persons may participate in the written part of the procedure, which, in

[168] Article 76(1) of the Rules of Procedure of the Court of Justice. The time limit may be extended by the President of the Court.
[169] Article 76(2) of the Rules of Procedure of the Court of Justice.
[170] Article 76(3) of the Rules of Procedure of the Court of Justice.
[171] Article 96(2) of the Rules of Procedure of the Court of Justice. The language arrangements for the oral part of the procedure can, at the duly substantiated request of one of the parties to the main proceedings, be slightly more flexible than for the written part of the procedure: see Article 37(3) of the aforementioned Rules.
[172] Article 82(1) of the Rules of Procedure of the Court of Justice.
[173] Article 59(2) of the Rules of Procedure of the Court of Justice.
[174] Article 82(2) of the Rules of Procedure of the Court of Justice.
[175] Article 87 of the Rules of Procedure of the Court of Justice lists the elements that must be contained in a judgment.
[176] Article 89(1) and (2) of the Rules of Procedure of the Court of Justice lists the elements that must be contained in a reasoned order.
[177] Article 99 of the Rules of Procedure of the Court of Justice.
[178] Article 53(2) of the Rules of Procedure of the Court of Justice.
[179] Article 23a of the CJEU Statute; Articles 107 to 114 of the Rules of Procedure of the Court of Justice.
[180] Article 107 of the Rules of Procedure of the Court of Justice.

cases of extreme urgency,[181] may be dispensed with altogether: the Member State from which the reference was made, the Commission, the EU institution(s) which adopted the act in issue, and the parties to the main proceedings.[182] Otherwise, the urgent procedure is broadly the same as the standard procedure: in particular, all the Member States – not only the Member State of the referring court or tribunal – are entitled to participate in the oral part of the procedure.[183] The time-limits in the urgent procedure are shorter than in the standard procedure, enabling the Court to deliver its ruling within less than three months of being notified of the order for reference.[184]

The urgent procedure is applied very sparingly, and as of the end of 2013 it had never been used for questions concerning the CEAS, although this had been requested and refused in one such case (concerning the use of an accelerated or prioritized asylum procedure).[185] As of the same date, the urgent procedure had, on the other hand, been applied in three cases concerning detention under the Returns Directive,[186] as well as a number of other cases.

Expedited preliminary ruling procedure: The Court's Statute and Rules of Procedure also provide for an "expedited" preliminary ruling procedure (previously known as the "accelerated" preliminary ruling procedure).[187] It is subject to the same requirements as the standard preliminary ruling procedure, except that time limits are much shorter.

The expedited procedure is used only when the Court deems it really necessary. As of the end of 2013, the expedited procedure had not been used in any cases concerning the CEAS, although in three separate cases concerning the application of the Dublin Regulation this had been requested by the referring court.[188]

Anonymity: Where anonymity has been granted by the referring court or tribunal, the Court of Justice must respect it in its own proceedings.[189] If the Court considers it necessary, it may itself render anonymous one or more persons or entities concerned by the case, either at the request of the referring court or tribunal, at the duly reasoned request of a party to the main proceedings, or of its own motion.[190]

As regards requests for anonymity made by a party to the main proceedings, the Court's Practice Directions state the following:

> "Where a party considers it necessary that its identity or certain information concerning it should not be disclosed in a case brought before the Court, it may request that the Court 'anonymise' the relevant case, in whole or in part. To be effective, such an application must, however, be made as

[181] Article 111 of the Rules of Procedure of the Court of Justice.
[182] Article 109(2) of the Rules of Procedure of the Court of Justice.
[183] Article 110 of the Rules of Procedure of the Court of Justice.
[184] Court of Justice, "Report on the use of the urgent preliminary ruling procedure by the Court of Justice", 31 January 2012, p. 2.
[185] CJEU, *H.I.D. and B.A. v. Refugee Applications Commissioner and Others (Ireland)*, C-175/11, Judgment of 31 January 2013, para. 49.
[186] *Said Shamilovich Kadzoev (Huchbarov) (Bulgaria)*, C-357/09 PPU, Judgment [GC] of 30 November 2009; *Hassen El Dridi (Italy)*, C-61/11 PPU, Judgment of 28 April 2011; *M.G. and N.R. v. Staatssecretaris van Veiligheid en Justitie (Netherlands)*, C-383/13 PPU, Judgment of 10 September 2013. Note that "PPU" designates that a case has been decided under the urgent preliminary ruling procedure.
[187] Article 23a of the CJEU Statute; Articles 105 to 106 of the Rules of Procedure of the Court of Justice.
[188] CJEU, *N.S. v. Secretary of State for the Home Department (United Kingdom)*, C-411/10, Order of 1 October 2010; *MA, BT and DA v. Secretary of State for the Home Department (United Kingdom)*, C-648/11, Order of 7 February 2012; CJEU, *Shamso Abdullahi v. Bundesasylamt (Austria))*, C-394/12, Order of 5 October 2012.
[189] Article 95(1) of the Rules of Procedure of the Court of Justice.
[190] Article 95(2) of the Rules of Procedure of the Court of Justice.

> early as possible. On account of the increasing use of new information and communication technologies, granting anonymity becomes much more difficult if the notice of the case concerned has already been published in the Official Journal of the European Union or, in preliminary ruling proceedings, if the request for a preliminary ruling has already been served on the interested persons referred to in Article 23 of the Statute, about one month after the request has been lodged at the Court."[191]

Legal aid: The procedure before the Court of Justice is free of charge.[192] A party to the main proceedings who is wholly or partly unable to meet the costs of taking part may apply to the Court for legal aid.[193]

For further information on the procedure for references for a preliminary ruling, see:

1. *Consolidated version of the Statute of the CJEU* [Link]

2. CJEU, *Rules of Procedure of the Court of Justice*, consolidated version of 25 September 2012 [Link]

3. CJEU, *Supplementary Rules* [Link]

4. CJEU, *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*, 6 November 2012 (2012/C 338/01) [Link]

5. *Practice directions to parties concerning cases brought before the Court* [Link]

6. Court of Justice, *Report on the use of the urgent preliminary ruling procedure by the Court of Justice*, 31 January 2012 [Link]

3. Submission of observations by UNHCR to the Court of Justice

As noted above, although the 1951 Refugee Convention is not formally part of EU law, the CEAS nevertheless aims at the "full and inclusive" application of that Convention by the Member States based on the acts adopted pursuant, initially, to Article 63 TEC, and, now, to Article 78 TFEU. Given that UNHCR has a responsibility to supervise the application of the Refugee Convention by all Contracting States,[194] which are obliged under Article 35(1) of the Refugee Convention to cooperate with UNHCR in the exercise of its responsibility, UNHCR has a particular interest in ensuring that the CEAS instruments are: (i) in accordance with the Refugee Convention, as required by Article 78 TFEU; and (ii) interpreted in a manner consistent with the Refugee Convention, as also required by Article 78 TFEU.

UNHCR therefore has a particular interest in being able to submit observations to the Court of Justice in the preliminary ruling procedure as regards both the interpretation and the validity of the CEAS instruments. First and foremost, this is because preliminary rulings are binding on all the Member States. However, in light of the pre-eminence of the Court, it is also because a preliminary ruling on

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[191] "Practice directions to parties concerning cases before the Court", para. 8.

[192] Article 143 of the Rules of Procedure of the Court of Justice.

[193] Articles 115 to 118 of the Rules of Procedure of the Court of Justice. See also "Practice directions to parties concerning cases before the Court", paras. 5 to 7.

[194] See paragraph 8 of UNHCR's Statute: "The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by: (a) promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto; …" See also the sixth preambular paragraph of the 1951 Refugee Convention: "Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner".

the CEAS has the potential for influencing the interpretation of the 1951 Convention by other Contracting States as well.

Whereas the Member States and the relevant EU institutions are automatically entitled to submit observations to the Court of Justice in the preliminary ruling procedure, UNHCR can only do this if it is able to become a party to the main proceedings (see above). According to the Court's rules of procedure "the parties to the main proceedings are those who are determined as such by the referring court or tribunal in accordance with national rules of procedure".[195] In some Member States, national rules of procedure present no obstacle to – or even provide a statutory right for – UNHCR being joined as a party to the main proceedings. In such cases, the national courts and tribunals often actively seek UNHCR's involvement. However, not all Member States have a tradition of allowing third party interveners, which means that in practice UNHCR is precluded from submitting observations to the Court of the Justice when requests for a preliminary ruling are made by the courts and tribunals of certain Member States. UNHCR has sought, to the extent possible, to overcome this obstacle by issuing public "statements" giving its views on how a particular request for a preliminary ruling should be answered.[196] Those statements may then potentially be drawn upon by the interested persons, including the parties to the main proceedings, who decide to submit observations to the Court. However, this solution is far from ideal because even though UNHCR's statements are frequently referred to by the interested persons who do submit observations,[197] there is no guarantee that this will happen. Moreover, even if a statement is referred to, UNHCR is precluded from being able to argue its case in any oral hearing before the Court, which is the only opportunity for commenting on the observations that have been submitted by others and for answering any questions the Court may have.

UNHCR is therefore seeking to identify additional ways to overcome the obstacles that the national rules of procedure of some Member States pose to its being joined as a party to the main proceedings. One such solution may be provided by EU law itself, since the Asylum Procedures Directive provides that the Member States "shall allow UNHCR … to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure".[198] Given that a court or tribunal is a "competent authority" within the meaning of the Asylum Procedures Directive,[199] the Member States may therefore have an obligation under EU law to allow UNHCR to be joined as a party to the main proceedings, which would then enable UNHCR to submit observations to the Court of Justice.

4. Principles for interpretation of EU law

The principles for interpretation of EU law can be complex. A general discussion is outside the scope of this introductory chapter, and specific issues are discussed as and when needed in the chapters that follow. That said, certain points should already be noted here:

[195] Article 97(1) of the Rules of Procedure of the Court of Justice.
[196] The statements are published on UNHCR's Refworld website <www.refworld.org>.
[197] See, for example, CJEU, *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration (France)*, C-179/11, Opinion of Advocate General Sharpston, 15 May 2012, footnote 19 to para. 31; CJEU, *Bundesrepublik Deutschland v. B and D (Germany)*, Joined Cases C-57/09 and C-101/09, Opinion of Advocate General Mengozzi, 1 June 2010, footnote 34 to para. 51.
[198] Article 29(1)(c) of the recast Asylum Procedures Directive; Article 21(1)(c) of the initial Asylum Procedures Directive (referring to "applications for asylum").
[199] See Article 20(3) of the recast Asylum Procedures Directive, explicitly referring to "a court or tribunal or other competent authority". No such explicit reference is contained in the initial Asylum Procedures Directive, but it would be strange indeed if it is not implicit in that directive that a court or a tribunal is to be construed as a competent authority.

(i) the "operative part" (the Articles) of an act is indissociably linked to its "recitals" (the preamble), meaning that the recitals must be taken into account when interpreting the operative part;[200]

(ii) given that the different language versions of an act are all equally authentic, an interpretation of a provision of EU law involves a comparison of the different language versions;[201]

(iii) even where the different language versions are entirely in accord with one another, EU law uses terminology which is peculiar to it – legal concepts do not necessarily have the same meaning in EU law and in the law of the various Member States;[202]

(iv) every provision of EU law must be placed in its context and interpreted in the light of the provisions of EU law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied;[203]

(v) the CJEU is not bound by its previous decisions, but considerations of legal certainty mean that it will not depart from them lightly.

5. Access to the case law of the Court

Access to the case law of the CJEU is freely available online, both on the Court's own website <http://curia.europa.eu> and at EUR-Lex <http://eur-lex.europa.eu/collection/eu-law/eu-case-law.html>. The hyperlinks in this manual are to the Court's web site.

The table of cases at the end of each chapter in this manual includes hyperlinks to each case that is cited, including, as applicable, hyperlinks to the Judgment, the Order, the official summary of the Judgment or the Order, and the Opinion or View[204] of the Advocate General. In cases where UNHCR made a submission to the Court, a hyperlink to the submission is included as well.

All hyperlinks are to the English-language texts where available at the time writing, otherwise they are to the French-language texts.

For help on searching the case law on the CJEU's website, see <http://curia.europa.eu/common/juris/en/aideGlobale.pdf#>

[200] See, for example, CJEU, *Textilwerke Deggendorf GmbH (TWD) v. European Commission and Federal Republic of Germany*, C-355/95 P, Judgment of 15 May 1997, para. 21; CJEU, *Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v. European Commission*, Joined Cases T-213/95 and T/18/96, Judgment of 22 October 1997, para. 104.
[201] CJEU, *CILFIT and Others (Italy)*, C-283/81, Judgment of 6 October 1982, para. 18.
[202] CJEU, *CILFIT and Others (Italy)*, C-283/81, Judgment of 6 October 1982, para. 19.
[203] CJEU, *CILFIT and Others (Italy)*, C-283/81, Judgment of 6 October 1982, para. 20.
[204] In the urgent and expedited preliminary ruling procedures, the Advocate General delivers a "View" rather than an "Opinion".

C. Table of cases

CJEU judgments (Court of Justice and General Court)

Advocaten voor de Wereld VZW v. Leden van de Ministerraad (Netherlands), C-303/05, Judgment [GC] of 3 May 2007 [Links: Judgment | Case summary | Advocate General's opinion]

Amministrazione delle finanze dello Stato v. Denkavit italiana Srl (Italy), C-61/79, Judgment of 27 March 1980 [Links: Judgment | Case summary | Advocate General's opinion]

Amministrazione delle finanze dello Stato v. Simmenthal SpA (Italy), C-106/77, Judgment of 9 March 1978 [Links: Judgment | Case summary | Advocate General's opinion]

Antonio Muñoz y Cia SA and Superior Fruiticola SA v. Frumar Ltd and Redbridge Produce Marketing Ltd (United Kingdom), C-253/00, Judgment of 17 September 2002 [Links: Judgment | Case summary | Advocate General's opinion]

Åklagaren v. Hans Åkerberg Fransson, C-617/10, Judgment [GC] of 26 February 2013 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion]

Bundesrepublik Deutschland v. B and D (Germany), Joined Cases C-57/09 and C-101/09, Judgment [GC] of 9 November 2010 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR statement]

Bundesrepublik Deutschland v. Kaveh Puid (Germany), C-4/11, Judgment [GC] of 14 November 2013 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion]

CILFIT and Others (Italy), C-283/81, Judgment of 6 October 1982 [Links: Judgment | Case summary | Advocate General's opinion]

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CNL-SUCAL v. HAG, C-10/89, Judgment of 17 October 1990 [Links: Judgment | Case summary | Advocate General's opinion]

Commission v. Italy, C-129/00, Judgment of 9 December 2003 [Links: Judgment | Case summary | Advocate General's opinion]

Commission v. Spain, C-154/08, Judgment of 12 November 2009 [Link: Judgment (French)]

European Parliament v. Council of the European Union, C-540/03, Judgment [GC] of 27 June 2006 [Links: Judgment | Case summary | Advocate General's opinion]

European Parliament v. Council of the European Union, C-133/06, Judgment [GC] of 6 May 2008 [Link: Judgment | Case summary | CJEU press release | Advocate General's opinion]

Foglia v. Novello, C-244/80, Judgment of 16 December 1981 [Links: Judgment | Case summary | Advocate General's opinion]

Foto-Frost v. Hauptzollamt Lübeck-Ost (Germany), C-314/85, Judgment of 22 October 1987 [Links: Judgment | Advocate General's opinion]

France v. Commission, Joined Cases 15/76 and 16/76, Judgment of 7 February 1979 [Links: Judgment | Case summary]

G. Seguela and A. Lachkar and others v. Administration des impôts (France), Joined Cases C-76/87, C-86/87 to C-89/87 and C-149/87, Judgment of 28 April 1988 [Links: Judgment | Case summary | Advocate General's opinion]

GISTI v. European Commission, C-408/05 P, Judgment of 6 April 2006 [Link: Order (French)]

H.I.D. and B.A. v. Refugee Applications Commissioner and Others (Ireland), C-175/11, Judgment of 31 January 2013 [Links: Judgment | Case summary | Advocate General's opinion]

Hassen El Dridi (Italy), C-61/11 PPU, Judgment of 28 April 2011 [Links: Judgment | Case summary | CJEU press release | Advocate General's view]

Hoekstra v. Bestuur der Bedrijfsvereniging voor Detailhande (Netherlands), C-75/63, Judgment of 19 March 1964 [Links: Judgment | Case summary | Advocate General's opinion]

I.B. (Belgium), C-306/09, Judgment of 21 October 2010 [Links: Judgment | Case summary | Advocate General's opinion]

Inuit Tapiriit Kanatami v. European Parliament and Council, T-18/10, Order of 6 September 2011 [Links: Order | Case summary]

Inasti and Others (Belgium), Joined Cases C-393/99 and C-394/99, Judgment of 19 March 2002 [Links: Judgment | Case summary | Advocate General's opinion]

Janko Rottmann v. Freistaat Bayern (Germany), C-135/08, Judgment [GC] of 2 March 2010 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion]

Joseph Trinon (Belgium), C-12/82, Judgment of 30 November 1982 [Links: Judgment | Case summary | Advocate General's opinion]

KappAhl Oy (Austria), C-233/97, Judgment of 3 December 1998 [Links: Judgment | Case summary | Advocate General's opinion]

Krüger GmbH & Co. KG v. Hauptzollamt Hamburg-Jonas, C-334/95, Judgment of 17 July 1997 [Links: Judgment | Case summary | Advocate General's opinion]

M.G. and N.R. v. Staatssecretaris van Veiligheid en Justitie (Netherlands), C-383/13 PPU, Judgment of 10 September 2013 [Links: Judgment | Case summary | CJEU press release | Advocate General's view]

MA, BT and DA v. Secretary of State for the Home Department (United Kingdom), C-648/11, Judgment of 6 June 2013 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | Order]

Marks & Spencer PLC v. Commissioners of Customs and Excise (United Kingdom), C-62/00, Judgment of 11 July 2002 [Links: Judgment | Case summary | Advocate General's opinion]

Marleasing SA v. La Comercial Internacional de Alimentación SA (Spain), C-106/89, Judgment of 13 November 1990 [Links: Judgment | Case summary | Advocate General's opinion]

Marshall v. Southampton and SW Hampshire Area Health Authority (United Kingdom), C-152/84, Judgment of 26 February 1986 [Links: Judgment | Case summary | Advocate General's opinion]

Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie (Netherlands), C-465/07, Judgment [GC] of 17 February 2009 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR statement]

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N.S. v. Secretary of State for the Home Department (United Kingdom) and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform (Ireland), Joined Cases C-411/10 and C-493/10, Judgment [GC] of 21 December 2011 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion in *N.S.* | Advocate General's opinion in *M.E.* | UNHCR written submission | UNHCR oral submission | Order in *N.S.*]

Orsolina Leonesio v. Ministero dell'agricoltura e foreste (Italy), C-93/71, Judgment of 17 May 1972 [Links: Judgment | Case summary | Advocate General's opinion]

Robert Bosch GmbH v. Hauptzollamt Hildesheim (Germany), C-135/77, Judgment of 16 March 1978 [Links: Judgment | Case summary | Advocate General's opinion]

Ruth Hünermund and others v. Landesapothekerkammer Baden-Württemberg (Germany), C-292/92, Judgment of 15 December 1993 [Links: Judgment | Case summary | Advocate General's opinion]

Said Shamilovich Kadzoev (Huchbarov) (Bulgaria), C-357/09 PPU, Judgment [GC] of 30 November 2009 [Links: Judgment | Case summary | Advocate General's view]

Shamso Abdullahi v. Bundesasylamt (Austria)), C-394/12, Judgment [GC] of 10 December 2013 [Links: Judgment | Case summary | Advocate General's opinion | Order (French)]

SpA International Chemical Corporation v. Administrazione delle finanze dello Stato (Italy), C-66/80, Judgment of 13 May 1981 [Links: Judgment | Case summary | Advocate General's opinion]

Schwarze v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Germany), C-16/62, Judgment of 1 December 1965 [Links: Judgment | Case summary | Advocate General's opinion]

Stefano Melloni v. Ministero Fiscal (Spain), C-399/11, Judgment [GC] of 26 February 2013 [Links: Judgment | Case summary | | CJEU press release | Advocate General's opinion]

Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v. European Commission, Joined Cases T-213/95 and T/18/96, Judgment of 22 October 1997 [Link: Judgment | Case summary]

Textilwerke Deggendorf GmbH (TWD) v. European Commission and Federal Republic of Germany, C-355/95 P, Judgment of 15 May 1997 [Links: Judgment | Case summary | Advocate General's opinion]

The Queen v Ministry of Agriculture, Fisheries and Food, ex parte H. & R. Ecroyd Holdings Ltd and John Rupert Ecroyd (United Kingdom), C-127/94, Judgment of 6 June 1996 [Links: Judgment | Advocate General's opinion | Case summary]

Wolfgang Oehlschläger v. Hauptzollamt Emmerich, C-104/77, Judgment of 16 March 1978 [Links: Judgment | Case summary | Advocate General's opinion]

Wünsche Handelsgesellschaft GmbH & Co.v. Federal Republic of Germany, C-69/85, Order of 5 March 1986 [Links: Order | Case summary]

Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet (Bulgaria), C-528/11, Judgment of 30 May 2013 [Links: Judgment | Case summary | UNHCR statement]

Cases pending before the CJEU at the end of 2013

H.N. v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (Ireland), C-604/12, Reference from Supreme Court of 27 December 2012, Opinion of Advocate General Bot delivered on 7 November 2013 [Link: Questions | Advocate General's opinion]

Mohammad Ferooz Qurbani, C-481/13, Reference from Oberlandesgericht Bamberg (Germany) of 9 September 2013 [Link: Questions

Opinion 2/13, Request for an opinion made by the European Commission on 4 July 2013 [Link: Request]

1.2 Criteria and assessment of claims for refugee status and subsidiary protection status

A. Introduction

Under EU law, the criteria for refugee status and subsidiary protection status are defined in the Qualification Directive ("initial QD") and its recast ("recast QD").

The Qualification Directive recognizes the 1951 Refugee Convention as the "cornerstone of the international legal regime for the protection of refugees"[1] and elaborates the criteria for refugee status based on that understanding. Subsidiary protection is intended to be complementary to refugee protection,[2] and is thus restricted to persons who do not qualify for refugee status. The eligibility criteria for subsidiary protection are drawn from "international obligations under human rights instruments and practices existing in Member States".[3]

The present chapter covers the case law of the CJEU on the criteria for refugee status and subsidiary protection status, and on the assessment of claims for refugee status and subsidiary protection status.

[1] Recital 3 initial QD [Recital 4 Recast].
[2] Recital 24 initial QD [Recital 33 Recast].
[3] Recital 25 initial QD [Recital 34 Recast].

Section B discusses the case law on the criteria for refugee status. Section C discusses the case law on subsidiary protection status, and Section D discusses the case law on the assessment of claims for refugee status and subsidiary protection status.

It should be noted that as of the end of 2013 the CJEU had decided four infringement actions brought by the Commission against Finland,[4] Spain,[5] Sweden[6] and the UK[7] respectively. In all four cases, the Court held that the Member State concerned had failed to meet its obligations for transposing the initial QD within the deadline required.[8]

> **For further information on the initial QD and the recast QD, see:**
>
> 1. Text of the initial QD (2004/83/EC) [Link]
> 2. Text of the recast QD (2011/95/EU) [Link]
> 3. UNHCR annotated comments on the initial QD, January 2005 [Link]
> 4. UNHCR study on the implementation of the initial QD, November 2007 [Link]
> 5. European Commission impact assessment of the initial QD, 21 October 2009 [Link]
> 6. Commission report to the European Parliament and the Council on the application of the initial QD, 16 June 2010 [Link]
> 7. UNHCR comments on the Commission proposal for a recast of the initial QD, 29 July 2010 [Link]

Deadlines for transposition of the QD: EU Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the initial QD by 10 October 2006. They were required to do the same for the recast QD by 21 December 2013.

EU Member States bound by the QD: All EU Member States except for the following are bound by the QD:

(i) Denmark did not take part in the adoption of the initial QD and was not bound by its terms;[9]

(ii) Denmark, Ireland and the UK did not take part in the adoption of the recast QD and are not bound by its terms,[10] although Ireland and the UK remain bound by the initial QD.

Article 40 of the recast QD provides that, with effect from 21 December 2013, the initial QD is repealed for the Member States bound by the recast.

Notation and terminology: Since in the recast most of the operative provisions of the initial QD remain unchanged, or in essence unchanged, and the Article numbering remains the same, this chapter only distinguishes between the provisions of the initial QD and the recast QD where necessary.

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[4] CJEU, *European Commission v. Finland*, C-102/06, Judgment of 5 February 2009.
[5] CJEU, *European Commission v. Spain*, C-272/08, Judgment of 9 July 2009.
[6] CJEU, *European Commission v. Sweden*, C-322/08, Judgment of 14 May 2009.
[7] CJEU, *European Commission v. the United Kingdom*, C-72/06, Judgment of 5 February 2009.
[8] The Commission also initiated infringement actions for the same reasons against Greece (C-220/08), Malta (C-269/08), the Netherlands (C-190/08) and Portugal (C-191/08). However, the actions were subsequently withdrawn by the Commission and removed from the Court's register.
[9] Recital 40 initial QD.
[10] Recitals 50 and 51 recast QD.

For example, “Article 4 QD” refers to the provisions in Article 4 of both the initial QD and the recast, whereas “Article 2(c) initial QD [Article 2(d) Recast]” refers to Article 2(c) of the initial QD and the new numbering of that provision in the recast QD. Where the recast has made changes to a provision in the initial QD, text that was deleted from the initial QD is quoted as ~~strikethrough~~ and text that was added by the recast is shown in {brackets}.

B. The CJEU case law on the eligibility criteria for refugee status

1. Introduction

Summary of case law: As of the end of 2013, preliminary rulings by the CJEU concerning the criteria for refugee status had addressed the following issues in particular: (i) the test for well-founded fear, including whether the applicant can be expected to act in a manner so as to avoid persecution; (ii) the interpretation of the term “act of persecution”; (iii) the connection between “acts of persecution” and “reasons for persecution”; (iv) whether homosexuals form a “particular social group”; (v) cessation of refugee status on the grounds of ceased circumstances in the country of nationality; (vi) exclusion from refugee status in the context of the individual’s membership, position and/or activity in an organization employing terrorist methods; (vii) exclusion from refugee status of persons receiving protection or assistance from the United Nations Relief and Works Agency for Palestinians in the Near East (UNRWA); (viii) more favourable standards in national law than in the QD regarding exclusion from refugee status.

Although all of the rulings concerned the interpretation and application of the initial QD, they will remain equally applicable with respect to the recast QD, the relevant provisions of which are in essence unchanged.

One preliminary reference concerning the criteria for refugee status was pending before the CJEU at the end of 2013.[11] The question referred concerned the interpretation of the term “act of persecution” in the context of prosecution or punishment for refusal to perform military service.

The refugee definition: For purposes of the QD, the term “refugee” is defined as follows:

> **Article 2(c) initial QD [Article 2(d) Recast]**
> **(‘Definitions’)**
>
> *‘refugee’ means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;*

According to the CJEU, to satisfy the above definition, the applicant must:

> “on account of circumstances existing in his country of origin and the conduct of actors of persecution, have a well-founded fear that he personally will be subject to persecution for at least one of the five reasons listed in the Directive and the Geneva Convention[.]”[12]

[11] CJEU, *Andre Lawrence Shepherd v. Bundesrepublik Deutschland*, C-472/13, Reference from Bayerisches Verwaltungsgericht München (Germany) of 2 September 2013.

[12] CJEU, *Bundesrepublik Deutschland v. Y and Z*, Joined Cases C-71/11 and C-99/11, Judgment [GC] of 5 September 2012, para. 51; CJEU, *X, Y and Z v. Minister voor Immigratie, Integratie en Asiel*, Joined Cases C-199/12, C-200/12 and C-201/12, Judgment of 7 November 2013, para. 43. See also the CJEU’s earlier formulation in *Salahadin Abdulla and*

The abovementioned circumstances "will indicate that the third country does not protect its national against acts of persecution" [13] and that:

> "[t]hose circumstances form the reason why it is impossible for the person concerned, or why he justifiably refuses, to avail himself of the 'protection' of his country of origin within the meaning of Article 2(c) of the Directive [Article 2(d) Recast], that is to say, in terms of that country's ability to prevent or punish acts of persecution."[14]

The refugee definition should be read in conjunction with the provisions laid down in Chapter II ('Assessment of applications for international protection') and Chapter III ('Qualification for being a refugee') of the QD.[15] The provisions in Chapter II are common to both the refugee definition and the definition of a person eligible for subsidiary protection, whereas the provisions in Chapter III concern the refugee definition only.

> **Note:** The QD distinguishes between the criteria for being recognized as a "refugee" and the criteria for being granted "refugee status". While in general persons qualifying as "refugees" are entitled to be granted "refugee status",[16] the QD allows that Member States may exceptionally decide not to grant refugee status – or to revoke, end or refuse to renew the refugee status that has already been granted – to refugees who fall within provisions of the QD that are worded in the same terms as the exception to the prohibition of *refoulement* contained in Article 33(2) of the 1951 Refugee Convention.[17] The QD also allows that, "without prejudice" to the 1951 Refugee Convention, Member States may determine that refugee status shall normally not be granted to *sur place* refugees if "the risk of persecution is based on circumstances which the applicant has created by his or her own decision since leaving the country of origin".[18]
>
> Persons granted refugee status benefit from the protection defined in Chapter VII QD ('Content of international protection'). Persons who are recognized as refugees but who are denied refugee status do not benefit from that protection but are entitled to the "rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31, 32 and 33 of the Geneva Convention in so far as they are present in the Member State".[19]

Principles for interpretation: By the end of 2013, the CJEU had delivered six judgments interpreting the refugee definition. Each contained, with minor variations in wording, the following preliminary observations:[20]

Others v. Bundesrepublik Deutschland, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Judgment [GC] of 2 March 2010, para. 57, which does not include the explicit reference to actors of persecution.

[13] *Salahadin Abdulla*, cited above, para. 58.

[14] *Ibid.*, para. 59.

[15] Article 13 QD provides: "Member States shall grant refugee status to a third country national or stateless person who qualifies as a refugee in accordance with Chapters II and III."

[16] Article 13 QD.

[17] Article 14(4) and (5) QD.

[18] Article 5(3) QD.

[19] Article 14(6) QD.

[20] CJEU, *Bundesrepublik Deutschland v. B and D*, Joined Cases C-57/09 and C-101/09, Judgment [GC] of 9 November 2010, paras. 76-78. See also CJEU, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Judgment [GC] of 2 March 2010, paras. 51-54; CJEU, *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, Judgment [GC] of 17 June 2010, paras. 36-38; CJEU, *Bundesrepublik Deutschland v. Y and Z*, Joined Cases C-71/11 and C-99/11, Judgment [GC] of 5 September 2012, paras. 47-48; CJEU, *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, C-364/11, Judgment [GC] of 19 December 2012, paras. 42-43; CJEU, *X, Y and Z v. Minister voor Immigratie, Integratie en Asiel*, Joined Cases C-199/12, C-200/12 and C-201/12, Judgment of 7 November 2013, paras. 39-40.

> "… One of the legal bases for Directive 2004/83 [the initial QD] was point (1)(c) of the first paragraph of Article 63 EC, under which the Council was required to adopt measures on asylum, in accordance with the 1951 Geneva Convention and other relevant treaties, within the area of minimum standards with respect to 'the qualification of nationals of third countries as refugees'.
>
> … Recitals 3, 16 and 17 to Directive 2004/83 state that the 1951 Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the directive for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria …
>
> … *Directive 2004/83 must for that reason be interpreted in the light of its general scheme and purpose, and in a manner consistent with the 1951 Geneva Convention and the other relevant treaties* referred to in point (1) of the first paragraph of Article 63 EC, now Article 78(1) TFEU. As is apparent from recital 10 to that directive, *Directive 2004/83 must also be interpreted in a manner consistent with the fundamental rights and the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union* …" (emphasis added).

It should be noted that the initial QD, to which the above observations apply, was adopted under Article 63(1) TEC, whereas the recast QD was adopted under Article 78(1) and (2) of the TFEU. While Article 63(1)(c) TEC required the adoption of "minimum standards with respect to the qualification of nationals of third countries as refugees", Article 78(2)(a) TFEU required the adoption of "a uniform status of asylum for nationals of third countries, valid throughout the Union". Both the initial QD and the recast QD provide that Member States may introduce or retain more favourable than those of the directive for determining who qualifies as a refugee, insofar as as those standards are compatible with the directive.[21]

2. Inclusion criteria

a) Well-founded fear

The test for well-founded fear: According to the CJEU, when assessing whether an asylum-seeker has a well-founded fear of being persecuted the competent authorities are required:

> "in the system provided for by the [QD] … to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subject to acts of persecution."[22]

Avoidance of persecution: In the joined cases of Y and Z, the CJEU was asked whether a fear of being persecuted is well-founded if, without being required to give up religious practice altogether, the person concerned can "avoid exposure to persecution … by abstaining from certain religious practices" (para.73). The Court was subsequently asked a similar question in the joined cases of *X, Y and Z*, namely whether an asylum-seeker can be expected to avoid being persecuted by "conceal[ing] his homosexuality [from everyone in his country of origin]… or exercis[ing] restraint in expressing it" (para.65).

[21] Article 3 QD.

[22] *Y and Z*, cited above, para. 76. See also CJEU, *Salahadin Abdulla*, cited above, para. 89; CJEU, *X, Y and Z*, cited above, para. 72. Note in this connection Recital 27 QD [Recital 36 Recast]: "Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status."

The CJEU observed in both cases that if the applicant had *already* been subject to persecution or to direct threats of persecution, then, in accordance with Article 4(4) QD, this would in and of itself be a "serious indication of well-founded fear": (*Y and Z*, para. 75; *X, Y and Z*, para.64)

> **Article 4(4) QD**
> **('Assessment of facts and circumstances')**
>
> *The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.*

The Court noted that the questions before it therefore presupposed that the applicant had not already been subject to persecution or to direct threats of persecution for the reasons given in the two respective cases: "religion" in *Y and Z* (para.74); and "membership of a particular social group whose members share the same sexual orientation" in *X, Y and Z* (para.63).

In *Y and* Z, the Court then looked to the rules in Article 4 QD as a whole to determine whether an applicant could reasonably be expected to abstain from religious practices that would expose him or her to a risk of persecution. It held that:

> "… None of [the rules in Article 4 QD] states that, in assessing the extent of the risk of actual acts of persecution in a particular situation, it is necessary to take account of the possibility open to the applicant of avoiding the risk of persecution by abstaining from the religious practice in question and, consequently, renouncing the protection which the Directive is intended to afford the applicant by conferring refugee status.
>
> … It follows that, where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status … The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant.
>
> … In the light of the above considerations, the answer … is that Article 2(c) of the Directive must be interpreted as meaning that the applicant's fear of being persecuted is well-founded if, in the light of the applicant's personal circumstances, the competent authorities consider that it may reasonably be thought that, upon his return to his country of origin, he will engage in religious practices which will expose him to a real risk of persecution. *In assessing an application for refugee status on an individual basis, those authorities cannot reasonably expect the applicant to abstain from those religious practices*" (emphasis added) (paras.78-80).

In *X, Y and* Z, the CJEU took an analogous approach to the above in which it drew on Article 4 QD to arrive at a ruling that homosexual applicants could not reasonably be expected to exercise restraint in the expression of their sexual orientation in order to avoid a risk of being persecuted (paras.74-76).[23] The Court considered that, as with the concept of religion, the concept of sexual orientation applies to acts in an individual's public life as well as his or her private life (para.69). The only acts excluded from consideration as falling within the concept of sexual orientation are those that are considered to be criminal in accordance with the national law of EU Member States, as stipulated in Article 10(1)(d) QD: (paras 66-67)

[23] Note the linguistic discrepancy between, on the one hand, the English-language version of the judgment in *X, Y and Z*, and, on the other hand, the Dutch-language version of that judgment, the Dutch-language version being the authentic text. Para. 74 of the English-language version mistakenly refers to "abstaining from the *religious practice* in question" (emphasis added).

Article 10(1)(d) QD
('Reasons for persecution')

[…]

~~depending~~ {Depending} on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member ~~States:~~ {States.} […]

Otherwise, for purposes of determining the reasons for persecution, there is no limitation on "the attitude that the members of a particular social group may adopt with respect to their identity or to behaviour which may or may not fall within the definition of sexual orientation" (paras.67-68).

As to whether applicants can be expected to completely conceal their sexual orientation in order to avoid persecution, which would be an even more demanding requirement than having to exercise restraint in expressing it, the CJEU took into account the definition of a "particular social group" in Article 10(1)(d) QD and ruled that:

> "[R]equiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it.
>
> Therefore, an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution." (paras.70-71)

Article 10(1)(d) QD
('Reasons for persecution')

1. Member States shall take the following elements into account when assessing the reasons for persecution:

[…]

(d) a group shall be considered to form a particular social group where in particular:

- *members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it […]*

b) Acts of persecution

As noted by the CJEU in *Y and Z*, Article 4(3)(c) QD requires that the assessment of the applicant's claim "take account of all the acts to which the applicant has been, or risks being, exposed, in order to determine whether, in the light of the applicant's personal circumstances, those acts may be regarded as constituting persecution within the meaning of Article 9(1) of the Directive": (para.68)

Article 4(3)(c) QD
('Assessment of facts and circumstances')

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

[…]

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

Article 9 QD
('Acts of persecution')

1. ~~Acts of persecution within the meaning of article 1 A of the Geneva Convention must~~ {In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must}:

(a) be sufficiently serious by ~~its~~ {their} nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

2. Acts of persecution as qualified in paragraph 1~~,~~ can, inter alia, take the form of:

(a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

(c) prosecution or punishment~~,~~ which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2);

(f) acts of a gender-specific or child-specific nature.

[…]

The CJEU has so far delivered two preliminary rulings concerning the interpretation of the term "act of persecution": first, in *Y and Z*, with respect to violations of the right to religious freedom; second, in *X, Y and Z*, with respect to criminalization of "homosexual activities".

In both cases, the CJEU's ruling focused on acts of persecution in the sense of Article 9(1)(a) QD, according to which an act qualifies as an act of persecution if it is "sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) [ECHR]".

Acts violating basic human rights in respect of which derogation is prohibited: As noted by the CJEU, Article 15(2) ECHR provides that no derogation may be made from obligations arising under the following provisions of the ECHR:[24]

Article 2 ('Right to life'), except from deaths resulting in lawful acts of war
Article 3 ('Prohibition of torture')
Article 4(1) ('Prohibition of slavery …')
Article 7 ('No punishment without law')

Bearing in mind, as noted above, that the QD "must be interpreted in a manner consistent with the fundamental rights and the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union", the CJEU has identified the corresponding provisions in the EU Charter as:[25]
Article 2 ('Right to life')
Article 4 ('Prohibition of torture and inhuman or degrading treatment or punishment')
Article 5(1) ('Prohibition of slavery …')
Article 49(1) and (2) ('Principles of legality and proportionality of criminal offences and penalties')

[24] *Y and Z*, para. 7; *X, Y and Z*, para. 7.
[25] *Y and Z*, para. 8; *X, Y and Z*, para. 8.

In *Y and* Z, the CJEU stated that Article 9(1) QD refers to the above rights "by way of guidance" for the purpose of determining which acts "must in particular be regarded as constituting persecution" (para.57).

Acts violating other basic human rights: In *Y and* Z, the CJEU was called upon to consider when an infringement of the right to freedom of religion protected by Article 9 ECHR may constitute an act of persecution within the sense of Article 9(1)(a) QD:

Article 9 ECHR
('Freedom of thought, conscience and religion')

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The CJEU started by observing that freedom of religion is one of the foundations of a democratic society and is a "basic human right" in the sense of Article 9(1)(a) QD,[26] and then went on to reason that only certain interferences with that right can amount to persecution.[27]

First, the Court identified Article 10(1) of the EU Charter as being worded in the same terms as and corresponding to Article 9(1) ECHR,[28] and noted that limitations on the exercise of the right to religious freedom in Article 10(1) of the Charter that are permissible under Article 52(1) of the Charter do not violate that right and therefore cannot be regarded as acts of persecution:[29]

Article 52(1) EU Charter

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Second, the CJEU noted that it is apparent from the wording of Article 9(1) QD that "there must be a 'severe violation' of religious freedom having a significant effect on the person concerned in order for it to be possible for the acts in question to be regarded as acts of persecution" (para.59). Hence, interferences with the exercise of the right to freedom of religion which infringe that right can only be regarded as acts of persecution if their gravity is "equivalent to that of an infringement of the basic human rights from which no derogation can be made by virtue of Article 15(2) of the ECHR" (para.61). Such acts are to be identified by "their intrinsic severity as well as the severity of their consequences for the person concerned" (para.65).

The CJEU accordingly ruled that, for the purpose of determining whether an interference with the right to freedom of religion which infringes Article 10(1) of the Charter may constitute an act of persecution within the sense of Article 9(1)(a) QD, the competent authorities must ascertain:

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[26] *Y and Z*, para. 57.
[27] Note the similar point made by the CJEU in *X, Y and Z*, para. 53: "It is clear from [Articles 9(1)(a) and 9(1)(b) of the QD] that, for a violation of fundamental rights to constitute persecution within the meaning of Article 1(A) of the Geneva Convention, it must be sufficiently serious. Therefore, not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness."
[28] *Y and* Z, paras. 7 and 56.
[29] *Y and Z*, para. 60.

> "in the light of the personal circumstances of the person concerned, whether that person, as a result of exercising that freedom in his country of origin, runs a genuine risk of, *inter alia*, being prosecuted or subject to inhuman or degrading treatment or punishment by one of the actors [of persecution] referred to in Article 6 of the [QD]." (para.72)

Article 6 QD
('Actors of persecution or serious harm')

Actors of persecution or serious harm include:

(a) the State;

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

With respect to the specific question of prohibition of worship in public, the CJEU noted that prohibition of participation in formal worship in public, either alone or in community with others, may meet the above test (para.69), and that in assessing the risk run by the applicant, the competent authorities must take into account a number of factors, both subjective and objective:

> "… The subjective circumstance that the observance of a certain religious practice in public, which is subject to the restrictions at issue, is of particular importance to the person concerned in order to preserve his religious identity is a relevant factor to be taken into account in determining the level of risk to which the applicant will be exposed in his country of origin on account of his religion, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned.
>
> … Indeed, it is apparent from the wording of Article 10(1)(b) of the [QD] that the scope of protection afforded on the basis of persecution on religious grounds extends both to forms of personal or communal conduct which the person concerned considers to be necessary to him – namely those 'based on … any religious belief' – and to those prescribed by religious doctrine – namely those 'mandated by any religious belief'." (paras.70-71)

Article 10(1)(b) QD
('Reasons for persecution')

1. Member States shall take the following elements into account when assessing the reasons for persecution:

[…]

(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

A certain ambiguity may be noted in the CJEU's reference to risk in the above test, namely as to whether the reference is to the determination of "well-founded fear", to the determination of an "act of persecution", or both. However, such ambiguity is perhaps resolved by the later case of *X, Y and Z*, in which the Court did not refer to risk in determining whether criminalization of "homosexual activities" constitutes an act of persecution.

To answer whether such criminalization would indeed be persecution, the CJEU first identified in *X, Y and Z* what it considered were the fundamental rights "specifically linked to the sexual orientation [of the applicants]" such as "the right to respect for private and family life, which is protected by Article 8 of the ECHR, to which Article 7 of the Charter corresponds, read together, where necessary, with Article 14 ECHR [prohibiting discrimination], on which Article 21(1) of the Charter is based" (para.54).

The Court then ruled that given that the identified rights are not among those from which no derogation is possible:

> "the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution" (para.55).

It follows that in order for the applicant to be recognized as a refugee, more is required: the competent authorities must undertake an examination of "all the relevant facts concerning [the] country of origin, including its laws and regulations and the manner in which they are applied", as provided for in Article 4(3)(a) QD: (para.58)

> **Article 4(3)(a) QD**
> **('Assessment of facts and circumstances')**
>
> *3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:*
>
> *(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;*

The CJEU reasoned that if the laws of the country of origin sanction homosexual acts by a term of imprisonment, and that sanction is applied in practice, this would infringe Article 8 ECHR, to which Article 7 of the Charter corresponds, and constitute punishment which is "disproportionate or discriminatory" within the meaning of Article 9(2)(c) QD. The Court ruled that such a term of imprisonment must be regarded as an act of persecution (paras.56-57, 61).

Irrelevance of distinguishing purported "core areas" of basic rights: In *Y and Z*, the reference to the CJEU was made by the German Federal Administrative Court, which was unsure whether forms of interference with religious freedom "other than those affecting the essential religious identity of the person concerned" should be regarded as persecution. This was because German case law, up until the transposition of the QD in Germany, had deemed that persecution is restricted to interferences with the "core areas" (*"forum internum")* of religious freedom, as opposed to interferences with the practice of faith in public ("*forum externum"*) (paras.42-44).

The CJEU held that a distinction between acts which do and do not interfere with the purported core areas of religious freedom was incompatible with the definition of "religion" in Article 10(1)(b) QD which "encompasses all its constituent components, be they public or private, collective or individual" (para.63). Accordingly, the CJEU considered that acts of persecution within the meaning of Article 9(1)(a) QD may include "serious acts which interfere with the applicant's freedom not only to practice his faith in private circles but also to live that faith publicly" (para.64).

In the later case of *X, Y and* Z, the Dutch Council of State asked the CJEU if a distinction could be made between forms of expression which relate to "the core area of sexual orientation" and forms of expression which do not. The CJEU considered the question analogous to that in *Y and Z*, and replied that for the purposes of determining whether acts may be regarded as constituting persecution within the meaning of Article 9(1) QD "it is unnecessary to distinguish acts that interfere with the core areas of the expression of sexual orientation, even assuming it were possible to identify them, from acts which do not affect those purported core areas" (para.78). The CJEU noted that the very fact that

Article 10(1)(b) QD expressly states that the concept of religion covers participation in formal worship in public as well as in private, does not allow the conclusion that the concept of sexual orientation – to which Article 10(1)(d) QD refers without making an equivalent express statement – must only apply to acts in the private life of the person concerned and not to acts in his public life (para.69).

The connection between acts of persecution and reasons for persecution: As discussed above, in both *Y and Z* and *X, Y and Z* the CJEU used the provisions of Article 10 QD to help interpret whether the acts at issue constituted acts of persecution within the meaning of Article 9(1) QD. However, the question arises as to whether the Court considered that Article 10 QD merely happened to be of interpretative assistance in those cases, or whether it actually considered the Article 10 QD as in some way indispensable to characterizing an act as an act of persecution.

Certain of the CJEU's statements do suggest that it may have been intimating that there cannot be an act of persecution unless the act concerned is for one of the reasons defined in Article 10 QD. It should be noted in this regard that the Court explicitly pointed out the provisions of Article 9(3) QD, according to which there must be a connection between the reasons for persecution as defined in Article 10 QD and the acts of persecution defined in Article 9(1) QD: (*Y and Z*, para.55; *X, Y and Z*, para.60)

Article 9(3) initial QD
('Acts of persecution')

In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.

However, while readers will need to draw their own conclusions about why the CJEU referred to Article 9(3) QD, it is perhaps most likely that, consistent with refugee law jurisprudence in other jurisdictions, the CJEU was merely underlining the fact that the refugee definition requires a well-founded fear of being persecuted for one of the five reasons mentioned in Article 10 QD, and that on its own a well-founded fear of being persecuted is not enough. This was a point that the Court had already made in both cases (*X and Y*, paras.50-51; *X, Y and Z*, paras.42-43).

In any event, the question as to what the CJEU meant may now be academic given the amendment of Article 9(3) by the recast QD and the addition of a new recital, Recital 29, to the recast's preamble:

Article 9(3) recast QD
('Acts of persecution')

In accordance with point (d) of Article 2, there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1 of this Article or the absence of protection against such acts.

Recital 29 recast QD

One of the conditions for qualification for refugee status within the meaning of Article 1(A) of the Geneva Convention is the existence of a causal link between the reasons for persecution, namely race, religion, nationality, political opinion or membership of a particular social group, and the acts of persecution or the absence of protection against such acts.

While both of the above provisions continue to underline that establishing a link to one of the five reasons mentioned is a *sine qua non* for qualifying as a refugee, neither provision would seem to be saying that an act can only be an act of persecution if it is connected with one of those five reasons.

Questions pending before the CJEU: As of the end of 2013, one case was pending before the CJEU concerning the interpretation of the term "act of persecution", that of *Shepherd*,[30] which primarily concerns the interpretation of Article 9(2)(e) QD regarding "prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the [QD's refugee exclusion clauses]".

c) Reasons for persecution

As noted above, the CJEU has observed that it must be established that the applicant has a well-founded fear that he or she will personally be subject to persecution "for at least one" of the five reasons listed in the QD:

Article 10 QD
('Reasons for persecution')

1. Member States shall take the following elements into account when assessing the reasons for persecution:

(a) the concept of race ~~shall in particular~~ {shall, in particular,} include considerations of colour, descent, or membership of a particular ethnic group;

(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

(c) the concept of nationality shall not be confined to citizenship or lack thereof but ~~shall in particular~~ {shall, in particular,} include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

(d) a group shall be considered to form a particular social group where in particular:[31]

— *members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and*

— *that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding ~~society;~~ {society.}*

~~depending~~ {Depending} on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member ~~States:~~ {States.} Gender related aspects ~~might be considered, without by themselves alone creating a presumption for the applicability of this Article~~{, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group};

(e) the concept of political opinion ~~shall in particular~~ {shall, in particular,} include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.

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[30] CJEU, *Andre Lawrence Shepherd v. Bundesrepublik Deutschland*, C-472/13, Bayerisches Verwaltungsgericht München (Germany) of 2 September 2013.

[31] See also Recital 30 recast QD: "… For the purposes of defining a particular social group, issues arising from an applicant's gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant's well-founded fear of persecution."

Past reasons for persecution compared to future reasons for persecution: In *Salahadin Abdulla and Others*,[32] the CJEU stated that where, in accordance with Article 4(4) QD, an applicant relies on past acts or threats of persecution to demonstrate a well-founded fear of being persecuted, the applicant also needs to show in order to qualify as a refugee that, in accordance with Article 9(3) QD, those acts or threats were connected with the same reason as that for the future feared persecution (para.94).

Membership of a particular social group: In *X, Y and Z*, the CJEU was asked whether asylum-seekers with a "homosexual orientation" form a particular social group as defined by Article 10(1)(d) QD.

Based on the wording of that Article, the CJEU answered that the definition of a particular social group is satisfied where in particular the following two cumulative conditions are met:[33]

> "First, members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. Second, that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society." (para.45)

The CJEU considered that a group whose members share the same sexual orientation necessarily satisfies the first condition, since it was undisputed that sexual orientation is a characteristic so fundamental to identity that a person should not be forced to renounce it (paras.46&70).[34]

However, whether such a group also satisfies the second condition will depend on the situation in the country of origin. According to the CJEU, where there are "criminal laws which … specifically target homosexuals", such as those at issue in the main proceedings in *X, Y and Z*, this is one example of how that second condition will be met, since the existence of such laws "supports a finding that those persons form a separate group which is perceived by the surrounding society as being different" (paras.47-48).

The CJEU therefore ruled that:

> "Article 10(1)(d) of the Directive must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group." (para.49)

The Court's ruling leaves open the question under what circumstances the requirements for membership of a particular social group may be met other than through cumulatively satisfying the two conditions above, which, bearing in mind the use of the words "in particular", does not appear to be the sole test envisaged under Article 10(1) QD.

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[32] CJEU, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Judgment [GC] of 2 March 2010.

[33] Note the difference between the English-language and the Dutch-language versions of the CJEU's judgment, the latter version being the authentic text. Para. 45 of the English-language version states that "a group is regarded as a 'particular social group' where, *inter alia*, two conditions are met"; whereas para. 45 of the Dutch-language version states that "wordt een groep geacht een „specifieke sociale groep" te vormen als met name aan twee cumulatieve voorwaarden is voldaan." The Dutch-language version uses the words "in particular" instead of "*inter alia*" and refers to the two conditions as being "cumulative".

[34] The CJEU added: "That interpretation is supported by the second subparagraph of Article 10(1)(d) of the Directive, from which it appears that, according to the conditions prevailing in the country of origin, a specific social group may be a group whose members have sexual orientation as the shared characteristic" (*X, Y and* Z, para. 46). However, although this statement was made in relation to the first condition, it also seems to be relevant to the second condition as well.

Religion: As discussed above under "acts of persecution", the CJEU referred to the concept of religion as defined in Article 10(1)(b) QD in determining when an infringement of the right to freedom of religion would constitute an act of persecution. However, the Court's observations in that respect seem equally pertinent to determining when an act of persecution is for reasons of religion. In addition to the points already made above, it should be noted that the Court stated that Article 10(1)(b) gives a "broad definition" of religion which encompasses "all its constituent components, be they public or private, collective or individual" (*Y and Z,* para.63).

Reasons of race, nationality, or political opinion: No case law yet.

d) Protection

To the extent that the CJEU has so far examined the meaning of "protection", this has been in the context of interpreting the ceased circumstances clause in Article 11(e) QD in the case of *Salahadin Abdulla and Others*, which is discussed more fully in the section below on "cessation criteria".

As should already be noted here, the CJEU held in *Salahadin Abdulla* that "protection" in the refugee definition in Article 2(c) QD [Article 2(d) Recast] means protection against persecution (paras.59&67-69). The CJEU also observed that Article 7(1) QD does not preclude such protection from being guaranteed by international organizations, including "protection ensured through the presence of a multinational force" (para.75):

Article 7 QD
('Actors of protection')[35]

1. Protection {against persecution or serious harm} can only be provided by:

(a) the State; or

(b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State;

{provided they are willing and able to offer protection in accordance with paragraph 2.}

2. Protection {against persecution or serious harm must be effective and of a non-temporary nature. Such protection} is generally provided when the actors mentioned ~~in~~ {under points (a) and (b) of} paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and {when} the applicant has access to such protection.

3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant ~~Council~~ {Union} acts.

The CJEU has not yet been called upon to interpret Article 8 QD, which defines when "internal protection" in a specific part of the country of origin may be an alternative to international protection under the QD. Nor has it been called upon to interpret Article 4(3)(e) QD, according to which the assessment of an application for international protection must take into account whether the applicant could reasonably be expected to avail himself or herself of the protection of a country other than the country of origin where he or she could "assert citizenship".

[35] See also recital 26 recast QD: "Protection can be provided, where they are willing and able to offer protection, either by the State or by parties or organisations, including international organisations, meeting the conditions set out in this Directive, which control a region or a larger area within the territory of the State. Such protection should be effective and of a non-temporary nature." Compare with recital 19 of the initial QD: "Protection can be provided not only by the State but also by parties or organisations, including international organisations, meeting the conditions of this Directive, which control a region or a larger area within the territory of the State."

3. Cessation criteria

Article 14(1) QD provides that Member States shall revoke, end or refuse to renew refugee status of a person who has ceased to be a refugee in accordance with Article 11 QD:

> **Article 11 QD**
> **('Cessation')**
>
> *1. A third-country national or a stateless person shall cease to be a refugee~~,~~ if he or she:*
>
> *[...]*
>
> *(e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality;[...]*
>
> *(f) being a stateless person ~~with no nationality~~, he or she is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence.*
>
> *2. In considering points (e) and (f) of paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.*
>
> {*3. Points (e) and (f) of paragraph 1 shall not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality or, being a stateless person, of the country of former habitual residence.*}

As of the end of 2013, the CJEU had addressed two out of the six different grounds for cessation defined in Article 11 QD:

(i) ceased circumstances in the country of nationality (Article 11(1)(e));

(ii) ceased circumstances in the country of former habitual residence (Article 11(1)(f)).

Since the CJEU's rulings concerned the interpretation of the initial QD, they did not take into consideration the exception to cessation of "compelling reasons arising out of previous persecution" that was added to Article 11 by paragraph 3 of the recast QD.

a) Ceased circumstances in the country of nationality

Ceased circumstances cessation clause is the converse of the refugee definition: In *Salahadin Abdulla*,[36] the CJEU held that Article 11(1)(e) QD is the converse of the refugee definition in Article 2(c) QD [Article 2(d) Recast] and is to be interpreted as meaning that an individual ceases to qualify as a refugee when:

> "having regard to a change of circumstances of a significant and non-temporary nature in the [country of nationality], the circumstances which justified the person's fear of persecution for one of the reasons referred to in Article 2(c) of the Directive [Article 2(d) Recast], on the basis of which refugee status was granted, no longer exist and that person has no other reason to fear being 'persecuted' within the meaning of Article 2(c) of the Directive" (para.76).

It is for these reasons that, pursuant to Article 11(1)(e) QD, the person concerned can no longer continue to refuse to avail himself or herself of the "protection" of the country of nationality, such protection meaning protection against persecution for one of five the reasons listed in the refugee definition (paras.66-69).

[36] CJEU, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Judgment of 2 March 2010.

Assessment of change of circumstances in the country of nationality: The CJEU went on to state that the change of circumstances will be of a "significant and non-temporary nature" within the meaning of Article 11(2) QD when "the factors which formed the basis of the refugee's fear of persecution may be regarded as having been permanently eradicated" (para.73).

For refugee status to cease, there must also be no other circumstances giving rise to a well-founded fear of persecution on the part of the person concerned either for the same reason as that initially at issue or for one of the other reasons listed in the refugee definition (para.91). The assessment of whether there are any other such circumstances is analogous to that carried out during the examination of the initial application for refugee status and, therefore, further to Article 4(1) and 14(2) QD, requires the same cooperation between the Member State and the person concerned with regard to establishing the relevant facts (paras.83&85):

> **Article 14(2) QD**
> **('Revocation of, ending of or refusal to renew refugee status')**
>
> *Without prejudice to the duty of the refugee in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at ~~his/her~~ {his or her} disposal, the ~~Member State, which has granted refugee status, shall on an individual basis~~ {Member State which has granted refugee status shall, on an individual basis,} demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with paragraph 1 of this Article.*

In order to arrive at the conclusion that the fear of persecution is no longer well-founded, the competent authorities must verify, having regard to the individual situation of the person concerned, and by reference to Article 7(2) QD, that the actor or actors of protection referred to in Article 7(1) QD:

> "have taken reasonable steps to prevent the persecution, that they therefore operate, *inter alia*, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status" (para.76).[37]

This means that the competent authorities must assess, in particular "[t]he conditions of operation of, on the one hand, the institutions, authorities and security forces and, on the other, all groups or bodies of the third country which may, by their action or inaction, be responsible for acts of persecution against the recipient of refugee status if he returns to that country." In accordance with Article 4(3) QD, the competent authorities may take into account, *inter alia*, "the laws and regulations of the country of origin and the manner in which they are applied, and the extent to which basic human rights are guaranteed in that country" (para.71).

Cessation of refugee status not dependent on ineligibility for subsidiary protection: In *Salahaddin Abdulla*, the CJEU held that cessation of refugee status pursuant to Article 11(1)(e) QD is distinct from and without prejudice to the question whether the individual concerned qualifies for subsidiary protection (paras.78-80). That is because the QD governs "two distinct systems" of protection:

> "firstly, refugee status and, secondly, subsidiary protection status, in view of the fact that Article 2(e) of the Directive [Article 2(f) of the Recast] states that a person eligible for subsidiary protection is one 'who does not qualify as a refugee'." (para.78)

[37] See also *Salahadin Abdulla*, para. 70.

b) Ceased circumstances in the country of former habitual residence

The CJEU briefly examined the ceased circumstances clause in Article 11(1)(f) QD in the joined cases of *El Kott and Others*,[38] concerning the circumstances in which a stateless Palestinian who has left the area of operations of the United Nations Relief and Works Agency for Palestinians in the Near East (UNRWA) may qualify for protection as a refugee. As discussed in the section on "exclusion criteria" below, the CJEU held that under certain circumstances such individuals may automatically qualify as refugees under Article 12(1)(a) QD concerning persons receiving protection or assistance from organs or agencies of the United Nations other than UNHCR. However, as should be noted here, the Court added:

> "Article 11(f) of [the QD], read in conjunction with Article 14(1) thereof, must be interpreted as meaning that the person concerned ceases to be a refugee if he is able to return to the UNRWA area of operations in which he was formerly habitually resident because the circumstances which led to that person qualifying as a refugee no longer exist (see in that regard, by analogy, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493, paragraph 76)." (para.77)

4. Exclusion criteria

Article 12 QD provides that certain categories of individual are excluded from being recognized as refugees:

(i) persons receiving protection or assistance from organs or agencies of the United Nations other than UNHCR (Article 12(1)(a));

(ii) persons considered not to be in need of refugee protection (Article 12(1)(b));

(iii) persons considered not to be deserving of refugee protection (Articles 12(2) and 12(3)).

The CJEU has so far been called upon to interpret the grounds for exclusion for persons falling within the first and the third categories, as discussed under the corresponding sub-headings below.

As a preliminary point, it should be noted that the CJEU held in *Bolbol*[39] that exclusion must be construed narrowly.

a) Persons already receiving United Nations protection or assistance

The CJEU was asked to interpret Article 12(1)(a) QD first in *Bolbol*, and subsequently in *El Kott*.[40] Both cases concerned stateless Palestinian refugees who had been residing in the UNRWA area of operations prior to leaving for Hungary, where they applied for refugee status.[41]

Article 12(1)(a) QD provides:

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[38] CJEU, *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, C-364/11, Judgment of 19 December 2012.
[39] CJEU, *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, Judgment of 17 June 2010, para. 51.
[40] CJEU, *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, C-364/11, Judgment of 19 December 2012.
[41] UNRWA's present area of operations covers Lebanon, Syria, Jordan, the West Bank (including East Jerusalem) and the Gaza Strip. The applicants in *Bolbol* and *El Kott* came from the Gaza Strip and Lebanon respectively.

Article 12(1)(a) QD
(‘Exclusion’)

1. A third-country national or a stateless person is excluded from being a refugee~~,~~ if:

(a) he or she falls within the scope of ~~Article 1 D~~ {Article 1(D)} of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason,without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Directive;

Given the express reference in Article 12(1)(a) QD to Article 1D of the 1951 Refugee Convention, the CJEU had to interpret the Refugee Convention in order to be able to interpret the QD:

Article 1D of the 1951 Refugee Convention

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

It is clear from both cases that the CJEU considered that Palestinian refugees may fall within the scope of Article 12(1)(a) QD. For example, as the Court stated in *El Kott*:

> “having regard to the particular situation of Palestinian refugees, the States signatories to the Geneva Convention deliberately decided in 1951 to afford them the special treatment provided for in Article 1D of the convention, to which Article 12(1)(a) of [the QD] refers.” (para.80)

Organs or agencies of the United Nations other than UNHCR: As stated in the first paragraph of Article 1D of the Refugee Convention, the Convention shall not apply to persons who are at present receiving protection or assistance from “organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees”.

Whereas in *Bolbol* it was common ground that UNRWA is “one of” the organs or agencies of the United Nations other than UNHCR to which Article 12(1)(a) QD and Article 1D of the Refugee Convention refer (para.44), in *El Kott* it was common ground that UNRWA is, at present, “the only” such organ or agency (para.48). It was also common ground in *El Kott* that while UNRWA provides “assistance” to Palestinian refugees, that agency was not set up to provide, and has never provided, “protection”.[42]

Persons at present receiving protection or assistance: In *Bolbol*, the CJEU was asked whether, for purposes of Article 12(1)(a) QD, a person must be regarded as receiving protection or assistance from

[42] *El Kott*, para. 48, which does not state this explicitly but refers to para. 5 of the Opinion of the Advocate General, which itself states in footnote 6: “It is common ground that the phrase ‘organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees’ has referred in fact solely to UNRWA since 1958. The only other such organ or agency ever to have provided protection or assistance to refugees (the United Nations Korean Reconstruction Agency – UNKRA) ceased operations in that year. Except where otherwise specified, therefore, I shall treat ‘organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees’ and ‘UNRWA’ as equivalents. It is also common ground that UNRWA was not set up to provide, nor has it ever provided, ‘protection’ to Palestinian refugees. It is not in a position to provide anything other than ‘assistance’. I shall therefore refer to ‘UNRWA assistance’ rather than ‘UNRWA protection or assistance’.”

a United Nations organ or agency other than UNHCR merely by virtue of the fact that he or she is entitled to receive such protection or assistance, or whether it is also necessary to "avail" himself or herself of that protection or assistance.

The CJEU held that the first paragraph of Article 1D of the 1951 Refugee Convention must, as an exclusion clause, be construed narrowly. Hence only persons who have "actually availed themselves" of the protection or assistance in question fall within the scope of Article 1D and therefore of Article 12(1)(a) QD. Persons who are, or were, eligible to receive such protection or assistance, but who have not availed themselves of it, fall outside these provisions (paras.49-51).[43]

The CJEU stated by reference to UNRWA's "Consolidated Eligibility and Registration Instructions" that registration with UNRWA is one means of proving receipt of protection or assistance from that agency, but did not indicate by what other means receipt of protection or assistance might be proved (para.52). It simply noted that, according to the referring court, Ms. Bolbol had not availed herself of the protection or assistance of UNRWA and that "it should be borne in mind that, in the context of a reference for a preliminary ruling, it is for the national court to establish the facts" (paras.40-41).

However, what can be inferred from the CJEU's ruling is that the phrase "persons who are *at present* receiving … protection or assistance" (emphasis added) does not only refer to persons who had already availed themselves of the protection or assistance of UNRWA when the Refugee Convention was adopted in 1951. As pointed out by the Court:

> "The Geneva Convention, in its original 1951 version, was amended by the Protocol on the Status of Refugees of 31 January 1967 specifically to allow the interpretation of that convention to adapt and to allow account to be taken of new categories of refugees, other than those who became refugees as a result of 'events occurring before 1 January 1951'." (para.48)

Therefore, the CJEU held that:

> "Contrary to the line of argument developed by the United Kingdom Government [in the observations it has submitted in this case], it cannot be maintained, as an argument against including persons displaced following the 1967 [Arab-Israeli] hostilities within the scope of Article 1D of the Geneva Convention, that only those Palestinians who became refugees as a result of the 1948 [Arab-Israeli] conflict who were receiving protection or assistance from UNRWA at the time when the original version of the Geneva Convention was concluded in 1951 are covered by Article 1D of that convention, and therefore, by Article 12(1)(a) of the Directive." (para.47)

In *El Kott*, the CJEU went on to examine a different aspect of the meaning of "at present receiving", namely whether an applicant who is in the territory of a EU Member State and therefore physically outside UNRWA's area of operations can fall within the ground for exclusion in Article 12(1)(a) QD.

The CJEU considered that in and of itself physical absence from UNRWA's area of operations does not end the ground for exclusion since otherwise no applicant would ever be excluded and the first sentence of Article 12(1)(a) QD would be deprived of any practical effect (para.50). Moreover, absence from UNRWA's area of operations as a result of "voluntary departure … and, therefore, voluntary renunciation of the assistance provided by that agency" cannot end the ground for exclusion either, since this "would run counter to the objective pursued by the first subparagraph of Article 1D of the Geneva Convention, which is intended to exclude from the benefits of the convention all persons who receive such assistance" (para.51).

[43] See also *El Kott*, para. 41.

The CJEU therefore held that:

> "It is … necessary to interpret the first sentence of Article 12(1)(a) of Directive 2004/83 as meaning that the ground for excluding a person from being a refugee laid down in that provision covers not only persons who are currently availing themselves of assistance provided by UNRWA but also those such as the applicants in the main proceedings who in fact availed themselves of such assistance shortly before submitting an application for asylum in a Member State, provided, however, that that assistance has not ceased within the meaning of the second sentence of Article 12(1)(a) of the directive." (para.52)

Cessation of such protection or assistance 'for any reason': The CJEU went on in *El Kott* to consider under what conditions the protection or assistance at issue can be considered to have "ceased for any reason" within the meaning of the second sentence of Article 12(1)(a) QD, bearing in mind in particular the situation of a person who, in circumstances like those of the applicants in the main proceedings, is no longer within the area of operations of the concerned United Nations organ or agency.

First, the CJEU noted that "it is not only the abolition itself of the organ or agency giving protection or assistance which brings about the cessation of the protection or assistance provided by that organ or agency … but also the fact that it is impossible for that organ or agency to carry out its mission" (para.56).

Second, the CJEU stated that based on the wording of Article 12(1)(a) QD ("when such protection or assistance has ceased"), it is "primarily the actual assistance provided by UNRWA and not the existence of that agency itself which must cease in order for the ground for exclusion from refugee status no longer to be applicable" (para.57).

Third, the CJEU noted that the inclusion in Article 12(1)(a) QD of the words "for any reason" indicates that assistance may cease not only as a result of circumstances affecting UNRWA directly, such as those mentioned above, but also as a result of circumstances beyond the control of the person concerned that have forced him or her to leave UNRWA's area of operations (para.58). The Court considered that such an interpretation is consistent with the objective of Article 12(1)(a) QD, which is "*inter alia* to ensure that Palestinian refugees continue to receive protection by affording them effective protection or assistance and not simply by guaranteeing the existence of a body or agency whose task is to provide such assistance or protection" (para.60).[44] It also takes account of the objective of Article 1D of the 1951 Convention, which is "to ensure that Palestinian refugees continue to receive protection, as Palestinian refugees, until their position has been definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations" (para.62).

The CJEU accordingly held that a Palestinian refugee must be regarded as having been forced to leave UNRWA's area of operations "if his personal safety is at serious risk and if it is impossible for that agency to guarantee that his living conditions in that area will be commensurate with the mission entrusted to that agency" (para.63).

In light of the above, the CJEU concluded that:

> "the second sentence of Article 12(1)(a) [QD] must be interpreted as meaning that the cessation of protection or assistance from organs or agencies of the United Nations other than the HCR 'for

[44] The CJEU similarly indicated the objective of Article 1D of the 1951 Convention as being "to ensure that Palestinian refugees continue to receive protection, as Palestinian refugees, until their position has been definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations" (para.62).

> any reason' includes the situation in which a person who, after actually availing himself of such protection or assistance, ceases to receive it for a reason beyond his control and independent of his volition. It is for the competent national authorities of the Member State responsible for examining the asylum application made by such a person to ascertain, by carrying out an assessment of the application on an individual basis, whether that person was forced to leave the area of operations of such an organ or agency, which will be the case where that person's personal safety was at serious risk and it was impossible for that organ or agency to guarantee that his living conditions in that area would be commensurate with the mission entrusted to that organ or agency." (para.65)

The Court added that when carrying out the abovementioned assessment, Article 4(3) QD may be applicable by analogy (para.64):

Article 4(3) QD
('Assessment of facts and circumstances')

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

- *(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;*
- *(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;*
- *(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;*
- *(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities ~~will~~ {would} expose the applicant to persecution or serious harm if returned to that country;*
- *(e) whether the applicant could reasonably be expected to avail himself {or herself} of the protection of another country where he {or she} could assert citizenship.*

***Ipso facto* entitlement to the benefits of the Directive:** In *El Kott*, the CJEU examined the meaning of the phrase "shall *ipso facto* be entitled to the benefits of this Directive" in the second sentence of Article 12(1)(a) QD, including: (i) which benefits of the QD are at issue; (ii) whether the applicant is automatically entitled to those benefits when the protection or assistance in question ceases.

As to which benefits of the QD are at issue, the CJEU stated that Article 12(1)(a) QD must be referring to the benefits relating to refugee status, since:

> "… it is important to point out that, unlike the Geneva Convention, which deals only with refugee status, [the QD] governs two distinct systems of protection, that is to say, first, refugee status and, second, subsidiary protection status, in view of the fact that Article 2(e) of the directive states that a person eligible for subsidiary protection is one 'who does not qualify as a refugee'.
>
> … Therefore, as there would otherwise be a failure to have regard for the different forms of protection afforded by the Geneva Convention and [the QD] respectively, the words 'be entitled to the benefits of [the] Directive' in the second sentence of Article 12(1)(a) of the directive must be understood as referring only to refugee status, since that provision was based on Article 1D of the Geneva Convention and the directive must be interpreted in the light of that provision." (paras.66-67)

As to whether the applicant is automatically entitled to be granted refugee status when the protection or assistance in question ceases, the Court noted that the words “shall *ipso facto* be entitled to the benefits of this Directive” in Article 12(1)(a) QD must be interpreted in a manner that is consistent with the second paragraph of Article 1D of the Refugee Convention, which provides that the persons concerned “shall *ipso facto* be entitled to the benefits of this Convention”. The French-language version of the Convention, which is equally authentic, reads “bénéficieront de plein droit du régime de cette convention” (‘shall benefit as of right from the regime of this Convention’). Article 12(1)(a) QD must therefore be interpreted as meaning that the persons concerned benefit “as of right” (paras.70-71).

The CJEU accordingly concluded that where it is established that protection or assistance from UNRWA has ceased, the applicant must be recognized as a refugee within the meaning of Article 2(c) QD [Article 2(d) Recast] and automatically be granted refugee status – given that the position of Palestinian refugees has not been definitely settled in accordance with the relevant United Nations resolutions – unless the applicant is caught by any of the remaining grounds for exclusion listed in Article 12 QD (paras.72-81).

Persons to whom Article 12(1)(a) QD does not apply: In *El Kott*, the CJEU held that once the position of the persons referred to in Article 12(1)(a) QD has been definitely settled in accordance with the relevant United Nations resolutions, they may nevertheless qualify as refugees if for any reason they satisfy the requirements laid down in Article 2(c) QD [Article 2(d) Recast]. (para.74)

The CJEU additionally held in *Bolbol* that “persons who have not actually availed themselves of protection or assistance from UNRWA [nothwithwithstanding their entitlement to do so], prior to their application for refugee status, may, in any event, have that application examined pursuant to Article 2(c) [Article 2(d) Recast] of the Directive” (para.54).

b) Persons considered not to be deserving of refugee protection

The CJEU has examined the exclusion of persons undeserving of protection in the joined cases of *B and D*,[45] which concerned the interpretation of paragraphs (b) and (c) of Article 12(2) QD in the context of an individual’s membership, position and/or activity in an organization employing terrorist methods.

> **Article 12 QD**
> **(‘Exclusion’)**
>
> *[…]*
>
> *2. A third-country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:*
>
> *(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
>
> *(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a ~~refugee;~~ {refugee,} which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;*
>
> *(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.*
>
> *3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.*

[45] CJEU, *Bundesrepublik Deutschland v. B and D*, Joined Cases C-57/09 and C-101/09, Judgment of 9 November 2010.

As a preliminary point, it should be noted that the CJEU observed that paragraphs (b) and (c) of Article 12(2) QD are "analogous to" paragraphs (b) and (c) of Article 1F of the 1951 Refugee Convention (para.102):[46]

> **Article 1F of the 1951 Geneva Convention**
>
> *The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*
>
> *(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;*
>
> *(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;*
>
> *(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.*

Objectives of exclusion: In *B and D*, the CJEU stated that the purpose underlying the grounds for exclusion in Article 12(2) QD is "to maintain the credibility of the protection system provided for in that directive in accordance with the 1951 Geneva Convention" (para.115). The CJEU was not called upon to address the grounds for exclusion under 12(2)(a) QD, but held that the grounds for exclusion under Article 12(2)(b) and (c) of the QD are "intended as a penalty for acts committed in the past" and were introduced "with the aim of excluding from refugee status persons who are deemed to be undeserving of the protection which that status entails and of preventing that status from enabling those who have committed certain serious crimes to escape criminal liability" (paras.103-104).

The Court therefore held that whether an individual is excludable does not depend on whether he or she represents "a present danger" to the host Member State (para.105).

Serious non-political crime: The CJEU held at the outset that it is clear that "terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective, fall to be regarded as serious non-political crimes" within the meaning Article 12(2)(b) QD. (para.81)

Acts contrary to the purposes and principles of the United Nations: The CJEU also held that terrorist acts are "contrary to the purposes and principles of the United Nations" within the meaning of Article 12(2)(c) QD, providing that they have an "international dimension" (para.84).

In reaching this conclusion the Court first referred to the contents of recital 22 [Recital 12 Recast] QD:

> **Recital 22 initial QD [Recital 12 Recast]**
>
> *Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations' and that 'knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations'.*

[46] See also *B and D*, para. 86: "it should be noted that points (b) and (c) of Article 12(2) of [the QD] – in the same way, moreover, as points (b) and (c) of Article 1F of the 1951 Geneva Convention – permit the exclusion of a person from refugee status only where there are 'serious reasons' for considering that 'he … has committed' a serious non-political crime outside the country of refuge prior to his admission as a refugee or that 'he … has been guilty' of acts contrary to the purposes and principles of the United Nations."

The CJEU then noted that the United Nations Resolutions referred to by the above recital include UN Security Council Resolutions 1373 (2002) and 1377 (2001), from which "it is clear that the Security Council takes as its starting point the principle that international terrorist acts are, generally speaking and irrespective of any State participation, contrary to the purposes and principles of the United Nations" (para.83).[47]

Individual responsibility: In *B and D*, the organizations at issue in the main proceedings were the PKK and Dev Sol (now DHKP/C), both of which are included in the periodically updated list of "persons, groups and entities involved in terrorist acts" referred to by Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism.

The CJEU held that neither of the following permits the conclusion that an applicant for refugee status necessarily and automatically falls within the grounds for exclusion in Article 12(2)(b) or (c) of the QD:

(i) the mere fact of the individual's membership in a terrorist group included on a list such as that in the Annex to Council Common Position 2001/931; (paras.88-91)

(ii) the mere fact of the individual's intentional participation in the activities of a terrorist group within the meaning of Article 2(2)(b) of Council Framework Decision 2002/475/JHA: (paras.92-93)

> **Article 2(2) Framework Decision 2002/475/JHA**
> **('Offences relating to a terrorist group')**
>
> *Each Member State shall take the necessary measures to ensure that the following intentional acts are punishable:*
>
> *[...]*
>
> *(b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.*

That is because Article 12(2) QD requires "serious reasons" for considering that the individual concerned has "committed" or "been guilty of" the wrongdoing at issue (para.86). The exclusion clauses in Article 12(2)(b) and (c) cannot be applied until the competent authority of the Member State concerned has undertaken:

> "*for each individual case*, an assessment of the specific facts within its knowledge, with a view to determining whether there are serious reasons for considering that the acts committed by the person in question, who otherwise satisfies the conditions for refugee status, are covered by one of those exclusion clauses" (emphasis added) (para.87).

The CJEU pointed out that both Common Position 2001/931 and Framework Decision 2002/475 have different aims than that of the QD, the latter being essentially humanitarian (paras.89&93).

With respect to membership of a terrorist group, the CJEU stated that the inclusion of an organization on a list such as that annexed to the Common Position makes it possible to establish the terrorist nature of the group of which the person concerned was a member, which is one of the factors that must be taken into account "when determining, initially, whether that group has committed acts falling within the scope of Article 12(2)(b) or (c)" (para.90). But the circumstances in which the

[47] See also *B and D*, paras. 7-10, highlighting the particular paragraphs of UN Security Council Resolutions 1373 (2001) and 1377 (2001) relied upon by the CJEU.

organizations at issue in the main proceedings were placed on the list annexed to the Common Position cannot be assimilated to the individual assessment of the specific facts that is required before a decision can be taken to exclude a person from refugee status (para.91). Hence, even if the acts committed by such an organization fall within each of the grounds for exclusion laid down in Article 12(2)(b) and (c), the mere fact that the person concerned was a member of the organization cannot automatically result in his or her exclusion (para.88).

With respect to participation in the acts of a terrorist group, the CJEU stated that even though Member States are required by Framework Decision 2002/475 to make the intentional act of participating in the activities of a terrorist group punishable under their national law, that too does not trigger the automatic application of the exclusion clauses in Article 12(2)(b) and (c). Again, a full investigation into all the circumstances of each individual case is required (para.93).

The CJEU therefore concluded that the exclusion from refugee status of an individual who has been a member of an organization which uses terrorist methods is conditional on:

> "an individual assessment of the specific facts, making it possible to determine whether there are serious reasons for considering that, in the context of his activities within that organisation, that person has committed a serious non-political crime or has been guilty of acts contrary to the purposes and principles of the United Nations, or that he has instigated such a crime or such acts, or participated in them in some other way, within the meaning of Article 12(3) of [the QD]" (para.94)

Article 12(3) QD
('Exclusion')

3. Paragraph 2 [of Article 12 QD] applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

The CJEU added that it must be possible to attribute to the person a share of the responsibility for the acts committed by the organization in question while he or she was a member, regard being had to the required standard of proof under Article 12(2) QD. That individual responsibility must be assessed in the light of both "objective and subjective" criteria,[48] meaning that the competent authority must, *inter alia*, assess:

> "the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct." (para.97)

Presumption of individual responsibility: The CJEU held that where in the course of the above assessment it is established that the applicant has occupied a prominent position within an organization which uses terrorist methods, a presumption is justified that the applicant has individual responsibility for "acts committed by that organisation during the relevant period", but it nevertheless remains necessary to examine all the relevant circumstances before excluding him or her from refugee status (para.98).

Whether assessment of proportionality is required: The CJEU recalled that exclusion from refugee status under Article 12(2)(b) or (c) QD is linked to "the seriousness of the acts committed", which must be "of such a degree" that the applicant cannot legitimately claim international protection

[48] The CJEU did not define these terms in its judgment, but note that para. 78 of the opinion of Advocate General Mengozzi refers to "objective criteria (actual conduct) and subjective criteria (awareness and intent)".

(para.108). Assessing the seriousness of those acts and the individual responsibility of the applicant requires taking into account "all the circumstances surrounding those acts and the situation of that person", following which the competent authority cannot be required to undertake a separate assessment of proportionality since that would require a "fresh assessment of the level of seriousness of the acts committed" (para.109).

Exclusion and protection against deportation: The CJEU noted that the exclusion of a person from refugee status under Article 12(2) QD does not imply the adoption of a position on "the separate question of whether that person can be deported to his country of origin" (para.110).

5. More favourable standards than the QD

In *B and D*, the CJEU also addressed the question whether, for purposes of Article 3 QD, it is compatible with the QD for a Member State to grant asylum under its constitutional law to a person who is excluded from refugee status under Article 12(2) QD as a person undeserving of international protection:

> **Article 3 QD**
> **('More favourable standards')**[49]
>
> *Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.*

Given that the purpose of the grounds for exclusion laid down in the QD is "to maintain the credibility of the protection system provided for in that directive in accordance with the 1951 Geneva Convention", the CJEU held that the reservation in Article 3 QD precludes Member States from introducing or retaining provisions granting refugee status under the QD to such a person (para.115).

However, given also the closing words of Article 2(g) QD [Article 2(h) Recast], the CJEU added that it is clear that the QD does not preclude a person from applying for "another kind of protection" outside the scope of the QD: (para.116)

> **Article 2(g) initial QD [Article 2(h) Recast]**
> **('Definitions')**
>
> *'application for international protection' means a request made by a third-country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;*

That other kind of protection would not count as "international protection" within the meaning of the QD, but would be "national protection" granted in accordance with national law "on a discretionary

[49] See also recital 8 of the initial QD and recital 14 of the recast QD. Recital 8 of the initial QD states: "It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person who otherwise needs international protection." Recital 14 of the recast QD states: "Member States should have the power to introduce or maintain more favourable provisions than the standards laid down in this Directive for third-country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person eligible for subsidiary protection."

and goodwill basis or for humanitarian reasons", as envisaged by recital 9 QD [Recital 15 Recast]: (paras.117-118)

> **Recital 9 initial QD [Recital 15 Recast]**
>
> *Those third-country nationals or stateless ~~persons,~~ {persons} who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian ~~grounds,~~ {grounds} fall outside the scope of this Directive.*

However, in order not to infringe the system established by the QD, that other kind of protection must not be confused with refugee status: the national rules under which it is granted must therefore permit a clear distinction between national protection and protection under the QD (paras.119-120).

C. The CJEU case law on the eligibility criteria for subsidiary protection

1. Introduction

Summary of case law: As of the end of 2013, the CJEU had issued one preliminary ruling concerning the criteria for subsidiary protection status.[50] The ruling centred on the interpretation of Article 15(c) QD, concerning a risk of suffering serious harm in a situation of international or internal armed conflict. Although the ruling concerned the interpretation of the initial QD, it will remain equally valid for the interpretation of the recast QD since Article 15(c) was unchanged by the recast.

Two preliminary references concerning the criteria for subsidiary protection status were pending before the CJEU at the end of 2013. One case concerned the interpretation of the concept of "internal armed conflict" in Article 15(c) QD;[51] the other case touched upon the question whether a lack of appropriate health care can fall within the scope "serious harm" as defined in Article 15 QD.[52]

Definition of a person eligible for subsidiary protection: For purposes of the QD, a "person eligible for subsidiary protection" is defined as follows:

> **Article 2(e) initial QD [Article 2(f) Recast]**
> **('Definitions')**
>
> *'person eligible for subsidiary protection' means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) ~~do~~ {does} not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;*

As noted above, the CJEU held in *Salahadin Abdulla* that the QD governs "two distinct systems" of protection, "firstly, refugee status and, secondly, subsidiary protection status, in view of the fact that Article 2(e) of the Directive [Article 2(f) of the Recast] states that a person eligible for subsidiary protection is one 'who does not qualify as a refugee'." (para.78)

[50] CJEU, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, C-465/07, Judgment of 17 February 2009.
[51] CJEU, *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, C-285/12, Reference from Conseil d'État (Belgium) of 7 June 2012, Opinion of Advocate General Mengozzi delivered on 18 July 2013.
[52] CJEU, *Mohamed M'Bodj v Conseil des ministers*, C-542/13, Reference from Cour constitutionnelle (Belgium) of 17 October 2013.

Detailed provisions concerning the interpretation and application of the definition of a person eligible for subsidiary protection are laid down in Chapter II ('Assessment of applications for international protection') and Chapter V ('Qualification for subsidiary protection') of the QD.[53] Whereas the provisions in Chapter V concern subsidiary protection only, as noted above the provisions in Chapter II are common to both the refugee definition and the definition of a person eligible for subsidiary protection.

> **Note:** Whereas the QD distinguishes between the criteria for being recognized as a "refugee"and the criteria for being granted "refugee status", it makes no such distinction with respect to subsidiary protection: all persons qualifying for "subsidiary protection" must, without exception, be granted "subsidiary protection status".[54] Persons granted subsidiary protection status benefit from the protection defined in Chapter VII QD ('Content of international protection') (see chapter 1.3 of this manual).

Principles for interpretation: The CJEU has not set out any general considerations for the interpretation of the definition of a person eligible for subsidiary protection as it has done for the refugee definition above. But the same considerations would clearly apply, apart from the reference to the 1951 Refugee Convention.

As to the QD's purpose, note that recital 25 QD [Recital 34 Recast] states:[55]

> **Recital 25 initial QD [Recital 34 Recast]**
>
> *It is necessary to introduce {common} criteria on the basis of which applicants for international protection are to be recognized as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.*

Article 78(1) TFEU (ex Article 63(1) TEC) provides in that regard that: "[t]he Union shall develop a common policy on asylum, *subsidiary protection* and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, *and other relevant treaties*" (emphases added).[56]

2. Inclusion criteria

a) Real risk

The requirement that a person eligible for subsidiary protection be at "real risk" of suffering serious harm was indirectly addressed by the CJEU in the case of *Elgafaji*,[57] in the context of providing an interpretation of "serious harm" in the following situation defined in Article 15(c) QD:

[53] Article 18 QD provides: "Member States shall grant subsidiary protection status to a third-country national or stateless person eligible for subsidiary protection in accordance with Chapters II and V."
[54] Article 18 QD.
[55] See also Article 1 QD.
[56] See also Article 78(2) TFEU: "For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: … (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; …"
[57] CJEU, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, C-465/07, Judgment of 17 February 2009.

Article 15 QD
('Serious harm')

Serious harm consists of:

[…]

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

On the one hand, the CJEU defined the threat referred to in Article 15(c) QD in terms of whether the degree of indiscriminate violence had reached the threshold of real risk:

> "[T]he existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place […] reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region [of that country], would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat." (para.43)[58]

On the other hand, the Court also held that:

> "[although the applicant is not required to adduce evidence that he or she is specifically targeted], the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection." (para.39)

The CJEU considered that the level of indiscriminate violence required for eligibility for subsidiary protection may also be lower where it is established that the applicant has already been subject to serious harm, since, as stipulated in Article 4(4) QD, that may itself be a serious indication of real risk: (para.40)

Article 4(4) QD
('Assessment of facts and circumstances')

The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

In order to avoid concluding that the above reasoning is circular, it seems necessary to read the CJEU as saying that where an application for subsidiary protection is based on Article 15(c) QD, the test under that Article and the test for "real risk" are inextricably interlinked.

It should also be noted that the CJEU pointed out that the situation envisaged by Article 15(c) QD is exceptional, bearing in mind that recital 26 QD [Recital 35 Recast] states the following: (para.37)

Recital 26 QD [Recital 35 Recast]

Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.

The Court held that although the above recital implies that a risk linked to the general situation in the country of origin is not, as a rule, sufficient to establish that a specific individual meets the test in

[58] See also *Elgafaji*, para. 35.

Article 15(c) QD, it nevertheless allows – by the use of the word "normally" – for the possibility of satisfying that test by:

> "an exceptional situation characterized by such a high degree of risk that substantial grounds have been shown for believing that that person would be subject individually to the degree of risk in question" (para.37).

The CJEU considered that its interpretation of Article 15(c) QD, in conjunction with Article 2(e) [Article 2(f) Recast] QD, is fully compatible with the rights guaranteed under the ECHR, including the case law of the European Court of Human Rights relating to Article 3 ECHR (para.44). The CJEU drew attention in particular to the following paragraphs of the judgment of the European Court of Human Rights in *NA. v. the United Kingdom*:

> "… the Court [ECtHR] has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.
>
> … Exceptionally, however, in [less extreme] cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court has considered that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned […] In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3. This will be determined in light of the applicant's account and the information on the situation in the country of destination in respect of the group in question […]
>
> … In determining whether it should or should not insist on further special distinguishing features, it follows that the Court may take account of the general situation of violence in a country. It considers that it is appropriate for it to do so if that general situation makes it more likely that the authorities (or any persons or group of persons where the danger emanates from them) will systematically ill-treat the group in question […]"[59]

b) Serious harm

In essence, the question before the CJEU in *Elgafaji* was whether Article 15(c) QD, read in conjunction with Article 2(e) QD [Article 2(f) Recast], must be interpreted as meaning that the existence of a "serious and individual threat" to the life or person of the applicant is subject to the requirement that the applicant is "specifically targeted by reason of factors particular to his or her circumstances" (para.30).

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[59] ECtHR, *NA. v. the United Kingdom*, No. 25904/07, Judgment of 17 July 2008, paras. 115-117. *NA. v. the United Kingdom* and related cases are discussed further in Part II of this manual concerning the case law of the ECtHR: see Part II, chapter 2.2, section B(3)(a). Note also ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, Judgment of 28 June 2011, paras. 220 - 226, commenting on the relationship between Article 15(c) QD and Article 3 ECHR. See in particular para. 226: "The jurisdiction of this Court [ECtHR] is limited to the interpretation of the Convention [ECHR] and it would not, therefore, be appropriate for it to express any views on the ambit or scope of article 15(c) of the Qualification Direction *[sic]*. However, based on the ECJ's interpretation in *Elgafaji*, the Court is not persuaded that Article 3 of the Convention, as interpreted in *NA*, does not offer comparable protection to that afforded under the Directive. In particular, it notes that the threshold set by both provisions may, in exceptional circumstances, be attained in consequence of a situation of general violence of such intensity that any person being returned to the region in question would be at risk simply on account of their presence there."

While the CJEU's answer to that question has already been addressed above, certain points made by the Court in reaching its answer are more appropriately addressed under the present sub-heading.

Note: The transposition and application of Article 15(c) QD has raised particular interpretative challenges for EU Member States. For further information, see UNHCR, *Safe at Last? Law and practice in selected EU Member States with respect to asylum-seekers fleeing indiscriminate violence*, July 2011 [Link]

The three types of serious harm: The CJEU noted that Article 15 QD defines three types of serious harm: paragraphs (a) and (b) cover situations in which the individual is exposed to the risk of a "particular type of harm", whereas paragraph (c) refers more generally to a "threat … to a civilian's life or person": (paras.32-34)

Article 15 QD
('Serious harm')

Serious harm consists of:

(a) {the} death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

The CJEU compared the provisions of Article 15 QD with the fundamental rights guaranteed under the ECHR, noting that those rights form a part of the general principles of Community (now EU) law, observance of which is ensured by the CJEU taking the case law of the European Court of Human Rights into consideration. Having been asked about the relationship between Article 15(c) QD and Article 3 ECHR, the CJEU pointed out that it is actually Article 15(b) QD which corresponds, in essence, to Article 3 ECHR: (para.28)

Article 3 ECHR

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The CJEU noted that the content of Article 15(c) QD is different from that of Article 3 ECHR, and that Article 15(c) QD must therefore be interpreted independently, "although with due regard for fundamental rights, as they are guaranteed under the ECHR" (para.28).[60]

The CJEU has not yet considered the field of application of Article 15(a) QD.

It is perhaps noteworthy that the CJEU did not make any reference in the above to the EU Charter of Fundamental Rights, but this may be explained by the fact that its ruling pre-dated the entry into force of the Treaty of Lisbon on 1 December 2009. It was not until that date that the Charter acquired legally binding effect, even though the rights and principles that it reaffirms were already considered to be reflective of general principles of Community (now EU) law at the time of its initial proclamation in December 2000.

[60] Given the abovementioned reference by the CJEU to the judgment of the European Court of Human Rights in *NA. v. the United Kingdom* in the context of interpreting Article 15(c) QD, Article 3 ECHR clearly remains one of the relevant rights to which due regard must be had. While the CJEU sought to identify an interpretation of Article 15 QD "which is likely to ensure that Article 15(c) of the Directive has its own field of application" (para.36), the judgment in *NA. v. the United Kingdom* would would seem equally pertinent to the interpretation of Article 15(b) QD, and the CJEU may therefore be accepting that there is some overlap between Article 15(b) and (c) of the QD.

Reconciling the requirements in Article 15(c) QD that the 'individual' threat be by reason of 'indiscriminate' violence: The CJEU held in *Elgafaji* that "indiscriminate" is a term which may extend to people "irrespective of their personal circumstances" (para.34). In that context, the word "individual" must be understood as covering harm to civilians "irrespective of their identity" where the level of indiscriminate violence is such that any civilian is at real risk of a threat to his or her life or person (para.35). Additionally, given that Article 15(c) must be subject to a coherent interpretation in relation to Articles 15(a) and 15(b), both of which require "a clear degree of individualization", Article 15(c) must be interpreted "by close reference to that individualization" (para.38). As already discussed above, in that regard the CJEU envisaged two situations in which the intensity of indiscriminate violence could be lower: (i) where it it is established that the applicant has already been subject to serious harm; (ii) where the applicant is able to show that he or she is specifically affected by reason of factors particular to his or her personal circumstances.

Interpretation of 'internal armed conflict' in Article 15(c) QD: In the case of *Aboubacar Diakité*,[61] the CJEU was asked whether the concept of "internal armed conflict" in Article 15(c) QD should be interpreted in accordance with international humanitarian law (IHL), or whether other criteria should be used for determining that an "internal armed conflict" exists. As of the end of 2013, Advocate General Mengozzi had delivered his opinion in the case but the CJEU had not issued its judgment.

Whether "serious harm" may include a lack of appropriate health care: In the case of *M'Bodj*,[62] which was still pending at the end of 2013, the CJEU was asked a question touching upon whether the criteria for the grant of subsidiary protection must be interpreted as applying to a person who "has been authorized by an administrative authority of a Member State to reside in the territory of that Member State and who suffers from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment in the case where there is no appropriate treatment in his country of origin or in the country in which he resides?"

c) Protection

The CJEU briefly touched upon the "protection" criteria for subsidiary protection status in the case of *Elgafaji*, in which the Court held that the assessment of an application for subsidiary protection with respect to Article 15(c) QD may take into account:

> "the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, as is clear from Article 8(1) of the Directive" (para.40).

> **Article 8 QD**
> **('Internal protection')**[63]
>
> *1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin*

[61] CJEU, *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, C-285/12, Reference from Conseil d'État (Belgium) of 7 June 2012, Opinion of Advocate General Mengozzi delivered on 18 July 2013.
[62] CJEU, *Mohamed M'Bodj v Conseil des ministers*, C-542/13, Reference from Cour constitutionnelle (Belgium) of 17 October 2013.
[63] See also recital 27 recast QD: "Internal protection against persecution or serious harm should be effectively available to the applicant in a part of the country of origin where he or she can safely and legally travel to, gain admittance to and can reasonably be expected to settle. Where the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant. When the applicant is an unaccompanied minor, the availability of appropriate care and custodial arrangements, which are in the best interest of the unaccompanied minor, should form part of the assessment as to whether that protection is effectively available."

> *~~there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.~~{, he or she:*
>
> *(a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or*
>
> *(b) has access to protection against persecution or serious harm as defined in Article 7;*
>
> *and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there.}*
>
> *2. In examining whether an applicant has a well-founded fear of being persecuted or is at real risk of suffering serious harm, or has access to protection against persecution or serious harm in a part of the country of origin in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant in accordance with Article 4. To that end, Member States shall ensure that precise and up-to-date information is obtained from relevant sources, such as the United Nations High Commissioner for Refugees and the European Asylum Support Office.*
>
> *~~3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin.~~*

3. Cessation criteria

No case law yet.

4. Exclusion criteria

The CJEU has not yet been asked to interpret any of the grounds for exclusion from subsidiary protection, but note that in *El Kott*[64] it stated the following with respect to the ground for exclusion from refugee status contained in Article 12(1)(a) QD:

> "[A]s it refers only to refugee status, Article 12(1)(a) of [the QD] does not exclude any person from subsidiary protection status within the meaning of Article 2(e) [Article 2(f) of the Recast] of the directive, and Article 17 thereof, which sets out the grounds for exclusion from subsidiary protection, contains no reference to protection or assistance from an agency such as UNRWA." (para.68)

5. More favourable standards than the QD

No case law yet.

D. The CJEU case law on assessment of claims for refugee status and subsidiary protection status

1. Introduction

As of the end of 2013, preliminary rulings by the CJEU concerning the assessment of claims for refugee status and subsidiary protection status had addressed the following issues: (i) the distinction between establishing the facts of a claim and the legal appraisal of the claim; (ii) the duty of the Member State to cooperate with the applicant in establishing the facts of his or her claim. Although the rulings concerned the interpretation and application of the initial QD, they will remain equally valid for the with respect to the recast QD, the relevant provisions of which are unchanged.

[64] CJEU, *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, C-364/11, Judgment of 19 December 2012.

One preliminary reference concerning the assessment of claims was pending before the CJEU at the end of 2013.[65] The question referred concerned the assessment of the credibility of an applicant's declared sexual orientation.

2. Assessment of the risk facing the applicant

The CJEU has held that the assessment of the extent of the risk facing the applicant in his or her country of origin must in all cases "be carried out with vigilance and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union."[66] It is to be based solely on "a specific evaluation of the facts and circumstances, in accordance with the rules laid down in particular by Article 4 [QD]":[67]

Article 4 initial QD
('Assessment of facts and circumstances')

1. Member States may consider it the duty of the applicant to submit as soon as possible all {the} elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in ~~of~~ paragraph 1 consist of the applicant's statements and all {the} documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, ~~identity and~~ travel documents and the reasons for applying for international protection.

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities ~~will~~ {would} expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself {or herself} of the protection of another country where he {or she} could assert citizenship.

4. The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need ~~confirmation,~~ {confirmation} when the following conditions are met:

(a) the applicant has made a genuine effort to substantiate his application;

(b) all relevant ~~elements,~~ {elements} at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;

[65] CJEU, *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, Joined Cases C-148/13, C-149/13 and C-150/13, Raad van State (the Netherlands) of 25 March 2013.
[66] *Salahadin Abdulla*, cited above, para. 90. See also *Y and Z*, cited above, para. 77; *X, Y and Z*, cited above, para. 73.
[67] *Y and Z*, cited above, para. 77; *X, Y and Z*, cited above, para. 73.

> *(c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;*
> *(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and*
> *(e) the general credibility of the applicant has been established.*

3. Two-stage assessment

In *M.M.*,[68] the CJEU held that the "assessment of facts and circumstances", to which Article 4 QD relates, takes place in two separate stages: (para.64)

(i) "the establishment of factual circumstances which may constitute evidence that supports the application";

(ii) "the legal appraisal of that evidence, which entails deciding whether, in light of the specific facts of a given case, the substantive conditions … for the grant of international protection are met".

However, the QD "in no way seeks … to prescribe the procedural rules applicable the examination of an application for international protection or, therefore, to determine the procedural safeguards which must, in that respect, be afforded to an applicant" (para.73). The QD's sole purpose is to lay down "on the one hand, the criteria common to all the Member States as regards the substantive conditions which nationals of third countries must meet in order to qualify for international protection and, on the other, the substance of that protection" (para.72).

4. The Member State's duty to cooperate with the applicant

In *M.M.*, the CJEU held that Article 4(1) QD relates only to the first stage of the assessment, concerning "the determination of the facts and circumstances *qua* evidence which may substantiate the asylum application": (para.67)

> **Article 4(1) QD**
> **('Assessment of facts and circumstances')**
>
> *Member States may consider it the duty of the applicant to submit as soon as possible all {the} elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.*

The CJEU interpreted the duty of the Member State to cooperate with the applicant as follows:

> "… Under Article 4(1) of [the QD], although it is generally for the applicant to submit all elements needed to substantiate the application, the fact remains that it is the duty of the Member State to cooperate with the applicant at the stage of determining the relevant elements of that application.
>
> … This requirement that the Member State cooperate therefore means, in practical terms, that if, for any reason whatsoever, the elements provided by an applicant for international protection are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, at that stage of the procedure, so that all the elements needed to substantiate the application may be assembled. A Member State may also be better placed than an applicant to gain access to certain types of documents.

[68] CJEU, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland and Attorney General*, C-277/11, Judgment of 22 November 2012.

… Moreover, the interpretation set out in the previous paragraph finds support in Article 8(2)(b) of [the Asylum Procedures Directive], pursuant to which Member States are to ensure that precise and up-to-date information is obtained on the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited." (paras.65-67)

> **Article 8(2)(b) initial Asylum Procedures Directive [Article 8(3)(b) Recast]**
> **('Requirements for the examination of applications')**
>
> *Member States shall ensure that decisions by the determining authority on applications for ~~asylum~~ {international protection} are taken after an appropriate examination. To that end, Member States shall ensure that:*
>
> *[…]*
>
> *(b) precise and up-to-date information is obtained from various sources, such as {EASO} and ~~the United Nations High Commissioner for Refugees (UNHCR)~~ UNHCR {and relevant international human rights organisations}, as to the general situation prevailing in the countries of origin of applicants ~~for asylum~~ and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;*

The CJEU held that the duty of the Member State to cooperate with the applicant does not extend to supplying the applicant, before the adoption of a negative decision on his or her application, with the elements on which it intends to base its decision and to seek the applicant's observations in that regard (para.60). On the contrary, the appraisal of the conclusions to be drawn from the evidence provided in support of the application concerns the second stage of the assessment, which is solely the responsibility of the competent national authority of the Member State concerned (paras.69-70).

5. Assessment of credibility

In March 2013, the Dutch Council of State referred the following question to the CJEU in the joined cases of *A, B and C*:[69]

> "What limits do Article 4 of [the QD], and the Charter of Fundamental Rights of the European Union, in particular Articles 3 ['Right to the integrity of the person'] and 7 ['Respect for private and family life'] thereof, impose on the method of assessing the credibility of a declared sexual orientation, and are those limits different from the limits which apply to assessment of the credibility of the other grounds of persecution and, if so, in what respect?"

The hearing of the case by the CJEU was still pending at the time of writing at the end of 2013.

E. Table of cases

CJEU judgments

Bundesrepublik Deutschland v. B and D (Germany), Joined Cases C-57/09 and C-101/09, Judgment [GC] of 9 November 2010 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR statement]

Bundesrepublik Deutschland v. Y and Z (Germany), Joined Cases C-71/11 and C-99/11, Judgment [GC] of 5 September 2012 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR statement]

European Commission v. Finland, C-102/06, Judgment of 5 February 2009 [Link: Judgment (French)]

European Commission v. Spain, C-272/08, Judgment of 9 July 2009 [Link: Judgment (French)]

European Commission v. Sweden, C-322/08, Judgment of 14 May 2009 [Link: Judgment (French)]

European Commission v. the United Kingdom, C-72/06, Judgment of 5 February 2009 [Link: Judgment (French)]

[69] CJEU, *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, Joined Cases C-148/13, C-149/13 and C-150/13, Raad van State (the Netherlands) of 25 March 2013.

M.M. v. Minister for Justice, Equality and Law Reform, Ireland and Attorney General (Ireland), C-277/11, Judgment of 22 November 2012 [Links: Judgment | Case summary | Advocate General's opinion]

Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie (Netherlands), C-465/07, Judgment [GC] of 17 February 2009 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR statement]

Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal (Hungary), C-364/11, Judgment [GC] of 19 December 2012 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR written submission | UNHCR oral submission]

Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal (Hungary), C-31/09, Judgment [GC] of 17 June 2010 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR statement]

Salahadin Abdulla and Others v. Bundesrepublik Deutschland (Germany), Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, Judgment [GC] of 2 March 2010 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR statement]

X, Y and Z v. Minister voor Immigratie, Integratie en Asiel (Netherlands), Joined Cases C-199/12, C-200/12 and C-201/12, Judgment of 7 November 2013 [Links: Judgment | CJEU press release | Advocate General's opinion | UNHCR written submission | UNHCR oral submission]

References pending before the CJEU at the end of 2013

A, B and C v. Staatssecretaris van Veiligheid en Justitie, Joined Cases C-148/13, C-149/13 and C-150/13, Raad van State (the Netherlands) of 25 March 2013 [Links: Questions (same in all three cases)]

Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides, C-285/12, Reference from Conseil d'État (Belgium) of 7 June 2012, Opinion of Advocate General Mengozzi delivered on 18 July 2013 [Links: Questions | Advocate General's opinion | UNHCR Note (French)]

Andre Lawrence Shepherd v. Federal Republic of Germany, C-472/13, Bayerisches Verwaltungsgericht München (Germany) of 2 September 2013 [Links: Questions]

Mohamed M'Bodj v Conseil des ministers, C-542/13, Reference from Cour constitutionnelle (Belgium) of 17 October 2013 [Link: Questions]

Judgments of the ECtHR

NA. v. the United Kingdom, No. 25904/07, Judgment of 17 July 2008 [Links: Judgment | Case summary]

Sufi and Elmi v. the United Kingdom, Nos. 8319/07 and 11449/07, Judgment of 28 June 2011 [Links: Judgment | Case summary]

1.3 Protection accorded to persons granted refugee status or subsidiary protection status

A. Introduction

Under EU law, persons granted refugee status or subsidiary protection status benefit from "international protection" as defined in Chapter VII of the Qualification Directive ("initial QD") and its recast ("recast QD").[1]

The content of such protection depends on whether the person concerned has been granted refugee status or subsidiary protection status, although the adoption of the recast QD led to a greater approximation between the two statuses, in particular with regard to access to employment and health care.[2]

Accompanying family members who do not individually qualify for refugee status or subsidiary protection status are also entitled to the benefits provided for in Chapter VII of the QD. Whereas the initial QD allowed Member States to attach conditions to such benefits insofar as family members of beneficiaries of subsidiary protection are concerned, the recast QD removed this limitation.[3]

Under EU law more generally, persons granted refugee status also benefit from the provisions of the Family Reunion Directive[4] and of the amended Long-Term Residents Directive.[5] Persons granted subsidiary protection status also benefit from the provisions of the latter directive, but are not covered by the former directive.[6]

Refugees may also specifically be included within the personal scope of certain other EU legislative acts which are not of general application and from which they would not otherwise benefit, such as the Regulation on the Coordination of Social Security Systems.[7]

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[1] Chapter VII of the QD does not apply to persons who are recognized as refugees but nevertheless denied refugee status under Article 14(4) and (5) of the QD. Article 14(6) QD provides that such persons "are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31, 32 and 33 of the Geneva Convention in so far as they are present in the Member State."

[2] Article 26 QD ('Access to employment') and Article 29 QD ('Healthcare') [Article 30 Recast].

[3] Compare the difference in wording of Article 23(2) in the initial QD and in the recast QD. Note that although the initial QD allows Member States to attach conditions concerning family members of beneficiaries of subsidiary protection, it nevertheless requires that an "adequate standard of living" be guaranteed. Note further Recital 29 of the initial QD: "While the benefits provided to family members of beneficiaries of subsidiary protection status do not necessarily have to be the same as those provided to the qualifying beneficiary, they need to be fair in comparison to those enjoyed by beneficiaries of subsidiary protection status."

[4] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [Link].

[5] Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection [Link].

[6] Article 3(2)(c) Family Reunion Directive.

[7] See recital 7 and Articles 1(h) and 2(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [Link].

The present chapter covers the case law of the CJEU concerning the elements of international protection that are defined in Chapter VII of the QD. It uses the same notation and terminology for referring to the QD as the previous chapter.

B. The CJEU case law on the content of 'international protection' within the meaning of the QD

1. Introduction

As of the end of 2013, the only point that had already been addressed by the CJEU in relation to Chapter VII of the QD was a point about *non-refoulement*, as mentioned below.

Additionally, there were two cases pending before the CJEU concerning the interpretation of provisions in Chapter VII of the QD. One case concerned the grounds for issuing and revoking residence permits;[8] the other case concerned the treatment of "vulnerable persons".[9]

2. *Non-refoulement*

Article 21 QD
('Protection from refoulement')

1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:

(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or

(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.

3. Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies.

Article 33 of the 1951 Refugee Convention

1. No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

In *B and D*,[10] the CJEU pointed out that the provisions of Article 21(2) QD reflect those of Article 33(2) of the 1951 Refugee Convention:

> "It is appropriate to point out … that, within the system of [the QD], any danger which a refugee may currently pose to the Member State concerned is to be taken into consideration … [*inter alia*

[8] CJEU, *H.T. v Land Baden-Württemberg*, C-373/13, Reference from Verwaltungsgerichtshof Baden-Württemberg (Germany) of 2 July 2013.
[9] CJEU, *H.T. v Land Baden-Württemberg*, C-373/13, Reference from Verwaltungsgerichtshof Baden-Württemberg (Germany) of 2 July 2013.
[10] CJEU, *Bundesrepublik Deutschland v. B and D*, Joined Cases C-57/09 and C-101/09, Judgment of 9 November 2010.

under] Article 21(2) of the directive, which provides that the host Member State may – as it is also entitled to do under Article 33(2) of the 1951 Geneva Convention – *refoule* a refugee where there are reasonable grounds for considering him to be a danger to the security or the community of that Member State." (para.101)

3. Residence permits

Pending case: In the case of *HT*,[11] which was pending before the CJEU at the end of 2013, the CJEU was asked *inter alia* about the relationship between the exception to the prohibition of *refoulement* in Article 21(2) QD, and the reference to "compelling reasons of national security and public order" in Article 24(1) QD:

> **Article 24(1) QD**
> **('Residence permits')**
>
> *As soon as possible after ~~their status~~ international protection has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least 3 years and renewable{,} unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3).*
>
> *[…]*

The CJEU was also asked how "compelling reasons of national security or public order" should be interpreted in relation to "the risks represented by support for a terrorist association".

In detail, the questions asked were as follows:

"1. (a) Must the rule contained in the first subparagraph of Article 24(1) of [the QD], concerning the obligation of Member States to issue a residence permit to persons who have been granted refugee status, be observed even in the case of revocation of a previously issued residence permit?

(b) Must that rule therefore be interpreted as meaning that it precludes the revocation or termination of the residence permit (by expulsion under national law, for example) of a beneficiary of refugee status in cases where the conditions laid down in Article 21(3) in conjunction with (2) of [the QD] are not fulfilled or there are 'compelling reasons of national security or public order' within the meaning of the first subparagraph of Article 24(1) of [the QD]?

2. If the first question is to be answered in the affirmative:

(a) How must the ground for exclusion of 'compelling reasons of national security or public order' in the first subparagraph of Article 24(1) of [the QD] be interpreted in relation to the risks represented by support for a terrorist association?

(b) Is it possible for 'compelling reasons of national security or public order' within the meaning of the first subparagraph of Article 24(1) of [the QD] to exist in the case where a beneficiary of refugee status has supported the PKK, in particular by collecting donations and regularly participating in PKK-related events, even if the conditions for non-compliance with the principle of non-refoulement laid down in Article 33(2) of the Geneva Convention relating to the Status of Refugees and also, therefore, the conditions laid down in Article 21(2) of [the QD] are not fulfilled?

3. If Question 1(a) is to be answered in the negative:

[11] CJEU, *H.T. v Land Baden-Württemberg*, C-373/13, Reference from Verwaltungsgerichtshof Baden-Württemberg (Germany) of 2 July 2013.

> Is the revocation or termination of the residence permit issued to a beneficiary of refugee status (by expulsion under national law, for example) permissible under European Law only in cases where the conditions laid down in Article 21(3) in conjunction with (2) of [the QD] (or the identically-worded provisions of [the recast QD]) are satisfied?"

4. Vulnerable persons

Pending case: In the case of *M'Bodj*,[12] which was pending before the CJEU at the end of 2013, the CJEU was asked *inter alia* about the obligation in Article 20(3) QD to take into account the specific situation of "vulnerable persons" in implementing Chapter VII of the QD:

> **Article 20(3) QD**
> **('General rules')**
>
> *When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children{, victims of human trafficking, persons with mental disorders} and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.*

The question concerned the access of beneficiaries of subsidiary protection to social welfare and healthcare bearing in mind the provisions of Belgian law concerning allowances for disabled persons.

C. Table of cases

CJEU judgments

Bundesrepublik Deutschland v. B and D (Germany), Joined Cases C-57/09 and C-101/09, Judgment [GC] of 9 November 2010 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR statement]

Cases pending a ruling by the CJEU at the end of 2013

H.T. v Land Baden-Württemberg, C-373/13, Reference from Verwaltungsgerichtshof Baden-Württemberg (Germany) of 2 July 2013 [Link: Questions]

Mohamed M'Bodj v Conseil des ministers, C-542/13, Reference from Cour constitutionnelle (Belgium) of 17 October 2013 [Link: Questions]

[12] CJEU, *Mohamed M'Bodj v Conseil des ministers*, C-542/13, Reference from Cour constitutionnelle (Belgium) of 17 October 2013.

1.4 Asylum procedures

A. Introduction

Under EU law, it is for each Member State to decide its own procedural rules for safeguarding the rights that individuals derive from EU law, except where EU rules regulate the matter. This principle – known as the "principle of national procedural autonomy" – is coupled with two other general principles of EU law, the "principle of equivalence" and the "principle of effectiveness". As stated by the CJEU:

> "[I]t is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from [EU] law, *provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by [EU] law (principle of effectiveness)*" (emphasis added).[1]

With regard to national asylum procedures, two secondary instruments of EU law lay down rules limiting the national procedural autonomy of the Member States: (i) the Asylum Procedures Directive ("initial APD") and its recast ("recast APD"), which regulate national procedures for granting and withdrawing refugee status and subsidiary protection status; (ii) the Dublin Regulation ("Dublin II") and its recast ("Dublin III"), which establish the criteria and mechanisms determining the Member State responsible for examining an application for refugee status or subsidiary protection status. As with any other secondary instrument of EU law, these instruments must be interpreted and applied in conformity with the EU Treaties, the EU Charter on Fundamental Rights and general principles of EU law.

Additionally, the EU Charter and general principles of EU law in and of themselves establish rules limiting national procedural autonomy in asylum procedures, insofar as those rules have not already been incorporated into the abovementioned instruments. The rules help secure the effectiveness of

[1] CJEU, *J. van der Weerd and others*, Joined Cases C-222/05 to C-225/05, Judgment of 7 June 2007, para. 28.

the provisions on refugee status and subsidiary protection status in the Qualification Directive, and include, in particular, the right to be heard and the right to an effective remedy.

The present chapter covers the CJEU's case law on asylum procedures except for procedures that are regulated by the Dublin Regulation, which are covered separately in chapter 1.5.

For further information on the initial APD and recast APD, see:

1. Text of the initial APD (2005/85/EC) [Link]
2. Text of the recast APD (2013/32/EU) [Link]
3. UNHCR provisional comments on the Council proposal for the initial APD, 10 February 2005 [Link]
4. UNHCR comparative analysis of the application of the initial APD in 12 EU Member States, March 2010 [Full report: Link] [Key findings and recommendations: Link]
5. European Commission impact assessment of the initial APD, 21 October 2009 [Link]
6. Report from the Commission to the European Parliament and the Council on the application of the initial APD, 8 September 2010 [Link]
7. UNHCR comments on the Commission's proposal for a recast of the initial APD, August 2010 [Link]
8. UNHCR comments on the Commission's amended proposal for a recast of the initial APD, January 2012 [Link]

Deadlines for transposition of the APD: Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the initial APD by 1 December 2007, with the exception of Article 15 regarding the right to legal assistance and representation, for which the deadline was 1 December 2008.[2]

Member States are required to transpose the recast APD by 20 July 2015, with the exception of paragraphs 3, 4 and 5 of Article 31 regarding the time limits for concluding the examination at first instance, for which the deadline for transposition is 20 July 2018.[3]

Transitional provisions: Article 52 of the recast APD provides that the national measures required to comply with its provisions shall apply to applications for international protection lodged, and procedures for the withdrawal of international protection started, after the deadline for transposition of the provisions concerned or an earlier date. Applications lodged before that date shall be governed by the national measures that were adopted to comply with the initial APD.

EU Member States bound by the APD: All EU Member States except the following are bound by the APD:

(i) Denmark did not take part in the adoption of the initial APD and was not bound by its terms;[4]

(ii) Denmark, Ireland and the UK did not take part in the adoption of the recast APD and are not bound by its terms,[5] although Ireland and the UK remain bound by the initial APD.

[2] Article 43 initial APD.
[3] Article 51 recast APD.
[4] Recital 34 initial APD.
[5] Recitals 58 and 59 recast APD.

Article 53 of the recast APD provides that, with effect from 21 July 2015, the initial APD is repealed for the Member States bound by the recast.

B. The CJEU case law on asylum procedures

1. Introduction

As of the end of 2013, preliminary rulings by the CJEU concerning asylum procedures had addressed the following issues: (i) purpose and scope of the initial APD; (ii) inadmissible applications; (iii) the use of accelerated or prioritized procedures at first instance; (iv) the right to be heard, including in a procedure for the examination of applications for subsidiary protection outside the framework of the initial APD; (v) effective remedies.

Additionally, the CJEU had decided an action for annulment brought by the European Parliament against the Council of the European Union, concerning the legislative procedure set out in the initial APD for the adoption of a "minimum common list of third countries regarded as 'safe countries of origin'" and a "common list of third countries regarded as 'European safe third countries'".[6] The CJEU had also decided an infringement action brought by the European Commission against Ireland, in which it held that Ireland had failed to meet its obligations for transposing the initial APD within the deadline required by the directive.[7]

Two preliminary references were pending before the CJEU at the end of 2013. One case concerned the timing of the consideration of an application for subsidiary protection;[8] the other case concerned the suspensive effect of an appeal against the rejection of an application for subsidiary protection at first instance.[9]

Although all of the case law discussed below concerns the initial APD, much of it is likely to remain of relevance to the interpretation and application of the recast APD, as discussed in the sub-sections marked "**►Recast APD◄**".

2. Purpose and scope of the APD

a) Common minimum standards for asylum procedures

In *Samba Diouf*,[10] the CJEU characterized the objective of the initial APD as being "to establish a common system of safeguards serving to ensure that the [1951] Geneva Convention and fundamental rights are fully complied with" (para.61).

In *H.I.D. and B.A.*,[11] the CJEU noted that, as set out in recitals 3 and 4 and in Article 1 of the initial APD, the purpose of the initial APD is "to establish common minimum standards for fair and efficient asylum procedures in the Member States" (para.57). At the same time, the CJEU stressed the fact that

[6] CJEU, *European Parliament v. Council of the European Union*, C-133/06, Judgment [GC] of 6 May 2008.
[7] CJEU, *European Commission v. Ireland*, C-431/10, Judgment of 7 April 2011.
[8] *H.N. v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (Ireland)*, C-604/12, Reference from Supreme Court (Ireland) of 27 December 2012, Opinion of Advocate General Bot delivered on 7 November 2013.
[9] CJEU, *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida (Belgium)*, C-562/13, Reference from Cour du travail de Bruxelles of 31 October 2013.
[10] CJEU, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration (Luxembourg)*, C-69/10, Judgment of 28 July 2011.
[11] CJEU, *H.I.D. and B.A. v. Refugee Applications Commissioner and Others (Ireland)*, C-175/11, Judgment of 31 January 2013.

Member States enjoy "in a number of respects, a discretion with regard to the implementation of the provisions of [the directive] in light of the particular features of national law" (para.63).[12]

It should be noted that according to recitals 3 and 4 of the initial APD, the "minimum standards" laid down therein represent a "first measure" leading in the longer term to Community rules leading to a "common asylum procedure" in the European Community, whereas recital 12 of the recast APD states that the main objective of the recast is to "further develop" procedural standards, again with a view to establishing a "common asylum procedure" in the EU.[13]

Both the initial APD and the recast APD provide that Member States may introduce or retain more favourable procedural standards than in the directive, insofar as as those standards are compatible with the directive.[14]

b) Applicability of the APD to applications for subsidiary protection

As noted by the CJEU in *M.M.*,[15] Article 3 of the initial APD provides that the initial APD does not apply to applications for subsidiary protection except where:

> "a Member State establishes a single procedure in which an application is examined in the light of both forms of international protection, namely asylum and subsidiary protection. In such a situation, the rules set out in that directive must be applied throughout the procedure, thus also when the competent national authority examines an application for subsidiary protection." (para.79)

►Recast APD◄ In contrast to the initial APD, Article 3(1) of the recast APD provides that the recast APD applies to *all* applications for international protection, including subsidiary protection status.

c) Applicability of the APD to procedures governed by the Dublin Regulation

As stated in recital 29 of its preamble, the initial APD does not apply to procedures governed by the Dublin II Regulation establishing the criteria and mechanisms for determing the Member State responsible for examining an asylum application. As held by the CJEU, this means *inter alia* that the appeal procedures in the initial APD do not apply to appeals under the Dublin II Regulation (*Abdullahi*,[16] para.50). It also means that the rules in the initial APD providing for various forms of cooperation between UNHCR and Member States – including as regards obtaining country information from UNHCR,[17] allowing UNHCR access to applicants and to information on individual applications for asylum,[18] and allowing UNHCR to present its views on individual applications[19] – do not apply to the process of determining the Member State responsible for examining the asylum

[12] The CJEU here reaffirmed what it had said earlier in *Samba Diouf*, para. 29.
[13] The initial APD was adopted under Article 63(1) TEC, whereas the recast APD was adopted under Article 78(1) and (2) of the TFEU. While Article 63(1)(d) TEC required the adoption of "minimum standards on procedures in Member States for granting or withdrawing refugee status", Article 78(2)(a) TFEU required the adoption of "common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status".
[14] Article 5 APD.
[15] CJEU, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland and Attorney General (Ireland)*, C-277/11, Judgment of 22 November 2012.
[16] CJEU, *Shamso Abdullahi v. Bundesasylamt (Austria)*, C-394/12, Judgment of 10 December 2013, para. 50.
[17] Article 8(2)(b) initial APD.
[18] Article 21(1)(a) and (b) of the initial APD.
[19] Article 21(1)(c) initial APD.

application (*Halaf*,[20] para.45). However, as discussed further in chapter 1.5 of this manual, it does not mean that cooperation with UNHCR is precluded during the Dublin procedure.

It also does not mean that the initial APD applies to applicants only after the Dublin procedure has been concluded. As the CJEU observed in *CIMADE and GISTI*,[21] an application for asylum is made before the process of determining the Member State responsible under the Dublin II Regulation even begins (para.41).[22] Additionally, as follows from a combined reading of Article 7(1) and Article 2(k) of the initial APD, the right of the applicant to "remain in the Member State" applies not only with respect to the Member State responsible for examining the application of the individual concerned, but also with respect to the Member State in which the application was lodged (paras.46-49):

> **Article 2(k) initial APD**
> **('Definitions')**
>
> *'remain in the Member State' means to remain in the territory, including at the border or in transit zones, of the Member State in which the application for asylum has been made or is being examined.*

> **Article 7(1) initial APD**
> **('Right to remain in the Member State pending the examination of the application')**
>
> *Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit.*

►Recast APD◄ Whereas recital 29 of the initial APD states that the initial APD does not deal with "procedures" governed by the Dublin II Regulation, recital 53 of the recast APD states that the recast APD does not deal with "procedures *between Member States*" (emphasis added) that are governed by the Dublin III Regulation. Recital 54 of the recast APD goes on to say that the recast APD should apply to "applicants to whom the Dublin III Regulation applies, in addition and without prejudice to the provisions of that Regulation". Similarly, recital 12 of the Dublin III Regulation states that the recast APD should apply "in addition and without prejudice to the provisions concerning the procedural safeguards regulated under this Regulation, subject to the limitations in the application of that Directive".

3. Procedures at first instance

a) Inadmissible applications

Article 25 of the initial APD lists the circumstances under which Member States may consider an asylum application as inadmissible:

> **Article 25 initial APD**
> **('Inadmissible applications')**
>
> *1. In addition to cases in which an application is not examined in accordance with [the Dublin II Regulation], Member States are not required to examine whether the applicant qualifies as a refugee*

[20] CJEU, *Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet (Bulgaria)*, C-528/11, Judgment of 30 May 2013, para. 45.

[21] CJEU, *Cimade, Groupe d'ínformation et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration (France)*, C-179/11, Judgment of 27 September 2012.

[22] Here, the CJEU was referring to an application for asylum as defined by the Dublin II Regulation. But note that the CJEU had already said earlier at para. 19 of its judgment that the definition of an application for asylum in the initial APD is, in essence, identical to the definition given in the Dublin II Regulation.

> *in accordance with [the Qualification Directive] where an application is considered inadmissible pursuant to this Article.*
>
> *2. Member States may consider an application for asylum as inadmissible pursuant to this Article if:*
>
> *(a) another Member State has granted refugee status;*
>
> *(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26;*
>
> *(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 27;*
>
> *(d) the applicant is allowed to remain in the Member State concerned on some other grounds and as result of this he/she has been granted a status equivalent to the rights and benefits of the refugee status by virtue of [the initial Qualification Directive];*
>
> *(e) the applicant is allowed to remain in the territory of the Member State concerned on some other grounds which protect him/her against refoulement pending the outcome of a procedure for the determination of status pursuant to point (d);*
>
> *(f) the applicant has lodged an identical application after a final decision;*
>
> *(g) a dependant of the applicant lodges an application, after he/she has in accordance with Article 6(3) consented to have his/her case be part of an application made on his/her behalf, and there are no facts relating to the dependant's situation, which justify a separate application.*

As of the end of 2013, the CJEU had addressed the issue of "identical applications" in Article 25(2)(f) of the initial APD.

'Identical' applications: In the case of *MA, BT and DA,*[23] the CJEU stated that it is clear from Article 25 of the initial APD that a Member State need not examine whether an applicant is a refugee where his or her asylum application is considered inadmissible because, *inter alia*, it is identical to one previously made in another Member State in respect of which a final decision has been taken against the applicant (paras.13&63-64). In other words, the CJEU appears to be saying that for purposes of Article 25(2)(f) of the initial APD, the previous application could have been made not only in the Member State that is deciding the current application, but in another Member State.

►Recast APD◄ Article 33(2)(d) of the recast APD replaces Article 25(2)(f) of the initial APD and provides that Member States may consider an application inadmissible if "the application is a subsequent application, where no new elements or findings relating to the examination of whether the applicant qualifies as a beneficiary of international protection by virtue of [the recast Qualification Directive] have arisen or have been presented by the applicant". Article 2(q) of the recast APD defines a "subsequent application" as "a further application for international protection made after a final decision has been taken on a previous application, including cases where the applicant has explicitly withdrawn his or her application and cases where the determining authority has rejected an application following its implicit withdrawal in accordance with Article 28(1)." There is no express reference as to whether the previous application must have made in the same Member State in which the subsequent application was made.

b) Prioritized and accelerated examination procedures

Definition of 'prioritized' and 'accelerated': "Prioritized" and "accelerated" procedures are provided for in Article 23 of the initial APD, and are referred to in recital 11 of its preamble:

[23] *MA, BT and DA v. Secretary of State for the Home Department*, C-648/11, Judgment of 6 June 2013.

Recital 11 initial APD

It is in the interest of both Member States and applicants for asylum to decide as soon as possible on applications for asylum. The organisation of the processing of applications for asylum should be left to the discretion of Member States, so that they may, in accordance with their national needs, prioritise or accelerate the processing of any application, taking into account the standards in this Directive.

Article 23 initial APD
('Examination procedure')

1. Member States shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees of Chapter II.

2. Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.

Member States shall ensure that, where a decision cannot be taken within six months, the applicant concerned shall either:

(a) be informed of the delay; or

(b) receive, upon his/her request, information on the time-frame within which the decision on his/her application is to be expected. Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time-frame.

3. Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees of Chapter II, including where the application is likely to be well-founded or where the applicant has special needs.

4. Member States may also provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritised or accelerated if:

(a) […]

[…]

(o) […]

As of the end of 2013, the CJEU had been asked about the use of "accelerated" procedures in the case of *Samba Diouf*, and about the use of "accelerated or prioritized" procedures in the later case of *H.I.D. and B.A.*

The CJEU noted in *Samba Diouf* that the initial APD does not define the concept of an "accelerated" procedure (para.33). The Court did not seek to offer a definition itself, and nor did it explicitly seek to compare or define the difference between the concept of an "accelerated" procedure and the concept of a "prioritized" procedure in the subsequent case of *H.I.D. and B.A.* However, in the latter case, the Court did refer at one point to the decision open to Member States to "examine [an application] in priority, or by way of an accelerated procedure", thus suggesting that the procedure does not itself change when the application is prioritized (para.70).

►Recast APD◄ In contrast to the initial APD, recitals 19 and 20 of the recast APD distinguish between a "prioritized examination" and an "accelerated procedure" and give some indication as to what is meant by these terms for purposes of the recast APD, even though they are not included in the list of definitions in Article 2 of the recast APD:

Recital 19 recast APD

In order to shorten the overall duration of the procedure in certain cases, Member States should have the flexibility, in accordance with their national needs, to prioritise the examination of any application by examining it before other, previously made applications, without derogating from normally applicable procedural time limits, principles and guarantees.

Recital 20 recast APD

In well-defined circumstances where an application is likely to be unfounded or where there are serious national security or public order concerns, Member States should be able to accelerate the examination procedure, in particular by introducing shorter, but reasonable, time limits for certain procedural steps, without prejudice to an adequate and complete examination being carried out and to the applicant's effective access to basic principles and guarantees provided for in this Directive.

Grounds for applying a prioritized or accelerated procedure: In the cases of both *Samba Diouf* and *H.I.D and B.A.*, the CJEU held that the grounds for prioritizing or accelerating the procedure that are listed in Article 23(3) and (4) of the initial APD are non-exhaustive.

Although in *Samba Diouf* the CJEU was not asked specifically about the grounds according to which the examination procedure may be prioritized or accelerated, it observed that:

> "the organisation of the processing of applications for asylum is, as stated in recital 11 to [the initial APD], left to the discretion of Member States, which may, in accordance with their national needs, prioritise or accelerate the processing of any application, taking into account the standards provided for by the directive, without prejudice, in the words of Article 23(2) of the directive, to an adequate and complete examination. Attention is also drawn, in recital 11, to the fact that it is in the interests of both Member States and applicants for asylum to decide as soon as possible on applications for asylum." (para.30)

In *H.I.D. and B.A.*, the CJEU was asked specifically whether the initial APD must be interpreted as precluding the examination under an accelerated or prioritized procedure of certain categories of asylum application on the basis of the nationality or country of origin of the applicant.

The Court answered that the wording of recital 11 and Article 23 of the initial APD reflected the intention of the EU legislature to leave a "broad discretion" to Member States in implementing the examination procedure: (para.65)

> "… the terms used ('any examination') indicate that the possibility given to Member States to prioritise certain asylum applications or to accelerate their examination cannot be limited to the cases set out in Article 23(3). The use of the term 'including' in Article 23(3) implies that such a procedure may be applied to both well-founded and unfounded applications.
>
> … Likewise, under Article 23(4) … Member States 'may' prioritise or accelerate the procedure on the basis of one of the 15 specific grounds justifying the implementation of such a procedure.
>
> … [I]t follows from the wording of Article 23(3) and (4) that the list of applications which can be subject to prioritised or accelerated examination is indicative and non-exhaustive. Member States may thus decide to examine in priority, or by way of an accelerated procedure, applications which do not fall within any of the categories listed in paragraph (4), provided that they comply with the basic principles and guarantees set out in Chapter II of [the initial APD]." (paras.68-70)

The CJEU considered whether prioritizing or accelerating the procedure on the basis of the applicant's nationality or country of origin might violate the principle of non-discrimination, but decided that it would not since the applicant's country of origin and nationality play a "decisive role" in matters of asylum and, in particular, under the system established by the APD (para.71).[24]

[24] The CJEU noted that: (i) "is clear from Article 8(2)(b) of the [initial APD] that the country of origin of the applicant has a bearing on the determining authority's decision, given that the determining authority is required to keep abreast of the general situation existing in that country in order to determine whether a danger exists for the applicant for asylum and, if necessary, whether that person has need of international protection" (para.71); (ii) "as appears from recital 17 in

►**Recast APD**◄ Not all of the CJEU's observations above will be of relevance to the procedures set out in the recast APD. As noted above, recitals 19 and 20 of the recast APD make a clearer distinction between procedures that are "accelerated" and examinations that are "prioritized". Although recital 19 of the recast APD states that Member States should continue to have the flexibility to prioritize "any" application, recital 20 of the recast APD limits recourse to an accelerated procedure to "well-defined circumstances where an application is likely to be unfounded or where there are serious national security or public order concerns". Recital 21 of the recast APD adds that "[a]s long as an applicant can show good cause, the lack of documents on entry or the use of forged documents should not *per se* entail an automatic recourse to border or accelerated procedures". The relevant enacting provisions can be summarized as follows:

Recast APD

Prioritized examination:

Article 31(7) of the recast APD provides that Member States "may" prioritize examination of an application "in particular" where the application is likely to be well-founded or the applicant is "vulnerable" within the meaning of Article 22 of the recast Reception Conditions Directive, or is in need of "special procedural guarantees" as provided for in Article 24 of the recast APD.

Accelerated procedure:

Article 31(8) of the recast APD stipulates that Member States "may" provide that an examination procedure be accelerated "if" the applicant falls within one of ten enumerated grounds. However, this is qualified by Article 24(3) of the recast APD which provides that Member States "shall not" apply accelerated procedures to applicants in need of special procedural guarantees – in particular where the need is as a result of torture, rape or other forms of psychological, physical or sexual violence – unless adequate support can be provided that enables the persons concerned to benefit from the rights and comply with the obligations of the directive.[25] Article 25(6)(a) of the recast APD further qualifies Article 31(8) of the recast APD by stipulating that Member States may apply accelerated procedures to an unaccompanied minor "only if" he or she: (i) comes from a safe country of origin; (ii) has introduced a subsequent application for international protection following a previous application; (iii) may for serious reasons be considered a danger to the national security or public order of the Member State concerned, or has been forcibly expelled for serious reasons of public security or public order under national law.

Procedural safeguards in prioritized or accelerated procedures under the initial APD: As noted above, the CJEU has observed that, according to Article 23 of the initial APD, the examination of applications under a prioritised or accelerated procedure must be "adequate and complete" and be in accordance with the basic principles and guarantees contained in chapter II of the initial APD. In *H.I.D and B.A.*, the CJEU stressed that applicants subject to a prioritized procedure "must enjoy a sufficient period of time within which to gather and present the necessary material in support of their application, thus allowing the determining authority to carry out a fair and comprehensive examination of those applications and to ensure that the applicants are not exposed to any dangers in their country of origin" (para.75).[26]

the preamble to [the initial APD], the European Union legislature introduced the concept of 'safe country of origin' according to which, when a third country may be regarded as safe, Member States should be able to designate it as safe and presume that a particular applicant will be safe there. The European Union legislature therefore provided under Article 23(4)(c) of that directive that Member States may decide that an examination procedure be prioritised or accelerated in the case where the asylum application is considered unfounded because the applicant is from a safe country of origin within the terms of that directive" (para.72).

[25] See also recital 30 of the recast APD.

[26] At this point, the CJEU referred only to a prioritized procedure, which is what was at issue in the main proceedings, but it is clear that the Court's observations apply to an accelerated procedure as well.

►Recast APD◄ Articles 31(7) and (8) of the recast APD stipulate that the principles and guarantees contained in chapter II of the recast APD apply to the prioritized examination of applications and to the examination of applications under an accelerated procedure. Article 31(2) of the recast APD requires that the examination be "adequate and complete". Recital 19 of the recast APD states that prioritized examinations must not "derogat[e] from normally applicable procedural time limits, principles and guarantees". Recital 20 of the recast APD allows Member States to accelerate the examination procedure "in particular by introducing shorter, but reasonable, time limits for certain procedural steps, without prejudice to an adequate and complete examination being carried out and to the applicant's effective access to basic principles and guarantees provided for in this Directive."

Application made in order to delay or frustrate removal: As the CJEU noted in *Arslan*,[27] Article 23(4)(j) of the initial APD provides that one ground justifying an accelerated or prioritized examination procedure is that the applicant made an application merely in order to delay or frustrate removal (para.61):

> **Article 23(4)(j) initial APD**
>
> *4. Member States may also provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritised or accelerated if:*
>
> *[...]*
>
> *(j) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal; [...]*

The CJEU held that the above provision ensures the effectiveness of the return procedure under the Returns Directive by avoiding suspension of that procedure "beyond what is necessary to process the application properly" (para.61). However, the CJEU added that "the mere fact that an asylum seeker, at the time of the making of his application, is the subject of a return decision and is being detained [for purposes of removal under the Returns Directive] does not allow it to be presumed, without an assessment on a case-by-case basis of all the relevant circumstances, that he has made that application solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary and proportionate to maintain detention" (para.62).

While the CJEU did not say so, presumably the same point would apply to whether the application may be subject to an accelerated or prioritized examination. That is, the mere fact that the applicant is detained for purposes of removal at the time of making his or her application should not allow it to be presumed that the application was made merely in order to delay or frustrate the enforcement of the removal decision and may therefore be subjected to an accelerated or prioritized examination.

The Returns Directive and the CJEU's ruling in *Arslan* are discussed further below in chapter 1.7 on the detention of asylum-seekers.

►Recast APD◄ The CJEU's ruling in *Arslan* would seem equally applicable to Article 31(8)(g) of the recast APD, which provides that the examination procedure may be accelerated and/or conducted at the border or in transit zones if "the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his or her removal".

[27] CJEU, *Mehmet Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie (Czech Republic)*, C-534/11, Judgment of 30 May 2013.

c) "European safe third countries" concept

The initial APD establishes both a "safe third country concept" (recital 23 and Article 27) and a "European safe third countries concept" (recital 24 and Article 36).[28] The rules for applying the two concepts differ, including, for example, as regards the criteria and the methodology for designating a country as a "safe third country" or a "European safe third country". The rules also entail different consequences for the applicant. For example, whereas Member States may reject the application of an individual coming from a "safe third country" as "inadmissible" (Article 25(2)(c)), Member States may provide that

> "no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II ['Basic Principles and Guarantees'], shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a [European] safe third country …" (Article 36(1) initial APD).[29]

As of the end of 2013, the case law of the CJEU had addressed the methodology for designating a country as a "European safe third country",[30] further to an action for annulment brought by the European Parliament.[31]

Whereas the initial APD leaves it to each Member State to decide whether to designate a particular country as a "safe third country", subject to the rules laid down in Article 27, the initial APD stipulates in Article 36(2) that a "European safe third country" is to be designated by the Council of the European Union in accordance with Article 36(3).

Article 36(3) of the initial APD provides that a "common list" of European safe third countries is to be adopted by the Council acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament. However, based on the abovementioned action by the European Parliament, Article 36(3) was annulled by the CJEU on the grounds that it should not have stipulated that the common list of European safe third countries be adopted by the Council only, rather than jointly with the European Parliament through the co-decision procedure required by Article 67(5) TEC.

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[28] Note also the closely related "first country of asylum" concept in Article 26 of the initial APD.

[29] See also Article 36(4) and (6) of the initial APD. Article 36(4) provides: "The Member States concerned shall lay down in national law the modalities for implementing the provisions of paragraph 1 and the consequences of decisions pursuant to those provisions in accordance with the principle of non-refoulement under the Geneva Convention, including providing for exceptions from the application of this Article for humanitarian or political reasons or for reasons of public international law." Article 36(6) provides: "Where the [European] safe third country does not re-admit the applicant for asylum, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II."

[30] CJEU, *European Parliament v. Council of the European Union*, C-133/06, Judgment [GC] of 6 May 2008.

[31] Additionally, the CJEU had made a brief but important reference to "European safe third countries" in *N.S. v. Secretary of State for the Home Department (United Kingdom) and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform (Ireland)*, Joined Cases C-411/10 and C-493/10, Judgment [GC] of 21 December 2011:

> "102. … Article 36 of [the initial APD], concerning the [European] safe third country concept, provides, in paragraph 2(a) and (c), that a third country can only be considered as a 'safe third country' where not only has it ratified the Geneva Convention and the ECHR but it also observes the provisions thereof.
>
> 103. Such wording indicates that the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that that State observes those conventions ..."

Since no subsequent legislative act has been adopted by the EU legislature to establish a common list of European safe third countries on a correct legal basis, the European safe third country concept in the initial APD appears to be left without any practical effect.[32]

►Recast APD◄ The recast APD retains the distinction in principle between the "safe third country concept" (recital 44 and Article 38) and the "European safe third country concept" (recital 45 and Article 39). However, the recast no longer provides for a "common list" of European safe third countries. Instead, Article 39(7) provides that "Member States shall inform the Commission periodically of the countries to which [the European safe third country] concept is applied in accordance with this Article."

d) "Safe country of origin" concept

Article 31 of the initial APD provides for the application of a "safe country of origin" concept, based on countries designated as a "safe country of origin" in accordance with either Article 29 or Article 30 of the initial APD.[33] Article 29 provides for a "minimum common list of third countries regarded as safe countries of origin", to be adopted by the Council of the European Union, whereas Article 30 provides for the designation of "safe countries of origin" by the Member States.

As of the end of 2013, the case law of the CJEU had addressed the question of a "minimum common list of safe countries of origin." This was in the same action for annulment brought by the European Parliament regarding the legislative procedure for adopting the "common list of European safe third countries".[34] Since Article 29 of the initial APD also provided for exactly the same legislative procedure for adopting the "minimum common list of safe countries of origin", the CJEU annulled paragraphs 1 and 2 of that Article.

No subsequent legislative act has been adopted by the EU legislature to establish a common list of safe countries of origin on a correct legal basis. Therefore, the application of the "safe country of origin" concept in Article 31 of the initial APD is based only the national designation of a country as as "safe country of origin" by the Member States.

►Recast APD◄ Article 36 of the recast APD retains the "safe country of origin" concept,[35] but the recast no longer provides for a "minimum common list" of safe countries of origin. The designation of a country as a "safe country of origin" is therefore left to the Member States alone (Article 37 of the recast).

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[32] Note, however, that this conclusion may possibly be subject to the exception provided for in Article 36(7) of the initial APD: "Member States which have designated third countries as safe countries in accordance with national legislation in force on 1 December 2005 and on the basis of the criteria in paragraph 2(a), (b) and (c), may apply paragraph 1 to these third countries until the Council has adopted the common list pursuant to paragraph 3." In other words, Article 36(7) of the initial APD may exceptionally allow a Member State to apply the European safe third country concept where, prior to the adoption of the initial APD, that Member State had designated a third country as a safe third country on the basis of the criteria that were subsequently used to a define a European safe third country in Article 36(2) of the initial APD. However, since Article 36(7) was only intended to apply for an interim period until the Council had adopted the common list, it is questionable whether it is still valid given the annulment of Article 36(3).

[33] See also Annex II, recitals 17 to 21, and Article 23(4)(c) of the initial APD. Note that according to Article 23(4)(c) of the initial APD, the examination of an asylum application may be prioritized or accelerated if the application is considered to be unfounded because the applicant comes from a "safe country of origin".

[34] CJEU, *European Parliament v. Council of the European Union*, C-133/06, Judgment [GC] of 6 May 2008.

[35] See also recital 32, recitals 40 to 42, recitals 46 to 48, and Article 31(8)(b) of the recast APD.

e) The right to be heard

Question before the CJEU: In *M.M.*,[36] the CJEU examined the situation where a Member State (Ireland) has chosen to establish two separate procedures for examining eligibility for refugee status and subsidiary protection status (para.80). As noted above, in such a situation the initial APD only applies to the examination of applications for refugee status, and the issue before the CJEU was therefore whether in the subsidiary protection procedure an applicant can derive procedural rights – in particular a right to be heard – from another source of EU law. The specific situation in Ireland was that, according to national case law, it was not necessary to observe the right to be heard when examining an application for subsidiary protection made following the rejection of an application for refugee status, given that the applicant will already have been heard in respect of his or her application for refugee status and given that the procedures for examining eligibility for refugee status and subsidiary protection status were closely linked (para.80).

Ruling by the CJEU: First, the CJEU observed that respect for the rights of the defence is a fundamental principle of EU law, inherent to which is the right to be heard in all proceedings (paras. 81-82).

Second, the Court stated that the right to be heard is now affirmed not only in Articles 47 and 48 of the EU Charter, respectively guaranteeing the right of defence and the right to fair legal process in all judicial proceedings, but also in Article 41(2) of the Charter: (para.82)

> **Article 41 EU Charter**
> **('Right to good administration')**
>
> *1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.*
>
> *2. This right includes:*
>
> *(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
>
> *(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
>
> *(c) the obligation of the administration to give reasons for its decisions.*
>
> *[…]*

The CJEU then went on to recall the procedural requirements relating to the right to be heard as elaborated in its existing case law on that right as it stems from the rights of the defence as a general principle of EU law:[37]

(i) the right to be heard must apply in all proceedings which are liable to culminate in a measure adversely affecting a person (para.85);

(ii) observance of the right to be heard is required even where the applicable EU legislation does not expressly so provide (para.86);

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[36] CJEU, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland and Attorney General (Ireland)*, C-277/11, Judgment of 22 November 2012.

[37] Note that although the CJEU stated that Article 41(2) of the Charter is of general application (para.84), Article 41 of the Charter is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the Union, as the CJEU has held in, for example, *Cicala*, C-482/10, Judgement of 21 December 2011, para.28. Hence, it is the principles contained in Article 41(2) of the Charter that are of general application – by virtue of the fact that they stem from the rights of the defence as a general principle of EU law – not Article 41(2) of the Charter itself.

(iii) the right to be heard guarantees the person concerned the opportunity to make known his or her views effectively during an administration procedure and before the adoption of any decision liable to affect his or her interests adversely (para.87);

(iv) the right to be heard requires the authorities to pay due attention to the views thus submitted, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of the reasons for their decision if negative; it follows from the principle of respect for the right of defence that these reasons must be sufficiently specific and concrete to allow the person concerned to understand why his or her application is being rejected (para.88).

The CJEU concluded that the right to be heard thus understood "must apply fully to the procedure in which the competent national authority examines an application for international protection pursuant to rules adopted in the framework of the Common European Asylum System" (para.89). Accordingly, where a Member State has chosen to establish two separate procedures, one following upon the other:

> "it is important that the applicant's right to be heard, in view of its fundamental importance, be fully guaranteed in each of those two procedures.
>
> … Furthermore, that interpretation is all the more justified in a situation such as that of the case in the main proceedings since, according to the information provided by the referring court itself, the competent national authority, when stating the grounds for its decision to reject the application for subsidiary protection, referred to a large extent to the reasons it had already relied on in support of its rejection of the asylum application, although, under Directive 2004/83 [the initial QD], the conditions which must be fulfilled for the grant of refugee status and for the awarding of subsidiary protection status are different, as is the nature of the rights attaching to each of them" (paras.91-92).
>
> […]
>
> "… it is for the national court to ensure observance, in each of [the two] procedures, of the applicant's fundamental rights and, more particularly, of the right to be heard in the sense that the applicant must be able to make known his views before the adoption of any decision that does not grant the protection requested. In such a system, the fact that the applicant has already been duly heard when his application for refugee status was examined does not mean that that procedural requirement may be dispensed with in the procedure relating to the application for subsidiary protection" (para.95).

►Recast APD◄ As noted above, the recast APD applies to all applications for international protection, including for subsidiary protection. However, that does not negate the continuing relevance of the points made by the CJEU in *M.M.* that Member States must ensure the applicant's fundamental rights, including his or her right to be heard, in national procedures for the granting and withdrawal of refugee status and subsidiary protection status.

Question pending before the CJEU regarding a separate subsidiary protection procedure: In *H.N.*,[38] the CJEU was asked the following question by the Supreme Court of Ireland:

> "Does [the initial APD], interpreted in the light of the principle of good administration in the law of the European Union and, in particular, as provided by Article 41 of the Charter of Fundamental Rights of the European Union, permit a Member State, to provide in its law that an application

[38] *H.N. v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (Ireland)*, C-604/12, Reference from Supreme Court (Ireland) of 27 December 2012, Opinion of Advocate General Bot delivered on 7 November 2013.

> for subsidiary protection status can be considered only if the applicant has applied for and been refused refugee status in accordance with national law?"

As of the end of 2013, Advocate General Bot had delivered his opinion in the case but the CJEU was yet to issue its judgment.

4. Appeals procedures

a) Decisions against which an effective remedy is required

In *Samba Diouf*, the CJEU was called upon to determine whether an applicant has the right to an effective remedy against a decision to examine his or her application in an accelerated procedure. As discussed below, this led the Court to compare the initial APD's requirements for an effective remedy with the requirements for an effective remedy under the EU Charter and fundamental principles of EU law.

First, the CJEU observed that the right to effective judicial protection is a general principle of EU law, to which expression is now given by Article 47 of the EU Charter: (para.49)

> **Article 47 EU Charter**
> **('Right to an effective remedy and to a fair trial')**
>
> *Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.*
>
> *Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.*
>
> *Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*

Second, the CJEU noted that the fundamental principle of the right to an effective remedy itself forms the subject matter of Article 39 of the initial APD, which requires Member States to ensure that applicants have the right to an effective remedy before a court or tribunal against the decisions listed in paragraph 1 of that article: (para.35)

> **Article 39(1) initial APD**
> **('The right to an effective remedy')**
>
> *Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:*
>
> *(a) a decision taken on their application for asylum, including a decision:*
>
> *(i) to consider an application inadmissible [...],*
>
> *(ii) taken at the border or in the transit zones of a Member State [...],*
>
> *(iii) not to conduct an examination [because the applicant is seeking to enter or has entered the territory illegally from a European safe third country];*
>
> *(b) a refusal to re-open the examination of an application after its discontinuation [...];*
>
> *(c) a decision not to further examine the subsequent application [...]*
>
> *(d) a decision refusing entry within the framework of [border procedures established prior to the adoption of the APD];*
>
> *(e) a decision to withdraw refugee status [...].*

Third, the CJEU stated that although the list of decisions in Article 39(1)(a) of the initial APD is non-exhaustive, it is clear from the wording of that Article that the concept of a "decision taken on [the] application for asylum" covers a series of decisions which relate to a final decision at first instance on whether the applicant qualifies for asylum; moreover, the same is true of the decisions listed in Article 39(1)(b) to (e) of the initial APD (para.41). Accordingly, the decisions against which an applicant must have a remedy under Article 39(1) of the directive are "those which entail rejection of the application for asylum for substantive reasons or, as the case may be, for formal or procedural reasons which preclude any decision on the substance" (para.42).

The CJEU concluded that Article 39(1) of the initial APD therefore does not cover "decisions that are preparatory to the decision on the substance or decisions pertaining to the organisation of the procedure" (para.43),[39] and as such does not require Member States to provide for a "specific" or "separate" remedy against a decision to examine an asylum application under an accelerated procedure (para.45).

Nevertheless, the CJEU went on to reason that the right to an effective remedy as a fundamental principle of EU law requires that the decision to use an accelerated procedure should at least be subject to judicial review in the framework of the action brought by the applicant against the decision finally rejecting his or her application at first instance (paras.47-61). The CJEU pointed out that the reasons for examining an application under an accelerated procedure may essentially be the same as the reasons relied on for finally rejecting the application at first instance, and that judicial review of the legality of the latter reasons will be impossible as regards both the facts and the law unless the former reasons can be effectively challenged as well (paras.57-58). Hence, in the framework of the action brought by the applicant against the decision finally rejecting his or her application at first instance, the national court must be able to:

(i) review the merits of the reasons for deciding to examine the application under an accelerated procedure;

(ii) establish whether, as required by Article 23 of the initial APD, the decision to examine the application under an accelerated procedure was taken in compliance with the basic principles and guarantees laid down in Chapter II of the directive. (para.61)

►Recast APD◄ The right to an effective remedy is provided for in Article 46 of the recast APD, which again would appear not to cover "decisions that are preparatory to the decision on the substance or decisions pertaining to the organisation of the procedure". The above ruling of the CJEU in *Samba Diouf* would therefore seem to be of continuing relevance for the application of the recast APD.

b) Time limits for appeal

As the CJEU noted in *Samba Diouf*, Article 39(2) of the initial APD leaves it to Member States to decide on the time-limits and other necessary rules for implementing the right to an effective remedy (para.46):

Article 39(2) initial APD
('The right to an effective remedy')

Member States shall provide for time-limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1.

[39] The CJEU added that if Article 39(1) of the initial APD were to be interpreted as referring to "any" decision taken on an application for asylum, that would not be consistent with the interest of expediency in asylum procedures which, as is clear from recital 11 of the directive, is shared both by Member States and applicants for asylum (para.44).

The issue considered by the CJEU was whether EU law precludes Member States from establishing shorter time limits for bringing an action against a final decision rejecting an application in an accelerated examination procedure than against a final decision rejecting an application in a regular examination procedure.

The CJEU noted that in the national legal system of the Member State concerned (Luxembourg), the time limit for appeal was fifteen days within the applicant being notified of a negative decision taken in an accelerated procedure, as opposed to one month for the regular procedure (para.62). The fifteen-day time limit was intended "to ensure that unfounded or inadmissible applications for asylum are processed more quickly, in order that applications submitted by persons who have good grounds for benefiting from refugee status may be processed more efficiently" (para.65).

The CJEU considered that a shorter time limit for bringing an action in the case of an accelerated procedure is not precluded by EU law provided that the time limit is "sufficient in practical terms to enable the applicant to prepare and bring an effective action" (para.66). A fifteen-day limit did not seem, generally, to be insufficient and appeared "reasonable and proportionate in relation to the rights and interests involved" (para.67). But should that time limit prove, in a given situation, to be insufficient in view of the circumstances, it is for the national court to determine:

> "whether that element is such as to justify, on its own, upholding the action brought indirectly against the decision to examine the application for asylum under an accelerated procedure, so that, in upholding the action, the national court would order that the application be examined under the ordinary procedure." (para.68)

In other words, within the framework of an action brought against a decision finally rejecting an application at first instance, the national court may determine that the time limits for examining the application under an accelerated procedure were insufficient, and therefore order that the application be re-examined under the regular procedure.

►Recast APD◄ In contrast to the initial APD, the recast APD is more specific on the subject of time limits for appeal. Article 46(4) of the recast APD provides that "Member States shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy" and that "[t]he time limits shall not render such exercise impossible or excessively difficult".

c) Number of levels of jurisdiction required

One level of jurisdiction may be sufficient for an effective remedy: In *Samba Diouf*, the CJEU considered whether EU law precludes Member States from providing for only one level of jurisdiction for a remedy against a final decision at first instance rejecting an application that has been examined under an accelerated procedure, in particular where an individual whose application has been finally rejected at first instance after being examined under the regular procedure has recourse to two levels of jurisdiction (para.64).

The CJEU held that EU law does not preclude such a system, since neither Article 39 of the initial APD specifically, nor the principle of effective judicial protection more generally, require there to be two levels of jurisdiction. What matters is that the individual has a right of access to a court or tribunal, as is guaranteed by Article 39 of the initial APD (para.69).

Effectiveness of the administrative and judicial system 'seen as a whole': As the CJEU later went on to examine in *H.I.D. and B.A.*, even against a decision taken in the regular procedure the effectiveness of the remedy will depend, as is stated in recital 27 of the initial APD, on the administrative and judicial system of each Member State "seen as a whole" (para.102):

> **Recital 27 initial APD**
>
> *It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article 234 of the Treaty. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.*

The specific question before the CJEU in *H.I.D. and B.A.* was whether, given the administrative and organizational features of a procedural system like that in Ireland, an appeal against a final rejection of an application at first instance to a tribunal with the competence to give binding decisions in favour of the applicant on all matters of law and fact constitutes an effective remedy (paras.48&78). In particular, the applicants in the main proceedings had submitted that the Irish Refugee Appeals Tribunal was not a "court or tribunal" within the meaning of Article 267 TFEU: (para.81)

> **Article 267 TFEU**
> **(previously Article 234 TEC)**
>
> *The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*
>
> *(a) the interpretation of the Treaties;*
>
> *(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*
>
> *Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.*
>
> *Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.*
>
> *If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.*

The CJEU examined the characteristics of the Irish Refugee Appeals Tribunal against the criteria for determining whether a body is a "court or tribunal" for purposes of Article 267 TFEU, as developed in its settled case law. These criteria include, for example, "whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*,[40] whether it applies rules of law and whether it is independent" (para.83).

It was common ground that the Refugee Appeals Tribunal met the criteria of establishment by law, permanence and application of the rules of law, so the CJEU only needed to examine whether the Tribunal met the criteria of an *inter partes* procedure, compulsory jurisdiction and independence (paras.84-85). The CJEU considered that these criteria were met (paras.86-93),[41] except that in and of itself the Tribunal might not fully meet the requirements of independence given how its ordinary members could be removed from office by the Minister (paras.84-101). But these concerns about independence were allayed by looking at the administrative and judicial system as a whole: since under Irish law applicants may question the validity of a decision of the Refugee Appeals Tribunal before the High Court, the decisions of which are themselves subject to appeal to the Supreme Court,

[40] That is, a procedure "between the parties", as opposed to an "*ex parte*" procedure where only the party bringing the action needs to be present.

[41] The CJEU noted that the requirement that the procedure be *inter partes* is not an absolute criterion and that the procedure before the Tribunal was adequate in this regard.

"[t]he existence of these means of obtaining redress appear, in themselves, to be capable of protecting the Refugee Appeals Tribunal against potential temptations to give in to external intervention or pressure liable to jeopardise the independence of its members" (paras.102-103). The CJEU accordingly concluded that "the criterion of independence is satisfied by the Irish system for granting and withdrawing refugee status and … that system must therefore be regarded as respecting the right to an effective remedy" (para.104).

►Recast APD◄ The above rulings of the CJEU in *Samba Diouf* and *H.I.D. and B.A.* would seem to be equally applicable as regards the right to an effective remedy "before a court or tribunal" in Article 46 of the recast APD.

d) Suspensive effect of appeals

Pending case: In the case of *Moussa Abdida*,[42] the Brussels Cour du Travail referred the following question to the CJEU about the suspensive effect of appeals in the context of an application for subsidiary protection:

> "1. On a proper construction of [the initial Qualification Directive (2004/83/EC), initial Asylum Procedures Directive (2005/85/EC) and initial Reception Conditions Directive (2003/9/EC)], is a Member State which provides that a foreign national has the right to subsidiary protection for the purposes of Article 15(b) of [the initial Qualification Directive] if that person 'suffers from an illness which is of such a kind as to entail a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there is no adequate treatment for that illness in his country of origin' under an obligation to
>
> – provide for a remedy with suspensive effect in respect of the administrative decision refusing leave to remain and/or subsidiary protection, and ordering the person to leave the territory of that State,
>
> – […]
>
> 2. If the answer to Question 1 is in the negative, does the Charter of Fundamental Rights – and, in particular, Articles 1 to 3 (human dignity, right to life and integrity), Article 4 (prohibition of inhuman or degrading treatment), Article 19(2) (right not to be removed to a State where there is a serious risk of inhuman or degrading treatment), Articles 20 and 21 (equality and non-discrimination as compared with other categories of applicants for subsidiary protection) and/or Article 47 (right to an effective remedy) of that Charter – place a Member State in course of transposing [the abovementioned directives] into national law under an obligation to make provision for a remedy with suspensive effect […]?"

The hearing of the case by the CJEU was still pending at the end of 2013.

C. Table of cases

CJEU judgments

Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration (Luxembourg), C-69/10, Judgment of 28 July 2011 [Links: Judgment | Case summary | Advocate General's opinion | UNHCR statement]

Cimade, Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration (France), C-179/11, Judgment of 27 September 2012 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR statement]

European Commission v. Ireland, C-431/10, Judgment of 7 April 2011 [Link: Judgment]

[42] CJEU, *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida (Belgium)*, C-562/13, Reference from Cour du travail de Bruxelles of 31 October 2013.

European Parliament v. Council of the European Union, C-133/06, Judgment [GC] of 6 May 2008 [Link: Judgment | Case summary | CJEU press release | Advocate General's opinion]

H.I.D. and B.A. v. Refugee Applications Commissioner and Others (Ireland), C-175/11, Judgment of 31 January 2013 [Links: Judgment | Case summary | Advocate General's opinion]

J. van der Weerd and others (Netherlands), Joined Cases C-222/05 to C-225/05, Judgment of 7 June 2007 [Links: Judgment | Case summary | Advocate General's opinion]

MA, BT and DA v. Secretary of State for the Home Department (United Kingdom), C-648/11, Judgment of 6 June 2013 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | Order]

M.M. v. Minister for Justice, Equality and Law Reform, Ireland and Attorney General (Ireland), C-277/11, Judgment of 22 November 2012 [Links: Judgment | Case summary | Advocate General's opinion]

Mehmet Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie (Czech Republic), C-534/11, Judgment of 30 May 2013 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion]

N.S. v. Secretary of State for the Home Department (United Kingdom) and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform (Ireland), Joined Cases C-411/10 and C-493/10, Judgment [GC] of 21 December 2011 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion in *N.S.* | Advocate General's opinion in *M.E.* | UNHCR written submission | UNHCR oral submission | Order in *N.S.*]

Shamso Abdullahi v. Bundesasylamt (Austria)), C-394/12, Judgment [GC] of 10 December 2013 [Links: Judgment | Case summary | Advocate General's opinion | Order (French)]

Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet (Bulgaria), C-528/11, Judgment of 30 May 2013 [Links: Judgment | Case summary | UNHCR statement]

References pending before the CJEU at the end of 2013

Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida (Belgium), C-562/13, Reference from Cour du travail de Bruxelles of 31 October 2013 [Link: Questions]

H.N. v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (Ireland), C-604/12, Reference from Supreme Court of 27 December 2012, Opinion of Advocate General Bot delivered on 7 November 2013 [Link: Questions | Advocate General's opinion]

1.5 The Dublin system for determining Member State responsibility for examining an asylum claim

A. Introduction

Under EU law, criteria and mechanisms have been established for determining which Member State is responsible for examining an application for international protection lodged on the territory of one of the Member States. Under this system, known as the "Dublin system", the "Member State responsible" is determined according to a hierarchy of binding criteria. If requested to do so, that Member State is required under a "take charge" or a "take back" procedure to accept the transfer of an applicant who is present in another Member State. If the Member State where the applicant is present does not act in time under those procedures, it becomes the Member State responsible itself. Member States also maintain the prerogative to examine an application for international protection irrespective of whether it is their responsibility to do so; they also retain the right, subject to the rules and safeguards contained in the recast Asylum Procedures Directive (APD), to send the applicant concerned to a "safe third country" that is not a Member State.

The Dublin system originated in the 1990 Schengen Convention[1] and in the 1990 Dublin Convention,[2] outside the framework of European Community (now EU) law. The system has evolved and is now regulated under EU law by the recast Dublin Regulation, the application of which is facilitated by comparison of fingerprint data processed in accordance with the Eurodac Regulation[3]

[1] Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, 19 June 1990, Articles 28 to 38. [Link]

[2] Dublin Convention for determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, 15 June 1990. [Link]

[3] Council Regulation (EC) No 2725 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [Link]; Council Regulation (EC) 407/2002 of 28

and the Regulation concerning the operation of the Visa Information System (VIS).[4] The Dublin system is also regulated under international law by a series of agreements between the EU and those States (Denmark, Iceland, Liechtenstein, Norway and Switzerland) that would not otherwise be able to participate in the system because they are not directly bound by the aforementioned regulations.

The present chapter covers the case law of the CJEU on the initial Dublin Regulation ("Dublin II") and examines its implications for the application and interpretation of the recast Dublin Regulation ("Dublin III").

For further information on the Dublin II Regulation and the Dublin III Regulation, see:

1. Text of the Dublin II Regulation (EC/343/2003) [Link]

2. Text of the Dublin III Regulation (EU/604/2013) [Link]

3. UNHCR discussion paper on the Dublin II Regulation, 2006 [Link]

4. European Commission evaluation of the Dublin system, 6 June 2007 [Links: Report | Annex]

5. European Commission impact assessment of the Dublin II Regulation, 3 December 2008 [Link]

6. UNHCR comments on the Commission's proposal for a recast of the Dublin II Regulation, 18 March 2009 [Link]

7. Website of the Dublin Transnational Project (containing jurisprudence, country reports, etc.) [Link]

8. Eurostat statistics on the Dublin system [Link]

Entry into force and applicability of the Dublin Regulation: The Dublin II Regulation entered into force in March 2003 and applied to all "asylum applications" (i.e. applications for refugee status) lodged as of 1 September 2003.[5] The provisions under which it empowered the European Commission to adopt certain implementing measures were later amended by Regulation EC No 1103/2008 to comply with new requirements for regulatory scrutiny that were introduced in 2006.[6]

The Dublin III Regulation entered into force in July 2013 and applies to all "applications for international protection" (i.e. applications for refugee status and subsidiary protection status) lodged as of 1 January 2014. The criteria for determining the Member State responsible for examining an application for international protection submitted before that date remain those set out in the Dublin II Regulation;[7] however the request to the Member State responsible to "take charge of" or "take back" the applicant is regulated as of 1 January 2014 by the recast provisions of the Dublin III Regulation.[8]

February 2002 laying down certain rules to implement the aforementioned Regulation [Link]. A recast of the Eurodac Regulation was adopted on 26 June 2013 [Link]. The recast will apply from 20 July 2015, as of which date the initial Eurodac Regulation and its implementing rules are repealed.

[4] Regulation (EC) No 767/2008 of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), 9 July 2008 [Link]. Denmark, Ireland and the United Kingdom did not take part in the adoption of the regulation (see recitals 26 and 28 of the regulation.

[5] Article 29 of the Dublin II Regulation.

[6] Regulation (EU) No 1103/2008 of the European Parliament and of the Council of 22 October 2008 dapting a number of instruments subject to the procedure laid down in Article 251 of the Treaty to Council Decision 1999/468/EC, with regard to the regulatory procedure with scrutiny [Link].

[7] Article 49 of the Dublin III Regulation.

[8] *Ibid.*

Rules for the application of the Dublin Regulation: Commission Regulation EC 1560/2003 entered in force in February 2003 and lays down detailed rules for the application of the Dublin II Regulation and now the Dublin III Regulation.[9] Certain of its provisions were repealed by the Dublin III Regulation,[10] and certain other provisions were due to be amended by a Commission Implementing Regulation in early 2014.

EU Member States bound by the Dublin Regulation: All EU Member States were bound by the Dublin II Regulation and are now bound by the Dublin III Regulation, except for Denmark which did not take part in the adoption of either regulation.

Denmark initially remained bound by the Dublin Convention, and continued to participate in the Dublin system on that basis with the Member States even after the Dublin II Regulation was adopted.[11] However, it now participates in the Dublin system through an international legal agreement entered into with the European Community in 2006.[12] The agreement provides for the applicability of the provisions of the Dublin II Regulation and, subject to an opt-in procedure, any future amendments of that regulation, i.e. the recast provisions in the Dublin III Regulation.[13]

The agreement also applies to the provisions of the Eurodac Regulation. On the other hand, Denmark's participation in the Visa Information System, which is part of the Schengen *acquis*, is based on separate international obligations.

The Dublin agreement with Denmark provides for the jurisdiction of the CJEU regarding questions about its validity or interpretation, or complaints of non-compliance with the obligations that it establishes. This means *inter alia* that Denmark may request, and is bound by, preliminary rulings from the CJEU on the interpretation of the Dublin regulations.

Other European States participating in the Dublin system: Iceland, Liechtenstein, Norway and Switzerland all participate in the Dublin system, based on agreements entered into with the European Community and with each other. In particular:

(i) Iceland and Norway participate in the Dublin System on the basis of a 2001 agreement with the European Community, which provides for the applicability of the provisions of the Dublin Convention and, subject to an opt-in procedure, subsequent related EC (now EU) legislation, i.e. the Dublin II Regulation and Dublin III Regulation.[14] Denmark became a party to the 2001 agreement on the basis of a 2005 protocol that was finally approved and entered into force in 2006.[15]

[9] Commission Regulation (EC) No. 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, 2 September 2003 [Link].
[10] Article 48 of the Dublin III Regulation.
[11] Recital 19 of the Dublin II Regulation.
[12] Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention [Link].
[13] *Ibid.*, Article 3.
[14] Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway, 19 January 2001 [Link].
[15] Protocol to the Agreement Between the European Community and the Republic of Iceland and the Kingdom of Norway Concerning the Criteria and Mechanisms for Establishing the State Responsible for Examining a Request for Asylum Lodged in a Member State or in Iceland or Norway, 29 June 2005 [Link].

The abovementioned agreement and protocol also apply to the Eurodac Regulation.

(ii) Switzerland participates in the Dublin System on the basis of a 2004 agreement with the European Community that entered into force following its final approval in 2008.[16] The agreement provides for the applicability of the provisions of the Dublin II Regulation and, subject to an opt-in procedure, any future measures amending or building upon that regulation, i.e. the Dublin III Regulation. Liechtenstein acceded to the agreement in 2008 by means of a protocol that entered into force in 2011.[17] A further protocol provides for Denmark's participation in the agreement.[18]

The abovementioned agreement and protocols also apply to the Eurodac Regulation.

(iii) Iceland and Norway, on the one hand, and Switzerland, on the other hand, operate the Dublin system in relation to each other on the basis of a 2004 tripartite agreement that entered into force in 2008.[19]

Although, as non-Member States, Iceland, Liechtenstein, Norway and Switzerland are not formally bound by CJEU rulings, the abovementioned EU/EC agreements nevertheless provide that those States must take into account both CJEU case law and Member State practice concerning the Dublin and Eurodac regulations. If a substantial divergence emerges between the courts of any of those States and the CJEU, and/or between the practice of any of those States and that of the Member States, a Joint/Mixed Committee will try to ensure a uniform application and interpretation of the Dublin/Eurodac provisions concerned. If necessary, the Committee is required to treat the matter as a dispute between the parties, which if not settled within the required timeframes will result in the termination of the agreement with the State(s) concerned.

The abovementioned EU/EC agreements also provide that Iceland, Liechtenstein, Norway and Switzerland have the right to submit statements of case or written observations to the CJEU in cases where a court or tribunal in a Member State has applied to the Court of Justice for a preliminary ruling concerning the interpretation of the Dublin and Eurodac regulations.

B. The CJEU case law on the Dublin II Regulation

1. Introduction

As of the end of 2013, preliminary rulings of the CJEU on the Dublin II Regulation had addressed the following issues in particular: (i) purpose and scope of the regulation; (ii) the Member State responsible for examining the asylum application of an unaccompanied minor; (iii) the application of the regulation's "sovereignty" and "humanitarian" clauses; (iv) the deadline for transfer to the

[16] Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [Link].

[17] Press Release of the Council of the European Union, *Signature of a Protocol on the accession of Liechtenstein to the criteria and mechanisms for establishing the state responsible for examining a request for asylum lodged in EU or in Switzerland (Dublin/Eurodac acquis)*, 28 February 2008 [Link]. On the date of entry into force, see web portal of Switzerland's Federal Authorities, consulted on 21 July 2014: [English | French].

[18] Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community, and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland [Link]; Press Release of the Council of the European Union, *Signature of a protocol on Denmark's participation in the Dublin/Eurodac agreement with Switzerland and Liechtenstein*, 28 February 2008 [Link].

[19] See web portal of Switzerland's Federal Authorities, consulted on 21 July 2014: [English | French].

Member State responsible; (v) the circumstances in which transfer to the Member State initially identified as responsible is precluded owing to a real risk of the applicant's fundamental rights being infringed in that Member State; (vi) whether, in an appeal against a transfer decision, the applicant has the right to plead that the criteria determining the Member State responsible have been misapplied.[20]

There were no preliminary references concerning the Dublin II Regulation pending before the CJEU at the end of 2013. With the Dublin III Regulation applying to all new applications lodged as of 1 January 2014, it is unlikely that there any further preliminary references concerning the Dublin II Regulation will be made to the CJEU.

While all of the case law discussed below concerns the Dublin II Regulation, much of it is likely to remain of relevance to the interpretation and application of the Dublin III Regulation, as discussed in the sub-sections marked "**►Dublin III◄**".

2. Purpose and scope of the Dublin Regulation

a) Purpose of the Dublin Regulation

Dual objectives of speed and effective access to procedures for determining refugee status: When interpreting the Dublin II Regulation, the CJEU has frequently referred to recitals 3 and 4 of that regulation:[21]

> **Recital 3 Dublin II Regulation**
>
> *The Tampere conclusions also stated that [the Dublin] system should include, in the short term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.*

> **Recital 4 Dublin II Regulation**
>
> *Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications.*

For example, in *Abdullahi*[22] the Court stated that one of the principal objectives of the regulation is "the establishment of a clear and workable method for determining rapidly the Member State responsible for the processing of an asylum application so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications" (para.59). In the case of *K*,[23] the Court said that the competent national

[20] Additionally: (i) two preliminary references concerning the interpretation of the Dublin II Regulation were removed from the CJEU's register after being withdrawn by the referring courts (C-666/11, *M. and Others*; C-158/13, *Rajaby*); (ii) an infringement action brought by the European Commission against Greece (C-130/08) for failing to fulfil its obligations under Article 3(1) of the Dublin II Regulation was removed from the CJEU's register after being withdrawn by the Commission.

[21] CJEU, *Migrationsverket v. Edgar Petrosian and Others (Sweden)*, C-19/08, Judgment of 29 January 2009, para.3; CJEU, *Migrationsverket v. Nurije Kastrati and Others (Sweden)*, C-620/10, Judgment of 3 May 2012, para.3; CJEU, *K v. Bundesasylamt (Austria)*, C-245/11, Judgment of 6 November 2012, paras.3&48-49; *MA, BT and DA v. Secretary of State for the Home Department (United Kingdom)*, C-648/11, Judgment of 6 June 2013, paras. 4, 54 & 62; CJEU, *Shamso Abdullahi v. Bundesasylamt (Austria)*, C-394/12, Judgment [GC] of 10 December 2013, paras.9&59.

[22] CJEU, *Shamso Abdullahi v. Bundesasylamt (Austria)*, C-394/12, Judgment [GC] of 10 December 2013.

[23] CJEU, *K v. Bundesasylamt (Austria)*, C-245/11, Judgment of 6 November 2012.

authorities are "under an obligation" to ensure that the implementation of the regulation is carried out in a manner which guarantees that objective (para.48).

A system based on a presumption of compliance with fundamental rights: In *N.S. and M.E.*,[24] the CJEU stated that the Common European Asylum System (CEAS) is based on a principle of mutual confidence making it possible to assume that "all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the [1951 Refugee] Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard" (para.78). On that basis, the EU legislature adopted the Dublin II Regulation and concluded implementing agreements with the participating third States

> "in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States."[25] (para.79)

However, the CJEU added that while it must be assumed that the treatment of asylum-seekers in all Member States complies with the requirements of the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and the 1951 Refugee Convention, there can be no conclusive presumption in that regard. Such a presumption would itself be incompatible with the duty of Member States to interpret and apply the Dublin II Regulation in a manner consistent with fundamental rights. Moreoever, were the Dublin II Regulation to require such a conclusive presumption, the regulation could itself be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the EU and its Member States. The presumption that a Member State complies with fundamental rights must therefore be regarded as rebuttable by evidence to the contrary (paras.80&99-105).

►Dublin III◄ Recitals 4 and 5 of the Dublin III Regulation set out the same aims as recitals 3 and 4 of the Dublin II Regulation, except that, as noted above, the Dublin III Regulation has been extended to applications for "international protection" (i.e. refugee status and subsidiary protection status), not just applications for "asylum" (i.e. refugee status only).

Recital 21 of the Dublin III Regulation explicitly foresees that a Member State may not comply with fundamental rights, stating that:

> **Recital 21 Dublin III Regulation**
>
> *Deficiencies in, or the collapse of, asylum systems, often aggravated or contributed to by particular pressures on them, can jeopardise the smooth functioning of the system put in place under this Regulation, which could lead to a risk of a violation of the rights of applicants as set out in the Union asylum acquis and the Charter of Fundamental Rights of the European Union, other international human rights and refugee rights.*

Recital 22 of the Dublin III Regulation refers to the need for a process "for early warning, preparedness and management of asylum crises serving to prevent a deterioration in, or the collapse of asylum systems … in order to ensure robust cooperation within the framework of this Regulation

[24] CJEU, *N.S. v. Secretary of State for the Home Department (United Kingdom) and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform (Ireland)*, Joined Cases C-411/10 and C-493/10, Judgment [GC] of 21 December 2011.
[25] Reaffirmed by the CJEU in *Abdullahi*, para.53.

and to develop mutual trust among Member States with respect to asylum policy." Article 33 of the Dublin III Regulation accordingly provides for a mechanism to this effect.

As discussed below, Article 3(2) of the Dublin III Regulation defines circumstances under which transfer to the Member State primarily identified as responsible is precluded if it would result in a real risk of the individual concerned being subjected to inhuman or degrading treatment.

b) Applicability of the Dublin Regulation when an asylum application is withdrawn

Circumstances in which the Dublin II Regulation is no longer applicable: In *Kastrati*,[26] the CJEU stated that the responsibility criteria of the Dublin II Regulation presuppose the existence of an asylum application which the Member State responsible "must examine, is in the process of examining or on which it has already taken a decision" (paras.45-46).

The CJEU held that it follows that where an applicant has lodged an asylum application in one Member State without having lodged an application in another Member State, the withdrawal of that application by the individual concerned before the Member State responsible has agreed to a request to "take charge" of him or her has the effect that the Dublin II Regulation can no longer be applicable. The requested Member State has no obligation to take charge of the individual, even if it had already agreed to take charge of him or her before it became aware of the withdrawal of the application (paras.27&47).

The CJEU considered the above conclusion follows both from the actual wording of the Dublin II Regulation and from the fact that, where an application for asylum has been withdrawn in the above circumstances, the regulation's principal objective – namely "the identification of the Member State responsible for examining an asylum application in order to guarantee effective access to an appraisal of the refugee status of the applicant" – can no longer be attained (paras.41-42&44-46).

Obligations of the Member State following the withdrawal of the asylum application: The CJEU added that where an application for asylum is withdrawn under the above circumstances it is for the Member State in which the application was lodged to "take the decisions required as a result of that withdrawal"; in particular, as provided in Article 19 of the initial Asylum Procedures Directive, the Member State should discontinue the examination of the application and place a record of the information relating to it in the applicant's file (para.48).

►Dublin III◄ In arriving at its ruling in *Kastrati*, the CJEU noted that "the European Union legislature has not expressly ruled on situations … in which asylum seekers have withdrawn their applications without having also lodged an application in at least one other Member State" (para.43). That is no longer fully the case given the adoption of the Dublin III Regulation, since the recast "take back" provisions of that regulation include a requirement that the Member State responsible shall be obliged to take back "a third-country national or a stateless person *who has withdrawn the application under examination* and made an application in another Member State or *who is on the territory of another Member State without a residence document*"[27] (emphases added). Nevertheless, the CJEU's ruling in *Kastrati* would still seem applicable to a situation where a Member State has been requested to "take charge" of an applicant.

[26] CJEU, *Migrationsverket v. Nurije Kastrati and Others*, C-620/10, Judgment of 3 May 2012.
[27] Article 18(1)(c) of the Dublin III Regulation.

3. Responsibility criteria in Chapter III of the Dublin Regulation

a) Hierarchy of criteria

As the CJEU recalled in, for example, *MA and Others*, Article 3(1) of the Dublin II Regulation provides that an asylum application is to be examined by a single Member State, which is to be the one that the criteria set out in Chapter III of that regulation indicate is responsible: (para.43)

> **Article 3(1) Dublin II Regulation**
>
> *Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.*

Article 5(1) of the Dublin II Regulation provides that the criteria for determining the Member State responsible are to be applied in the order in which they are set out in Chapter III: (paras.9&44-45)

> **Article 5 Dublin II Regulation**
>
> *1. The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.*
>
> *2. The Member State responsible in accordance with the criteria shall be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State.*

Article 5(2) of the regulation is intended to determine the framework in which the criteria must be applied in order to determine the Member State responsible, and does not in any way affect the meaning of those criteria (para.45). The criteria are objective and are established in Articles 6 to 14 of Chapter III of the regulation (paras.9&45).

Hierarchy of criteria when transfer to the Member State initially identified as responsible is precluded: As discussed below, the CJEU ruled in *Puid*[28] and in *N.S. and M.E.* that transfer to the Member State identified as responsible in accordance with the criteria in Chapter III of the Dublin II Regulation is precluded where "the Member States cannot be unaware that systemic deficiencies in the asylum procedure and in the conditions for the reception of asylum seekers in the [identified] Member State … provide substantial grounds for believing that the asylum seeker concerned would face a real risk of being subjected to inhuman of degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights" (e.g. *Puid*, para.36).[29] Under such circumstances, the identified Member State cannot be the responsible Member State; therefore, subject to the right of the determining Member State to itself examine the application pursuant to the sovereignty clause in Article 3(2) of the Dublin II Regulation, the criteria determining the Member State responsible must continue to be examined in the order in which they are set out in Chapter III of the regulation in order to establish whether another Member State can be identified as responsible. This includes examining the applicability of the criterion in Article 13 in Chapter III of the Dublin II Regulation, according to which "[w]here no Member State responsible for examining the application can be designated on the criteria listed in [the regulation], the first Member State with which the application for asylum was lodged shall be responsible for examining it." If necessary, the Member State in which the individual is present must exercise its right to itself examine the application, since it must not use a procedure for determining the responsible Member State which takes an unreasonable length of time (*N.S. and M.E.*, paras.95-98&107-108; *Puid*, paras.32-36).

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[28] CJEU, *Bundesrepublik Deutschland v. Kaveh Puid (Germany)*, C-4/11, Judgment [GC] of 14 November 2013.
[29] See also *Puid*, para. 28; N.*S. and M.E.*, paras.94&106.

►Dublin III◄ The Dublin III Regulation retains the principle of a hierarchy of criteria determining the Member State responsible. However, the abovementioned criterion in Article 13 of the Dublin II Regulation has not been included in the hierarchy of criteria in Chapter III of the Dublin III Regulation but has been moved instead into the the first paragraph of Article 3(2) of that regulation, which provides:

> **Article 3(2) Dublin III Regulation**
> **('Access to the procedure for examining an application for international protection')**
>
> *Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.*
>
> *[…]*

The second paragraph of Article 3(2) of the Dublin III Regulation includes the systemic deficiencies test from *N.S. and M.E.* and *Puid*, including that the determining Member State shall continue to examine the criteria set out in Chapter III of the Dublin III Regulation to establish whether another Member State can be designated as responsible.

The third paragraph of Article 3(2) of the Dublin III Regulation then provides that "[w]here the transfer cannot be made … to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible."

b) Family unity criteria

Binding provisions on family unity: In the case of *K*,[30] the CJEU stated that Articles 6 to 8 of the Dublin II Regulation contain binding provisions which seek to preserve family unity in accordance with recital 6 of the regulation:[31] (para.40)

> **Recital 6 Dublin II Regulation**
>
> *Family unity should be preserved in so far as this is compatible with the other objectives pursued by establishing criteria and mechanisms for determining the Member State responsible for examining an asylum application.*

> **Article 6 Dublin II Regulation**
>
> *Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.*
>
> *In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.*

> **Article 7 Dublin II Regulation**
>
> *Where the asylum seeker has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a refugee in a Member State, that Member*

[30] CJEU, *K v. Bundesasylamt (Austria)*, C-245/11, Judgment of 6 November 2012.

[31] Note also the provisions of Article 14 of the Dublin II Regulation, which also concern family unity and to which the CJEU did not refer. However, the fact that the CJEU did not mention Article 14 should not be taken as having any significance, given the point that the Court was making in the case of *K*, which compared the scope of the "humanitarian clause" in Article 15 of the Dublin II Regulation and the scope of Articles 6 to 8 of that regulation.

> *State shall be responsible for examining the application for asylum, provided that the persons concerned so desire.*

> **Article 8 Dublin II Regulation**
>
> *If the asylum seeker has a family member in a Member State whose application has not yet been the subject of a first decision regarding the substance, that Member State shall be responsible for examining the application for asylum, provided that the persons concerned so desire.*

The CJEU has not been called upon to interpret the above provisions in the context of preserving family unity, but, as discussed below, has provided its interpretation of the second paragraph of Article 6 concerning the Member State responsible for examining the application of an unaccompanied minor in a situation where there is no prospect of securing family unity.

►Dublin III◄ Recitals 14 to 16 of the Dublin III Regulation require respect for family life generally and for the principle of family unity in particular. Chapter III of the Dublin III Regulation includes binding provisions on family unity similar to those in Chapter III of the Dublin II Regulation,[32] except that the recast provisions have a broader scope given that in the recast regulation: (i) the definition of "family members" has been slightly extended, changing the requirement that minor children be "unmarried and dependent" to a requirement that they only be be "unmarried";[33] (ii) the provision regarding family unity of unaccompanied minors has *inter alia* been broadened to include siblings and certain relatives of the unaccompanied minor (adult aunts/uncles/grandparents) in addition to persons meeting the definition of family members;[34] (iii) the definition of "unaccompanied minor" no longer requires that the child concerned be unmarried.[35] The recast provisions in the Dublin III Regulation also have a broader scope in that the provisions replacing Articles 7 and 8 of the Dublin II Regulation concern family unity between the applicant and family members who are beneficiaries of, or applicants for, "international protection" (i.e. refugee status or subsidiary protection status), i.e. not just family members who are beneficiaries of, or applicants for, refugee status.[36]

c) Unaccompanied minors with no family member legally present in any Member State

Question before the CJEU: In *MA and Others*,[37] the CJEU was asked which Member State is responsible for examining the application of an unaccompanied minor who has no family members legally present in any Member State, when that minor has lodged an asylum application in more than one Member State (paras.33&42).

The CJEU noted that Article 6 of the Dublin II Regulation serves to determine the Member State responsible for examining an asylum application lodged by an unaccompanied minor, and comes first in the hierarchy of criteria in Chapter III of the regulation: (para.46)

[32] Articles 8 to 11 of the Dublin III Regulation.

[33] Compare the definition of "family members" in Article 2(g) of the Dublin III Regulation with the definition of "family members" in Article 2(i) of the Dublin II Regulation.

[34] Article 8 of the Dublin III Regulation read in conjunction with the definition of "relative" in Article 2(h) of that regulation. Note that it remains in the case in the Dublin III Regulation that siblings are not themselves defined as family members.

[35] Compare the definition of "unaccompanied minor" in Article 2(j) of the Dublin III Regulation with the definition of "unaccompanied minor" in Article 2(i) of the Dublin II Regulation.

[36] Compare Articles 9 and 10 of the Dublin III Regulation with Articles 7 and 8 of the Dublin II Regulation.

[37] CJEU, *MA, BT and DA v. Secretary of State for the Home Department (United Kingdom)*, C-648/11, Judgment of 6 June 2013.

Article 6 Dublin II Regulation

Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.

In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.

The CJEU considered that, in a situation where no family member of the unaccompanied minor is legally present in any Member State, the Member State responsible for examining the minor's application must be determined on the basis of the second paragraph of Article 6 of the Dublin II Regulation (paras.47-48). The question was thus whether the reference in that paragraph to "the Member State … where the minor has lodged his or her application for asylum" should be construed as a reference to the Member State in which the minor lodged his or her *first* application, or as a reference to the Member State in which the minor is present after having lodged *another* application (paras.42&49).

The Member State responsible: In order to decide which of the above two possible interpretations was correct, the CJEU referred to its settled case law according to which in interpreting a provision of European Union law it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (para.50). The CJEU decided that, in circumstances like those in the main proceedings, the responsible Member State must be the one where the unaccompanied minor is present after having lodged an asylum application there, since:

(i) if the EU legislature had intended to confer responsibility on the Member State in which the unaccompanied minor first lodged an asylum application, it would have expressly done so in the same precise terms as in the responsibility criterion in Article 13 of the Dublin II Regulation, according to which "[w]here no Member State responsible … can be designated on the basis of the criteria listed in this Regulation, *the first Member State* with which the application for asylum was lodged shall be responsible" (emphasis added) (paras.51-53);

(ii) given that unaccompanied minors form a category of "particularly vulnerable persons", it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, and to ensure that unaccompanied minors have prompt access to procedures for determining refugee status – meaning that, as a rule, unaccompanied minors should not be transferred to another Member State (paras.55&61).

The best interests of the child: The CJEU considered the above stricture against unnecessarily prolonging the Dublin procedure to be justified in light of the objective of the second paragraph of Article 6 ("which is to focus particularly on unaccompanied minors") and the objective of the Dublin II Regulation as a whole ("which … is to guarantee effective access to an assessment of the applicant's refugee status") (para.54). The Court also considered the above stricture to be justified by the best interests of the child, since even though those best interests are only expressly mentioned in the first paragraph of Article 6 of the Dublin II Regulation, they must be a primary consideration in all decisions adopted by Member States on the basis of the second paragraph of Article 6 of the regulation. That is because the Dublin II Regulation is predicated on observance of the fundamental rights and principles acknowledged in the EU Charter, which include, in particular, the requirement in Article 24(2) of the Charter that "in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration." Taken in conjunction with Article 51(1) of the Charter, the effect of Article 24(2) of the Charter is that the second paragraph of Article 6 of the Dublin II Regulation cannot be interpreted in a way that disregards the best interests of the child: (paras.56-61)

> **Article 51(1) EU Charter of Fundamental Rights**
> **('Field of application')**
>
> *The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.*

Obligation to inform the Member State where the previous application was lodged: Where the Member State in which the unaccompanied minor is present is responsible under the second paragraph of Article 6 of the Dublin II Regulation for examining his or her latest application, it must inform the Member State where the previous asylum application was lodged, since an asylum application is required to be examined only by a single Member State (para.65). But an unaccompanied minor cannot necessarily compel the Member State where he or she is present to examine his or her latest asylum application, since it is clear from Article 25 of the initial APD that a Member State need not examine an asylum application which is identical to one previously made in another Member State in respect of which a final decision has been taken (paras.13&63-64).

►Dublin III◄ Article 8(4) of the Dublin III Regulation is the counterpart in that regulation to the second paragraph of Article 6 of the Dublin II Regulation, and provides that:

> **Article 8(4) Dublin III Regulation**
> **('Minors')**
>
> *In the absence of a family member, a sibling or a relative [who is legally present on the territory of the Member States], the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor.*

It can be seen that aside from the inclusion of an express reference to the best interests of the child, the recast provision in Article 8(4) of the Dublin III Regulation retains the formulation that the Member State responsible shall be "that where the unaccompanied minor has lodged his or her application". During the negotiations on the Dublin III Regulation, the EU legislature was conscious of the fact that a ruling from the CJEU on the interpretation of Article 6 of the Dublin II Regulation was imminent, and therefore decided to leave open the question of which way that ruling would go. In a statement annexed to the Dublin III Regulation, the EU legislature committed to consider a revision of Article 8(4) of that regulation, taking into account the best interests of the child, once the CJEU had issued its ruling. In the meantime, now that the ruling has been issued it would seem at to establish a presumption that, where an unaccompanied minor falling within the scope of Article 8(4) of the Dublin III Regulation has lodged an application for international protection in more than one Member State, as a rule it is in his or her best interests that the Member State responsible pursuant to Article 8(4) of the Dublin III Regulation is the Member State where he or she is present after having lodged his or her application there. However, Article 8(4) would also appear to allow for exceptions to that rule, where it is in the best interests of the minor.

The interpretation and application of Article 8(4) of the Dublin III Regulation will need to done in conformity with the guarantees for minors that are provided for in Article 6 of that regulation:

Article 6 Dublin III Regulation
('Guarantees for minors')

1. The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.

2. Member States shall ensure that a representative represents and/or assists an unaccompanied minor with respect to all procedures provided for in this Regulation. The representative shall have the qualifications and expertise to ensure that the best interests of the minor are taken into consideration during the procedures carried out under this Regulation. Such representative shall have access to the content of the relevant documents in the applicant's file including the specific leaflet for unaccompanied minors.

This paragraph shall be without prejudice to the relevant provisions in Article 25 of [the recast Asylum Procedures Directive].

3. In assessing the best interests of the child, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors:

(a) family reunification possibilities;

(b) the minor's well-being and social development;

(c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;

(d) the views of the minor, in accordance with his or her age and maturity.

4. For the purpose of applying Article 8, the Member State where the unaccompanied minor lodged an application for international protection shall, as soon as possible, take appropriate action to identify the family members, siblings or relatives of the unaccompanied minor on the territory of Member States, whilst protecting the best interests of the child.

To that end, that Member State may call for the assistance of international or other relevant organisations, and may facilitate the minor's access to the tracing services of such organisations.

The staff of the competent authorities referred to in Article 35 who deal with requests concerning unaccompanied minors shall have received, and shall continue to receive, appropriate training concerning the specific needs of minors.

5. With a view to facilitating the appropriate action to identify the family members, siblings or relatives of the unaccompanied minor living in the territory of another Member State pursuant to paragraph 4 of this Article, the Commission shall adopt implementing acts including a standard form for the exchange of relevant information between Member States. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

d) Criteria based on the Member State responsible for the applicant's entry to or residence on the territory of the Member States

The CJEU has not interpreted any of the criteria in Chapter III of the Dublin II Regulation based on the Member State responsible for the applicant's entry to or residence on the territory of the Member States, namely Article 9 (possession of residence document or visa), Article 10 (irregular entry and/or stay), Article 11 (visa waived entry) and Article 12 (application made in an international transit area of an airport). Although in *Abdullahi* the CJEU was asked for an interpretation of Article 10 of the Dublin II Regulation, it only needed to provide an interpretation if it considered that the applicant had a right at appeal to call into question the determination of the Member State responsible for examining her application (para.63). As discussed below, the Court considered that the applicant had no such right, and therefore that it did not need to provide an interpretation of Article 10 of the Dublin II Regulation.

4. Responsibility derogating from the criteria in Chapter III of the Dublin Regulation

a) 'Sovereignty' clause

As noted by the CJEU in *N.S. and M.E.*,[38] Article 3(2) of the Dublin II Regulation is often referred to as the "sovereignty" clause: (paras.61-63)

> **Article 3(2) Dublin II Regulation**
>
> *By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.*

Extent of Member States' discretion under the sovereignty clause: In *Halaf*,[39] the CJEU held that there are no circumstances under which a Member State is precluded from exercising its option under the sovereignty clause to examine an application for asylum. According to the Court, that conclusion follows from the sovereignty clause's very wording; it is also corroborated by the preparatory documents that led to the adoption of the Dublin II Regulation, according to which the sovereignty clause was introduced to allow each Member State to decide "sovereignly, for political, humanitarian or practical considerations" to examine an application for asylum even if such examination is not its responsibility under the criteria laid down in the Chapter III of the Dublin II Regulation.[40] In that regard, it is irrelevant whether or not the responsible Member State according to the criteria in Chapter III of the Dublin II Regulation has already been requested, or has responded to a request, to "take back" the applicant concerned (paras.33-39).

On the other hand, as the CJEU held in *N.S. and M.E.*, there may be circumstances in which a Member State is obliged to examine an application in accordance with the procedure laid down in the sovereignty clause. That is because the Member State in which the applicant is present must not use a procedure for determining the responsible Member State which takes "an unreasonable length of time", and must if necessary itself examine the application for asylum (paras.98&108).[41]

The above requirement would appear to be of general application. However, it should be noted that the specific situation considered by the CJEU in *N.S. and M.E.* was one in which an applicant's fundamental rights had already been infringed by another Member State, back to which the applicant could not be transferred because this would expose him or her to a real risk of being subjected to inhuman or degrading treatment. The CJEU considered that in such circumstances the Member State in which the applicant is currently present must ensure that it does not "worsen" the situation by taking an unreasonable length of time in determining whether a third Member State is responsible for examining the asylum application of the person concerned.

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[38] CJEU, *N.S. v. Secretary of State for the Home Department (United Kingdom) and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform (Ireland)*, Joined Cases C-411/10 and C-493/10, Judgment [GC] of 21 December 2011.
[39] CJEU, CJEU, *Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet (Bulgaria)*, C-528/11, Judgment of 30 May 2013.
[40] See also *Abdullahi*, para. 57, in which the CJEU states that the sovereignty clause "maintains the prerogatives of the Member States in the exercise of the right to grant asylum".
[41] See also *Puid*, para.35.

Whether a Member State's decision whether to apply the sovereignty clause falls within the scope of EU law: In *N.S. and M.E.*, the CJEU held that the discretionary power conferred on Member States by the sovereignty clause forms "an integral part" of the Common European Asylum System provided for by the Treaty on the Functioning of the European Union (TFEU) and developed by the EU legislature. Accordingly, a Member State which exercises that discretionary power must be considered as implementing EU law for purposes of Article 51 of the EU Charter and/or Article 6 of the Treaty on European Union (TEU): (paras.64-69)

Article 51(1) EU Charter on Fundamental Rights
('Field of application')

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties

Article 6 TEU

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

In other words, when deciding whether or not to apply the sovereignty clause, Member States must respect fundamental rights.

In the case of *K*,[42] the CJEU was asked whether there could be circumstances in which a Member State must apply the sovereignty clause "if the responsibility otherwise provided for by the Dublin II Regulation will result in an infringement of Article 3 or Article 8 of the European Convention on Human Rights (ECHR) (Article 4 or Article 7 of the Charter of Fundamental Rights of the European Union)" (para.25). The issue in the main proceedings was whether the removal of the applicant from the Member State concerned would infringe the aforementioned rights, since it would separate the applicant from her daughter-in-law and grandchildren who were dependent on her.[43] However, given that in circumstances like those at issue in the main proceedings the CJEU considered that the Member State concerned would already have to accept responsibility for the applicant under the "humanitarian clause" in Article 15 of the Dublin II Regulation, the CJEU decided that there was no need to answer the question (para.55).

[42] CJEU, *K v. Bundesasylamt (Austria)*, C-245/11, Judgment of 6 November 2012.
[43] This is not mentioned in the CJEU's judgment, but is discussed in the opinion of Advocate General Trstjenjak of 27 June 2012, para.67.

►**Dublin III**◄ The sovereignty clause of the Dublin II Regulation is retained, subject to technical modifications, in Article 17(1) ('Discretionary clauses') of the Dublin III Regulation, to which the case law of the CJEU discussed above would seem equally applicable.

b) 'Humanitarian' clause

Question before the CJEU: In the case of *K*,[44] the CJEU examined the applicability of the "humanitarian clause" contained in Article 15 of the Dublin II Regulation:

> **Chapter IV**
> **Humanitarian Clause**
> **Article 15 Dublin II Regulation**
>
> *1. Any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent relatives, on humanitarian grounds based in particular on family or cultural considerations. In this case that Member State shall, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent.*
>
> *2. In cases in which the person concerned is dependent on the assistance of the other on account of pregnancy or a new-born child, serious illness, severe handicap or old age, Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States, provided that family ties existed in the country of origin.*
>
> *3. If the asylum seeker is an unaccompanied minor who has a relative or relatives in another Member State who can take care of him or her, Member States shall if possible unite the minor with his or her relative or relatives, unless this is not in the best interests of the minor.*
>
> *4. Where the Member State thus approached accedes to the request, responsibility for examining the application shall be transferred to it.*
>
> *[…]*

The question referred to the CJEU concerned the applicability of Article 15 to an individual in the position of "K", an adult applicant whose adult son was residing as a recognized refugee in Austria along with his adult wife and their three minor children. K had entered the EU irregularly by crossing the border from a third country into Poland, where she made a first application for asylum. Without waiting for a decision on that application, K had subsequently entered Austria irregularly, where she joined her son and his family and made a second application for asylum (paras.13-15).

Since Austria was *prima facie* not responsible for examining K's application under the family unity criteria or any of the other criteria set out in Chapter III of the Dublin II Regulation, the issue before the CJEU was whether, pursuant to Article 15 of that regulation, Austria nevertheless could automatically become the responsible Member State on humanitarian grounds even though Poland had previously been the responsible Member State. This was given that K's daughter-in-law had become dependent on K for assistance, as she had a new-born baby and suffered from a serious illness and handicap in respect of which K was particularly well-placed to provide support (paras.16-26).

The CJEU considered that whereas Article 15(1) of the Dublin II Regulation is "an optional provision which affords the Member States extensive discretion with regard to deciding to 'bring together' family members and other dependent relatives on humanitarian grounds",[45] Article 15(2) of the regulation "restricts that power in such a way that, where the conditions laid down in that provision are satisfied, the Member States 'normally keep together' the asylum seeker and another member of

[44] CJEU, *K v. Bundesasylamt (Austria)*, C-245/11, Judgment of 6 November 2012.
[45] See also CJEU, *Abdullahi*, para.57: "[Article 15(1) of the Dublin II Regulation] is designed to maintain the prerogative of Member States in the exercise of the grant of asylum irrespective of the Member State responsible on the basis of the criteria set out in that regulation. It is an optional provision that grants a wide discretionary power to Member States."

his family" (para.27). Given K's specific situation and the question whether Austria could "automatically" become the responsible Member State on humanitarian grounds, the CJEU therefore considered that it was primarily being asked for an interpretation of Article 15(2) of the regulation (para.28).

Humanitarian purpose of Article 15: The CJEU stated that, as laid down in recital 7 of the Dublin II Regulation, the objective of Article 15 is to allow Member States to bring together family members where that is necessary on humanitarian grounds: (para.35)

Recital 7 Dublin II Regulation

The processing together of the asylum applications of the members of one family by a single Member State makes it possible to ensure that the applications are examined thoroughly and the decisions taken in respect of them are consistent. Member States should be able to derogate from the responsibility criteria, so as to make it possible to bring family members together where this is necessary on humanitarian grounds.

Since the purpose of Article 15 of the Dublin II Regulation is to permit Member States to derogate from the responsibility criteria in Chapter III of that regulation, it must be capable of applying to situations going beyond those which are the subject of the binding provisions on family unity contained in Articles 6 to 8 of the regulation (para.40).

Family relationships falling within the scope of Article 15: The CJEU held that Article 15 of the Dublin II Regulation includes within its scope persons who do not fall within the definition of "family members" in Article 2(i) of the Dublin II Regulation: (para.40)

Article 2(i) Dublin II Regulation

'family members' means insofar as the family already existed in the country of origin, the following members of the applicant's family who are present in the territory of the Member States:

(i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens;

(ii) the minor children of couples referred to in point (i) or of the applicant, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;

(iii) the father, mother or guardian when the applicant or refugee is a minor and unmarried;

Specifically, Article 15(2) of the Dublin II Regulation "delimits, on the basis of a criterion of dependence on account of, *inter alia*, an illness or serious handicap, a group of members of the family of the asylum seeker which is necessarily wider than that defined by Article 2(i) of that regulation" (para.41). It must be interpreted as meaning that the daughter-in-law and grandchildren of the applicant are covered by the words "another relative" (para.38).
The family ties on which the relationship of dependency is predicated must have existed in the country of origin (paras.42-44).

'Dependency' within the meaning of Article 15(2): The CJEU held that, in conformity with the humanitarian objective of Article 15 of the Dublin II Regulation, dependency within the meaning of Article 15(2) covers a situation both where the applicant is dependent on the assistance of his or her relative, and where the relative is dependent on the applicant (paras.32-37). It must be established that assistance is actually required and that, pursuant to Article 11(4) of Commission Regulation No 1560/2003 laying down detailed rules for the application of the Dublin II Regulation, the person who must provide the assistance is in a position to do so: (paras.42-43)

Article 11 Commission Regulation (EC) 1560/2003
(‘Situations of dependency’)

1. Article 15(2) of [the Dublin II Regulation] shall apply whether the asylum seeker is dependent on the assistance of a relative present in another Member State or a relative present in another Member State is dependent on the assistance of the asylum seeker.

2. The situations of dependency referred to in Article 15(2) of [the Dublin II Regulation] shall be assessed, as far as possible, on the basis of objective criteria such as medical certificates. Where such evidence is not available or cannot be supplied, humanitarian grounds shall be taken as proven only on the basis of convincing information supplied by the persons concerned.

3. The following points shall be taken into account in assessing the necessity and appropriateness of bringing together the persons concerned:

(a) the family situation which existed in the country of origin;

(b) the circumstances in which the persons concerned were separated;

(c) the status of the various asylum procedures or procedures under the legislation on aliens under way in the Member States.

4. The application of Article 15(2) of [the Dublin II Regulation] shall, in any event, be subject to the assurance that the asylum seeker or relative will actually provide the assistance needed.

5. The Member State in which the relatives will be reunited and the date of the transfer shall be agreed by the Member States concerned, taking account of:

(a) the ability of the dependent person to travel;

(b) the situation of the persons concerned as regards residence, preference being given to the bringing the asylum seeker together with his relative where the latter already has a valid residence permit and resources in the Member State in which he resides.

Obligation to ‘keep together’ and take charge of the applicant: The CJEU noted that the reference in Article 15(2) of the Dublin II Regulation to a situation in which Member States shall normally “keep together” the applicant and one of his or her relatives is where the persons concerned are already on the territory of a Member State other than that which is responsible under the criteria laid down in Chapter III of the regulation (para.30). The obligation “normally” to keep together the persons concerned must be understood as meaning that the Member State on whose territory the persons are present may derogate from that obligation only if justified in doing so because an exceptional situation has arisen. Absent such a situation, and provided that the dependency conditions stated in Article 15(2) of the regulation are satisfied, that Member State is obliged to take charge of the applicant on humanitarian grounds and “becomes” the Member State responsible for examining his or her application for asylum (paras.44-47).

No need for a request to ‘keep together’: The CJEU held that the obligation to “keep together” the persons concerned arises irrespective of whether the Member State on whose territory the persons are present has received a request to that effect from another Member State. Whereas Article 15(1) of the Dublin II Regulation does provide for a request from another Member State to “bring together” the persons to whom that provision refers, Article 15(2) of the regulation does not contain any reference to a request. In a situation such as that at issue in the main proceedings in *K*, where what is at issue is not the “bringing together” but the “keeping together” of the persons concerned, a requirement for a request would run counter to the obligation to act speedily, since contrary to the regulation’s objective it would unnecessarily prolong the procedure for determining the Member State responsible. It would also disregard the exigencies of the situation of dependency within the meaning of Article 15(2) of the regulation between the persons concerned (paras.48-53).

Obligation to inform the Member State previously responsible: The CJEU held that the Member State which has become the responsible Member State in circumstances such as those at issue in *K* must assume the obligations which go along with that responsibility, and must in that respect inform the Member State previously responsible (para.54).

Relationship between Article 15 and Article 3(2): It should be noted that the sovereignty clause in Article 3(2) of the Dublin II Regulation also states that the Member State which has become the Member State responsible "shall assume the obligations associated with that responsibility" and, where appropriate, "shall inform the Member State previously responsible". Whether the CJEU was relying on Article 3(2) to derive the same obligation in circumstances such as those at issue in *K* is not clear. While it should be noted that earlier on in its judgement in *K* the CJEU did say that its interpretation of "keeping together" in Article 15(2) of the Dublin II Regulation was consistent with Article 3(2) of the regulation (para.31), it did not at any point address the exact relationship between Articles 3(2) and 15 of the regulation, or comment in that regard on the opinion of Advocate General Trstjenjak[46] who had summarized the relationship between the two articles as follows:

> "To summarise, it must therefore be held that both Article 3(2) and Article 15 of [the Dublin II Regulation] are special provisions for discretionary decisions by Member States, that their fields of application may overlap and that, if the factual preconditions are met, they may be applicable in tandem. Article 15 of [the Dublin II Regulation] is a special provision for discretionary decisions regarding family reunion on humanitarian grounds, irrespective of the place of residence of the asylum seeker, whereas invocation of the right to intervene under Article 3(2) of the regulation may also depend on factors other than humanitarian grounds ..." (Opinion, para.38)

►Dublin III◄ In the Dublin III Regulation, Articles 15(1) and 15(2) of the Dublin II Regulation have been significantly amended and have been split between Article 17(2) ('Discretionary clauses') and Article 16 ('Dependent persons') respectively. "Dependency" within the meaning of Article 16 of the Dublin III Regulation is restricted to dependency between the applicant and his or her child, sibling or parent legally resident in one of the Member States, thus excluding a relationship like that in *K* which concerned dependency between the applicant and her daughter-in-law and grandchildren. However, the CJEU's ruling in *K* would otherwise still seem to be relevant to the interpretation of Article 16 of the Dublin III Regulation, in particular regarding the obligation "normally" to keep the persons concerned together irrespective of whether a request to that effect has been received from another Member State.

The CJEU's ruling in *K* would also seem relevant to the interpretation of the discretionary clause in Article 17(2) of the Dublin III Regulation, the first paragraph of which provides:

Article 17(2) Dublin III Regulation
('Discretionary clauses')

The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 [i.e. the family unity criteria in Chapter III of the Dublin III Regulation] and 16. The persons concerned must express their consent in writing.

[…]

Specifically, the ruling in *K* would seem relevant to the interpretation in Article 17(2) of the Dublin III Regulation of the term "family relations", which, unlike the terms "family members"[47] and "relative",[48] is not defined in that regulation. The ruling in *K* would suggest that "family relations" be construed more broadly than "family members" and "relatives".

[46] CJEU, *K v. Bundesasylamt (Austria)*, C-245/11, Opinion of Advocate General Trstjenjak of 27 June 2012.
[47] Article 2(g) Dublin III Regulation.
[48] Article 2(i) Dublin III Regulation.

A broad interpretation of "family relations" would also seem to be supported by recital 17 of the Dublin III Regulation, according to which "[a]ny Member State should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or *any other family relations* and examine an application for international protection lodged with it or with another Member State, even if such examination is not its responsibility under the binding criteria laid down in this Regulation" (emphasis added).[49]

5. Transfer to the responsible Member State

a) Deadline for transfer

Question before the CJEU: In *Petrosian*,[50] the CJEU was asked to rule on the deadline for transfer following the explicit or presumed acceptance of the responsible Member State to "take back" the asylum-seeker. According to Article 20(2) of the Dublin II Regulation, where transfer does not take place within normally a six-month period, the Member State that requested the transfer becomes responsible for the examining the asylum application; the question before the CJEU was from what point in time the period for implementation of the transfer starts to run in a case where the asylum seeker has appealed against being transferred and the appeal has suspensive effect. While Article 20(1)(d) of the Dublin II Regulation provides that the implementation period for transfer starts to run from "the decision on an appeal or review where there is a suspensive effect", it was not evident whether that means the provisional judicial decision suspending the implementation of the transfer procedure, or the judicial decision ruling on the merits of the transfer: (paras.27, 32-33)

Article 20 Dublin II Regulation

1. An asylum seeker shall be taken back in accordance with Article 4(5) and Article 16(1)(c), (d) and (e) as follows:

- *(a) the request for the applicant to be taken back must contain information enabling the requested Member State to check that it is responsible;*
- *(b) the Member State called upon to take back the applicant shall be obliged to make the necessary checks and reply to the request addressed to it as quickly as possible and under no circumstances exceeding a period of one month from the referral. When the request is based on data obtained from the Eurodac system, this time limit is reduced to two weeks;*
- *(c) where the requested Member State does not communicate its decision within the one month period or the two weeks period mentioned in subparagraph (b), it shall be considered to have agreed to take back the asylum seeker;*
- *(d) a Member State which agrees to take back an asylum seeker shall be obliged to readmit that person to its territory. The transfer shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken by another Member State or of the decision on an appeal or review where there is a suspensive effect;*

[…]

2. Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time limit may be extended up to a maximum of one year if the transfer or the examination of the application could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

[…]

[49] The expression "family members, relatives or any other family relations" is also used in recital 18, Article 4(c), Article 7(3), Article 31(2)(b) and Article 34(2)(a) of the Dublin III Regulation.
[50] CJEU, *Migrationsverket v. Edgar Petrosian and Others*, C-19/08, Judgment of 29 January 2009.

Deadline for transfer: The CJEU held that the period for implementation of the transfer begins to run from "the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation" (paras.46&53). The Court justified this by the need to ensure: (i) the effectiveness of Article 20(1)(d) of the Dublin II Regulation; (ii) observance of the judicial protection guaranteed by the Member States; and (iii) observance of the principle of the procedural autonomy of the Member States:

(i) ***Effectiveness of Article 20(1)(d):*** The CJEU stressed that the six-month period for implementing transfer under the Dublin II Regulation had been established by the EU legislature in order to take into account the practical difficulties previously encountered by Member States when organizing transfers under the former Dublin Convention, where the deadline for transfer had been set at only one month. In light of that objective, the starting point of the period for implementation of transfer in the case of an appeal with suspensive effect should be determined in such a manner as to allow for a full six months in which to organize the practicalities of the transfer. Accordingly, that period may begin to run only from the point at which the appeal is held to be unsuccessful, since it is only then that the transfer is, in principle, agreed upon and certain (paras.43-46).

(ii) ***Judicial protection guaranteed by the Member States:*** The CJEU held that the EU legislature clearly did not intend that the judicial protection guaranteed by the Member States should be "sacrificed to the requirement of expedition in processing asylum applications." Therefore, in order not to run the risk of becoming the Member State responsible for examining the asylum application, a Member State which requires that an appeal against transfer should have suspensive effect should not be placed in a less favourable position than a Member State which does not provide for suspensive effect (paras.48-51).

(iii) ***Principle of procedural autonomy of the Member States:*** The CJEU held that if the six-month period for transfer were to start as of the provisional judicial decision suspending the transfer, the national court deciding on the merits of the transfer might not have sufficient time to satisfactorily address the complexity of the proceedings if it felt compelled to take its decision before the deadline for transfer expires. That would run counter to the principle of procedural autonomy of the Member States, according to which, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law (para.52, including references to the CJEU's settled case law in *Safalero* [Case-13/01] and *Unibet* [Case-432/05]).

►Dublin III◄ Regarding the time limits for transfer, the first paragraph of Article 29(1) of the Dublin III Regulation provides as follows:

> **Article 29(1) Dublin III Regulation**
> **('Modalities and time limits')**
>
> *The transfer of the applicant … from the requesting Member State to the Member State responsible shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person concerned or* **of the final decision on an appeal or review where there is a suspensive effect** … [emphasis added]

The CJEU's ruling in *Petrosian* would imply that, where an appeal or review has suspensive effect, the six-month period for transfer begins from the final decision on the merits of that appeal or review.

b) Circumstances under which transfer to the Member State identified as responsible is precluded owing to a real risk of the asylum-seeker's fundamental rights being infringed in that Member State

Question before the CJEU: In the joined cases of *N.S. and M.E.*,[51] the CJEU was asked about the circumstances under which transfer of an asylum-seeker to the Member State identified as responsible is precluded under EU law, where, on account of shortcomings in the asylum procedure and the reception conditions for asylum-seekers in that Member State, there is a risk that: (i) the individual concerned will not benefit from the minimum standards set out in the directives of the CEAS; and/or (ii) the individual's fundamental rights under EU law will not be observed (paras. 44-50, 52-53, 70-73).

The Member State identified as responsible in the main proceedings was Greece, and the following fundamental rights set out in the EU Charter were in particular mentioned by the referring courts:

Article 1 EU Charter on Fundamental Rights
('Human dignity')

Human dignity is inviolable.

Article 4 EU Charter on Fundamental Rights
('Prohibition of torture and inhuman or degrading treatment or punishment')

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 18 EU Charter on Fundamental Rights
('Right to asylum')

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance'with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').

Article 19(2) EU Charter on Fundamental Rights
('Protection in the event of removal, expulsion or extradition')

No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Article 47 EU Charter on Fundamental Rights
('Right to an effective remedy and to a fair trial')

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

[51] CJEU, *N.S. v. Secretary of State for the Home Department (United Kingdom) and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform (Ireland)*, Joined Cases C-411/10 and C-493/10, Judgment [GC] of 21 December 2011.

> *Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.*

Real risk of inhuman or degrading treatment contrary to Article 4 of the EU Charter: The CJEU replied that, even though the Dublin II Regulation is based on a principle of mutual confidence according to which it must be assumed that all Member States comply with fundamental rights, it is not inconceivable that the CEAS

> "may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights [under the 1951 Refugee Convention, the EU Charter of Fundamental Rights and the European Convention on Human Rights]" (para.81).

However, it could not be concluded in that regard that "any infringement" of a fundamental right by the Member State responsible affects the obligations of the other Member States under the Dublin II Regulation. That could not be so, given the abovementioned principle of mutual confidence and given that what is at issue is "the *raison d'être* of the EU and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System" (paras.82-83).

Nor could it be concluded that the "slightest infringement" of the CEAS directives by the Member State responsible is sufficient to preclude transfer to it and exempt it from its obligations under the Dublin II Regulation. Such a result would deprive those obligations of their substance and would not be compatible with the aims of the Dublin II Regulation (paras.84-85).

On the other hand, in a situation such as that at issue in the main proceedings in *N.S. and M.E.*, the Member States may not transfer an asylum seeker to the Member State identified as responsible, where

> "they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in [the Member State responsible] amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter" (para.94).[52]

'Systemic deficiencies' in the asylum system: With regard to what would constitute "systemic deficiencies in the asylum procedure and in the reception conditions for asylum seekers", the CJEU referred to the judgment of the European Court of Human Rights (ECtHR) in *M.S.S.*,[53] which, similar to the situation at issue in the main proceedings in *N.S. and M.E.*, concerned the Dublin transfer of an asylum-seeker to Greece. In *M.S.S.*, the ECtHR found that the transfer of the individual concerned to Greece from Belgium had infringed the prohibition against inhuman and degrading treatment in Article 3 of the ECHR in two respects: (para.88)

(i) the Belgian authorities knew or ought to have known that there was a risk that the Greek authorities would not seriously examine the individual's asylum application (as a result of which, although the CJEU did not itself explicitly say so in its summary of the ECtHR's judgment, there was a risk of the individual being expelled to his country of origin where he claimed he would face ill-treatment contrary to Article 3 of the ECHR);

[52] See also CJEU, *N.S. and M.E.*, paras. 86 (referring to systemic "flaws" rather than systemic "deficiencies") and 106.
[53] ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011.

(ii) the Belgian authorities knowingly exposed the individual to detention and living conditions in Greece that amounted to treatment contrary to Article 3 of the ECHR.

The CJEU considered that the extent of the infringement of fundamental rights described in the ECtHR's judgment showed that at the time of the individual's transfer to Greece there existed "a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers" in that Member State (para.89).

Whether 'systemic deficiencies' in the asylum system of the Member State responsible are a necessary condition for transfer to be precluded: The fact that the CJEU's ruling in *N.S. and M.E.* pointed to the finding of two separate violations of Article 3 of the ECHR in *M.S.S.* – one violation being in connection with risked ill-treatment arising from deficiencies in the asylum procedure, the other violation being in connection with ill-treatment arising from deficiencies in the reception conditions for asylum-seekers – suggests that the CJEU did not mean that, for transfer to be precluded under EU law, there must necessarily be systemic deficiencies in *both* the asylum procedure *and* the reception conditions for asylum-seekers in the concerned Member State. However, the question arises whether systemic deficiencies in the asylum system of the concerned Member State – be they only in the asylum procedure, only in the reception conditions for asylum-seekers, or both in the asylum procedure and in reception conditions – are a *necessary* condition or merely a *sufficient* condition precluding transfer to that Member State, where they amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter. In other words, is transfer precluded under EU law if and only if the real risk of ill-treatment within the meaning of Article 4 of the Charter is grounded in systemic deficiencies in the asylum system of the Member State responsible; or does it not matter what those grounds are, providing that they amount to substantial grounds for believing that the asylum-seeker faces a real risk of ill-treatment? For example, under international law a real risk of ill-treatment could in principle arise for reasons entirely unrelated to problems with the implementation of the CEAS in the Member State responsible, and/or to the question of whether that Member State complies with fundamental rights.

The CJEU later reiterated the systemic deficiencies test from *N.S. and M.E.* in the case of *Puid*.[54] However, given the assumptions that lay behind the questions from the referring court in the latter case,[55] it still was not clear from the CJEU's answer whether systemic deficiencies in the asylum system of the Member State responsible were a necessary condition or merely a sufficient condition precluding transfer, where they amount to substantial grounds for believing that the applicant would face a real risk of being subjected to inhuman or degrading treatment. (paras.22-25&29-31)

But then the CJEU subsequently held in *Abdullahi*[56] that where a Member State has agreed to take charge of an applicant for asylum on the basis that it was the Member State in which the applicant first entered the EU, the only way under EU law that the applicant can call into question the choice of that criterion by the Member State where he or she is present is by pleading that the systemic deficiencies test in *N.S. and M.E.* is satisfied (paras.60-62). In other words, for transfer to be precluded under EU law, it would seem that it is necessary and not merely sufficient that the real risk of ill-treatment contrary to Article 4 of the Charter be grounded in systemic deficiencies in the asylum system of the Member State concerned.

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[54] CJEU, *Bundesrepublik Deutschland v. Kaveh Puid (Germany)*, C-4/11, Judgment [GC] of 14 November 2013.

[55] The referring court originally asked four questions in *Puid*, but subsequently withdrew three of them following the CJEU's ruling in *N.S. and M.E.* Those questions showed that the referring court was concerned with deficiencies in the asylum system of the responsible Member State amounting to a threat to the fundamental rights of asylum-seekers generally, irrespective of the particularities of an individual case.

[56] CJEU, *Shamso Abdullahi v. Bundesasylamt (Austria)*, C-394/12, Judgment [GC] of 10 December 2013.

Whether protection against refoulement under EU law is narrower than under international law: If the above interpretation of the CJEU's ruling in *Abdullahi* is correct, it means that protection against *refoulement* under EU law is narrower than under international law, since it does not allow for the possibility that a real risk of ill-treatment could in principle arise for reasons entirely unrelated to problems with the implementation of the CEAS in the Member State responsible, and/or to the question of whether that Member State complies with fundamental rights.

How much narrower the test is under EU law will depend upon how broadly the expression "systemic deficiencies in the asylum procedure and in the reception conditions for asylum-seekers" may be construed, including the extent to which the individual circumstances of a particular asylum-seeker can be taken into account. For example, even if there are not systemic deficienicies that pose a real risk to all asylum-seekers, can there nevertheless be systemic deficiencies that a pose a real risk depending on the circumstances of an individual case? In that regard it should be asked what evidence could be adduced by the asylum-seeker concerned, bearing in mind that in support of its ruling in *Abdullahi* the CJEU reiterated that the CEAS "was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard" (para.52).

It should also be noted that the CJEU did not explicitly examine in *N.S. and M.E.*, *Puid*, or *Abdullahi*, the general protection against *refoulement* enshrined in Article 19(2) of the EU Charter, although it was raised by one of the referring courts in *N.S. and M.E.*:

Article 19(2) EU Charter on Fundamental Rights
('Protection in the event of removal, expulsion or extradition')

No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

If protection against *refoulement* is indeed narrower under EU law than under international law, Member States can nevertheless ensure that they meet their international legal obligations of *non-refoulement* by exercising their right under Article 3(2) of the Dublin II Regulation to examine an asylum application themselves, when necessary, instead of transferring the applicant to the Member State identified as responsible.

Real risk of infringement of fundamental rights other than Article 4 of the EU Charter: In *N.S. and M.E.*, the CJEU was also asked whether, insofar as protection against transfer under the Dublin II Regulation is concerned, the scope of the protection conferred by Article 1 ('Human dignity'), Article 18 ('Right to asylum') and Article 47 ('Right to an effective remedy and to a fair trial') of the EU Charter is broader than the protection conferred by Article 3 of the ECHR (paras.50, 109, 111).

The CJEU interpreted this question as being about a situation in which the threshold of Article 3 of the ECHR had not been reached in the Member State responsible, namely a situation which was different from that at issue in the ECtHR's judgement in *M.S.S.* and which was similar to that at issue in the ECtHR's earlier decision in *K.R.S.*,[57] which had also concerned Dublin transfer to Greece but in which the applicant's complaint of a violation of Article 3 of the ECHR had been held inadmissible (para.111).

The CJEU pointed out that whereas the ECtHR's decision in *K.R.S.* predated the order for reference in *N.S. and M.E.*¸ the ECtHR issued its judgment in *M.S.S.* only after the order for reference was

[57] *K.R.S. v. the United Kingdom*, No. 32733/08, Decision of 2 December 2008.

made in *N.S. and M.E.* In light of new evidence that had emerged about the situation in Greece since the ECtHR's decision in *K.R.S.*, the ECtHR had changed its position in *M.S.S.* and found that the Dublin transfer to Greece of the individual concerned had in fact violated Article 3 of the ECHR (para.112).

The CJEU intimated that it was a situation such as that at issue in *M.S.S.* rather than a situation such as that at issue in *K.R.S.* that fell for consideration in the main proceedings in *N.S. and M.E.*, and reiterated that in such a situation a Member State would infringe Article 4 of the EU Charter if it transferred an asylum-seeker to the Member State identified as responsible (para.113). The CJEU then simply added that "Articles 1, 18 and 47 of the Charter do not lead to a different answer" (para.114).

It is not completely clear how the CJEU's ruling on the above point should be interpreted. On the one hand, it does not seem to be saying that an infringement of Articles 1, 18 and/or 47 of the Charter would have no implications at all for the transferring Member State; but on the other hand, if the above interpretation of the CJEU's ruling in *Abdullahi* is correct, it would seem that such an infringement would only preclude transfer if the circumstances of the case were such as to amount to an infringement of Article 4 of the Charter as well.

►Dublin III◄ As to when the transfer of an asylum-seeker to the Member State indicated as responsible is precluded owing to a real risk that the asylum-seeker's fundamental rights will be infringed in that Member State, the second paragraph of Article 3(2) of the Dublin III Regulation provides:

> **Article 3(2) Dublin III Regulation**
> **('Access to the procedure for examining an application for international protection')**
>
> *[…]*
>
> *Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.*
>
> *[…]*

As noted above, the CJEU's ruling in *N.S. and M.E.* would suggest that, for the above test to be satisfied, it is sufficient that there be systemic flaws in *either* the asylum procedure *or* the reception conditions, without there necessarily being systemic flaws in both.

c) Assessment of compliance with fundamental rights by the Member State responsible and of the risk to which the asylum-seeker would be exposed if transferred to that Member State

Information available to Member States: In *N.S. and M.E.*, the CJEU stated that, contrary to what some Member States had submitted in that case, the Member States do not lack the instruments necessary to assess compliance with fundamental rights by the Member State responsible and, therefore, the risks to which the asylum-seeker would be exposed were he or she to be transferred to that Member State. The CJEU pointed out that information such as that cited by the ECtHR in *M.S.S.* enables the Member States to assess the functioning of the asylum system in the Member State responsible, making it possible to evaluate the risks to which the asylum-seeker would be exposed: the information in that case included reports of international non-governmental organizations, correspondence from UNHCR, and Commission reports on the evaluation of the functioning of the Dublin system and proposals for recasting the Dublin II Regulation (paras.90-92).

Seeking the views of UNHCR: In *Halaf*,[58] the CJEU was asked whether, during the process of determining the Member State responsible, the Member State in which the asylum-seeker is present is obliged under EU law to request UNHCR to present its views where it is apparent from UNHCR documents that the Member State indicated as responsible is in breach of EU law on asylum (paras.25&43).

The CJEU held that Member States are not obliged to request UNHCR to present its views in relation to a transfer under the Dublin II Regulation (para.47). However, it added that it was important to note that there is nothing to prevent Member States from seeking UNHCR's views, particularly in a situation such as that at issue in the main proceedings, which concerned UNHCR's call for a suspension of Dublin transfers to Greece (paras.17-21&46-47). The Court pointed out that:

> "documents from the UNHCR are among the instruments likely to enable the Member States to assess the functioning of the asylum system in the Member State indicated as responsible by the criteria in Chapter III of the [Dublin II] Regulation, and therefore to evaluate the risks to which the asylum seeker would actually be exposed were he to be transferred to that Member State […] Those documents are particularly relevant in that assessment in the light of the role conferred on the UNHCR by the Geneva Convention, in consistency with which the rules of European Union law dealing with asylum must be interpreted […]" (para. 44).

In setting out the legal context for its answer, the CJEU took into account *inter alia*:

(i) the requirement under Article 78(1) TFEU that the CEAS comply with the 1951 Refugee Convention; (para.4)

(ii) the provision in Article 35(1) of the 1951 Refugee Convention that "[t]he Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees … and shall in particular facilitate its duty of supervising the application of the provisions of this Convention"; (para.6)

(iii) the final perambular paragraph of the 1951 Refugee Convention, which notes that "[UNHCR] is charged with the task of supervising international conventions providing for the protection of refugees" and recognizes that "the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with [UNHCR]"; (para.5)

(iv) the fact that the Member States are Contracting Parties to the 1951 Refugee Convention, whereas the European Union is not; (para.4)

(v) Articles 8(2)(b) and 21(c) of the initial Asylum Procedures Directive (APD): (paras.15&21)

Article 8(2)(b) initial APD
('Requirements for the examination of applications')

Member States shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that:

[…]

(b) precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the

[58] CJEU, *Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet (Bulgaria)*, C-528/11, Judgment of 30 May 2013.

> *countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions*

> **Article 21(c) initial APD**
> **('The role of UNHCR')**
>
> *Member States shall allow the UNHCR:*
>
> *[...]*
>
> *(c) to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.*

The CJEU held that although Articles 8(2)(b) and 21 of the initial APD provide for various forms of cooperation between UNHCR and the Member States during the examination of an application for asylum, recital 29 of the initial APD specifies that those rules do not apply to the process under the Dublin II Regulation for determining the Member State responsible for examining the application (para.45).

►Dublin III◄ As noted above in chapter 1.4 on asylum procedures, whereas recital 29 of the initial APD states that the initial APD does not deal with "procedures" governed by the Dublin II Regulation, recital 53 of the recast APD states that the recast APD does not deal with "procedures between Member States" that are governed by the Dublin III Regulation. Recital 54 of the recast APD goes on to say that the recast APD should apply to "applicants to whom the Dublin III Regulation applies, in addition and without prejudice to the provisions of that Regulation". Similarly, recital 12 of the Dublin III Regulation states that the recast APD should apply "in addition and without prejudice to the provisions concerning the procedural safeguards regulated under this Regulation, subject to the limitations in the application of that Directive". The question arises whether these changes result in an obligation of the Member States under EU law to cooperate with UNHCR in the sense discussed in *Halaf* above; but even if they do not, the CJEU's point in that case about the particular relevance of UNHCR documents remains pertinent.

d) Appeal against a transfer decision

Question before the CJEU: In *Abdullahi*,[59] the CJEU examined the scope of the appeal provided for by Article 19(2) of the Dublin II Regulation against a transfer decision in the "take charge" procedure:[60]

> **Article 19 Dublin II Regulation**
>
> *1. Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State.*
>
> *2. The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case by case basis if national legislation allows for this.*
>
> *[…]*

The facts and the dispute in the main proceedings were as follows. The applicant had first entered the EU via Greece, in an irregular manner, following which she had exited the EU via the former Yugoslav Republic of Macedonia. She then passed through Serbia and re-entered the EU irregularly via Hungary, from where she travelled to Austria and lodged an application for asylum. At the request of Austria, Hungary agreed to take charge of her in accordance with the criterion in Article 10(1) of the Dublin II Regulation that it was the Member State through which she had first entered the EU. The applicant appealed against the decision to transfer her to Hungary on the basis that responsibility under Article 10(1) of the Dublin II Regulation lay with Greece. She pleaded that Greece would not fully observe her human rights and therefore that Austria had to examine her asylum application (paras.27-37).

The CJEU was in essence asked whether, pursuant to Article 19(2) of the Dublin II Regulation, Member States are obliged to accord an applicant the right, in an appeal against a transfer decision under Article 19(1) of that regulation, to request a review of the determination of the Member State responsible on the grounds that the criteria in Chapter III of the regulation have been misapplied (paras.41-42).

A 'single appeal': The CJEU replied that under Article 19(2) of the Dublin II Regulation applicants have the possibility of appealing against a decision not to examine their application and to transfer them to the Member State responsible, or of applying for such a decision to be reviewed. The appeal that is provided for is "a single appeal", which is distinct from the appeals procedures provided for in the initial Asylum Procedures Directive (para.50).

Rights conferred upon the applicant: The CJEU recalled its settled case law according to which EU regulations "operate to confer rights on individuals which the national courts have a duty to protect", but added that it was necessary to ascertain "to what extent the provisions laid down in Chapter III of [the Dublin II Regulation] actually confer on applicants for asylum which the national courts have a duty to protect" (paras.48-49). The CJEU ended up implying that those rights are very limited, since it held that:

[59] CJEU, *Shamso Abdullahi v. Bundesasylamt (Austria)*, C-394/12, Judgment [GC] of 10 December 2013.
[60] Note that Article 20(1)(e) of the Dublin II Regulation likewise provides for an appeal against a transfer decision in the "take back" procedure.

> "Article 19(2) of [the Dublin II Regulation] must be interpreted as meaning that, in circumstances where a Member State has agreed to take charge of an applicant for asylum on the basis of the criterion laid down in Article 10(1) of that regulation – namely, as the Member State of the first entry of the applicant for asylum into the European Union – the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union." (para.62)

The CJEU based its conclusion on the fact that the Dublin II Regulation must be construed "not only in the light of the wording of its provisions, but also in the light of its general scheme, its objectives and its context, in particular its evolution in connection with the system of which it forms part" (para.51). In that regard, the CJEU emphasized the principle of mutual confidence on which the Dublin II Regulation is based, the fact that the CEAS has to a large extent harmonized the rules applicable to asylum applications, and that one of the principal objectives of the Dublin II Regulation is "the establishment of a clear and workable method *for determining rapidly* the Member State responsible" (emphasis added) (paras.52-55&59).

The CJEU also compared the rules in the Dublin II Regulation regarding the determination of the Member State responsible with the rules in the former Dublin Convention, which did not confer rights upon individuals but governed the relations between Member States. It considered that certain provisions of the Dublin II Regulation indicate that the regulation was intended to be similar in that regard. Thus, the "sovereignty" and the "humanitarian" clauses in Articles 3(2) and 15(1) of that regulation are optional provisions granting a wide discretionary power to Member States, which is designed to maintain the prerogatives of the Member States in the exercise of their right to grant asylum irrespective of the Member State responsible on the basis of the criteria laid down in Chapter III of that regulation. Additionally, Article 23 of the Dublin II Regulation provides for the establishment of certain bilateral arrangements between Member States; and Article 14(1) of Commission Regulation No 1560/2003 provides for a conciliation mechanism for resolving certain disputes between Member States regarding the application of the Dublin II Regulation, in which it is not envisaged that the applicant will even be heard (paras.55-58).

►Dublin III◄ Whereas the conciliation mechanism regarding the application of the Dublin II Regulation only concerned disputes relating to the application of Article 15 of that regulation,[61] the conciliation mechanism has been extended by Article 37 of the Dublin III Regulation to disputes on "any matter related to the application of this Regulation". Similarly, recital 37 of the Dublin III Regulation states:

Recital 37 Dublin III Regulation

[…] Certain provisions of Regulation (EC) No 1560/2003 should be incorporated into this Regulation, either for reasons of clarity or because they can serve a general objective. In particular, it is important, both for the Member States and the applicants concerned, that there should be a general mechanism for finding a solution in cases where Member States differ over the application of a provision of this Regulation. It is therefore justified to incorporate the mechanism provided for in Regulation (EC) No 1560/2003 for the settling of disputes on the humanitarian clause into this Regulation and to extend its scope to the entirety of this Regulation.

[61] The Commission's authority to establish the conciliation mechanism was provided for in Article 15(5) of the Dublin II Regulation, and was limited to the settling of differences between Member States over the application of Article 15 of that regulation.

On the other hand, Article 27(1) of the Dublin III Regulation provides in relation to both the "take back" and the "take charge" procedures that the applicant "shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal." Recital 19 of the Dublin III Regulation specifies in that regard:

> **Recital 19 Dublin III Regulation**
>
> *In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the Charter of Fundamental Rights of the European Union. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of* **the application of this Regulation** *and* **of the legal and factual situation in the Member State** *to which the applicant is transferred.* [emphases added]

Article 27(1) of the Dublin III Regulation would seem to confer more rights upon the applicant than the CJEU found in *Abdullahi* in relation to Article 19(2) of the Dublin II Regulation. However, the exact extent of those rights may still be open to question bearing in mind that the Dublin III Regulation also governs the relations between Member States.

C. Table of cases

CJEU judgments

Bundesrepublik Deutschland v. Kaveh Puid (Germany), C-4/11, Judgment [GC] of 14 November 2013 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion]

K v. Bundesasylamt (Austria), C-245/11, Judgment [GC] of 6 November 2012 [Links: Judgment | Case summary | Advocate General's opinion]

MA, BT and DA v. Secretary of State for the Home Department (United Kingdom), C-648/11, Judgment of 6 June 2013 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | Order]

Migrationsverket v. Edgar Petrosian and Others (Sweden), C-19/08, Judgment of 29 January 2009 [Links: Judgment | Case summary]

Migrationsverket v. Nurije Kastrati and Others (Sweden), C-620/10, Judgment of 3 May 2012 [Links: Judgment | Case summary | Advocate General's opinion]

N.S. v. Secretary of State for the Home Department (United Kingdom) and M.E. and Others v. Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform (Ireland), Joined Cases C-411/10 and C-493/10, Judgment [GC] of 21 December 2011 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion in *N.S.* | Advocate General's opinion in *M.E.* | UNHCR written submission | UNHCR oral submission | Order in *N.S.*]

Safalero Srl v. Prefetto di Genova (Italy), Case C-13/01, Judgment of 11 September 2003 [Links: Judgment | Case summary | Advocate General's opinion]

Shamso Abdullahi v. Bundesasylamt (Austria)), C-394/12, Judgment [GC] of 10 December 2013 [Links: Judgment | Case summary | Advocate General's opinion | Order (French)]

Unibet v. Justitiekanslern (Sweden), C-432/05, Judgment [GC] of 13 March 2007 [Links: Judgment | Case summary | Advocate General's opinion]

Zuheyr Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet (Bulgaria), C-528/11, Judgment of 30 May 2013 [Links: Judgment | Case summary | UNHCR statement]

Judgments of the ECtHR

K.R.S. v. the United Kingdom, No. 32733/08, Decision of 2 December 2008 [Links: Decision | Case summary]

M.S.S. v. Belgium and Greece, No. 30696/09, Judgment [GC] of 21 January 2011 [Links: Judgment | Case summary | UNHCR written submission | UNHCR oral submission]

1.6 Reception conditions of asylum-seekers

A. Introduction

Under EU law, standards for the reception of asylum-seekers are laid down in the Reception Conditions Directive ("the initial RCD") and its recast ("recast RCD").

The present chapter covers the case law of the CJEU on reception conditions except for the issue of detention of asylum-seekers, which is addressed separately in chapter 1.7.

For further information on the initial RCD and the recast RCD, see:

1. Text of initial RCD (2003/9/EC) [Link]

2. Text of recast RCD (2013/33/EU) [Link]

3. Report from the Commission to the Council and to the European Parliament on the application of the initial RCD, 26 November 2007 [Link]

4. UNHCR annotated comments on the initial RCD, July 2003 [Link]

5. UNHCR comments on the Commission's proposal for a recast of the initial RCD, 13 March 2009 [Link]

6. UNHCR comments on the Commission's amended proposal for a recast of the initial RCD, July 2012 [Link]

Deadlines for transposition of the RCD: Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the initial RCD by 6 February 2005.[1] Member States are required to transpose the recast RCD by 20 July 2015.[2]

EU Member States bound by the RCD: All EU Member States except for the following are bound by the RCD:

(i) Denmark and Ireland did not take part in the adoption of the initial RCD and were not bound by its terms;[3]

(ii) Denmark, Ireland and the UK did not take part in the adoption of the recast RCD and are not bound by its terms,[4] although the UK remains bound by the initial RCD.

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[1] Article 26 initial RCD.
[2] Article 31 recast RCD.
[3] Recitals 20 and 21 initial RCD.
[4] Recitals 33 and 34 recast RCD.

Article 32 of the recast RCD provides that, with effect from 21 July 2015, the initial RCD is repealed for the Member States bound by the recast.

B. The CJEU case law on the reception conditions of asylum-seekers

1. Introduction

As of the end of 2013, preliminary rulings of the CJEU concerning reception conditions had addressed the following issues: (i) the personal and temporal scope of the initial RCD; (ii) the circumstances under which transfer under the Dublin II Regulation to a particular EU Member State is precluded due to deficient reception conditions in that State. The latter issue is not discussed in the present chapter as it is addressed instead in chapter 1.5 on the Dublin system.

The CJEU had also decided two infringement actions brought by the Commission, against Austria[5] and Greece[6] respectively. In both cases, the Court held that the Member State concerned had failed to meet its obligations for transposing the initial APD within the deadline required by the directive.[7]

Two preliminary references were pending before the CJEU at the end of 2013. As discussed below, one case concerned the provision of financial allowances to asylum-seekers,[8] the second case concerned the support to be provided specifically to applicants for subsidiary protection.[9]

Although the case law discussed below concerns the initial RCD, it is likely to remain of relevance to the interpretation and application of the recast RCD, the relevant provisions of which are discussed in the sub-sections marked "**►Recast RCD◄**".

2. Purpose and scope of the RCD

a) Respect for fundamental rights

As the CJEU stated in *Cimade and GISTI*,[10] the provisions of the initial RCD must be interpreted "in the light of the general scheme and purpose of the directive and, in accordance with recital 5 in the preamble to that directive, while respecting the fundamental rights and observing the principles recognised in particular by the Charter." The CJEU underlined that, according to recital 5 of the initial RCD, the directive "aims in particular to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter" (para.42):

> **Recital 5 initial RCD**
>
> *This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the said Charter.*

[5] CJEU, *European Commission v. Austria*, C-102/06, Judgment of 26 October 2006.
[6] CJEU, *European Commission v. Greece*, C-72/06, Judgment of 19 April 2007.
[7] The Commission also initiated infringement actions for the same reasons against Belgium (C-389/06), Germany (C-496/06), Luxembourg (C-47/06) and Portugal (C-75/06). However, the actions were subsequently withdrawn by the Commission and removed from the Court's register.
[8] CJEU, *Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri and Others (Belgium)*, C-79/13, Reference from Arbeidshof te Brussel of 15 February 2013.
[9] CJEU, *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida (Belgium)*, C-562/13, Reference from Cour du travail de Bruxelles of 31 October 2013.
[10] CJEU, *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration (France)*, C-179/11, Judgment of 27 September 2012.

> **Article 1 EU Charter**
> **('Human dignity')**
>
> *Human dignity is inviolable. It must be respected and protected.*

> **Article 18 EU Charter**
> **('Right to asylum')**
>
> *The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties').*

►Recast RCD◄ The preamble to the recast RCD is more expansive than the preamble to the initial RCD, stating in particular in its 35th recital that: "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly." In addition to respect for human dignity (Article 1) and the right to asylum (Article 18), the aforementioned Articles concern the prohibition of torture and inhuman or degrading treatment or punishment (Article 4); the right to right to liberty and security (Article 6); respect for private and family life (Article 7); non-discrimination (Article 21); the rights of the child (Article 24); and the right to an effective remedy and to a fair trial (Article 47).

b) Personal and temporal scope of the RCD

Personal scope of the RCD: In *Cimade and GISTI*, the CJEU held that, pursuant to Article 3 of the initial RCD, a Member State must guarantee the reception conditions laid down in that directive to any third-country national or stateless person who satisfies the following two conditions: (i) he or she has made an "application for asylum" at the border or in the territory of the Member State concerned (para.38); (ii) he or she is allowed to remain on the territory of the Member State as an asylum-seeker (para.46):

> **Article 3(1) initial RCD**
> **('Scope')**
>
> *This Directive shall apply to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State as long as they are allowed to remain on the territory as asylum seekers, as well as to family members, if they are covered by such application for asylum according to the national law.*

As regards the first condition, the CJEU noted that Article 2(b) of the initial RCD provides that an "application for asylum" is an application made by a third country national or a stateless person "which can be understood as a request for international protection from a Member State, under the [1951] Geneva Convention" and that "[a]ny application for international protection is presumed to be an application for asylum unless [the person concerned] explicitly requests another kind of protection that can be applied for separately" (para.38).

As regards the second condition, the CJEU held that an applicant has the right to remain as an asylum-seeker: (i) in the territory of the Member State where he or she made his or her application, during the Dublin procedure for determining the Member State responsible for examining the application;[11] (ii) in the territory of the Member State responsible for examining the application (be it the same or another Member State), for purposes of that examination.[12] Remaining "in the territory" could include at the border or in a transit zone (paras.46-49).[13]

The CJEU observed that "[o]nly in the circumstances listed in Article 16 of [the initial RCD] may the reception conditions laid down in that directive be reduced or withdrawn where the asylum-seeker does not comply with the reception rules provided for by the Member State concerned" (para.57):

Article 16 initial RCD
('Reduction or withdrawal of reception conditions')

1. Member States may reduce or withdraw reception conditions in the following cases:

(a) where an asylum seeker:

— abandons the place of residence determined by the competent authority without informing it or, if requested, without permission, or

— does not comply with reporting duties or with requests to provide information or to appear for personal interviews concerning the asylum procedure during a reasonable period laid down in national law, or

— has already lodged an application in the same Member State.

When the applicant is traced or voluntarily reports to the competent authority, a duly motivated decision, based on the reasons for the disappearance, shall be taken on the reinstallation of the grant of some or all of the reception conditions;

(b) where an applicant has concealed financial resources and has therefore unduly benefited from material reception conditions.

If it transpires that an applicant had sufficient means to cover material reception conditions and health care at the time when these basic needs were being covered, Member States may ask the asylum seeker for a refund.

2. Member States may refuse conditions in cases where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State.

3. Member States may determine sanctions applicable to serious breaching of the rules of the accommodation centres as well as to seriously violent behaviour.

4. Decisions for reduction, withdrawal or refusal of reception conditions or sanctions referred to in paragraphs 1, 2 and 3 shall be taken individually, objectively and impartially and reasons shall be given. Decisions shall be based on the particular situation of the person concerned, especially with regard to persons covered by Article 17, taking into account the principle of proportionality. Member States shall under all circumstances ensure access to emergency health care.

5. Member States shall ensure that material reception conditions are not withdrawn or reduced before a negative decision is taken.

The CJEU was thus presumably referring to Article 16(1)(a) of the initial RCD when it said with regard to the obligation to grant reception conditions that the personal scope of the initial RCD encompasses "any asylum seeker who has lodged an application for asylum *for the first time* with a Member State" (emphasis added) (para.52).

►Recast RCD◄ In contrast to the initial RCD, the recast RCD applies not just to "asylum-seekers" but to "applicants for international protection", meaning applicants for subsidiary protection status as well as applicants for refugee status. The personal scope of the recast RCD is thus defined in Article 3(1) of the recast as follows: "This Directive shall apply to all third-country nationals and stateless

[11] The CJEU noted that the definition of an application for asylum in Article 2(c) of the Dublin II Regulation is, in essence, identical to that in Article 2(b) of the initial RCD (para.38).
[12] For further information on the right to remain as an asylum-seeker, including exceptions to that right, see below chapter 1.7 on the detention of asylum-seekers.
[13] For further details of the CJEU's reasoning, see section B.2.c in chapter 1.4 on asylum procedures.

persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants, as well as to family members, if they are covered by such application for international protection according to national law."

Recital 8 of the recast RCD further clarifies the scope of the recast: "In order to ensure equal treatment of applicants throughout the Union, this Directive should apply during all stages and types of procedures concerning applications for international protection, in all locations and facilities hosting applicants and for as long as they are allowed to remain on the territory of the Member States as applicants." It should be noted in that regard that recital 11 of the Dublin III Regulation itself states that the recast RCD "should apply to the procedure for the determination of the Member State responsible as regulated under this Regulation, subject to the limitations in the application of that Directive."

When the obligation to grant the conditions of the RCD begins: In *Cimade and GISTI*, the CJEU pointed out that Article 13(1) of the initial RCD provides that the obligation to grant material reception conditions (housing, food and clothing, and a daily expenses allowance) begins when the individual concerned applies for asylum (para.39):

> **Article 13(1) initial RCD**
> **('General rules on material reception conditions and health care')**
> *Member States shall ensure that material reception conditions are available to applicants when they make their application for asylum.*

►Recast RCD◄ Article 17(1) of the recast RCD similarly provides that "Member States shall ensure that material reception conditions are available to applicants when they make their application for international protection."

When the obligation to grant the conditions of the RCD ends in the case of an applicant who is subject to transfer under the Dublin Regulation to another Member State: In *Cimade and GISTI*, the CJEU held that the obligation to grant the benefits of the initial RCD applies even when, pursuant to the Dublin II Regulation, the Member State where the application was made considers that it is not the responsible Member State for examining the application and calls upon another Member State to take charge of or take back the applicant (para.50).

That obligation ceases only when the individual is actually transferred to the responsible Member State and therefore no longer has the status of an asylum-seeker in the Member State from which he or she was transferred. That is because Article 2(c) of the initial RCD and Article 2(d) of the Dublin II Regulation both define an asylum-seeker as an individual who has made an application for asylum in respect of which "a final decision has not yet been taken". In that regard, a "final decision" can not include a decision to call upon another Member State to accept the transfer of the applicant under the Dublin II Regulation, since it is possible that the requested Member State will not agree that it is responsible for examining the asylum application, and therefore that the applicant will remain in the territory of the requesting Member State. A "final decision" also does not include the requested Member State's agreement to the individual being transferred, since if the transfer does not take place within the time limits specified by the Dublin II Regulation, responsibility for examining the individual's application will lie with the requesting Member State. Hence it is only when the transfer has actually taken place that the requesting Member State's obligations to grant the reception conditions in the initial RCD to the applicant come to an end (paras.52-58).

The CJEU stressed that, in accordance with the initial RCD's general scheme and purpose, including in particular the requirement that human dignity be respected, the applicant may not be deprived of the protection of the directive "even for a temporary period of time" before being transferred to the responsible Member State (para.56).

►Recast RCD◄ As noted above, Article 3(1) of the recast RCD defines the scope of the recast as applying to "all third-country nationals and stateless persons who make an application for international protection on the territory, including at the border, in the territorial waters or in the transit zones of a Member State, as long as they are allowed to remain on the territory as applicants" and to family members. Article 2(b) of the recast RCD defines an "applicant" as "a third-country national or a stateless person who has made an application for international protection *in respect of which a final decision has not yet been taken*" (emphasis added). Hence, the CJEU's ruling in *Cimade and GISTI* with respect to the initial RCD and the Dublin II Regulation would seem equally applicable to the interpretation and implementation of the recast RCD in conjunction with the Dublin III Regulation.

3. Reception measures

a) The Member State responsible for financing reception conditions

In *Cimade and GISTI*, the CJEU held that the financial costs of granting the reception conditions laid down in the initial RCD are to be assumed by the Member State which has the obligation to grant those conditions, even when the individual concerned is subsequently transferred to another Member State as the responsible Member State under the Dublin II Regulation for examining his or her asylum application. However, the Court drew attention to the fact that Member States have the possibility of seeking financial assistance from the European Refugee Fund,[14] established by Decision No 573/2007/EC, a need which "can in particular manifest itself in the case of major migration flows" (paras.59-60).

►Recast RCD◄ The European Refugee Fund only covered the period 2008 – 2013 and will therefore not be available to support measures taken by Member States to implement their obligations under the recast RCD. However, the European Refugee Fund was due to be replaced in 2014 by the Asylum, Migration and Integration Fund.

b) Cases pending before the CJEU

Two cases were pending before the CJEU at the end of 2013.

In *Saciri*,[15] the CJEU was asked *inter alia* about the amount of the financial allowances that a Member State must grant to an asylum-seeker when it has opted under Article 13(5) of the initial RCD not to provide material reception conditions directly, and about the time from when such allowances must be granted. The hearing before the CJEU took place in November 2013, but the Court's ruling was still pending at the end of that year.

In detail, the questions were as follows:

> "1. When a Member State elects, pursuant to Article 13(5) of [the RCD], to provide the material support in the form of a financial allowance, does the Member State then still have any

[14] The European Refugee Fund covered the period 2008 – 2013. It was due to be replaced by the Asylum, Migration and Integration Fund in 2014.

[15] CJEU, *Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri and Others (Belgium)*, C-79/13, Reference from Arbeidshof te Brussel of 15 February 2013.

responsibility to ensure that the asylum applicant, in one way or another, enjoys the minimum protection measures of the Directive as contained in Articles 13(1), 13(2), 14(1), 14(3), 14(5) and 14(8) of the Directive?

2. Should the financial allowance, provided for by Article 13(5) of the Directive, be granted from the date of the application for asylum and the reception request, or from the expiry of the period provided for in Article 5(1) of the Directive, or from another date. Should the financial allowance be of such a nature that it allows the asylum seeker, in the absence of material reception facilities provided by the Member State or by an institution designated by the Member State, to provide for his own accommodation at all times, if necessary in the form of hotel accommodation, until such time as he is offered permanent accommodation or as he is able to acquire more permanent accommodation himself?

3. Is it compatible with the Directive that a Member State only grants the material reception facilities to the extent that the existing reception structures, as established by the State, are able to ensure that accommodation, and refers the asylum seeker who does not find place there for assistance which is available to all the residents of the State, without providing for the necessary statutory rules and structures so that institutions which have not been established by the State itself are effectively able to extend a dignified reception to the asylum applicants within a short period?"

In *Moussa Abdida*,[16] the CJEU was asked about the reception conditions that Member States must provide to an applicant for subsidiary protection in the following circumstances:

"1. On a proper construction of [the initial Qualification Directive (2004/83/EC), initial Asylum Procedures Directive (2005/85/EC) and initial Reception Conditions Directive (2003/9/EC)], is a Member State which provides that a foreign national has the right to subsidiary protection for the purposes of Article 15(b) of [the initial Qualification Directive] if that person 'suffers from an illness which is of such a kind as to entail a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there is no adequate treatment for that illness in his country of origin' under an obligation to

– […]

– make provision under its social security or reception system for the basic needs of the person applying for subsidiary protection (other than his medical needs) to be met pending a ruling on his appeal against that administrative decision?

2. If the answer to Question 1 is in the negative, does the Charter of Fundamental Rights – and, in particular, Articles 1 to 3 (human dignity, right to life and integrity), Article 4 (prohibition of inhuman or degrading treatment), Article 19(2) (right not to be removed to a State where there is a serious risk of inhuman or degrading treatment), Articles 20 and 21 (equality and non-discrimination as compared with other categories of applicants for subsidiary protection) and/or Article 47 (right to an effective remedy) of that Charter – place a Member State in course of transposing [the abovementioned directives] into national law under an obligation to make provision for a remedy with suspensive effect and for the requisite means of meeting the basic needs referred to in Question 1?"

The hearing of the case by the CJEU was still pending at the end of 2013.

[16] CJEU, *Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida (Belgium)*, C-562/13, Reference from Cour du travail de Bruxelles of 31 October 2013.

C. Table of cases

CJEU judgments

Cimade, Groupe d'ínformation et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration (France), C-179/11, Judgment of 27 September 2012 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion | UNHCR statement]

European Commission v. Austria, C-102/06, Judgment of 26 October 2006 [Link: Judgment (French)]

European Commission v. Greece, C-72/06, Judgment of 19 April 2007 [Link: Judgment (French)]

References pending before the CJEU at the end of 2013

Centre public d'action sociale d'Ottignies-Louvain-La-Neuve v. Moussa Abdida (Belgium), C-562/13, Reference from Cour du travail de Bruxelles of 31 October 2013 [Link: Questions]

Federaal agentschap voor de opvang van asielzoekers v. Selver Saciri and Others (Belgium), C-79/13, Reference from Arbeidshof te Brussel of 15 February 2013 [Link: Questions]

1.7 Detention of asylum-seekers

A. Introduction

Under EU law, there are two distinct legal regimes of detention in the field of asylum and immigration: (i) detention when necessary during the asylum procedure, including for purposes of securing transfer procedures under the Dublin III Regulation; (ii) detention for purposes of removing an "illegally staying third-country national"[1] who is the subject of return procedures under the Returns Directive.[2] Whereas return-related detention is regulated by the Returns Directive,[3] asylum-related detention is regulated by the Asylum Procedures Directive (APD),[4] the Reception Conditions Directive (RCD)[5] and the Dublin III Regulation.[6]

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[1] For purposes of the Returns Directive, a "third-country national" means any person who is not a citizen of the EU and who is not "a person enjoying the the right of free movement under Union law" as defined in the Schengen Borders Code (Article 3(1) of the Returns Directive, referring to the then "Community right of freedom of movement"). This includes stateless persons as well as persons who are nationals of non-Member States.

[2] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [Link].

[3] In the **Returns Directive**, see: (i) recital 16 and Article 15 regarding the grounds for and procedural guarantees related to detention, including judicial review and the maximum permitted period of detention; (iii) recital 17 and Article 16 regarding conditions of detention; (iv) Article 17 regarding detention of minors and families; (v) Article 18 regarding emergency situations where "an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff".

[4] In the **initial APD**, see: (i) Article 18 regarding the grounds for, and judicial review of, detention; (ii) Article 16(2) regarding the access of legal advisers and counselors to applicants who are detained; (iii) Article 21(1)(a) regarding access of UNHCR to applicants who are detained; (iv) Article 35(2) to (5) impliedly permitting detention at the border for up to four weeks. In the **recast APD**, see: (i) Article 26 regarding the grounds for, and judicial review of, detention; (ii) Article 8(2) regarding the access of organizations and persons providing advice and counseling to applicants who are detained; (iii) Article 29(1)(a) regarding access of UNHCR to applicants who are detained; (iv) Article 43(2) and (3) impliedly limiting detention at the border to no longer than four weeks.

[5] In the **initial RCD**, see: (i) Article 2(k) for the definition of detention; (ii) Article 7(3) regarding the grounds for detention; (iii) Article 21(1) regarding the right of appeal against detention, including the possibility of an appeal or a review before a judicial body at least in the last instance; (iv) recital 10, Article 13(2) and Article 14(8) regarding conditions of detention. In the **recast RCD**, see: (i) Article 2(h) recast RCD for the definition of detention; (ii) recital 15, recital 17, recital 20 and Article 8 regarding the grounds for detention; (iii) recital 15, recital 16 and Article 9 regarding the procedural guarantees related to detention, including a requirement for regular judicial review; (iv) recital 17, recital 18, recital 19 and Article 10 regarding conditions of detention; (v) Article 11 regarding detention of "vulnerable persons and applicants with special reception needs".

[6] Detention was not regulated by the **Dublin II Regulation**, although note Article 17(2) of that regulation requiring an urgent reply to a "take charge" request when an applicant is detained in the requesting Member State. In the **Dublin III Regulation**, see recital 20 and Article 28 regarding the grounds for and procedural guarantees related to detention, and the conditions of detention.

The present chapter covers the case law of the CJEU on the detention of asylum-seekers, including individuals who make an application for asylum while detained for purposes of removal under the Returns Directive.

The CJEU has clarified that for as long as an applicant has the right to remain in the concerned Member State for the purpose of the asylum procedure, he or she does not fall within the scope of the Returns Directive. However, as discussed below, there are certain situations in which although an asylum application has not been definitively rejected as unfounded on its merits, the applicant may not, or may no longer, have the right to remain in the Member State concerned. The CJEU has not yet been asked to rule in relation to any of these situations on which detention regime – asylum-related detention or return-related detention – is applicable under EU law.

Whereas the CJEU's case law on asylum-related detention is discussed in the present chapter, the Court's case law on return-related detention is discussed below in chapter 1.8. The case law in the latter chapter may also need to be considered in the context of asylum-related detention if there are any circumstances under which an asylum-seeker may be detained under the Returns Directive.

> **For further information on the detention of asylum-seekers, see:**
>
> 1. UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012 [Link]
>
> 2. UNHCR, *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees, 2014-2018*, 2014 [Link]

B. The CJEU case law on detention of asylum-seekers

1. Introduction

As of the end of 2013, the case law of the CJEU on detention of asylum-seekers had addressed the following issues: (i) the applicability of the Returns Directive to asylum-seekers; (ii) the grounds for detention under the initial APD and initial RCD; (iii) detention to determine whether an individual is illegally staying.

2. Detention of an individual who makes an application for asylum while detained for purposes of removal as an illegally staying third-country national

In *Arslan*,[7] the CJEU considered whether the detention of an individual for purposes of removal under Article 15 of the Returns Directive must automatically be terminated if he or she makes an application for asylum:

> **Article 15 Returns Directive**
> **('Detention')**
>
> *1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:*
>
> *(a) there is a risk of absconding or*
>
> *(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.*

[7] CJEU, *Mehmet Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie (Czech Republic)*, C-534/11, Judgment of 30 May 2013.

> *Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.*
>
> *[…]*

First, the CJEU examined the personal scope of the Returns Directive. It noted that Article 2(1) of the Returns Directive provides that the directive applies to third-country nationals "staying illegally on the territory of a Member State"; and that, as defined in Article 3(2) of the directive, "illegal stay" means "the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions … for entry, stay or residence in that Member State" (para.43).

Second, the CJEU examined whether asylum-seekers can be considered to be "illegally staying" and therefore fall within the scope of the Returns Directive. In that regard, recital 9 of the Returns Directive states (para.44):

> **Recital 9 Returns Directive**
>
> *In accordance with [the initial Asylum Procedures Directive], a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force.*

The CJEU noted that, subject to the exceptions stipulated in Article 7(2) of the initial APD, Article 7(1) of the initial APD provides that applicants have the right to remain in the Member State concerned for the purpose of the asylum procedure until the determining authority has made a decision at first instance on their application (paras.45-46); furthermore, Article 39(3) of the initial APD allows Member States to extend their right to remain until the outcome of an appeal against a negative decision at first instance (para.47):

> **Article 7 initial APD**
> **('Right to remain in the Member State pending the examination of the application')**
>
> *1. Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit.*
>
> *2. Member States can make an exception only where, in accordance with Articles 32 and 34, a subsequent application will not be further examined or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant or otherwise, or to a third country, or to international criminal courts or tribunals.*

> **Article 39 initial APD**
> **('The right to an effective remedy')**
>
> *1. Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal, against the following:*
>
> *(a) a decision taken on their application for asylum, including a decision:*
>
> *(i) to consider an application inadmissible pursuant to Article 25(2),*
>
> *(ii) taken at the border or in the transit zones of a Member State as described in Article 35(1),*
>
> *(iii) not to conduct an examination pursuant to Article 36;*
>
> *(b) a refusal to re-open the examination of an application after its discontinuation pursuant to Articles 19 and 20;*
>
> *(c) a decision not to further examine the subsequent application pursuant to Articles 32 and 34;*

> *(d) a decision refusing entry within the framework of the procedures provided for under Article 35(2);*
>
> *(e) a decision to withdraw of refugee status pursuant to Article 38.*
>
> *[…]*
>
> *3. Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:*
>
> *(a) the question of whether the remedy pursuant to paragraph 1 shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome;*
>
> *[…]*
>
> *[…]*

Consequently, an applicant cannot be considered to be "illegally staying" within the meaning of the Returns Directive during the period from making his or her application until at least the rejection of that application at first instance, or, where an appeal against rejection at first instance has suspensive effect, until the outcome of the appeal (paras.48-49). The applicant therefore cannot be detained under the Returns Directive during that period, and any continued detention must be based on the rules for asylum-related detention (para.52).[8] However, the return procedure is not thereby definitively terminated as it may continue if the application is rejected (para.60).

►Recast APD◄ The CJEU's ruling in *Arslan* would seem equally applicable to applicants who have the right to remain within the meaning of the recast APD. As discussed below, the recast APD provides more extensive guarantees than the initial APD in that regard.

3. Detention of an individual who has the right to remain for the purpose of the asylum procedure

a) Grounds for detention under the initial APD and the initial RCD

In *Arslan*,[9] the CJEU pointed out that neither the initial APD nor the initial RCD sets out the grounds on which an applicant for asylum may be detained, apart from: (i) the provision in Article 18(1) of the initial APD that an individual may not be detained for the sole reason that he or she is an applicant;[10] (ii) the principle laid down in Article 7(1) of the initial RCD that applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State, and the provision in Article 7(3) of that directive that when it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law:[11] (paras.53-55)

> **Article 18(1) initial APD**
>
> *Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.*

[8] See also CJEU, *Said Shamilovich Kadzoev (Huchbarov) (Bulgaria)*, C-357/09 PPU, Judgment [GC] of 30 November 2009, para 45: "Detention for the purpose of removal governed by [the Returns Directive] and detention of an asylum seeker in particular under [the initial RCD and the initial APD] and the applicable national provisions … fall under different legal rules."

[9] CJEU, *Mehmet Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie (Czech Republic)*, C-534/11, Judgment of 30 May 2013.

[10] See also CJEU, *Kadzoev*, para. 44.

[11] See also CJEU, *Kadzoev*, para. 42.

Article 7 initial RCD

1. Asylum seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State. The assigned area shall not affect the unalienable sphere of private life and shall allow sufficient scope for guaranteeing access to all benefits under this Directive.

2. Member States may decide on the residence of the asylum seeker for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application.

3. When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.

[…]

The CJEU held that until such time as an exhaustive list of grounds of detention was established in EU law, as was then being planned in the context of the recasting of the RCD, "it is for Member States to establish, in full compliance with their obligations arising from both international law and European Union law, the grounds on which an asylum seeker may be detained or kept in detention" (paras.55-56).

►Recast APD, recast RCD, and the Dublin III Regulation◄ The grounds on which a Member State may (and may not) detain an applicant for international protection are set out in: Article 26(1) of the recast APD; recital 15, recital 17, recital 20 and Article 8 of the recast RCD; and recital 20 and Article 28 of the Dublin III Regulation. They are consolidated and exhaustively listed in Article 8 of the recast RCD:

Article 8 recast RCD
('Detention')

1. Member States shall not hold a person in detention for the sole reason that he or she is an applicant in accordance with [the recast Asylum Procedures Directive].

2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.

3. An applicant may be detained only:

- *(a) in order to determine or verify his or her identity or nationality;*
- *(b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;*
- *(c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory;*
- *(d) when he or she is detained subject to a return procedure under [the Returns Directive], in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;*
- *(e) when protection of national security or public order so requires;*
- *(f) in accordance with Article 28 of [the Dublin III Regulation].*

The grounds for detention shall be laid down in national law.

4. Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law.

The provision in Article 8(3)(c) of the recast RCD concerning detention to decide on the applicant's right to enter the territory should be read in conjunction with Article 43(2) and (3) of the recast APD, which limit detention at the border to no longer than four weeks.

b) Detention of an individual who makes an application for asylum in order to delay or frustrate the enforcement of a return decision

As discussed above, the CJEU held in *Arslan* that detention under the Returns Directive of an asylum-seeker is prohibited for as long as he or she has the right to remain in the concerned Member State for the purpose of the asylum procedure.

However, the CJEU also held that where an individual is detained for purposes of removal under Article 15 of the Returns Directive at the time of making his or her asylum application, the initial APD and the initial RCD do not preclude maintaining the detention on the basis of a provision of national law "where it appears, after an assessment on a case-by-case basis of all the relevant circumstances, that the application was made solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary to maintain detention to prevent the person concerned from permanently evading his return" (para.63).

Such detention is compatible with Article 18(1) of the initial APD, since it results not from the making of the application for international protection but "from circumstances characterising the individual behaviour of the applicant before and during the making of that application" (para.58). It is also permissible under Article 7(3) of the initial RCD "in so far as maintaining the detention appears in such circumstances to be objectively necessary to prevent the person concerned from permanently evading his return" (para.59).

However, the mere fact that the individual concerned is the subject of a return decision and was detained under Article 15 of the Returns Directive at the time of making his or her application "does not allow it to be presumed, without an assessment on a case-by-case basis of all the relevant circumstances, that he has made that application solely to delay or jeopardise the enforcement of the return decision and that it is objectively necessary and proportionate to maintain detention" (para.62).

►Recast RCD◄ The CJEU's ruling in *Arslan* is addressed in Article 8(3)(d) of the recast RCD:

Article 8(3)(d) recast RCD
('Detention')

3. An applicant may be detained only:

[…]

(d) when he or she is detained subject to a return procedure under [the Returns Directive], in order to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;

[…]

4. Whether there are any circumstances under which an asylum-seeker may be detained under the Returns Directive

Although the CJEU has clarified that detention of an asylum-seeker under the Returns Directive is precluded for as long as he or she has the right to remain in the Member State in question for the purpose of the asylum procedure, this begs the question whether there may be certain situations in which an asylum-seeker may not have, or may no longer have, the right to remain for purpose of the asylum procedure or on any other grounds, and therefore fall within the scope of the Returns Directive.

A literal reading of the initial APD suggests the following situations in which an applicant may not, or may no longer, have the right to remain for the purpose of the asylum procedure:

(i) the applicant's appeal against a first-instance decision that his or her application for asylum is unfounded on its merits, or is inadmissible, does not have suspensive effect;[12]

(ii) the applicant's appeal *does* have suspensive effect, but results in a ruling that his or her application for asylum is nevertheless inadmissible on the grounds that he or she may be sent to a "safe third country" or "first country of asylum" outside the EU;[13]

(iii) the applicant makes a "subsequent application" which will not be further examined;[14]

(iv) the applicant will be surrendered or extradited to another EU Member State in accordance with a European arrest warrant or otherwise, or to a third country, or to international criminal courts or tribunals.[15]

It is by no means clear that in all of the above situations the individual concerned could be considered as "illegally staying" within the Returns Directive and therefore be detained for purposes of removal. For example, it might be argued by analogy with the CJEU's ruling on Dublin transfers in *Cimade and GISTI*[16] that where an individual is subject to removal to a "safe third country" or a "first country of asylum", he or she only loses his or her right to remain for purpose of the asylum procedure if and when he or she is actually removed to, and readmitted by, the "safe third country" or "first country of asylum" in question.[17]

►Recast APD◄ The recast APD provides more extensive guarantees regarding the right to remain than the initial APD, in particular by:

(i) providing for the automatic suspensive effect of appeals (subject to certain exceptions, in respect of which a court or tribunal must have the power to rule whether or not the appeal should have suspensive effect);[18]

(ii) providing that, in the case of a first subsequent application, Member States may make an exception to the right to remain only if the application was lodged merely in order to delay or frustrate the enforcement of a decision that would result in the applicant's

[12] Article 25 and Article 39(1) and (3) initial APD. A first-instance decision that the application should not be examined on the grounds that the applicant comes from a "European safe third country" could also in principle be added to this list. However, as discussed above in section B.3.c of chapter 1.4, the "European safe third country concept" would appear to be devoid of any practical effect in the initial APD.
[13] Article 26 and Article 27 initial APD.
[14] Article 7(2) initial APD.
[15] Article 7(2) initial APD. In 2010 the Supreme Court of Finland requested a preliminary ruling from the CJEU regarding the application of Article 7(2) initial APD to two Chechen asylum-seekers in Finland whose surrender had been requested by Lithuania under a European arrest warrant. However, the Supreme Court subsequently withdrew its request after Lithuania rescinded the warrant. See CJEU, *Public Prosecutor v. Gataev and Gateva (Finland)*, Case C-105/10, Reference from the Korkein oikeus (Supreme Court) of 25 February 2010.
[16] See section B.2.b of chapter 1.6, under the following sub-heading: "When the obligation to grant the conditions of the RCD ends in the case of an applicant who is subject to transfer under the Dublin Regulation to another Member State".
[17] Note that Article 26 of the initial APD concerning the application of the "first country of asylum" concept includes the proviso that the applicant will be readmitted to the country in question. Similarly, as regards the application of the "safe third country" concept, Article 27(4) of the initial APD provides: "Where the third country does not permit the applicant for asylum to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II."
[18] Article 46 recast APD.

imminent removal from that Member State; or, in the case of another subsequent application in the same Member State, by providing that an exception may be made to the right to remain only following a final decision considering a first subsequent application inadmissible or after a final decision to reject that application as unfounded;[19]

(iii) providing that Member States may make an exception to the right to remain in the case of a subsequent application, or in order to surrender or extradite an individual, only where it would not lead to direct or indirect *refoulement* in violation of the Member State's obligations under international and EU law.[20]

A literal reading of the recast APD again begs the question whether there may be certain situations in which an applicant could be detained under the Returns Directive for purposes of removal. However, again it is by no means clear that in all of those situations detention under the Returns Directive would be permissible.

5. Detention to determine whether an individual is illegally staying

In *Achughbabian*,[21] the CJEU considered the legal regime governing the detention of an individual to determine whether he or she is illegally staying in the Member State concerned (paras.28-32).

The CJEU pointed out that the Returns Directive is only applicable once it has been established that an individual's stay in the Member State concerned is unlawful. Detention to determine whether an individual is illegally staying remains governed by national law, not EU law, as is corroborated by recital 17 of the Returns Directive: (para.30)

Recital 17 Returns Directive

Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Without prejudice to the initial apprehension apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities.

While detention to determine whether an individual is illegally staying is not precluded by the Returns Directive, such detention must also not undermine the objective of that directive, namely the effective return of illegally staying third country nationals (paras.30-31).

On the one hand, in order not to undermine that objective, Member States must be able to prevent a person suspected of staying illegally from absconding before his or her situation can even be clarified. The competent national authorities must therefore have "a brief but reasonable time to identify the person under constraint and to research the information enabling it to be determined whether that person is an illegally-staying third-country national" (paras.30-31).

On the other hand, again in order not to undermine the abovementioned objective, the competent authorities must "act with due diligence and take a position without delay on the legality or otherwise of the stay of the person concerned." This is notwithstanding the fact that: "Determination of the name and nationality may prove difficult where the person concerned does not cooperate. Verification of the existence of an illegal stay may likewise prove complicated, particularly *where the person concerned invokes a status of asylum seeker or refugee*" (emphasis added) (para.31).

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[19] Article 9(2) and Article 41(1) recast APD.
[20] Article 9(3) and Article 41(1) recast APD.
[21] CJEU, *Alexandre Achughbabian v. Préfet du Val-de-Marne (France)*, C-329/11, Judgment [GC] of 6 December 2011.

►Recast RCD◄ Article 8(3) of the recast RCD, which was adopted 18 months after the CJEU's ruling in *Achughbabian*, exhaustively defines the grounds on which an applicant for international protection may be detained, one of which is "to determine or verify his or her identity or nationality". Nevertheless, the CJEU's ruling in *Achughbabian* may still be applicable to applicants for international protection, since there is a difference between detaining an individual who is already known to be an applicant for international protection in order to establish his or her identity, and detaining an individual to determine his or her identity in order to establish whether he or she has already made an application for international protection and is therefore lawfully on the territory.

C. Table of cases

CJEU judgments

Alexandre Achughbabian v. Préfet du Val-de-Marne (France), C-329/11, Judgment [GC] of 6 December 2011 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion]

Mehmet Arslan v. Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie (Czech Republic), C-534/11, Judgment of 30 May 2013 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion]

Said Shamilovich Kadzoev (Huchbarov) (Bulgaria), C-357/09 PPU, Judgment [GC] of 30 November 2009 [Links: Judgment | Case summary | Advocate General's view]

1.8 Detention of “illegally staying third-country nationals” for purpose of removal

A. Introduction

Under EU law, the Returns Directive establishes common standards and procedures for returning “illegally staying third-country nationals”, including safeguards relating to detention for purposes of removal. The term “third-country nationals” means persons who are not nationals of the Member States, and includes stateless persons.[1]

“Return” may be to the country of origin, to a “country of transit in accordance with Community or bilateral readmission agreements or other arrangements”, or to “another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted”.[2]

The present chapter covers the case law of the CJEU on detention for purposes of removal. As discussed in the previous chapter, an asylum-seeker cannot be considered to be “illegally staying” within the meaning of the Returns Directive during the period from making his or her application until at least the rejection of that application at first instance, or, where an appeal against rejection at first instance has suspensive effect, until the outcome of the appeal. However, if there are any circumstances in which an asylum-seeker may nevertheless be considered as “illegally staying”, the case law discussed below may be of relevance to his or her situation. The case law below is also of relevance to the situation of other persons of concern to UNHCR, namely refugees and stateless persons, where such persons are “illegally staying” within the meaning of the Returns Directive.

For further information on the Returns Directive, see:

1. Text of the Returns Directive (2008/115/EC) [Link]
2. UNHCR position on the initial Commission proposal for the Returns Directive [Link]

[1] In one of the cases discussed below, the applicant in the main proceedings was considered to be stateless by the concerned national court: see CJEU, *Said Shamilovich Kadzoev (Huchbarov) (Bulgaria)*, C-357/09 PPU, Judgment [GC] of 30 November 2009, para.22.
[2] Article 3(3) of the Returns Directive.

Deadline for transposition of the Returns Directive: Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the Returns Directive by 24 December 2010, with the exception of Article 13(4) regarding free legal assistance and/or representation, for which the deadline was 24 December 2011.[3]

EU Member States bound by the Returns Directive: All EU Member States except Denmark Ireland and the United Kingdom are bound by the Returns Directive. However, Denmark implements the directive in the context of the Schengen *acquis*.

Other European States implementing the Returns Directive: Iceland, Liechtenstein, Norway and Switzerland implement the Returns Directive in the context of the Schengen *acquis*.

B. The CJEU case law on return-related detention

1. Introduction

As of the end of 2013, the CJEU had issued a number of preliminary rulings concerning detention under the Returns Directive. The main issues addressed included: (i) detention to determine whether an individual is illegally staying; (ii) detention as a measure of last resort for ensuring the removal of an individual who is the subject of a return decision; (iii) the grounds and maximum duration of detention; (iv) the right to be heard in the context of an administrative decision extending detention; (v) whether the Returns Directive precludes the criminal prosecution of an individual solely on the grounds of his or her illegal stay, and whether in that regard the directive precludes a criminal sentence of imprisonment.

Five cases concerning the interpretation of the Returns Directive were pending before the CJEU as of the end of 2013, three of which concerned return-related detention,[4] as discussed below under “conditions of detention”.

2. Legal framework for detention

The detention-related provisions in the Returns Directive are as follows: (i) recital 16 and Article 15 regarding the grounds for and procedural guarantees related to detention, including judicial review and the maximum permitted periods of detention; (ii) recital 17 and Article 16 regarding conditions of detention; (iv) Article 17 regarding detention of minors and families; (v) Article 18 regarding emergency situations where “an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff”.

As of the end of 2013, the focus of the CJEU’s case law on detention under the Returns Directive had been on Article 15 and Article 16(1) of the directive:

[3] Article 26 initial RCD.
[4] CJEU, *Adala Bero v. Regierungspräsidium Kassel*, C-473/13, reference from Bundesgerichtshof (Germany) of 3 September 2013; CJEU, *Thi Ly Pham v. Stadt Schweinfurt, Amt für Meldewesen und Statistik*, C-474/13, reference from Bundesgerichtshof (Germany) of 3 September 2013; CJEU, *Ettayebi Bouzalmate v.Kreisverwaltung Kleve*, C-514/13, reference from Landgericht München I (Germany) of 26 September 2013.

Article 15 Returns Directive
('Detention')

1. Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

2. Detention shall be ordered by administrative or judicial authorities.

Detention shall be ordered in writing with reasons being given in fact and in law.When detention has been ordered by administrative authorities, Member States shall:

(a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;

(b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch ofthe relevant proceedings.

The third-country national concerned shall be released immediately if the detention is not lawful.

3. In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

4. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

5. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

6. Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.

Article 16(1) Returns Directive
('Conditions of detention')

Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.

3. Detention to determine whether an individual is illegally staying

In *Achughbabian*,[5] the CJEU held that EU law does not govern the detention of an individual to determine whether he or she is illegally staying in the Member State concerned, and does not preclude such detention. However, in order not to undermine the objective of the Returns Directive of ensuring the effective return of illegally staying third country nationals, the competent authorities of that Member State must act with due diligence as regards such detention and take a position without delay on the legality of the individual's stay (paras.30-31).

For further details, see chapter 1.7 above on the detention of asylum-seekers.

[5] CJEU, *Alexandre Achughbabian v. Préfet du Val-de-Marne (France)*, C-329/11, Judgment [GC] of 6 December 2011.

4. Detention as a measure to enforce return

In *Achughbabian*, the CJEU stated that it is obvious that the expressions "measures" and "coercive measures" in Article 8(1) and (4) of the Returns Directive refer to any intervention which leads, in an effective and proportionate manner, to the return of the individual concerned: (para.36)

> **Article 8 Returns Directive**
> **('Removal')**
>
> *1. Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.*
>
> *2. If a Member State has granted a period for voluntary departure in accordance with Article 7, the return decision may be enforced only after the period has expired, unless a risk as referred to in Article 7(4) arises during that period.*
>
> *3. Member States may adopt a separate administrative or judicial decision or act ordering the removal.*
>
> *4. Where Member States use — as a last resort — coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.*
>
> *5. In carrying out removals by air, Member States shall take into account the Common Guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC.*
>
> *6. Member States shall provide for an effective forced-return monitoring system.*

Detention in accordance with Article 15 of the Returns Directive falls within the scope of those measures, as it is permitted only for the purposes of preparing and permitting the removal of the individual concerned, whereas the criminal sanction of a sentence of imprisonment for illegal stay does not constitute such a measure since it does not contribute to the removal (paras.36-37).

In *Sagor*,[6] the CJEU similarly held that the criminal sanction of a "home detention order"[7] for illegal stay does not contribute to removal, and therefore also does not constitute a "measure" or a "coercive measure" within the meaning of Article 8 of the Returns Directive (para.44).

On whether the Returns Directive therefore precludes a sentence of imprisonment or the penalty of a home detention order, see below.

5. Detention as a measure of last resort to enforce return

In *El-Dridi*,[8] the CJEU held that detention in a specialized facility in accordance with Articles 15 and 16 of the Returns Directive must observe the principle of proportionality and is the most serious constraining measure allowed under the directive under a forced removal procedure. Detention is

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[6] CJEU, *Md Sagor (Italy)*, C-430/11, Judgment of 6 December 2012.

[7] The "home detention order" at issue in the main proceedings was as defined in Article 53 of Italian legislative decree 274/2000:

> "1. The penalty of home detention involves an obligation to remain in one's own home, or any other private residence, or in a place of treatment, assistance or day-care, every Saturday and Sunday. The court, in view of the family, work or study commitments or the state of health of the convicted person, may order that that penalty be carried out on different days of the week, or, at the convicted person's request, continuously.
> 2. The duration of the home detention may not be less than six days and may not exceed 45 days. The convicted person shall not be regarded as being in custody."

[8] CJEU, *Hassen El Dridi (Italy)*, C-61/11 PPU, Judgment of 28 April 2011.

"strictly regulated" by those articles, *inter alia* in order to ensure observance of the fundamental rights of the individual concerned (para.42).

The Court's reasoning was as follows:

> "... [The Returns Directive] sets out specifically the procedure to be applied by each Member State for returning illegally staying third-country nationals and fixes the order in which the various, successive stages of that procedure should take place.
>
> … Thus, Article 6(1) of the directive provides, first of all, principally, for an obligation for Member States to issue a return decision against any third-country national staying illegally on their territory.
>
> ... As part of that initial stage of the return procedure, priority is to be given, except where otherwise provided for, to voluntary compliance with the obligation resulting from that return decision, with Article 7(1) of [the Returns Directive] providing that the decision must provide for an appropriate period for voluntary departure of between seven and thirty days.
>
> … It follows from Article 7(3) and (4) of that directive that it is only in particular circumstances, such as where there is a risk of absconding, that Member States may, first, require the addressee of a return decision to report regularly to the authorities, deposit an adequate financial guarantee, submit documents or stay at a certain place or, second, grant a period shorter than seven days for voluntary departure or even refrain from granting such a period.
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> … In the latter situation, but also where the obligation to return has not been complied with within the period for voluntary departure, Article 8(1) and (4) of [the Returns Directive] provides that, in order to ensure effective return procedures, those provisions require the Member State which has issued a return decision against an illegally staying third-country national to carry out the removal by taking all necessary measures including, where appropriate, coercive measures, in a proportionate manner and with due respect for, inter alia, fundamental rights.
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> … In that regard, it follows from recital 16 in the preamble to that directive and from the wording of Article 15(1) that the Member States must carry out the removal using the least coercive measures possible. It is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him.
>
> … Under the second subparagraph of Article 15(1) of [the Returns Directive], that deprivation of liberty must be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence. Under Article 15(3) and (4), such deprivation of liberty is subject to review at reasonable intervals of time and is to be terminated when it appears that a reasonable prospect of removal no longer exists. Article 15(5) and (6) fixes the maximum duration of detention at 18 months, a limit which is imposed on all Member States. Article 16(1) of that directive further requires that the persons concerned are to be placed in a specialised facility and, in any event, kept separated from ordinary prisoners.
>
> … It follows from the foregoing that the order in which the stages of the return procedure established by [the Returns Directive] are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility; the principle of proportionality must be observed throughout those stages." (paras.34-41)

6. Grounds for detention

Grounds for return-related detention must be as specified in Article 15 of the Returns Directive: In *Kadzoev*,[9] the CJEU held that detention on grounds of public order and public safety cannot be based on the Returns Directive, meaning that none of the following can in themselves constitute a ground for detention under the directive: not being in possession of valid documents; being of aggressive conduct; having no means of supporting oneself and no accommodation or means supplied by the Member State for that purpose (paras.68&70).

Reasonable prospect of removal: In *Kadzoev*, the CJEU clarified what is meant by a "reasonable prospect of removal" in Article 15(4) of the Returns Directive:

> "… [U]nder Article 15(4) of [the Returns Directive], detention ceases to be justified and the person concerned must be released immediately when it appears that, for legal or other considerations, a reasonable prospect of removal no longer exists.
>
> … As is apparent from Article 15(1) and (5) of [the Returns Directive], the detention of a person for the purpose of removal may only be maintained as long as the removal arrangements are in progress and must be executed with due diligence, provided that it is necessary to ensure successful removal.
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> … It must therefore be apparent, at the time of the national court's review of the lawfulness of detention, that a real prospect exists that the removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6) of [the Returns Directive], for it to be possible to consider that there is a 'reasonable prospect of removal' within the meaning of Article 15(4) of that directive.
>
> … Thus a reasonable prospect of removal does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods." (paras.63-66)

7. Maximum duration of detention

Maximum duration of 6 months, extendable under certain circumstances to 18 months: As confirmed by the CJEU, Article 15(5) and (6) of the Returns Directive strictly limit the maximum duration of detention for the purpose of removal to 18 months (see, for example, *Kadzoev*, para.56; *El-Dridi*, paras.40-43). Article 15(5) of the directive provides that the maximum duration of detention is initially limited to 6 months. An additional period of detention of 12 months is capable of being added under Article 15(6) of the directive only where non-implementation of the return decision during the initial 6-month period of detention is due to a lack of cooperation from the individual concerned or to delays in obtaining the necessary documentation from third countries (*Achughbabian*, para.36). Hence, once the 18-month limit is reached, the Returns Directive does not allow the individual "not to be released immediately on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose" (*Kadzoev*, paras.68-71). Moreover, the question of whether there is a "reasonable prospect of removal" within the meaning of Article 15(4) of the Returns Directive does not arise once the maximum limits in Article 15(5) and (6) of the directive have been reached (*Kadzoev*, paras.59-62).

In *El-Dridi*, the CJEU emphasized that Article 15(5) and (6) of the Returns Directive serve the purpose of limiting the deprivation of liberty in a situation of forced removal, and that in this regard the directive is intended to take account of:

[9] CJEU, *Said Shamilovich Kadzoev (Huchbarov) (Bulgaria)*, C-357/09 PPU, Judgment [GC] of 30 November 2009.

(i) the case law of the European Court of Human Rights, according to which "the principle of proportionality requires that the detention of a person against whom a deportation or extradition procedure is under way should not continue for an unreasonable length of time, that is, its length should not exceed that required for the purpose pursued";[10]

(ii) the "Twenty guidelines on forced return" adopted by the Committee of Ministers of the Council of Europe, referred to in recital 3 of the Returns Directive, the eighth guideline of which states that any detention pending removal is to be for as short a period as possible (para.43).

In *Kadzoev*, the CJEU noted that while Article 15(5) and (6) of the Returns Directive set limits to the duration of detention, they do not set a limit to the implementation of the removal procedure as such (para.56).

Period of detention during which removal is suspended for judicial review of the removal decision: In *Kadzoev*, the CJEU ruled that where an individual continues to be held in detention under Article 15 of the Returns Directive during a procedure for judicial review of the decision to remove him or her, that period of detention must be taken into account when calculating the maximum period of detention for the purposes of Article 15(5) and (6) of the directive (paras.49-57).

Period of detention as an asylum-seeker: In *Kadzoev*, the CJEU held that if an individual applies for asylum while detained for purposes of removal under the Returns Directive, and his or her detention is then maintained under the rules for asylum-related detention, the latter period of detention does not count towards calculating the maximum period of detention permitted by the Returns Directive should the asylum application be rejected and the returns procedure be resumed. However, this requires that a fresh decision was in fact taken to detain the individual under the rules for asylum-related detention. If no such decision was taken and the individual's detention during the asylum procedure remained based on the provisions of the Returns Directive, then that period of detention would have to be taken into account as a period of detention for the purpose of removal under the Returns Directive (paras.40-48).

8. Right to be heard in the context of a decision ordering or extending detention

In *M.G. and N.R.*,[11] the CJEU was asked in essence whether EU law requires that, where an administrative decision to extend detention under Article 15(6) of the Returns Directive has been taken in breach of the right to be heard, a national court assessing the lawfulness of that decision must order the immediate release of the individual concerned. This was bearing in mind in particular the requirement in Article 15(2) of the Returns Directive that judicial review of the lawfulness of detention must result in immediate release if the individual's detention is not lawful (paras.21&27).

The CJEU noted that the Returns Directive does not specify whether, and under what conditions, a detention decision taken under Article 15 of the directive must observe the right to be heard (para.31). Nor does Article 15(6) of the directive contain any procedural rules (para.30). Nevertheless, the CJEU pointed out that, as it had previously held in *M.M.* (see chapter 1.4 above), EU law requires observance of the rights of the defence, including the right to be heard, even where the applicable legislation does not expressly so provide (para.32). When Member States exercise their procedural autonomy as regards ensurance of those rights in national law, they must comply with the principles

[10] The CJEU referred by way of example to ECtHR, *Saadi v. the United Kingdom*, No. 13229/03, Judgment [GC] of 29 January 2008, paras. 72 and 74.
[11] CJEU, *M.G. and N.R. v. Staatssecretaris van Veiligheid en Justitie (Netherlands)*, C-383/13 PPU, Judgment of 10 September 2013.

of equivalence and effectiveness,[12] taking into account the scheme of the Returns Directive (paras.35-37).

The CJEU did not proceed to rule on the circumstances under which there would be an infringement of the right to be heard under the Returns Directive, since it had already been established in the main proceedings that there had been such an infringement; instead, given the question that had been asked, the Court focussed on the consequences of an infringement (para.28).

The CJEU noted that, according to its settled case law, an infringement of the rights of the defence, in particular the right to be heard, results in annulment of the decision concerned only if, had it not been for such an irregularity, the outcome might have been different. The CJEU therefore held that:

> "… It follows that not every irregularity in the exercise of the rights of the defence in an administrative procedure extending the detention of a third-country national with a view to his removal will constitute an infringement of those rights. Consequently, nor will every breach of, in particular, the right to be heard systematically render the decision taken unlawful, for the purposes of the final sub-paragraph of Article 15(2) of [the Returns Directive], and therefore not every such breach will automatically require the release of the third-country national concerned.
>
> … To make such a finding of unlawfulness, the national court must – where it considers that a procedural irregularity affecting the right to be heard has occurred – assess whether, in the light of the factual and legal circumstances of the case, the outcome of the administrative procedure at issue could have been different if the third-country nationals in question had been able to put forward information which might show that their detention should be brought to an end.
>
> … Not to recognise that the national court has such a power of assessment, and to require that every infringement of the right to be heard automatically brings about the annulment of the decision extending the detention and the lifting of that measure, even though such a procedural irregularity might actually have had no impact on that extension decision and the detention fulfils the substantive conditions laid down in Article 15 of [the Returns Directive], would be liable to undermine the effectiveness of the directive." (paras.39-41)

In short, where it is established that there has been an infringement of the right to be heard in an administrative procedure deciding on the extension of detention under Article 15(6) of the Returns Directive, the detention may be lifted only if, in light of all the legal and factual circumstances of the case, the infringement deprived the individual concerned from arguing his or or her defence better, to the extent that the outcome of the administrative procedure could have been different(paras.44-45).

Pending cases: As of the end of 2013, two cases concerning the right to be heard in the context of administrative decisions made under the Returns Directive were pending before the CJEU: *Mukarubega*[13] and *Boudjlida*.[14] However, neither case specifically concerned the right to to be heard in the context of a decision ordering detention for the purposes of removal.

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[12] See above the introduction to chapter 1.4 on asylum procedures for an explanation of the principles of national procedural autonomy, equivalence and effectiveness.

[13] CJEU, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, C-166/13, reference from Tribunal administratif de Melun (France) 3 April 2013.

[14] CJEU, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, C-249/13, reference from Tribunal administratif de Pau (France) 6 May 2013.

9. Whether a criminal sentence of imprisonment for illegal stay is precluded by the Returns Directive

In the cases of *El-Dridi* and *Achughbabian*, the CJEU was asked, in essence, whether the Returns Directive precludes the imposition of a criminal sentence of imprisonment on an illegally staying third-country national on the sole grounds that: (i) he or she is staying illegally on the territory of the Member State concerned (*Achughbabian*, para.25); or (ii) he or she remains on the territory of that Member State contrary to an order to leave that territory within a given period (*El-Dridi*, paras.25&29). Similarly, the CJEU was asked in *Sagor*[15] whether the Returns Directive precludes penalization of illegal stay by means of a fine which may be replaced *inter alia* by the penalty of a "home detention order" (paras.18&26-27).[16]

The CJEU noted that the Returns Directive concerns only the *return* of illegally staying third-country nationals, and is thus not designed to harmonize in their entirety national rules on the stay of third-country nationals. The directive therefore does not preclude a Member State from classifying an illegal stay as a criminal offence and imposing criminal sanctions to deter and penalize illegal stay (*Achughbabian*, para.28; *Sagor*,[17] para.31; also affirmed in *Mbaye*,[18] para.24).

However, the Member States may not apply criminal law rules which are liable to undermine the application of the common standards and procedures established by the Returns Directive and thereby, contrary to Article 4(3) of the Treaty on European Union (TEU), deprive that directive of its effectiveness:[19] (*El-Dridi*, paras.55-56; *Achughbabian*, paras.33&43; *Sagor*, para.32; *Mbaye*, para.25)

> **Article 4(3) TEU**
>
> *Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*
>
> *The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*
>
> *The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.*

A criminal sentence of imprisonment solely for illegal stay would undermine the effectiveness of the Returns Directive, whether: (i) it prefaces the adoption or implementation of a return decision under the directive; or (ii) it is imposed during the return procedure itself, including in response to the individual concerned failing to comply with an order to leave the territory within a given period. That is because a criminal sentence of imprisonment solely for illegal stay is not a "measure" or a "coercive measure" that contributes to the individual's removal (see above). It is in fact likely to delay return,[20] whereas, as a matter of priority, the individual must be subjected to the returns procedure specified in the Returns Directive according to which, as regards deprivation of liberty, her or she may at the very most only be ordered to be detained under Article 15 of the directive (*El-Dridi*, paras.57-59; *Achughbabian*, paras.37-39&45; *Sagor*, para.33).

[15] CJEU, *Md Sagor (Italy)*, C-430/11, Judgment of 6 December 2012.
[16] For a definition of the the "home detention order" that was at issue in the main proceedings, see footnote 7 above.
[17] CJEU, *Md Sagor (Italy)*, C-430/11, Judgment of 6 December 2012.
[18] CJEU, *Abdoul Khadre Mbaye (Italy)*, C-522/11, Order of 21 March 2013.
[19] The CJEU noted also the requirements of effectiveness as referred to in recital 4 of the Returns Directive: "Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy" (*Achughbabian*, para.45).
[20] In addition to the fact that such a delay would undermine the effectiveness of the Returns Directive, the CJEU also noted that a criminal prosecution for illegal stay followed by a term of imprisonment also does not appear amongst the justifications for a postponement of removal referred to in Article 9 of the directive (*Achughbabian*, para.45).

For the same reasons, the Returns Directive also precludes penalization of illegal stay by means of a "home detention order", unless it is guaranteed that enforcement of the order must come to an end as soon as the physical removal of the individual from the Member State concerned is possible (*Sagor*, paras.43-47). The prior criminal prosecution leading to the impostion of the home detention order must itself not impede the returns procedure, and must be capable of being discontinued as a result of the return of the individual concerned (*Sagor*, para.35; *Mbaye*, para.27).

The Returns Directive does not, however, preclude the imposition of a fine as a result of prosecution for illegal stay, since, providing that the prosecution itself does not impede the return procedure, the fine does not in any way prevent a return decision from being made and implemented (*Sagor*, para.36; *Mbaye*, para.28).

Additionally, the Returns Directive also does not preclude national criminal rules permitting the imprisonment of an individual who has reached the end of the return procedure specified by the Returns Directive and who remains illegally in the Member State concerned with no justified ground for non-return. However, imposition of this or any other criminal sanction must be subject to the full observance of fundamental rights, particularly those guaranteed by the European Convention on Human Rights (*El-Dridi*, paras.52&60; *Achughbabian*, paras.46-50).

Finally, Article 2(2)(b) of the Returns Directive provides as follows:

> **Article 2(2)(b) Returns Directive**
>
> *2. Member States may decide not to apply this Directive to third-country nationals who:*
>
> *[…]*
>
> *(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.*

The above provision cannot, without depriving the Returns Directive of its purpose and binding effect, be interpreted as permitting the Member States not to the apply the directive to third-country nationals who have committed only the offence of illegally staying (*El-Dridi*, para.49; *Achughbabian*, para.41; *Mbaye*, para.21). However, a third-country national who has in addition committed one or more other offences may in certain cases be removed from the scope of the directive (*Achughbabian*, para.41).

10. Conditions of detention

Pending cases: As of the end of 2013, three cases were pending before the CJEU concerning the interpretation of Article 16(1) of the Returns Directive.

In the cases of *Bero*[21] and *Bouzalmate*,[22] the CJEU was asked whether Article 16(1) of the Returns Directive requires a Member State, as a rule, to detain an illegally staying third country national for purposes of removal in a specialised detention facility even if the Member State has a federal structure and only some its federal subdivisions have such a facility.

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[21] CJEU, *Adala Bero v. Regierungspräsidium Kassel*, C-473/13, reference from Bundesgerichtshof (Germany) of 3 September 2013.

[22] CJEU, *Ettayebi Bouzalmate v.Kreisverwaltung Kleve*, C-514/13, reference from Landgericht München I (Germany) of 26 September 2013.

In *Thi Ly Pham*,[23] the CJEU was asked whether Article 16(1) of the Returns Directive permits an illegally staying third-country national to be detained for purposes of removal in prison accommodation together with ordinary prisoners if he or she consents to such accommodation.

C. Table of cases

CJEU judgments

Abdoul Khadre Mbaye (Italy), C-522/11, Order of 21 March 2013 [Link: Order (French)]

Alexandre Achughbabian v. Préfet du Val-de-Marne (France), C-329/11, Judgment [GC] of 6 December 2011 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion]

Hassen El Dridi (Italy), C-61/11 PPU, Judgment of 28 April 2011 [Links: Judgment | Case summary | CJEU press release | Advocate General's view]

M.G. and N.R. v. Staatssecretaris van Veiligheid en Justitie (Netherlands), C-383/13 PPU, Judgment of 10 September 2013 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion]

Md Sagor (Italy), C-430/11, Judgment of 6 December 2012 [Link: Judgment | Case summary | CJEU press release]

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Thi Ly Pham v. Stadt Schweinfurt, Amt für Meldewesen und Statistik, C-474/13, reference from Bundesgerichtshof (Germany) of 3 September 2013 [Link: Questions]

Khaled Boudjlida v Préfet des Pyrénées-Atlantiques, C-249/13, reference from Tribunal administratif de Pau (France) of 6 May 2013 [Link: Questions]

Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis, C-166/13, reference from Tribunal administratif de Melun (France) of 3 April 2013 [Links: Questions]

Judgments of the ECtHR

Saadi v. the United Kingdom, No. 13229/03, Judgment [GC] of 29 January 2008 [Links: Judgment | Case summary | UNHCR submission]

[23] CJEU, *Thi Ly Pham v. Stadt Schweinfurt, Amt für Meldewesen und Statistik*, C-474/13, reference from Bundesgerichtshof (Germany) of 3 September 2013.

1.9 Statelessness

A. Introduction

Under EU law, there is no system specifically for the international protection of stateless persons.[1] Although stateless persons may qualify for the international protection defined in Chapter VII of the Qualification Directive (QD), that is only if they qualify for refugee status or subsidiary protection status, not because of the fact that they are stateless. The closest EU law gets to addressing the international protection needs of stateless persons as such is that Member States are permitted to apply the Asylum Procedures Directive (APD)[2] and the Reception Conditions Directive (RCD)[3] to procedures for deciding on applications for any kind of protection falling outside the scope of the QD, which might conceivably be construed as including procedures for determining qualification for international protection as a stateless person. However, statelessness determination procedures cannot be equated to refugee status determination procedures, even though they have certain features in common, and those few Member States which have established statelessness determination procedures under their national law have not done so on the basis of the APD. Nor have those Member States applied the RCD to applicants for statelessness status.

EU law also does not directly regulate the prevention and reduction of statelessness, since, as the CJEU has consistently held, the rules for the acquisition and loss of nationality fall within the competence of the Member States. However, as the CJEU has also consistently held, Member States must exercise that competence with due regard to EU law. The present chapter discusses how the prevention and reduction of statelessness may therefore potentially be indirectly regulated by EU law in certain situations.

The detention of stateless persons under EU law is discussed in chapter 1.8 above.

For further information on statelessness, see:

1. UNHCR, *Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons*, 2014 [Link]

2. UNHCR, *Guideliness on Statelessness No. 4: Ensuring Every Child's Right to Acquire a*

[1] Stateless persons may nevertheless be specifically included within the personal scope of certain EU legislative acts which are not of general application and from which they would not otherwise benefit. See, for example, recital 7 and Articles 1(h) and 2(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [Link].

[2] Article 3(4) initial APD: "… Member States may decide to apply this Directive in procedures for deciding on applications for any kind of international protection." Article 3(4) recast APD: "Member States may decide to apply this Directive in procedures for deciding on applications for any kind of protection falling outside of the scope of [the recast QD]."

[3] Article 3(4) initial RCD: "Member States may decide to apply this Directive in connection with procedures for deciding on applications for kinds of protection other than that emanating from the Geneva Convention for third-country nationals or stateless persons who are found not to be refugees." Article 3(4) recast RCD: "Member States may decide to apply this Directive in connection with procedures for deciding on applications for kinds of protection other than that emanating from [the recast QD]."

> *Nationality through Articles 1 to 4 of the 1961 Convention on the Reduction of Statelessness*, 21 December 2012 [Link]

B. The CJEU case law on statelessness

1. Introduction

As of the end of 2013, the CJEU had issued one judgment concerning the deprivation of EU citizenship, which, as discussed below, is of potential relevance to the prevention and reduction of statelessness.

2. Prevention and reduction of statelessness

In *Rottmann*,[4] the CJEU was asked, in essence, "whether it is contrary to European Union law, in particular to [Article 20 TFEU (ex Article 17 TEC)], for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation and obtained by deception inasmuch as that withdrawal deprives the person concerned of the status of citizen of the Union and of the benefit of the rights attaching thereto by rendering him stateless, acquisition of that nationality having caused that person to lose the nationality of his Member State of origin": (para.36)

Article 20 TFEU
(ex Article 17 TEC)

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

- *(a) the right to move and reside freely within the territory of the Member States;*
- *(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;*
- *(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;*
- *(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.*

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

The situation at issue in the main proceedings was that Rottmann was by birth a national of Austria. He later transferred his residence to Germany and applied for and was granted German nationality, as a result of which, in accordance with Austrian law, he automatically lost his Austrian nationality. It subsequently emerged that he had failed to disclose when applying for German nationality that he was the subject of a criminal investigation in Austria, and his German nationality was therefore withdrawn on the grounds that it had been obtained by deception. The withdrawal had not reached the point of being definitive, given the action for its annulment in the main proceedings, but if it was to become definitive then he would also lose his EU citizenship and become stateless unless Austria was obliged in the circumstances to restore his Austrian nationality (paras.22-34).

[4] CJEU, *Janko Rottmann v. Freistaat Bayern (Germany)*, C-135/08, Judgment [GC] of 2 March 2010.

The CJEU reiterated its established case law according to which it is for each Member State, "having due regard to EU law", to lay down the conditions for the acquisition and loss of nationality. It held that a situation like that in the main proceedings, where a citizen of the Union stands to lose the status conferred by Article 20 TFEU and the rights attaching thereto, falls by reason of its nature and its consequences within the scope of EU law (paras.39-46).

The CJEU considered that a Member State's decision to withdraw nationality acquired by deception is a decision "correspond[ing] to a reason relating to the public interest" which has the legitimate aim of "protect[ing] the special relationship of solidarity and good faith between [that Member State] and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality" (para.51). The Court noted that such a decision can be legitimate in international law, in principle, even if it leads to statelessness, as is borne out by Article 8(2) of the 1961 Convention on the Reduction of Statelessness and Articles 7(1) and (3) of the European Convention on Nationality: (para.52)

Article 8, 1961 Convention on the Reduction of Statelessness

1. A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.

2. Notwithstanding the provisions of paragraph 1 of this article, a person may be deprived of the nationality of a Contracting State:

[…]

(b) where the nationality has been obtained by misrepresentation or fraud.

[…]

4. A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

Article 7, European Convention on Nationality

1. A State Party may not provide in its internal law for the loss of its nationality ex lege or at the initiative of the State Party except in the following cases:

[…]

(b) acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant;

[…]

[…]

3. A State Party may not provide in its internal law for the loss of its nationality under paragraphs 1 and 2 of this article if the person concerned would thereby become stateless, with the exception of the cases mentioned in paragraph 1, subparagraph b, of this article.

The legitimacy, in principle, of a decision to withdraw nationality acquired by deception is also in keeping with the general principle of international law that no one is to be arbitrarily deprived of his or her nationality,[5] since depriving a person of his or her nationality because of his or her acts of deception, legally established, cannot be considered to be an arbitrary act (para.53).

The CJEU held that the above considerations in international law remain, in theory, valid in EU law when the consequence of a decision to withdraw nationality acquired by deception is that the

[5] The CJEU noted that the general principle of international law that nobody is to arbitrarily deprived of his or her nationality is reproduced in Article 15(2) of the Universal Declaration of Human Rights and Article 4(c) of the European Convention on Nationality (*Rottmann*, para.53).

individual concerned loses citizenship of the Union. However, such a decision must observe the principle of proportionality as regards the consequences that it entails for the situation of the individual concerned and, if relevant, his or her family members, in the light of EU law (paras.54-56).

The CJEU noted the importance that EU primary law attaches to citizenship of the Union, which is intended to be the fundamental status of nationals of the Member States (paras.43&56). According to Article 20(2) TFEU (ex Article 17(2) TEC), citizens of the Union have the rights and duties laid down by TFEU and TEU, including the right to rely on Article 18 TFEU (ex Article 12 TEC) in all situations falling within the scope *ratione materiae* of EU law: (para.44)

> **Article 18 TFEU**
> **(ex Article 12 TEC)**
>
> *Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.*
>
> *[…]*

In determining whether a decision resulting in the loss of the rights of EU citizenship is proportionate, it is necessary to establish, in particular, the following three points: (para.56)

(i) whether the loss is justified in relation to the gravity of the offence committed by the individual concerned;

(ii) whether the loss is justified in relation to the lapse of time between the naturalization decision and the withdrawal decision;

(iii) whether it is possible for the individual concerned to recover his or her original nationality.

As regards the third point, the principle of proportionality also requires the individual concerned to be afforded a reasonable period of time to try to recover his or her original nationality (para.58).

The CJEU declined to give a ruling on whether the original Member State of nationality would be obliged to interpret its domestic legislation in such a way as to prevent the individual concerned from losing EU citizenship by allowing him or her to recover its nationality. The Court's reason for not ruling on that point was that the withdrawal of German nationality in the main proceedings had not become definitive and no decision regarding the recovery of Austrian nationality had been taken by the Austrian authorities on which the Austrian courts would, if necessary, have to give judgment (paras.60-64).

Nevertheless, the CJEU held that the principles stemming from its judgment in *Rottmann* – as regards both the sovereign powers of the Member States in the sphere of nationality, and the duty of Member States to exercise those powers having due regard to EU law – apply both to the Member State of naturalization and to the Member State of nationality (para.62).

From the above it can be concluded that while EU law does not appear to prohibit the deprivation of nationality resulting in statelessness when the nationality of the concerned Member State has been acquired by deception, any such deprivation must, if it results in loss of citizenship of the Union, meet the requirements of proportionality under EU law. While it is the loss of citizenship of the Union and not the fact of statelessness that engages EU law, the possibility of statelessness ensuing from the deprivation of nationality may nevertheless be a factor that needs to be taken into account in assessing whether the loss of citizenship of the Union meets the requirements of proportionality.

More generally, it can be concluded that EU law would appear to prohibit any arbitrary deprivation of nationality that results in loss of citizenship of the Union, which would include any situation where such deprivation also results in statelessness.

C. Table of cases

CJEU judgments

Janko Rottmann v. Freistaat Bayern (Germany), C-135/08, Judgment [GC] of 2 March 2010 [Links: Judgment | Case summary | CJEU press release | Advocate General's opinion]

Part 2:
The European Court of Human Rights

2.1 Introduction

A. Protection of refugees, asylum-seekers and stateless persons under the European Convention on Human Rights

1. The European Convention on Human Rights (ECHR)

a) The ECHR and its Protocols

The European Convention on Human Rights (hereinafter "ECHR" or "the Convention") was adopted in November 1950 and entered into force in September 1953. Sixteen additional Protocols to the Convention have also been adopted.[1] As of the end of 2013, there were forty-seven Contracting States to the ECHR,[2] but not all Protocols had been signed and/or ratified by all ECHR Contracting States.[3]

The ECHR protects a set of fundamental civil and political rights and freedoms that are defined in Section I of the Convention. Protocol Nos. 1, 4, 6, 7, 12 and 13 contain provisions defining certain additional rights and freedoms, which are to be regarded as additional Articles to section I of the Convention. The remaining Protocols do not define additional rights and freedoms but amend other provisions of the Convention.[4]

Article 1 of the ECHR provides that Contracting States shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the ECHR:

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[1] One Protocol (No. 9) was subsequently repealed, another Protocol (No. 10) lost its purpose and never entered into force, and two Protocols (Nos. 15 and 16) are yet to enter into force.

[2] This involves all Member States of the Council of Europe: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom.

[3] State Parties to each Protocol are listed on the website of the Treaty Office of the Council of Europe [Link].

[4] References to the ECHR in this manual are to the text of the Convention as amended by its Protocols [Link], up to and including Protocol No. 14 which entered into force on 1 June 2010.

Article 1 ECHR
(‘Obligation to respect human rights’)

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

b) Jurisdiction of ECHR Contracting States

The concept of “jurisdiction”: Article 1 ECHR prescribes the responsibility of Contracting States to safeguard the rights and freedoms of the Convention to everyone who is “within their jurisdiction”. As such, a Contracting State is responsible for securing the rights and freedoms of the Convention for those present within its territory. The concept of “jurisdiction” under Article 1 ECHR is, however, not restricted to the territory of the Contracting State concerned. The European Court of Human Rights (hereinafter “the ECtHR” or “the Court”) has made clear that the responsibility of Contracting States can be engaged extra-territorially. For example, in accordance with its established case law, the European Court of Human Rights (hereinafter “the ECtHR” or “the Court”) held in *Loizidou v. Turkey* that:[5]

> “… [T]he extradition or expulsion of a person by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention … In addition, the responsibility of Contracting Parties can be involved *because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory* …
>
> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it *exercises effective control of an area outside its national territory*. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.” (emphases added) (para.62)

Extradition or expulsion of a person by a Contracting State giving rise to an issue under Article 3 ECHR is discussed in chapter 2.2 below.

Jurisdiction in airport transit zones: Contracting States have sometimes argued that individuals in an airport international transit zone do not fall within their jurisdiction, for example because the individual concerned has not passed through airport immigration controls and therefore under national law is not deemed to have entered the country, or because the individual has been placed in the transit zone pursuant to an expulsion order and is deemed under national law to have already been expelled from the territory. However, the ECtHR has consistently held that such individuals do not fall outside the jurisdiction of the State concerned.[6]

Jurisdiction in international waters: In *Hirsi Jamaa and Others v. Italy*,[7] which concerned “pushback operations” at sea within the framework of bilateral agreements between Italy and Libya, the ECtHR found that Italy had exercised jurisdiction over the applicants given that they had been “under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities” whilst on board ships of the Italian armed forces. This conclusion was based on the fact that all of the events had taken place entirely on board ships flying the Italian flag (establishing *de jure* control), the crews

[5] ECtHR, *Loizidou v. Turkey (Preliminary Objections)*, No. 15318/89, Judgment [GC] of 23 March 1995.
[6] ECtHR, *Amuur v. France*, No. 19776/92, Judgment of 25 June 1996, para. 52. See also, for example, ECtHR, *Shamsa v. Poland*, Nos. 45355/99 and 45357/99, Judgment of 27 November 2003.
[7] ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, Judgment [GC] of 23 February 2012, para. 81.

of which had been composed exclusively of Italian military personnel (as opposed to crew members from another State) (establishing *de facto* control).

The case of *Hirsi Jamaa* is discussed further in chapters 2.2 and 2.3 below.

For further information, see: ECtHR, *Extra-terratorial jurisdiction of ECHR States Parties,* Factsheet (periodically updated) [Link]

c) Personal scope of the ECHR

The requirement in Article 1 ECHR that Contracting States secure the Convention's rights and freedoms to "everyone within their jurisdiction" entails that, subject to the very limited exceptions where the Convention and its Protocols provide otherwise,[8] the rights and freedoms apply to all individuals irrespective of their nationality (or absence thereof) or legal status vis-à-vis the Contracting State. The rights and freedoms of the Convention therefore apply to all asylum-seekers, refugees and stateless persons within the jurisdiction of a Contracting State.

2. Scope of this manual

This manual, which is necessarily selective in its approach, focusses on certain protections that are of particular relevance to refugees, asylum-seekers and/or stateless persons, most notably under Article 3 ('Prohibition of torture [and inhuman or degrading treatment or punishment]'), Article 5 ('Right to liberty and security'), Article 8 ('Right to respect for private and family life') and Article 13 ('Right to an effective remedy') of the ECHR. Insofar as refugees and asylum-seekers are concerned, this includes, for example, protection against *refoulement* (chapter 2.2), procedural safeguards for protection against *refoulement* (chapter 2.3), and living conditions in the country of asylum (chapter 2.4).

Because of the time and resource constraints under which this manual was prepared, there are no dedicated chapters on detention, family unity or statelessness. However, chapters on these two issues will be included in the second edition of this manual that is planned for 2015.

This first edition of the manual covers the case law of the ECtHR until the end of 2013.

[8] The following two exceptions allow for more favourable treatment of nationals than non-nationals: (i) Article 16 ECHR, permitting restrictions on the political activity of aliens; (ii) the prohibition on expulsion of nationals (but not of non-nationals) contained in Article 3 of Protocol No. 4 to the ECHR. On the other hand, the following two provisions are expressly for the protection of non-nationals: (i) Article 4 of Protocol No. 4 to the ECHR, prohibiting collective expulsion of aliens; (ii) Article 1 of Protocol No. 7 to the ECHR, establishing procedural safeguards relating to the expulsion of aliens lawfully in the territory. Note further Article 2(1) of Protocol No. 4 to the ECHR: "Everyone *lawfully within the territory* of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence" (emphasis added).

B. The European Court of Human Rights

1. Introduction

Article 19 ECHR
('Establishment of the Court')

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

Article 32 ECHR
('Jurisdiction of the Court')

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it [...]

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Functions of the Court: The European Court of Human Rights, which has its seat in Strasbourg, is the judicial body established by Article 19 ECHR for ensuring Contracting States' compliance with their obligations under the Convention and its Protocols.[9]

The Court currently has four functions:[10]

(i) Examining ***individual applications*** from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by a Contracting State of a right set out in the ECHR and its Protocols;[11]

(ii) Examining ***inter-State cases*** whereby any Contracting State may refer to the Court any alleged breach of the ECHR or its Protocols by another Contracting State;[12]

(iii) Giving ***advisory opinions***, at the request of the Committee of Ministers of the Council of Europe, on legal questions concerning the interpretation of the ECHR and its Protocols other than questions relating to the content or scope of the rights and freedoms defined therein;[13]

(iv) Ruling, at the request of the Committee of Ministers, on questions of interpretation of its own judgments and on whether a Contracting State has failed to abide by any judgment in a case to which it is a party.[14]

In practice, the Court's work is devoted almost exclusively to individual applications.

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[9] The Court's competence used to be shared with the former European Commission of Human Rights, which was part of a two-tier structure with the Court until the two merged into a single institution with the coming into force of Protocol No. 11 in November 1998. According to Article 32 ECHR, the Court's jurisdiction shall extend to all matters concerning the interpretation and application of the Convention and its Protocols.
[10] Protocol No. 16 to the ECHR, which was adopted in October 2013 and will enter into force once it has been ratified by ten States, foresees a fifth function of the Court according to which the "highest courts and tribunals" of a Contracting State may request an advisory opinion on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR and its Protocols.
[11] Article 34 ECHR.
[12] Article 33 ECHR.
[13] Article 47 ECHR.
[14] Article 46 ECHR.

The Court's subsidiary role: The Court has observed that "[s]ubsidiarity is at the very basis of the Convention, stemming as it does from a joint reading of Articles 1 and 19." [15] Thus the primary responsibility for safeguarding the ECHR's rights and freedoms rests with the Contracting States. Subsidiarity is also inherent in the requirement in Article 13 ECHR that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority", and that, as stipulated in Article 35(1) ECHR, "[t]he Court may only deal with the matter after all domestic remedies have been exhausted".[16]

Additionally, the Court will not as a general rule reconsider findings of fact that have already been made by the domestic courts. As stressed in, for example, *Austin and Others v. the United Kingdom*:[17]

> "The Court must be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. As a general rule, where domestic proceedings have taken place, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and it is for the latter to establish the facts on the basis of the evidence before them. Though the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts" (para. 61).

On the other hand, the Court's very *raison d'être* would be undermined if it were to be subject to the same constraints when it comes to applying the law to the facts in order to determine whether there has been a Convention violation. Thus, in *Austin and Others*, the Court went on to say immediately after the passage quoted above that:

> "since pursuant to Articles 19 and 32 of the Convention it is the Court's role definitively to interpret and apply the Convention, while it must have reference to the domestic court's findings of fact, it is not constrained by their legal conclusions as to whether or not there has been a deprivation of liberty within the meaning of [the Convention]" (para.61).

The Court's subsidiary role can nevertheless be relevant to a certain degree when applying the Convention to the facts, given the doctrine of the "margin of appreciation" and the principle of proportionality according to which the national authorities enjoy a degree of discretion in determining whether certain measures are permitted by the Convention or not.[18]

Composition of the Court: The Court is comprised of 47 Judges, one from each Contracting State, each fully independent and sitting in their individual capacity and elected for a non-renewable term of nine years.[19] The Court sits in various formations to consider the cases brought before it: a single-judge formation, Committees of three Judges, Chambers of seven Judges (which may be reduced to

[15] ECtHR, *Austin and Others v. the United Kingdom*, Nos. 39692/09, 40713/09, 41008/09, Judgment [GC] of 15 March 2012, para. 61.
[16] ECtHR, *Kudła v. Poland*, No. 30210/96, Judgment [GC] of 26 October 2000, para. 152.
[17] ECtHR, *Austin and Others*, cited above, para. 61.
[18] See, for example, ECtHR, *Handyside v. the United Kingdom*, No. 5493/72, Judgment (Plenary) of 7 December 1976, concerning *inter alia* the lawfulness under Article 10 ECHR of a restriction on the applicant's freedom of expression. Note also Article 1 of Protocol No. 15 to the ECHR (yet to enter into force): "At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention,'."
[19] Articles 20 to 23 ECHR.

five Judges), and a Grand Chamber of seventeen Judges.[20] Cases are decided by a majority, with the possibility of dissenting or concurring opinions being issued by individual Judges.

Workload of the Court: In 2013, 13,600 applications were disposed of administratively, without being allocated to a judicial formation, because they had not been submitted correctly. A further 93,396 applications were disposed of judicially, 89,737 of which were declared inadmissible or struck out of the list of cases, with the remaining 3,659 being judged on their merits. A significant number of the latter applications were joined, with the result that the number of judgments actually delivered was 916.[21]

As of the end of 2013, 99,900 applications were pending before a judicial formation, and a further 21,950 applications were pending at the pre-judicial administrative stage.[22] A total of about 17,000 judgments had been delivered by the Court since its first judgment in 1960.[23]

Virtually all applications are decided on the documents alone, through correspondence with the parties as necessary. For example, the Grand Chamber held only 16 oral hearings in 2013, 11 oral hearings in 2012 and 21 oral hearings in 2011.[24]

For further information, see:

1. ECtHR, *The ECHR in 50 Questions*, July 2012 [Link]
2. ECtHR, *The European Court of Human Rights in Facts and Figures: 2013*, January 2014 [Link]
3. ECtHR, *Overview 1959 – 2013: ECHR*, February 2014 [Link]

2. Admissibility criteria

Article 34 ECHR
('Individual applications')

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Article 35 ECHR
('Admissibility criteria')

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

2. The Court shall not deal with any [individual application] that

(a) is anonymous; or

(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

[20] Article 26 ECHR. The Court also sits as a Plenary Court in order to decide matters concerning its functioning (Article 25 ECHR).
[21] ECtHR, *Analysis of statistics 2013*, January 2014 [Link].
[22] *Ibid.*
[23] ECtHR, *Overview 1959 – 2013: ECHR*, February 2014 [Link].
[24] ECtHR, *Annual Report for 2013*, p. 61 [Link]; ECtHR, *Annual Report for 2012*, p. 59 [Link]; ECtHR, *Annual Report for 2011*, p. 65 [Link]. Webcasts of public hearings are available on the Court's website [Link].

> *3. The Court shall declare inadmissible any individual application [...] if it considers that:*
> *(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or*
> *(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.*
>
> *4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings*

The Court's admissibility criteria for individual applications are set out in Articles 34 and 35 ECHR. Some of these criteria – such as the six-month time-limit for submitting an application and the requirement that the applicant him/herself be the victim of the alleged violation, which must be attributable to an ECHR Contracting State – are in most cases conceptually relatively straightforward. However, other criteria, such as the requirements for all domestic remedies to have been exhausted and for the application not to be "manifestly ill-founded", can be more complex. For example, as pointed out in the Court's *Practical Guide on Admissibility Criteria* regarding the meaning of the term "manifestly ill-founded":[25]

> "375. Even where an application is compatible with the Convention and all the formal admissibility conditions have been met, the Court may nevertheless declare it inadmissible for reasons relating to the examination on the merits. By far the most common reason is that the application is considered to be manifestly ill-founded. ***It is true that the use of the term 'manifestly' in Article 35 § 3 (a) may cause confusion: if taken literally, it might be understood to mean that an application will only be declared inadmissible on this ground if it is immediately obvious to the average reader that it is far-fetched and lacks foundation***. However, it is clear from the settled and abundant case-law of the Convention institutions (that is, the Court and, before 1 November 1998, the European Commission of Human Rights) that the expression is to be construed more broadly, in terms of the final outcome of the case. In fact, any application will be considered 'manifestly ill-founded' if a preliminary examination of its substance does not disclose any appearance of a violation of the rights guaranteed by the Convention, with the result that it can be declared inadmissible at the outset without proceeding to a formal examination on the merits (which would normally result in a judgment).
>
> 376. The fact that ***the Court, in order to conclude that an application is manifestly ill-founded, sometimes needs to invite observations from the parties and enter into lengthy and detailed reasoning in its decision does nothing to alter the 'manifestly' ill-founded nature of the application*** […]" (emphases added).

Similarly, it will not necessarily be immediately obvious whether all domestic remedies have been exhausted. For example, according to the Court's case law, applicants need only have exhausted domestic remedies that are "effective" (a term whose meaning does not require there to have been a favourable outcome for the applicant, as discussed in chapter 2.3 below). If the respondent Government claims non-exhaustion of domestic remedies, it has the burden of proving that the particular remedy at issue was available both in theory and in practice.[26] Moreover, as emphasized by the Court in *Kozacioğlu v. Turkey*:[27]

> "[T]he application of the exhaustion of domestic remedies rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 § 1 must

[25] ECtHR, *Practical Guide on Admissibility Criteria*, 3rd edition, 1 January 2014.
[26] See, for example, ECtHR, *NA. v. the United Kingdom*, No. 25904/07, Judgment of 17 July 2008, paras. 88-90.
[27] ECtHR, *Kozacioğlu v. Turkey*, No. 2334/03, Judgment [GC] of 19 February 2009.

> be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in monitoring compliance with this rule, it is essential to have regard to the circumstances of the individual case. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the context in which they operate as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies […] It should also be reiterated that an applicant must have made normal use of domestic remedies which are likely to be effective and sufficient and that, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required" (para.40).

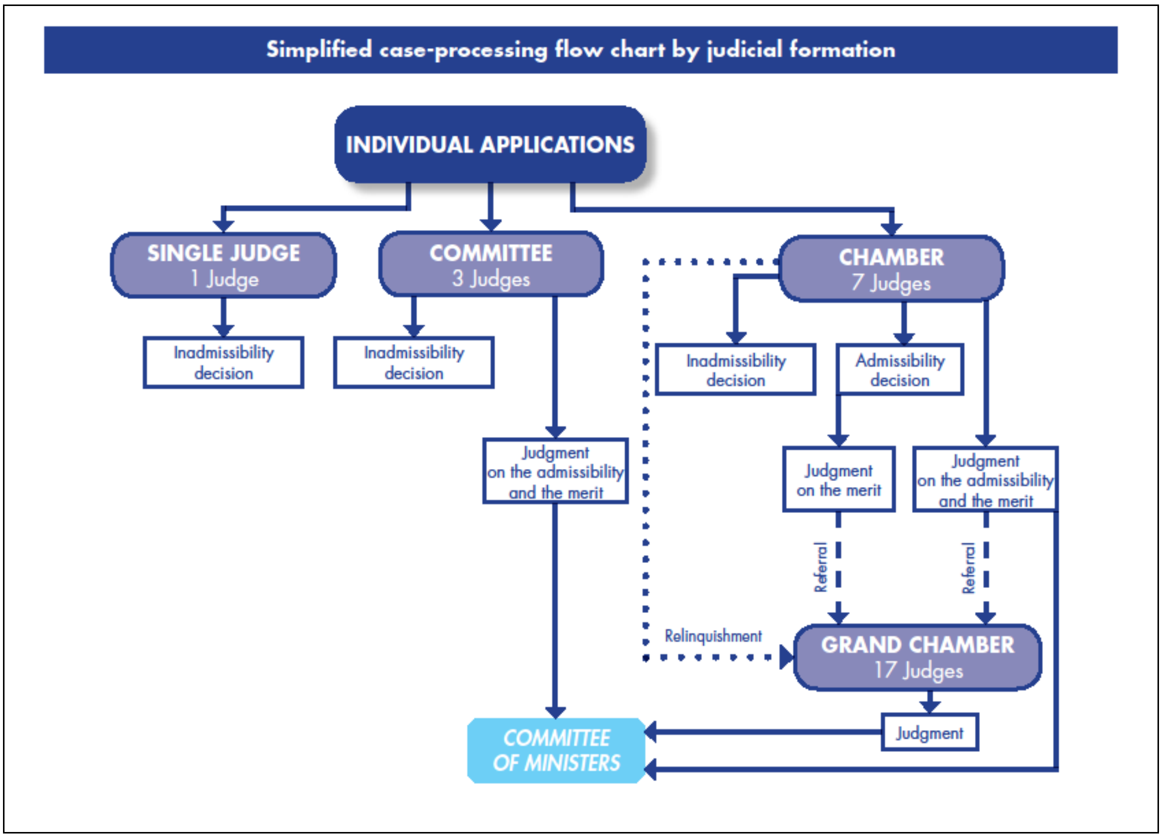
For further guidance on the admissibility criteria for individual applications, the reader is strongly advised to consult the Court's *Practical Guide on Admissibility Criteria*.

For further information, see:

1. ECtHR, *Practical Guide on Admissibility Criteria*, 3rd edition, 1 January 2014 [Link]
2. ECtHR, *Video on admissibility conditions*, 25 January 2012 [Link]
3. ECtHR, *Online admissibility checklist* [Link]

3. The procedure for individual applications

a) Standard procedure



© European Court of Human Rights, The ECHR in facts and figures: 2013, January 2014, page 9.

The procedure for individual applications has evolved over the years and is regulated both by the Convention itself and by the Rules of Court. The explanation given here is only a brief, simplified summary.[28]

An individual application starts with the lodging of a complaint, the contents of which must meet all the requirements of Rule 47 of the Rules of Court. Applicants who do not wish their identity to be disclosed to the public may request the Court to grant them anonymity,[29] which may be desirable in asylum cases.

If the application has been submitted correctly, it will be allocated, depending on the complexity of the case and on the likelihood of it being found inadmissible, to one of the following three judicial formations: a single judge, a Committee or a Chamber.[30] At this point, the application may already be found inadmissible, without any communication taking place with the applicant or the respondent Government(s), in which case the Court will send the applicant a letter indicating that the application does not meet the criteria of Articles 34 and 35 ECHR.[31] An application may contain several complaints, and it is possible that some complaints will be declared admissible while the others are declared inadmissible.[32] The Court's decision to declare a complaint inadmissible is final and cannot be appealed.[33]

Applications that are not immediately found inadmissible will be communicated to the respondent State to give it an opportunity to submit its observations.[34] Those observations will then be sent to the applicant to provide an opportunity for a reply, which in turn will be communicated to the respondent State for its comments.[35] If at any point the Court finds the application to be inadmissible, or a friendly settlement is reached between the parties,[36] it will issue a reasoned "Decision" to this effect. Decisions of inadmissibility are final and cannot be appealed.[37] If the Court proceeds to examine the application on its merits, it will issue a "Judgment". While sometimes the Court will issue a separate Decision that all or part of the application is admissible before moving on to examine the merits, usually it will address admissibility at the same time as the merits in the Judgment itself.[38]

Only Committees and Chambers can give judgments, and Committees can only give judgments "if the underlying question in the case […] is already the subject of well-established case-law of the Court."[39] Committee judgments are final whereas, for Chamber judgments, any party to the case may request within a period of three months from the date of judgment that the case be referred to the Grand Chamber.[40] Absent such a request, or if the request is not accepted, the Chamber's judgment becomes final.[41] A request for referral will only be accepted in exceptional cases where "the case

[28] In addition to the summary here, note, for example, Article 37 ECHR regarding the circumstances under which the Court make strike an application out of its list of cases, or restore an application to the list.
[29] Rule 47(4) of the Rules of Court.
[30] See Articles 27, 28 and 29 ECHR establishing the different competencies of single judges, Committees and Chambers.
[31] Rule 52A(1) of the Rules of Court.
[32] Rule 54(3) of the Rules of Court.
[33] Article 27(2) ECHR.
[34] The vast majority of applications to the Court are rejected by the Single-Judge formation as being inadmissible on their face, without ever being communicated to the respondent State. For example, whereas 7,931 applications were communicated to the respondent State in 2013, 80,583 applications were decided that same year by a Single-Judge formation without being communicated to the respondent State (ECtHR, *Analysis of statistics 2013*, January 2014, p. 4).
[35] Rule 54(2)(b) of the Rules of Court.
[36] Article 39 ECHR.
[37] Article 28(2) ECHR.
[38] Article 28(1)(b) and Article 29(1) ECHR.
[39] Article 28(1)(b) ECHR.
[40] Article 43(1) ECHR.
[41] Article 44(2) ECHR.

raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance."[42] If the request is accepted, the Grand Chamber will decide the case by means of a final judgment.

Exceptionally, a case may reach the Grand Chamber even before a Chamber has decided on its admissibility and/or merits. Providing that none of the parties objects, the Chamber may relinquish its jurisdiction to the Grand Chamber where a case "raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court[.]"[43]

A final judgment of the Court is binding on the respondent Contracting State.[44] Final judgments are transmitted by the Court to the Committee of Ministers of the Council of Europe, which supervises their execution by the Contracting State concerned.[45]

As stipulated in Article 41 ECHR, "[i]f the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party." As the Court has explained in, for example, *M.S.S. v. Belgium and Greece*,[46] this means the following:

> "Under Article 46 of the Convention the High Contracting Parties undertake to abide by the final judgment of the Court in the cases to which they are parties, the Committee of Ministers being responsible for supervising the execution of the judgments. This means that when the Court finds a violation the respondent State is legally bound not only to pay the interested parties the sums awarded in just satisfaction under Article 41, but also to adopt the necessary general and/or, where applicable, individual measures. As the Court's judgments are essentially declaratory in nature, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in order to discharge its legal obligation under Article 46 of the Convention, provided that those means are compatible with the conclusions contained in the Court's judgment. In certain particular situations, however, the Court may find it useful to indicate to the respondent State the type of measures that might be taken in order to put an end to the – often systemic – situation that gave rise to the finding of a violation [...] Sometimes the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it" (para.399).

Judgments of the Court are thus essentially declaratory, underlining again the Court's subsidiary role and the fact that it is not a court of appeal capable of quashing or reversing rulings by the domestic courts.

For further information, see:

1. ECtHR, *Rules of Court* (periodically updated) [Link][47]
2. ECtHR, *Practice Direction: Institution of Proceedings* [Link]
3. ECtHR, *Application Form*, ENG-2014/1 [Link]
4. ECtHR, *Notes for filling in the application form*, ENG-2014/1 [Link]
5. ECtHR, *The Correct Way to Lodge an Application with the Court*, Video, 03 January 2014

[42] Aticle 43(2) ECHR.
[43] Article 30 ECHR.
[44] Article 46(1) ECHR.
[45] Article 46(2) ECHR.
[46] ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011.
[47] This Manual relies upon the edition of the Rules of Court that entered into force on 1 January 2014.

[Link]

6. ECtHR, *Your application to the ECHR: How to apply and how your application is processed* [Link]

7. ECtHR, *The general practice followed by the Panel of the Grand Chamber when deciding on requests for referral in accordance with Article 43 of the Convention*, October 2011 [Link]

b) Pilot-judgment procedure

Rule 61 – Pilot-judgment procedure (Rules of Court)

1. The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.

2. (a) Before initiating a pilot-judgment procedure, the Court shall first seek the views of the parties on whether the application under examination results from the existence of such a problem or dysfunction in the Contracting Party concerned and on the suitability of processing the application in accordance with that procedure.

(b) A pilot-judgment procedure may be initiated by the Court of its own motion or at the request of one or both parties.

(c) Any application selected for pilot-judgment treatment shall be processed as a matter of priority in accordance with Rule 41 of the Rules of Court.

3. The Court shall in its pilot judgment identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the Contracting Party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment.

[…]

6. (a) As appropriate, the Court may adjourn the examination of all similar applications pending the adoption of the remedial measures required by virtue of the operative provisions of the pilot judgment.

(b) The applicants concerned shall be informed in a suitable manner of the decision to adjourn. They shall be notified as appropriate of all relevant developments affecting their cases.

(c) The Court may at any time examine an adjourned application where the interests of the proper administration of justice so require.

[…]

8. Subject to any decision to the contrary, in the event of the failure of the Contracting Party concerned to comply with the operative provisions of a pilot judgment, the Court shall resume its examination of the applications which have been adjourned in accordance with paragraph 6 above.

9. The Committee of Ministers, the Parliamentary Assembly of the Council of Europe, the Secretary General of the Council of Europe, and the Council of Europe Commissioner for Human Rights shall be informed of the adoption of a pilot judgment as well as of any other judgment in which the Court draws attention to the existence of a structural or systemic problem in a Contracting Party.

[…]

In 2011, the ECtHR codified in Article 61 of the Rules of Court a "pilot-judgment procedure" which had been developed following its first "pilot judgement" in 2004.[48]

The pilot-judgment procedure was developed as a means of dealing with large numbers of so-called "repetitive cases" coming before the ECtHR, all of them similar or identical and all deriving from the same underlying problem or dysfunction in the Contracting State concerned.

[48] ECtHR, *Broniowski v. Poland*, No. 31443/96, Judgment [GC] of 22 June 2004.

Under the pilot-judgment procedure, one or more individual applications are selected for examination by the ECtHR, while examination of all similar applications is adjourned. The aim of the pilot judgment is:

> "- to determine whether there has been a violation of the Convention in the particular case;
>
> - to identify the dysfunction under national law that is at the root of the violation;
>
> - to give clear indications to the Government as to how it can eliminate this dysfunction;
>
> - to bring about the creation of a domestic remedy capable of dealing with similar cases (including those already pending before the Court awaiting the pilot judgment), or at least to bring about the settlement of all such cases pending before the Court."[49]

If the respondent Contracting State fails to implement the remedial measures required in the operative provisions of the pilot judgment, the ECtHR may resume its examination of the applications that were adjourned. The ECtHR may in any event resume examination of an individual application at any time where the interests of the proper administration of justice so require.

For further information, see:

1. ECtHR, *The pilot-judgment procedure*, Information note issued by the Registrar [Link]
2. ECtHR, *Pilot judgments*, Factsheet (periodically updated) [Link]

4. Rule 39 interim measures

Rule 39 – Interim Measures (Rules of Court)

1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.

2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.

3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated.

4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures.

Nature and purpose of interim measures: Under Rule 39 of the Rules of Court, the Court may indicate "interim measures" to be taken by one or more of the parties to the proceedings before it. The grounds for indicating such measures have been determined by the Court through its case law, as recapitulated in *Mamatkulov and Askarov v. Turkey*:[50]

> "[I]n practice the Court applies Rule 39 only if there is an imminent risk of irreparable damage. While there is no specific provision in the Convention concerning the domains in which Rule 39 will apply, requests for its application usually concern the right to life (Article 2), the right not to be subjected to torture or inhuman treatment (Article 3) and, exceptionally, the right to respect for private and family life (Article 8) or other rights guaranteed by the Convention. The vast

[49] ECtHR, *The pilot-judgment procedure*, Information note issued by the Registrar, para. 3 [Link].
[50] ECtHR, *Mamatkulov and Askarov v. Turkey*, Nos. 46827/99 and 46951/99, Judgment [GC] of 4 February 2005.

> majority of cases in which interim measures have been indicated concern deportation and extradition proceedings." (para.104)

Interim measures are a means by which an individual applicant can *inter alia* obtain the immediate suspension of an order for his or her removal to another country if he or she is at "imminent risk of irreparable damage".[51] In such cases, the object of the interim measure is "to maintain the status quo pending the Court's determination of the justification for the measure."[52] A request for indication of an interim measure must accordingly accompany, or be followed by, a complaint submitted to the Court in accordance with the procedure for individual applications summarized above. As stated in *Mamatkulov and Askarov*, the interim measure goes to the very substance of the Convention complaint:

> "As far as the applicant is concerned, the result that he or she wishes to achieve through the application is the preservation of the asserted Convention right before irreparable damage is done to it. Consequently, the interim measure is sought by the applicant, and granted by the Court, in order to facilitate the 'effective exercise' of the right of individual petition under Article 34 of the Convention in the sense of preserving the subject matter of the application when that is judged to be at risk of irreparable damage through the acts or omissions of the respondent State." (para.108)

The granting of the request for indication of an interim measure by no means predetermines the outcome of the case, since such an indication means more often than not that the Court does not yet have before it all the relevant evidence it requires to decide the case.[53] For example, the Court may grant a request for it to indicate an interim measure for suspension of an expulsion, but subsequently find the applicant's complaint concerning the expulsion to be inadmissible.[54] Conversely, the Court may reject such a request, but then later find, after expulsion has taken place, that the expulsion was in violation of a Convention right. For example, in finding in *M.S.S. v. Belgium and Greece*[55] that Belgium had violated Article 3 ECHR in expelling the applicant to Greece, the Court said:

> "The Court … rejects the [Belgian] Government's argument that the Court itself had not considered it necessary to indicate an interim measure under Rule 39 to suspend the applicant's transfer. It reiterates that in cases such as this, where the applicant's expulsion is imminent at the time when the matter is brought to the Court's attention, it must take an urgent decision. The measure indicated will be a protective measure which on no account prejudges the examination of the application under Article 34 of the Convention. At this stage, when an interim measure is indicated, it is not for the Court to analyse the case in depth – and indeed it will often not have all the information it needs to do so" (para.355).

Binding character of interim measures: Although interim measures are provided for only in the Rules of Court and not in the Convention itself, they are nevertheless binding:

> "The Court reiterates that by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual

[51] In cases where the stringent criteria for the application of interim measures under Rule 39 are not met, applicants can request the Court to apply Rule 40 (urgent notification of an application to the respondent government) or Rule 41 (prioritizing cases), both of which provide an additional mechanism for the speedy resolution of the case. In other cases, the Court can apply Rules 40 and 41 on its own initiative, either alone or in combination with Rule 39.
[52] ECtHR, *Mamatkulov and Askarov v. Turkey*, Nos. 46827/99 and 46951/99, Judgment [GC] of 4 February 2005, para. 108.
[53] ECtHR, *Mamatkulov and Askarov v. Turkey*, Nos. 46827/99 and 46951/99, Judgment [GC] of 4 February 2005, para. 69.
[54] See, for example, ECtHR, *Matsiukhina and Matsiukhin v. Sweden*, No. 31260/04, Decision of 21 June 2005; ECtHR, *Collins and Akaziebie v. Sweden*, No. 23944/05, Decision of 27 March 2007.
[55] See, for example, ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011.

> applicant's right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34." (*Ibid.*, para.128) [56]

Call for applicants and Contracting States to cooperate fully with the Court: Faced with a rapid rise in the number of requests for interim measures, increasing from 112 requests in 2006 to 4,786 requests in 2010, the then President of the Court, Jean-Paul Costa, issued an unprecedented statement in February 2011, underlining *inter alia* that:[57]

> "[T]he Court is **not** an appeal tribunal from the asylum and immigration tribunals of Europe, any more than it is a court of criminal appeal in respect of criminal convictions. Where national immigration and asylum procedures carry out their own proper assessment of risk and are seen to operate fairly and with respect for human rights, the Court should only be required to intervene in truly exceptional cases.
>
> For the Court to be able effectively to perform its proper role in this area both Governments and applicants must co-operate fully with the Court. In particular it is **essential** that:
>
> ▪ **applicants and their representatives** respect the Practice Direction on Requests for Interim Measures […] In particular, requests for interim measures should be individuated, fully reasoned, be sent with all relevant documentation including the decisions of the national authorities and courts, and be sent in good time before the expected date of removal. The widespread distribution of application forms to potential applicants is not and should not be seen as a substitute for proper legal representation in compliance with these conditions.
>
> It must be emphasised that failure to comply with the conditions set out in the Practice Direction may lead to such cases not being accepted for examination by the Court.
>
> ▪ **Member States** provide national remedies with suspensive effect which operate effectively and fairly, in accordance with the Court's case-law and provide a proper and timely examination of the issue of risk. Where a lead case concerning the safety of return to a particular country of origin is pending before the national courts or the Court of Human Rights, removals to that country should be suspended. Where the Court requests a stay on removal under Rule 39, that request must be complied with."

The number of requests for interim measures has since been decreasing year-by-year, but still remains relatively high compared to 2006 and earlier. For example, in 2013 the Court decided 1,973 requests for interim measures, 103 of which were granted, 1,203 of which were dismissed, and the remainder of which fell outside the scope of Rule 39.[58]

For further information, see:

1. ECtHR, *Practice Direction: Requests for Interim Measures* [Link]
2. UNHCR, *Toolkit on how to Request Interim Measures under Rule 39 of the Rules of the European Court of Human Rights for Persons in Need of International Protection*, February 2012 [Link]
3. ECtHR, *Interim measures*, Factsheet (periodically updated) [Link]
4. ECRE/ELENA, *Research on ECHR Rule 39 Interim Measures*, April 2012 [Link]

[56] See also, in particular, ECtHR, *Paladi v. Moldova*, No. 39806/05, Judgment [GC] of 10 March 2009, paras. 78-106.
[57] ECtHR, *Statement issued by the President of the European Court of Human Rights Concerning Requests for Interim Measures (Rule 39 of the Rules of Court*, 11 February 2011 [Link].
[58] ECtHR, *Analysis of statistics 2013*, January 2014.

5. Third party interventions, including by UNHCR

> **Article 36 ECHR**
> **(“Third party intervention”)**
>
> *1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.*
>
> *2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.*
>
> *3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.*

Article 36 ECHR entitles the Council of Europe Commissioner of Human Rights, and any Contracting State which is not already party to the proceedings as a respondent State but whose national is an applicant, to submit written comments – and, if there is an oral hearing, to take part in it – in cases before a Chamber or Grand Chamber.

Any other Contracting State, or any other person, may also submit written comments or take part in oral hearings if invited to do so by the President of the Court. As specified in Rule 44(3) of the Rules of Court, the invitation may either be at the initiative of the President of the Court or as a result of a successful request for leave to intervene by the third party concerned. Invitations to take part in an oral hearing are reserved for “exceptional cases”.

Leave to intervene must be requested not later than twelve weeks after notice of the application has been communicated by the Court to the respondent State, although another time limit may be fixed by the President of the Chamber for “exceptional reasons”.[59] Similar time limits also apply where a case is relinquished or accepted for referral to the Grand Chamber.[60]

As of the end of 2013, UNHCR had submitted its position as third-party intervener in seventeen cases since making its first intervention to the Court in *T.I. v. the United Kingdom* (March 2000).[61] Cases in which UNHCR has intervened are indicated as such in the tables of cases at the end of each chapter in this manual.

Even in cases where UNHCR does not formally intervene, the Court has been making increasing use of the Office’s guidelines and reports in its assessment of asylum cases, either by taking them into account of its own motion or because they have been submitted by one of the parties.

6. Principles for interpretation of the ECHR

The Court applies a number of core principles for the interpretation of the Convention, including, for example, that the Convention shall be interpreted:

(i) “in light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties”, which at Article 31(3)(c) includes the rule that interpretation

[59] Rule 44(3)(b) of the Rules of Court.
[60] Rule 44(4) of the Rules of Court.
[61] ECtHR, *T.I. v. the United Kingdom*, No. 43844/98, Decision of 7 March 2000.

must not take place "in a vacuum" but should take into account "any relevant rules of international law applicable in the relations between the parties";[62]

(ii) as a "living instrument … in light of present day conditions" and in accordance with developments in international law so as to reflect the "increasing high standard being required in the area of protection of human rights";[63]

(iii) "read as a whole, and in such a way as to promote internal consistency and harmony between its various provisions";[64]

(iv) in a manner that gives "practical and effective" protection to human rights, as opposed to protection that is "theoretical or illusory".[65]

Although the Court decides each individual application on its own merits, and is not formally bound to follow any of its previous judgments, precedent is nevertheless central to its decision-making and will not be departed from without good reason. As stated, for example, in *Scoppola v. Italy (No. 2)*:[66]

> "While the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases […] Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in the respondent State and in the Contracting States in general and respond, for example, to any emerging consensus as to the standards to be achieved […] It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement[.]" (para.104)

It is not only Judgments that create precedent for the Court, but (in)admissibility Decisions as well. For example, the prohibition of "indirect *refoulement*" implicit in Article 3 ECHR (see chapter 2.2 below) was first established by the Court in its Decision of inadmissibility in *T.I. v. the United Kingdom*.[67]

7. Establishing the facts of the case

When the Court communicates an application to the respondent State, it provides both the applicant and the respondent State with a brief Statement of Facts containing: (i) a summary of the facts of the case as submitted by the applicant; (ii) a summary of relevant domestic law; (iii) a summary of the applicant's complaints; and (iv) specific questions from the Court on factual or legal points as to

[62] See, for example, ECtHR, *Loizidou v. Turkey*, No. 15318/89, Judgment [GC] of 18 December 1996, para. 43; ECtHR, *Al-Adsani v. the United Kingdom*, No. 35763/97, Judgment of 21 November 2001, para. 55; ECtHR, *Demir and Baykara v. Turkey*, No. 34503/97, Judgment [GC] of 12 November 2008, para. 67.
[63] ECtHR, *Selmouni v. France*, No. 25803/94, Judgment [GC] of 28 July 1999, para. 101.
[64] See, for example, ECtHR, *Stec and Others v. the United Kingdom*, Nos. 65731/01 and 65900/01, Decision [GC] of 6 July 2005, para. 48.
[65] See, for example, ECtHR, *Artico v.* Italy, No. 6694/74, Judgment of 13 May 1980, para. 33; ECtHR, *Soering v. the United Kingdom*, No. 14038/88, Judgment of 7 July 1989, para. 87.
[66] ECtHR, *Scoppola v. Italy (No. 2)*, No. 10249/03, Judgment [GC] of 17 September 2009. See also, for example, ECtHR, *Cossey v. the United Kingdom*, No. 10843/84, Judgment (Plenary) of 27 September 1990, para. 35; ECtHR, *Mamatkulov and Askarov v. Turkey*, Nos. 46827/99 and 46951/99, Judgment [GC] of 4 February 2005, para. 121.
[67] ECtHR, *T.I. v. the United Kingdom*, No. 43844/98, Decision of 7 March 2000.

whether there has been a violation of the Convention, and, if requested, "any factual information, documents or other material considered by the Chamber or its President to be relevant".[68]

The parties' pleadings following communication of the application should include:[69]

> "(a) any comments they wish to make on the facts of the case; however,
>
> > (i) if a party does not contest the facts as set out in the statement of facts prepared by the Registry [of the Court], it should limit its observations to a brief statement to that effect;
> >
> > (ii) if a party contests only part of the facts as set out by the Registry, or wishes to supplement them, it should limit its observations to those specific points;
> >
> > (iii) if a party objects to the facts or part of the facts as presented by the other party, it should state clearly which facts are uncontested and limit its observations to the points in dispute;
>
> (b) legal arguments relating first to admissibility and, secondly, to the merits of the case […]"

The establishment of the facts by the Court is generally carried out without any express reference to the standard and burden of proof. While, as noted above, the Court will not normally depart from findings of fact already made in the domestic proceedings unless there are cogent reasons for doing so – for example, because the domestic proceedings were arbitrary or unfair – it will also need to take into consideration any new or additional evidence submitted by the parties.

In cases where the Court *has* expressly referred to the standard and burden of proof, it has in general adopted the standard of "beyond reasonable doubt". However, this standard and the burden of proof for meeting it are much less stringent than, and should not be confused with, the requirement of "beyond reasonable doubt" used for determining criminal liability in national legal systems based on common law. As explained in *El-Masri v. the former Yugoslav Republic of Macedonia*:[70]

> "In cases in which there are conflicting accounts of events, the Court is inevitably confronted when establishing the facts with the same difficulties as those faced by any first-instance court. It reiterates that, in assessing evidence, it has adopted the standard of proof 'beyond reasonable doubt'. However, it has never been its purpose to borrow the approach of the national legal systems that use that standard. Its role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof. In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the specificity of the facts, the nature of the allegation made and the

[68] Rule 54(2)(a) of the Rules of Court. Note also: (i) Article 38 ECHR, which provides that "[t]he Court shall examine the case together with the representatives of the parties and, *if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities*" (emphasis added); (ii) Rule A1(1) of the Annex to the Rules of Court, according to which "[the Court] may, at the request of a party or its own motion, adopt any investigative measure which it considers capable of clarifying the facts of the case".
[69] See paragraph 14 of the Court's Practice Direction on Written Pleadings [Link].
[70] ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia*, No. 39630/09, Judgment [GC] of 13 December 2012. See also, for example, ECtHR, *Ireland v. the United Kingdom*, No. 5310/71, Judgment (Plenary) of 18 January 1978, paras. 160-161.

> Convention right at stake. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights […]" (para.151).

Specific evidentiary considerations apply to protection against *refoulement*, given the forward-looking nature of the assessment, the fundamental nature of the rights at stake, and the potentially irreversible consequences of an incorrect decision; and given that "due to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof"[71] (see further chapter 2.2 below).

8. Access to the case law of the Court

Access to most of the case law of the Court and of the former Commission of Human Rights is freely available online in the Court's HUDOC database at http://hudoc.echr.coe.int. The case law is available in either one or both of the official languages of the Court (English and French),[72] and sometimes is also available in unofficial translations in other languages as well.

The table of cases at the end of each chapter in this manual includes a hyperlink to HUDOC for each Court or Commission case that is cited, and also the official summary of that case where available. In cases where UNHCR made a submission to the Court, a hyperlink to the submission is made as well.

Hyperlinks are the English-language texts where available, otherwise to the French-language texts.

For further information, see:

1. ECtHR, *HUDOC User Manual* [Link]
2. ECtHR, *HUDOC 2.2 User Manual: New Features* (to be read in conjunction with the first User Manual) [Link]

C. Table of cases

Judgments and decisions of the ECtHR

Al-Adsani v. the United Kingdom, No. 35763/97, Judgment of 21 November 2001 [Links: Judgment | Case summary]

Al-Masri v. the former Yugoslav Republic of Macedonia, No. 39630/09, Judgment [GC] of 13 December 2012 [Links: Judgment | Case summary]

Amuur v. France, No. 19776/92, Judgment of 25 June 1996 [Links: Judgment | Case summary]

Artico v. Italy, No. 6694/74, Judgment of 13 May 1980 [Link: Judgment]

Austin and Others v. the United Kingdom, Nos. 39692/09, 40713/09, 41008/09, Judgment [GC] of 15 March 2012 [Links: Judgment | Case summary]

Broniowski v. Poland, No. 31443/96, Judgment [GC] of 22 June 2004, [Links: Judgment | Case summary]

Collins and Akaziebie v. Sweden, No. 23944/05, Decision of 27 March 2007 [Links: Decision | Case summary]

Cossey v. the United Kingdom, No. 10843/84, Judgment (Plenary) of 27 September 1990 [Link: Judgment]

Demir and Baykara v. Turkey, No. 34503/97, Judgment [GC] of 12 November 2008 [Links: Judgment | Case summary]

El-Masri v. the former Yugoslav Republic of Macedonia, No. 39630/09, Judgment [GC] of 13 December 2012 [Links: Judgment | Case summary]

F.H. v. Sweden, No. 32621/06, Judgment of 20 January 2009 [Link: Judgment]

Handyside v. the United Kingdom, No. 5493/72, Judgment (Plenary) of 7 December 1976 [Link: Judgment]

[71] See, for example, ECtHR, *Matsiukhina and Matsiukhin v. Sweden*, No. 31260/04, Decision of 21 June 2005, p. 9; ECtHR, *F.H. v. Sweden*, No. 32621/06, Judgment of 20 January 2009, para. 95.

[72] Rules 17, 30 and 76 of the Rules of Court.

Hirsi Jamaa and Others v. Italy, No. 27765/09, Judgment [GC] of 23 February 2012 [Links: Judgment | Case summary | UNHCR written submission | UNHCR oral submission]

Ireland v. the United Kingdom, No. 5310/71, Judgment of 18 January 1978 [Link: Judgment]

Kozacioğlu v. Turkey, No. 2334/03, Judgment [GC] of 19 February 2009 [Links: Judgment | Case summary]

Kudła v. Poland, No. 30210/96, Judgment [GC] of 26 October 2000 [Links: Judgment | Case summary (French)]

Loizidou v. Turkey (Preliminary Objections), No. 15318/89, Judgment [GC] of 23 March 1995 [Links: Judgment | Case summary]

Loizidou v. Turkey, No. 15318/89, Judgment [GC] of 18 December 1996 [Links: Judgment | Case summary]

M.S.S. v. Belgium and Greece, No. 30696/09, Judgment [GC] of 21 January 2011 [Links: Judgment | Case summary | UNHCR written submission | UNHCR oral submission]

Mamatkulov and Askarov v. Turkey, Nos. 46827/99 and 46951/99, Judgment [GC] of 4 February 2005 [Links: Judgment | Case summary]

Matsiukhina and Matsiukhin v. Sweden, No. 31260/04, Decision of 21 June 2005 [Links: Decision]

NA. v. the United Kingdom, No. 25904/07, Judgment of 17 July 2008 [Links: Judgment | Case summary]

Paladi v. Moldova, No. 39806/05, Judgment [GC] of 10 March 2009 [Links: Judgment | Case summary]

Scoppola v. Italy (No. 2), No. 10249/03, Judgment [GC] of 17 September 2009 [Links: Judgment | Case summary]

Selmouni v. France, No. 25803/94, Judgment [GC] of 28 July 1999 [Link: Judgment]

Shamsa v. Poland, Nos. 45355/99 and 45357/99, Judgment of 27 November 2003 [Links: Judgment (French only)]

Soering v. the United Kingdom, No. 14038/88, Judgment of 7 July 1989 [Link: Judgment]

Stec and Others v. the United Kingdom, Nos. 65731/01 and 65900/01, Decision [GC] of 6 July 2005 [Link: Decision]

T.I. v. the United Kingdom, No. 43844/98, Decision of 7 March 2000 [Links: Decision | UNHCR submission]

2.2 *Non-refoulement*

A. Introduction

The ECtHR has repeated in many cases that the ECHR and its Protocols do not contain a right to asylum, and that Contracting States have the right as a matter of well-established international law to control the entry, residence and expulsion of aliens. However, the ECtHR has pointed out that this right is not unqualified and is subject to States' treaty obligations, including under the ECHR.[1] Thus, the ECHR contains various protections, both explicit and implicit, in relation to expulsion and other forms of removal, including protection against *refoulement*.

The present chapter covers the case law of the ECtHR on the substantive protection afforded against *refoulement* by the ECHR, whereas chapter 2.3 discusses the case law of the ECtHR concerning procedural safeguards against *refoulement*.

Section B of this chapter discusses the case law on the substantive protection against *refoulement* afforded by Article 3 ECHR, whereas Section C discusses the case law on the substantive protection against *refoulement* afforded by other provisions of the ECHR.

[1] See for example ECtHR, *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, Judgment of 30 October 1991, para. 102.

For further information, see: ECtHR, *Expulsions and extraditions*, Factsheet (periodically updated) [Link]

B. The ECtHR case law on protection against *refoulement* under Article 3 ECHR (‘Prohibition of torture’)

1. Introduction

a) Application of Article 3 ECHR to expulsion, extradition, and other forms of removal

Article 3 ECHR
(‘Prohibition of torture’)

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

The ECtHR’s jurisprudence on Article 3 ECHR was first established in 1989 in *Soering v. the United Kingdom*,[2] an extradition case against the United Kingdom involving a German national accused of a capital offence in the United States. The ECtHR ruled against the extradition on the basis that:

> “the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 … and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.” (para.91, emphasis added).

Only the responsibility of the extraditing State is at issue, not that of the State requesting the extradition. As held in *Soering*:

> “The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 … of the Convention. Nonetheless, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.” (para.91)

Two years later, the ECtHR held in two separate judgments – *Cruz Varas and Others v. Sweden*[3] and *Vilvarajah and Others v. the United Kingdom*[4] – that the principles enunciated in *Soering* also apply to expulsion. It is now well-established in the case law of the ECtHR that *any* form of removal to another State can give rise to an issue under Article 3 ECHR, since “the question whether there is a real risk of treatment contrary to Article 3 in another State cannot depend on the legal basis for removal to that State.”[5] Hence, as stated by the ECtHR in *Hirsi Jamaa and Others v. Italy*:[6]

> “expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of the expelling State under the

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[2] ECtHR, *Soering v. the United Kingdom*, No. 14038/88, Judgment of 7 July 1989.
[3] ECtHR, *Cruz Varas and Others v. Sweden*, No. 15576/89, Judgment of 20 March 1991, paras. 69-70.
[4] ECtHR, *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, Judgment of 30 October 1991, para. 103.
[5] ECtHR, *Babar Ahmed and Others v. the United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Judgment of 10 April 2012, para. 168.
[6] ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, Judgment [GC] of 23 February 2012.

> Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country" (para.114).

While the ECHR thus provides for protection against *refoulement*, it does not in and of itself provide for a corresponding legal status or for the legalization of stay in the host country, given that the judgments of the ECtHR are essentially declaratory and leave to Contracting States the choice of the means to be used in their domestic legal systems for the performance of their obligations under the ECHR.[7]

b) Protection against indirect *refoulement*

Introduction: In addition to prohibiting an individual's removal to a country in which he or she is at real risk of ill-treatment, Article 3 ECHR also prohibits removal to an intermediary country in which the individual is not at risk of ill-treatment but from which he or she might ultimately be removed to a country where he or she *is* at risk. This prohibition against "indirect *refoulement*" applies irrespective of whether, for example, the intermediary country is party to the ECHR or participates in a system for the allocation of State responsibility for examining asylum claims (for example the system established by the European Union in the Dublin Regulation ("Dublin system")).[8]

In *T.I. v. the United Kingdom*,[9] the applicant complained that his transfer under the Dublin system from the United Kingdom to Germany would result in his onward removal to Sri Lanka, where he was at real risk of treatment contrary to Article 3 ECHR. Although the ECtHR found on the facts that the applicant would not be at risk of onward removal to Sri Lanka, it established in principle that indirect *refoulement* would be contrary to Article 3 since:

> "the indirect removal in this case to an intermediary country, which is also a [ECHR] Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention." (page 15)

Dublin transfers: In *T.I.*, the ECtHR added that just because Germany participated in the Dublin system did not absolve the United Kingdom of responsibility for ensuring that the applicant would not be subject to onward removal from Germany to Sri Lanka:

> "[T]he United Kingdom [cannot] rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or mutatis mutandis international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution […] The Court notes the comments of the UNHCR that, while the Dublin Convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered." (page 15)

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[7] ECHR Contracting States that are EU Member States have provided for a specific status in the EU Qualification Directive and its Recast, according to which "subsidiary protection status" is to be granted *inter alia* to persons who do not qualify as refugees but who nevertheless face a real risk of torture or inhuman or degrading treatment or punishment in their country of origin, and are unable, or, owing to such risk, unwilling to avail themselves of the protection of that country. See further chapter 1.2 above.
[8] For details on the so-called "Dublin system", see chapter 1.5 above.
[9] ECtHR, *T.I. v. the United Kingdom*, No. 43844/98, Decision of 7 March 2000.

The ECtHR confirmed its approach in *K.R.S. v. the United Kingdom*,[10] a case concerning the Dublin transfer of an Iranian asylum-seeker from the United Kingdom to Greece. While the Court again found on the facts of the case that there was no risk of indirect *refoulement*, it found the opposite just over two years later in another case concerning a Dublin transfer to Greece, that of *M.S.S. v. Belgium and Greece*.[11]

M.S.S. concerned an Afghan national who had entered the EU through Greece and then travelled on to Belgium where he had applied for asylum, following which he had been transferred back to Greece. The ECtHR observed that numerous reports had been added to the information that had been available to it when it adopted its decision in *K.R.S.*, all of which agreed "as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure [in Greece] and the practice of direct or indirect *refoulement* on an individual or a collective basis" (para.347). The ECtHR considered that at the time of the applicant's transfer to Greece "the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities" (para.358).

> **For further information, see:** ECtHR, *"Dublin"cases,* Factsheet (periodically updated) [Link]

Removals outside the context of the Dublin system: In *Abdolkhani and Karimnia v. Turkey*,[12] concerning the threatened expulsion from Turkey to Iraq of two Iranian nationals who had been recognized as refugees by UNHCR, the ECtHR found that their expulsion would violate Article 3 ECHR,[13] reiterating that "the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention" (para.88).

In *Hirsi Jamaa and Others v. Italy*,[14] the ECtHR found a violation of Article 3 ECHR by Italy, which had intercepted the applicants at sea and then handed them over to the Libyan authorities in Tripoli, from where they risked onwards removal to their countries of origin (Somalia and Eritrea). The ECtHR observed in particular that Libya was not a party to the 1951 Refugee Convention and that, although UNHCR had a presence in Tripoli, this "hardly constituted a guarantee of protection for asylum-seekers on account of the negative attitude of the Libyan authorities, which did not recognise any value in the status of refugee" (para.153). The ECtHR considered that when the applicants were transferred to Libya:

> "the Italian authorities knew or should have known that there were insufficient guarantees protecting [the applicants] from the risk of being arbitrarily returned to their countries of origin, having regard in particular to the lack of any [Libyan] asylum procedure and the impossibility of making the Libyan authorities recognise the refugee status granted by UNHCR." (para.156)

[10] ECtHR, *K.R.S. v. the United Kingdom*, No. 32733/08, Decision of 2 December 2008.
[11] ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011.
[12] ECtHR, *Abdolkhani and Karimnia v. Turkey*, No. 30471/08, Judgment of 22 September 2009.
[13] The ECtHR considered that the applicants were at risk of ill-treatment not only in Iran but in Iraq as well.
[14] ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, Judgment [GC] of 23 February 2012.

c) Obligation to prevent *refoulement* by "any person"

> **Article 1 ECHR**
> **('Obligation to respect human rights')**
>
> *The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*

Contracting States must not only themselves refrain from directly or indirectly *refouling* individuals who are in their jurisdiction, they must also take reasonable steps to ensure that individuals in their jurisdiction are not *refouled* by third parties (i.e. private individuals or another State).

The ECtHR has ruled in a number of cases that Article 1 ECHR, taken in conjunction with Article 3 ECHR, requires that where a Contracting State is aware, or ought to be aware, of a "real and immediate risk" of an individual being exposed to ill-treatment through being forcibly transferred by any person to another State, it has an obligation to take "within the scope of [its] powers, such preventive operational measures that, judged reasonably, might be expected to avoid that risk".[15]

In each of the cases concerned, the applicant's extradition had been sought from the Russian Federation by another State – either Tajikistan or Uzbekistan – where the applicant claimed to be at real risk of ill-treatment. The applicant was subsequently abducted and forcibly transferred by unidentified individuals to that State, without reasonable steps having been taken by the Russian authorities to take preventive measures to protect the applicant after being informed of his disappearance. The ECtHR accordingly found a violation of Article 3 by the Russian Federation, irrespective of whether its own officials may or may not have been involved in the transfer.

2. The content of the prohibition on *refoulement* under Article 3 ECHR

a) The absolute and unconditional character of Article 3 ECHR

Article 3 ECHR is listed in Article 15(2) ECHR as a non-derogable provision of the Convention. Therefore, it must be upheld even "in time of war or other public emergency threatening the life of a nation" (Article 15(1) ECHR).

Moreover, unlike many other of the rights and freedoms included in the ECHR, Article 3 ECHR leaves no scope for limitations by law under any circumstances (national security, public order or other grounds). Thus, in *Soering v. the United Kingdom*,[16] the ECtHR held:

> "It would hardly be compatible with the underlying values of the Convention … were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, *however heinous the crime allegedly committed*." (para.88)

As stated by the ECtHR in *Chahal v. United Kingdom*,[17] "the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration" (para.80) and the ECHR

[15] ECtHR, *Savriddin Dzhurayev v. Russia*, No. 71386/10, Judgment of 25 April 2013, paras. 177-185; *Nizomkhon Dzhurayev v. Russia*, no. 31890/11, Judgment of 03 October 2013, paras. 136-139; *Ermakov v. Russia*, no. 43165/10, Judgment of 07 November 2013, paras. 208-211; *Kasymakhunov v. Russia*, no. 29604/12, Judgment of 14 November 2013, paras. 134-141. As the ECtHR ruled in these cases, Contracting States are also required to conduct an effective investigation into any such incidents of forcible transfer (see further section D.3.b in chapter 2.3 below).
[16] ECtHR, *Soering v. the United Kingdom*, No. 14038/88, Judgment of 7 July 1989.
[17] ECtHR, *Chahal v. the United Kingdom*, No. 22414/93, Judgment [GC] of 15 November 1996.

therefore does not permit of "any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 … is engaged" (para.81).[18]

The prohibition under Article 3 is absolute, and it makes no difference whether the treatment to which the individual risks being exposed is torture or some other form of ill-treatment proscribed by that article.[19]

b) The treatment proscribed by Article 3 ECHR

Categories of ill-treatment: In the *Greek Case*,[20] the former European Commission of Human Rights described the concepts of torture, inhuman or degrading treatment or punishment as follows:

> "The notion of inhuman treatment covers *at least* such treatment as *deliberately causing* severe suffering, mental or physical, which, in a particular situation, is unjustifiable. The word "torture" is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confession, or the infliction of punishment, and is generally *an aggravated form of inhuman treatment*. Treatment or punishment of an individual may be said to be degrading if it *grossly humiliates* him before others or drives him to act against his will or conscience." (emphasis added)

In *Selmouni v. France*,[21] the ECtHR lowered the threshold necessary to qualify certain treatments as "torture". It held that in order to carry out the assessment of the minimum level of severity, regard must be had to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions" and that "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" (para.101).

In *A. and Others v. the United Kingdom*,[22] the ECtHR categorized "inhuman" or "degrading" treatment or punishment in the following terms:

> "The Court has considered treatment to be 'inhuman' because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be 'degrading' because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them […] In considering whether a punishment or treatment was 'degrading' within the meaning of Article 3, the Court will have regard to whether its object was to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. However, the absence of any such purpose cannot conclusively rule out a finding of a violation of Article 3. In order for a punishment or treatment associated with it to be 'inhuman' or 'degrading', the suffering or humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment" (para.127).

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[18] See also, for example, ECtHR, *D. v. the United Kingdom*, No. 30240/96, Judgment of 2 May 1997, para. 47; ECtHR, *Saadi v. Italy*, No. 37201/06, Judgment [GC] of 28 February 2008, para. 138; ECtHR, *Auad v. Bulgaria*, No. 46390/10, Judgment of 11 October 2011, para. 101; ECtHR, *M.S. v. Belgium*, No. 50012/08, Judgment of 31 January 2012, paras. 126-127.

[19] ECtHR, *Babar Ahmed and Others v. the United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Judgment of 10 April 2012, paras. 167-175.

[20] ECmHR, the "Greek case" (No. 3321/67, *Denmark v. Greece*; No.3322/67, *Norway v. Greece*; No. 3323/67, *Sweden v. Greece*; No. 3344/67, *Netherlands v. Greece*), Report of 5 November 1969.

[21] ECtHR, *Selmouni v. France*, No. 25803/94, Judgment [GC] of 28 July 1999.

[22] ECtHR, *A. and Others v. the United Kingdom*, No. 3455/05, Judgment [GC] of 19 February 2009.

Whenever the ECtHR has found that a proposed removal would be in violation of Article 3 ECHR, it has normally refrained from considering whether the ill-treatment in question should be characterised as torture or as inhuman or degrading treatment or punishment.[23]

Severity of ill-treatment: In *Ireland v. the United Kingdom,*[24] the ECtHR held that ill-treatment must attain a minimum level of severity for it to fall within the scope of Article 3 ECHR, and that:

> "[t]he assessment of this minimum is, in the nature of things, relative; it *depends on all the circumstances of the case,* such as duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc." (para.162, emphasis added)

Thus, for example, the ECtHR has found that the minimum level of severity required for conditions of detention to fall within the scope of Article 3 is lower for children than for adults.[25] The ECtHR has also recognized the particular vulnerability of asylum-seekers as a factor to be taken into account when assessing the severity of ill-treatment. In *M.S.S. v. Belgium and Greece,*[26] the Court found that Belgium had violated Article 3 through its Dublin transfer of an Afghan asylum-seeker back to Greece, *inter alia* because Belgium had knowingly exposed him to conditions of detention and to living conditions in Greece that amounted to degrading treatment (para.367). The Court considered that it "must take into account that the applicant, being an asylum-seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously" (para.232) and that:

> "in the light of the available information on the conditions at the holding centre near Athens airport, the Court considers that the conditions of detention experienced by the applicant were unacceptable. It considers that, taken together, the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person's dignity, constitute degrading treatment contrary to Article 3 of the Convention. In addition, the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum seeker." (para.233)

Similar considerations with respect to the applicant's vulnerability as an asylum-seeker were also a factor in determining that his living conditions in Greece constituted degrading treatment contrary to Article 3 (see further under "source of ill-treatment" below, and chapter 2.4).

Although the assessment of complaints under Article 3 ECHR in expulsion cases involves an assessment of the conditions in the receiving State against the standards of Article 3, the ECtHR has repeatedly made clear that this is not to impose Convention standards on non-Contracting States. Thus, as exemplified by cases concerning a lack of access to appropriate medical care for terminally ill HIV/AIDS patients, what might count as ill-treatment falling within the scope of Article 3 were the act or omission to occur in a Contracting State might not always count as such and be a bar to

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[23] ECtHR, *Babar Ahmed and Others v. the United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Judgment of 10 April 2012, para. 171.

[24] ECtHR, *Ireland v. the United Kingdom*, No. 5310/71, Judgment (Plenary) of 18 January 1978. See also ECtHR, *Raninen v. Finland*, No. 20972/92, Judgment of 16 December 1997, para. 55; ECtHR, *Hilal v. the United Kingdom*, No. 45276/99, Judgment of 6 March 2001, para. 60.

[25] See, for example, ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, No. 13178/03, Judgment of 12 October 2006, paras. 48-59; ECtHR, *Muskhadzhiyeva and Others v. Belgium*, No. 41442/07, Judgment of 19 January 2010, paras.55-63; ECtHR, *Rahimi v. Greece*, No. 8687/08, Judgment of 5 April 2011, paras. 81-86; ECtHR, *Popov v. France*, Nos. 39472/07 and 39474/07, Judgment of 19 January 2012, paras. 76-103.

[26] ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011.

removal if instead the act or omission were to occur in a receiving non-Contracting State (see further the discussion below concerning *D. v. the United Kingdom* and *N. v. the United Kingdom*).[27]

Source of ill-treatment: Ill-treatment may fall within the scope of Article 3 ECHR irrespective of whether it is inflicted by State or non-State actors. For example, in *H.L.R. v. France*,[28] a case in which the applicant risked ill-treatment by drug traffickers in Colombia, the ECtHR held:

> "Owing to the absolute character of the right guaranteed, … Article 3 of the Convention … may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection" (para.40).[29]

In reaffirming this point in *Salah Sheekh v. the Netherlands,*[30] the ECtHR added that the existence of the obligation not to expel is therefore "not dependent on whether the risk of the treatment stems from factors which involve the responsibility, *direct or indirect*, of the authorities of the receiving country" (para.147, emphasis added).

While cases of ill-treatment falling within the scope of Article 3 generally involve harm that is intentionally inflicted by State or non-State actors, the ECtHR noted in *D. v. United Kingdom*[31] that "the Court must reserve to itself sufficient flexibility to address the application of that Article in other contexts which might arise" (para.49). That particular case concerned the proposed expulsion from the United Kingdom of a terminally-ill AIDS patient back to Saint Kitts and Nevis, his country of origin, where he had no family or material resources and where there was no social welfare provision available to him or any guarantee that he would be able to obtain a bed in hospital. The ECtHR held that the abrupt withdrawal of his support and medical treatment in the UK would entail "dramatic consequences" and that "[t]here is a serious danger that the conditions of adversity which await him in St Kitts will further reduce his already limited life expectancy and subject him to acute mental and physical suffering" (para.52). The Court found that in view of the exceptional circumstances of the case and of the critical stage reached in the applicant's illness:

> "Although it cannot be said that *the conditions which would confront him in the receiving country* are themselves a breach of the standards of Article 3 …, his *removal* would expose him to a real risk of dying under most distressing circumstances and would thus amount to inhuman treatment." (emphases added) (para.53)

It should however be noted that the ECtHR has not since found again that a proposed removal of an alien from a Contracting State would give rise to a violation of Article 3 ECHR on grounds of ill-health.[32] In particular, in *N. v. the United Kingdom,*[33] the applicant, who was HIV positive, complained that her removal from the United Kingdom to Uganda would be in breach of Article 3 owing to "a lack of freely available antiretroviral and other necessary medical treatment, social support or nursing care in Uganda" (para.20). In distinguishing the facts of that case from *D. v. the United Kingdom* and finding that there would be no violation of Article 3, the ECtHR observed:

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[27] ECtHR, *Babar Ahmed and Others v. the United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Judgment of 10 April 2012, paras. 172-177.
[28] ECtHR, *H.L.R. v. France*, No. 24573/94, Judgment [GC] of 29 April 1997.
[29] See also, for example, ECtHR, *Ahmed v. Austria*, No. 25964/94, Judgment of 17 December 1996, para. 44, in which the source of the ill-treatment was a rival clan in the civil war in Somalia.
[30] ECtHR, *Salah Sheekh v. the Netherlands*, No. 1948/04, Judgment of 11 January 2007.
[31] ECtHR, *D. v. the United Kingdom*, No. 30240/96, Judgment of 2 May 1997.
[32] See, for example, ECtHR, *Ahorugeze v. Sweden*, No. 37075/09, Judgment of 27 October 2011, where the Court recalled that the threshold for a medical condition to raise an issue under Article 3 ECHR was very high. It thus considered that the applicant's heart problems could not be considered so serious as to raise an issue under that article and that there were no compelling humanitarian grounds against his extradition to Rwanda due to his medical condition (para.89).
[33] ECtHR, *N. v. the United Kingdom*, No. 26565/05, Judgment [GC] of 27 May 2008.

> "Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the *D. v. the United Kingdom* case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support." (para.42)

The ECtHR considered that it should maintain the high threshold set in *D. v. the United Kingdom*, given that in such cases "the alleged future harm would emanate not from the intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country" (para.43).

The United Kingdom subsequently sought to rely on this test in *Sufi and Elmi v. the United Kingdom,*[34] in which the applicants complained *inter alia* that their removal to Somalia would force them to flee into IDP camps or makeshift settlements whose "dire humanitarian conditions" fell within the scope of Article 3 ECHR. However, the ECtHR considered that the test did not apply since:

> "If the dire humanitarian conditions in Somalia were solely or even predominantly attributable to poverty or to the State's lack of resources to deal with a naturally occurring phenomenon, such as a drought, the test in *N. v. the United Kingdom* may well have been considered to be the appropriate one. However, it is clear that while drought has contributed to the humanitarian crisis, that crisis is predominantly due to the direct and indirect actions of the parties to the conflict." (para.282)

In the circumstances of the case, the ECtHR found that the conditions complained of were indeed "sufficiently dire to amount to treatment reaching the threshold of Article 3" (para.291).[35]

Similarly, the ECtHR had found several months previously in the abovementioned case of *M.S.S. v. Belgium and Greece*[36] that Belgium had violated Article 3 through its Dublin transfer of an Afghan asylum-seeker to Greece, *inter alia* because Belgium had knowingly exposed the applicant to living conditions that amounted to degrading treatment (para.367). The Court arrived at this finding given that Greece was directly responsible for the applicant's living conditions, having regard to its positive obligations under the EU Reception Conditions Directive and to the applicant's vulnerability as an asylum-seeker, and given that:

> "[The applicant] allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving." (para.254)

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[34] ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, Judgment of 28 June 2011.

[35] Cf. ECtHR, *S.H.H. v. the United Kingdom*, No. 60367/10, Judgment of 29 January 2013, in which the applicant sought to rely on *Sufi and Elmi* but in which the ECtHR distinguished the situation in Afghanistan from that in Somalia and found no violation of Article 3.

[36] ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011. Compare and contrast with the subsequent series of inadmissibility decisions of the ECtHR concerning Dublin transfers to Italy, starting with ECtHR, *Samsam Mohammed Hussein and Others v. the Netherlands and Italy*, No. 27725/10, Decision of 2 April 2013.

For further discussion of this finding, see chapter 2.4.

3. The element of risk

a) Real risk

Degree of risk: The applicant need only be exposed upon removal to a "real risk" of ill-treatment for there to be a violation of Article 3 ECHR.

On the one hand, the ECtHR held in *Vilvarajah and Others v. United Kingdom*[37] that a "mere possibility" of ill-treatment does not meet the threshold of "real risk" (para.111). On the other hand, it held in *Saadi v. Italy*[38] that the threshold is lower than "more likely than not" (para.140).

Same threshold for all applicants, irrespective of their profile: The ECtHR held in *Saadi* that the same test of "real risk" applies to applicants who are a threat to national security, meaning that such applicants do not need to satisfy a higher threshold of risk than other applicants.

Same threshold irrespective of the source of the risked ill-treatment: Similarly, the same test of real risk applies irrespective of the source of the risked ill-treatment, including, for example in a situation of armed conflict and/or generalized violence as discussed below.

b) Point in time for the assessment of risk

The point in time from which the risk to the applicant should be assessed depends upon whether the applicant is still within the jurisdiction of the Contracting State and is complaining that his or her removal *would* violate Article 3 ECHR, or whether he or she has already been removed.

If the applicant has not been removed, whether removal would be in violation of Article 3 ECHR is determined by whether a real risk of ill-treatment is foreseeable at the time of the proceedings before the ECtHR ("*ex nunc*" assessment).

For example, as held in *Chahal v. United Kingdom*:[39]

> "Since [the applicant] has not yet been deported, the material point in time must be that of the Court's consideration of the case. It follows that, although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive" (para.86).

Since it is the present conditions which are decisive, it is "necessary to take into account information that has come to light after the final decision taken by the domestic authorities[.]"[40]

The ECtHR may thus revisit a removal decision months or even years after it has been taken by the sending State, taking into account as appropriate any changed circumstances, particularly in the receiving State.

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[37] ECtHR, *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, Judgment of 30 October 1991.
[38] ECtHR, *Saadi v. Italy*, No. 37201/06, Judgment [GC] of 28 February 2008.
[39] ECtHR, *Chahal v. the United Kingdom*, No. 22414/93, Judgment [GC] of 15 November 1996.
[40] ECtHR, *Salah Sheekh v. the Netherlands*, No. 1948/04, Judgment of 11 January 2007, para. 136.

If the applicant has already been removed, whether there has been a violation of Article 3 ECHR depends on whether a real risk of ill-treatment was foreseeable at the time of removal, not on whether ill-treatment is foreseeable at the time of the proceedings or whether it has actually occurred after removal, although the fact of such ill-treatment may be relevant.

In *Vilvarajah and Others v. United Kingdom*,[41] the applicants were sent back to Sri Lanka and there was undisputed evidence that some of them were subsequently ill-treated there. They were finally allowed to come back to the UK and were granted exceptional leave to remain. The ECtHR nevertheless found no violation of Article 3 ECHR considering that at the time of the assessment by the domestic authorities the personal circumstances of each applicant had been carefully considered in the light of a substantial body of material concerning the situation in Sri Lanka and the position of the Tamil community within it. As the ECtHR stated:

> "since the nature of the Contracting States' responsibility under Article 3 … in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears" (para.107).

c) Situations of armed conflict and/or generalized violence

The ECtHR has recognized that in "extreme" cases a situation of generalized violence may be so intense that the return of *any individual* to that situation would expose him or her to a real risk of ill-treatment. However, the Court has generally found in the complaints brought before it that the violence in the receiving State has not reached such an intensity for applicants to face a "real risk" of ill-treatment upon return.

In the abovementioned case of *Vilvarajah and Others v. the United Kingdom*,[42] in which the applicants were all Tamils from Sri Lanka, the ECtHR found that:

> "The evidence … concerning the background of the applicants, as well as the general situation, does not establish that their personal position was any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country. Since the situation was still unsettled there existed the possibility that they might be detained and ill-treated as appears to have occurred previously in the cases of some of the applicants … A mere possibility of ill-treatment, however, in such circumstances, is not in itself sufficient to give rise to a breach of Article 3" (para.111).

As for those applicants who claimed to have been ill-treated following their return, the ECtHR added that "be that as it may, however, there existed *no special distinguishing features* in their cases that could or ought to have enabled the Secretary of State to foresee that they would be treated in this way" (para.112, emphasis added).[43]

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[41] ECtHR, *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, Judgment of 30 October 1991.
[42] ECtHR, *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, Judgment of 30 October 1991.
[43] See also ECtHR, *H.L.R. v. France*, No. 24573/94, Judgment [GC] of 29 April 1997, in which the applicant claimed that he faced attacks by drug traffickers in Colombia. The ECtHR held that it "can but note the general situation of violence existing in the country of destination. It considers, however, that this circumstance would not in itself entail, in the event of deportation, a violation of Article 3" (para.41).

In *Salah Sheekh v. the Netherlands*,[44] a case concerning a Somali national from Mogadishu, the ECtHR found that the applicant's membership of the Ashraf minority was sufficient in and of itself for him to be at risk of treatment in breach of Article 3, and that the applicant was therefore not required to show the existence of "further special distinguishing features" in his case (para.148).

In *NA. v. the United Kingdom*,[45] a case which again concerned the return of a Tamil to Sri Lanka, the ECtHR reaffirmed its approach in *Salah Sheekh*, stating that:

> "where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court has considered that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned" (para.116)

Although on the facts of the case being a Tamil was still not sufficient in and of itself to meet the above test, the applicant did manage to show "special distinguishing features" that, taken cumulatively, demonstrated why he in particular was at risk, and the Court accordingly found that his expulsion to Sri Lanka would be in violation of Article 3. (para.138-147)

In *NA. v. the United Kingdom*, the ECtHR also recognized explicitly for the first time that the return of *any* individual to the receiving State could in certain situations violate Article 3, stating that:

> "the Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return." (para.115)

This threshold was subsequently reached in *Sufi and Elmi v. the United Kingdom*,[46] a case of threatened removal to Somalia, in which the ECtHR concluded:

> "the situation of general violence in Mogadishu is sufficiently intense … that any returnee would be at real risk of Article 3 ill-treatment solely on account of his presence there, unless it could be demonstrated that he was sufficiently well connected to powerful actors in the city to enable him to obtain protection" (para.293)

The ECtHR considered in the context of the case that, although not to be seen as an exhaustive list applying to all future cases, the following criteria formed an appropriate yardstick against which to assess the level of violence in Mogadishu:

> "first, whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; secondly, whether the use of such methods and/or tactics was widespread among the parties to the conflict; thirdly, whether the fighting was localised or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting" (para.241).

In applying these criteria, the ECtHR took into account a large quantity of objective information, including from UNHCR, indicating the indiscriminate character of attacks in densely populated areas, the indiscriminate use of weapons and firing, the "unacceptable" number of civilian casualties, the

[44] ECtHR, *Salah Sheekh v. the Netherlands*, No. 1948/04, Judgment of 11 January 2007.
[45] ECtHR, *NA. v. the United Kingdom*, No. 25904/07, Judgment of 17 July 2008.
[46] ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, Judgment of 28 June 2011.

"substantial" number of persons displaced and the unpredictable and widespread nature of the conflict. (paras.242-250)

Two years later, the ECtHR found in *K.A.B. v. Sweden*[47] that the level of violence in Mogadishu had decreased, indicating that the situation is no longer such that everyone who is present in the city has a real risk of treatment contrary to Article 3 of the Convention, and that therefore it must be shown that the applicant's personal situation is such that his return to Somalia would contravene the relevant provisions of the Convention. (paras.87-91)

d) The internal flight alternative

In certain cases where an applicant has relied on Article 3 ECHR to challenge expulsion, the expelling State has argued that even if the applicant would be at risk of ill-treatment in one part of the receiving State, he or she would not be at risk in another part of the receiving State, and that where there is such an "internal flight alternative" expulsion is not prohibited.

For example, in *Chahal v. the United Kingdom*,[48] the UK Government offered to return the applicant, a Sikh separatist from Punjab, to any airport of his choice in India rather than to Punjab itself. However, the ECtHR found that "elements in the Punjab police were accustomed to act without regard to the human rights of suspected Sikh militants and were fully capable of pursuing their targets into areas of India far away from Punjab" (para.100). In finding that the applicant's return to India would expose him to a real risk of ill-treatment, the Court attached significance to a number of factors, but considered that the applicant would be "most at risk from the Punjab security forces acting either within or outside State boundaries" (para.104).

Similarly, in *Hilal v. the United Kingdom*,[49] the UK Government argued that the applicant, an opposition party member from Zanzibar, had an internal flight alternative in mainland Tanzania. However the ECtHR again held that no internal flight alternative existed, since, even though human rights violations were more prevalent in Zanzibar than in mainland Tanzania, the situation in mainland Tanzania was far from satisfactory and disclosed "a long-term, endemic situation of human rights problems." The Court referred *inter alia* to reports of police on the mainland ill-treating and beating detainees, and to descriptions of inhuman and degrading conditions in mainland prisons. It also noted the possibility of "internal extradition" to Zanzibar and the fact that the police on the mainland were "linked institutionally to the police in Zanzibar as part of the Union and cannot be relied on as a safeguard against arbitrary action" (para.67).

Preconditions for an internal flight alternative: In *Salah Sheekh v. the Netherlands*,[50] the ECtHR confirmed that Article 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment whether an individual would be exposed to a real risk of ill-treatment if removed to his or her country of origin. However, just as the Court had held in the above-mentioned case of *T.I. v. the United Kingdom* that "the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3", the Court considered that it saw "no reason to hold differently where the expulsion is … to take place not to an intermediary country but to a particular region of the country of origin" (para.141). The Court accordingly held that as a precondition for relying on an internal flight alternative certain guarantees have to be in place:

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[47] ECtHR, *K.A.B. v. Sweden*, No. 886/11, Judgment of 5 September 2013.
[48] ECtHR, *Chahal v. the United Kingdom*, No. 22414/93, Judgment [GC] of 15 November 1996.
[49] ECtHR, *Hilal v. the United Kingdom*, No. 45276/99, Judgment of 6 March 2001.
[50] ECtHR, *Salah Sheekh v. the Netherlands*, No. 1948/04, Judgment of 11 January 2007.

> "the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment." (para.141)

The individual must also not be exposed to a risk of ill-treatment while travelling to the area concerned. (para.144)

On the facts of the case, the ECtHR found that there was no internal flight alternative available to the applicant in Somalia, since even though the Dutch authorities might well have succeeded in removing him directly to northern Somalia, which they claimed to be a "relatively safe" area of the country, it seemed rather unlikely that he would have been allowed to settle there. Consequently, irrespective of whether he did actually face a risk of ill-treatment in northern Somalia, there was a "real chance" of his being removed from that area or of his having no alternative but to go to areas of the country where he did face such a risk. (paras.139-149)

The ECtHR subsequently applied the same preconditions for an internal flight alternative in *Sufi and Elmi v. the United Kingdom*,[51] which again concerned expulsion to Somalia. In addition to finding in this case as well that the applicants did not have access to an internal flight alternative, the ECtHR considered that it would also not have been viable for them to seek refuge in the neighbouring refugee camps in Kenya. (paras.287-292)

e) Diplomatic assurances

Where assurances have been provided by the country to which the applicant is to be removed that he or she will not be ill-treated in that country, such assurances are not in and of themselves sufficient to guarantee protection against a risk of ill-treatment. As stressed by the ECtHR in *Othman (Abu Qatada) v. the United Kingdom*:[52]

> "There is an obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time" (para.187).

The preliminary question will be whether the general human rights situation in the receiving country excludes accepting any assurances whatsoever. However it will only be in rare cases – notably when there is a systemic practice of torture,[53] or where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the ECHR[54] – that the general situation in a country will mean that no weight at all can be given to assurances.

More usually – and as reaffirmed by the ECtHR in *Othman (Abu Qatada)* – "the Court will assess first, the quality of any assurances given and, second, whether, in light of the receiving State's practices they can be relied upon" (para.189). In that case the ECtHR recalled the approach it had previously taken to assurances and accordingly enumerated various factors to be taken into account in the assessment such as:

(i) "whether the terms of the assurances have been disclosed to the Court";

[51] ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, Judgment of 28 June 2011.
[52] ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, Judgment of 17 January 2012.
[53] ECtHR, *Ismoilov and Others v. Russia*, No. 2947/06, Judgment of 24 April 2008, para. 127.
[54] ECtHR, *Saadi v. Italy*, No. 37201/06, Judgment [GC] of 28 February 2008, paras. 147-148.

(ii) "whether the assurances are specific or are general and vague";

(iii) "who has given the assurances and whether that person can bind the receiving State";

(iv) "if the assurances have been issued by the central government of the receiving State, whether local authorities can be expected to abide by them";

(v) "whether the assurances concerns treatment which is legal or illegal in the receiving State";

(vi) "whether they have been given by a Contracting State";

(vii) "the length and strength of bilateral relations between the sending and receiving States, including the receiving State's record in abiding by similar assurances";

(viii) "whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers";

(ix) "whether there is an effective system of protection against torture in the receiving State, including whether it is willing to cooperate with international monitoring mechanisms (including international human rights NGOs), and whether it is willing to investigate allegations of torture and to punish those";

(x) "whether the applicant has previously been ill-treated in the receiving State"; and

(xi) "whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State". (para.189)

In *Othman (Abu Qatada)*, the ECtHR considered that the assurances obtained by the United Kingdom from Jordan were superior in their detail and their formality to any assurances that it had previously examined, and also appeared to be superior to assurances that had been examined by the UN Committee Against Torture and the UN Human Rights Committee in other cases under their own complaints procedures. After comprehensively examining the assurances provided by Jordan in the case at issue, and the applicant's concerns as to their meaning and operation, the ECtHR concluded that his return to Jordan would not expose him to a real risk of ill-treatment.

Such findings by the ECtHR have been relatively infrequent,[55] and more often the Court has found that assurances provided by the receiving State were insufficient.

For example, in *Chahal v. the United Kingdom*,[56] the UK Government sought to rely on assurances given by the Indian authorities. The ECtHR found that the Indian Government had made the assurances in good faith, but that violations of human rights by certain members of the security forces in the Punjab and elsewhere in India remained a "recalcitrant and enduring problem", despite the efforts of the government to bring about reform (para.105). The assurances were therefore insufficient to negate the existence of a real risk.

In *Baysakov and Others v. Ukraine*,[57] which concerned a request to Ukraine for the extradition of four Kazakhstani refugees, the ECtHR considered that the assurances given by Kazakh prosecutors

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[55] Other cases in which assurances were found to mitigate, or to contribute to mitigating, any risk of treatment contrary to Article 3 ECHR include, for example: ECtHR, *Abu Salem v. Portugal*, No. 26844/04, Decision of 9 May 2006, concerning an extradition to India; ECtHR, *Saoudi v. Spain*, No. Decision of 18 September 2006, concerning extradition to Algeria; ECtHR, *Harkins and Edwards v. the United Kingdom*, Nos. 9146/07 and 32650/07, Judgment of 17 January 2012, concerning an extradition to the USA.

[56] ECtHR, *Chahal v. the United Kingdom*, No. 22414/93, Judgment [GC] of 15 November 1996.

[57] ECtHR, *Baysakov and Others v. Ukraine*, No. 54131/08, Judgment of 18 February 2010.

that the applicants would not be ill-treated could not be relied on. In particular, it was not established that the Prosecutor General's Office of Kazakhstan was empowered to provide such assurances on behalf of the State and, given the lack of an effective system of torture prevention, it would be difficult to see whether such assurances would be respected. The ECtHR concluded that the applicants' fears of possible ill-treatment in Kazakhstan were well-founded and that their extradition to that country would give rise to a violation of Article 3 ECHR. (paras.51-52)

4. Evidentiary standards

a) The standard of proof

Ever since *Soering v. the United Kingdom*,[58] the ECtHR has repeatedly underlined that the specific standard of proof required in *non-refoulement* cases is:

> "*substantial grounds* have been shown for believing that the person in question, if expelled, would face *a real risk* of being subjected to *treatment contrary to Article 3* in the receiving country" (emphases added).[59]

Just as the Court has not sought to quantify precisely what degree of likelihood constitutes a "real risk", it has also not sought to define what constitutes "substantial grounds".

b) Assessment by the ECtHR

A comprehensive exposition of the approach taken by the ECtHR towards the assessment of evidence, whether in cases generally or in *non-refoulement* cases in particular, is beyond the scope of this manual. However, following is a summary of the main principles articulated by the Court for its assessment of evidence in *non-refoulement* cases. This summary is then followed by a number of further explanatory remarks.

Summary of the main principles governing the ECtHR's assessment: The main principles were summarized by the Grand Chamber in *Saadi v. Italy*,[60] and subsequently reiterated as follows in *Auad v. Bulgaria*:[61]

> "(a) In determining whether substantial grounds have been shown for believing that there is a real risk of treatment incompatible with Article 3, the Court takes into account all the material placed before it or, if necessary, material obtained proprio motu. Its examination of the existence of a real risk must necessarily be a rigorous one.
>
> (b) It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. Where such evidence is adduced, it is for the Government to dispel any doubts about it.
>
> (c) To determine whether there is a risk of ill-treatment, the Court must examine the foreseeable consequences of sending the applicant to the receiving country, bearing in mind the general situation there and his or her personal circumstances.

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[58] ECtHR, *Soering v. the United Kingdom*, No. 14038/88, Judgment of 7 July 1989, para. 91.
[59] See, for example, ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, Judgment [GC] of 23 February 2012, para. 114.
[60] ECtHR, *Saadi v. Italy*, No. 37201/06, Judgment [GC] of 28 February 2008, paras. 128-133.
[61] ECtHR, *Auad v. Bulgaria*, No. 46390/10, Judgment of 11 October 2011, para. 99.

> (d) To that end, as regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights organisations such as Amnesty International, or governmental sources, including the United States Department of State. At the same time, it has held that the mere possibility of ill-treatment on account of an unsettled situation in the receiving country does not in itself give rise to a breach of Article 3, and that, where the sources available to it describe a general situation, an applicant's specific allegations in a particular case require corroboration by other evidence.
>
> (e) In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the protection of Article 3 enters into play when the applicant establishes, where necessary on the basis of the sources mentioned in the previous subparagraph, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned.
>
> (f) With regard to the material date, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been removed when the Court examines the case, the relevant time will be that of the Court's examination. Accordingly, while historical facts are of interest in so far as they shed light on the current situation and the way it is likely to develop, the present circumstances are decisive." (para.99)

Further remarks concerning the assessment by the ECtHR: As noted above, the burden of proof on the applicant and on the respondent State respectively in *non-refoulement* cases before the ECtHR is that:

> "It is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. Where such evidence is adduced, it is for the Government to dispel any doubts about it."

The starting point must be what happened in the domestic proceedings. Bearing in mind the fact that its own proceedings are conducted in writing, the ECtHR has stated that "as a general principle, the national authorities are best placed to assess not just the facts but, more particularly, the credibility of witnesses since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned."[62] Given also its subsidiary role, the ECtHR will therefore not normally enter into a fresh assessment of risk or of the applicant's credibility unless there is reason to question the adequacy of the domestic proceedings or there are new developments that need to be considered. For example, as the ECtHR stated in *Savriddin Dzhurayev v. Russia*:[63]

> "… The Court notes that the applicant argued before the domestic courts that his extradition would expose him to a real risk of being subjected to treatment contrary to Article 3. In his applications for refugee status and asylum he further raised, in a clear and unequivocal manner, his fear of ill-treatment. The Government submitted that the applicant's arguments had been adequately considered by the domestic courts and rejected.
>
> … The Court reiterates that, where domestic proceedings have taken place, as in the present case, it is not the Court's task to substitute its own assessment of the facts for that of the domestic courts and, as a general rule, it is for those courts to assess the evidence before them […] This should not lead, however, to abdication of the Court's responsibility and a renunciation of all supervision of the result obtained from using domestic remedies, otherwise the rights guaranteed by the Convention would be devoid of any substance […] In accordance with Article 19 of the

[62] See, for example, ECtHR, *R.C. v. Sweden*, No. 41827/07, Judgment of 9 March 2010, para. 52.
[63] ECtHR, *Savriddin Dzhurayev v. Russia*, No. 71386/10, Judgment of 25 April 2013.

> Convention, the Court's duty is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention.
>
> … With reference to extradition or deportation, this means that in cases where an applicant provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government, the Court must be satisfied that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources, such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations […] Accordingly, the Court will first assess whether the applicant's complaint received an adequate reply at the national level." (paras. 154-155)

The Court's examination of the claim "must necessarily be a rigorous one, in view of the absolute character of Article 3 and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe".[64] Thus, there may be new evidence that needs to be considered,[65] gaps in the findings made in the domestic proceedings, legitimate reasons why certain findings should be questioned,[66] or the domestic proceedings may have been inadequate generally.[67]

The ECtHR adopts a flexible approach towards the burden of proof. On the one hand, it may find unsubstantiated statements by asylum-seekers insufficient to establish their credibility if it considers that they ought to be able to provide corroborating evidence,[68] and asylum-seekers should seek to provide such evidence to the extent possible.[69] On the other hand, it also acknowledges that "due to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof"; although "when information is presented [by the respondent State] which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies".[70]

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[64] See, for example, ECtHR, *Chahal v. the United Kingdom*, No. 22414/93, Judgment [GC] of 15 November 1996, para. 96; ECtHR, *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, Judgment of 30 October 1991, para. 108.

[65] See, for example, ECtHR, *Muradi and Alieva v. Sweden*, No. 11243/13, Decision of 25 June 2013, para. 41: "Turning to the present case, the applicants' request for asylum was carefully examined by the domestic authorities. There are no indications that these proceedings lacked effective guarantees to protect the applicants against arbitrary *refoulement* or were otherwise flawed. The Court will therefore continue by examining whether the information presented before this Court would lead it to depart from the domestic authorities' conclusions."

[66] See, for example, ECtHR, *Said v. the Netherlands*, No. 2345/02, Judgment of 5 July 2005, paras. 49-53.

[67] See, for example, ECtHR, *Savriddin Dzhurayev v. Russia*, No. 71386/10, Judgment of 25 April 2013, paras. 154-164.

[68] See, for example, *J.H. v. the United Kingdom*, No. 48839/09, Judgment of 20 December 2011, para. 61: "… Even having regard to the special situation in which asylum seekers often find themselves, and the need to give them the benefit of the doubt when it comes to assessing their credibility, the Court is not convinced that, in the present case, a bare assertion can be considered sufficient to establish that his father is still politically active or has a public profile in Afghanistan such as to give rise to any risk upon return to the applicant …"

[69] See, for example, ECtHR, *Said v. the Netherlands*, No. 2345/02, Judgment of 5 July 2005, para. 49: "The Court has recognised … that direct documentary evidence proving that an applicant himself or herself is wanted for any reason by the authorities of the country of origin may well be difficult to obtain … It is nevertheless incumbent on persons who allege that their expulsion would amount to a breach of Article 3 to adduce, to the greatest extent practically possible, material and information allowing the authorities of the Contracting State concerned, as well as the Court, to assess the risk a removal may entail."

[70] See, for example, ECtHR, *Matsiukhina and Matsiukhin v. Sweden*, No. 31260/04, Decision of 21 June 2005, p. 9; ECtHR, *R.C. v. Sweden*, No. 41827/07, Judgment of 9 March 2010, para. 50; ECtHR, *J.H. v. the United Kingdom*, No. 48839/09, Judgment of 20 December 2011, para. 52; ECtHR, *S.H.H. v. the United Kingdom*, No. 60367/10, Judgment of 29 January 2013, para. 71.

As noted above, the point in time from which claimed risk to the applicant in the receiving country should be assessed depends upon whether or not removal has already taken place. As stated by the Grand Chamber in *Mamatkulov and Askarov v. Turkey*:[71]

> "Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the extradition; the Court is not precluded, however, from having regard to information which comes to light subsequent to the extradition. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party of the well-foundedness or otherwise of an applicant's fears […]
>
> However, if the applicant has not been extradited or deported when the Court examines the case, the relevant time will be that of the proceedings before the Court […]" (para.69)

In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 exists, the Court will, as noted above, assess the issue "in the light of all the material placed before it or, if necessary, material obtained *proprio motu*". It will do so "in particular where the applicant – or a third party [intervener] within the meaning of Article 36 of the Convention – provides reasoned grounds which cast doubt on the accuracy of the information relied on by the respondent Government".[72] In *NA. v. the United Kingdom*,[73] the Court outlined various considerations for assessing and comparing the materials before it:

> "… In assessing such material, consideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations …
>
> … The Court also recognises that consideration must be given to the presence and reporting capacities of the author of the material in the country in question. In this respect, the Court observes that States (whether the respondent State in a particular case or any other Contracting or non-Contracting State), through their diplomatic missions and their ability to gather information, will often be able to provide material which may be highly relevant to the Court's assessment of the case before it. It finds that same consideration must apply, *a fortiori*, in respect of agencies of the United Nations, particularly given their direct access to the authorities of the country of destination as well as their ability to carry out on-site inspections and assessments in a manner which States and non-governmental organisations may not be able to do …
>
> … While the Court accepts that many reports are, by their very nature, general assessments, greater importance must necessarily be attached to reports which consider the human rights situation in the country of destination and directly address the grounds for the alleged real risk of ill-treatment in the case before the Court. Ultimately, the Court's own assessment of the human rights situation in a country of destination is carried out only to determine whether there would be a violation of Article 3 if the applicant in the case before it were to be returned to that country. Thus the weight to be attached to independent assessments must inevitably depend on the extent to which those assessments are couched in terms similar to Article 3. Thus in respect of the UNHCR, due weight has been given by the Court to the UNHCR's own assessment of an applicant's claims when the Court determined the merits of her complaint under Article 3 […] Conversely, where the UNHCR's concerns are focussed on general socio-economic and

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[71] ECtHR, *Mamatkulov and Askarov v. Turkey*, Nos. 46827/99 and 46951/99, Judgment [GC] of 4 February 2005.

[72] ECtHR, *Salah Sheekh v. the Netherlands*, No. 1948/04, Judgment of 11 January 2007, para. 136. See also, for example, ECtHR, *NA. v. the United Kingdom*, No. 25904/07, Judgment of 17 July 2008, para. 119; ECtHR, *Savriddin Dzhurayev v. Russia*, No. 71386/10, Judgment of 25 April 2013, para. 156.

[73] ECtHR, *NA. v. the United Kingdom*, No. 25904/07, Judgment of 17 July 2008.

> humanitarian considerations, the Court has been inclined to accord less weight to them, since such considerations do not necessarily have a bearing on the question of a real risk to an individual applicant of ill-treatment within the meaning of Article 3 …" (paras.120-122).

Finally, if sufficient doubt is cast on the adequacy of the findings in the domestic proceedings and evidence *prima facie* capable of proving a risk of ill-treatment has been adduced, the ECtHR will find in favour of the applicant unless the respondent State is able to demonstrate why it should find otherwise. It is in this sense that, as noted above, the burden of proof shifts to the respondent State to "dispel any doubts" about the risk of ill-treatment in the receiving State.[74]

c) Assessment by Contracting States

The ECtHR expects Contracting States to conduct a rigorous scrutiny of claims in *non-refoulement* cases.[75] For example, in *Singh and Others v. Belgium*, the Belgian authorities' dismissal of documentary evidence at the core of an asylum claim without taking any steps to verify its authenticity was not considered to be a close and rigorous scrutiny of the claim.[76]

Just as the Court does not impose an unrealistic burden of proof on applicants in its own examination of their claims, it does not expect Contracting States to do so in the domestic proceedings either: States are expected to apply the principle of the benefit of the doubt when appropriate, and also, especially where they themselves ought to know about relevant risks in the receiving State, should not require applicants to bear the entire burden of proof.[77] When assessing the risk of ill-treatment faced by applicants upon return, States are expected to take into account not only domestic materials but also materials originating from other reliable and objective sources.[78]

As discussed in detail in chapter 2.3 below, Contracting States are required to provide an effective remedy for a complaint that an expulsion measure has resulted, or would result, in *refoulement* of the individual concerned. The national authority providing the remedy must be independent of the authority responsible for the expulsion measure and must itself carry out a close and rigorous scrutiny of the substance of the claim.

[74] See also: (i) ECtHR, *Saadi v. Italy*, No. 37201/06, Judgment [GC] of 28 February 2008, para. 143: "In the present case the Court has had regard, firstly, to the reports of Amnesty International and Human Rights Watch on Tunisia … which describe a disturbing situation. The conclusions of those reports are corroborated by the report of the US Department of State […] Bearing in mind the authority and reputation of the authors of these reports, the seriousness of the investigations by means of which they were compiled, the fact that on the points in question their conclusions are consistent with each other and that those conclusions are corroborated in substance by numerous other sources … the Court does not doubt their reliability. Moreover, the Government have not adduced any evidence or reports capable of rebutting the assertions made in the sources cited by the applicant"; (ii) ECtHR, *R.C. v. Sweden*, No. 41827/07, Judgment of 9 March 2010, para. 55: "Having regard to its finding that the applicant has discharged the burden of proving that he has already been tortured [in Iran], the Court considers that the onus rests with the State to dispel any doubts about the risk of his being subjected again to treatment contrary to Article 3 in the event that his expulsion proceeds; (iii) ECtHR, *S. H. v. the United Kingdom*, No. 19956/06, Judgment of 15 June 2010, para. 71: "[A]lthough none of the experts have been able to predict precisely what would happen to the applicant on return, on balance the Court is satisfied that there are substantial grounds for believing that there is a real risk that the applicant would be subjected to ill-treatment contrary to Article 3 if returned to Bhutan. In response, the Government have not adduced any evidence capable of dispelling the Court's concerns"; (iv) ECtHR, *Auad v. Bulgaria*, No. 46390/10, Judgment of 11 October 2011, para. 103: "Those circumstances, coupled with the applicant's personal account, amount to at least *prima facie* evidence capable of proving that there are substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 3 if expelled to Lebanon […] The burden is therefore on the State to dispel any doubts in that regard."

[75] See, for example, ECtHR, *Jabari v. Turkey*, No. 40035/98, Judgment of 11 July 2000, paras. 39-40.

[76] ECtHR, *Singh and Others v. Belgium*, No. 33210/11, Judgment of 2 October 2012, para. 104

[77] See, for example, ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011, paras. 344-359; ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, Judgment [GC] of 23 February 2012, paras. 122-158.

[78] See, for example, ECtHR, *Salah Sheekh v. the Netherlands*, No. 1948/04, Judgment of 11 January 2007, para. 136.

C. The ECtHR case law on protection against *refoulement* under provisions of the ECHR other than Article 3

1. Introduction

While the vast majority of *non-refoulement* cases that have come before the ECtHR concern the prohibition against ill-treatment contained in Article 3 ECHR, applicants have also complained under provisions of the ECHR other than Article 3 that their removal to another State would expose them to a risk of treatment that does not measure up to the standards contained in those provisions. The case law of the main provisions concerned is examined below.

2. Article 2 ECHR ('Right to life') and Protocol Nos. 6 & 13 to the ECHR (Abolition of the death penalty)

Article 2 ECHR
('Right to life')

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Articles 1 and 2, Protocol No. 6[*] to the ECHR

Article 1 – Abolition of the death penalty

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

Article 2 – Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

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[*] Protocol No. 6 was adopted in April 1983 and entered into force on 1 March 1985. It has been signed by all ECHR Contracting States, and ratified by all Contracting States except the Russian Federation.

Preamble and Article 1, Protocol No. 13[*] to the ECHR

[…]

Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms […];

Noting that Protocol No. 6 to the Convention […] does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows:

Article 1 – Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

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[*] Protocol No. 13 was adopted in May 2002 and entered into force on 1 July 2003. It has been signed by all ECHR Contracting States except Azerbaijan and the Russian Federation, and ratified by all signatory States except Armenia and Poland.

a) Introduction

Applicants have frequently complained that their removal to another country would put their life in in danger and therefore be a violation of their right to life under Article 2 ECHR.[79] In some cases, given that on its face Article 2(1) ECHR permits judicially imposed capital punishment as an exception to the right to life, applicants have additionally or alternatively relied on Protocol No. 6[80] – which provides for the abolition of the death penalty in peacetime – or on Protocol No. 13,[81] which provides for the abolition of the death penalty in all circumstances, both in time of war as well as peace.

Since applicants have usually simultaneously complained that their removal would also be in breach of Article 3 ECHR, initially the approach of the ECtHR was generally to find that the substance of the complaint under Article 2 and/or Protocol Nos. 6 or 13 was indissociable from the the substance of the complaint under Article 3, and then, if it did not find the application as a whole manifestly ill-founded,[82] to examine the merits of the complaint under Article 3 only.[83] In this way the Court abstained from pronouncing itself definitively on whether Article 2 and/or Protocol Nos. 6 or 13 provide protection against *refoulement*, be it in relation to the death penalty or loss of life for other reasons; however, at the same time, the Court also explicitly said in many cases that it did not exclude that such protection might apply due to analogous considerations to the "real risk" test under Article 3 ECHR.[84]

More recently, as a result of developments in the Court's case law on Article 2 ECHR outside the context of *non-refoulement* – in particular the Grand Chamber judgment of 2005 in *Öcalan v. Turkey*[85] – the Court has prononounced itself unequivocally in holding that analogous considerations to Article 3 ECHR *do* apply in the above context.

[79] See, for example, ECtHR, *D. v. the United Kingdom*, No. 30240/96, Judgment of 2 May 1997; ECtHR, *Sinnarajah v. Switzerland*, No. 45187/99, Decision of 11 May 1999; ECtHR, *Said v. the Netherlands*, No. 2345/02, Decision of 5 October 2004; ECtHR, *NA. v. the United Kingdom*, No. 25904/07, Judgment of 17 July 2008.

[80] See, for example, ECtHR, *S.R. v. Sweden*, No. 62806/00, Decision of 23 April 2002; ECtHR, *Blech v. France*, No. 78074/01, Decision of 30 June 2005; ECtHR, *Registe v. the Netherlands*, No. 28620/09, Decision (Striking out) of 23 March 2010.

[81] See, for example, ECtHR, *Bello v. Sweden*, No. 32213/04, Decision (Final) of 17 January 2006; ECtHR, *Hakizimana v.* Sweden, No. 37913/05, Decision of of 27 March 2008; ECtHR, *Rrapo v. Albania*, No. 58555/10, Judgment of September 2012.

[82] See, for example, ECtHR, *S.R. v. Sweden*, No. 62806/00, Decision of 23 April 2002; ECtHR, *Tekdemir v. the Netherlands*, Nos. 46860/99 and 49823/99, Decision of 1 October 2002.

[83] See, for example, ECtHR, *Said v. the Netherlands*, No. 2345/02, Decision of 5 October 2004 and Judgment of 5 July 2005; ECtHR, *NA. v. the United Kingdom*, No. 25904/07, Judgment of 17 July 2008.

[84] See, for example, ECtHR, *S.R. v. Sweden*, No. 62806/00, Decision of 23 April 2002, page 10: "the Court does not exclude that analogous considerations might apply to Article 2 of the Convention and Article 1 of Protocol No. 6 to the Convention where the return of an alien puts his or her life in danger, as a result of the imposition of the death penalty or otherwise". See also, for example, ECtHR, *Hakizimana v.* Sweden, No. 37913/05, Decision of of 27 March 2008, p. 15: "the Court does not exclude that analogous considerations might apply to Article 2 of the Convention and to Article 1 of Protocol No. 13 where the return of an alien puts his or her life in danger, as a result of the imposition of the death penalty or otherwise".

[85] ECtHR, *Öcalan v. Turkey*, No. 46221/99, Judgment of 12 March 2003 and Judgment [GC] of 12 May 2005.

b) Crystallization of the test for *non-refoulement* in relation to the right to life

The turning point in the case law on *non-refoulement* in relation to the right to life was in *Bader and Kanbor v. Sweden*¸[86] in which the Court held that:

> "an issue may arise under Articles 2 and 3 of the Convention if a Contracting State deports an alien who has suffered or risks suffering a flagrant denial of a fair trial in the receiving State, the outcome of which was or is likely to be the death penalty" (para.42).

The Court arrived at this conclusion since, whereas the *imposition* of the death penalty is contrary to Protocol Nos. 6 and 13 only, the Grand Chamber had held in *Öcalan* that the actual *implementation* of the death penalty is contrary not only to the aforementioned Protocols but also, if implemented as a result of an unfair trial, to Article 2(1) ECHR as well.[87]

The Grand Chamber had also not excluded the applicability of an even broader test, according to which – in peacetime at the very least – Article 2(1) could no longer be construed as ever permitting implementation of the death penalty; but it abstained from reaching any firm conclusions on this point since the facts of the case did not require it.[88] In *Bader and Kanbor* the Court similarly did not need to reach any conclusions on this point, and it simply reiterated its longstanding position that it "ha[d] not in earlier cases excluded the possibility that a Contracting State's responsibility might be engaged under Article 2 of the Convention or Article 1 of Protocol No. 6 where an alien is deported to a country where he or she is seriously at risk of being executed, as a result of the imposition of the death penalty or otherwise" (para.42).[89]

However, the Court subsequently applied the broader test under Article 2 in *Kaboulov v. Ukraine*,[90] a case in which the applicant was challenging extradition to Kazakhstan:

> "The Court observes that, in the context of extradition and positive obligations under Article 2 of the Convention, in complying with their obligations in the area of international legal cooperation in criminal matters, the Contracting States must have regard to the requirements enshrined in that provision of the Convention. Thus, in circumstances where there are substantial grounds to believe that the person in question, if extradited, would face a real risk of being liable to capital punishment in the receiving country, Article 2 implies an obligation not to extradite the individual" (para.99).

The Court added that there was also a second way in which removal could violate Article 2:

> "[I]f an extraditing State knowingly puts the person concerned at such high risk of losing his life as for the outcome to be near certainty, such an extradition may be regarded as 'intentional deprivation of life', prohibited by Article 2 of the Convention" (para.99).

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[86] ECtHR, *Bader and Kanbor v. Sweden*, No. 13284/04, Judgment of 8 November 2005.

[87] ECtHR, *Öcalan v. Turkey*, No. 46221/99, Judgment [GC] of 12 May 2005, para. 166. Note that in *Bader and Kanbor v. Sweden* the Court required a "flagrant" denial of a fair trial, whereas in *Öcalan v. Turkey* it was sufficient for the trial to be unfair, not necessarily "flagrantly" unfair. Due to developments in the case law since *Bader and Kanbor v. Sweden* that are described below, there is no need to discuss the reasons for this distinction here since the position now seems to be that the removal of an individual to a country where there are substantial grounds for believing that he or she would be at real risk of execution is contrary to Article 2(1) ECHR irrespective of whether the risk arises due to an unfair trial.

[88] ECtHR, *Öcalan v. Turkey*, No. 46221/99, Judgment [GC] of 12 May 2005, para. 165.

[89] The Court also saw no need to consider the applicability of Protocol No. 13 to the case, as the respondent State had suggested it should do.

[90] ECtHR, *Kaboulov v. Ukraine*, No. 41015/04, Judgment of 19 November 2009.

The Court found on the facts of the case that even in the unlikely event that the applicant was at risk of being tried on charges that carried the death penalty, due to a moratorium on carrying out executions in Kazakhstan there was no real risk that he would be executed even if the death sentence was imposed.[91]

One year after *Kaboulov v. Ukraine*, the Court also addressed the issue of the applicability of Protocol No. 13 to removal cases, holding in *Al-Saadoon and Mufdhi v. the United Kingdom*[92] that:

> "in respect of those States which are bound by it, the right under Article 1 of Protocol No. 13 not to be subjected to the death penalty, which admits of no derogation and applies in all circumstances, ranks along with the rights in Articles 2 and 3 as a fundamental right, enshrining one of the basic values of the democratic societies making up the Council of Europe. As such, its provisions must be strictly construed" (para.118)

and that:

> "Article 2 of the Convention and Article 1 of Protocol No. 13 prohibit the extradition or deportation of an individual to another State where substantial grounds have been shown for believing that he or she would face a real risk of being subjected to the death penalty there" (para.123).[93]

Beyond the specific issue of the death penalty, the Court now also holds more broadly that the general principles applying to the "real risk" test under Article 3 ECHR also apply to Article 2.[94]

c) Whether implementation of the death penalty constitutes inhuman and degrading punishment within the meaning of Article 3 ECHR

In *Soering v. the United Kingdom*,[95] neither the applicant nor the UK Government argued that the death penalty in and of itself was contrary to Articles 2 or 3 ECHR, and the Court rejected the third party intervention of Amnesty International that the implementation of the death penalty in and of itself constituted inhuman and degrading punishment within the meaning of Article 3 since that would "nullify the clear wording" of Article 2(1). While the Court did not exclude that subsequent developments in the national practice of Contracting States could be taken as establishing their agreement "to abrogate the exception provided for under [Article 2(1)] and hence to remove a textual limit on the scope for evolutive interpretation of Article 3" (para.103), it did not consider that the adoption of Protocol No. 6 represented such a development at the time of its judgment:

> "[A]s a subsequent written agreement, [Protocol No. 6] shows that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement" (para.103).

At the time of the Court's judgment in *Soering* in 1989, Protocol No. 6 had been signed and ratified by only fourteen out of the then total of twenty-three ECHR Contracting States. It was not signed and

[91] *Ibid.*, paras. 101-103.
[92] ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, No. 61498/08, Judgment of 2 March 2010.
[93] This test was subsequently confirmed in ECtHR, *Rrapo v. Albania*, No. 58555/10, Judgment of September 2012, paras. 69-70.
[94] See, for example, ECtHR, *N.A.N.S. v. Sweden*, No. 68411/10, Judgment of 27 June 2013, para. 27; ECtHR, *N.M.Y. and Others v. Sweden*, No. 72686/10, Judgment of 27 June 2013, para. 27.
[95] ECtHR, *Soering v. the United Kingdom*, No. 14038/88, Judgment of 7 July 1989, paras. 102-103.

ratified by the United Kingdom until 1999.[96]

However, by the time of the Court's Grand Chamber judgment in *Öcalan v. Turkey*[97] in 2005, Protocol No. 6 had been signed by all ECHR Contracting States – then numbering a total of forty-six States – and ratified by all but two of those States.[98] Protocol No. 13 had been adopted in 2002 and signed by forty-three ECHR Contracting States, with sixteen yet to ratify it.[99] In light of these developments, and of the "considerable developments" in the concepts of inhuman and degrading treatment and punishment since the Court's judgment in *Soering*, the Grand Chamber held that to impose a death sentence on a person after an unfair trial would be contrary to Article 3 since:

> "… As the Court has previously noted [in *Soering*] in connection with Article 3, the manner in which the death penalty is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3 ...
>
> … In the Court's view, to impose the death sentence on a person after an unfair trial would be to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention." (paras.168-169)

Just as the Grand Chamber had not excluded that Article 2 ECHR could no longer be construed as permitting the death penalty at all (see above), it also did not exclude that implementation of the death penalty in and of itself constituted inhuman and degrading treatment contrary to Article 3 ECHR, but it again abstained from reaching any firm conclusions on this point.

The Court revisited the judgment in *Öcalan* in *Al-Saadoon and Mufdhi v. the United Kingdom* in 2010,[100] by which time Protocol No. 6 remained to be ratified by the Russian Federation alone. Protocol No. 13 had been ratified by forty-two ECHR Contracting States, and signed but not ratified by a further three States (Armenia, Latvia and Poland), with only two States (Azerbaijan and the Russian Federation) not having signed it. The Court held that:

> "These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2 § 1 continues to act as a bar to its interpreting the words 'inhuman or degrading treatment or punishment' in Article 3 as including the death penalty" (para.120).

Referring to the Grand Chamber's judgement in *Öcalan*, the Court did not exclude that the situation had already changed earlier.

For further information, see:

1. ECtHR, *Death penalty abolition*, Factsheet (periodically updated) [Link]

96 See website of the Council of Europe for tables of signatures and ratifications of: (i) the ECHR [Link] (ii) Protocol No. 6 to the ECHR [Link].
97 ECtHR, *Öcalan v. Turkey*, No. 46221/99, Judgment [GC] of 12 May 2005.
98 *Ibid*, para. 58.
99 *Ibid.*, para. 164.
100 ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, No. 61498/08, Judgment of 2 March 2010.

2. ECtHR, *Right to life*, Factsheet (periodically updated) [Link]

3. Article 4 ECHR ('Prohibition of slavery and forced labor')

Article 4 ECHR
('Prohibition of slavery and forced labour')

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term "forced or compulsory labour" shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.

Article 3(a) Palermo Protocol
('Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children')

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

Although the ECtHR is yet to find a violation of Article 4 ECHR in an expulsion case, Article 4 may potentially be relied on in such cases, including in situations of trafficking in human beings.

The case of *Rantsev v. Cyprus and Russia*,[101] while not itself an expulsion case, established that trafficking in human beings within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Council of Europe Convention on Action against Trafficking in Human Beings,[102] falls within the scope of Article 4 ECHR, there being no need to identify whether the treatment complained of constitutes "slavery", "servitude" or "forced and compulsory labour" (para. 282).

Subsequent to *Rantsev*, a number of applicants have complained to the ECtHR that their expulsion would expose them to a risk of falling into the hands of traffickers. So far none of these complaints have been upheld, either being held inadmissible[103] or being struck out of the ECtHR's case list on the grounds that the applicant had been granted refugee status and was no longer at risk of expulsion.[104]

[101] ECtHR, *Rantsev v. Cyprus and Russia*, No. 25965/04, Judgment of 7 January 2010.
[102] Article 4(a) of the Council of Europe Convention on Action against Trafficking in Human Beings reproduces the definition of trafficking in Article 3(a) of the Palermo Protocol.
[103] See ECtHR, *V.F. v. France*, No. 7196/10, Decision of 29 November 2011; ECtHR, *F.A. v. the United Kingdom*, No. 20658/11, Decision of 10 September 2013.
[104] ECtHR, *L.R. v. the United Kingdom*, No. 49113/09, Decision of 14 June 2011.

In particular, in *V.F. v. France*[105] the applicant complained under Articles 3 and 4 ECHR that her expulsion to Nigeria would expose her to a risk of being re-enrolled in a prostitution network and that the French authorities were under an obligation not to expel potential victims of trafficking. While the ECtHR considered that the issue of the extraterritorial applicability of Article 4 ECHR could arise in this respect, particularly having regard to that provision's "absolute and inviolable"[106] character, there was no need to decide the issue given that the complaint was manifestly ill-founded on its facts (unofficial translation from French original) (pages 14 to 15).

For further information, see:

1. ECtHR, *Trafficking in human beings*, Factsheet (periodically updated) [Link]

2. ECtHR, *Key Case-Law Issues - Prohibition of Slavery and Forced Labour: Article 4 of the Convention*, December 2012 [Link]

4. Article 5 ECHR ('Right to liberty and security')

Article 5 ECHR
('Right to liberty and security')

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

[105] ECtHR, *V.F. v. France*, No. 7196/10, Decision of 29 November 2011.
[106] Note that Article 15(2) ECHR provides that no derogation shall be made from Article 4(1) ECHR.

After having previously expressed doubts whether Article 5 ECHR could apply in expulsion cases,[107] the ECtHR determined in *Othman (Abu Qatada) v. the United Kingdom*[108] that Article 5 could in principle be applicable, stating that:

> "a Contracting State would be in violation of Article 5 if it removed an applicant to a State where he or she was at real risk of a flagrant breach of that Article. However … a high threshold must apply. A flagrant breach of Article 5 would occur only if, for example, the receiving State arbitrarily detained an applicant for many years without any intention of bringing him or her to trial. A flagrant breach of Article 5 might also occur if an applicant would be at risk of being imprisoned for a substantial period in the receiving State, having previously been convicted after a flagrantly unfair trial" (para. 233).

Applying these principles to the facts of the case, the ECtHR considered that, if the applicant were to be expelled from the United Kingdom to Jordan, his claimed risk of *incommunicado* pre-trial detention in Jordan for a period of up to fifty days fell "far short" of the length of detention required for a flagrant breach of Article 5. (para.235)

5. Article 6 ECHR ('Right to a fair trial')

> **Article 6 ECHR**
> **('Right to a fair trial')**
>
> *1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
>
> *2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
>
> *3. Everyone charged with a criminal offence has the following minimum rights:*
>
> *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
>
> *(b) to have adequate time and facilities for the preparation of his defence;*
>
> *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
>
> *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
>
> *(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

As far back as *Soering v. the United Kingdom*,[109] the ECtHR considered that an issue might exceptionally be raised under Article 6 ECHR by an extradition decision "in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country" (para.113). However, it considered that the facts of that case did not disclose such a risk.

[107] ECtHR, *Tomic v. the United Kingdom*, No. 178373/03, Decision of 14 October 2003.
[108] ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, Judgment of 17 January 2012.
[109] ECtHR, *Soering v. the United Kingdom*, No. 14038/88, Judgment of 7 July 1989.

It was only twenty-two years later, after a series of further complaints under Article 6 which were similarly unsuccessful on their facts,[110] that the ECtHR found for the first time that an expulsion would be in violation of Article 6. The case was that of *Othman (Abu Qatada) v. the United Kingdom*,[111] in which the applicant complained *inter alia* that if he was expelled to Jordan for retrial following his conviction *in absentia* for conspiracy to cause explosions, his retrial would be flagrantly unfair, *inter alia* because there was a real risk that evidence obtained by torture – either of himself, or his co-defendants or other prisoners – would be used against him.

In finding in favour of the applicant, the ECtHR reiterated that "an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a *flagrant denial of justice* in the requesting country" (para.258) (emphasis added). The Court stressed that a "stringent test of unfairness" is required:

> "A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article." (para.260)

The ECtHR found that the use in a criminal trial of evidence obtained by torture constitutes a "flagrant denial of justice", and added that it did not exclude that similar considerations might apply in respect of evidence obtained by other forms of ill-treatment which fall short of torture. (para.267) It also recalled previous cases in which it had indicated that certain forms of unfairness could amount to a "flagrant denial of justice", including:

- "conviction *in absentia* with no possibility subsequently to obtain a fresh determination of the merits of the charge";
- "a trial which is summary in nature and conducted with a total disregard for the rights of the defence";
- "detention without any access to an independent and impartial tribunal to have the legality the detention reviewed";
- "deliberate and systematic refusal of access to a lawyer, especially for an individual detained in a foreign country" (para.259)

The ECtHR considered that the same standard of proof should apply as in Article 3 expulsion cases, namely "substantial grounds for believing that, if [the applicant] is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice" (para.261).

6. Article 8 ECHR ('Right to respect for private and family life')

> **Article 8 ECHR**
> **('Right to respect for private and family life')**
>
> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security,*

[110] See in particular, ECtHR, *Mamatkulov and Askarov v. Turkey*, Nos. 46827/99 and 46951/99, Judgment [GC] of 4 February 2005; ECtHR, *Ahorugeze v. Sweden*, No. 37075/09, Judgment of 27 October 2011.
[111] ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, Judgment of 17 January 2012, paras. 263 - 267.

> *public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Although applicants have sometimes invoked Article 8 ECHR as a ground for *non-refoulement*, this is usually in combination with a complaint under Articles 2 and/or 3 ECHR. So far the ECtHR has either found the complaints under Article 8 to be manifestly ill-founded,[112] or that they did not raise a separate issue than the complaints under Article 3.[113]

> **Note:** Article 8 ECHR can provide protection against expulsion on grounds other than *non-refoulement*. See chapter 2.5 below.

D. Table of cases

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H.L.R. v. France, No. 24573/94, Judgment [GC] of 29 April 1997 [Links: Judgment | Case summary]

Hakizimana v. Sweden, No. 37913/05, Decision of of 27 March 2008 [Link: Decision]

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[112] ECtHR, *Hussein and Others v. the Netherlands and Italy*, No. 27725/10, Decision of 2 April 2013, para. 85.
[113] See, for example, ECtHR, *D. v. the United Kingdom*, No. 30240/96, Judgment of 2 May 1997, paras. 60-64; ECtHR, *Sufi and Elmi v. the United Kingdom*, Nos. 8319/07 and 11449/07, Judgment of 28 June 2011, para. 199.

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Rrapo v. Albania, No. 58555/10, Judgment of September 2012 [Link: Judgment]

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2.3 Procedural safeguards for protection against *refoulement*

A. Introduction

Whereas the previous chapter concerned the substantive protection against *refoulement* afforded by the ECHR, in particular under Articles 2 and 3, the present chapter concerns the procedural safeguards against *refoulement* afforded by the ECHR. The Convention and its Protocols contain a number of such safeguards, the most important of which is Article 13 ECHR ('Right to an effective remedy') taken in conjunction with Article 3 and/or Article 2 ECHR.

Section B of this chapter discusses the ECtHR's case law on the general characteristics of an effective remedy under Article 13 ECHR, which are applicable not only to an effective remedy against *refoulement* in violation of Article 3 ECHR and/or Article 2 ECHR, but also to an effective remedy against *any* violation of a Convention right. Section B thus serves as an introduction to the concept of an effective remedy not only for the present chapter, but also for later chapters in this manual where the right to an effective remedy is referred to.

Section C discusses the ECtHR's case law specifically on an effective remedy in the context of protection against *refoulement* under Article 3 ECHR and/or Article 2 ECHR. While no particular form of remedy is required, providing that it is effective, it is shown that national asylum procedures can provide one such remedy where they meet the requirements of Article 13 ECHR.

Section D discusses the ECtHR's case law on procedural safeguards against *refoulement* deriving from provisions of the ECHR and its Protocols other than Article 13 ECHR. However, it should already be noted here that those safeguards do not include Article 6 ECHR ('Right to a fair trial'), which the ECtHR has repeatedly stated is not applicable to decisions regarding the entry, stay and deportation of aliens.[1]

B. The ECtHR case law on the general characteristics of an effective remedy under Article 13 ECHR

> **Article 13 ECHR**
> **(‘Right to an effective remedy’)**
>
> *Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

1. General characteristics of an an effective remedy

In *Klass and Others v. Germany*,[2] the ECtHR explained the right to an effective remedy in Article 13 ECHR as follows:

> “Article 13 requires that where an individual considers himself to have been prejudiced by *a measure allegedly in breach of the Convention*, he should have *a remedy before a national authority* in order both *to have his claim decided* and, if appropriate, *to obtain redress*” (emphases added) (para.64).

Article 13 is therefore not an autonomous provision and is only applicable in conjunction with another Convention right. Moreover, as the Court held in *Boyle and Rice v. the United Kingdom*:[3]

> “Article 13 … cannot reasonably be interpreted so as to require a remedy in domestic law in respect of *any supposed grievance* under the Convention that an individual may have, no matter how unmeritorious his complaint may be: the grievance *must be an arguable one* in terms of the Convention” (emphases added) (para.52).

While the ECtHR has not defined what constitutes an “arguable claim”, it has clarified that “arguable” does not mean that the right in question must have been violated,[4] but rather that the claim must not be so weak that it would not be admissible if it was being made to the ECtHR. The claim must therefore not be “manifestly ill-founded” within the meaning of Article 35(3)(a) ECHR (‘Admissibility criteria’) since, as the Court stated in *Powell and Rayner v. the United Kingdom*:[5]

> “Article 13 and Article 27 § 2 [now Article 35(3)(a)] [6] are concerned, within their respective spheres, with the availability of remedies for the enforcement of the same Convention rights and freedoms. The coherence of this dual system of enforcement is at risk of being undermined if Article 13 … is interpreted as requiring national law to make available an ‘effective remedy’ for a grievance classified under Article 27 § 2 [Article 35(3)(a)] as being so weak as not to warrant examination on its merits at international level. Whatever threshold … [is] set for declaring claims

[1] ECtHR, *Maaouia v. France*, No. 39652/98, Judgment [GC] of 5 October 2000, paras. 37-40. The ECtHR reaffirmed that position in *Mamatkulov and Askarov v. Turkey*, Nos. 46827/99 and 46951/99, Judgment [GC] of 4 February 2005.
[2] ECtHR, *Klass and Others v. Germany*, No. 5029/71, Judgment of 6 September 1978.
[3] ECtHR, *Boyle and Rice v. the United Kingdom*, Nos. 9658/82 and 9659/82, Judgment of 27 April 1988.
[4] ECtHR, *Diallo v. the Czech Republic*, No. 20493/07, Judgment of 23 June 2011, para. 64.
[5] ECtHR, *Powell and Rayner v. the United Kingdom*, No. 9310/81, Judgment of 21 February 1990.
[6] Article 27 ECHR concerning the admissibility of a complaint before the then European Commission of Human Rights was replaced by Article 35 ECHR following the amendment of the Convention first by Protocol No. 11 and then by Protocol No. 14.

> 'manifestly ill-founded' … [should] in principle [be] set … in regard to the parallel notion of 'arguability'." (para. 33)

The "national authority" referred to in Article 13 does not necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. The national authority must in any event be independent.[7]

Article 13 does not impose a particular form of remedy[8] and Contracting States have a margin of appreciation to decide as to the manner in which they honour their obligations under this provision.[9] However, Article 13 entails a series of requirements for considering the remedy effective. Thus, as the ECtHR held in *Silver and Others v. the United Kingdom*,[10] "although no single remedy may itself entirely satisfy the requirements of Article 13 … the aggregate of remedies provided for under domestic law may do so" (para.113).

Particular attention should be paid to the speediness of the remedy, it not being excluded that its adequacy can be undermined by its excessive duration.[11]

The remedy must also be available in practice as well as in law, "in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State".[12]

However, the scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaints.[13] For example, while the effectiveness of the remedy in relation to a claim under Article 3 ECHR that expulsion would result in *refoulement* requires that such remedy have automatic suspensive effect (see below), the ECtHR has affirmed that suspensive effect is not in principle required in relation to a claim that expulsion would violate the right to respect for private and family life under Article 8 ECHR.[14]

Lastly, as is clear from the passage from *Klass and Others* quoted above, the "effectiveness" of the remedy does not depend upon the applicant being guaranteed a favourable outcome, since the fact that his or her complaint is "arguable" does not necessarily mean that it is well-founded.

> **For further information, see:** Council of Europe, *Guide to good practice in respect of domestic remedies*, adopted by the Committee of Ministers on 18 September 2013 [Link]

2. Complaint to the ECtHR of a violation of Article 13 ECHR

a) Article 13 ECHR taken in conjunction with another Convention right

Because the right to an effective remedy is not an autonomous Convention right, a complaint to the ECtHR of a violation of Article 13 must specify the other Convention right(s) in conjunction with which that Article has been violated. For example, the applicant might complain of a violation of Article 3 ECHR ('Prohibition of torture'), Article 5 ECHR ('Right to liberty and security'), and of

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[7] ECtHR, *De Souza Ribeiro v. France*, No. 22689/07, Judgment [GC] of 13 December 2012, para 85.
[8] ECtHR, *Diallo v. the Czech Republic*, No. 20493/07, Judgment of 23 June 2011.
[9] ECtHR, *De Souza Ribeiro v. France*, No. 22689/07, Judgment [GC] of 13 December 2012, para 85.
[10] ECtHR, *Silver and Others v. United Kingdom*, Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, Judgment of 25 March 1983.
[11] See, for example, ECtHR, *Doran v. Ireland*, No. 50389/99, Judgment of 31 July 2003, para. 57.
[12] ECtHR, *Çakici v. Turkey*, No. 26357/94/09, Judgment [GC] of 8 July 1999, para. 112.
[13] ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011, para. 288.
[14] ECtHR, *De Souza Ribeiro v. France*, No. 22689/07, Judgment [GC] of 13 December 2012, paras. 82-83.

Article 13 ECHR taken in conjunction with Article 3 ECHR. This would mean that the applicant is complaining of the lack of an effective remedy in respect of his or her grievance under Article 3 ECHR, but not in respect of his or her grievance under Article 5 ECHR.

Where the applicant complains that he or she is the victim of a violation of Article 3 ECHR, and of Article 13 ECHR taken in conjunction with Article 3 ECHR, the ECtHR could in principle go on to find the following, assuming both complaints to be admissible:

(i) a violation both of Article 3, and of Article 13 taken in conjunction with Article 3;[15] or

(ii) a violation of Article 3 only, since, even if the national remedy complained of did not itself result in a finding of a violation of Article 3, that does not necessarily mean that it was ineffective;[16] or

(iii) only a violation of Article 13 taken in conjunction with Article 3, since a complaint of an alleged violation of Article 3 only needs to be "arguable", not necessarily well founded, for a violation of Article 13 to be possible;[17] or

(iv) no violation at all.[18]

In principle, in certain exceptional circumstances the ECtHR could also find the complaint of a violation of Article 3 to be *inadmissible*, but nevertheless find the complaint of violation of Article 13 taken in conjunction with Article 3 to be *admissible*, and then proceed to decide the merits of the latter complaint alone.[19]

b) Relationship between Article 13 ECHR and the ECtHR's admissibility requirement for exhaustion of domestic remedies

Article 35(1) ECHR
('Admissibility criteria')

The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

As discussed in chapter 2.1, Article 35(1) ECHR provides that the ECtHR may only deal with a complaint after all domestic remedies have been exhausted.

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[15] See, for example, ECtHR, *Hirsi Jamaa and Others v. Italy, No. 27765/09*, Judgment [GC] of 23 February 2012;

[16] This follows from the point already made above that the effectiveness of the remedy is not conditional upon it guaranteeing the applicant a favourable outcome. See, for example, ECtHR, *M.E. v. France*, No. 50094/10, Judgment of 6 June 2013; ECtHR, *K.K. v. France*, No. 18913/11, Judgment of 10 October 2013.

[17] See, for example, ECtHR, *Mohammed v. Austria*, No. 2283/12, Judgment of 6 June 2013; ECtHR, *Chankayev v. Azerbaijan*, No. 56688/12, Judgment of 14 November 2013.

[18] ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, Judgment of 17 January 2012.

[19] ECtHR, *I.M. v. France*, No. 9152/09, Decision of 12 December 2010 and Judgment of 2 February 2012. See also, for example, ECtHR, *Gebremedhin [Gaberamadhien] v. France*, No. 25389/05, Decision of 10 October 2006 and Judgment of 26 April 2007; ECtHR, *M.A. v. Cyprus*, No. 41872/10, Judgment of 23 July 2013; ECtHR, *Budrevich v. the Czech Republic*, No. 65303/10, Judgment of 17 October 2013. In *I.M. v. France*, the ECtHR initially found the Article 3 complaint admissible, and only later found that it had become inadmissible; whereas it did not find the Article 3 complaint initially admissible in *Gebremedhin v. France*, *M.A. v. Cyprus* or *Budrevich v. the Czech Republic*. However, the point in common to all four cases was that the applicants concerned were only granted refugee status (or, in the case of Budrevich, subsidiary protection status) after they had lodged their complaints with the ECtHR and had been granted Rule 39 interim measures supending their removal from the Contracting State concerned.

The Court has indicated that this admissibility requirement has a “close affinity” with Article 13 ECHR since it is based on the assumption that there is an effective remedy available in the domestic system to redress alleged violations of Convention rights.[20] Taken together, Article 13 and Article 35(1) thus underline the Court’s subsidiary role.[21]

The ECtHR has further held that this close affinity “means that if there are no effective domestic remedies that the applicants must exhaust, an issue under Article 13 arises and applicants can lodge a complaint under Article 13 in conjunction with another substantive provision of the Convention”.[22]

It is incumbent on the Government claiming non-exhaustion of domestic remedies to satisfy the ECtHR that the remedy was an effective one available in theory and in practice at the relevant time. However, once the authorities have discharged their burden of proving that there was an appropriate and effective remedy available to the applicant, it is for the latter to show that the remedy was for some reason inadequate and ineffective in the particular circumstances of the case;[23] or that there existed special circumstances absolving the applicant from the requirement.[24]

Mere doubts on the part of the applicant regarding the effectiveness of a particular remedy will not absolve him or her from the obligation to try it.[25]

C. The ECtHR case law on an effective remedy against *refoulement* under Article 13 ECHR in conjunction with Article 3 ECHR and/or Article 2 ECHR

1. Introduction

In *De Souza Ribeiro v. France*,[26] the ECtHR summarized the additional requirements under Article 13 ECHR for a remedy to be effective when an individual has an arguable claim that his or or removal would expose him or her to a real risk of treatment contrary to Article 3 ECHR, or to a real risk of a violation of his or her right to life under Article 2 ECHR:

> “Where a complaint concerns allegations that the person’s expulsion would expose him to a real risk of suffering treatment contrary to Article 3 of the Convention, in view of the importance the Court attaches to that provision and given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised, the effectiveness of the remedy for the purposes of Article 13 requires imperatively that the complaint be subject to close scrutiny by a national authority …, independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 …, and reasonable promptness … In such a case, effectiveness also requires that the person concerned should have access to a remedy with automatic suspensive effect … The same principles apply when expulsion exposes the applicant to a real risk of a violation of his right to life safeguarded by Article 2 of the Convention.” (para.82)

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[20] ECtHR, *Diallo v. the Czech Republic*, No. 20493/07, Judgment of 23 June 2011, para. 53.
[21] ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011, para. 287. On the subsidiary role of the ECtHR, see further chapter 2.1 above.
[22] ECtHR, *Diallo v. the Czech Republic*, No. 20493/07, Judgment of 23 June 2011, para. 55.
[23] ECtHR, *Selmouni v. France*, No. 25803/94, Judgment [GC] of 28 July 1999, para. 76.
[24] ECtHR, *Akdivar and Others v. Turkey*, No. 21893/93, Judgment [GC] of 16 September 1996, paras. 68 - 75; ECtHR, *Sejdovic v. Italy*, No. 56581/00, Judgment [GC] of 1 March 2006, para. 55; ECtHR, *Veriter v. France*, No. 31508/07, Judgment of 14 October 2010, para. 60; ECtHR, *Y.P. and L.P. v. France*, No. 32476/06, Judgment of 2 September 2010, paras. 54 - 57.
[25] ECtHR, *Epözdemir v. Turkey*, No. 57039/00, Decision of 31 January 2002; ECtHR, *Miloševič v. the Netherlands*, No. 77631/01, Decision of 19 March 2002.
[26] *De Souza Ribeiro v. France*, No. 22689/07, Judgment [GC] of 13 December 2012. See also, for example, ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011, para. 293.

In short, the remedy must have automatic suspensive effect, be subject to reasonable promptness, and not only be independent but also ensure a "close and rigorous scrutiny" of the substance of the claim.

Before discussing some of the requirements for an effective remedy against *refoulement* in more detail below, the following preliminary points should be underlined:

(i) Where an individual has an arguable claim that he or she is subject to a measure for his or her removal from the jurisdiction of a Contracting State that would expose him or her to a real risk of treatment contrary to Article 3 ECHR, and/or to a real risk of a violation of his or her right to life under Article 2 ECHR, he or she must have an effective remedy against that measure before a national authority of the Contracting State concerned.

> **Examples of measures for removal against which an effective remedy may be required:** Enforceable deportation order (including, for example, a decision to transfer the individual to a third State considered responsible for examining an asylum application from that individual);[27] a risk of arbitrary removal from the territory;[28] enforceable return after denial of entry at the border;[29] push-backs at sea.[30]

(ii) One remedy against such a measure may be the examination by the national authority of an asylum application made by that individual, in which case the requirements of Article 13 ECHR will be met if the asylum procedure itself meets the requirements of Article 13 ECHR.[31] However, even if the asylum procedure does not meet those requirements, it is still possible in principle that the requirements may be satisfied by another remedy, or by the aggregate of remedies under domestic law.

> **Different types of asylum procedure are possible:** Depending on the Contracting State concerned, the national asylum procedure may only look at the question whether an individual should be granted asylum as a refugee under the 1951 Refugee Convention, or it may additionally look at the question of whether, if that individual does not qualify as a refugee, he or she should nevertheless be granted asylum on the basis of being protected against *refoulement* by the ECHR.[32] Whichever is the case, the asylum procedure will meet the requirements of an effective remedy if it meets the requirements of Article 13 ECHR, since even if the asylum procedure does not directly examine whether the individual is protected against *refoulement* under the ECHR, that protection is similar (albeit not identical) in substance to the protection against *refoulement* afforded to refugees under the 1951 Refugee Convention.[33] As the ECtHR has reiterated on numerous occasions, Article 13 ECHR

[27] Note that an order to leave the territory that is unenforceable may in itself be sufficient: see ECtHR, *Vijayanathan and Pusparajah v. France*, Nos. 17750/90 and 17825/91, Judgment of 27 August 1992 (reaffirmed by, for example, ECtHR, *Auad v. Bulgaria*, No. 46390/10, Judgment of 11 October 2011, para. 92; ECtHR, *Shevanova v. Latvia*, No. 588220, Judgment [GC] of December 2007, para. 46; *Sisojeva and Others v. Latvia*, No. 60654/00, Judgment [GC] of 15 January 2007, para. 93).
[28] See, for example, ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011, paras. 265 - 322.
[29] See, for example, ECtHR, *Gebremedhin [Gaberamadhien] v. France*, No. 25389/05, Judgment of 26 April 2007.
[30] ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, Judgment [GC] of 23 February 2012, paras. 187 - 207.
[31] See, for example, ECtHR, *I.M. v. France*, No. 9152/09, Judgment of 2 February 2012; ECtHR, *Singh and Others v. Belgium*, No. 33210/11, Judgment of 2 October 2012.
[32] In the case of those ECtHR Contracting States that are EU Member States, note that Asylum Procedures Directive and its recast provide for a procedure that examines the need both for protection as a refugee and subsidiary protection in the event that the individual does not qualify as a a refugee. See further chapter 1.4 above.
[33] See, for example, ECtHR, *NA. v. the United Kingdom*, No. 25904/07, Judgment of 17 July 2008, para. 122, cited in chapter 2.2 above: "[T]he weight to be attached to independent assessments must inevitably depend on the extent to which

> guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms "in whatever form they are secured in the domestic legal order";[34] hence, for an issue to arise under Article 13 ECHR in domestic proceedings, it is not necessary for a claim for protection against *refoulement* to explicitly invoke Article 2 ECHR and/or Article 3 ECHR, providing that it concerns those Articles in substance.[35]

(iii) The impugned measure for removal, or the imminent risk of removal taking place, could alternatively arise within the asylum procedure itself, in particular as a result of the rejection of the asylum application at first instance. In that case, the requirements of Article 13 ECHR will be met if the asylum procedure from the second instance onwards meets the requirements of Article 13 ECHR, or if a different remedy or the aggregate of remedies under domestic law satisfies those requirements.

(iv) There may be more than one effective remedy that is open to the individual, but there must be at least one such remedy. It need not necessarily be an asylum procedure which results in the granting of a legal status and the legalization of stay in the event of a decision in favour of the applicant, but it must at least be a remedy that protects against *refoulement*.

For example, the following summary of the case of *I.M. v. France*[36] illustrates how the applicant sought to rely on both the asylum procedure and the non-expulsion procedure in France as remedies against a risk of *refoulement*; that neither remedy met the requirements of effectiveness under Article 13 ECHR; and that those shortcomings were not offset by the further remedies remaining open to the applicant:

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those assessments are couched in terms similar to Article 3. Thus in respect of the UNHCR, due weight has been given by the Court to the UNHCR's own assessment of an applicant's claims [for refugee status] when the Court determined the merits of her complaint under Article 3 (see *Jabari v. Turkey*, no. 40035/98, § 41, ECHR 2000-VIII). Conversely, where the UNHCR's concerns are focussed on general socio-economic and humanitarian considerations, the Court has been inclined to accord less weight to them, since such considerations do not necessarily have a bearing on the question of a real risk to an individual applicant of ill-treatment within the meaning of Article 3." See also, for example, *M.S.S. v. Belgium and Greece*, cited above, para. 286: "In cases concerning the expulsion of asylum seekers the Court has explained that it does not itself examine the actual asylum applications or verify how the States honour their obligations under the [1951 Refugee] Convention. Its main concern is whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled". See also ECtHR, *Chahal v. the United Kingdom*, No. 22414/93, Judgment [GC] of 15 November 1996, para. 80: "The prohibition provided by Article 3 … against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 … if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion … In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 … is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees …"

[34] See, for example, *De Souza Ribeiro v. France*, No. 22689/07, Judgment [GC] of 13 December 2012, para. 78.

[35] See also by analogy ECtHR, *Practical Guide on Admissibility Criteria*, 3rd edition, 1 January 2014, para. 67 [Link].

[36] ECtHR, *I.M. v. France*, No. 9152/09, Decision of 12 December 2010 and Judgment of 2 February 2012. See also, for example, ECtHR, *Gebremedhin [Gaberamadhien] v. France*, No. 25389/05, Decision of 10 October 2006 and Judgment of 26 April 2007; ECtHR, *M.A. v. Cyprus*, No. 41872/10, Judgment of 23 July 2013; ECtHR, *Budrevich v. the Czech Republic*, No. 65303/10, Judgment of 17 October 2013. The point in common to all these cases was that the applicants concerned were only granted refugee status (or, in the case of Budrevich, subsidiary protection status) after they had lodged their complaints with the ECtHR and had been granted Rule 39 interim measures supending their removal from the Contracting State concerned.

***I.M. v. France*:**

On 23 December 2008, the applicant, a Sudanese national, was apprehended by the French authorities on crossing into France from Spain with false documents. Three days later he appeared before the *tribunal de grande instance* of Perpigan and was sentenced to one month's imprisonment for having violated the French law on foreigners.

On 7 January 2009, the prefecture issued an order for the applicant's removal from France. He was given only two days to appeal to the Administrative Court of Montpellier, which he duly did, claiming to be at risk of ill-treatment in Sudan. On 12 January 2009 the Court dismissed the appeal.

At the end of his prison sentence on 16 January 2009, the applicant was placed in administrative detention pending removal. On 19 January 2009 he managed to submit an application for asylum, which he had not succeeded in doing before. On 30 January 2009 he was interviewed under a prioritized asylum procedure by OFPRA, the French national asylum authority. His application was rejected the following day, as a result of which he lodged an appeal, which had no suspensive effect, to the National Asylum Tribunal.

On 11 February 2009, the applicant was presented to the Sudanese consular authorities, who issued him a travel document.

On 16 February 2009 the applicant submitted a complaint to the ECtHR alleging a violation of Article 3 ECHR, and of Article 13 ECHR taken in conjunction with Article 3 ECHR. He also submitted a Rule 39 request in order to have the removal order against him suspended.[37] The request was granted by the ECtHR the same day. The following day, the applicant was released from administrative detention and placed under house arrest.

On 12 May 2009, the ECtHR communicated the applicant's complaints to the French Government for its observations.

On 14 October 2010, after further proceedings before the courts in Montpellier (first the Administrative Court, then the Court of Appeal) and before the National Asylum Tribunal, the applicant was recognized as a refugee under the 1951 Refugee Convention by the National Asylum Tribunal. He was notified of this decision five days later, and he subsequently informed the ECtHR on 19 February 2011.

In the meantime, the ECtHR had found both of the applicant's complaints admissible by a decision dated 14 December 2010. The ECtHR subsequently held a public hearing of the case on 17 May 2011 and issued its judgment on 2 February 2012.

In its judgment, the ECtHR found that the complaint of a violation of Article 3 had become inadmissible because the applicant was now protected against removal to Sudan as a result of being granted refugee status by the National Asylum Tribunal, meaning that he could no longer claim to be a victim of a violation of Article 3.

However, the ECtHR found that the complaint of a violation of Article 13 taken in conjunction with Article 3 remained admissible. At the time when the applicant lodged his application with the ECtHR, his complaint of a violation of Article 3 ECHR had been "arguable". At that time, neither the remedy of the appeal before the Administrative Court of Montpellier, nor the remedy of the first instance asylum procedure before OFPRA, had resulted in the annulment of the order for his removal. Nor did any further remedy that had remained open to him – including the pending appeal to the National Asylum Tribunal – have suspensive effect. It was

[37] See the explanation of Rule 39 in chapter 2.1 above.

therefore only as a result of the application of Rule 39 that his removal was suspended until eventually, 20 months later, he was granted refugee status.

Given the admissibility of the complaint under Article 13 ECHR, the ECtHR proceeded to examine the remedies on which the applicant had relied, namely the asylum procedure before OFPRA, and the appeal before the Administrative Court of Montpellier. The ECtHR found that neither remedy met the requirements of Article 13 ECHR (see further below), and that the further remedies remaining open to the applicant had not offset those shortcomings. It therefore concluded that there had been a violation of Article 13 taken in conjunction with Article 3 due to the ineffectiveness of the domestic legal arrangements as a whole.

2. Automatic suspensive effect of the remedy

As noted above, an individual who has an arguable claim that his or or removal would expose him or her to a real risk of treatment contrary to Article 3 ECHR, or to a real risk of a violation of his or her right to life under Article 2 ECHR, must have access to a remedy with "automatic" suspensive effect.[38] "Automatic" does not mean that *anyone* who makes a claim that they are at such risk has a right to a remedy with suspensive effect, but only that persons who have an *arguable* claim have such a right.

Suspensive effect must be guaranteed in law: In *Gebremedhin v. France*,[39] the ECtHR held that it is not sufficient that suspensive effect only be applied "in practice" – it must be guaranteed in law (para.66).

Moreover, the possibility of requesting suspension of the removal is not sufficient in itself to meet the requirement that the remedy have suspensive effect. For example, the ECtHR pointed out in *Čonka v. Belgium*[40] that the procedure in Belgium by which such a request could be made in 2002 did not meet the requirements of Article 13 ECHR:

> "… Firstly, it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly, in particular if it was subsequently to transpire that the court ruling on the merits has nonetheless to quash a deportation order for failure to comply with the Convention, for instance, if the applicant would be subjected to ill-treatment in the country of destination or be part of a collective expulsion. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13.
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> … Secondly, even if the risk of error is in practice negligible – a point which the Court is unable to verify, in the absence of any reliable evidence – it should be noted that the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention …
>
> However, it appears that the authorities are not required to defer execution of the deportation order while an application under the extremely urgent procedure is pending, not even for a minimum reasonable period to enable the Conseil d'Etat to decide the application. Furthermore, the onus is in practice on the Conseil d'Etat to ascertain the authorities' intentions regarding the

[38] The ECtHR first recognized the need for the remedy to have suspensive effect in *Jabari v. Turkey*, No. 40035/98, Judgment of 11 July 2000, para. 50, where the Court said that Article 13 ECHR requires "the possibility of suspending the implementation of the measure impugned."
[39] ECtHR, *Gebremedhin [Gaberamadhien] v. France*, No. 25389/05, Judgment of 26 April 2007.
[40] ECtHR, *Čonka v. Belgium*, No. 51564/99, Judgment of 5 February 2002.

proposed expulsions and to act accordingly, but there does not appear to be any obligation on it to do so. Lastly, it is merely on the basis of internal directions that the registrar of the Conseil d'Etat, acting on the instructions of a judge, contacts the authorities for that purpose, and there is no indication of what the consequences might be should he omit to do so. Ultimately, the alien has no guarantee that the Conseil d'Etat and the authorities will comply in every case with that practice, that the Conseil d'Etat will deliver its decision, or even hear the case, before his expulsion, or that the authorities will allow a minimum reasonable period of grace.

Each of those factors makes the implementation of the remedy too uncertain to enable the requirements of Article 13 to be satisfied." (paras.82-83)

Nine years later, in *M.S.S. v. Belgium and Greece*,[41] the ECtHR recognized some improvement in the Belgian procedure for applying for suspension of removal, but still considered that the procedure did not meet the requirements of Article 13 ECHR:

"… The Court notes first of all that in Belgian law an appeal to the Aliens Appeals Board to set aside an expulsion order does not suspend the enforcement of the order. However, the Government pointed out that a request for a stay of execution could be lodged before the same court 'under the extremely urgent procedure' and that unlike the extremely urgent procedure that used to exist before the Conseil d'Etat, the procedure before the Aliens Appeals Board automatically suspended the execution of the expulsion measure by law until the Board had reached a decision, that is, for a maximum of seventy-two hours.

… While agreeing that that is a sign of progress in keeping with the *Čonka* judgment … the Court reiterates that it is also established in its case-law … that any complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3 of the Convention requires close and rigorous scrutiny and that, subject to a certain margin of appreciation left to the States, conformity with Article 13 requires that the competent body must be able to examine the substance of the complaint and afford proper reparation.

… In the Court's view the requirement flowing from Article 13 that execution of the impugned measure be stayed cannot be considered as a subsidiary measure, that is, without regard being had to the requirements concerning the scope of the scrutiny. The contrary would amount to allowing the States to expel the individual concerned without having examined the complaints under Article 3 as rigorously as possible.

… However, the extremely urgent procedure leads precisely to that result. The Government themselves explain that this procedure reduces the rights of the defence and the examination of the case to a minimum. The [Belgian] judgments [in the extremely urgent procedure] of which the Court is aware … confirm that the examination of the complaints under Article 3 carried out by certain divisions of the Aliens Appeals Board at the time of the applicant's expulsion was not thorough. They limited their examination to verifying whether the persons concerned had produced concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3, thereby increasing the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of a violation. Furthermore, even if the individuals concerned did attempt to add more material to their files along these lines after their interviews with the Aliens Office, the Aliens Appeals Board did not always take that material into account. The persons concerned were thus prevented from establishing the arguable nature of their complaints under Article 3 of the Convention.

… The Court concludes that the procedure for applying for a stay of execution under the extremely urgent procedure does not meet the requirements of Article 13 of the Convention." (paras. 386-390)

[41] ECtHR, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09), Judgment [GC] of 21 January 2011.

On the other hand, the ECtHR did not, for example, question the procedure for requesting suspension of removal in *Reza Sharifi v. Switzerland*.[42]

Suspensive effect cannot be waived on grounds of national security: The ECtHR has stressed that national security may not be relied on as a justification for denying suspensive effect. For example, as the Court stated in *M. and Others v. Bulgaria*:[43]

> "… [The Court] observes that under Bulgarian law, whenever the executive chooses to mention national security as the grounds for a deportation order, appeals against such an order have no suspensive effect, even if an irreversible risk of death or ill-treatment in the receiving State is claimed …
>
> … The Court reiterates that the notion of an effective remedy under Article 13 requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. Consequently, it is inconsistent with Article 13 for such measures to be executed before the national authorities have examined whether they are compatible with the Convention … In the context of deportation, the domestic remedy for examination of allegations about serious risks of ill-treatment contrary to Article 3 in the destination country must have automatic suspensive effect … As the prohibition provided by Article 3 against torture and inhuman or degrading treatment is of an absolute character, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration … By choosing to rely on national security in a deportation order the authorities cannot do away with effective remedies …" (paras.128-129)

3. Accessibility of the remedy

As noted above, the remedy must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the Contracting State concerned.

The ECtHR has accordingly identified a number of obstacles undermining the effectiveness of a remedy against a risk of *refoulement*, including, for example:

(i) removing the individual before he or she has had the practical possibility of accessing the remedy;[44]

(ii) excessively short time limits in law for submitting the claim;[45]

(iii) insufficient information on how to gain effective access to the relevant procedure(s) and on how to substantiate the claim;[46]

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[42] ECtHR, *Reza Sharifi v. Switzerland*, No. 69486/11, Decision of 4 December 2012, paras. 22 - 27.
[43] ECtHR, *M. and Others v. Bulgaria*, No. 41416/08, Judgment of 26 July 2011. See also, for example, ECtHR, *Auad v. Bulgaria*, No. 46390/10, Judgment of 11 October 2011, para. 121.
[44] See, for example, ECtHR, *Shamayev and Others v. Georgia and Russia*, No. 36378/02, Judgment of 12 April 2005, para. 460; ECtHR, *Labsi v. Slovakia*, No. 33809/08, Judgment of 15 May 2012, para. 139.
[45] See, for example, ECtHR, *I.M. v. France*, No. 9152/09, Decision of 14 December 2010, para. 144; ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011, para. 306.
[46] See, for example, ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011, para. 304; ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, Judgment [GC] of 23 February 2012, para. 204.

(iv) difficulties in physical access to and/or in contacting and receiving communications from the responsible authority;[47]

(v) lack of interpretation;[48]

(vi) lack of legal assistance[49]

For example, in *M.S.S. v. Belgium and Greece*,[50] the ECtHR identified the following shortcomings in access to the first instance asylum procedure in Greece:

> "… insufficient information for asylum seekers about the procedures to be followed, difficult access to the Attica police headquarters, no reliable system of communication between the authorities and the asylum seekers, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, lack of legal aid effectively depriving the asylum seekers of legal counsel … These shortcomings affect asylum seekers arriving in Greece for the first time as well as those sent back there in application of the Dublin Regulation.
>
> […]
>
> … The Government maintained that whatever deficiencies there might be in the asylum procedure, they had not affected the applicant's particular situation.
>
> … The Court notes in this connection that the applicant claims not to have received any information about the procedures to be followed. Without wishing to question the Government's good faith concerning the principle of an information brochure being made available at the airport, the Court attaches more weight to the applicant's version because it is corroborated by a very large number of accounts collected from other witnesses by the Commissioner, the UNHCR and various non-governmental organisations. In the Court's opinion, the lack of access to information concerning the procedures to be followed is clearly a major obstacle in accessing those procedures.
>
> … The Government also criticised the applicant for not setting the procedure in motion by going to the Attica police headquarters within the time-limit prescribed in the notification.
>
> … On this point the Court notes firstly that the three-day time-limit the applicant was given was a very short one considering how difficult it is to gain access to the police headquarters concerned.
>
> … Also, it must be said that the applicant was far from the only one to have misinterpreted the notice and that many asylum seekers do not go to the police headquarters because they have no address to declare.
>
> … Moreover, even if the applicant did receive the information brochure, the Court shares his view that the text is very ambiguous as to the purpose of the convocation … and that nowhere is it stated that asylum seekers can inform the Attica police headquarters that they have no address in Greece, so that information can be sent to them through another channel.

[47] See, for example, ECtHR, *Gebremedhin [Gaberamadhien] v. France*, No. 25389/05, Judgment of 26 April 2007, para. 54; ECtHR, *I.M. v. France*, No. 9152/09, Decision of 14 December 2010, para. 130; ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011, paras. 301 - 313.
[48] See, for example, ECtHR, *I.M. v. France*, No. 9152/09, Decision of 14 December 2010, para. 145; ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011, para. 301; ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, Judgment [GC] of 23 February 2012, para. 202.
[49] *Ibid.*
[50] ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011.

> … In such conditions the Court considers that the Government can scarcely rely on the applicant's failure to comply with this formality and that they should have proposed a reliable means of communicating with the applicant so that he could follow the procedure effectively.
>
> … Next, the Court notes that the parties agree that the applicant's asylum request has not yet been examined by the Greek authorities.
>
> … According to the Government, this situation is due at present to the fact that the applicant did not keep the appointment on 2 July 2010 to be interviewed by the refugee advisory committee. The Government have not explained the impact of that missed appointment on the progress of the domestic proceedings. Be that as it may, the applicant informed the Court, through his counsel, that the convocation had been given to him in Greek when he renewed his pink card, and that the interpreter had made no mention of any date for an interview. Although not in a position to verify the truth of the matter, the Court again attaches more weight to the applicant's version, which reflects the serious lack of information and communication affecting asylum seekers.
>
> … In such conditions the Court does not share the Government's view that the applicant, by his own actions, failed to give the domestic authorities an opportunity to examine the merits of his complaints and that he has not been affected by the deficiencies in the asylum procedure.
>
> … The Court concludes that to date the Greek authorities have not taken any steps to communicate with the applicant or reached any decision in his case, offering him no real and adequate opportunity to defend his application for asylum …" (paras. 301 - 313)

The ECtHR then proceeded to examine whether these and other deficiencies in the asylum procedure in Greece were offset by the possibility of judicial review by the Supreme Administrative Court of Greece, in the event of the asylum application being rejected at first instance. However, the ECtHR identified various shortcomings in the procedure for judicial review, including its inaccessibility:

> "… the Court reiterates that the accessibility of a remedy in practice is decisive when assessing its effectiveness. The Court has already noted that the Greek authorities have taken no steps to ensure communication between the competent authorities and the applicant. That fact, combined with the malfunctions in the notification procedure in respect of "persons of no known address" … makes it very uncertain whether the applicant will be able to learn the outcome of his asylum application in time to react within the prescribed time-limit.
>
> … In addition, although the applicant clearly lacks the wherewithal to pay a lawyer, he has received no information concerning access to organisations which offer legal advice and guidance. Added to that is the shortage of lawyers on the list drawn up for the legal aid system … which renders the system ineffective in practice. Contrary to the Government's submissions, the Court considers that this situation may also be an obstacle hindering access to the remedy and falls within the scope of Article 13, particularly where asylum seekers are concerned." (paras.318-319)

In *Hirsi Jamaa and Others v. Italy,*[51] where the Italian navy had intercepted the applicants at sea and handed them over in a "pushback operation" to the Libyan authorities in Tripoli, the ECtHR found that the applicants did not have access to an effective remedy:

> "… the applicants had no access to a procedure to identify them and to assess their personal circumstances before they were returned to Libya … The [Italian] Government acknowledged that no provision was made for such procedures aboard the military ships onto which the applicants were made to embark. There were neither interpreters nor legal advisers among the personnel on board.

[51] ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, Judgment [GC] of 23 February 2012.

> … The Court observes that the applicants alleged that they were given no information by the Italian military personnel, who had led them to believe that they were being taken to Italy and who had not informed them as to the procedure to be followed to avoid being returned to Libya. In so far as that circumstance is disputed by the Government, the Court attaches more weight to the applicants' version because it is corroborated by a very large number of witness statements gathered by UNHCR, the CPT and Human Rights Watch.
>
> … The Court has previously found that the lack of access to information is a major obstacle in accessing asylum procedures (see *M.S.S. v. Belgium and Greece* …§ 304). It reiterates here the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.
>
> … Having regard to the circumstances of the instant case, the Court considers that the applicants were deprived of any remedy which would have enabled them to lodge their complaints under Article 3 of the Convention … with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced." (paras.202-205)

In *Gebremedhin v. France*,[52] the ECtHR noted in regard to French border procedures that "under domestic law a decision to refuse leave to enter the country such as that taken in the applicant's case acts as a bar to lodging an application for asylum; moreover, such a decision is enforceable, with the result that the individual concerned can be removed immediately to the country he or she claims to have fled" (para.54).

In *I.M. v. France*[53] (see summary in box above), even though the applicant had crossed the border into France he did not have access to the asylum procedure while in police custody and while serving his one-month sentence of imprisonment, since he had been unable to report in person to the prefecture to lodge his asylum claim as required by French law (paras.140-141). Even after he had managed to access the asylum procedure after being transferred to administrative detention, no interpreter had been provided to help him prepare his claim and he had had to rely on the limited assistance that an NGO was able to provide (para.145) As discussed in more detail below, the time limit for submitting and presenting his claim was also excessively short (paras.144-148).

The applicant also faced similar substantial obstacles in his appeal against removal to the Administrative Court of Montpellier (paras.149-153).

In *Shamayev and Others v. Georgia and Russia*,[54] the applicants learned that they were going to be extradited only moments before being taken to to the airport, as they had not been informed of the extradition orders against them that had been issued two days previously. The ECtHR held that they had been unjustificably hindered in the exercise of their right to seek a remedy:

> "It is not the Court's task to determine *in abstracto* the time that should elapse between the adoption of an extradition order and its enforcement. However, where the authorities of a State hasten to hand over an individual to another State two days after the date on which the order was issued, they have a duty to act with even greater promptness and expedition to enable the person concerned to have his or her complaint under Articles 2 and 3 submitted to independent and rigorous scrutiny and have enforcement of the impugned measure suspended … The Court finds it unacceptable for a person to learn that he is to be extradited only moments before being taken to the airport, when his reason for fleeing the receiving country has been his fear of treatment contrary to Article 2 or Article 3 of the Convention.

[52] ECtHR, *Gebremedhin [Gaberamadhien] v. France*, No. 25389/05, Judgment of 26 April 2007.
[53] ECtHR, *I.M. v. France*, No. 9152/09, Decision of 14 December 2010.
[54] ECtHR, *Shamayev and Others v. Georgia and Russia*, No. 36378/02, Judgment of 12 April 2005.

> Accordingly, the Court concludes that neither the applicants extradited on 4 October 2002 nor their lawyers were informed of the extradition orders issued in respect of the applicants on 2 October 2002, and that the competent authorities unjustifiably hindered the exercise of the right of appeal that might have been available to them, at least theoretically." (paras.461-462)

4. Duration of the remedy and time limits for submitting the claim

a) Time limits for submitting the claim

In *Bahaddar v. the Netherlands*,[55] the ECtHR held that time limits for accessing remedies for protection against *refoulement* are permissible in principle but should not be too short or inflexibly applied:

> "The Court notes at the outset that, although it has …held the prohibition of torture or inhuman or degrading treatment contained in Article 3 of the Convention to be absolute in expulsion cases as in other cases …, applicants invoking that Article are not for that reason dispensed as a matter of course from exhausting domestic remedies that are available and effective. It would not only run counter to the subsidiary character of the Convention but also undermine the very purpose of the rule set out in Article 26 [now Article 35(1)] of the Convention if the Contracting States were to be denied the opportunity to put matters right through their own legal system. It follows that, even in cases of expulsion to a country where there is an alleged risk of ill-treatment contrary to Article 3, the formal requirements and time-limits laid down in domestic law should normally be complied with, such rules being designed to enable the national jurisdictions to discharge their caseload in an orderly manner.
>
> Whether there are special circumstances which absolve an applicant from the obligation to comply with such rules will depend on the facts of each case. It should be borne in mind in this regard that in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if – as in the present case – such evidence must be obtained from the country from which he or she claims to have fled. Accordingly, time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim." (para.45)

In *Jabari v. Turkey*,[56] the ECtHR considered whether the asylum procedure in Turkey had provided an effective remedy for the applicant, who had lodged an application for asylum after realizing that she was going to be deported to Iran, her country of origin. The police had rejected her application without examining it, on the grounds that it should have been submitted it within five days of her entry into Turkey.

In its initial admissibility decision, the ECtHR reaffirmed what it had said above in *Bahaddar* and considered whether, on the facts of the case, there were special circumstances which absolved the applicant from the obligation to comply with the five-day time limit for applying for asylum:

> "[The Court] notes in this connection that the authorities in the instant case never considered the merits of the applicant's claim that she risked persecution if removed to Iran. Any examination of that claim was blocked on account of the operation of the five-day rule contained in the Asylum Regulations 1994. In the Court's view the rigid application of the rule denied the applicant any opportunity of persuading the authorities of the merits of her case and failed to have regard to the predicament in which she found herself at the time, being linguistically handicapped and without access to a lawyer or other support … For these [and other] reasons the Court considers that the applicant cannot be reproached for her failure to comply with the five-day rule and cannot be

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[55] ECtHR, *Bahaddar v. the Netherlands*, No. 25894/94, Judgment of 19 February 1998.
[56] ECtHR, *Jabari v. Turkey*, No. 40035/98, Decision of 28 October 1999 and Judgment of 11 July 2000.

> considered to have failed to have exhaust domestic remedies on that account." (Decision on admissibility, pp.6-7)

The ECtHR found the complaint admissible and, in its subsequent judgment, found a violation of Article 13 ECHR taken in conjunction with Article 3 ECHR:

> "… The Court reiterates that there was no assessment made by the domestic authorities of the applicant's claim to be at risk if removed to Iran. The refusal to consider her asylum request for non-respect of procedural requirements could not be taken on appeal. Admittedly the applicant was able to challenge the legality of her deportation in judicial review proceedings. However, this course of action entitled her neither to suspend its implementation nor to have an examination of the merits of her claim to be at risk. The Ankara Administrative Court considered that the applicant's deportation was fully in line with domestic law requirements. It would appear that, having reached that conclusion, the court felt it unnecessary to address the substance of the applicant's complaint, even though it was arguable on the merits in view of the UNHCR's decision [while she was in detention pending deportation] to recognise her as a refugee within the meaning of the Geneva Convention.
>
> … In the Court's opinion, given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which it attaches to Article 3, the notion of an effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned. Since the Ankara Administrative Court failed in the circumstances to provide any of these safeguards, the Court is led to conclude that the judicial review proceedings relied on by the Government did not satisfy the requirements of Article 13 …" (Judgment, paras.49-50)

In *M.S.S. v. Belgium and Greece*,[57] the ECtHR noted that a three-day time limit to apply for asylum was "far too short in practice" in the circumstances of the case (paras.180&301).

b) Excessive duration of the remedy

As noted above, the ECtHR held in *M.S.S. v. Belgium and Greece* that the deficiencies in the asylum procedure in Greece were not offset by the possibility of judicial review by the Supreme Administrative Court. The ECtHR noted that one of the shortcomings in the procedure for judicial review was its excessive duration:[58]

> "Lastly, the Court cannot consider, as the Government have suggested, that the length of the proceedings before the Supreme Administrative Court is irrelevant for the purposes of Article 13. The Court has already stressed the importance of swift action in cases concerning ill-treatment by State agents … In addition it considers that such swift action is all the more necessary where, as in the present case, the person concerned has lodged a complaint under Article 3 in the event of his deportation, has no procedural guarantee that the merits of his complaint will be given serious consideration at first instance, statistically has virtually no chance of being offered any form of protection and lives in a state of precariousness that the Court has found to be contrary to Article 3. It accordingly considers that the information supplied by the Council of Europe Commissioner for Human Rights concerning the length of proceedings … which the Government have not contradicted, is evidence that an appeal to the Supreme Administrative Court does not offset the lack of guarantees surrounding the examination of asylum applications on the merits." (*M.S.S. v. Belgium and Greece*, para.320)

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[57] ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011.

[58] See also ECtHR, *Ahmade v. Greece*, No. 50520/09, Judgment of 25 September 2012, paras. 113-115.

On the other hand, the ECtHR did not, for example, consider the total duration of the asylum proceedings (more than 27 months) excessive in the circumstances in *Gordyeyev v. Poland*.[59] Although that case concerned the applicant's detention "with a view to extradition" within the meaning of Article 5(1)(f) ECHR,[60] and did not concern a complaint under Article 13 ECHR, the applicant had alleged that his detention was unlawful on the basis *inter alia* that the Polish authorities had failed to act with due diligence in the extradition proceedings after he had applied for asylum. In finding the applicant's complaint inadmissible, the ECtHR stated:

> "[The applicant] claimed that the period of [his] detention had not been reasonable. The applicant further argued that the domestic courts had placed too much reliance on the issue of the determination of the request for asylum in their decisions on prolongation of detention. The prolongation of the applicant's detention solely on the grounds of the pending asylum proceedings had resulted in unjustified delays in the extradition proceedings. The applicant concluded that the extradition proceedings had not been conducted with due diligence.
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> […]
>
> In the present case, the applicant was arrested on 18 July 1997 and extradited to Belarus on 28 April 2000. The extradition proceedings thus lasted 2 years, 9 months and 10 days.
>
> The Court notes that on 9 September 1997, while already [in] detention pending extradition, the applicant applied for asylum on the grounds that he had been a member of the opposition movement in Belarus and that the request for his extradition had been politically motivated.
>
> The asylum proceedings, which altogether lasted 2 years, 3 months and 12 days, involved consideration and reconsideration of the applicant's claim by the Minister of Foreign Affairs (decisions issued respectively on 24 August and 29 September 1998) and the Minister of the Interior and Administration (decisions issued respectively on 21 April and 9 October 1998). They also involved a review of the decisions taken by those Ministers by the Supreme Administrative Court (judgment of 21 December 1999). Having regard to the issue to be determined in the asylum proceedings, i.e. whether the applicant had well-founded fears of being subjected to persecution within the meaning of the Geneva Convention Relating to the Status of Refugees and/or treatment contrary to Article 3 of the Convention, the Court considers that it was neither in the interests of the individual applicant nor in the general public interest in the administration of justice that such decisions should be taken hastily, without due regard to all the relevant issues and evidence.
>
> When assessing the length of the asylum proceedings, the Court attaches considerable weight to the fact that the applicant's request for asylum was rejected by the authorities as being entirely without substance. The Court also notes that the Minster of the Interior and Administration considered that the applicant's asylum claim amounted to an abuse of the relevant procedures. Against this background and bearing in mind what was at stake for the applicant and the interest that he had in his claims being thoroughly examined by the domestic authorities, and given the nature of the decision-making process in respect of asylum claims in Poland, the total duration of the asylum proceedings cannot be regarded as excessive …
>
> As regards the extradition proceedings, the Court observes that they appear to be linked with the determination of the asylum claim, as found, inter alia, by the Supreme Court in its decisions of 27 May 1998 and 25 March 1999. The Court notes that … the applicant could not have been extradited if he had been granted asylum in Poland. For that reason the domestic courts adjourned the consideration of the issue of the applicant's extradition on a number of occasions. In these

[59] ECtHR, *Gordyeyev v. Poland*, Nos. 43369/98 and 51777/99, Decision of 3 May 2005.

[60] Article 5(1) ECHR provides: "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: … (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

> circumstances, the Court considers that the applicant should have been aware that by bringing his asylum claim he might contribute to the length of the extradition proceedings.
>
> The Court notes that once the asylum proceedings were terminated, the issue of the applicant's extradition was determined without any significant delay."

Although the above findings concerned the lawfulness of the applicant's detention with a view to his extradition under Article 5(1)(f) ECHR, they would seem equally relevant, as regards the duration of asylum proceedings, to the effectiveness of a remedy under Article 13 ECHR.

c) Accelerated or prioritized asylum procedures

A series of cases against France illustrates the approach taken by the ECtHR towards the use of accelerated or prioritized procedures, instead of the normal procedure, for examining an asylum application.

In *Sultani v. France*,[61] the applicant had lodged a second asylum application after his first application had been rejected. Whereas OFPRA (the French national asylum authority) had examined his first application under the normal procedure, it had examined and rejected his second application in the prioritized procedure. Although the ECtHR was not actually determining whether there had been a violation of Article 13 ECHR,[62] it considered that the channeling of the second application into the prioritized procedure had been justified in the circumstances of the case:

> "… The mere fact that [the applicant's] second application was processed in a prioritized procedure and therefore within a limited timeframe does not, in itself, enable the Court to conclude that the examination was ineffective. In that regard, the Court notes that the applicant's first application had already received a full examination under the normal procedure. That first examination enabled OFPRA, and then the refugee appeals commission, to examine all the reasons why the applicant allegedly could not be returned to Afghanistan, and to reject his asylum application. The existence of that first review justifies the brevity of the examination of the second application, in the framework of which OFPRA simply checks, in an accelerated procedure, whether there are any new reasons for changing its previous decision to reject the application.
>
> … The administrative courts have themselves adjudicated on the case [in the context of deportation proceedings] following the rejection of the second asylum application, both at first instance and at appeal. The decision of the administrative appeal court … appeared particularly detailed in that regard." (paras.65-66, unofficial translation from French original)

In *H.R. v. France*,[63] the applicant had submitted a *third* asylum application, which had been rejected in the prioritized procedure, after his first two asylum applications had been rejected in the normal procedure. In finding the applicant's complaint of a violation of Article 13 ECHR taken in conjunction with Article 3 ECHR to be manifestly ill-founded, the ECtHR stated:

> "To the extent that the applicant does not deny the effectiveness of the examination of the first two asylum applications, the mere fact that the third application was processed under a prioritized procedure and therefore within a limited timeframe does not, in itself, enable the Court to conclude that the examination was ineffective." (para.68, unofficial translation from French original)

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[61] ECtHR, *Sultani v. France*, No. 45223/05, Judgment of 20 September 2007.
[62] The ECtHR was determining wheter there had been a violation of Article 3 ECHR, not whether there been a violation of Article 13 ECHR taken in conjunction with Article 3 ECHR.
[63] ECtHR, *H.R. v. France*, No. 64780/09, Judgment of 22 September 2011.

On the other hand, in *I.M. v. France* (see summary in box above) the applicant's *first and only* asylum application had been examined and rejected under the prioritized procedure. After being transferred to administrative detention the applicant had been allowed only five days within which to lodge a fully completed written asylum application – in French, with supporting documents, and without being guaranteed a translator – following which OFPRA had been required to decide the application within ninety-six hours. The ECtHR held that although the use of accelerated or prioritized procedures can be legitimate in certain circumstances, this was not so in the applicant's case:

> "Admittedly, the Court is aware of the risks of blockages in the system … and of the need for States confronted with a large number of asylum-seekers to have the necessary means to deal with such litigation … In that regard, the Court recognizes that … accelerated asylum procedures, which have been adopted by numerous European States, can facilitate the processing of applications that are clearly abusive or manifestly ill-founded. It has already had the opportunity [in *Sultani v. France*] to determine that the re-examination of an asylum application in the prioritized procedure did not deprive a detained alien of a detailed examination when his first application was subject to a full examination in the framework of the normal asylum procedure ...
>
> However, as the Court must underline, this was not so in the case of the [present] applicant. Indeed, the case concerns a first application, not a re-examination. Thus, the examination of the applicant's application by OFPRA under the prioritized procedure would have constituted the sole examination of the merits of his asylum claim before his removal, had he not obtained in time a [Rule 39] interim measure from the Court." (paras.142-143, unofficial translation from French original)

The ECtHR pointed out that the asylum application had automatically been channelled into the prioritized asylum procedure, with no regard to the applicant's circumstances or to the substance of his claim (para.141). This had had significant consequences. The five-day time limit had been "particularly short" and the circumstances under which the applicant had had to prepare his application while in detention did not provide him with an adequate opportunity to substantiate his claim. Notwithstanding the Government's assertion that the prioritized procedure was subject to the same guarantees as the normal procedure, the result had been extremely rapid, even summary, treatment of the application by the OFPRA. The ECtHR stated that while it recognized the importance of the speediness of remedies, this should not take precedence over essential procedural guarantees aimed at protecting the applicant against arbitrary expulsion (para.144-148).

In *M.E. v. France*,[64] the applicant's first and only asylum application was examined and rejected under the same prioritized procedure as in *I.M. v. France*. However, the applicant had already spent three years in France before being detained for purposes of removal and finally submitting an asylum claim. The ECtHR did not consider that he had been deprived of an effective remedy under Article 13 ECHR given that he had had ample time before being detained to prepare his asylum application, although it did find that his removal to Egypt would violate Article 3 ECHR.[65]

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[64] ECtHR, *M.E. v. France*, No. 50094/10, Judgment of 6 June 2013.

[65] See similarly ECtHR, *K.K. v. France*, No. 18913/11, Judgment of 10 October 2013, para.69, in which the applicant had not only significantly delayed in applying for asylum in France but had also previously applied for asylum in the United Kingdom and Greece.

5. Independent and rigorous scrutiny[66]

a) Failure to give any scrutiny at all

In *Abdolkhani and Karimnia v. Turkey*,[67] the ECtHR was "struck by the fact that both the administrative and judicial authorities [in Turkey] remained totally passive regarding the applicants' serious allegations of a risk of ill-treatment if returned to Iraq or Iran." It considered that the lack of any response by the Turkish authorities to the applicants' allegations amounted to a lack of the "rigorous scrutiny" that is required by Article 13 ECHR (para.113).

In *Diallo v. the Czech Republic*,[68] the asylum applications of both of the applicants had been rejected by the Czech Ministry of the Interior as manifestly unjustified without any consideration on the merits, on the ground that the applicants had arrived from Portugal, which was considered a safe third country. However, instead of being removed to Portugal, the applicants were removed to Guinea, where they had an arguable claim that they were at real risk of ill-treatment contrary to Article 3 ECHR. The ECtHR held that the asylum proceedings did not provide with an effective domestic remedy within the meaning of Article 13 ECHR, since their claims "were not subjected to close and rigorous scrutiny by the Ministry of the Interior as required by the Convention, or in fact to any scrutiny at all." Similarly, in separate administrative expulsion proceedings, none of the authorities had examined the merits of the applicants' claims (paras.75-81).

b) Insufficient scrutiny

Dismissal of evidence without checking its authenticity: In *Singh and Others v. Belgium*,[69] the ECtHR considered that the dismissal of documentary evidence at the core of an asylum claim without taking any steps to verify its authenticity was not considered to be a close and rigorous scrutiny of the claim. The applicants had provided certificates showing that they had been recognized as refugees by UNHCR in India, but the probative value of the certificates had been dismissed first by the Belgian Office of the Commissioner-General for Refugees and Stateless Persons ("CGRA") and then by the Belgian Aliens' Disputes Board ("CCE"), without checking with UNHCR. In the case of the CCE, this was even though the applicants had produced further evidence – in the form of email communications with UNHCR – according to which the certificates were genuine (paras.14-15&103-104).

Dismissal of evidence emanating from reliable sources: In *Abdulkhakov v. Russia*,[70] the ECtHR held that the Russian courts had given a preponderant weight to diplomatic assurances from Uzbekistan when upholding an order for the applicant's extradition, without taking into account reliable evidence about the human rights situation in Uzbekistan:

> "… In particular, the applicant relied on international reports [reports from UN agencies and human rights NGOs, and case law of the ECtHR], an expert opinion and witness statements … However, in the refugee status proceedings the Federal Migration Service found, and that finding was subsequently confirmed by domestic courts, that the risk of ill-treatment [if substantiated] could not serve as a basis for granting refugee status … As to the extradition proceedings, the courts refused to examine the international reports … and rejected the expert opinions and witness statements as irrelevant … The Court is struck by the summary reasoning adduced by the domestic courts and their refusal to assess materials originating from reliable sources. In such

[66] See also section B.4 on evidentiary standards in chapter 2.2 above.
[67] ECtHR, *Abdolkhani and Karimnia v. Turkey*, No. 30471/08, Judgment of 22 September 2009.
[68] ECtHR, *Diallo v. the Czech Republic*, No. 20493/07, Judgment of 23 June 2011.
[69] ECtHR, *Singh and Others v. Belgium*, No. 33210/11, Judgment of 2 October 2012.
[70] ECtHR, *Abdulkhakov v. Russia*, No. 14743/11, Judgment of 2 October 2012.

circumstances, the Court doubts that the issue of the risk of ill-treatment of the applicant was subject to rigorous scrutiny, either in the refugee status or the extradition proceedings.

> … It transpires from the judicial decisions in the extradition proceedings that, when rejecting the applicant's arguments concerning the risk of ill-treatment in Uzbekistan, the courts gave a preponderant weight to the diplomatic assurances provided by the Uzbek authorities. In this respect, the Court reiterates that it has already cautioned against reliance on diplomatic assurances against torture from States where torture is endemic or persistent. Furthermore, it should be pointed out that even where such assurances are given, that does not absolve the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention …" (paras.148-149)

Excessive burden of proof on the applicant: In *M. and Others v. Bulgaria,*[71] the ECtHR held that the scrutiny of the applicant's claim by the Supreme Administrative Court of Bulgaria had been insufficient because it had placed an excessive burden of proof on the applicant as to whether the risk of his ill-treatment by non-State actors in Afghanistan could or would be obviated by the Afghan authorities:

> "the Court finds disturbing the approach of the Supreme Administrative Court on the question whether or not the alleged risks of ill-treatment and death in the event of Mr M.'s deportation to Afghanistan rendered the deportation order unlawful. In particular, while it apparently acknowledged the existence of such risks, the court placed on the first applicant the burden of proving that they stemmed from the Afghan authorities and that those authorities would not guarantee his safety … This approach appears deficient on two levels. First, it seems to place excessive reliance on the question whether the ill-treatment risked in the receiving State would emanate from State or non-State sources, whereas, in accordance with the Court's established case-law, this issue, albeit relevant, cannot be decisive (see, among others, *N. v. Finland*, no. 38885/02, §§ 163-165, 26 July 2005, and *Salah Sheekh v. the Netherlands*, no. 1948/04, §§ 137-149, ECHR 2007-I). Second, by dealing with such a serious issue summarily and by placing on the first applicant, without any explanation, the burden of proving negative facts, such as the lack of State guarantees in Afghanistan, the court practically deprived Mr M. of a meaningful examination of his claim under Article 3. The Court reiterates in this connection that in view of the importance which it attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires independent and rigorous scrutiny by a national authority of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 …" (para.127)

In *M.S.S. v. Belgium and Greece,*[72] the ECtHR considered that an excessive burden of proof had been placed on the applicant by the Belgian Aliens' Appeals Board as regards his claim that his Dublin transfer to Greece would place him at real risk of ill-treatment:

> "The Government themselves explain that [the extremely urgent procedure before the Aliens Appeals Board] reduces the rights of the defence and the examination of the case to a minimum. The judgments of which the Court is aware [see below] confirm that the examination of the complaints under Article 3 carried out by certain divisions of the Aliens Appeals Board at the time of the applicant's expulsion was not thorough. They limited their examination to verifying whether the persons concerned had produced concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3, thereby increasing the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of a violation. Furthermore, even if the individuals concerned did attempt to add more material to their files along these lines after their interviews with the Aliens Office, the Aliens Appeals Board

[71] ECtHR, *M. and Others v. Bulgaria*, No. 41416/08, Judgment of 26 July 2011.
[72] ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011.

did not always take that material into account. The persons concerned were thus prevented from establishing the arguable nature of their complaints under Article 3 of the Convention." (para.389)

The ECtHR reached the above conclusions after having analysed the 'Dublin' jurisprudence of the Aliens Appeals Board as follows:

"… The first cases in which asylum-seekers reported difficulties in accessing the asylum procedure in Greece date back to 2008. In its judgment no. 9.796 of 10 April 2008, the Aliens Appeals Board stayed the execution of a 'Dublin' transfer to Greece under the extremely urgent procedure because the Greek authorities had not responded to the request for them to take charge of the asylum application concerned and the Aliens Office had not sought individual guarantees. The Aliens Appeals Board found that a tacit agreement failed to provide sufficient guarantees of effective processing of the asylum application by the Greek authorities. Since March 2009, however, the Aliens Office no longer seeks such guarantees and takes its decisions based on tacit agreements. The Aliens Appeals Board no longer questions this approach, considering that Greece has transposed the Qualification and Procedures Directives.

… In assessing the reasoning for the order to leave the country, the Aliens Appeals Board takes into consideration first and foremost the facts revealed to the Aliens Office during the 'Dublin' interview and recorded in the administrative file. Should evidence be adduced subsequently, including documents of a general nature, in a letter to the Aliens Office during the 'Dublin' examination process or in an appeal against the order to leave the country, it is not systematically taken into account by the Aliens Appeals Board, on the grounds that it was not adduced in good time or that, because it was not mentioned in the asylum applicant's statements to the Aliens Office, it is not credible …

… In cases where the Aliens Appeals Board has taken into account international reports submitted by 'Dublin' asylum applicants confirming the risk of a violation of Article 3 of the Convention because of the deficiencies in the asylum procedure and the conditions of detention and reception in Greece, its case-law is divided as to the conclusions to be drawn.

… Certain divisions have largely been inclined to take the general situation in Greece into account. For example, in judgments nos. 12.004 and 12.005 of 29 May 2008, the Board considered that the Aliens Office should have considered the allegations of ill-treatment in Greece:

> 'The applicant party informed the other party in good time that his removal to Greece would, in his opinion, amount to a violation of Article 3 of the Convention, in particular because of the inhuman and degrading treatment he alleged that he had suffered and would no doubt suffer again there. ... The Board notes that in arguing that he faced the risk, in the event that he was sent back to Greece, of being exposed to inhuman and degrading treatment contrary to Article 3 of the Convention, and in basing his arguments on reliable documentary sources which he communicated to the other party, the applicant formulated an explicit and detailed objection concerning an important dimension of his removal to Greece. The other party should therefore have replied to that objection in its decision in order to fulfil its obligations with regard to reasoning.'

… In the same vein, in judgment no. 25.962 of 10 April 2009, the Aliens Appeals Board stayed the execution of a transfer to Greece in the following terms:

> 'The Board considers that the terms of the report of 4 February 2009 of the Commissioner for Human Rights of the Council of Europe ... and the photos illustrating the information contained in it concerning the conditions of detention of asylum-seekers are particularly significant. ... While it post-dates the judgments of the Board and of the European Court of Human Rights cited in the decision taken, the content of this report is clear enough to establish that despite its recent efforts to comply with proper European standards in matters of asylum

> and the fundamental rights of asylum-seekers, the Greek authorities are not yet able to offer asylum applicants the minimum reception or procedural guarantees.'

… Other divisions have opted for another approach, which consists in taking into account the failure to demonstrate a link between the general situation in Greece and the applicant's individual situation. For example, in judgment no. 37.916 of 27 February 2009, rejecting a request for a stay of execution of a transfer to Greece, the Aliens Appeals Board reasoned as follows:

> [Translation by the Registry]
>
> 'The general information provided by the applicant in his file mainly concerns the situation of aliens seeking international protection in Greece, the circumstances in which they are transferred to and received in Greece, the way they are treated and the way in which the asylum procedure in Greece functions and is applied. The materials establish no concrete link showing that the deficiencies reported would result in Greece violating its non-refoulement obligation vis-à-vis aliens who, like the applicant, were transferred to Greece ... Having regard to the above, the applicant has not demonstrated that the enforcement of the impugned decision would expose him to a risk of virtually irreparable harm.'

… In three cases in 2009 the same divisions took the opposite approach and decided to suspend transfers to Athens, considering that the Aliens Office, in its reasoning, should have taken into account the information on the general situation in Greece. These are judgments nos. 25.959 and 25.960 of 10 April 2009 and no. 28.804 of 17 June 2009.

… In order to ensure the consistency of its case-law, the President of the Aliens Appeals Board convened a plenary session on 26 March 2010 which delivered three judgments (judgments nos. 40.963, 40.964 and 10.965) in which the reasoning may be summarised as follows:

> – Greece is a member of the European Union, governed by the rule of law, a party to the Convention and the Geneva Convention and bound by Community legislation in asylum matters;
>
> – based on the principle of intra-Community trust, it must be presumed that the State concerned will comply with its obligations (referring to the Court's case-law in K.R.S. v. the United Kingdom (dec.), no. 32733/08, 2 December 2008);
>
> – in order to reverse that presumption the applicant must demonstrate in concreto that there is a real risk of his being subjected to treatment contrary to Article 3 of the Convention in the country to which he is being removed;
>
> – simple reference to general reports from reliable sources showing that there are reception problems or that refoulement is practised or the mere fact that the asylum procedure in place in a European Union member State is defective does not suffice to demonstrate the existence of such a risk.

… In substance, the same reasoning is behind the judgments of the Aliens Appeals Board when it examines appeals to set aside a decision. Thus, after having declared the appeal inadmissible as far as the order to leave the country was concerned, because the applicant had already been removed, the Board, in the above-mentioned judgment no. 28.233 of 29 May 2009, went on to analyse the applicant's complaints under the Convention – particularly Article 3 – and rejected the appeal because the applicant had failed to demonstrate any concrete link between the general situation in Greece and his individual situation." (paras.143-151)

c) National security considerations

In *Chahal v. the United Kingdom,*[73] the ECtHR held that the scrutiny of the claim must be carried out solely with reference to the question of the risk of ill-treatment upon removal, without regard to what the applicant may have done to warrant expulsion or to any perceived threat to the national security of the expelling State. The judicial authority or other national authority carrying out the scrutiny of the claim must have access to all the relevant information:

> "… It is true, as the Government have pointed out, that in the cases of *Klass and Others* and *Leander* …, the Court held that Article 13 … only required a remedy that was 'as effective as can be' in circumstances where national security considerations did not permit the divulging of certain sensitive information. However, it must be borne in mind that these cases concerned complaints under Articles 8 and 10 of the Convention … and that their examination required the Court to have regard to the national security claims which had been advanced by the Government. The requirement of a remedy which is 'as effective as can be' is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3 …, where the issues concerning national security are immaterial.
>
> … In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3 …, the notion of an effective remedy under Article 13 … requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 … This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State.
>
> … Such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant in determining whether the remedy before it is effective …
>
> … In the present case, neither the advisory panel nor the courts could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security considerations. On the contrary, the courts' approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national security … It follows from the above considerations that these cannot be considered effective remedies in respect of Mr Chahal's Article 3 … complaint for the purposes of Article 13 of the Convention …
>
> … Moreover, the Court notes that in the proceedings before the advisory panel the applicant was not entitled, *inter alia,* to legal representation, that he was only given an outline of the grounds for the notice of intention to deport, that the panel had no power of decision and that its advice to the Home Secretary was not binding and was not disclosed … In these circumstances, the advisory panel could not be considered to offer sufficient procedural safeguards for the purposes of Article 13 …
>
> … Having regard to the extent of the deficiencies of both the judicial review proceedings and the advisory panel, the Court cannot consider that the remedies taken together satisfy the requirements of Article 13 in conjunction with Article 3 …" (paras.150-155)

In *Othman (Abu Qatada) v. the United Kingdom,*[74] the ECtHR held that providing that all the relevant evidence relating to the safety of return is disclosed to the reviewing authority, the remedy will not necessarily be ineffective if some of that evidence is not disclosed to the applicant and safeguards for protecting his or her interests have been ensured.

[73] ECtHR, *Chahal v. the United Kingdom*, No. 22414/93, Judgment [GC] of 15 November 1996.
[74] ECtHR, *Othman (Abu Qatada) v. the United Kingdom*, No. 8139/09, Judgment of 17 January 2012.

The facts of the case were as follows.

All of the evidence relating to the safety of the applicant's return to Jordan had been disclosed by the Home Secretary to the Special Immigration Appeals Commission (SIAC) as the appellate authority for security cases, but, for security reasons, not all of that evidence had been disclosed to the applicant. Some of the "closed" evidence related to the process by which a framework Memorandum of Understanding (MoU) had been agreed between the United Kingdom and Jordan, setting out a series of assurances of compliance with international human rights standards that would be adhered to when an individual was returned from one State to the other. The remainder of the closed material concerned the extent to which the MoU would mitigate the risk of the applicant being tortured in Jordan, and evidence as to the national security threat that he allegedly posed to the United Kingdom. (para.26)

Although the closed evidence was not disclosed to the applicant, it was disclosed to a "special advocate" with security clearance, appointed by the Government Solicitor General, whose role was to represent the applicant's interests in the sessions of the SIAC from which the applicant and his legal representatives were excluded.[75] The MoU itself was not closed material.

In his complaint to the ECtHR, the applicant alleged that he was the victim *inter alia* of a violation of Article 13 ECHR taken in conjunction with Article 3 ECHR. He submitted that "even greater rigour [than normal] was required in a case involving assurances when the respondent State accepted that, without those assurances, there would be real risk of ill-treatment", and that:

> "For that reason … there ought to be an enhanced requirement for transparency and procedural fairness where assurances were being relied upon because, in such a case, the burden fell on the respondent State to dispel any doubts about a serious risk of ill-treatment on return. As a matter of principle, therefore, a respondent State should never be allowed to rely on confidential material on safety of return." (para.212)

However, the ECtHR held that, on the facts of the case, SIAC's procedures satisfied the requirements of Article 13 ECHR:

> "… First, the Court does not consider … that there is an enhanced requirement for transparency and procedural fairness where assurances are being relied upon; as in all Article 3 cases, independent and rigorous scrutiny is what is required. Furthermore … Article 13 of the Convention cannot be interpreted as placing an absolute bar on domestic courts receiving closed evidence, provided the applicant's interests are protected at all times before those courts.
>
> … Second, the Court has previously found that SIAC is a fully independent court … In the present case, just as in any appeal it hears, SIAC was fully informed of the Secretary of State's national security case against the applicant. It would have been able to quash the deportation order it had been satisfied that the Secretary of State's case had not been made out. As it was, SIAC found that case to be 'well proved'. The reasons for that conclusion are set out at length in its open determination.
>
> … Third, while Parliament may not originally have intended for SIAC to consider closed evidence on safety or return, there is no doubt that, as a matter of domestic law, it can do so, provided the closed evidence is disclosed to the special advocates. Moreover, as the Government have observed, SIAC is empowered to conduct a full merits review as to safety of a deportee on return and to quash the deportation order if it considers there is a real risk of ill-treatment.

[75] For further details on the functioning of the SIAC and the role of the special advocates, see *Othman (Abu Qatada)* at paras. 67-62. See also ECtHR, *A. and Others v. the United Kingdom*, No. 3455/05, Judgment [GC] of 19 February 2009, paras. 91-93.

… Fourth, the Court notes that both the applicant and the third party interveners have submitted that involvement of special advocates in SIAC appeals is not sufficient for SIAC to meet the requirements of Article 13. The Court is not persuaded that this is the case. In *A and Others v. the United Kingdom* …the Grand Chamber considered the operation of the special advocate system in the context of appeals to SIAC against the Secretary of State's decision to detain individuals whom she suspected of terrorism and whom she believed to be a risk to national security. The Grand Chamber considered that, in such appeals, the special advocate could not perform his or her function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate … It was therefore necessary to consider, in each case, whether the nature of the open evidence against each applicant meant he was in a position effectively to challenge the allegations against him …

… There is, however, a critical difference between those appeals and the present case. In *A and Others v. the United Kingdom* ... the applicants were detained on the basis of allegations made against them by the Secretary of State. In the present case, at least insofar as the issue of the risk of ill-treatment in Jordan was concerned, no case was made against the applicant before SIAC. Instead, he was advancing a claim that there would be a real risk of ill-treatment if he were deported to Jordan. In the Court's view, there is no evidence that, by receiving closed evidence on that issue, SIAC, assisted by the special advocates, failed to give rigorous scrutiny to the applicant's claim. Nor is the Court persuaded that, by relying on closed evidence, SIAC ran an unacceptable risk of an incorrect result: to the extent that there was such a risk, it was mitigated by the presence of the special advocates.

… Finally, the Court accepts that one of the difficulties of the non-disclosure of evidence is that one can never know for certain what difference disclosure might have made. However, it considers that such a difficulty did not arise in this case. Even assuming that closed evidence was heard as to the United States' interest in him, the [Jordanian] GID's commitment to respecting the assurances and the [United Kingdom] Foreign and Commonwealth Office's negotiation of the MOU, the Court considers that these issues are of a very general nature. There is no reason to suppose that, had the applicant seen this closed evidence, he would have been able to challenge the evidence in a manner that the special advocates could not." (paras.229-224)

It can be concluded that, where national security considerations are concerned, Article 13 ECHR does not permit a less rigorous scrutiny of an individual's claim that his or her removal would subject him or her to a risk of ill-treatment. However, such considerations may legitimately play a part in determining what remedy is afforded to the individual, providing that the remedy meets the requirements of Article 13 ECHR.

It should also be emphasized that, as the ECtHR stated in *Chahal v. the United Kingdom*, the prohibition provided by Article 3 against ill-treatment is absolute, including in expulsion cases, meaning that "the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration" (para.81).[76]

D. The ECtHR case law on procedural safeguards against *refoulement* other than Article 13 ECHR

1. Introduction

In addition to Article 13 ECHR, a number of other provisions of the ECHR and its Protocols in principle afford procedural safeguards against *refoulement*, namely:

[76] See further section B.2.a in chapter 2.2 above.

(i) Article 3 ECHR, which provides procedural as well as substantive protection against *refoulement*;

(ii) Article 4 of ECHR Protocol No. 4, which prohibits the collective expulsion of aliens;

(iii) Article 1 of ECHR Protocol No. 7, which provides procedural safeguards relating to the expulsion of aliens who are lawfully in the territory of a Contracting State.

2. Article 3 ECHR ('Prohibition of torture')

> **Article 3 ECHR**
> **('Prohibition of torture')**
> *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*

Requirement for rigorous scrutiny: As discussed above, in *Jabari v. Turkey* the ECtHR considered the affect on the applicant of a five-day time for applying for asylum in Turkey. Not only did the Court consider that the rigid application of that time limit had deprived the applicant of an effective remedy under Article 13 ECHR taken in conjunction with Article 3 ECHR, it also considered that the refusal to examine the claim was at variance with Article 3 ECHR itself:

> "The Court is not persuaded that the authorities of the respondent State conducted any meaningful assessment of the applicant's claim, including its arguability. It would appear that the applicant's failure to comply with the five-day registration requirement under the Asylum Regulation 1994 denied her any scrutiny of the factual basis of her fears about being removed to Iran … In the Court's opinion, the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention." (para.40)

Requirement for investigations: As discussed in chapter 2.2,[77] the ECtHR has ruled in a number of cases that where a Contracting State is aware, or ought to be aware, of a "real and immediate risk" of an individual being exposed to ill-treatment through being forcibly transferred by any person to another State, it has an obligation to take "within the scope of [its] powers, such preventive operational measures that, judged reasonably, might be expected to avoid that risk".[78]

In each of the cases concerned, the applicant's extradition had been sought from the Russian Federation by another State where the applicant claimed to be at real risk of ill-treatment. The applicant was subsequently abducted and forcibly transferred by unidentified individuals to that State, without reasonable steps having been taken by the Russian authorities to take preventive measures to protect the applicant after being informed of his disappearance. The ECtHR found a violation of Article 3 ECHR by the Russian Federation not only because of the failure of the Russian authorities to take preventive measures, but also because of the subsequent failure of the Russian authorities to carry out an effective investigation. For example, the Court stated in *Savriddin Dzhurayev v. Russia*:[79]

> "… The Court reiterates that Article 3, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation into any arguable claim of torture or ill-treatment by State agents. Such an

[77] See section B.1.c of chapter 2.2.
[78] ECtHR, *Savriddin Dzhurayev v. Russia*, No. 71386/10, Judgment of 25 April 2013; *Nizomkhon Dzhurayev v. Russia*, No. 31890/11, Judgment of 03 October 2013; *Ermakov v. Russia*, No. 43165/10, Judgment of 07 November 2013; *Kasymakhunov v. Russia*, No. 29604/12, Judgment of 14 November 2013.
[79] ECtHR, *Savriddin Dzhurayev v. Russia*, No. 71386/10, Judgment of 25 April 2013.

> investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity…
>
> … The investigation into serious allegations of ill-treatment must be both prompt and thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions … They must take all reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony and forensic evidence …
>
> … The investigation should be independent from the executive in both institutional and practical terms … and allow the victim to participate effectively in the investigation in one form or another …
>
> … The Court considers that these well-established requirements of the Convention fully apply to the investigation that the authorities should have conducted into the applicant's abduction and his ensuing exposure to ill-treatment and torture in Tajikistan …" (paras. 187-190)

In *El-Masri v. the former Yugoslav Republic of Macedonia*,[80] the ECtHR found that the authorities of the former Yugoslav Republic of Macedonia had failed to carry out an effective investigation into the applicant's complaints that he had been ill-treated by State agents, who had also allegedly been actively involved in his rendition by CIA agents to Afghanistan, where there was a real risk that he would be ill-treated (paras.182-194).

> **Note:** Like Article 3 ECHR, Article 2 ECHR also contains a "procedural limb" according to which Contracting States must carry out effective investigations. See Council of Europe, *Guide to good practice in respect of domestic remedies*, 18 September 2013, pp. 31-34 [Link]

3. Article 4, ECHR Protocol No. 4 ('Prohibition of collective expulsion of aliens')

> **Article 4, ECHR Protocol No. 4**
> **('Prohibition of collective expulsion of aliens')**
>
> *Collective expulsion of aliens is prohibited.*

Definition of 'collective expulsion of aliens': In *Becker v. Denmark*,[81] the European Commission of Human Rights defined the "collective expulsion of aliens" as meaning:

> "any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group." (p.235)

In *Andric v Sweden*,[82] the ECtHR further clarified that:

> "the fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion if each person concerned has been given the

[80] ECtHR, *El-Masri v. the former Yugoslav Republic of Macedonia*, No. 39630/09, Judgment [GC] of 13 December 2012.
[81] ECmHR, *Becker v. Denmark*, No. 701175, Decision of 3 October 1975.
[82] ECtHR, *Andric v. Sweden*, No. 45917/99, Decision of 23 February 1999.

> opportunity to put arguments against his expulsion to the competent authorities on an individual basis."

However, there is no violation of Article 4 of Protocol No. 4 if "the lack of an expulsion decision made on an individual basis is the consequence of the applicants' own culpable conduct".[83] For example, in *Berisha and Hajliti v. the former Yugoslav Republic of Macedonia*,[84] the ECtHR held that:

> "the fact that the national authorities issued a single decision for both the applicants, as spouses, was a consequence of their own conduct. The applicants arrived in the respondent State together, lodged their asylum request jointly on the same grounds, produced the same evidence to support their allegations and submitted joint appeals before the Government Appeal Commission and the Supreme Court. Hence, the authorities evaluated the risks associated with expulsion for both of them jointly."

Extraterratorial scope: In *Hirsi Jamaa and Others v. Italy*,[85] the ECtHR examined whether Article 4 of Protocol No. 4 can apply to a case involving the removal of aliens to a third State that is carried out outside national territory. The Court held that Article 4 of Protocol No. 4 does indeed have such extraterritorial applicability:

> "the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction within the meaning of Article 1 of the Convention which engages the responsibility of the State in question under Article 4 of Protocol No. 4." (para.180)

The Court's reasoning was as follows:

> "… In interpreting the provisions of the Convention, the Court draws on Articles 31 to 33 of the Vienna Convention on the Law of Treaties …
>
> … Pursuant to the Vienna Convention on the Law of Treaties, the Court must establish the ordinary meaning to be given to the terms in their context and in the light of the object and purpose of the provision from which they are taken. It must take account of the fact that the provision in issue forms part of a treaty for the effective protection of human rights and that the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions … The Court must also take account of any relevant rules and principles of international law applicable in the relations between the Contracting Parties … The Court may also have recourse to supplementary means of interpretation, notably the *travaux préparatoires* of the Convention, either to confirm the meaning determined in accordance with the methods referred to above or to clarify the meaning when it would otherwise be ambiguous, obscure or manifestly absurd and unreasonable (see Article 32 of the Vienna Convention).
>
> … The Government submitted that there was a logical obstacle to the applicability of Article 4 of Protocol No. 4 in the instant case, namely the fact that the applicants were not on Italian territory at the time of their transfer to Libya so that measure, in the Government's view, could not be considered to be an "expulsion" within the ordinary meaning of the term.
>
> … The Court does not share the Government's opinion on this point. It notes, firstly, that, while the cases thus far examined have concerned individuals who were already, in various forms, on the territory of the country concerned, the wording of Article 4 of Protocol No. 4 does not in itself

[83] ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, Judgment [GC] of 23 February 2012, para.184.
[84] ECtHR, *Berisha and Hajliti v. the former Yugoslav Republic of Macedonia*, Decision (Partial) of 16 June 2005.
[85] ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09, Judgment [GC] of 23 February 2012.

pose an obstacle to its extraterritorial application. It must be noted that Article 4 of Protocol No. 4 contains no reference to the notion of ‘territory’, whereas the wording of Article 3 of the same Protocol, on the contrary, specifically refers to the territorial scope of the prohibition on the expulsion of nationals. Likewise, Article 1 of Protocol No. 7 explicitly refers to the notion of territory regarding procedural safeguards relating to the expulsion of aliens lawfully resident in the territory of a State. In the Court’s view, that wording cannot be ignored.

… The *travaux préparatoires* are not explicit as regards the scope of application and ambit of Article 4 of Protocol No. 4. In any event, the Explanatory Report to Protocol No. 4, drawn up in 1963, reveals that as far as the Committee of Experts was concerned the purpose of Article 4 was to formally prohibit ‘collective expulsions of aliens of the kind which was a matter of recent history’. Thus, it was ‘agreed that the adoption of [Article 4] and paragraph 1 of Article 3 could in no way be interpreted as in any way justifying measures of collective expulsion which may have been taken in the past’. The commentary on the draft reveals that, according to the Committee of Experts, the aliens to whom the Article refers are not only those lawfully resident on the territory but ‘all those who have no actual right to nationality in a State, whether they are passing through a country or reside or are domiciled in it, whether they are refugees or entered the country on their own initiative, or whether they are stateless or possess another nationality’ … Lastly, according to the drafters of Protocol No. 4, the word ‘expulsion’ should be interpreted ‘in the generic meaning, in current use (to drive away from a place)’. While that last definition is contained in the section relating to Article 3 of the Protocol, the Court considers that it can also be applied to Article 4 of the same Protocol. It follows that the travaux préparatoires do not preclude extraterritorial application of Article 4 of Protocol No. 4.

… It remains to be seen, however, whether such an application is justified. To reply to that question, account must be taken of the purpose and meaning of the provision in issue, which must themselves be analysed in the light of the principle, firmly rooted in the Court’s case-law, that the Convention is a living instrument which must be interpreted in the light of present-day conditions … Furthermore, it is essential that the Convention is interpreted and applied in a manner which renders the guarantees practical and effective and not theoretical and illusory …

… A long time has passed since Protocol No. 4 was drafted. Since that time, migratory flows in Europe have continued to intensify, with increasing use being made of the sea, although the interception of migrants on the high seas and their removal to countries of transit or origin are now a means of migratory control in so far as they constitute tools for States to combat irregular immigration.

The economic crisis and recent social and political changes have had a particular impact on certain regions of Africa and the Middle East, throwing up new challenges for European States in terms of immigration control.

… The Court has already found that, according to the established case-law of the Commission and of the Court, the purpose of Article 4 of Protocol No. 4 is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority. If, therefore, Article 4 of Protocol No. 4 were to apply only to collective expulsions from the national territory of the States Parties to the Convention, a significant component of contemporary migratory patterns would not fall within the ambit of that provision, notwithstanding the fact that the conduct it is intended to prohibit can occur outside national territory and in particular, as in the instant case, on the high seas. Article 4 would thus be ineffective in practice with regard to such situations, which, however, are on the increase. The consequence of that would be that migrants having taken to the sea, often risking their lives, and not having managed to reach the borders of a State, would not be entitled to an examination of their personal circumstances before being expelled, unlike those travelling by land.

… It is therefore clear that, while the notion of ‘jurisdiction’ is principally territorial and is presumed to be exercised on the national territory of States …, the notion of expulsion is also principally territorial in the sense that expulsions are most often conducted from national territory. Where, however, as in the instant case, the Court has found that a Contracting State has, exceptionally, exercised its jurisdiction outside its national territory, it does not see any obstacle to accepting that the exercise of extraterritorial jurisdiction by that State took the form of collective expulsion. To conclude otherwise, and to afford that last notion a strictly territorial scope, would result in a discrepancy between the scope of application of the Convention as such and that of Article 4 of Protocol No. 4, which would go against the principle that the Convention must be interpreted as a whole. Furthermore, as regards the exercise by a State of its jurisdiction on the high seas, the Court has already stated that the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction …

… The above considerations do not call into question the right of States to establish their own immigration policies. It must be pointed out, however, that problems with managing migratory flows cannot justify having recourse to practices which are not compatible with the State's obligations under the Convention. The Court reiterates in that connection that the provisions of treaties must be interpreted in good faith in the light of the object and purpose of the treaty and in accordance with the principle of effectiveness …" (paras.170-179)

Violations of Article 4 of Protocol No. 4: As of the end of 2013, the ECtHR had found a violation of Article 4 of Protocol No. 4 in only two cases, both concerning asylum-seekers.

In *Hirsi Jamaa and Others v. Italy*, the ECtHR held that:

"… In the instant case, the Court considers that the operation resulting in the transfer of the applicants to Libya was carried out by the Italian authorities with the intention of preventing the irregular migrants disembarking on Italian soil. In that connection, it attaches particular weight to the statements given after the events to the Italian press and the State Senate by the Minister of the Interior, in which he explained the importance of the push-back operations on the high seas in combating clandestine immigration and stressed the significant decrease in disembarkations as a result of the operations carried out in May 2009 …

[…]

… the Court can only find that the transfer of the applicants to Libya was carried out without any form of examination of each applicant's individual situation. It has not been disputed that the applicants were not subjected to any identification procedure by the Italian authorities, which restricted themselves to embarking all the intercepted migrants onto military ships and disembarking them on Libyan soil. Moreover, the Court notes that the personnel aboard the military ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers.

That is sufficient for the Court to rule out the existence of sufficient guarantees ensuring that the individual circumstances of each of those concerned were actually the subject of a detailed examination.

… Having regard to the above, the Court concludes that the removal of the applicants was of a collective nature, in breach of Article 4 of Protocol No. 4 to the Convention. Accordingly, there has been a violation of that Article." (paras.181&185-186)

In *Čonka v. Belgium*,[86] the facts of the case were more complex. The applicants were four Slovak Roma, a married couple and their two minor children. They had applied for asylum in Belgium in November 1998, but their applications had been rejected on 3 March 1999 as inadmissible on the

[86] ECtHR, *Čonka v. Belgium*, No. 51564/99, Judgment of 5 February 2002.

grounds that they had not produced sufficient evidence that their lives were at risk in Slovakia, and they were ordered to leave Belgium within five days. On 5 March 1999, they lodged an appeal under the urgent applications procedure to the Commissioner-General for Refugees and Stateless Persons, which was rejected on 18 June 1999. In upholding the order to leave the territory, the Commissioner-General stipulated that the applicants could be deported to Slovkia. However, they did not leave within the required five-day period (which had been suspended during the appeal) and on 3 August 1999 lodged applications with the *Conseil d'Etat* for judicial review of the decision of 18 June 1989 and for a stay of execution. On 28 October 1999, these applications were struck out of the list because the applicants had failed to respond in time to an invitation from the *Conseil d'Etat* to pay the court fees that were due (paras.9-17).

On 29 September 1999 the applicants were served with a fresh order to leave the territory, which became the subject of their complaint to the ECtHR of a violation of Article 4 of Protocol No. 4. The circumstances under which the order was served and the applicants were subsequently removed to Slovakia were as follows:

> "… At the end of September 1999 the Ghent police sent a notice to a number of Slovakian Roma families, including the applicants, requiring them to attend the police station on 1 October 1999. The notice was drafted in Dutch and Slovak and stated that their attendance was required to enable the files concerning their applications for asylum to be completed.
>
> … At the police station, where a Slovak-speaking interpreter was also present, the applicants were served with a fresh order to leave the territory dated 29 September 1999, accompanied by a decision for their removal to Slovakia and their detention for that purpose. The documents served, which were all in identical terms, informed the recipients that they could apply to the *Conseil d'Etat* for judicial review of the deportation order and for a stay of execution – provided that they did so within sixty days of service of the decision – and to the committals division (*chambre du conseil*) of the criminal court against the order for their detention. According to the Government, some of the aliens concerned were nevertheless allowed to leave the police station of their own free will on humanitarian grounds or for administrative reasons.
>
> … A few hours later the applicants and other Roma families, accompanied by an interpreter, were taken to a closed transit centre, known as "Transit Centre 127 *bis*", at Steenokkerzeel near Brussels Airport. It appears that the interpreter only remained at the centre briefly. According to the Government, he could have been recalled to the centre at the applicants' request. The applicants say that they were told that they had no further remedy against the deportation order.
>
> … While at the centre, the Slovakian families received visits from a delegation of Belgian members of Parliament, the Slovakian Consul, delegates of various non-governmental organisations and doctors. At 10.30 p.m. on Friday 1 October 1999 the applicants' counsel, Mr van Overloop, was informed by the President of the Roma Rights League that his clients were in custody. Taking the view that he was still instructed by them, Mr van Overloop sent a fax on 4 October 1999 to the Aliens Office informing it that the applicants were in Transit Centre 127 bis awaiting repatriation to Slovakia. He requested that no action be taken to deport them, as they had to take care of a member of their family who was in hospital. However, Mr van Overloop did not appeal against the deportation or detention orders made on 29 September 1999.
>
> … On 5 October 1999 the families concerned were taken to Melsbroek Military Airport, where the seat numbers allocated to them in the aircraft were marked on their hands with a ballpoint pen. The aircraft left Belgium for Slovakia at 5.45 p.m.
>
> … Shortly afterwards the Minister of the Interior declared in reply to a parliamentary question put on 23 December 1999:

> ‘Owing to the large concentration of asylum-seekers of Slovakian nationality in Ghent, arrangements have been made for their collective repatriation to Slovakia. ... Reports I have received from the mayor of Ghent and the Director-General of the Aliens Office indicate that the operation was properly prepared, even if the unfortunate wording of the letter sent by the Ghent police to some of the Slovaks may have been misleading. Both the Aliens Office and the Ghent Police Department were surprised by the large number of Slovaks who responded to the notice sent to them. That factual circumstance resulted in their being detained in Transit Centre 127 *bis* for deportation a few days later ...’ ” (paras.18-23)

In finding that the applicants had been subjected to collective expulsion, the ECtHR held:

> “… The Court reiterates its case-law whereby collective expulsion, within the meaning of Article 4 of Protocol No. 4, is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group … That does not mean, however, that where the latter condition is satisfied the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4.
>
> … In the instant case, the applications for asylum made by the applicants were rejected in decisions of 3 March 1999 that were upheld on 18 June 1999. The decisions of 3 March 1999 contained reasons and were accompanied by an order made on the same day requiring the applicants to leave the territory. They were reached after an examination of each applicant's personal circumstances on the basis of their depositions. The decisions of 18 June 1999 were also based on reasons related to the personal circumstances of the applicants and referred to the order of 3 March 1999 to leave the territory, which had been stayed by the appeals under the urgent procedure.
>
> … The Court notes, however, that the detention and deportation orders in issue were made to enforce an order to leave the territory dated 29 September 1999; that order was made solely on the basis of section 7, first paragraph, point (2), of the Aliens Act, and the only reference to the personal circumstances of the applicants was to the fact that their stay in Belgium had exceeded three months. In particular, the document made no reference to their application for asylum or to the decisions of 3 March and 18 June 1999. Admittedly, those decisions had also been accompanied by an order to leave the territory, but by itself, that order did not permit the applicants' arrest. The applicants’ arrest was therefore ordered for the first time in a decision of 29 September 1999 on a legal basis unrelated to their requests for asylum, but nonetheless sufficient to entail the implementation of the impugned measures. In those circumstances and in view of the large number of persons of the same origin who suffered the same fate as the applicants, the Court considers that the procedure followed does not enable it to eliminate all doubt that the expulsion might have been collective.
>
> … That doubt is reinforced by a series of factors: firstly, prior to the applicants' deportation, the political authorities concerned had announced that there would be operations of that kind and given instructions to the relevant authority for their implementation …; secondly, all the aliens concerned had been required to attend the police station at the same time; thirdly, the orders served on them requiring them to leave the territory and for their arrest were couched in identical terms; fourthly, it was very difficult for the aliens to contact a lawyer; lastly, the asylum procedure had not been completed.
>
> … In short, at no stage in the period between the service of the notice on the aliens to attend the police station and their expulsion did the procedure afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account.
>
> In conclusion, there has been a violation of Article 4 of Protocol No 4.” (paras.59-63)

For further information, see: ECtHR, *Collective expulsions of aliens*, Factsheet (periodically updated) [Link]

4. Article 1, ECHR Protocol No. 7 ('Procedural safeguards relating to expulsion of aliens')

Article 1, ECHR Protocol No. 7
('Procedural safeguards relating to expulsion of aliens')

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

(a) to submit reasons against his expulsion,

(b) to have his case reviewed, and

(c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

While in principle the procedural safeguards in Article 1 of ECHR Protocol No. 7 may be relied on by individuals seeking protection from *refoulement*, in practice the ECtHR's case law remains undeveloped in this respect. See, for example, *Imamovic v. Sweden*,[87] in which the ECtHR found the applicants' complaints *inter alia* under Articles 2 and 3 ECHR, and Article 1 of ECHR Protocol No. 7, to be inadmissible.

There appear to be no cases yet where the ECtHR has found a violation of Article 1 of ECHR Protocol No. 7, whether in respect of individuals seeking asylum or otherwise.

E. Table of cases

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A. and Others v. the United Kingdom, No. 3455/05, Judgment [GC] of 19 February 2009 [Links: Judgment | Case summary]

Abdolkhani and Karimnia v. Turkey, No. 30471/08, Judgment of 22 September 2009 [Links: Judgment | Case summary | UNHCR submission]

Abdulkhakov v. Russia, No. 14743/11, Judgment of 2 October 2012 [Link: Judgment | Case summary]

Ahmade v. Greece, No. 50520/09, Judgment of 25 September 2012 [Link: Judgment (French only)]

Akdivar and Others v. Turkey, No. 21893/93, Judgment [GC] of 16 September 1996 [Links: Judgment | Case summary]

Andric v. Sweden, No. 45917/99, Decision of 23 February 1999 [Link: Decision]

Auad v. Bulgaria, No. 46390/10, Judgment of 11 October 2011 [Links: Judgment | Case summary]

Bahaddar v. the Netherlands, No. 25894/94, Judgment of 19 February 1998 [Link: Judgment]

Berisha and Hajliti v. the former Yugoslav Republic of Macedonia, Decision (Partial) of 16 June 2005 [Link: Decision]

Boyle and Rice v. the United Kingdom, Nos. 9658/82 and 9659/82, Judgment of 27 April 1988 [Link: Judgment]

Budrevich v. the Czech Republic, No. 65303/10, Judgment of 17 October 2013 [Link: Judgment]

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Chankayev v. Azerbaijan, No. 56688/12, Judgment of 14 November 2013 [Link: Judgment]

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De Souza Ribeiro v. France, No. 22689/07, Judgment [GC] of 13 December 2012 [Links: Judgment | Case summary]

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[87] ECtHR, *Imamovic v. Sweden*, No. 57633/10, Decision of 13 November 2012.

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Gebremedhin [Gaberamadhien] v. France, No. 25389/05, Decision of 10 October 2006 [Link: Decision (French only)]

Gebremedhin [Gaberamadhien] v. France, No. 25389/05, Judgment of 26 April 2007 [Links: Judgment | Case summary]

Gordyeyev v. Poland, Nos. 43369/98 and 51777/99, Decision of 3 May 2005 [Link: Decision]

H.R. v. France, No. 64780/09, Judgment of 22 September 2011 [Link: Judgment (French only)]

Hirsi Jamaa and Others v. Italy, No. 27765/09, Judgment [GC] of 23 February 2012 [Links: Judgment | Case summary | UNHCR written submission | UNHCR oral submission]

I.M. v. France, No. 9152/09, Decision of 14 December 2010 [Link: Decision (French only) | UNHCR initial written submission (French)]

I.M. v. France, No. 9152/09, Judgment of 2 February 2012 [Links: Judgment (French only) | Case summary (English) | UNHCR initial written submission (French) | UNHCR updated written submission (French) | UNHCR oral submission (French) | UNHCR oral submission (unofficial English translation)]

Imamovic v. Sweden, No. 57633/10, Decision of 13 November 2012 [Link: Decision]

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Jabari v. Turkey, No. 40035/98, Judgment of 11 July 2000 [Link: Judgment]

K.K. v. France, No. 18913/11, Judgment of 10 October 2013 [Link: Judgment (French only)]

Klass and Others v. Germany, No. 5029/71, Judgment of 6 September 1978 [Link: Judgment]

Labsi v. Slovakia, No. 33809/08, Judgment of 15 May 2012 [Links: Judgment | Case summary]

M. and Others v. Bulgaria, No. 41416/08, Judgment of 26 July 2011 [Links: Judgment | Case summary]

M.A. v. Cyprus, No. 41872/10, Judgment of 23 July 2013 [Links: Judgment | Case summary]

M.E. v. France, No. 50094/10, Judgment of 6 June 2013 [Link: Judgment (French only)]

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Maaouia v. France, No. 39652/98, Judgment of 5 October 2000 [Link: Judgment]

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Decisions of the ECmHR

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2.4 Living conditions of asylum-seekers and refugees

A. Introduction

The present chapter is concerned with the question of when inadequate living conditions of asylum-seekers or refugees in a host Contracting State amount to a breach by that State of its obligations under the ECHR. That question raises some of the same issues as, but is distinct from, the question of when a Contracting State is precluded by its obligations under the ECHR from returning an asylum-seeker or refugee to inadequate living conditions in: (i) another Contracting State; or (ii) a non-Contracting State. The latter question relates to the obligation of *non-refoulement*, which has been discussed in chapter 2.2.

> **Note:** This chapter does not cover detention conditions, which will be addressed separately in a chapter on the ECtHR case law on detention that is planned for the second edition of this manual.

With the exception of the rights to protection of property and to education that are set out in Articles 1 and 2 respectively of ECHR Protocol No. 1, the ECHR and its Protocols do not directly protect socio-economic rights and are therefore not directly concerned with living conditions in Contracting States.[1] However, in exceptional circumstances, an individual's living conditions in a Contracting State may amount to a breach by that State of a right that *is* protected by the ECHR, in particular Article 2 ECHR ('Right to life'), Article 3 ECHR ('Prohibition of torture [and inhuman or degrading treatment or punishment]') or Article 8 ECHR ('Right to respect for private and family life'). Article 14 ECHR ('Prohibition of discrimination') can also be applicable in conjunction with Article 8 ECHR or Article 1 ('Protection of property') of Protocol No. 1.

More generally, the following statement of the ECtHR in *Airey v. Ireland* is of note:

> "… [According to the respondent Government's] submission, the Convention should not be interpreted so as to achieve social and economic developments in a Contracting State; such developments can only be progressive.
>
> The Court is aware that the further realisation of social and economic rights is largely dependent on the situation - notably financial - reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions … and it is designed to

[1] The principal Council of Europe treaty concerning socio-economic rights is the European Social Charter, which was adopted in 1961 and subsequently revised in 1996. The Charter is overseen by the European Committee of Social Rights, which has developed its own body of case law comprising all the sources in which it sets out its interpretation of the Charter's provisions. These include "Conclusions", "Statements of interpretation" and "Decisions on collective complaints". For further information, see the Council of Europe's website on the Charter (http://www.coe.int/T/DGHL/Monitoring/SocialCharter/).

> safeguard the individual in a real and practical way as regards those areas with which it deals … Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers … that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention." (first and second indents of para.26)

B. The ECtHR case law on living conditions of asylum-seekers and refugees

1. Introduction

The ECtHR's case law on the living conditions of asylum-seekers and refugees has developed in the context of the Court's case law on living conditions more generally. Notably, the Court has made a distinction between Contracting States' obligations concerning the living conditions of asylum-seekers – whom it considers "a particularly underprivileged and vulnerable population group in need of special protection"[2] – and Contracting States' obligations concerning the living conditions of the general population.[3] This is only a recent development, and so far the Court has not been ready to make the same distinction in the case of recognized refugees, at least not when recognized refugees have been granted rights in the host State that put them on a par with the general population.[4]

This introductory section reviews the ECtHR's case law on living conditions generally. Section 2 below then discusses the case law specifically concerning asylum-seekers and recognized refugees.

a) Articles 2 and 3 ECHR ('Right to life' and 'Prohibition of torture')

Article 2 ECHR
('Right to life')

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3 ECHR
('Prohibition of torture')

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

An individual's living conditions may in principle give rise to an issue under Article 2 ECHR and/or Article 3 ECHR where they are severe enough and are attributable to actions or omissions of the

[2] ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, Judgment [GC] of 21 January 2011, para.251.

[3] In addition to asylum-seekers, the ECtHR has identified other particularly vulnerable groups in need of special protection, such as the Roma, e.g ECtHR, *Oršuš and Others v. Croatia*, No. 15766/03, Judgment [GC] of 16 March 2010, paras.147-148. See further Lourdes Peroni and Alexandra Timmer, *Vulnerable Groups: The promise of an emerging concept in European Human Rights Convention Law*, International Journal of Constitutional Law, Volume 11, Issue No. 4, October 2013 [Link].

[4] ECtHR, *Hassan and Others v. the Netherlands and Italy*, No. 40524/10 and nine other applications, Decision of 27 August 2013, para. 79.

State. However, while Contracting States must not inflict ill-treatment on individuals within their jurisdiction, their positive obligations to ensure adequate living conditions are relatively narrow.

Article 2 ECHR: In *Cyprus v. Turkey*,[5] and subsequently in *Nitecki v. Poland*,[6] the ECtHR held that an issue may arise under Article 2 ECHR "where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally" (para.219). The Court noted that Article 2(1) ECHR requires the State "not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction" (para.219).

Article 3 ECHR: In *Pančenko v. Latvia*,[7] the ECtHR recalled that the ECHR "does not guarantee, as such, socio-economic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living."[8] The applicant, who had been living in Latvia first as a citizen of the U.S.S.R., then as a stateless person, and then as a Ukrainian citizen, had complained that she was suffering from a number of socio-economic problems. The ECtHR held that to the extent that her complaint related to the prohibition against ill-treatment in Article 3 ECHR, her living conditions had not attained "a minimum level of severity" to amount to treatment contrary to Article 3.

In *Larioshina v. Russia*,[9] the applicant, a Russian national, complained about the insufficiency of her State pension and other social benefits. Although the ECtHR considered her application manifestly ill-founded, it did hold that such a complaint could in principle raise an issue under Article 3 ECHR:

> "As to the applicant's complaint about the insufficient amount of pension and the other social benefits which she receives, the Court recalls that, in principle, it cannot substitute itself for the national authorities in assessing or reviewing the level of financial benefits available under a social assistance scheme (see, mutatis mutandis, *Pancenko v. Latvia* …).
>
> […]
>
> This being said, the Court considers that a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman or degrading treatment. However, on the basis of the material in its possession, the Court finds no indication that the amount of the applicant's pension and the additional social benefits has caused such damage to her physical or mental health capable of attaining the minimum level of severity falling within the ambit of Article 3 of the Convention." (para.3)

In *Budina v. Russia*,[10] the ECtHR held that it could not exclude that responsibility of a Contracting State could in principle be engaged under Article 3 ECHR where an individual is wholly dependent on State support but is "faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity". However, on the facts of the case, which again concerned a Russian national complaining about the insufficiency of her State pension, the Court held that the threshold for ill-treatment within the meaning of Article 3 ECHR had not been met:

[5] ECtHR, *Cyprus v. Turkey*, No. 25781/94, Judgment [GC] of 10 May 2001.
[6] ECtHR, *Nitecki v. Poland*, No. 65653/01, Decision of 21 March 2002.
[7] ECtHR, *Pančenko v. Latvia*, No. 40772/98, Decision of 22 October 1998.
[8] See also the earlier case of ECmHR, *Andersson v. Sweden*, No. 11776/85, Decision of 4 March 1986: "the Convention does not as such guarantee the right to public assistance either in the form of financial support to maintain a certain standard of living or in the form of supplying day home care places."
[9] ECtHR, *Larioshina v. Russia*, No. 56869/00, Decision of 23 April 2002.
[10] ECtHR, *Budina v. Russia*, No. 45603/05, Decision (Final) of 18 June 2009.

"In the present case, it cannot be said that the State authorities have imposed any direct ill-treatment on the applicant. The essence of the applicant's complaint is that the State pension on which she depends for her subsistence and livelihood is not sufficient for her basic human needs. The Court cannot exclude that State responsibility could arise for 'treatment' where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity (see *O'Rourke v. United Kingdom*, no. 39022/97, 26 June 2001, where the Court held that the applicant's suffering, notwithstanding that he had remained on the streets for 14 months to the detriment of his health, had not attained the requisite level of severity to engage Article 3 and had, in any event, not been the result of State action rather than his own volition as he had been eligible for public support but had been unwilling to accept temporary accommodation and had refused two offers of permanent accommodation; also see, mutatis mutandis, *Nitecki v. Poland*, no. 65653/01, 21 March 2002, where, in rejecting the applicant's complaint about the State's refusal to refund him the full price of a life-saving drug, the Court noted while Article 2 might be engaged if the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally, in this case 70% of the drug price had been compensated by the State and the applicant only had to stand for the outstanding 30%).

Turning to the facts of the present application, the Court notes that the applicant's income within the period in question was not high in absolute terms. However, the applicant has failed to substantiate her allegation that the lack of funds translated itself into concrete suffering. On the contrary, in her observations the applicant explained that in 2008 her pension was enough for flat maintenance, food, and hygiene items, but was not enough for clothes, non-food goods, sanitary and cultural services, health and sanatorium treatment. Of these latter items, it appears that the applicant was in fact eligible for free medical treatment. While she claimed that in practice the paperwork for sanatorium treatment was prohibitive, she has not shown that essential medical treatment has, for that reason, been rendered unavailable. Indeed there is no indication in the materials before the Court that the level of pension and social benefits available to the applicant have been insufficient to protect her from damage to her physical or mental health or from a situation of degradation incompatible with human dignity (see also *Larioshina* ….). Therefore even though the applicant's situation was difficult, especially from 2004 to 2007, the Court is not persuaded that in the circumstances of the present case the high threshold of Article 3 has been met."

Note also the very different situation in *Moldovan and Others v. Romania (No. 2)*,[11] in which the applicants, Romanian nationals of Roma origin, had been driven out of their homes and their village by a mob, with the collusion of the police, following which they had had to live "in crowded and improper conditions – cellars, hen-houses, stables, etc. – and frequently changed address, moving in with friends or family in extremely overcrowded conditions" (para.103). The ECtHR held that in the special circumstances of the case there had been a violation of Article 3 ECHR in connection with the applicants' living conditions:

"… the applicants' living conditions …, in particular the severely overcrowded and unsanitary environment and its detrimental effect on the applicants' health and well-being, combined with the length of the period [ten years] during which the applicants have had to live in such conditions and the general attitude of the authorities, must have caused them considerable mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement.

… In addition, the remarks concerning the applicants' honesty and way of life made by some authorities dealing with the applicants' grievances … appear to be, in the absence of any substantiation on behalf of those authorities, purely discriminatory. In this connection the Court

[11] ECtHR, *Moldovan and Others v. Romania (No. 2)*, Nos. 41138/98 and 64320/10, Judgment of 12 July 2005.

reiterates that discrimination based on race can of itself amount to degrading treatment within the meaning of Article 3 of the Convention …

Such remarks should therefore be taken into account as an aggravating factor in the examination of the applicants' complaint under Article 3 of the Convention.

[…]

… In the light of the above, the Court finds that the applicants' living conditions and the racial discrimination to which they have been publicly subjected by the way in which their grievances were dealt with by the various authorities, constitute an interference with their human dignity which, in the special circumstances of this case, amounted to 'degrading treatment' within the meaning of Article 3 of the Convention." (paras.110-113)

b) Article 8 ECHR ('Right to respect for private and family life')

Article 8 ECHR
('Right to respect for private and family life')

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Note: For an overview of the different interests protected by Article ECHR, and of the ECtHR's caselaw thereon, see ECtHR, *Practical Guide on Admissibility Criteria*, 3rd edition, 1 January 2014, pages 66 to 77 [Link].

From the ECtHR's case law, it can be concluded that while Article 8 ECHR does not establish a right to be provided with a home, it may create an obligation to secure shelter to particularly vulnerable individuals in exceptional cases.

In *Chapman v. the United Kingdom*,[12] the ECtHR stated that Article 8 ECHR "does not in terms recognise a right to be provided with a home" and "nor does any of the jurisprudence of the Court acknowledge such a right" (para.99). The Court then added:

"While it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision." (para.99)

This does not mean that there is no positive obligation at all under Article 8 ECHR for Contracting States to house the homeless. For example, in *Marzari v. Italy*,[13] the ECtHR had already stated:

"although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual. The Court recalls in this respect that, while the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, this provision does not merely compel the

[12] ECtHR, *Chapman v. the United Kingdom*, No. 27238/95, Judgment [GC] of 18 January 2001.
[13] ECtHR, *Marzari v. Italy*, No. 36448/97, Decision of 4 May 1999.

> State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by an applicant and the latter's private life …"

In *O'Rourke v. the United Kingdom*,[14] the ECtHR recalled that "Article 8 does not in terms give a right to be provided with a home … [and] therefore … the scope of any positive obligation to house the homeless must be limited." In *Yordanova and Others v. Bulgaria*,[15] it added that "an obligation to secure shelter to *particularly vulnerable individuals* may flow from Article 8 of the Convention in *exceptional cases*" (para.130) (emphases added).

The applicants in *Yordanova* were a group of Bulgarian Roma, who were subject to an order for their eviction from an unauthorized makeshift settlement built on municipal land, without plumbing or sewage, which they had occupied for many years as part of a community of several hundred people. The ECtHR held that, if enforced, the eviction order would constitute an interference with their right both to respect for their "homes" and for their "private and family life" within the meaning of Article 8(1) ECHR (paras.102-106). In determining whether the interference would be legitimate within the meaning of Article 8(2) ECHR, the Court held that the eviction order had a valid legal basis in domestic law and pursued a legitimate aim, but that the salient issue was whether it was "necessary in a democratic society" (paras.107&116). In accordance with the Court's established case law, an interference will be considered "necessary in a democratic society" if it answers a "pressing social need" and, in particular, is proportionate to the legitimate aim pursued (para.117). However, the eviction order was not proportionate in the circumstances, given in particular that:

(i) The principle of proportionality requires that "such situations, where a whole community and a long period are concerned, be treated as being entirely different from routine cases of removal of an individual from unlawfully occupied property." While the applicants could not claim any legitimate expectation to remain in the settlement, the fact that their stay and that of their ancestors had *de facto* been tolerated by the authorities for several decades had resulted in them developing strong links with the settlement and building a community life there. (para.121)

(ii) In view of the long history of the tolerated stay of the applicants' families in the settlement and of the community they had formed, the principle of proportionality required that "due consideration be given to the consequences of their removal and the risk of their becoming homeless." However, the Bulgarian authorities had attempted to enforce the eviction order regardless of the consequences, declaring that the risk of the applicants becoming homeless was "irrelevant". (para.126)

(iii) The Bulgarian authorities had not taken into account the applicants' "underprivileged status" as members of an "outcast community" and a "socially disadvantaged group" in deciding on the timing, modalities and, if possible, arrangements for alternative shelter when ordering their eviction:

> "Such social groups, regardless of the ethnic origin of their members, may need assistance in order to be able effectively to enjoy the same rights as the majority population … In the context of Article 8, in cases such as the present one, the applicants' specificity as a social group and their needs must be one of the relevant factors in the proportionality assessment [under Article 8(2) ECHR] that the national authorities are under a duty to undertake." (para.129)

[14] ECtHR, *O'Rourke v. the United Kingdom*, No. 39022/97, Decision of 26 June 2001.
[15] ECtHR, *Yordanova and Others v. Bulgaria*, No. 25446/06, Judgment of 24 April 2012.

> In particular, the applicants' disadvantaged position "could and should have been taken into consideration, for example, in assisting them to obtain officially the status of persons in need of housing which would make them eligible for the available social dwellings on the same footing as others." (paras.128-133)

c) Article 14 ECHR ('Prohibition of discrimination')

> **Article 14 ECHR**
> **('Prohibition of discrimination')**
>
> *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

A discussion of the general principles emerging from the case law on Article 14 ECHR is outside the scope of this manual. However, two cases specifically concerning refugees – *Fawsie v. Greece*[16] and *Saidoun v. Greece*[17] – are discussed in sub-section 2 below. Those cases concerned the discriminatory denial of a family allowance to refugee mothers payable under Greek law to "mothers of large families", in respect of which the ECtHR found a violation of Article 14 ECHR taken in conjunction with Article 8 ECHR due to discrimination on grounds of nationality.

Additionally, the case of *Stec and Others v. the United Kingdom*[18] is of note. That case also concerned the denial of welfare benefits, this time to nationals of the respondent State (the United Kingdom), who alleged discrimination on grounds of sex, on the basis of which they claimed a violation of Article 14 ECHR taken in conjunction with Article 1 of Protocol No. 1:

> **Article 1, Protocol No. 1 to the ECHR**
> **('Protection of property')**
>
> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

In its admissibility decision, the ECtHR reiterated its established caselaw according to which, for Article 14 ECHR to be engaged, the applicants' interests that have been adversely affected must "fall within the ambit" of one of the substantive rights guaranteed by the ECHR, in this case Article 1 of Protocol No. 1:

> "… The Court reiterates that Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions … The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary but it is also sufficient for the facts of the case to fall 'within the ambit' of one or more of the Convention Articles …

[16] ECtHR, *Fawsie v. Greece*, No. 40080/70, Judgment of 28 October 2010.
[17] ECtHR, *Saidoun v. Greece*, No. 40083/07, Judgment of 28 October 2010.
[18] ECtHR, *Stec and Others v. the United Kingdom*, Nos. 65731/01 and 65900/01, Decision [GC] of 6 July 2005.

> … The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court's case-law …
>
> … The Court must decide, therefore, whether the interests of the applicants which were adversely affected by the impugned legislative scheme [regarding welfare benefits] fell within the 'ambit' or 'scope' of Article 1 of Protocol No. 1." (paras.39-41)

The ECtHR continued that although Article 1 of Protocol No. 1 does not require Contracting States to establish a social security scheme, if such a scheme is established it generates a proprietary interest falling within the ambit of that Article:

> "[Article 1 of Protocol No. 1] does not create a right to acquire property. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme … If, however, a Contracting State has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements …" (para.54)

Hence, if a Contracting State decides to create a social security scheme, it must do so in a manner that does not discriminate as to its beneficiaries on the grounds covered by Article 14 ECHR:

> "In cases, such as the present one, concerning a complaint under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 that the applicant has been denied all or part of a particular benefit on a discriminatory ground covered by Article 14, the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question … Although Protocol No. 1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Article 14." (para.55)

Although the ECtHR's subsequent judgment in *Stec and Others* was that the applicants had not been discriminated against on grounds of sex,[19] the case nevertheless establishes the principle that if a Contracting State establishes a social security scheme, be it contributory or non-contributory, the scheme must comply with the requirements of Artcle 14 ECHR.

2. Living conditions of asylum-seekers and refugees

Living conditions not in breach of the ECHR: In *A.N. v. France*,[20] the applicant complained that he was without means and unable to meet his basic needs because he was not authorized to work in France. His application for refugee status had been rejected by the French authorities, who had nevertheless given a formal undertaking to the former European Commission of Human Rights (ECmHR) not to enforce an order prohibiting his entry to France or a decision to expel him to Angola, his country of origin. The ECmHR held:

> "according to established case law, the Convention does not recognise, as such, the right of an individual to enter or reside in a State of which he is not a national … any more than it recognises, as such, the right to work … When examined from this point of view, the complaint must be

[19] ECtHR, *Stec and Others v. the United Kingdom*, Nos. 65731/01 and 65900/01, Judgment [GC] of 12 April 2006.
[20] ECmHR, *A.N. v. France*, No. 24088/94, Decision of 12 October 1994.

> dismissed as being incompatible *ratione materiae* with the Convention, pursuant to Article 27 para. 2 [now Article 35(3)(a)].
>
> When examined under Article 3 of the Convention, the Commission considers that although the applicant is in an extremely difficult position as a result of not being entitled to exercise a professional activity, his situation is not sufficiently serious for him to be considered as being subjected to degrading treatment. It follows that even assuming the applicant has exhausted domestic remedies, his complaint … is manifestly unfounded and must be rejected pursuant to Article 27 para. 2 of the Convention." (para.2)

In *Műslim v. Turkey*,[21] the ECtHR reaffirmed the above ruling in *A.N. v. France* and added that Article 8 ECHR "does not impose a general obligation on Contracting States to provide refugees with financial assistance to enable them to maintain a certain standard of living" (para.85) (unofficial translation from French original). The applicant, an Iraqi national, had been granted "provisional refugee status" by the Turkish authorities, on the basis of which he was provisionally allowed to remain in Turkey in order to seek resettlement to a third country if recognized as a refugee by UNHCR. He complained of a violation by Turkey of Articles 3 and 8 of the ECHR on the grounds that his living conditions were precarious and that he had had to fend for himself without any support from the Turkish authorities. The ECtHR rejected the complaint:

> "the applicant does not appear to be prevented from maintaining the standard of living that he himself chose when he took refuge in Turkey and does not appear to be in a state of need such that this solution is not viable, so as to force him to leave Turkey ... If the situation is difficult for the applicant, it cannot be any worse than for the more impoverished of citizens.
>
> The Court sees nothing … that could engage the responsibility of the respondent State … under Article 8, nor does it find a situation that has assumed such a degree of seriousness that the applicant can be considered as having been subjected to treatment contrary to Article 3." (para. 86) (unofficial translation from French original)

Living conditions in breach of the ECHR: The ECtHR subsequently distinguished *Műslim v. Turkey* in *M.S.S. v. Belgium and Greece*,[22] on the grounds that "the obligation to provide accommodation and decent material conditions to impoverished asylum-seekers" had entered into "positive law" in Greece following that country's transposition of the EU Reception Conditions Directive:

> "… [The Court] considers it necessary to point out that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home (see *Chapman [v. the United Kingdom]* … § 99). Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living (see *Müslim v. Turkey* … § 85 …).
>
> … The Court is of the opinion, however, that what is at issue in the instant case cannot be considered in those terms. Unlike in the above-cited Müslim case … the obligation to provide accommodation and decent material conditions to impoverished asylum-seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community law, namely Council Directive 2003/9/EC laying down minimum standards for the reception of asylum-seekers in the member States ("the Reception Directive" …). What the applicant holds against the Greek authorities in this case is that, because of their deliberate actions or omissions, it has been impossible in practice for him to avail himself of these rights and provide for his essential needs." (paras.249-250)

[21] ECtHR, *Műslim v. Turkey*, No. 53566/99, Judgment of 26 April 2005.
[22] ECtHR, *M.S.S. v. Belgium and Greece*, Appl. No. 30696/09, Judgment [GC] of 21 January 2011.

In determining whether the applicant's living conditions in Greece amounted to a breach of Article 3 ECHR, the Court attached considerable importance to the applicant's status as an asylum-seeker and, as such, "a member of a particularly underprivileged and vulnerable population group in need of special protection". The Court noted the existence of "a broad consensus at the international and European level" concerning this need for special protection, as evidenced by "the [1951] Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the Reception Directive" (para.251).

Given the facts of the case, the Court found that following the "Dublin" transfer of the applicant from Belgium to Greece, the particularly serious situation in which the applicant had been living as a homeless asylum-seeker, for several months with no end in sight, amounted to a violation of Article 3 ECHR:

> "… The Court reiterates that it has not excluded the possibility "that State responsibility [under Article 3] could arise for 'treatment' where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity" (see *Budina v. Russia* (dec.), no. 45603/05, 18 June 2009).
>
> … It observes that the situation in which the applicant has found himself is particularly serious. He allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving. It was to escape from that situation of insecurity and of material and psychological want that he tried several times to leave Greece.
>
> … The Court notes in the observations of the Council of Europe Commissioner for Human Rights and the UNHCR, as well as in the reports of non-governmental organisations … that the situation described by the applicant exists on a large scale and is the everyday lot of a large number of asylum-seekers with the same profile as that of the applicant. For this reason, the Court sees no reason to question the truth of the applicant's allegations.
>
> … The Greek Government argue that the applicant is responsible for his situation, that the authorities acted with all due diligence and that he should have done more to improve his situation.
>
> … [As to whether the applicant should have known about possibilities for accommodation and that he could tell the police that he was homeless, the Court concludes that] the applicant was not duly informed at any time of the possibilities of accommodation that were available to him, assuming that there were any.
>
> … In any event, the Court does not see how the authorities could have failed to notice or to assume that the applicant was homeless in Greece. The Government themselves acknowledge that there are fewer than 1,000 places in reception centres to accommodate tens of thousands of asylum-seekers. The Court also notes that, according to the UNHCR, it is a well-known fact that at the present time an adult male asylum-seeker has virtually no chance of getting a place in a reception centre and that according to a survey carried out from February to April 2010, all the "Dublin" asylum-seekers questioned by the UNHCR were homeless. Like the applicant, a large number of them live in parks or disused buildings …
>
> … Although the Court cannot verify the accuracy of the applicant's claim that he informed the Greek authorities of his homelessness several times prior to December 2009 [when the police asked the Ministry of Health and Social Security to help him find a home], the above data concerning the capacity of Greece's reception centres considerably reduce the weight of the Government's argument that the applicant's inaction was the cause of his situation. In any event,

given the particular state of insecurity and vulnerability in which asylum-seekers are known to live in Greece, the Court considers that the Greek authorities should not simply have waited for the applicant to take the initiative of turning to the police headquarters to provide for his essential needs.

… The fact that a place in a reception centre has apparently been found in the meantime does not change the applicant's situation since the authorities have not found any way of informing him of this fact. The situation is all the more disturbing in that this information was already referred to in the Government's observations submitted to the Court on 1 February 2010, and the Government informed the Grand Chamber that the authorities had seen the applicant on 21 June 2010 and handed him a summons without, however, informing him that accommodation had been found.

… The Court also fails to see how [the fact that he had been issued] a 'pink card' could have been of any practical use whatsoever to the applicant. The law does provide for asylum-seekers who have been issued with 'pink cards' to have access to the job market, which would have enabled the applicant to try to solve his problems and provide for his basic needs. Here again, however, the reports consulted reveal that in practice access to the job market is so riddled with administrative obstacles that this cannot be considered a realistic alternative … In addition, the applicant had personal difficulties due to his lack of command of the Greek language, the lack of any support network and the generally unfavourable economic climate.

… Lastly, the Court notes that the situation the applicant complains of has lasted since his transfer to Greece in June 2009. It is linked to his status as an asylum-seeker and to the fact that his asylum application has not yet been examined by the Greek authorities. In other words, the Court is of the opinion that, had they examined the applicant's asylum request promptly, the Greek authorities could have substantially alleviated his suffering.

… In the light of the above and in view of the obligations incumbent on the Greek authorities under the Reception Directive … the Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum-seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.

… It follows that, through the fault of the authorities, the applicant has found himself in a situation incompatible with Article 3 of the Convention. Accordingly, there has been a violation of that provision." (paras.253-264)

M.S.S. v. Belgium and Greece was the first of only two cases in which the ECtHR has found that the living conditions of an asylum-seeker or refugee have been contrary to Article 3 ECHR.[23] The second case was that of an unaccompanied minor, as discussed below.

[23] Following its ruling in *M.S.S. v. Belgium and Greece*, the ECtHR was called upon to decide in several cases whether Italy had violated the ECHR as regards the living conditions of the individuals concerned. All the individuals had applied for asylum in Italy, and some had subsequently been granted refugee status, subsidiary protection status or residence for humanitarian reasons. However, the Court did not find a violation in any case. See ECtHR, *Hussein and Others v. the Netherlands and Italy*, No. 27725/10, Decision of 2 April 2013, paras. 59-71, 72-73 and 85; ECtHR, *Abubeker v. Austria and Italy*, No. 73874/11, Decision of 18 June 2013, paras. 42 and 53-63; ECtHR, *Hassan and Others v. the Netherlands and Italy*, No. 40524/10 and nine other applications, Decision of 27 August 2013, paras. 166-168 and paras. 172-184. Note also ECtHR, *Halimi v. Austria and Italy*, No. 53852/11, Decision of 18 June 2013, paras. 38 and 62-65, in which

Children: In *Rahimi v. Greece*,[24] the ECtHR found a violation of Article 3 ECHR on account of the applicant, an unaccompanied minor from Afghanistan, being abandoned by the Greek authorities to fend for himself as an illegal alien after being released from immigration detention with an order to leave the country within 30 days. The applicant was not provided with any accommodation by the authorities, or even with a boat ticket to leave the island of Lesbos where he had been detained. He received some initial assistance from the NGO "Prosyfgi" on the day of his release, and then made his way to Athens, where he arrived the following day. He spent the night in the city without shelter and then the next day approached the NGO "Arsis", which took care of him and, four days later, helped him to apply for asylum. Even then the Greek authorities failed to provide him with any accommodation, and it was only one week later that, with the help of "Arsis", he was finally accommodated in a hostel for minors. Four years later, when the ECtHR decided the case, the Greek authorities had still not appointed him with a guardian. (paras.13-17, 87-94)

In determining that the applicant's abandonment by the Greek authorities was contrary to Article 3 ECHR, the ECtHR emphasized the period following his release up until when he was taken care of by "Arsis":

> "[The applicant's] accommodation and, in general, his care were provided solely by local NGOs in Lesbos and Athens which looked into his case before and after his arrival in Athens. The Court considers that due to the behavior of the authorities who demonstrated indifference towards the applicant, the latter must have suffered deep anguish and anxiety, especially from the time of his release up until being taken care of by 'Arsis'. On this point, the Court takes note of the claims of 'Arsis', according to which the applicant, when admitted to the hostel for minors, had difficulty in sleeping without the light on, spoke with difficulty and presented with a strong weight loss." (para.92) (unofficial translation from French original)

Prior to being taken care of by "Arsis", the applicant's status was that of an illegal alien as he had not yet applied for asylum. However, the Court noted that Greece's positive obligations under Article 3 ECHR overrode such considerations:

> "… the applicant's position was characterized by his young age, the fact that he was an illegal immigrant in a foreign country, and the fact that he was unaccompanied and therefore left to his own devices. As regards the absolute protection afforded by Article 3 of the Convention, it should be born in mind that these factors are decisive in this case and take precedence over the applicant's status as an illegal immigrant. He therefore indisputably came within the class of highly vulnerable members of society to whom the Greek State owed a duty to take adequate measures to provide care and protection as part of its positive obligations under Article 3 …" (para.87) (unofficial translation from French original)

In concluding its ruling, the Court considered it helpful to refer to its observations in *M.S.S. v. Belgium v. Greece* regarding "the particular state of insecurity and vulnerability in which asylum-seekers are known to live in Greece" which engaged the responsibility of the Greek authorities "because of their inaction", particularly as regards "the situation in which [M.S.S.] found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs" (para.93) (unofficial translation from French original).

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the Court pointed out that the applicant had not applied for asylum in Italy and therefore could not legitimately claim that he did not have access to the reception schemes reserved for asylum-seekers.

[24] ECtHR, *Rahimi v. Greece*, No. 8687/08, Judgment of 5 April 2011.

The ECtHR later held in *Popov v. France*[25] that, as part of their positive obligations under Article 3, Contracting States owe a special duty of protection not only to unaccompanied minors but also to minors who are accompanied:

> "[The Court finds that the fact that a minor is accompanied] is not capable of exempting the authorities from their duty to protect children and take appropriate measures as part of their positive obligations under Article 3 of the Convention … and that it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant. [The EU Reception Conditions Directive] thus treats minors, whether or not they are accompanied, as a category of vulnerable persons particularly requiring the authorities' attention … The Court would, moreover, observe that the Convention on the Rights of the Child encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents …" (para.91)

Distinction between asylum-seekers and recognized refugees: In *Hassan and Others v. the Netherlands and Italy*,[26] the ECtHR drew a distinction, as regards Contracting States' positive obligations under the ECHR, between the situation of asylum-seekers and the situation of recognized refugees who have been granted rights that put them on a par with the general population of the host State:

> "The Court reiterates that asylum seekers, i.e. persons seeking refuge, are an underprivileged and vulnerable population group requiring special protection in the form of basic reception facilities pending the determination of their asylum request … The Court is nevertheless of the view that the situation of asylum seekers cannot be equated with the lawful stay of a recognised refugee who has been explicitly granted permission to settle in the country of refuge, such as the applicants … whose Italian asylum-based residence permit put them on a par, as regards rights and obligations under Italian domestic law, with the general population in Italy …" (para.179)

Non-discrimination: In *Fawsie v. Greece*[27] and *Saidoun v. Greece*,[28] the ECtHR found that Greece had violated Article 14 ECHR in conjunction with Article 8 ECHR because it had discriminated against the applicants on grounds of nationality in refusing to pay them the family allowance that was payable under Greek law to "mothers of large families". The applicants were recognized refugees from Lebanon and Syria, and had been refused the family allowance on the grounds that they did not meet the criteria stipulated by the national legislation in force at the time, according to which they or their children had to be nationals of Greece or an EU Member State, or refugees of Greek origin.

In determining that the case fell to be considered under Articles 8 and 14 of the ECHR, the Court stated:

> "… As the Court has held on many occasions, Article 14 comes into play whenever 'the subject-matter of the disadvantage...constitutes one of the modalities of the exercise of a right guaranteed' … or the measures complained of are 'linked to the exercise of a right guaranteed' …
>
> … The Court considers first of all that the refusal of the authorities to grant the applicant the allowance for large families was not aimed at breaking up her family, nor did it have such an effect, since Article 8 does not impose any positive obligation on States to provide the financial assistance in question …

[25] ECtHR, *Popov v. France*, No. 39472/07, Judgment of 19 January 2012.
[26] ECtHR, *Hassan and Others v. the Netherlands and Italy*, No. 40524/10 and nine other applications, Decision of 27 August 2013, para. 79.
[27] ECtHR, *Fawsie v. Greece*, No. 40080/70, Judgment of 28 October 2010.
[28] ECtHR, *Saidoun v. Greece*, No. 40083/07, Judgment of 28 October 2010.

> … Nevertheless, the Court has previously held that, by granting benefits to large families, States are able to 'demonstrate their respect for family life' within the meaning of Article 8 and that such benefits therefore fall within the scope of Article 8. Accordingly, Article 14 taken in conjunction with Article 8, is applicable …" (*Fawsie*, paras.26-28; *Saidoun*, paras.26-28) (unofficial translation from French original)

The Court noted that previously in similar cases concerning the granting of welfare benefits to the families of non-nationals, it had found a violation of Article 14 taken in conjunction with Article 8 on the grounds that the authorities had not provided any "reasonable justification" for the practice of excluding non-nationals who were lawfully settled in the countries concerned from entitlement to certain allowances on the sole basis of their nationality. In the present two cases, the Greek authorities claimed that such exclusion was justified by the need for Greece to deal with its demographic problem. However, while the ECtHR did not call into question the legitimacy of that aim, it did not agree with the Greek authorities on the relevance of the chosen eligibility criterion – based mainly on Greek nationality or Greek origin – especially as it was not uniformly applied in the national legislation and jurisprudence prevailing at the material time. (*Saidoun*, paras.33-36; *Fawsie*, paras.31-34)

The Court recalled its previous case law according to which only very strong considerations could lead it to consider a difference in treatment exclusively based on nationality to be compatible with the ECHR. It pointed out *inter alia* how the Greek authorities themselves had over a period of eleven years progressively broadened the criteria as to the nationalities which were eligible for the large family allowance, and also that Article 23 of the 1951 Refugee Convention, to which Greece was a party, requires States to grant to refugees lawfully staying on their territory the same treatment with respect to public relief and assistance as is accorded to their nationals. (*Saidoun*, paras.37-41; *Fawsie*, paras.35-39)

The Court concluded that the refusal to grant the applicants the allowance for mothers of large families did not have a "reasonable justification" and therefore violated Article 14 ECHR in conjunction with Article 8 ECHR. (*Saidoun*, para.42, *Fawsie*, para.40)

C. Table of cases

Judgments and decisions of the ECtHR

Abubeker v. Austria and Italy, No. 73874/11, Decision of 18 June 2013 [Link: Decision]

Airey v. Ireland, No. 6289/73, Judgment of 9 October 1979 [Link: Judgment]

Budina v. Russia, No. 45603/05, Decision (Final) of 18 June 2009 [Links: Decision | Case summary]

Chapman v. the United Kingdom, No. 27238/95, Judgment [GC] of 18 January 2001 [Link: Judgment]

Cyprus v. Turkey, No. 25781/94, Judgment [GC] of 10 May 2001 [Link: Judgment]

Fawsie v. Greece, No. 40080/70, Judgment of 28 October 22010 [Links: Judgment (French only) | Case summary]

Halimi v. Austria and Italy, No. 53852/11, Decision of 18 June 2013 [Link: Decision]

Hassan and Others v. the Netherlands and Italy, No. 40524/10 and nine other applications, Decision of 27 August 2013 [Link: Decision]

Hussein and Others v. the Netherlands and Italy, No. 27725/10, Decision of 2 April 2013 [Links: Decision | Case summary]

Larioshina v. Russia, No. 56869/00, Decision of 23 April 2002 [Link: Decision]

M.S.S. v. Belgium and Greece, No. 30696/09, Judgment [GC] of 21 January 2011 [Links: Judgment | Case summary | UNHCR written submission | UNHCR oral submission]

Marzari v. Italy, No. 36448/97, Decision of 4 May 1999 [Link: Decision]

Moldovan and Others v. Romania (No. 2), Nos. 41138/98 and 64320/10, Judgment of 12 July 2005 [Link: Judgment | Case summary]

Műslim v. Turkey, No. 53566/99, Judgment of 26 April 2005 [Link: Judgment (French only)]

Nitecki v. Poland, No. 65653/01, Decision of 21 March 2002 [Link: Decision]

O'Rourke v. the United Kingdom, No. 39022/97, Decision of 26 June 2001 [Link: Decision]

Oršuš and Others v. Croatia, No. 15766/03, Judgment [GC] of 16 March 2010 [Link: Judgment | Case summary]

Pančenko v. Latvia, No. 40772/98, Decision of 22 October 1998 [Link: Decision]

Popov v. France, No. 39472/07, Judgment of 19 January 2012 [Links: Judgment (French) | Judgment (English, extracts only) | Case summary]

Rahimi v. Greece, No. 8687/08, Judgment of 5 April 2011 [Links: Judgment (French only) | Case summary]

Saidoun v. Greece, No. 40083/07, Judgment of 28 October 2010 [Links: Judgment (French only) | Case summary]

Stec and Others v. the United Kingdom, Nos. 65731/01 and 65900/01, Decision [GC] of 6 July 2005 [Link: Decision]

Stec and Others v. the United Kingdom, Nos. 65731/01 and 65900/01, Judgment [GC] of 12 April 2006 [Links: Judgment | Case summary]

Yordanova and Others v. Bulgaria, No. 25446/06, Judgment of 24 April 2012 [Links: Judgment | Case summary]

Decisions of the ECmHR

A.N. v. France, No. 24088/94, Decision of 12 October 1994 [Link: Decision]

Andersson v. Sweden, No. 11776/85, Decision of 4 March 1986 [Link: Decision]