

*Judicial Training Project*

***Roadmap to European Effective Justice (Re-Jus): Judicial Training  
Ensuring Effective Redress to Fundamental Rights Violations***

# **RE-JUS CASEBOOK**

## **EFFECTIVE JUSTICE IN ASYLUM AND IMMIGRATION**



THE RE-JUS PROJECT IS CO-FUNDED  
BY THE JUSTICE PROGRAMME OF THE  
EUROPEAN UNION  
(JUST/2015/JTRA/AG/EJTR/8703)

*A analysis of the judicial dialogue developing between European and national courts on the application of the EU principles of effectiveness, proportionality and the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, in matters related to asylum and immigration*

*Date of publication: 31<sup>st</sup> October 2018*

*Coordinating Partner:*

University of Trento (*Italy*)

*Main Partners:*

University of Versailles Saint Quentin-end-Yvelines (*France*)

Institute of Law Studies of the Polish Academy of Sciences (*Poland*)

University of Amsterdam (*The Netherlands*)

*Associate Partners:*

Scuola Superiore della Magistratura (*Italy*)

Consejo General del Poder Judicial (*Spain*)

Institutul National al Magistraturii (*Romania*)

Pravosudna Akademija (*Croatia*)

Ministrstvo za pravosodje Republika Slovenije (*Slovenia*)

Judicial Studies Committee of the Irish Judiciary (*Ireland*)

Coordinator of the Re-Jus Project:

Fabrizio Cafaggi

Coordination team

Paola Iamiceli (*Coordinator of Re-Jus teams*)

Pietro Antonio Messina (*Project Manager*)

Coordinator of the team of legal experts on Immigration and Asylum:

Madalina Moraru

Co-authors of this Casebook (in alphabetical order):

Madalina Moraru

Simone Penasa

Davide Strazzari

Note on national experts and collaborators:

The Re-Jus team would like to thank all the judges, experts and collaborators who contributed to the project and to the casebook (in alphabetical order):

*Lavinia Gabriela Barbu*, Judge, Craiova Court of Appeal, Romania

*Aurélie Bretonneau*, rapporteur public at the French Conseil d'État

*Maria Cristina Contini*, Judge Tribunal of Turin, Italy

*Claudiu Dragusin*, Judge Court of first instance of Bucharest, Romania

*Shauna Gillan*, Judge at the International Protection Appeals Tribunal, Ireland

*Martina Flamini*, Judge Tribunal of Milano, Italy

*Polina Frida*, Administrative Court of Athens - First Instance (23rd division), Greece

*Ilias Kouvaras*, Judge at the Administrative Court of First Instance of Kalamata, Greece

*Irmantas Jarukaitis*, Vice-President, Judge Supreme Administrative Court of Lithuania

*Villem Lapimaa*, Court of Appeal of Tallinn, Estonia

*Grusa Matevzic*, Legal Officer within the refugee program at the Hungarian Helsinki Committee (lawyer)

*Claudia Pretto*, ASGI

*Dobroslav Rukov*, Judge at Sofia City Administrative Court, Bulgaria

*Karolina Rusiłowicz*, The Helsinki Foundation of Human Rights

*Carlos Sanchez Sanz*, Juzgado de lo contencioso administrativo numero 1 de Soria, Spain

*Lilly Weidemann*, Administrative Court Bremen, Germany

*Bostjan Zalar*, Administrative Court of Slovenia

## *Table of contents*

### INTRODUCTION: A BRIEF GUIDE TO THE CASEBOOK

Aims of the Casebook.....	6
Areas covered .....	9
Methodology.....	10
Structure.....	12
<b>1. THE IMPACT OF ART. 47 EU CHARTER AND PRINCIPLES OF EFFECTIVENESS OF EU LAW AND NON-REFOULEMENT ON EVIDENTIAL PROCEDURAL RULES</b>	
1.1. Burden of proof.....	15
1.2. Duty of cooperation .....	15
1.3. Elements of evidence .....	15
1.4. Standard of proof and benefit of doubt .....	16
1.5. National legal contexts on evidential procedures in asylum adjudication: variety of types of jurisdiction and judicial review powers.....	16
1.6. Burden of proof.....	19
Question 1 – What main duties have the CJEU and ECtHR jurisprudence imposed on national procedural principles governing the burden of proof?.....	20
1.7. Duty of cooperation .....	22
Question 1 – What are the duties of national courts regarding the burden and standard of proof for recognising subsidiary protection under Article 15(c) Qualification Directive? .....	26
Question 2 – The extent of the duty of cooperation of the national court.....	35
1.8. Elements of evidence which can be taken into consideration by the national authorities for the purpose of establishing the risk of persecution .....	38
Question 1 – Are restrictions on evidence in cases of renewal of subsidiary protection compatible with the principles of <i>non-refoulement</i> and effectiveness?.....	40
1.9. Standard of proof – what needs to be proven and circumstances alleviating the duty to substantiate the application .....	42
Question 1 – What is the standard of proof in cases of persecution on grounds of political opinion required under Article 4 Recast Qualification Directive read in light of the principle of effectiveness? .....	47
Question 2 – How are national courts implementing the requirements of Article 7 EU Charter, the CJEU jurisprudence, and Article 4 Qualification Directive on the standard of proof and benefit of doubt principle in cases regarding international protection on the basis of persecution for homosexual orientation? .....	50
Guidelines for judges emerging from the analysis.....	52
On the burden of proof.....	52
On the duty of cooperation.....	54
On the elements of evidence .....	55
On the standard of proof and the benefit of the doubt.....	56
On judicial dialogue: conclusions resulting from the national caselaw .....	57
<b>2. THE RIGHT TO BE HEARD .....</b>	<b>59</b>
2.1. The Right to be Heard during the Administrative Phase of International Protection Proceedings .....	60
Question 1 – Does a third country national have an individual right to be heard during subsidiary protection proceedings, when these are provided as a separate domestic proceeding following the asylum proceedings? What is the content of the right to be heard of an applicant for subsidiary protection as developed by the CJEU? .....	64
2.2. The Right to an Oral Hearing before a Court.....	70
Question 1 – Does an asylum seeker have a right to an oral hearing before the court? .....	71
2.3. The Right to be Heard in Return Proceedings .....	79
Question 1 – What is the legal status and content of the right to be heard in return proceedings? .....	81
Question 2 – What is the remedy for violations of the right to be heard in return proceedings? .....	86
2.4. The Right to be Heard in Collective Expulsion Cases .....	89
2.5. Guidelines for judges emerging from the analysis.....	90
<b>3. THE RIGHT OF ACCESS TO A COURT.....</b>	<b>85</b>

3.1.	Prohibitive Limitations to the Right of Access to an Independent Judge .....	97
	Question 1 – Is there an obligation under Article 47 EU Charter to ensure access to a court hearing an appeal against the Consulate’s decision refusing the issuance of a visa? .....	97
	Question 2 – Is the right to an effective remedy permitting access to a court by individual application when the national legislation provides only for <i>ex officio</i> review? .....	100
3.2.	Restrictive Limitations in Procedural Norms: Conformity of New Judicial and Quasi-Judicial Bodies with the Right to an Effective Remedy.....	103
	Question 1 – Is the Irish legislation establishing the Irish Refugee Appeals Tribunal compatible with Article 39 Asylum Procedure Directive (current Article 46 Recast Asylum Procedure Directive) and Article 47 EU Charter? .....	104
	Question 2 – Was the creation of the Greek Independent Appeals Committees conform with the right to an effective remedy?.....	110
3.3.	Procedural Restrictive limitations: time-limits in asylum procedures .....	111
	Question 1 – What is the impact of the principles of equivalence and effectiveness on domestic procedural time limits in asylum adjudication? .....	112
	Question 2 – What are the requirements of the right to an effective remedy on time limits in accelerated procedures and intensity of judicial review .....	115
3.4.	Access to Justice as a State Obligation to Remove Practical Barriers that Prevent an Individual from effectively Exercising the Right to an Effective Remedy: Legal Aid .....	118
	Question 1 – What is the impact of Article 47 EU Charter on national rules limiting access to legal aid in asylum claims .....	119
	Question 2 – Does Art. 47 EU Charter require a late appeal be admitted in cases where there was no effective access to legal aid?.....	120
3.5.	Guidelines for judges emerging from the analysis .....	122
	Effective remedy and limitations to access a Court: .....	122
	Effective remedy and right to access an independent Court .....	123
	Effective remedy and strict time limits to lodge an appeal: asylum procedures .....	123
	Right to an effective remedy and positive duties on Member States to make access to a judge effectively available: legal aid.....	124
<b>4.</b>	<b>RIGHTS OF DEFENCE IN CASES REGARDING NATIONAL SECURITY .....</b>	<b>125</b>
4.1.	Short introduction: Comparative overview of issues at national and European level .....	125
	Short overview of EU and ECHR standards .....	127
	Questions addressed.....	130
	Question 1 - What is the scope of disclosure of evidence under Article 47 EU Charter in national security cases? .....	131
	Question 2 – Is the special procedure of nominating security cleared advocates in national security cases in conformity with Article 47 EU Charter and Article 6 ECHR? .....	137
	Question 3 – What is the meaning of ‘essential grounds’ to be disclosed in national security cases? .....	140
4.2.	Guidelines for judges emerging from the analysis.....	145
	General conclusions developed by the CJEU on limitations to the right to an effective remedy on the basis of national security concerns:.....	145
	General conclusions regarding the impact of the ZZ preliminary rulings on the personal scope of application of the principles developed by the CJEU under Article 47 EU Charter .....	146
	General conclusions regarding the conformity of the special procedure of nominating security cleared advocates in national security cases with Article 47 EU Charter and Article 6 ECHR .....	147
	General conclusions regarding the meaning of ‘essential grounds’ to be disclosed in national security cases.....	147
<b>5.</b>	<b>THE IMPACT OF THE RIGHT TO AN EFFECTIVE REMEDY ON JUDICIAL REVIEW POWERS .....</b>	<b>148</b>
5.1.	Ex nunc and full assessment of facts and law .....	149
	Question 1 - What are the judicial review requirements developed by the CJEU in <i>Mahdi</i> .....	149
	Question 2 - What is the impact of the <i>Mahdi</i> preliminary ruling on judicial review powers within return proceedings? .....	152
	Question 3 - Cross-sectorial Impact of the Mahdi preliminary ruling – detention under the Dublin III Regulation .....	155
5.2.	The impact of the principles of proportionality and good administration on remedies to asylum and immigration detention .....	159
	Question 1 – What is the impact of the principle of good administration on the legality of asylum detention.....	160

Question 2 – What is the impact of the principle of proportionality in detention cases: Alternative measures in return proceedings .....	162
Question 3 – What is the impact of the principle of proportionality in detention cases: Shorter detention period as a new remedy established ex officio by the national court .....	163
Question 4 – What kind of remedies for unlawful detention: Compensation .....	165
5.3. Extending Judicial Review in Dublin transfers Cases based on Articles 4 EU Charter.....	168
5.4. Reformatory Judicial Powers Necessary to Ensure Respect of the Right to an Effective Remedy .....	170
Question 1 – Can the right to an effective remedy require reformatory powers from national courts? .....	170
<b>6. RIGHT TO AN EFFECTIVE REMEDY AND SUSPENSIVE EFFECT OF APPEAL .....</b>	<b>173</b>
6.1. The Right to Remain on the Territory and Suspensive Effect of Appeal.....	174
Question 1 – Does Article 47 EU Charter require an automatic suspensive effect of appeal in accelerated asylum procedure?.....	176
Question 2 – What is the scope of suspensive effect of appeal under the right to an effective remedy – one or two levels of jurisdiction? .....	183
5.2 Suspensive effect of appeal in return proceedings .....	188
Question 1.a – Automatic suspensive effect of appeal on the basis of absolute fundamental rights – Articles 19(2) and 47 EU Charter .....	189
Question 1.b – Can there be an automatic suspensive effect of appeal on the basis of relative fundamental rights: Articles 8 ECHR and 7 Charter.....	195
1. Guidelines for judges emerging from the analysis .....	196
<b>7. AGE ASSESSMENT AND EFFECTIVE JUDICIAL REMEDY AGAINST AGE ASSESSMENT PROCEDURE AND OUTCOMES .....</b>	<b>199</b>
7.1. Age assessment: Effective remedies against age assessment and the scope of judicial review of unfair administrative evaluation.....	199
Question 1 – The Evaluation of the Appropriateness of Standards Implemented during the Age Assessment Procedure .....	203
7.2. Guidelines for judges emerging from the analysis.....	207
<b>8. IMPACT OF ARTICLE 47 EU CHARTER AND GENERAL PRINCIPLES OF EU LAW ON ASYLUM AND IMMIGRATION ADJUDICATION: COMPARATIVE PRELIMINARY REMARKS .....</b>	<b>209</b>
Mapping the type and levels of jurisdiction in asylum and return proceedings .....	209
Investigative powers .....	211
Scope of judicial review powers (scope of assessment).....	212
Intensity of judicial review powers (remedial powers) .....	213
Preliminary conclusions on judicial dialogue in asylum and immigration .....	215

# Introduction: a brief guide to the Casebook

## Aims of the Casebook

The *Re-Jus Casebook on Effective Justice in Asylum and Immigration* aims to showcase the added value of Article 47 of the EU Charter of Fundamental Rights (EU Charter) (*right to fair trial and effective remedy*), Article 41 EU Charter (*right to good administration*), and of the general EU law principles of good administration, and effective judicial protection, equivalence, effectiveness and proportionality in the field of asylum and immigration. The Casebook also discusses the complementary added value of Articles 3, 5(1)(f), 8 and 13 of the European Convention on Human Rights (ECHR). By ‘added value’ we mean the real and potential impact of EU law principles and fundamental rights on EU law and domestic law of the Member States. In particular, the ways in which they clarify abstract EU law notions, rules, individual rights, State obligations and the scope of the powers and duties of national courts.

The Casebook aims to look also beyond the content of the two EU Charter rights we analyse, Articles 41 and 47, to the wider impact of the general principles of EU law, such as the right to good administration, rights of defence, and effective judicial protection. We discuss the impact of these principles on the interpretation and application of asylum and immigration laws by national courts. The caselaw of the Court of Justice of the European Union (CJEU) in the area of asylum and immigration has shown that the codification of fundamental rights in the EU Charter has not deprived the general principles of EU law of their relevance. For instance, the principle of the rights of defence is playing a major role in asylum and irregular migration. While the Return Directive (2008/115/EC) does not provide for an express right to be heard, such a right has been developed by the CJEU in the administrative phase of return proceedings on the basis of the general principle of rights of defence (see, the right to be heard in the *Mukarubega*, *Boudjlida* and *M.M.* cases<sup>1</sup>).

The Casebook will discuss the differences between the fundamental rights enshrined in Articles 41 and 47 of the EU Charter and other principles of EU law, such as the rights of defence and the general principles of equivalence, effectiveness, and proportionality. In short, while the principles of equivalence, effectiveness and proportionality are overarching constitutional principles which constrain how domestic procedures should work, in general terms, other principles, such as effective judicial protection, relate to particular stages of the asylum and return procedures, notably the judiciary stage. The Casebook (in particular *Chapter 2 - The Right to be Heard*) aims to clarify the relationship between general EU law principles and particular fundamental rights that have similar substantive content, for example: Article 41 EU Charter and the general principle of good administration. While Article 41 does not apply to Member States when acting within the scope of EU law, but only to the EU institutions, bodies and agencies, the general principle of good administration does apply to the Member States when acting within the scope of EU law (see further *Chapter 2 – The Rights to be Heard*). Within each Chapter, the reader will find examples of the impact of the relevant fundamental rights and general principles of EU law at a domestic level in different Member States.

---

<sup>1</sup> C-166/13, *Mukarubega*, ECLI:EU:C:2014:2336; C-249/13, *Boudjlida*, ECLI:EU:C:2014:2431; C-277/11, *M.M. (1)*, ECLI:EU:C:2012:744; C-560/14, *M.M. (2)*, ECLI:EU:C:2017:101.

The Casebook aims to show the contribution of European and national courts to the interpretation and application of codified norms. The majority of EU countries<sup>2</sup> have continental civil legal systems, whereby the main source of rights, obligations and duties is a codified law – this includes EU secondary asylum and immigration law and the domestic transposing legal systems. However these codified laws shall be interpreted in light of the case law of the CJEU and the European Court of Human Rights (ECtHR). Both courts have developed a robust body of jurisprudence which has elaborated on the scope of individual rights, State obligations and the judicial powers and duties of domestic courts. This complements the legal framework at EU and national level. For instance, the courts have provided clarification of the right to be heard of the irregular migrant within the framework of return proceedings by interpreting it as part of the general principle of EU law of rights of defence. The courts have also expanded on issues like: the *ex nunc* and full assessment of facts and law in asylum and return adjudication; the duty of cooperation of national courts and State bodies in international protection proceedings; and the suspensive effect of appeals in international protection and return proceedings where there is a risk of exposing the individual to a violation of his fundamental rights. These examples reflect the importance of the European courts in clarifying the sometime unclear and abstract EU secondary legal provisions.

The focus of the Casebook is on both European and national jurisprudence interpreting the fundamental rights and general principles of EU law as limits to the Member States' discretionary powers in the field of asylum and immigration.<sup>3</sup> While the Recast Directives on asylum procedure, reception and qualification have codified the standards of the ECtHR and CJEU more than the previous set of asylum Directives, and thus introduced higher standards of fundamental rights protection, they still have gaps in fundamental rights protection and normative clarity. The EU Charter and the general principles of EU law are primary EU law and, as such, the EU Directives and national implementing legislation must be interpreted in line with them.<sup>4</sup> If the EU secondary legal provisions appear to be in conflict with the EU Charter or general principles of EU law, then national courts could consider to address a preliminary reference to the CJEU to clarify the matter. If national legislation or practice, falling within the scope of EU law, is in contrast with the EU Charter or general principles of EU law, then national courts are required to first try to remedy the conflict by way of conform interpretation<sup>5</sup>, and should this judicial interaction technique not be sufficient,<sup>6</sup> than on the basis of the *Simmenthal* doctrine,<sup>7</sup> national courts are required to disapply national legislation, without the need to wait for the legislator to remedy the conflict.<sup>8</sup>

---

<sup>2</sup> The main exceptions are Ireland and the United Kingdom who have common law legal systems.

<sup>3</sup> Case C-650/13, *Delvigne*.

<sup>4</sup> See Case C-601/15 PPU, *J. N. v. Staatssecretaris van Veiligheid en Justitie*, EU:C:2016:84; Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd*, ECLI:EU:C:2014:238.

<sup>5</sup> C-106/89, *Marleasing*, ECLI:EU:C:1990:395.

<sup>6</sup> Case C-282/10, *Dominguez*, ECLI:EU:C:2012:33.

<sup>7</sup> See Case C-236/09, *Test Achats*, ECLI:EU:C:2011:100; In *Volker und Markus Schecke* (Joined cases C-92/09 and C-93/09, *Volker und Markus Schecke*, ECLI:EU:C:2010:662), the CJEU found a provision requiring publication of personal data of natural persons who are beneficiaries of European agricultural finance to be contrary to Articles 7 and 8 EU Charter; <sup>7</sup> Joint cases C-293/12, C-594/12, *Digital Rights Ireland and Seitlinger v. Austrian Minister for Communications, Marine and Natural Resources*, ECLI:EU:C:2014:238.

<sup>8</sup> See C-106/77, *Simmenthal*, ECLI:EU:C:1978:49; Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratssstelle für Getreide und Futtermittel*, EU:C:1970:114 For more details on judicial interaction techniques, see JUDCOOP European Judicial Cooperation and Fundamental Rights: Practical Guidelines, available at: <https://www.eui.eu/Projects/CentreForJudicialCooperation/Documents/JUDCOOPdeliverables/JUDCOOPdeliverables/JUDCOOP%20Guidelines%20-%20English%20Version.pdf>



Although the Casebook focuses on the impact of the rights to a fair trial and effective remedy, and the general principles of EU law, it also includes the added value of landmark jurisprudence of the ECtHR. The jurisprudence of both CJEU and ECtHR is equally binding on the Member States. In certain areas the courts have developed complementary rules (see in particular the section on the duty of cooperation within asylum procedures). The ECtHR continues to be the venue for significant litigation on asylum and immigration, and has recently held that the domestic asylum and/or immigration procedures or practices in Belgium, France, Greece, Italy, Spain, and Sweden did not ensure effective legal protection.<sup>9</sup> It should be recalled that the ECHR is binding on the Member States not only directly, as signatories of the Convention, but also via general principles of EU law. According to Article 6(3) TEU, Convention rights “shall constitute general principles of the Union's law.”

It is important to mention a main distinction between the ECHR and EU legal orders in the field of asylum and immigration. Namely, that apart from Article 4, Protocol 4, the ECHR does not have any express reference to migration/asylum<sup>10</sup>. Overall it has more limited procedural guarantees than the EU Charter. Article 6 ECHR (*right to a fair trial*) is not applicable to asylum and immigration. Article 13 ECHR (*right to an effective remedy*), is only applicable when read together with another Convention right, and then only secures an effective *legal* remedy, as distinct from an effective *judicial* remedy; the latter, stronger protection is provided by Article 47 EU Charter. These shortcomings have not stopped the ECtHR from developing a dynamic interpretation of these ECHR rights in the field of asylum and immigration, which has given rise to concrete standards and norms. The majority of the ECtHR case law relevant to asylum / immigration has developed under Articles 3 (*prohibition of torture and ill treatments*), 5(1)(f) (*right to liberty*) and 8 (*right to private and family life*) together with Article 13 ECHR. Given the importance of these rights in the asylum / immigration context, each chapter of the Casebook includes a short overview of relevant standards developed by the ECtHR. As will be observed, the ECtHR has developed more detailed rules than the CJEU in certain fields (e.g. on evidential procedural rules).

The Chapters each include case examples clustered under relevant questions, all framed within the structure of judicial dialogue between European and national courts. A central purpose of the Re-Jus project is to offer examples of how judicial dialogue and cooperation have contributed to the impact of Article 47 EU Charter and general principles of EU law in the field of asylum and immigration. In order to achieve this, the Casebook maps out the existing and emerging patterns, mechanisms and techniques of judicial dialogue and cooperation and presents their concrete outcomes in the field of asylum and migration. These strands of judicial interaction are sometimes *vertical*, for example arising between the national and European courts. They may also be *horizontal*, arising between national courts from the same or different Member States, on the one hand, and between the CJEU and the ECHR, on the other. The impact of judicial dialogue on national jurisprudence, legislation, and administrative practice will be discussed. The analysis will cover a variety of Member States, in order to demonstrate how a preliminary reference or international judgment is applied at the domestic level, and also to identify whether divergent jurisprudence needs particular techniques of judicial dialogue to provide redress for an inconsistency.

---

<sup>9</sup> *I.M. v France*, Appl. No 9152/09 (ECtHR, 2 February 2012); *Hirsi Jamaa v Italy*, Appl. No. 27765/09 (ECtHR, 23 February 2012); *Singh v Belgium*, Appl. No. 33210/11 (ECtHR, 2 October 2012); *me v France*, Appl no 50094/10 (ECtHR, 6 June 2013); *Mohammed v Austria*, Appl no 2283/12 (ECtHR, 6 June 2013); *ac v Spain*, Appl no 6528/11 (ECtHR, 22 April 2014).

<sup>10</sup> Unlike the EU Charter (e.g. Article 18, Article 19(2)).

The ultimate purpose of the Casebook is to facilitate learning and the exchange of knowledge and ideas between national and European judges, lawyers and other legal practitioners and academics for the purpose of ensuring an effective, coherent implementation of EU law that secures effective justice.

Learning outcomes: With this Casebook, we aim to explain what is required by the EU Charter and general principles of EU law in terms of the right to fair trial and to an effective remedy in the area of asylum and immigration. In particular we focus on the following questions:

- Why an effective remedy is needed in the asylum procedure;
- The types of decisions that require an effective remedy;
- Whether Article 47, the right to a fair trial and effective remedy, has facilitated the judicial development of effective remedies and procedures in asylum and return proceedings;
- Whether Articles 3, 5(1)(f) and 8 jointly with Article 13 ECHR have contributed to clarifying, restricting, or adding standards to the EU asylum and return laws;
- The scope and intensity of judicial review according to Article 47 EU Charter and the principle of good administration;
- Whether Article 41 EU Charter has added something to EU secondary legislation – asylum compared to return – according to the CJEU;
- Whether Article 47 EU Charter has added something to the EU secondary legislation in order to guarantee substantive, procedure and remedial protection of EU law rights related to international protection and return proceedings;
- The added value of effectiveness, equivalence, and proportionality;
- The different weight to be applied to general principles of EU law and Charter provisions when interpreting primary and secondary legislation.

## Areas covered

The Casebook covers substantive areas that relate in particular to asylum and immigration procedures, and detention. For example:

- Recast Asylum Procedures Directive<sup>11</sup>: Right to remain (Article 9); Requirements for the examination of asylum application (Article 10(3)); Procedural guarantees (Articles 12 and 46); Right to be informed; Right to an interpreter; Right to counselling; Right to be given notice in reasonable time of the decision and to be informed of decision in a language they understand in absence of legal adviser or counsellor; Right to an effective remedy; Right to legal and procedural information and assistance (Articles 19-23); Personal interview (Articles 14-17); Protection of confidentiality (Article 15(2) and Articles 30 and 48); Right not to be detained (Article 26); Additional guarantees for applicants in need of special protection (Article 24); Additional guarantees for unaccompanied minors (Article 25); Right to a representative; Interviews to be conducted by a person having the necessary knowledge of the needs of minors; best interests of the child; right to an effective remedy before a court or tribunal (Article 46).
- Recast Reception Conditions Directive<sup>12</sup> (detention - Articles 8-11).

---

<sup>11</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L 180, 29.6.2013, p. 60–95.

<sup>12</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection OJ L 180, 29.6.2013, p. 96–116.

- Revised Qualification Directive<sup>13</sup>: in particular, Article 4 on assessment of facts and law.
- Dublin III Regulation<sup>14</sup> (detention - Article 28).
- Return Directive<sup>15</sup>: in particular Chapter III on procedural guarantees, and Article 15 on detention.

Asylum and immigration are addressed separately or integrated within the selected seven chapters. Where the level of harmonisation is similar for both asylum and immigration (i.e. national security, public order) the cases are analysed within the same questions. Where the level of harmonisation is different, or there is a high number of relevant reported cases, the areas are discussed separately. The Casebook highlights instances where principles, rules or rights developed by the European courts in one specific area have been applied to another. For instance, the right to be heard of an individual, although initially developed by the CJEU in the context of return proceedings (*Boudjlida*), has transcended also to asylum (*M.M.(2)*) (see further Chapter 2 – The right to be heard). Similarly, the suspensive effect of appeals, derived from Articles 19(2) and 47 EU Charter, has transcended return proceedings to asylum adjudication (see *Abdida*<sup>16</sup> and *Tall*<sup>17</sup> in Chapter 6 - Right to an Effective Remedy and Suspensive Effect of Appeal).

## Methodology

*The Re-Jus Casebook on effective justice in the field of asylum and immigration* is the result of a productive collaboration between academics and judges of multiple European countries. This collaboration permitted us to combine academic methodologies with judicial practices, and provided the authors with rich comparative material. We firmly believe that transnational training of judges should be based on a rigorous analysis of judicial dialogue between national and European courts and, where it exists, among national courts. The Casebook is a working tool rather than the final product of the training. The Re-Jus Project aims to create a learning community composed of different professional skills. This Casebook will evolve both in content and method over time with additional suggestions coming from its use in training events.

The selection of the issues was dictated by the following criteria:

- Current problems or issues submitted by the Re-Jus participants, which indicate common problems across different EU Member States;

---

<sup>13</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted OJ L 337, 20.12.2011, p. 9–26.

<sup>14</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person OJ L 180, 29.6.2013, p. 31–59.

<sup>15</sup> 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 OJ L 348, 24.12.2008, p. 98–107.

<sup>16</sup> C-562/13, *Abdida*, ECLI:EU:C:2014:2453.

<sup>17</sup> C-239/14, *Tall*, ECLI:EU:C:2015:824.

- Cases where Article 47 EU Charter and/or the general principles of EU law (good administration, rights of defence, equivalence, effectiveness, proportionality) played an important role, beyond merely being cited;
- Cases where EU concepts and rules were clarified, impacting on national legislation, jurisprudence, administrative practice or institutional relations (e.g. delimitation of competences between administration and judiciary);
- Cases where the use of judicial dialogue (vertical and horizontal) was instrumental in reaching a solution. For instance, cases that have used one or more of the following judicial interaction techniques: preliminary reference procedure under Article 267 TFEU; direct reference to the case law of CJEU or ECtHR; references to the jurisprudence of foreign national courts; disapplication of national legislation implementing EU secondary legislation on asylum/irregular migration; proportionality; and/or mutual recognition. The Casebook analysis includes as much as possible the entire ‘cycle’ of an issue that arose in the application of a particular fundamental rights guarantee. For instance, the analysis will encompass the development of a problem at the domestic level, the referral of preliminary questions by a domestic court, to the preliminary ruling of the CJEU, and the subsequent decision of the referring court. We also examine the potential impact of the case on the other courts of the referring Member State, including beyond the area of law in which the reference arose (a *cross-sectoral impact*) as well as the impact of the case on the case law of other Member States (a *cross-border impact*).<sup>18</sup> Where available jurisprudence exists, the Chapter will do this by tracing the relevant cases, from the national court’s decision to make a reference to the CJEU, to the reasoning and judgment rendered by the Court, the follow-up judgment of the referring court, and then impact on jurisprudence, legislation and administrative practice of the case back to the referring national court.
- The Casebook includes also national cases, where a European aspect has resulted from the direct use of Article 47 EU Charter and/or general principles of EU law as well as indirect judicial dialogue (conform interpretation, disapplication, horizontal dialogue) by the national courts. As there are limited judgments of the CJEU in which Articles 47 and 41 EU Charter have played a direct role, the national cases that we discuss may indirectly assist other national judges faced with similar issues. National courts are all common courts and enforcers of EU law, which should be uniformly and effectively applied throughout all the Union. National judges may thus feel inspired by the judgments, reasoning, rights and principles developed by their colleagues from the same or other jurisdictions. The Casebook includes both best practice cases, but also cases that signal a persistent problem that requires further dialogue in order to arrive at a solution that ensures both effective implementation of EU law and respect for fundamental rights (see, Chapter 2- *Rights of defence in cases regarding national security*).

The Casebook builds on the work carried out by the Coordinator in other past and ongoing Projects, such as JUDCOOP<sup>19</sup>, ACTIONES<sup>20</sup>, REDIAL.<sup>21</sup>

---

<sup>18</sup> For an analogy of the cross-sectoral and cross-border impacts of Article 47 EU Charter in a different area, i.e. European Private Law, see F. Cafaggi and S. Law, *Judicial Cooperation in European Private Law*, Edward Elgar (2017).

<sup>19</sup> European University Institute, Centre for Judicial Cooperation lead Project: “European Judicial Cooperation in the fundamental rights practice of national courts” was a project supported by the European Commission DG Justice (contract n. JUST/2012/FRAC/AG/2755) and lasted from January 1st, 2013 until July 30th, 2014, see <https://www.eui.eu/Projects/CentreForJudicialCooperation/Projects/EuropeanJudicialCooperationinFR/EuropeanJudicialCooperationinthefundamentalrightspractice>

The Casebook is complemented by a database that endorses the methodological approach of judicial dialogue. This is organized around EU judgments and their impact on national legal systems. Two types of national judgments are included in the database: those directly concerning cases brought before the CJEU within a preliminary reference procedure, and those that apply or take into consideration the CJEU case-law when addressing national cases outside of a referral procedure. The database is selective, and reflects the idea that judicial dialogue has effectively contributed to solving issues concerning the interpretation and application of the right to a fair trial and to an effective remedy, and more generally for securing effective justice in the area asylum and immigration.

We encourage training courses organized by national training bodies in both the use of the Casebook and the associated database, both which will be subject to constant updating during the course of the project. We are grateful for the contribution we have had from the various schools of the Judiciary in Europe and the participants in our judicial workshops.

## Structure

The Casebook is comprised of seven thematic chapters clustering judgments from a variety of Member States that have addressed similar problems of interpretation and/or application of the right to a fair trial and effective remedy. The impact analysis is very important for judges other than those from the referring court. Their effort to interpret and to adapt the judgment to their national legal context is often underestimated. While formally the CJEU judgments are binding on all Member States courts, their application needs a careful analysis of which domestic substantive and procedural rules may be affected by the preliminary ruling.

### Chapter 1 – Impact of the principle of effectiveness and right of fair trial on asylum evidential procedural rules

This Chapter analyses, from both a top-down and bottom-up approach, the impact of: the right to a fair trial and effective remedy enshrined in Article 47 EU Charter; the principle of effectiveness of the EU right to asylum and the principle of *non-refoulement*, on domestic evidential procedural rules, investigative powers, and duties of national courts. The analysis is divided across the four main stages of asylum evidential procedure:

1. Burden of proof
2. Duty of cooperation
3. Elements of evidence
4. Standard of proof and benefit of doubt

### Chapter 2 – The right to be heard

This chapter briefly presents the main guarantees of the right to be heard introduced by the CJEU within both asylum and return adjudication. We discuss the guarantees of the right to be heard first at the administrative stage of international protection proceedings, then before the court or Tribunal

---

<sup>20</sup> European University Institute, Centre for Judicial Cooperation lead Project: Active Charter Training through Interaction of National ExperienceS, started on November 1st, 2015 and lasting until October 31st, 2017. (<https://www.eui.eu/Projects/CentreForJudicialCooperation/Projects/ACTIONES/ACTIONES> )

<sup>21</sup> European University Institute, Project Return directive DIALogue (Migration Policy Centre, Centre for Judicial Cooperation (CJC), Odysseus Academic Network), <http://euredial.eu/>

charged with the appeal, and conclude with the guarantees that apply to return proceedings. The chapter is divided accordingly:

- 1.1. The right to be heard of an asylum seeker under the principle of good administration (Article 41 EU Charter) at the administrative phase.
- 1.2. The right to be heard of the asylum seeker (Article 47 EU Charter) – right to an oral hearing before the court.
- 1.3. The right to be heard in return proceedings within the administrative phase.

## Chapter 3 – Access to a court

This chapter offers examples of how Article 47 EU Charter is a useful and necessary ground for reviewing the following:

- National legislation that **does not provide any access before an independent** judge to enforce an EU law right in the field of the application of the Schengen Border Code.
- National legislation that **creates judicial or quasi-judicial bodies for asylum adjudication**.
- National legislation that makes difficult for the individual to get appropriate relief with specific regard to the **time-limit in asylum proceedings**.
- Administrative decisions or practices that **hinder the rights of individuals to legal aid**, thus preventing them from having effective access to a court / Tribunal in immigration and asylum claims.

## Chapter 4 – Rights of defence in cases regarding national security

This chapter addresses particular cases, where the establishment of facts and credibility of the asylum seeker, or irregular migrants is based on evidence that is gathered by the national authorities and is not made available to the third country national or his legal representative. This information may be kept secret due to the third country national being considered to be a danger for the national security or public order. This chapter will first sketch the standards and principles developed by the CJEU in ZZ in relation to rights of defence of third country nationals in national security cases.<sup>22</sup> The application of these principles by other national courts is also included.

## Chapter 5 – The impact of the right to an effective remedy on judicial review powers

This chapter focuses primarily on cases involving detention measures under three different frameworks: asylum, the Dublin Regulation and return proceedings. The first section focuses on the impact of Article 47 EU Charter and general principles of effective judicial protection as developed by the CJEU on domestic judicial review powers. We present the conclusions of the CJEU in the *Mahdi* case<sup>23</sup> and discuss the impact of this preliminary ruling on national jurisprudence from the referring Member States as well as on other Member States. The chapter also offers an example of the cross-sectorial impact of the *Mahdi* case.

---

<sup>22</sup> C-300/11, ZZ, ECLI:EU:C:2013:363.

<sup>23</sup> C-146/14, *Mahdi PPU*, ECLI:EU:C:2014:1320.



The second section of this chapter discusses the requirements of the principle of proportionality in the field of detention in both asylum and return cases. First, we highlight cases where national courts arrived at measures that were contrary to the proposals of the State administration. This section also includes cases where national courts decided of their own motion to not prolong detention, where this was sought by the State administration, but instead to shorten the period, using the principle of proportionality. Cases where national courts granted compensation for unlawful detention are also included.

The chapter will continue with cases that reflect the extension of judicial review powers on the basis of Article 47 EU Charter outside the field of detention measures. For instance, in the field of the Dublin Regulation (5.3 *Extending judicial review in Dublin transfer cases based on Article 4 EU Charter*) and in asylum adjudication (5.4 *Judicial powers necessary to ensure respect of the right to an effective remedy*).

## **Chapter 6 – Right to an effective remedy and suspensive effect of appeals**

This section examines the requirements imposed by Article 47 EU Charter as regards the automatic suspensive effect of appeals in accelerated asylum proceedings and return proceedings (6.1 Suspensive effect of appeals in international protection proceedings and 6.2 Suspensive effect of appeal in return proceedings)

A second issue addressed in this section is the scope of application of the right to remain under Article 46(5) Recast APD. Namely, does Article 47 EU Charter require that the suspensive effect of an appeal automatically applies also to the second (or third) instance appeals?

## **Chapter 7 – Minors – procedural guarantees (age assessment)**

Age assessment arises as an important issue within different phases of international protection proceedings. It has a direct impact on, *inter alia*, the credibility assessment of an asylum seeker, his/her reception conditions and alternative measures to immigration detention. This section explores the effects of Article 47 EU Charter and general principles of EU law on national practices concerning age assessment in asylum and return adjudication.

Each of the *Issues* explored includes at the end *Points to Remember*, which summarises the main principles and requirements on the interpretation and application of the guarantee in question as well as the various national solutions and approaches to current problems.

The Casebook concludes with a chapter on comparative remarks regarding the differences and similarities between asylum and return procedural law focussing on the impact of the right to fair trial, the right to an effective remedy and the general principles of EU law.

# 1. The Impact of Art. 47 EU Charter and principles of effectiveness of EU law and non-refoulement on evidential procedural rules

This section analyses, from both a top-down and bottom-up approach, the impact of: the right to a fair trial and effective remedy enshrined in Article 47 of the EU Charter; the principle of effectiveness of the EU right to asylum and of the principle of *non-refoulement* on domestic evidential procedural rules, investigative powers, and duties of national courts. The analysis is divided across the four main stages of asylum evidential procedure, addressing the following main questions:

## 1.1. Burden of proof

*Question 1* – How has the CJEU and ECtHR jurisprudence affected national procedural principles governing the burden of proof?

## 1.2. Duty to cooperate – Article 4 Recast QD

*Question 1* – What are the duties of national courts regarding the burden and standard of proof for recognising subsidiary protection under Article 15(c) of the Qualification Directive?

*Question 1.a* – What are the standards developed by the CJEU in *Elgafaji* and *Diakité* cases? (the development of the sliding scale test in the assessment of ‘violence in the country of origin’)

*Question 1.b* – Do national courts have a duty to consider *ex officio* subsidiary protection under a different ground than the one invoked by the applicant and / or that considered by the State?

*Question 1.c* – Does the duty of cooperation require a national court to consider *ex officio* subsidiary protection under Article 15(c) of the Qualification Directive when the situation in the applicant’s country of origin does not meet the definition of an ‘internal armed conflict’?

*Question 2* – The extent of the duty of cooperation of the national court in asylum adjudication?

*Question 2.a* – Does the duty of cooperation impose a positive obligation on national courts to make investigative enquiries?

*Question 2.b* – Does the duty of cooperation require the national judge to consider *ex officio* a new ground for recognising international protection, other than the one considered by the State?

## 1.3. Elements of evidence

*Question 1* – Are restrictions of elements of evidence in cases of renewal of subsidiary protection case compatible with the principles of *non-refoulement* and effectiveness?



## 1.4. Standard of proof and benefit of doubt

*Question 1* – What is the standard of proof in cases of persecution on grounds of political opinion as required under Article 4 Recast Qualification Directive read in light of the principle of effectiveness?

*Question 2* – How are national courts implementing the requirements of Article 7 EU Charter, the CJEU jurisprudence, and Article 4 of the Qualification Directive on the standard of proof and benefit of doubt principle in international protection cases that involve persecution for homosexual orientation?

## 1.5. National legal contexts on evidential procedures in asylum adjudication: variety of types of jurisdiction and judicial review powers<sup>24</sup>

Issues related to evidential procedural law, including, in particular, the standard and burden of proof and credibility of the applicant for international protection, are amongst the most complex and difficult tasks in asylum proceedings.

Facts assessment in asylum adjudication has been described as a complex and crucial function of asylum judges.<sup>25</sup> It is a difficult task due to the often scarce documentary evidence,<sup>26</sup> and the fact that the credibility of applicants' oral statements may be affected by suspicions regarding their veracity, compounded by the fact that the evidence is usually given in a foreign language. National judges are required to have wide-ranging geographical and historical knowledge on the general situation in around 146 countries that could potentially be the country of origin of the asylum seeker. The judge would need to verify whether the statements made by an applicant are consistent with the situation in his/her country of origin. Determining authorities are required to assess whether there is a future risk of *refoulement*, a difficult exercise where certainty cannot be established. The gathering and assessment of additional evidence is crucial since it may well have a decisive effect on the outcome of asylum proceedings. The inherent complexity of asylum evidential procedures, stemming from the specific situation of the applicant for international protection, is often accentuated by complex national evidential rules and powers of national courts in asylum adjudication.

For instance, while **Italy** has allocated asylum adjudication to civil judges, due to these proceedings being considered to involve subjective rights (the right to asylum), the majority of Member States allocate asylum adjudication to administrative courts. However, this does not mean that all administrative judges across the EU have identical powers as regards evidential procedures. For instance, in **Germany** administrative courts have inquisitorial<sup>27</sup>, adversarial<sup>28</sup> and reformatory

---

<sup>24</sup> The taxonomy of competence jurisdiction and their powers provided in this section is not exhaustive and takes into consideration data up until 31<sup>st</sup> October 2018.

<sup>25</sup> See S. Sedley, Former Lord Justice of Appeal, England and Wales, "[Asylum: Can the Judiciary Maintain its Independence?](#)"

<sup>26</sup> Asylum seekers often leave their countries of origin without documents or other material evidence to support their applications.

<sup>27</sup> In inquisitorial administrative judicial procedure, the judge carries the final responsibility for the sufficiency of evidence. Inquisitorial procedures thus give the judge the possibility of carrying out investigations of his/her own, to produce and use knowledge from his own sources and also to guide the parties regarding information that needs to be presented.

powers<sup>29</sup>. This means that **German** administrative courts can ask for additional evidence from the administrative authorities, or independent bodies, and can also require the administration to adopt a certain form of international protection. Whereas other countries' administrative courts have only inquisitorial and adversarial powers (**Romania, France, Hungary**), and instead of reformatory powers asylum judges only have cassatory powers, meaning they are competent to overturn the decision with detailed guidelines to be followed. In the **UK** the courts have only adversarial and legality assessment powers.

In other Member States the division of powers among asylum judges is even starker, for example, in **Romania** in certain regions the jurisdiction is allocated to civil judges but in other regions of the same State, it is the administrative judge that is competent for asylum adjudication.<sup>30</sup> This has impacted on the extent of judicial review powers due to the differences between extent of judicial review powers of civil and administrative judges; the latter can usually only quash an administrative decision, but has limited evidential powers and no reformatory powers.

The allocation of judicial competences varies furthermore in the field of asylum and pre-removal detention. For instance, asylum detention falls under the competences of criminal courts (e.g. **Hungary, Poland, France**), although non detention asylum and pre-removal cases are still handled by administrative courts. Due to the impact of Article 4 of the Qualification Directive, the principle of effectiveness of EU rights and the jurisprudence of the CJEU and ECtHR, administrative courts have acquired enhanced judicial review powers, for instance inquisitorial powers, in the sense of producing new evidence, in particular as regards the use of up to date and accurate country of origin information in international protection proceedings. It will be shown in Chapter 5 that administrative courts that under domestic law have only cassatory powers, started to exercise also reformatory powers directly on the basis of the EU law principles of effectiveness (or Art. 47 EU Charter), *non-refoulement* and the right to asylum, when the administrative authorities fail to take on board their previous judgments (e.g. **Hungary**, see the case discussed below of the **Pecs Administrative Court**).

A number of key principles and standards have been set by Article 4 Recast Qualification Directive ('Recast QD') concerning the assessment of facts and laws and by Article 10 of the Recast Asylum Procedure Directive ('Recast APD'), which introduced the requirement for an appropriate, individual and careful examination of the asylum claim. It will be pointed out below that the EU has imposed specific evidential rules in asylum adjudication which take priority over the general principles of civil, administrative, or criminal procedural law governing the administration of evidence in these proceedings.

EU secondary legislation in the asylum area has introduced general rules, which leave considerable discretion to Member States<sup>31</sup>, and leave many evidential issues untouched. As a result of this, a

---

<sup>28</sup> Adversarial administrative judicial procedures exclude any role of the judge in the evidential production, see for instance the UK courts. For further details on the differences in the judicial powers in inquisitorial versus adversarial administrative judicial procedures, see I. Staffans, *Evidentiary Standards of Inquisitorial versus Adversarial Asylum Procedures in the Light of Harmonization*, European Public Law, Volume 14, Issue 4.

<sup>29</sup> By reformatory powers, we mean the power to recognise international protection as such, thus going beyond the mere power of quashing the administration decision, which is commonly describe as cassatory power, see

<sup>30</sup> Administrative courts are usually competent to hear asylum cases, however, in Bucharest the allocation of jurisdiction was attributed to the civil section of the Bucharest sector 4 court.

<sup>31</sup> Article 4 of the Recast Qualification Directive includes both optional and prescriptive rules to be followed by the Member States. One of the optional rules is the duty of the applicant for international protection to submit as soon as possible all elements of evidence in support of his application. Although an option, most of the Member States have

wide variety of national evidential procedures and judicial powers has led to inconsistent jurisprudence and practices across Member States. Some of the general rules, and the related discretionary powers, have been interpreted by the CJEU. This has served to establish additional requirements beyond those set by the EU secondary legislation. The CJEU has imposed these requirements on the basis of principles, such as: the principle of effectiveness, the principle of good administration and the rights of defence. Additional requirements have been set by the ECtHR, with which national courts have to comply under Article 4 Recast QD (see the *F.G. v Sweden* and *J.K. v Sweden* discussed below). The CJEU has also provided additional guidelines for the interpretation of the concept of ‘as soon as possible’ in regard to the timing of submitting evidence in asylum claims in the *A.B.C.* case<sup>32</sup>:

*“the requirement of the presentation of facts as soon as possible must be in accordance with the sensitive nature of questions relating to a person’s personal identity and, in particular, his sexuality. Therefore, it cannot be concluded that the declared sexuality lacks credibility simply because, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the outset.”*

In the important cases *Elgafaji* and *Diakité*, the CJEU provided guidelines on the standard of proof and duty of cooperation when evaluating subsidiary protection claims under Article 15(c) of the Qualification Directive.

In this section, we will offer examples of how these preliminary rulings have been applied at national level by national courts from various Member States. These national judgments are not only operating an implementation *ad litteram* of the preliminary rulings, but they offer a constructive interpretation of the CJEU preliminary rulings as regards the domestic judges *ex officio* duties in terms of the standard of proof (see **Supreme Court of Cassation of Italy**, judgment of 10 April 2015, file No. 7333/2015 and the **French Conseil d’Etat**, 8 février 2017, M. Boite, n° 396695). A further example of extension of judicial review powers under the impact of the CJEU preliminary rulings and the principles of effectiveness of EU rights to asylum is found in the judgment of the **Sofia City Administrative Court** (case 5774/2015) and the **Pécs Court of Public Administration and Labour** (case of 25 January 2017).

This section includes national case law submitted by the Re-Jus collaborators which demonstrates the impact of the EU principles of good administration, effectiveness of EU rights on national procedural laws concerning assessment of facts and circumstances in international protection proceedings. It will reflect:

- EU and ECHR requirements on the burden of proof, duty of cooperation, elements of evidence, standard of proof and the benefit of the doubt principle;

---

chosen to impose an obligation on the applicant to present all the evidence at his disposal in support of the application. While some Member States do not provide for a time limit, others have imposed specific time limits for submitting proof. For instance, in certain jurisdictions, evidence that is submitted after the administrative interview does not need to be taken into consideration (e.g. Netherlands). In case the Member State took advantage of the option and provided for a national prescriptive rule to submit asylum related evidence, then the requirements of Article 4(5) of the Recast Qualification Directive should be followed. However, not all Member States have strictly transposed this provision. See The Report from the Commission to the European Parliament and the Council on the application of Directive 2004/83/EC 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, Brussels, 16.6.2010 COM(2010)314 final, p.5.

<sup>32</sup> C-148/13 to C-150/13, *A.B.C.*, ECLI:EU:C:2014:2406.

- how national courts apply the duty to conduct an appropriate examination of the asylum claim;
- circumstances in which national courts exercise *ex officio* inquisitorial powers for the purpose of fact finding in order to secure the principle of effectiveness of EU rights;<sup>33</sup>
- the intensity of judicial review of the State's duty of cooperation;
- implementation of landmark judgment of the CJEU (*A.B.C.*, *Elgafaji* and *Diakité*).

The selected cases will also illustrate how national courts have overcome national procedural obstacles, such as, limited judicial powers and procedural deadlines regarding submission of evidence, for the purpose of securing the principle of effectiveness of the right to asylum, the principle of *non-refoulement* and other fundamental rights of the asylum seeker. The cases also reflect the divergent powers between the applicant, the State administration and the courts as regards the burden of proof and evidence assessment, and the impact thereon of the rights to fair trial, principle of effectiveness and good administration. The case law herein discussed illustrates that although Article 4 Recast QD and Article 10 Recast APD have introduced detailed evidential rules, there are still a significant number of issues that need further clarification or which have not been regulated at EU level. Additional relevant rules have been developed by the CJEU and ECtHR which need to be taken into account when implementing EU secondary legislation. Furthermore, the principle of effectiveness imposes additional requirements on Member States even when they are acting within their permitted margin of discretion.

Procedural and evidential rules in EU secondary legislation are very limited. The CJEU and ECtHR have filled this gap by using general principles of EU law (e.g. rights of defence) as well as specific provisions of the EU Charter and ECHR. National courts have referred to this case law in adapting national rules. It is notable that the judiciary's powers tend to increase with different intensity in legal systems where administrative courts are in charge versus legal systems where civil courts are in charge.

## 1.6. Burden of proof

The allocation of the burden of proof is the starting point for asylum adjudication. In refugee or subsidiary protection status determination, the placement of the burden of proof refers to the distinction between the obligation for the asylum seeker to prove his or her status as a refugee or beneficiary of subsidiary protection and the burden of the State to verify this evidence, i.e. to check if the person in question should indeed qualify for refugee or a beneficiary of subsidiary protection. Domestic proceedings on international protection commonly start with the task of the applicant to prove his or her status. According to Article 4(1) Recast QD, the applicant has a duty "*to submit as soon as possible all the elements needed to substantiate the application for international protection.*" The specificity of asylum proceedings is that the burden of proof does not entirely fall on the applicant, but it is shared with "*the duty of the Member State to assess the relevant elements of the application*"

Not all Member States have provided for a duty of the applicant for international protection to submit all the evidence needed to substantiate the application for international protection as soon as

---

<sup>33</sup> For an analogy with judicial review powers in consumer protection, please see Re-Jus Casebook on consumer protection, Chapter 1.

possible. The proposal for a future Regulation on Qualification will transform this option into a requirement.<sup>34</sup>

The second sentence of Article 4(1) provides for a duty of cooperation between the State authorities and the applicant during the process of assessment of the claim.

Thus the evidential structure of asylum adjudication is markedly different from the evidential structures of general administrative, civil, or criminal procedures. The presumption of innocence that characterises national criminal procedures, or the rule in civil procedure, that it is for the applicant to prove the facts he alleges, are attenuated in asylum adjudication. Specific rules govern asylum procedures, and the general procedural rules have to be interpreted in light of these specific duties and principles. Notably, in asylum procedures, the asylum seeker usually has a duty to substantiate his/her claim followed then by the duty of Member State to assess all the relevant evidence, in collaboration or cooperation with the applicant. This ‘duty of collaboration’ applies to all Member States’ authorities – administrative or judicial – that are involved in the assessment of an asylum application (Art. 4(1)(2) Recast QD).

The impact of these provisions is that, in asylum cases, although the burden of proof rests primarily on the applicant, the competent authorities of the Member States also have a duty to cooperate in establishing the asylum seeker’s claim. The context of these types of cases, which involve third country nationals who have escaped persecution, often in haste and without a chance to gather evidence, requires a different interpretation of the burden of proof as compared with other civil or administrative proceedings. The asylum seeker is required to substantiate his/her claim by providing statements and any documentary evidence that s/he has, but in cases where this evidence is not forthcoming from the applicant, for whatever reason, the State authority, instead of simply rejecting the application, must actively cooperate with the asylum seeker in order to assist him/her to gather all relevant material that might help to evidence the claim.

### **Question 1 – What main duties have the CJEU and ECtHR jurisprudence imposed on national procedural principles governing the burden of proof?**

#### Relevant CJEU jurisprudence

In spite of the requirement of Article 4(1) Recast QD, regarding the stages in evidential procedure, certain national authorities continue to apply a more cumbersome burden of proof for asylum seekers. In this context, the CJEU has given important clarification of the what the duty of cooperation entails for the division of the burden of proof between the applicant and the national authorities. In *M.M. (I)* (C-277/11) the CJEU held that:

*Article 4(1) of Directive 2004/83, 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.*

---

<sup>34</sup> Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU Brussels, 13.7.2016 , COM(2016) 467 final 2016/0224 (COD).

*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. (paras.65 and 66)*

### Relevant ECtHR jurisprudence

Compared to the CJEU, the ECtHR has developed more extensive jurisprudence on evidential requirements, including more detailed rules on the burden of proof. Interestingly, the judgment of the ECtHR in *J.K. v Sweden*<sup>35</sup> gives a concrete example of what the principle of effectiveness of EU law would require in terms of burden of proof under Article 3 ECHR standards.

In *J.K. v Sweden*, the ECtHR held that the national rules concerning “*the burden of proof should not render ineffective the applicants’ rights protected under Article 3 of the Convention. It is also important to take into account all the difficulties which an asylum-seeker may encounter abroad when collecting evidence (see Bahaddar, cited above § 45, and, mutatis mutandis, Said, cited above, para. 49)*” (para. 97) (underlining added).

In terms of who needs to prove a certain fact, the ECtHR has held that “*general situation in another country, including the ability of its public authorities to provide protection, has to be established proprio motu by the competent domestic immigration (see Hirsi Jamaa and Others, § 116). [...] Similarly, Article 4 § 3 of the Qualification Directive requires that “all relevant facts as they relate to the country of origin” are taken into account.*” (*J.K.*, para. 98)

In *R.C. v Sweden*<sup>36</sup>, the ECtHR held that the burden of proof shifted from the applicant to the domestic court to dispel doubts about the cause of injuries after the applicant produced a medical certificate despite the fact that it was not prepared by an expert in assessment of torture injuries. In cases, such as the present one, the State has a duty to assess or take into consideration all relevant facts, particularly in circumstances where there is a strong indication that an applicant's injuries may have been caused by torture. Since the applicant had already proved he has been tortured, the ECtHR considered that “*the onus rest[ed] with the State to dispel any doubts about the risk of being subjected again to treatment contrary to Article 3 in the event that his expulsion proceeded.*” (para. 55)

One of the most important judgments of the ECtHR regarding the Contracting States’ obligation to assess *ex officio* the risk of an asylum seeker to be subjected to persecution if return to his country of origin is the Grand Chamber judgment in *F.G. v Sweden*<sup>37</sup>. The ECtHR clarified that while in asylum claims based on a well-know generalised risk, the Contracting States have the obligation to carry out *ex officio* an assessment of the risk, in cases of asylum claims based on an individual risk, the Contracting States do not usually have such an obligation. However, the ECtHR carved out an obligation on the part of the States to an obligation for the national authorities to assess “of their own motion” the risk to the applicant. (para. 156). The ECtHR Grand Chamber judgment is

---

<sup>35</sup> *J.K. and Others v. Sweden*, Appl. No. 59166/12, Grand Chamber judgment of 23 August 2016.

<sup>36</sup> *R.C. v Sweden*, Application No. 41827/07, ECtHR Judgment 9 June 2010.

<sup>37</sup> *F.G. v Sweden*, Appl. No. 43611/11, Grand Chamber Judgment of 23 March 2016.

furthermore important for referring to judgments of the CJEU Grand Chambers on burden and standards of proof in asylum claims (*Y.Z.*<sup>38</sup> and *A.B.C.*<sup>39</sup>) (para. 52).<sup>40</sup>

## 1.7. Duty to cooperate – Article 4 Recast QD

### Introductory remarks

Equally diverse national transposing legislation has been adopted with regard to Article 4(1)(2) Recast QD, which requires Member States to assess relevant evidence "in cooperation with" the applicant. This provision establishes a duty on the competent national authorities, including judges, to be actively involved in the assessment of the relevant facts of the application. This provision, together with the obligation to secure the principles of *non-refoulement* (Article 19(2) EU Charter) and the effectiveness of EU rights, requires the national judge to play an active role in evidential production. This particular duty does not sit easily with certain Member States' legal traditions, in particular in those that allocate more decision-making powers to the State administration vis-à-vis the national courts. However, national courts are challenging the national procedural rules which hinder their fulfillment of the duty of sincere cooperation (Article 4(3) TEU) and principle of effectiveness of EU law, whereby they need to give effect utile to Article 4 Recast QD duty to cooperate. This sub-section will include a short overview of the relevant CJEU and ECtHR jurisprudence before discussing the impact of relevant CJEU preliminary rulings and additional national judgments that have developed innovative approaches under the duty of cooperation and the principle of effectiveness of EU rights.

### Clarifications concerning the "duty to cooperate" offered by the CJEU jurisprudence

An overriding component of any asylum application is the assessment of the risk that the applicant will be persecuted. Since the gist of any asylum application revolves around the potential violation of an absolute human rights – prohibition of torture, the EU legislature enshrined in the Recast Qualification Directive the "duty of cooperation". The CJEU clarified when the duty of cooperation is relevant: "*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.*" (*M.M. (I)*, para. 65). The CJEU highlighted that the assessment of the facts in cases of international protection is structured in two stages. The first concerns the establishment of factual circumstances which may constitute evidence that supports the application, while the second stage deals with the legal evaluation of these evidence, i.e. the assessment of the forward looking fear of harm. The Court clarified that the duty to cooperate actively with the applicant only applies at the first of these two stages.

The EU duty of cooperation requirement means, in practical terms, that if the evidence provided by an applicant is not complete, up to date, or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, so that all the evidence required to substantiate the application may be gathered (*M.M. (I)*, para. 66). The CJEU also drew attention to the fact that a

---

<sup>38</sup> Joined Cases C-71/11 and C-99/11, *Y and Z*, ECLI:EU:C:2012:518.

<sup>39</sup> C-148/13 to C-150/13, *A.B.C.*, ECLI:EU:C:2014:2406.

<sup>40</sup> See more in S. F. Nicolosi, *Introductory Note on F.G. V. SWEDEN*, International Legal Materials, Issue 4, Vol. 56, 2017.

Member State may be better placed than an applicant to gain access to certain types of documents. (*A.B.C.*, para. 68 and *M.M. (I)*, para. 66).

In the *A.B.C.* judgment<sup>41</sup> – a case dealing with the assessment of an asylum application based on alleged persecution on the ground of sexual orientation – the CJEU observed that Article 4(5) QD (now replaced by Article 4(5) of the Recast QD) provides for an alleviation of the asylum seeker’s *onus probandi*. According to this provision, where aspects of the applicant’s statements are not supported by documentary or other evidences, those aspects shall not need confirmation where the conditions listed in that Article are met.

Thus, the provisions and the principles elaborated by the CJEU introduce some derogations or attenuation to the principle that is usually applied in the civil and administrative procedures of many of the Member States.

The Member States’ “duty to cooperate” with the asylum applicant in order to assess his application is clearly related to the right to an effective remedy. The duty to cooperate is meant to guarantee the asylum seeker an effective right to defence – which is an expression of the right to an effective remedy (see *A.B.C.* judgment, para. 82) – as well as to guarantee ‘equality of arms’ with the State party. It is also a way to circumvent the inherent difficulties in substantiating international protection claims. The duty is in line with the ECtHR finding that the asylum seekers constitute a vulnerable group that deserves special protection which translates in ease of burden and standards of proof (see *M.S.S. and other v Belgium and Greece*<sup>42</sup>, *F.G. v Sweden*). Furthermore, according to the CJEU (*Steffensen*<sup>43</sup> and *Boiron*<sup>44</sup>), evidential rules fall within the principle of effectiveness of EU law. Where the national court finds that the evidential requirement renders it impossible or excessively difficult for the individual to exercise a right granted by the EU (in this case the right to access international protection), then it must declare the evidential rule incompatible with the principle of effectiveness of EU law.

### **Clarifications concerning the duty to cooperate, offered by the ECtHR jurisprudence**

When searching for the relevant rules on the implementation of the duty to cooperate, national judges should have in mind not only the standards set by the CJEU, but also those set by the ECtHR, even if the concept is an EU law one (i.e. Art. 4 Recast QD). So far, the ECtHR has set detailed standards with respect to duties to cooperate, usually under the ambit of Article 3 ECHR, clarifying that national authorities are required to assess all information brought to their attention, even if the applicant does not wish to rely on certain evidence (e.g. in *F.G. v Sweden*, the post-flight conversion from Islam to Christianity). The ECtHR has recently assessed the legitimacy of national evidential procedural limitations which at first sight adequately transposed provisions from the Asylum Procedure Directive in light of Article 3 ECHR (*F.G. v Sweden*).

Relevant for the ECtHR carving out the “duty to cooperate” is the *F.G. v Sweden* case. This concerned an Iranian national who had converted to Christianity after arrival in Sweden. He submitted an asylum application, but did not base it on persecution due to his conversion, but to to

---

<sup>41</sup> C-148-150/13, *A.B.C.*, ECLI:EU:C:2014:2406.

<sup>42</sup> *M.S.S. v Belgium and Greece* [GC], Application No. 30696/09.

<sup>43</sup> C-276/01, ECLI:EU:C:2003:228.

<sup>44</sup> C-526/04, ECLI:EU:C:2006:528.



his past political activities. However his return to Ira would put him at a risk of the death penalty for apostasy in Iran. He sought to suspend the deportation order and submit a new application on account of his religious conversion. However, the national authority held that the conversion did not constitute “new facts” which needed to be proved in a subsequent asylum claim in order to justify a re-examination of the case. This national procedural requirement (new evidence required for subsequent applications) is permitted under the Recast APD (see recital 36, Article 40(2))<sup>45</sup>. As for legitimate reasons for not presenting evidence sooner, Article 40(4) provides that “*Member States may provide that the application will only be further examined if the applicant concerned was, through no fault of his or her own, incapable of asserting the situations set forth in paragraphs 2 and 3 of this Article in the previous procedure, in particular by exercising his or her right to an effective remedy pursuant to Article 46.*”

However, Article 42(2)(2) of the APD codifies the principle of effectiveness of protection of EU rights, and requires that the evidential procedural rules in cases of subsequent applications “*shall not render impossible the access of applicants to a new procedure or result in the effective annulment or severe curtailment of such access.*” Additionally, the principle of *non-refoulement* has to be respected irrespective of procedural limitations, due to its absolute nature (Article 41(1)(2) and Article 19(2) EU Charter, Article 3 ECHR).

The added value of the ECtHR judgment in *F.G. v Sweden* is to clarify the interaction between the domestic limitation of the rights of defence and its impact on the protection of the principle of *non-refoulement*. In this case, the Court recalled that, “*when an asylum request is based on an individual risk, it is not for the State examining this request to look for a risk factor that the asylum seeker did not present. However, in view of the absolute nature of the rights guaranteed by Articles 2 and 3 of the ECHR and the vulnerable situation that asylum seekers frequently find themselves in, if the State is informed that an individual may be subjected to treatment contrary to said articles upon returning to his country of origin.*” (para. 127) The national authorities are obliged to assess that risk *ex officio*, where they know that the asylum seeker is likely to belong to a group of persons systematically exposed to such treatment.<sup>46</sup> The ECtHR pointed out, in particular, that the Swedish authorities had not carried out a thorough examination of the actual situation and the implications of the applicant's religious conversion. It found that, irrespective of the applicant's conduct, the national authorities were still required “*to make an ex nunc assessment of the risk he would face upon returning to Iran as a result of his conversion.*” (para. 158) Therefore, in the absence of such an assessment, the ECtHR ruled that the deportation order, if implemented, would constitute a violation of Articles 2 and 3 ECHR.

The ECtHR thus clarified that Article 40(2) and recital 36 APD, although permitting discretionary powers to Member States to dismiss as inadmissible subsequent asylum applications which are not based on new evidence, they cannot establish evidential procedural rules which would lead to a violation of an absolute fundamental rights - principle of *non-refoulement*.

Under EU law, the principle of effectiveness of the guarantees resulting from the principle of *non-refoulement* requires national authorities to interpret domestic rules in conformity with EU law and to disapply national evidential rules when a conforming interpretation is not available.<sup>47</sup>

---

<sup>45</sup> Directive 2013/32.

<sup>46</sup> Similar conclusions were drawn by the CJEU in the area of consumer protection, see Re-Jus Casebook on consumer protection.

<sup>47</sup> See See C-106/77, *Simmenthal*, ECLI:EU:C:1978:49.

## Main questions addressed

The duty of cooperation section addresses two main clusters of questions:

**Question 1** What are the duties of national courts regarding the burden and standard of proof for recognising subsidiary protection under Article 15(c) Qualification Directive

This analysis will assess in chronological order the full cycle of the preliminary rulings in *Elgafaji*<sup>48</sup> and *Diakité*<sup>49</sup> and their impact at national level in Member States other than the referring ones. We discuss the cross-border impact of the CJEU rulings in these cases and how the national courts involved (Bulgaria<sup>50</sup>, France and Italy) have interpreted their duty of cooperation in light of these rulings. We will analyse how other national courts have applied these rulings in cases where applicants relied on different grounds of persecution and where the national authorities' assessment of country of origin information ('COI') had shortcomings.

*Question 1.a* – What are the standards developed by the CJEU: the sliding scale test developed in *Elgafaji* and *Diakité* cases.

*Question 1.b* – Do national courts have a duty to consider *ex officio* subsidiary protection under a different ground than the one invoked by the applicant and / or that considered by the State?

*Question 1.c* – Does the duty of cooperation require a national court to consider *ex officio* subsidiary protection under Article 15(c) of the Qualification Directive when the situation in the applicant's country of origin does not meet the definition of an "internal armed conflict"?

**Question 2** The extent of the duty of cooperation of the national court

*Second cluster* of cases aims to show the extent of duties incumbent on national courts under the duty of cooperation and the principle of effectiveness of EU rights. Examples include: the duty to exercise investigative powers, such as: an inquiry of the court's own motion to verify the credibility of the asylum seeker having regard to updated country of origin information; to consider new reasons for persecution that can be deduced from the application, even if not expressly invoked by the applicant (e.g. persecution on the basis of membership of a particular social group).

*Question 2.a* – Does the duty of cooperation impose a positive obligation on national courts to make investigative enquiries?

*Question 2.b* – Does the duty of cooperation require the national court to consider *ex officio* a new ground for recognising international protection other than the one considered by the State?

---

<sup>48</sup> Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* EU:C:2009:94.

<sup>49</sup> Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* EU:C:2014:39.

<sup>50</sup> These are not exhaustive judgments, but only a selection.

The following national cases will be discussed:

- *Supreme Court of Cassation of Italy, judgment of 10 April 2015, file No. 7333/2015*
- *Sofia City Administrative Court, case 5774/2015*
- *Supreme Court of Cassation, Italy, judgment of 13 December 2016, file No. 25534*
- *Tribunal of Torino, Judgment of 24 February 2017*
- *French Conseil d'État, M. Seedik, Judgment of 28 December 2017, No. 404768<sup>51</sup>*
- *French Conseil d'État, M. Boite, Judgment of 8 February 2017, No. 396695<sup>52</sup>*

**Question 1 – What are the duties of national courts regarding the burden and standard of proof for recognising subsidiary protection under Article 15(c) Qualification Directive?**

Question 1.a – What are the standards developed by the CJEU: the sliding scale test developed in *Elgafaji* and *Diakité* cases

What are the requirements under the duty of cooperation in light of the CJEU's preliminary rulings in the *Elgafaji* and *Diakité* cases?<sup>53</sup>

Summary of *Elgafaji* and *Diakité* preliminary rulings their implementation at national level

According to Article 15(c) of the Qualification Directive, the existence of an international or internal armed conflict is a *conditio sine qua non* for obtaining subsidiary protection. However, the Directive does not provide for a definition of the concept, and national courts have adopted different interpretations, some endorsing the definition given by international humanitarian law in the Additional Protocol II of the 1977 Geneva Convention. However, the threshold therein is difficult to meet: the government's forces need to be involved, and the threshold of intensity of violence is high. If these requirements are not met then there will be no armed conflict within the meaning of international humanitarian law.

In the *Elgafaji* case, the CJEU provided guidance as regards the type of threat an applicant would need to have experienced in order to qualify for subsidiary protection. For instance, when interpreting Article 15(c) QD regarding the conditions for receiving subsidiary protection, the CJEU concluded that the existence of a serious and individual threat should not be subordinated to the condition that “*the applicant adduces evidence that he or she is specifically targeted by reason of factors particular to his personal circumstances.*” (para.30) The CJEU established a presumption of

---

<sup>51</sup> On duty of cooperation, inspired by the *Elgafaji* and *Diakité* cases.

<sup>52</sup> Which is part of a series of decisions regarding standard of proof and benefit of doubt principle in cases of persecution on grounds of homosexual orientation, directly inspired by the *A. B. C.* case.

<sup>53</sup> Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* EU:C:2009:94; Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* EU:C:2014:39.

individual threat when the degree of indiscriminate violence characterising the armed conflict reaches a high level:

“The existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict [...] 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, 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.”<sup>54</sup>

The CJEU preliminary ruling did not, however, provide a definition of the EU law concept of “internal armed conflict” per Article 15(c) of the Qualification Directive. Therefore, divergent jurisprudence developed, with certain national courts continuing to endorse the more prohibitive definition of the international humanitarian law,<sup>55</sup> while other closely followed the CJEU judgment in *Elgafaji*, which did not appear to include among its requirements the involvement of government forces. Lord Justice Sedley, of the **UK Court of Appeal**, held in *QD (Iraq)* that the EU’s subsidiary protection regime pursues a different objective to that of international humanitarian law, legitimising “*an autonomous meaning [of ‘internal armed conflict’] broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed factions or by a state, which reaches the level described by the ECJ in Elgafaji*” (para. 35)<sup>56</sup>.

When faced with the implementation of a preliminary ruling referred by a different Member State, the **Federal Administrative Court of Germany** looked at both the **Swedish** and **UK** jurisprudence and decided to follow the interpretation of the **UK Court of Appeal** which admitted the autonomous meaning of the EU concept of ‘internal armed conflict’ in light of the CJEU *Elgafaji* ruling:

“according to the European Court of Justice in its judgment of 17 February 2009 (*Elgafaji*), one must assume that account should be taken not only of those acts of violence which violate the rules of international humanitarian law (for this interpretation, see also the judgment of this Court of 24 June 2008, loc. cit., marginal no. 37), but also of other acts of violence that are not directed against specific persons or groups of persons, but are perpetrated non selectively, and extend to civilians irrespective of their personal circumstances (see ECJ, loc. cit., marginal no. 34). In view of the ECJ’s interpretation of the concept of indiscriminate violence but also in

---

<sup>54</sup> Additionally, the CJEU ruled that “the word ‘individual’ must be understood as covering harm to civilians irrespective of their identity, 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, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.” (Case 465/07, *Elgafaji*, para. 35). This is in conformity with the case-law of the ECHR, which has accepted that in the most extreme cases of general violence, there may be a real risk of ill-treatment (in the sense of Art. 3 ECHR) simply by virtue of exposing an individual to such violence. See *NA v. The United Kingdom*, ECHR (2008), Appl. No. 25904/07, para. 115.

<sup>55</sup> See Stockholm Migration Court, judgment on appeal of 22 November 2009, available at: <http://www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-22-february-2011-um-10061-09#content>

<sup>56</sup> *QD (Iraq) v. Secretary of State for the Home Department*; *AH (Iraq) v. Secretary of State for the Home Department*, [2009] EWCA Civ 620, United Kingdom: Court of Appeal (England and Wales), 24 June 2009, available at <http://www.refworld.org/docid/4a5b58522.html>

view of the meaning and effect of the grant of protection under article 15(c) of the Directive, a limitation to the acts of violence that violate international humanitarian law, meaning for example that unforeseeable collateral damage would not count among such acts, cannot be deduced from this provision (this too is the position of recent UK case law, judgment of the Court of Appeal of 24 June 2009, *QD and AH v. Secretary of State for the Home Department* [2009] EWCA Civ. 620).” [para. 34] <sup>57</sup>

Continuing the line of horizontal judicial dialogue, the **Czech Supreme Administrative Court**, in a case concerning determination of subsidiary protection in a situation of internal armed conflict, referred to the CJEU case of *Elgafaji* and the above-mentioned judgments of the **UK Court of Appeal** and **German Federal Administrative Court**<sup>58</sup>.

A few months after the adoption of the *Recast Qualification Directive*, the **Conseil d'État of Belgium** addressed a preliminary reference to the CJEU concerning the interpretation of “internal armed conflict” (*Diakité* C-285/12). The CJEU concluded that the concept of “internal armed conflict” is an autonomous concept with a definition distinct than that given by international humanitarian law. The CJEU underlined that “internal armed conflict” is an EU law concept to be interpreted in line with the relevant primary and secondary EU law and not necessarily international humanitarian law. The definition given by the CJEU is broader than that under international humanitarian law.

The Court underlined that:

- *first*, there is no need to qualify the actors who are in conflict, namely whether they are state or non-state actors;
- *secondly*, it is necessary only to establish whether the conflict can be characterized by a “degree of indiscriminate violence, so high” as to indicate that mere presence in the country or region in question would subject the applicant to a real risk of serious harm;
- *thirdly*, there is no need to carry out, “*in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict.*”

These two preliminary rulings thus require a relaxation of the burden of proof and standard of proof and therefore a neutralisation of excessive obstacles towards ensuring effective justice. They also establish concrete standards on the duty of cooperation of public authorities. Notably, an expansion of the duty of cooperation since more risks need to be assessed by the judge *ex officio*.

The requirements for subsidiary protection set out in Arts. 2(e) and 15(b) of the Qualification Directive have been further clarified by the CJEU a more recent case - C- 353/16, *M.P.*, ECLI:EU:C:2018:276. According to the CJEU, these articles “*read in the light of Art. 4 of the Charter, must be interpreted as meaning that a third country national who in the past has been tortured by the authorities of his country of origin and no longer faces a risk of being tortured if returned to that country, but whose physical and psychological health could, if so returned, seriously deteriorate, leading to a serious risk of him committing suicide on account of trauma resulting from the torture he was subjected to, is eligible for subsidiary protection if there is a real risk of him being intentionally deprived, in his country of origin, of appropriate care for the*

---

<sup>57</sup> BVerwG 10 C 4.09, VGH 8 A 611/08.A, Judgment of 27 April 2010, available online at: [http://www.bverwg.de/medien/pdf/ent\\_en/10\\_c\\_4\\_09.pdf](http://www.bverwg.de/medien/pdf/ent_en/10_c_4_09.pdf)

<sup>58</sup> Supreme Administrative Court, March 13, 2009, no. 5 Azs 28: 2008.

*physical and mental after-effects of that torture, that being a matter for the national court to determine.”*

The following paragraphs will consider the impact of *Elgafaji* C-465/07 and *Diakité* C-285/12 on national jurisprudence of Member States other than the referring ones and the duty upon national courts to consider subsidiary protection under Article 15(c) Recast Qualification Directive *ex officio*.

*Question 1.b – Do national courts have a duty to consider ex officio subsidiary protection under a different ground than the one invoked by the applicant and considered by the administration?*

Does the national court have an obligation to consider *ex officio* the risk emanating from the generalised situation of violence in the country of origin, even if not expressly invoked by the applicant?

What does the duty of cooperation require from national courts in cases where the applicant for international protection did not establish a direct link between the presence of high levels of indiscriminate violence in his country of origin and his own particular situation and the threat he would face if returned there?

*Italy, Court of Cassation, judgment of 10 April 2015, file No. 7333/2015*<sup>59</sup>

#### *Facts of the case*

The applicant, a Nigerian national, made an application for subsidiary protection in Italy. In it he alleged a threat to his life as a result of a succession dispute in his extended family following the death of his father, as well as threats to the life of his wife. He did not submit any information in relation to the general security situation in Nigeria. He was granted subsidiary protection by the **Court of First Instance**. This however was reversed on appeal before the **Court of Appeal of Bologna**. The **Court of Appeal** found that the applicant had not established a direct link between the presence of high levels of indiscriminate violence in his country of origin and his own particular situation and the threat he faced. Accordingly, he did not qualify for subsidiary protection. The applicant appealed this judgment to the **Court of Cassation** arguing that the **Court of Appeal** had rejected his claim based on the fact that he did not submit information regarding the general security in his country of origin whereas there was a duty on the national authorities to take such facts into account when assessing an application for subsidiary protection.

#### *Reasoning of the Italian Court of Cassation*

The main questions that had to be answered by the Italian Court of Cassation concerned the burden of proof and duty of cooperation of the national courts in regard to the evaluation of subsidiary protection claims. In particular, whether the applicant was obliged to submit information regarding the general security situation in his country of origin or whether this information could or should have been taken into account by judicial authorities on their own motion.

---

<sup>59</sup> Commentary drafted by Madalina Moraru with the help of Judge Martina Flamini.

The **Italian Court of Cassation** reversed the judgment of the **Court of Appeal of Bologna** finding that the authorities are under a duty to take into account general information regarding the country of origin.

It found that while the applicant has a general duty to submit as soon as possible all evidence necessary to substantiate his claim (Article 4(1) Recast QD), this does not entail an obligation to substantiate the specific grounds which make him eligible for protection; rather it is the duty of the judicial authorities to make the assessment of the legal qualification for subsidiary protection, in particular taken into consideration whether this can be recognised under the individual or general risk of persecution. In doing so the judicial authority is obliged to take into account “*all relevant facts as they relate to the country of origin at the time of taking a decision on the application*” (the Court cited Article 4(3)(a) of the Qualification Directive in this regard). These relevant facts may in turn be used in assessing the credibility of the applicant. In order to establish the precise burden of proof and duty of cooperation of the national court, the Supreme Court cited the CJEU judgments of *Elgafaji*<sup>60</sup> and *Diakité*<sup>61</sup>.

As regards the duty of cooperation incumbent upon the national courts, the **Italian Court of Cassation** held that it is the duty of the judicial authorities to assess qualification for subsidiary protection. In terms of evidence, the Court held that the judicial authority is obliged to take into account “*all relevant facts as they relate to the country of origin at the time of taking a decision on the application*”. As to the standard of proof, the Court of Cassation endorsed the sliding scale developed by the CJEU in *Elgafaji*: “*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*” and *vice versa*.

In applying these findings, the Court of Cassation found that the credibility of the applicant had been established and that, taking into account the general security situation in Nigeria (the persistent conflict between tribes and the general lack of control by the authorities), it was clear that the national authorities were not in a position to provide the applicant with adequate security. He would therefore be exposed to a risk of serious harm in the event of his removal to Nigeria and therefore should qualify for subsidiary protection under Article 15(c) Recast Qualification Directive.

The **Italian Court of Cassation** reversed the judgment of the **Court of Appeal** because it did not take into account the interpretation of the Qualification Directive as provided by the CJEU in the cases *Elgafaji* and *Diakité*<sup>62</sup>. The Court cited the definition of the “general risk of harm” provided by the CJEU in the *Elgafaji* case:

*“...the word ‘individual’ must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – 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, would, solely on account of his presence on*

---

<sup>60</sup> Case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, EU:C:2009:94.

<sup>61</sup> Case C-285/12, *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides*, EU:C:2014:39.

<sup>62</sup> The *Diakité* judgment is cited for the purpose of giving effect to the CJEU definition of an ‘armed conflict’.

*the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.” (para. 35)*

Additionally, the court cited the sliding scale of the standard of proof defined by the CJEU in cases of subsidiary protection:

*“...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 case is a concrete example of how the CJEU development of the evidential rules set out by the Qualification Directive has directly impacted on the jurisprudence in Member States other than the referring one. The Court of Cassation imposed on national courts a duty to consider of their own motion the general situation in the country of origin and assess whether Article 15(c) of the Qualification Directive, namely the generalised risk of harm, is applicable, even if not expressly invoked by the individual, on the basis of the Qualification Directive as interpreted by the CJEU in *Elgafaji* and *Diakité*.

The interpretation of the **Italian Court of Cassation** and the CJEU has since been confirmed by the ECtHR in *F.G. v. Sweden* where the Strasbourg Court states that “*in relation to asylum claims based on a well-known general risk, when information about such a risk is freely ascertainable from a wide number of sources, the obligations incumbent on the States under Articles 2 and 3 of the Convention in expulsion cases entail that the authorities carry out an assessment of that risk of their own motion (see, for example, Hirsi Jamaa and Others v. Italy [GC], cited above, §§ 131-133, and M.S.S. v. Belgium and Greece [GC], cited above, § 366). By contrast, in relation to asylum claims based on an individual risk, it must be for the person seeking asylum to rely on and to substantiate such a risk*”. (para. 126-127)

Although the Italian Court of Cassation cites only the CJEU judgments in *Elgafaji* and *Diakité* cases, it should be mentioned that the Italian Court’s judgment is also in line with the conclusions of the CJEU in *M.M. (I)*. In that case, the CJEU confirmed the obligation of the national authorities “*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.*” (para.67). This obligation has been codified in Article 10(3) and recital 39 of the Recast Asylum Procedure Directive. The added value of the judgment of the Italian Court of Cassation is that it does not only confirm an obligation of the national court to investigate the situation in the country of origin of its own motion, but to also consider *ex officio* a possible new ground for recognising international protection (in this case subsidiary protection), even if the applicant himself has not advanced the point.

*Question 1.c – Does the duty of cooperation require a national court to consider ex officio subsidiary protection under Article 15(c) of the QD when the situation in the applicant’s country of origin does not meet the definition of an ‘internal armed conflict’?*

When the administrative authorities reject an asylum application on the basis of lack of proof regarding an individual threat in the country of origin, is the national court bound under the duty of cooperation, EU Charter and CJEU jurisprudence to consider *ex officio* subsidiary protection on the basis of indiscriminate violence?



What evidence is the national court required to gather when considering *ex officio* subsidiary protection under on the ground of indiscriminate violence under Article 15(c) Qualification Directive?

What is required from a national court under the EU Charter, CJEU jurisprudence in terms of intensity of judicial review of the administrative decision and remedies?

*Bulgaria, Sofia City Administrative Court, Yasiniefta v. State Agency for Refugees, case 5774/2015 of SCAC*<sup>63</sup>

#### *Facts of the case*

The applicant, Victor Yasiniefta, was a Ukrainian citizen, born in Donetsk with Russian nationality. At the beginning of 2015 he left Ukraine legally and arrived in Bulgaria, where he applied for international protection.

The State Agency for Refugees rejected his application due to lack of evidence that his life would be threatened if returned, and on grounds that the current situation in his country of origin did not fall within the scope of Article 15(c) of the Qualification Directive. The decision of the state authority was appealed before **Sofia City Administrative Court**.

#### *Reasoning of the Sofia City Administrative Court*

The State Refugee Agency argued that the applicant did not substantiate his allegation that if he returned to Ukraine, he would be persecuted on a Convention ground. The Court considered the evidence gathered by the Agency, but it also gathered new evidence from public sources of information on the situation in the country of origin of the asylum-seeker in light of Article 8 of the Qualification Directive. The Court informed the parties that in taking its decision, it would use publicly available sources, in particular, information about the countries of origin published on the website [www.ecoi.net](http://www.ecoi.net) managed by the European Asylum Support Office ('EASO').

According to the German Migration and Refugee Service report of July 2015, published on the EASO website, the OSCE representatives noted the situation in Ukraine has deteriorated considerably in recent months. On the front line, both sides had used tanks and gaffers, the withdrawal of which was negotiated in February's peace talks. In twenty-four hours, as a result of the intercepted strikes, at least two civilians were killed.

The Court also looked at the report of Human Rights Watch on Ukraine, published in February 2015 as regards events occurred between May and September 2014. Accordingly, hundreds of peaceful inhabitants of Donetsk and Lugansk areas have died as a result of the indiscriminate use of missiles, mortars, and artillery on both sides of the conflict. It was mentioned that these heavy weapons were also targeting densely populated civilian areas, which is contrary to the laws of war. Data on the use of the banned cluster munitions was present in the reports. In areas controlled by the rebels there was a serious breakdown of law and order. Authorities prosecuted and arrested without trial people suspected of being supportive of the power in Kiev. It was reported as frequent practice, the abduction of adults and children for ransom. The Ukrainian Special Forces and paramilitary formations in the two troubled areas also used widespread kidnappings, torture, and

---

<sup>63</sup> Case submitted by Dobroslav Rukov, Judge at the Sofia City Administrative Court.

illegal detentions to achieve political or even commercial ends, as well as suspicion of sympathy for the two separatist areas. The Court took into account the fact that the Report mentioned that there is no guarantee that no person will suffer severe and personal threats unless he is in any way suspected of co-opting or supporting any of the warring parties. Since the beginning of the conflict, more than 450,000 people from troubled regions have been forced to leave their homes and seek refuge in other parts of the country or in other countries, including Russia, Estonia, Latvia, and Lithuania.

In addition, the Court referred to the findings of the Amnesty International Human Rights Report published on the same website. This stated that more than 4,000 people have died since the conflict in Ukraine. Most of the victims are civilians and have died as a result of the indiscriminate shooting of residential areas on both sides with heavy arms and mortars. According to Amnesty International, the number of displaced persons as a result of the conflict is more than one million. The majority found shelter in Russia, but also in other countries, including EU countries.

Considering the collected written evidence, the Court found that the return of the asylum-seeker in his country of origin would be in contradiction to the principle of *non-refoulement* guaranteed by the 1951 Geneva Convention.

The Court pointed out that the Qualification Directive provides for subsidiary protection for persons who cannot be defined as refugees but who, if returned to their country of origin or to their former habitual residence, would be exposed to a serious risk of serious harm: this could be torture, inhuman or degrading treatment or punishment (Article 15 (a) or (b)) or a serious and personal threat to life of a person as a civilian due to indiscriminate violence in the case of international or internal armed conflict (Article 15(c)).

In arriving at its decision, the Court looked at the standards required under Article 18 EU Charter, the right to asylum, and Article 19 EU Charter, which includes the respect for the principle of *non-refoulement*, as well as Article 3 ECHR interpreted by the ECtHR and incorporated within the interpretation of Article 19(2) EU Charter. These standards mean that Member States are prohibited from expelling individuals to countries where there is a risk of being subjected to ill treatment.

The Court looked then at the requirements established by the CJEU. It held that the CJEU interpreted the requirements under Article 15(c) of the Qualification Directive in C-465/07 (*Elgafaji*) and Case C-285/2012 (*Diakité*) as meaning that:

- the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he would be specifically targeted by reason of factors particular to his personal circumstance; and
- the existence of such a threat can be considered to be established where the degree of indiscriminate violence characterizing 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, 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.

Considering the interpretation of the CJEU of Article 15(c) of the Qualification Directive, the Sofia City Administrative Court found that, in the present case, the situation in the applicant's country of origin even if it does not meet the definition of an 'internal armed conflict' set out in Article 3 of the Geneva Convention and the Second Additional Protocol of 1977, it does reach the level of indiscriminate violence as set by the CJEU:

*“The level of violence is so high that there are serious and confirmed grounds for believing that the applicant, as a civilian person if returned to Ukraine, will suffer the assaults and threats under Art. 15(c) of QD, due to its very presence on the territory of the country. He must not prove that he is specifically affected by elements inherent in its personal situation within the meaning of the sliding scale under paragraph 39 of the judgment in case C-465/07. The security situation is a dynamic concept and is constantly changing, and each decision-making body or court should take into account the situation as it is at the time when the dispute is resolved before it. Evidence of the actual situation from which to draw the safety of the life of the asylum-seeker should be up to date. Accordingly, the data relied on by the administrative authority in the contested decision are up to date but they are incorrectly assessed as regards the risk assessment within the meaning of Article 15(c) of Directive 2004/83 in the light of the interpretation given in the judgment of 30 January 2014 in case C-285/2012 of the ECJ.”[underlining added]*

In light of the above, the Court annulled the administrative negative decision insofar as it refused to grant subsidiary protection and remitted the case for a new ruling on the application with an indication of a grant of protection.

#### *Instances of judicial dialogue*

Articles 18 and 19 EU Charter and Article 3 ECHR were cited as standards for assessing the circumstances when an individual cannot be returned to his country of origin. In regard to establishing whether the individual qualifies for subsidiary protection, the Court directly applied the standards set by the CJEU in *Elgafaji* and *Diakité*, rejecting the prohibitive standard applied by the administration as regards the level of indiscriminate violence that needs to be reached in order for the individual to qualify for subsidiary protection.

The national court summarised the duties as regards evidence assessment, commencing its judgment by underlining that it will not limit the assessment to the country of origin information provided by the administration, but will gather its own information if needed, for example to ensure the material is up to date. Additionally, the information taken from the country of origin information needs to be checked in light of the standards set by the CJEU.

Further national case law: **French Conseil d'État** (CE), *M. Seedik*, judgment of 28 December 2017, Case n° 404768, on **duty of cooperation**, inspired by the *Elgafaji* and *Diakité*; the French CE quashed the judgment of the first instance asylum court for not assessing ex officio whether there was a situation of armed conflict in the region of which the asylum seeker came from.

## Question 2 – The extent of the duty to cooperate of the national court

### Question 2.a – Does the duty to cooperate impose a positive obligation on national courts to make investigative enquiries?

Is the duty to cooperate in international protection proceedings to be interpreted as a derogation from the dispositive principle usually applied in civil procedure law?

Is the duty to cooperate to be interpreted in the sense of placing on the judge a duty to establish measures of inquiry of its own motion?

What is the role of the assessment of the country of origin information?

What does the duty to cooperate of national courts entail when there are concerns regarding credibility of evidence (documentation regarding death of mother, and kidnapping of father) and genuineness of the Christian religion; also when there is an alleged lack of evidential documents raised by the administration?

### Italy, Court of Cassation, decision no. 25534/2016 – The impact of the duty of cooperation and effectiveness of EU rights on the burden of proof

#### *Facts of the case*

The applicant, a Nigerian citizen, fled his Country, claiming a fear of persecution on the ground of religion. He alleged that his father – a minister of the Christian Apostolic church – had been kidnapped and his mother killed. The administrative authorities deemed not credible the documentation produced by the applicant (a copy of a newspaper article and the mother's death certificate) and doubted of the genuineness of his asserted Christian religion. The **judge of first instance**, at which proceedings the state administration did not appear, refused to grant refugee status but granted subsidiary protection. The Home Affairs Minister appealed against the decision, contesting the veracity of the documents produced and the lack of evidence to substantiate the asylum application. The **Court of Appeal** upheld the appeal and denied any form of international protection. With Decision No. 25534/2016, the Italian **Court of Cassation (Supreme Court)** quashed the **Court of Appeal** decision on the grounds that the appeal judge did not comply with its positive duty of collaboration with the asylum seeker.

#### *Reasoning of the Court*

The **Court of Cassation** held that when assessing asylum claims the dispositive principle commonly applicable in civil proceedings cannot be applied in its strict terms. The applicable evidential procedural rules in asylum adjudication have to be enforced according to a more lenient standard than other civil cases (N.B. in Italy international protection claims are assessed by civil judges). This means not only that general procedural deadlines for submitting evidence or content of evidence are not applicable, but also that the judge must exert an “unofficial probative inquiry” (“*attività istruttoria ufficiosa*”), which includes the recourse to diplomatic channels or even international rogatories.

This obligation arises especially in cases where the respondent (the Home Affairs minister) contests the authenticity of the applicant's documentation and statements.

The positive obligation to actively cooperate with the asylum applicant in assessing his application is grounded in EU law. Because of that, domestic procedural law has to be interpreted consistently with it. The positive obligation of the judge to establish measures of inquiry on his/her own motion is also considered a way to compensate for the relatively weak procedural position of the asylum seeker.

This decision is consistent with previous case-law of the **Court of Cassation**.<sup>64</sup>

#### *Conclusion of the Court*

The **Court of Cassation** remitted the decision to a different composition of the **Court of Appeal**, holding that, while the asylum seeker has a duty to substantiate his request, if the evidence produced is not sufficiently corroborative, the judge cannot simply reject the application. He has a positive obligation to ascertain by all possible means the evidence that is relevant for his case.

The Court held that the dispositive principle, according to which it is for the applicant to produce evidence, does not strictly apply in asylum adjudication. The duty to cooperate implies that it is for the judge to adopt measures of inquiry of his/her own motion and to verify the credibility of the asylum seeker's application having regard to up-to-date country of origin information, which the adjudicating judge must assess on his own.

The **Italian Court of Cassation** has also clarified that in cases where inconsistencies exist between the evidence provided by the applicant, and the information gathered by public authorities, the national court has to verify the country of origin information of its own motion, by securing relevant and up to date information. The conclusion is similar to the one reached by the **Sofia City Administrative Court** in the above case, which did an independent assessment of the country of origin information. The Court of Cassation requires in such cases, that the national court must indicate the sources of country information and their dates (see decision 3347/2015)<sup>65</sup>.

#### *Instances of judicial dialogue*

The Italian Court of Cassation used the principle of consistent interpretation to deduce a duty of national courts to exert an "unofficial probative inquiry" (*attività istruttoria ufficiosa*), which includes the recourse to diplomatic channels or even international rogatories, and gathering of country of origin information, in cases where there is concern regarding the credibility of the applicant's statements and the authenticity of evidence. The duty was derived from the EU duty of cooperation enshrined in Article 4 of the Qualification Directive.

#### *Question 2.b – Does the duty to cooperate require the national court to consider ex officio a new ground for recognising international protection, other than the one considered by the State?*

---

<sup>64</sup> See Cassation Court (plenary sess.), decision no. 27310/2008; Cassation Court no. 8282, 4 April 2013.

<sup>65</sup> Similarly, see German jurisprudence developed on the respect of the principle of equality of arms. A similar approach on the *ex officio* judicial powers exercised for the purpose of rights of defence has developed in the field of consumer protection; see the Re-Jus Casebook on consumer protection.

Can the duty to cooperate require the national judge to consider *ex officio* a new ground for recognising international protection other than the one assessed by the administrative authority, if supportive proof are already present (e.g. victim of trafficking)?

*Tribunal of Torino, Judgment of 24 February 2017 - considering new reason for recognising international protection under the duty of cooperation*

*Facts of the case*

A Nigerian woman applied for asylum in Italy. She claimed to have been raised in the Delta Niger State, a Region where armed groups and gangs were known to kidnap oil workers and their relatives and to perpetrate sexual violence on the female population.

The applicant claimed to be a victim of sexual abuse and that, in order to escape the ongoing violence, she moved to another village, still within the Delta Niger Region. Here, a woman offered to help and persuaded her to move to Libya. In Libya, she was forced into prostitution and “sold” to a Nigerian man. She was informed that her debt was 10.000 US dollars. The applicant was sold on to a Libyan national, and having been isolated and repeatedly abused, she was then forced to go to Italy. On arrival in Italy, she claimed international protection.

The administrative body in charge with the assessment of the request rejected her application on grounds of lack of credibility: there were discrepancies with regard to the region the claimant was from and the asserted sexual violence in Nigeria, as a result of which she was considered not credible.

On appeal, the judge granted subsidiary protection.

*Reasoning of the Court*

The administrative stage of the procedure focused almost entirely on the asserted violence suffered by the victim in Nigeria and on the discrepancies in her story. While recognising that the applicant’s story presented some inconsistencies with regard to her stay in Nigeria, the Tribunal relied much more on the alleged trafficking situation experienced by the applicant. Referring to the UNHCR guidelines concerning the risk of persecution for trafficked women, the Tribunal refused to recognise refugee status. Although State action to repress of trafficking crimes in Nigeria is far from effective, it could not be concluded, according to the Tribunal, that it is completely absent. Criminal gangs involved in trafficking in Nigeria were considered to not qualify as a non-state agent for the purpose of the relevant refugee definition. However, the Tribunal considered that should the applicant return to Nigeria, she would likely face a risk of re-trafficking, in light of her vulnerability due to young age and lack of relatives; as such the Tribunal granted subsidiary protection.

In conclusion, the Tribunal appears to have recognised international protection relying on the trafficked status of the victim, a ground the administrative authorities did not assess during the administrative phase, although it was evidence from the applicant’s account. The Tribunal made extensive reference to the UNHCR guidelines in recognising subsidiary protection. These guidelines could be considered as an autonomous use of COI by the judge in order to reinforce the ‘personal reasons’ with the precarious situation in the country of origin. Therefore, the lack of objective evidence regarding her personal condition (testimony) were overcome by the fact that the essential ground of the application – returning to a region characterised by a high risk of trafficking – was demonstrated to be a real risk by the UNHCR Guidelines.

**Further national case law: French Conseil d'État**, case *M. Boite*, judgment of 8 February 2017, case n° 396695 and *M. Jalayta*, n° 379378 : a series of decisions regarding **standard of proof and benefit of doubt principle** in cases of persecution on grounds of homosexual orientation, directly inspired by the *A. B. C.* case .

## **1.8. Elements of evidence which can be taken into consideration by the national authorities for the purpose of establishing the risk of persecution**

### **Relevant legal sources**

#### **EU level**

Article 4(2) of Directive 2011/95/EU (possible items of evidence), states that the elements of evidence 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, travel documents and the reasons for applying for international protection.”

Article 4(3) of Directive 2011/95/EU (possible items of evidence), states that:

“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 those activities 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.”

### **Other sources**

According to the International Association of Refugee Law Judges<sup>66</sup> the types of evidence that can be taken into account in the risk assessment includes the following:

- a) the applicant's profile at the time of assessment;
- b) accepted evidence of other witnesses;
- c) expert evidence duly assessed for probative weight;
- d) relevant Country of Origin Information (duly assessed and weighted in accordance with COI guidelines, such as those of EASO, UNHCR);
- e) the relevant legal framework applicable in the QD, APD, CJEU and, ECtHR and international asylum law.

### Overview of the relevant CJEU case law

According to the CJEU in *Y and Z*<sup>67</sup>: “in accordance with Article 4(3) of the Directive, the competent authorities carry out an assessment of an application for international protection on an individual basis, they are required to 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)

The CJEU in *Y and Z* held that the possibility of avoiding persecution by hiding or avoiding the public expression of religious belief cannot be taken into consideration within the assessment of the risk of persecution.

CJEU findings in relation to prohibited evidence and methods of collecting evidence (*A*, *B*, *C*<sup>68</sup> and *F* cases<sup>69</sup>) are as follows:

- Asylum applicants may not be questioned on the details of their sex lives, nor can evidence, including videos, pictures of sex acts be accepted;
- Expert reports which were drafted on the basis of procedures inconsistent with the fundamental rights guaranteed by the Charter cannot be taken into account as evidence during asylum proceedings;
- Administrative authorities and courts or tribunals cannot ‘base their decision on an asylum application based on persecution for sexual orientation solely on the conclusions of the expert's report and that they are not bound by those conclusions when assessing the applicant's statements relating to his sexual orientation’;
- Article 4 of the Qualification Directive “read in the light of Article 7 of the Charter, must be interpreted as precluding the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist's expert report, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant”; (*F*., para. 51)
- Failure to reveal sexual orientation early in an application for asylum is not necessarily fatal to credibility of an applicant;

---

<sup>66</sup> See IARLJ, *Assessment of Credibility in Refugee and Subsidiary Protection Claims under the EU Qualification Directive: Judicial Criteria and Standards*, prepared by J. Barnes and A. Mackey, 2013. A forthcoming chapter in the EASO Professional Development Series will deal in detail with Evidence Assessment and Credibility.

<sup>67</sup> C-71/99 and 99/11, *Y. and Z.*, ECLI:EU:C:2012:518.

<sup>68</sup> C-148/13 to C-150/13, *A, B, C*, ECLI:EU:C:2014:2406.

<sup>69</sup> C-473/16, *F*, ECLI:EU:C:2018:36.



- Failure to mention LGBT related organisation cannot constitute the sole ground for rejecting the credibility of an asylum seeker requesting international protection on the basis of persecution on grounds of sexual orientation;
- Administrative authorities must provide details regarding the form of questions posed to ensure that respect for private life and human dignity is maintained.<sup>70</sup>

## Overview of the ECtHR case law

According to an established body of jurisprudence, evidence of past ill treatment can be an indication of a future risk of ill treatment.<sup>71</sup> They can be dispelled only if the situation in the country of origin has changed in the meantime, confirmed by information on country of origin.<sup>72</sup> More details will be provided in the following sub-section on the standard of proof.

## Main questions addressed

### Question 1 – Are restrictions on evidence in cases of renewal of subsidiary protection compatible with the principles of *non-refoulement* and effectiveness?

Are procedural rules limiting the grounds for renewal of subsidiary protection compatible with fundamental rights and the principle of effectiveness of EU rights?

In the process of the renewal of subsidiary protection the applicant was unable to state any new relevant circumstances which occurred after the first decision that granted him subsidiary protection.

### Slovenia, Constitutional Court, Cases U-I-189/14, Up-663/14<sup>73</sup>

#### *Facts of the case*

The applicant was granted the status of subsidiary protection in Slovenia on the basis of the second and third indent of Article 28 of the International Protection Act of Slovenia, which includes torture or other inhuman or degrading treatment or punishment in the state of origin and serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict as grounds for granting asylum. An assessment of whether the conditions contained in the third indent (internal armed conflict) were fulfilled was not made. In the process for the renewal of his subsidiary protection, the applicant again referred to the second and third indents of Article 28 of the International Protection Act. The national administration

<sup>70</sup> Council of States, Netherlands, 201208550/1/V2, 201110141/1/V2, 201210441/1/V2, see more details in the *ACTIONES Module on the Judicial Application of the EU Charter in asylum and immigration*.

<sup>71</sup> See *A.A. v Switzerland*, Application No. 58802/12, ECtHR Judgment of 7 January 2014; *R.C. v Sweden*, Application No. 41827/07, ECtHR Judgment 9 June 2010.

<sup>72</sup> *D.N.W. v Sweden*, Application no. 29946/10, ECtHR Judgment of 6 December 2012.

<sup>73</sup> Case can be found online in the [ACTIONES Database](#).

stated in its decision that its assessment for renewal was limited to the reasons already put forward in the request for subsidiary protection on the basis of which the subsidiary protection was granted in the first place (i.e. limited to the second indent) and denied the renewal of the status. This decision was confirmed by the **Administrative Court** and **Supreme Court**.

After these repeated judicial refusals to renew his subsidiary protection, the applicant lodged a complaint before the **Constitutional Court**, claiming that his constitutionally protected rights had been violated. The Court found that the process of renewal of subsidiary protection set out by the national legislation was incompatible with the prohibition of torture as provided for in Article 18 of the Constitution of the Republic of Slovenia, which includes the principle of *non-refoulement*, and with Article 19 Charter, if there is a real risk of ill treatment in the event of return.

### *Reasoning of the Court*

The **Constitutional Court** assessed whether the Article 106 of the International Protection Act which governs procedural aspects of the request for the renewal of subsidiary protection, was compatible with the constitutionally protected right of the prohibition of torture. The Court held that the effect of the rejection of renewal of subsidiary protection is that the third country national will lose his right of residence in Slovenia and will thus possibly be made subject to removal. The Court stated that it is an essential aspect of the International Protection Act to ensure respect for the principle of *non-refoulement*, as included in the Article 18 of the Constitution. Furthermore, the Court held that the *principle of non-refoulement* enshrined in Article 19 EU Charter is also applicable to situations of cessation of subsidiary protection, since the situation is governed by the Recast Qualification Directive and Article 45 of the Asylum Procedure Directive, which requires the competent authority to obtain information on the general situation prevailing in the countries of origin of the persons concerned.

In the procedure for renewal of subsidiary protection, the final decision of a competent authority is based on reasons put forward by the applicant in the request. The Court held that where the authority fails to consider reasons put forward by the applicant in the course of the proceedings, it must carry out a similar assessment as the one used when granting the status of subsidiary protection.

The **Constitutional Court** stressed that it follows from the principle of *non-refoulement* that an individual who is in the subsidiary protection process must have the opportunity to state all reasons and circumstances that are relevant for prolonging the status. The applicant should therefore be able to state new circumstances which occurred after the decision that granted him or her subsidiary protection was granted, if removal would risk subjecting the individual to torture or other ill treatment.

The **Constitutional Court** concluded that Article 18 of the Constitution contains an absolute prohibition of returning individuals if there is a real danger that the individual will be subject to inhuman treatment in the country of origin. It concluded that request for renewal of the subsidiary protection must be treated as a new request for subsidiary protection. The applicant should therefore be free to state any circumstances and reasons relevant for his status. Article 106 of the International Protection Act was therefore found to be incompatible with Article 18 of the Constitution of the Republic of Slovenia.

### *Conclusion and outcome of the Court*

Article 106 of the International Protection Act, which excluded the possibility of bringing new reasons and evidence for the renewal of subsidiary protection, was held to be incompatible with Article 18 of the Constitution as interpreted in light of Article 19 EU Charter and Article 3 ECHR. National legislation has been amended to the extent that, according to new legislation, a competent authority shall assess the existence of all reasons for the prolongation of subsidiary protection and not just those reasons that led to the original grant of subsidiary protection.

### *Instances of judicial dialogue*

The Constitutional Court made an interesting application of the *consistent interpretation technique* in order to decide whether national legal provisions that limited procedural evidence in cases of renewal of subsidiary protection are compatible with Article 18 of the Constitution. This Article, enshrining the prohibition of torture and ill treatment, was interpreted in light of the specific requirements of Article 19 Charter, the principle of *non-refoulement*.

Furthermore, in order to understand the precise requirements of Article 45 of the Revised Asylum Procedure Directive (which stipulates that the competent authority will have to obtain information as to the general situation prevailing in the countries of origin of the persons concerned), the Constitutional Court also referred to Article 3 ECHR and ECtHR jurisprudence, which requires an *ex nunc* assessment of the situation in the country of origin.

The Constitutional Court made use also of the *disapplication technique* in striking down Article 106 of the International Protection Act on the basis of its incompatibility with Article 18 of the Constitution, as interpreted in light of Article 19 EU Charter and Article 3 ECHR

## **1.9. Standard of proof – what needs to be proven and circumstances alleviating the duty to substantiate the application**

By ‘standard of proof’ we refer to the level of evidence needed to establish that a fact presented by the applicant can be accepted by a Member State. In short, the necessary threshold for an applicant to be found credible. As already discussed, specific rules govern the standard of proof required in asylum adjudication as compared with administrative, civil, or criminal proceedings. The standards are usually more lenient due in part to the irreversible negative consequences that a rejection of asylum application may entail for the applicant.

### **Relevant legal sources**

Article 4(5) of the Recast Qualification Directive provides as follows:

“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 when the following conditions are met:(a) the applicant has made a genuine effort to substantiate his application;(b) all relevant elements at the applicant’s disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements; (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.”

This provision sets out an alleviation of the applicant's duty to present evidence when his conduct would otherwise make his claim credible.

## Overview of EU law and CJEU jurisprudence

There is no complete EU harmonisation of the standard of proof, therefore Member States are, in principle, free to set their own standards. This has led to a variety of standards being applied in practice in the Member States, as a result of their different legal traditions.

However, guidelines and principles may be found in Articles 4(4) and 4(5) of the Recast QD and in the relevant jurisprudence of the CJEU and ECtHR.

Article 4 Recast Qd provides for an alleviation of the evidential standard in two circumstances. First in cases of past persecution (Article 4(4))<sup>74</sup> and secondly, in cases of a lack of evidence (Article 4(5)). According to the first part of Article 4(4) Recast QD, past persecution or serious harm, or past direct threats of such persecution or such harm, is considered to create a presumption of a serious indication of a future risk of persecution or real risk of suffering serious harm. This presumption of future risk of persecution can be rebutted, according to Article 4(4) of Recast QD if “*there are good reasons to consider that such persecution or serious harm will not be repeated.*” The CJEU has not yet interpreted the meaning of “good reasons”, however relevant guidelines can be found in the jurisprudence of the ECtHR, discussed below.

Important guidelines have been developed also in the jurisprudence of the CJEU. For instance, AG Sharpston has pointed out that the Member States “*are prohibited from laying down unrealistic standards for the evidence required, as this may undermine the effectiveness of EU rights*”, such as the EU right to asylum and the prohibition of *non-refoulement*. (Opinion of AG Sharpston in *Bolbol*, para. 95)<sup>75</sup> The Opinion of AG Sharpston was confirmed by the ECtHR, which in *M.S.S and others v Belgium and Greece* held that the Aliens Appeal Board had violated Article 3 ECHR by requiring the applicants to produce “*concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3 ECHR.*” Accordingly, the Board had increased the burden of proof to such an extent as to hinder the examination of the merits of the alleged risk of a violation (para. 389). The requirement is that the risk of torture be foreseeable, real, and personal, but the risk does not need to be highly probable.<sup>76</sup> The level of proof required in asylum adjudication is not the normal civil or criminal standard of proof (civil balance of probabilities) nor the criminal (beyond reasonable doubt) level, where the decision-maker needs to

---

<sup>74</sup>Article 4(4) Recast Qualification Directive reads as follows: “*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.*”

<sup>75</sup> See also, the CJEU in *Pontin*, “*this means that whilst Member States retain the right to lay down, under national law, the applicable rules of evidence, those rules must not make it impossible or virtually impossible for an applicant to claim rights guaranteed by EU law*” (Case C-63/08, *Pontin*, ECLI:EU:C:2009:666, para. 43).

<sup>76</sup> See also, M. Reneman, *EU Asylum Procedures and the Right to an Effective Remedy*, OUP, 2014, p.189.

be convinced to a very high degree before passing a sentencing judgment, but rather it is that of a 'real risk' or 'reasonable degree of likelihood' of the possible future risk.<sup>77</sup>

### **Selected ECtHR jurisprudence on the interpretation of the conditions for the benefit of the doubt and credibility assessment**

1. Interpretation of the phrase 'strong indication' in Article 4(4) Recast QD:  
*J.K. v Sweden*<sup>78</sup>

The case involved Iraqi nationals who were subject to a deportation order after their request for asylum in Sweden was rejected. Their request was based on their fear of being persecuted by Al-Qaeda if they returned to Iraq, as a result of previous commercial relations one of the applicants had had with the American forces. The Court held that the security situation in Iraq was not such that it would create a general need for international protection, however the applicants' personal situation and the diminished capacity of the Iraqi authorities to protect them should be considered factors that led to the existence of a genuine risk of ill treatment should they be returned.

The Court held that the applicants would be at risk in Iraq based on the past persecution on the basis of their coherent, credible accounts which were compatible with the information gathered from reliable and objective sources on the situation in Iraq.

Regarding the protection capacity of the Iraqi authorities, the ECtHR emphasised that although the current level of protection provided was perhaps sufficient for the general population of Iraq, it was not the adequate for persons belonging to a target group such as the applicants, who had collaborated with the American forces. The ECtHR reiterated that past ill treatment is a strong indication of future risk of ill treatment relying on several legal instruments, citing also Article 4(4) Qualification Directive as proof that the position under Article 3 ECHR is correct. Thus, the ECtHR held that the deportation order, if implemented, would lead to a violation of Article 3 ECHR.

2. Standards regarding the benefit of the doubt and credibility:

The ECtHR acknowledged in *R.C. v Sweden* that, "*owing 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. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must*

---

<sup>77</sup> UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 1998; B. Gorlick, Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status, (2003) 15 *International Journal of Refugee Law* 357, S. Norman, Assessing the Credibility of Refugee Applicant: A Judicial Perspective, (2007) 19 *International Journal of Refugee Law* 279.

<sup>78</sup> Application No. 59166/12, GC Judgment 23 August 2016.

*provide a satisfactory explanation for the alleged discrepancies.”* (para. 50)<sup>79</sup> Many asylum applicants arrive in the EU Member States without documents or evidence that could support their account.<sup>80</sup>

In the Court's view, the Migration Board ought to have directed that an expert opinion be obtained as to the probable cause of the applicant's scars in circumstances where he had made out a *prima facie* case as to their origin. It did not do so and neither did the appellate courts. While the burden of proof, in principle, rests on the applicant, the Court disagreed with the Government's view that “it was incumbent upon the applicant to produce such expert report. In cases such as the present one, the State has a duty to ascertain all relevant facts, particularly in circumstances where there is a strong indication that an applicant's injuries may have been caused by torture.” (para.53)

As regards the credibility assessment, the ECtHR noted the applicant's evidence should have ‘general credibility’ but stated this does not imply the need for complete accuracy and consistency because: “*The Court acknowledges that complete accuracy as to dates and events cannot be expected in all circumstances from a person seeking asylum.*” (*Bello v Sweden*, App. No. 32213/04)

In *A.A v Switzerland*<sup>81</sup> the ECtHR had to establish whether the applicant had a genuine case or had constructed it in order to create post-flight grounds for asylum. In this case, the applicant claimed persecution on grounds of political opinion, as a Sudanese regime opponent, politically active in Switzerland.<sup>82</sup> The ECtHR held that whether the applicant was a political activist prior to fleeing his home country or he played an active role in

---

<sup>79</sup> This is settled case law of the ECtHR which has been repeated in most asylum and immigration cases involving an issue of credibility assessment. See, also the following cases: *A.J. v Sweden*, *Collins and Akasiebie v. Sweden*, Application No. 23944/05, Judgment of 8 March 2007, and *Matsiukhina and Matsiukhin v. Sweden* (dec.), Application No. 31260/04, Judgment of 21 June 2005), *N v. Finland*, Application No. 38885/02, para. 167, Judgment of 26 July 2005).

<sup>80</sup> See the Report of the European Migration Network, *Establishing Identity for International Protection: Challenges and Practices*.

<sup>81</sup> See also *A.A. v. Switzerland*, Application No. 58802/12, 7 January 2014.

<sup>82</sup> The applicant was a Sudanese national and had been the human rights officer of the anti-government group Sudan Liberation Movement-Unity (SLM-Unity), based in Switzerland, since 2009. He claimed that he fled his home village in North Darfur, Sudan, when it was attacked by the Janjaweed, a government-backed militia that operates in Darfur and is in conflict with Darfur rebel groups. He alleged that his father and other villagers were killed and he was mistreated, prompting him to flee without papers via boat to Calais and then Geneva. He applied twice for international protection in Switzerland, but both of his asylum applications were rejected due to credibility issues. Regarding the first claim, the Swiss authorities relied on an expert assessment of his language and cultural knowledge to reject his claim to be from Darfur, relying also on inconsistencies in the Applicant's account regarding his travel itinerary, his region and his relatives' whereabouts.

In his second asylum claim, the applicant claimed a new risk based on his political activism in Switzerland with SLM-Unity as well as fresh evidence of his North Darfuri origins obtained from the birth register in Sudan. As regards political activities carried out in Switzerland – including an interview with a Swiss local TV channel – these were rejected as a non-genuine attempt to create ‘post-flight grounds’ against removal, and as insufficiently high-profile to attract the attention of the Sudanese government. The Applicant appealed, submitting that his political activities, including an argument with the Sudanese President's brother during an international meeting at the UN building in Geneva, must be known by the Sudanese authorities. His appeal was rejected for the same reasons as before, and his birth certificate was deemed valueless as evidence in part due to the likelihood of forgery.

The applicant brought a claim before the ECtHR, arguing that return to Sudan would violate his rights under Article 3 ECHR, and that the appeal process against his return in Switzerland had violated his right to an effective remedy under Article 13, read together with Article 3 ECHR.

making his asylum case known to the public in the respondent State so as to create a post-flight ground for asylum, the Court ruled that “*not only leaders and high-profile people, but also those merely suspected of supporting opposition movements are at risk of treatment contrary to Article 3 of the Convention in Sudan*”. The applicant’s representation of SLM-Unity at the UN meetings in Geneva meant that he “*might, at least, be suspected of being affiliated with an opposition movement by the Sudanese government*”. The Court therefore found substantial grounds for believing that the applicant would be at risk of detention, interrogation and torture contrary to Article 3 ECHR if returned to Sudan. As to the applicant’s related complaint that his asylum claims were not afforded sufficiently close and rigorous scrutiny as required by Article 13 ECHR, these were dismissed by the Court, which accepted that the Swiss authorities were entitled to be critical of the applicant’s credibility.

Following this judgment, the **Swiss Federal Administrative Court** recognised that post-flight activities *in loci* can also lead to the risk of ill-treatment.

The ECtHR has had the opportunity to interpret the meaning of the term “good reasons” in Article 4(4) Recast QD. In the interpretation of this notion, the following circumstances could be taken into account: conditions in the country of origin have changed significantly;<sup>83</sup> the abuses were applied by individuals and were not endorsed by the authorities;<sup>84</sup> the applicant has stayed in the country of origin without problems after the ill treatments;<sup>85</sup> the persecution or torture occurred a long time ago.<sup>86</sup>

## Main questions addressed

**Question 1** *What is the standard of proof in cases of persecution on grounds of political opinion as required under Article 4 Recast QD read in light of the principle of effectiveness?*

The first case concerns the standard of proof in cases of persecution on grounds of political opinion. The **Pecs Court** held that a sentence issued against the applicant in the country of origin is sufficient to consider that his right to fair trial was violated. As to the level of violation of the right to fair trial for the purpose of making a finding of persecution, the Court held that the fact that proceedings had been initiated against the applicant for his political opinion was, in itself, persecution. The Court looked also at the cases of other Russian opposition politicians (such as the murder of Boris Nemtsov), to assess the likelihood of persecution. In addition, COI was also assessed as regards the situation for political opponents in Russia. When arguing against the well-foundedness of the fear from persecution, the Court held that the administrative authorities have to be absolutely certain that no harm will come to the applicant if returned.

---

<sup>83</sup> *Salah Sheekh*, Application No. 1948/04, Judgment of 11 January 2007.

<sup>84</sup> *Hakizimana v. Sweden*, Application No. 37913/05.

<sup>85</sup> *DNW v Sweden*, *ibid.*

<sup>86</sup> *RK v Sweden*, Application 61264/11, Judgment of 9 July 2015.

**Question 2** *How are national courts implementing the requirements of Article 7 EU Charter, CJEU jurisprudence, and Article 4 Recast QD on the standard of proof and benefit of doubt principle in cases of persecution on grounds of homosexual orientation?*<sup>87</sup>

The second case addresses perhaps one of the most difficult circumstances of proving credibility in the asylum context, namely persecution on grounds of sexual orientation. In these cases, the elements of evidence presented by applicants are generally limited to the statements of the applicant. The credibility assessment is thus usually an assessment of the genuineness of the applicant's statements. Under the duty of cooperation, national courts have developed an innovative evidence assessment intended to determine the credibility of the applicant. In this case, the **Tribunal of Catanzaro** departed from the dispositive principle governing civil proceedings, according to which the judge is bound to consider only the evidence offered by the parties, and applied the *lex specialis* of asylum adjudication. The Court invited the applicant to submit additional relevant elements for assessing his credibility concerning his claimed homosexuality. The judge also admitted the additional relevant documentation (i.e. the statements of the LGBT association) although these were submitted after the procedural time limits usually applied. This case offers an example of how to implement Article 4(5) of the Qualification Directive as well as the CJEU judgments on the benefit of the doubt and evidential rules in homosexual claims (see judgments in *A. B. C* and *X. Y. Z.* cases).

The following national cases will be discussed:

- *Hungary, Pécs Court of Public Administration and Labour, 25 January 2017*
- *Tribunal of Catanzaro, Italy, judgment of 7 December 2015*

**Question 1 – What is the standard of proof in cases of persecution on grounds of political opinion required under Article 4 Recast QD read in light of the principle of effectiveness?**

What level of violation of the right to fair trial reaches the threshold of persecution?

What are the applicant's rights to be informed of evidence; and what is the extent of judicial powers as regards evidential assessment?

*Hungary, Pécs Court of Public Administration and Labour, 25 January 2017*<sup>88</sup>

*Relevant national legal sources*

Fundamental Law of Hungary, Article XIV Section 3, Article XXVIII Section (7): Everyone shall have the right to seek legal remedy against any court, authority or other administrative decision

<sup>87</sup> For other relevant CJEU jurisprudence, see cases C -148/13 to C-150/13, *A, B, C*, ECLI:EU:C:2014:2406 and C-473/16, *F*, ECLI:EU:C:2018:36.

<sup>88</sup> Case submitted by Gruša Matevžič, lawyer at the Hungarian Helsinki Committee, and a practising lawyer in Slovenia. The summary of the case was originally prepared for European Database of Asylum Law (EDAL, [www.asylumlawdatabase.org](http://www.asylumlawdatabase.org)) within the project "Legal exchange and mutual learning between asylum practitioners to promote fundamental rights in the EU" coordinated by the European Council on Refugees and Exiles (ECRE) in partnership with the Helsinki Foundation for Human Rights with financial support from the Fundamental Rights and Citizenship Programme of the European Union.



which violates his or her rights or legitimate interests.; the Act LXXX of 2007 on Asylum (Met.) 6.§ (1), 12.§ (1) , 15.§ para. b), 45.§ (1), 58.§ (1)-(2), 61.§.

Code of Civil Procedure (the Act III of 1952), Government Decree no. 301/2007 (XI. 9.) on the implementation of Act LXXX of 2007 on asylum 7/A.§ (2).

### *Facts of the case*

The Applicant was an entrepreneur in Russia and a member of an opposition liberal right wing party which opposes Russia's current Head of State. The Applicant reported a public interior affairs servant to the police, but when the procedure started, charges were brought against the Applicant himself. From 2008 onwards, several different proceedings were initiated against him. He fled to the Czech Republic but was deported to Russia, despite the fact that his asylum case was still pending. The **Czech Constitutional Court** later found this act to be in violation of the Constitution of the Czech Republic.

Having been brought back to Russia, the Applicant was given bail during the procedure. Making use of this possibility, he fled Russia and entered Hungary through the Ukraine on 9 December 2013 and applied for asylum on the same day.

The Immigration and Asylum Office (IAO) rejected his claim on 15 August 2014 and ordered his return. This was overturned by the Court, who ordered the IAO to conduct a new procedure.

In the new procedure, the IAO again rejected the application based on the opinion of the Constitution Protection Office (CPO), which held that the Applicant posed a threat to national security, finding that Article 1 F(c) of the 1951 Geneva Convention was applicable. The IAO noted that the right to fair trial was guaranteed in Russia and even if the Applicant were convicted, the sentence would not reach a threshold which could be labelled persecution. The Applicant challenged the decision.

### *Reasoning of the Court*

This particular judgment is relevant for three main issues regarding the challenges of securing effective justice in asylum adjudication:

- 1) the standard of proof required in cases concerning criminal charges or proceedings taken against political opponents;
- 2) the obligation of the State to provide reasons and ensure prompt access to evidence in cases involving national security; and
- 3) the limitation of national courts' power to recognise the individual as a beneficiary of international protection vis-à-vis the administration (this judgment, therefore, is relevant also for Chapter 5 – *The impact of the right to an effective remedy on judicial review powers*, discussed below in this casebook).

As regards the standard of proof of persecution, the Court noted that the IAO collected relevant country of origin information on the persecution of those who oppose the Russian Government. The information demonstrated serious procedural flaws in the Russian judicial system, which showed that the right to fair trial was not respected. The Court noted that even though all this information was considered by the IAO, its conclusions were not in line with the information cited.

The Court further noted that when assessing persecution for political opinion, it is not correct to reject a claim based on the presumption that a sentence issued against the applicant would not be

serious enough to be considered persecution. The fact that proceedings were initiated against the applicant because of his political opinion was, of itself, already persecution.

The Court went on to say that, as can be seen in the case of several Russian opposition politicians (such as the murder of Boris Nemtsov) many times it is not ‘just’ the personal liberty but the life of opposition politicians which may be at risk. When arguing against the well-foundedness of the fear of persecution, the IAO has to be absolutely certain that no harm will come to the Applicant if returned. This could not be deduced from the current case. The Court notes that the IAO has to rely on facts and not on assumptions.

Assessing the opinion of the CPO, the Court noted that there were several flaws which tainted the procedure. The IAO gave its opinion in September 2015 but only revealed it to the Applicant in June 2016. The opinion was kept away from the applicant, who did not know its contents. This was in breach of Article XXVIII (7) of the Fundamental Law of Hungary (Constitution) which guarantees the right to an effective remedy. The Applicant is entitled to be informed about the evidence against him, as well as to comment on it.

Commenting on the evaluation of the opinion of the CPO by the IAO, the Court noted that it was irrational, just as the opinion of the IAO. The IAO did not assess the fact that in the first procedure the CPO did not signal that the applicant would be a threat to national security. The CPO’s opinion itself was also contradictory since its reasoning did not support the declaration that the applicant was a threat to national security.

The Court found that the errors were so serious in themselves that the decision should be quashed. Commenting on a request by the applicant’s legal representative, the Court noted that under the Asylum Act, it had no power to change the decision but only to quash it – even though the procedure started before the Asylum Act was amended this way.

The Court concluded on the merits by finding that the applicant’s fear of persecution was well-founded; its finding was reinforced by country of origin information. The Court also noted that the applicant cannot be deprived of international protection.

#### *Conclusion and outcome of the Court*

As regards the standard of proof in cases of persecution on grounds of political opinion, the **Pecs Court** held that the court decision issued against the applicant in his country of origin was sufficient proof of a violation of his right to a fair trial.

As to the level of violation of the right to fair trial required to reach the threshold of persecution, the Court found that since proceedings had been initiated against the applicant because of his political opinion, then this is, in itself, already amounted to persecution. The Court looked also at the cases of other Russian opposition politicians to assess the likelihood of persecution. In addition, COI were assessed as regards the general situation for political opponents in Russia.

When arguing against the well-foundedness of the fear of persecution, the IAO has to be absolutely certain that no harm will come to the Applicant if returned.

Since the opinion of the CPO was not presented to the applicant and therefore he was not able to comment on it, the Court found that his right to an effective remedy had been breached. The Court annulled the administrative decision and referred the case back to the administrative body.

Finally, this judgment is important also for showing an extension of judicial review powers under Articles 3 and 13 ECHR: the administrative court decided on the merits, to recognise a form of international protection after repeated refusals of the administration to recognise refugee status.

**Question 2 – How are national courts implementing the requirements of Article 7 EU Charter, the CJEU jurisprudence, and Article 4 Recast QD on the standard of proof and benefit of doubt principle in cases regarding international protection on the basis of persecution for homosexual orientation?**

What is the impact of the EU duty of cooperation?

Can new evidence be suggested by the national court to the asylum seeker for the purpose of proving the credibility of a claim of persecution based on homosexual orientation?

National judgment directly applying the CJEU judgments on benefit of the doubt and evidential rules in homosexual claims (*A. B. C* and *X.Y. Z*) and Article 4(5) Recast QD.

*Tribunal of Catanzaro, Italy, judgment of 7 December 2015*

*Facts of the case*

The applicant, a citizen of Ghana, fled the country for fear of being killed because of his homosexuality. His father – an imam – had discovered him having sexual relations with his cousin and, given his position within the religious community, had never accepted his son's homosexuality.

The Italian administrative authorities refused to grant the applicant refugee status for lack of credibility and sufficient evidence.

In reversing the administrative decision, the judge applied Article 4(5)(a) - (e) of the Recast QD and asserted the credibility of the asylum seeker application in so far as the recurrent had met the conditions listed in this provision. Although the applicant did not submit any evidence in relation to his homosexuality, he was in contact with LGBT associations and the subsequent provision of a statement of a LGBT association declaring the involvement of the applicant in the association's activities were decisive elements in the judge's decision.

*Reasoning of the Tribunal*

The Tribunal of Catanzaro approached the case by first setting out the applicable standards and the burden of proof to be followed in regard to the credibility assessment of a claim of persecution on grounds of sexual orientation. The applicable standards were those developed by the **Italian Court of Cassation**, in pursuance of the EU principle of the duty of cooperation. Notably, in asylum cases, the standard of proof is not that generally applicable in civil proceedings, although the hearing judge is a civil one, but the more lenient standard, where the benefit of the doubt is applied. In addition, another specificity is the role of the national judges in evidential assessment, which, unlike in civil proceedings, the judge has a positive duty to collaborate in the assessment of the facts, which also implies concrete fact-finding tasks.

The judge considered that the effort of the applicant to substantiate his application was genuine: the applicant presented before the Court on two occasions in order to actively collaborate with the judge in substantiating his application.

According to the judge, the applicant's statements were consistent with available information from the country of origin. The judge noted that in Ghana having homosexual relations is a criminal offence. He made reference to the 2014 US State Department Country Report on Human Rights Practices, which reported that in Ghana homosexuals are exposed to discrimination and even physical assault, and that the police do not conduct effective inquiries into these issues.

Finally, the judge interpreted his duty to collaborate with the applicant broadly, to the extent of suggesting evidence that he could produce in order to substantiate his application. In fact, during the first hearing, the judge invited the applicant to get in contact with local LGBT associations. After the applicant acknowledged his willingness to do so, the judge adjourned the case in order to allow the applicant to attend activities organised by a LGBT association and to produce relevant documentation. At a second hearing, the applicant did in fact produce a LGBT association's statement declaring that the asylum seeker had actively taken part in the association's activities.

This allegation was considered to fulfil the conditions set in Article 4(5)(b) of the Recast QD (as transposed in national legislation by legislative decree no. 251/2007, art. 3.5) requiring the applicant to submit all relevant documents in order to substantiate his application.

### *Conclusion of the Tribunal*

The decision substantially departed from the dispositive principle according to which the judge is bound to the evidence offered by the parties. The judge assisted the applicant in producing relevant evidence for assessing his credibility concerning homosexuality. He also admitted the submission of further documentation (i.e. the statements of the LGBT association) beyond the procedural time limits usually applied.

### *Instances of judicial dialogue*

In the reasoning of the **Tribunal of Catanzaro**, the CJEU's preliminary ruling in the *A.B.C.* case played a pivotal role in establishing the conditions of the benefit of the doubt and the permitted evidence when assessing the credibility of the applicant's claim of persecution on grounds of sexual orientation. In *A.B.C.*, the CJEU stated that, while it is for the asylum seeker to identify his sexual orientation and to substantiate his application, a mere declaration from the administration contesting the veracity/credibility of statements is not sufficient. Account should also be taken of Article 4(5) of the Recast QD detailing circumstances where documentary evidence may not be required, the authorities being permitted to rely on the statements of the applicants. The **Tribunal of Catanzaro** applied the interpretation of the CJEU of Articles 4(5), considering that although certain aspects of the applicant's statement were not sufficiently substantiated, these aspects might not need further confirmation, provided that the cumulative conditions laid down in Article 4(5)(a) to (e) of Recast QD were met.

In relation to the specific situation of individuals claiming a particular sexual orientation, the CJEU outlined limitations on the type of questioning and the assessment of credibility. Firstly, it held that questioning based on 'stereotypical' ideas may constitute a starting point, but only a starting point for the assessment. To hold otherwise and, in particular, to reject an application based solely on the fact that an applicant is unaware of certain organisations, for example, would be contrary to the need to conduct an individual assessment, i.e. to have regard to the specific circumstances of the

applicant. Secondly, it held that detailed questions regarding sexual acts would violate Article 7 EU Charter. Thirdly, it found that authorities cannot accept, as evidence, videos of sex acts or ‘medical’ tests regarding sexual orientation. Aside from the questionable probative value of such evidence, the Court held that it would violate the applicant’s human dignity under Article 1 EU Charter. Moreover, it would encourage other applicants to submit similar evidence leading to a de facto requirement of these types of evidence. Finally, the Court held that the fact of non-disclosure of sexual orientation earlier in the application process should not be fatal to credibility, having regard to the sensitivity of the subject matter.

The **Tribunal of Catanzaro** decision may raise some criticism on the ground that it considered the involvement of the applicant in a LGBT association’s activities as being a probative element of his homosexuality. There is a possible conflict with the right to respect for private life (Article 7 EU Charter, Article 8 ECHR), in so far as the fulfilment of the conditions set in Article 4(5) (b) is made dependent or at least substantially affected by the attendance of the applicant at the activities of a LGBT association. However, it is noted that the **Tribunal of Catanzaro** did not consider the credibility of the applicant statements were affected by the lack of his knowledge of LGBT organisations, which would have been in stark contrast with the CJEU judgment. The approach of the Tribunal was to suggest the applicant to actively attend the activities of an LGBT organisation and to postpone its decision on the substance for several weeks after re-hearing the applicant. The positive reaction of the applicant and of the report of the organisation led the Court to find Article 4(5)(b) conditions applicable and thus the applicant worthy of the benefit of the doubt. The Tribunal observed that the duty of cooperation in this case was bilateral, acknowledging the willingness of the applicant to respond to its questions and proposals. It should be noted that the attendance at a LGBT association’s activities is not in itself probative of sexual orientation as not all homosexuals participate in LGBT association activities (this was also noted by the CJEU).

The judgment of the **Tribunal of Catanzaro** is an additional instance of consistent interpretation with the CJEU jurisprudence, when examining whether the criminal punishment for homosexual relation provided by the law in Ghana is applied in practice. The Court made direct application of the CJEU preliminary ruling in X, Y, Z (paras. 58-60) that: *“In undertaking that assessment it is, in particular, for those authorities to determine whether, in the applicant’s country of origin, the term of imprisonment provided for by such legislation is applied in practice. It is in the light of that information that the national authorities must decide whether it must be held that in fact the applicant has a well-founded fear of being persecuted on return to his country of origin within the meaning of Article 2(c) of the Directive, read together with Article 9(3) thereof.”*

## **Guidelines for judges emerging from the analysis**

### **On the burden of proof**

- The burden of proof is the starting point of the asylum procedure. As the appellant is the initiator, the majority of Member States have placed the formal burden of proof on the applicant, although Article 4(1) of the Recast QD does not establish a mandatory obligation, but leaves it to the Member States discretion.

- The standard of proof in asylum adjudication is specific and should apply with priority, within general procedural rules. These vary depending on whether civil or administrative procedure applies.
- Asylum evidential procedures are *lex specialis*.
- The fundamental nature of the right to asylum (Article 18 EU Charter), principle of *non-refoulement* (Article 19 EU Charter) and effectiveness of EU law, together with Article 4 Recast QD have softened the burden of proof in international protection proceedings. It can be noted that in Member States, where the right to asylum is recognised as a constitutional right, appear to adopt a more relaxed burden of proof (see, e.g. Germany and Italy).
- According to the settled case law of the CJEU (*Steffensen*<sup>89</sup> and *Boiron*<sup>90</sup>), evidential rules fall under the principle of effectiveness of EU law. Where the national court finds that the evidential requirement renders it impossible or excessively difficult for the individual to exercise a right granted by the EU (in this case the right to access international protection), then it must declare the evidential related rule incompatible with the principle of effectiveness of EU law.

Table showing the transformative power of EU secondary and primary legislation, and the jurisprudence of the CJEU and ECtHR on the burden of proof in asylum adjudication.

Burden of proof in Civil proceedings	Burden of proof in Criminal proceedings	Burden of proof in Administrative proceedings
dispositive principle	presumption of innocence	Wide powers of the administration

#### Impact of EU secondary law: Art. 4 QD

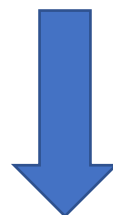


Shared burden of proof between the applicant and the national authorities



#### Impact of CJEU (*M.M.* (1))

First Step: “it is generally for the applicant to submit all evidence needed to substantiate the application” (para. 65), then the burden shifts to the State authority.



#### Impact of ECtHR and CJEU

(effectiveness as explained in *J.K. v Sweden*)

<sup>89</sup> C-276/01, ECLI:EU:C:2003:228.

<sup>90</sup> C-526/04, ECLI:EU:C:2006:528.

*Effectiveness: “the burden of proof should not render ineffective the applicants’ rights protected under Article 3 of the Convention. It is also important to take into account all the difficulties which an asylum-seeker may encounter abroad when collecting evidence (see Bahaddar, cited above § 45, and, mutatis mutandis, Said, cited above, para. 49)” (J.K. v Sweden, para. 97) (underlining added)*

*Shift of Burden: burden of proof shifted from the applicant to the **domestic court** to dispel doubts about the cause of injuries after the applicant produced a medical certificate although not prepared by an expert in assessment of torture injuries “the onus rest[ed] with the State to dispel any doubts about the risk of being subjected again to treatment contrary to Article 3 in the event that his expulsion proceeded.” (para. 55)*

The remedy for cumbersome national rules on burden of proof which render ineffective the applicant’s rights under Article 3 ECHR should be to disapply them (*J.K. v Sweden*) leading to the shift of the burden of proof from the applicant to the courts or national authorities (*R.C. v Sweden*)

Within national legal systems, the burden of proof can vary depending on the applicable type of procedural rules. The EU law principle of effectiveness, has, thus, a different effect in practice, depending on whether the applicable domestic procedure is civil or administrative, with differences also within the various domestic types of administrative proceedings.

### On the Article 4 Recast QD duty to cooperate

- The principle of effectiveness of the EU right to asylum and the principle of *non-refoulement* requires national authorities to disapply national procedural limitations of judicial investigative powers, and allow them to consider *ex officio* complete, up to date or relevant evidence, in particular country of origin information. (*M.M. (I)*, para. 66);
- The duty of cooperation requires the national authorities to assess all information brought to their attention, even if the applicant does not wish to rely on certain evidence (*in casu*, conversion from Islam to Christianity in Sweden). The ECtHR clarifies thus that Article 40(2) and recital 36 of the Recast Asylum Procedure Directive, although permitting discretionary powers to the Member States to dismiss as inadmissible subsequent asylum applications which are not based on new evidence, they cannot establish evidential procedural rules which would lead to a violation of the principle of *non-refoulement* which is an absolute fundamental right (*F.G. v Sweden*);
- Irrespective of whether the applicant invokes a generalised or individual risk of ill treatment if returned to the country of origin, a national court has to consider *ex officio* both of these risks (*F.G. v Sweden*,<sup>91</sup> *Elgafaji*, and *Diakité*);
- The CJEU underlined in *Diakité* that:
  - *first*, there is no need to qualify the actors in conflict;
  - *secondly*, it is necessary only to establish whether the conflict can be characterized by a “degree of indiscriminate violence, so high” as to indicate that the presence in the country

---

<sup>91</sup> The ECtHR clarified that the duty of cooperation requires the national authorities to assess all information brought to their attention, even if the applicant does not wish to rely on certain evidence (*in casu*, conversion from Islam to Christianity in Sweden). The ECtHR has recently assessed the legitimacy of national evidential procedural limitations which at first sight adequately transposed provisions from the Asylum Procedure Directive in light of Article 3 ECHR.

or region in question, would subject the applicant to a real risk of being subject to that threat;

- *thirdly*, there is no need to carry out, “*in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict.*”

- The *Elgafaji* and *Diakité* preliminary rulings thus require a relaxation of the burden of proof and standard of proof compared to the international armed conflict rules, and therefore a neutralisation of excessive obstacles towards ensuring effective justice. They also establish concrete standards on the duty of cooperation of public authorities. Notably, this is an expansion of the duty of cooperation since more risks of persecution should be assessed by the domestic judge *ex officio*. The subsidiary protection has been further clarified by the CJEU in C- 353/16, M.P.. According to the CJEU, Articles 4 and 15 Recast QD “*read in the light of Art. 4 of the Charter, must be interpreted as meaning that a third country national who in the past has been tortured by the authorities of his country of origin and no longer faces a risk of being tortured if returned to that country, but whose physical and psychological health could, if so returned, seriously deteriorate, leading to a serious risk of him committing suicide on account of trauma resulting from the torture he was subjected to, is eligible for subsidiary protection if there is a real risk of him being intentionally deprived, in his country of origin, of appropriate care for the physical and mental after-effects of that torture, that being a matter for the national court to determine.*”
- A useful example of the implementation of the duty of cooperation as interpreted by the CJEU and ECtHR comes from the **Italian Court of Cassation**, which imposed a duty on national courts to consider of their own motion the general situation in the country of origin and assess whether Article 15(c) of the Qualification Directive (the generalised risk of harm) is applicable, even if not expressly invoked by the individual. The duty to cooperate implies that the judge must admit measures of inquiry on his/her own motion and to verify the credibility of the asylum application having regard to up-to-date country of origin information.

## On the elements of evidence

- A list of relevant elements of evidence in support of the asylum application can be found in Article 4(2) of the Recast QD.<sup>92</sup> As regards the assessment of the evidence, relevant principles are to be found in Article 4(3): individual assessment, and the factors to be taken into account. Article 10(3) Recast APD contains further principles that should guide evidence assessment: it should be an individual, objective and impartial examination and decision. Article 10(3)(b) requires that precise and up-to-date country of origin information should be taken into account. Article 10(3)(d) mentions the possibility of seeking expert advice when necessary.
- The CJEU held in *Y and Z* that: “*in accordance with Article 4(3) of the [Qualification] Directive, the competent authorities carry out an assessment of an application for international protection on an individual basis, they are required to take account of all the acts to which the applicant has been, or risks being, exposed, in order to determine whether,*

---

<sup>92</sup> It consists of the applicant’s statements and all the documentation at the applicant’s disposal regarding his/her age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection



*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)

- Importantly, the CJEU has consistently rejected the domestic governments' allegations that the risk of persecution could be avoided by asking the asylum seeker to hide or avoid the public practice of religious belief. In *Y and Z*, and *F* cases the CJEU underlined that these requirements cannot be taken into consideration within the assessment of the risk of persecution.

CJEU: prohibited evidence and methods of collecting evidence (*A, B, C* and *F* cases)<sup>93</sup>:

- Asylum applicants may not be questioned on the details of their sex lives, nor can evidence, including videos or pictures of sexual acts be accepted (*A, B, C* case).
- Administrative authorities and courts or tribunals cannot found “*their decision on an asylum application based on persecution for sexual orientation solely on the conclusions of the expert's report and that they are not bound by those conclusions when assessing the applicant's statements relating to his sexual orientation*” (*F* case, paras. 45 and 46)
- Article 4 of the Qualification Directive “*read in the light of Article 7 of the Charter, must be interpreted as precluding the preparation and use, in order to assess the veracity of a claim made by an applicant for international protection concerning his sexual orientation, of a psychologist's expert report, the purpose of which is, on the basis of projective personality tests, to provide an indication of the sexual orientation of that applicant*” (*F* case, para. 71).
- Failure to reveal sexual orientation early in an application for asylum is not necessarily fatal to the credibility of an applicant (*A, B, C* case).
- Failure to mention LGBT related organisations cannot constitute the sole ground for rejecting the credibility of an asylum seeker requesting international protection on the basis of persecution on grounds of sexual orientation (*A, B, C* case).
- Administrative authorities must provide details regarding the form of questions posed to ensure that respect for private life and human dignity is maintained<sup>94</sup> (*A, B, C* case).
- The Court held that it follows from the *principle of non-refoulement* that an individual who is in the process of a subsidiary protection process must have the opportunity to state all reasons and circumstances that are relevant for the prolongation of his/her status of protection to the extent that any procedural rules to the contrary should be disapplied (*A, B, C* case).

### **On the standard of proof and the benefit of the doubt**

- In principle, Member States are free to set their own rules on standards of proof. However, “*they are prohibited from laying down unrealistic standards for the evidence required, as this may undermine the effectiveness of EU rights*”, such as the EU right to asylum and the prohibition of *non-refoulement* (Opinion of AG Sharpston in *Bolbol*, para. 95).<sup>95</sup> The Opinion of AG Sharpston has been confirmed by the ECtHR, which in *M.S.S and others v Belgium and Greece* held that the Aliens Appeal Board violated Article 3 ECHR by

---

<sup>93</sup> C-148/13 to C-150/13, *A, B, C*, ECLI:EU:C:2014:2406 and C-473/16, *F*, ECLI:EU:C:2018:36.

<sup>94</sup> See also the Council of States, Netherlands, 201208550/1/V2, 201110141/1/V2, 201210441/1/V2, see more details in the *ACTIONES Module on the Judicial Application of the EU Charter in asylum and immigration*, available online at <https://www.eui.eu/Projects/CentreForJudicialCooperation/Documents/D1.1.e-Module-5.pdf>

<sup>95</sup> See also, the CJEU in *Pontin*, “this means that whilst Member States retain the right to lay down, under national law, the applicable rules of evidence, those rules must not make it impossible or virtually impossible for an applicant to claim rights guaranteed by EU law” (Case C-63/08 *Pontin*, para. 43)

- requiring the applicants to produce “*concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3 ECHR.*”
- In asylum cases, the standard of proof is specific, a *lex specialis*, and should apply with priority, as set out in Article 4 Recast QD as interpreted by the jurisprudence of the CJEU and ECtHR. In addition, the judge has a positive duty to cooperate in the assessment of the facts, which in certain circumstances implies a concrete fact-finding task.
  - The **Tribunal of Catanzaro** offers an example of the interpretation of the standard of proof and benefit of doubt principle in asylum applications based on the persecution on grounds of sexual orientation. The approach of the Tribunal was to suggest the applicant to attend the activities of an LGBT organisation and then to postpone its decision for several weeks after the first hearing with the applicant. The positive reaction of the applicant to the suggestion of the Tribunal to attend the activities of an LGBT organisation, and of the report of the organisation led the Tribunal to find Article 4(5)(b) Recast QD conditions were applicable and thus the applicant was worthy of the benefit of the doubt. The Tribunal observed that the duty to cooperate in this case was bilateral, acknowledging the willingness of the applicant to answer to questions and proposals. The Tribunal made direct application of the CJEU preliminary ruling in *X, Y, Z* (paras. 58-60) that: “*In undertaking that assessment it is, in particular, for those authorities to determine whether, in the applicant’s country of origin, the term of imprisonment provided for by such legislation is applied in practice. It is in the light of that information that the national authorities must decide whether it must be held that in fact the applicant has a well-founded fear of being persecuted on return to his country of origin within the meaning of Article 2(c) of the Directive, read together with Article 9(3) thereof.*”
  - Post-flight activities can also lead to the risk of ill-treatment (*A.A. v Switzerland*).
  - Article 4(5) Recast QD provides for an alleviation of the asylum seeker’s *onus probandi*. According to this provision, where aspects of the applicant’s statements are not supported by documentary or other evidence, those aspects shall not need confirmation where conditions listed in subsequent letters from a) to e) are cumulatively met ( see the *A.B.C. case*).

## On judicial dialogue: conclusions resulting from the national caselaw

This section showcased various outcomes of the judicial dialogue: domestic procedural rules may be disapplied for more lenient evidential requirements; extension of the positive obligation of national courts in terms of fact finding and evidence assessment in view of the courts’ EU law duty of cooperation (Article 4(3) TEU) which requires to give full effect of Article 4 Recast QD (duty to cooperate). The following examples were among the most common examples of judicial dialogue:

1. *Consistent interpretation* is used both by national and European courts for the purposes of ensuring conformity of national evidential procedural laws with EU and ECHR standards; the European Courts use it for the purpose of ensuring coordination of their approaches on evidential standards under the principle of *non-refoulement* and other fundamental rights.

For instance, the **Italian Court of Cassation** offered as examples of fact finding probative evidence the possible contact of diplomatic channels or the organisation of international rogatory commission for the purpose of clarifying the authenticity of documents and statements. The case law of the **Italian Court of Cassation** and of the **Sofia City Administrative Court** reflect the impact of the CJEU in *Elgafaji and Diakité* on national jurisprudence. Furthermore, in order to comply with the requirements of *A.B.C.* and Article

4 of the Recast QD, the Italian Court considered new evidence in order to assess the credibility of asylum seekers.

The **Slovenian Constitutional Court** made an interesting application of the *consistent interpretation technique* in order to decide whether the national legal provisions limiting procedural evidence in cases of renewal of subsidiary protection are compatible with Article 18 of the Constitution. This Article, enshrining the prohibition of torture and ill treatment, was interpreted in light of the specific requirements of Article 19 EU Charter, principle of *non-refoulement*.

Furthermore, in order to understand the precise requirements of Article 45 Recast APD (which stipulates that the competent authority will have to obtain information as to the general situation prevailing in the countries of origin of the persons concerned), the Constitutional Court also referred to Article 3 ECHR and ECtHR jurisprudence, which requires an *ex nunc* assessment of the situation in the country of origin.

## 2. *Disapplication*

The Constitutional Court of Slovenia made use of the *disapplication technique* by striking down Article 106 of the International Protection Act on the basis of its incompatibility with Article 18 of the Constitution as interpreted in light of Article 19 Charter and Article 3 ECHR, since it limited the invocability of the grounds for prolongation of subsidiary protection, thus risking the potential infringement of the principle of non-refoulement as first laid down in the Constitution, but also enshrined in the EU Charter.

## 2. The right to be heard

This chapter aims to provide the main jurisprudentially developed standards on the right to be heard within international protection and return proceedings. In particular, it focuses on the legal nature of the right, its content, and remedies associated with it. This section will also give examples of how relevant CJEU preliminary rulings have been applied by national courts in both the referring Member State and other Member States. This analysis of the impact of the CJEU rulings can help national judges to decide when it is necessary to make a preliminary ruling, and what adaptations are required at the national level in light of the court-developed standards on the right to be heard in asylum and return proceedings.

In addition, the relevant jurisprudence of the ECtHR will be discussed, as national courts are equally obliged to apply ECHR fundamental rights standards.

The chapter is structured in four main sub-sections:

*2.1 The Right to be Heard during the Administrative Phase of International Protection Proceedings;*

*2.2 The Right to be Heard in an Oral Hearing before a Court in international protection proceedings;*

*2.3. The Right to be Heard in Return Proceedings;*

*2.4 The Right to be Heard in Collective Expulsion Cases.*

Each of these sections discusses the legal sources of the right to be heard applicable for each of the four proceedings and their impact on national procedures. This structure was determined by our analysis of EU primary and secondary legislative provisions and the CJEU jurisprudence governing these three procedures (administrative phase during international protection proceedings; judicial phase during international protection proceedings; and return proceedings).

It is important to underline from the outset the critical importance of the right to be heard in both international protection and return proceedings. Given the fact that in many asylum cases there is a lack of documentary evidence to support the asylum claim, the statements of the asylum applicant are thus essential in assessing whether s/he runs a risk of *refoulement*. Specific guarantees are provided by the Recast Asylum Procedure Directive (Recast APD), the principle of good administration and by the relevant jurisprudence of the CJEU and ECtHR. In certain circumstances, a hearing before the national court is also necessary, and this issue will be discussed in section 2.2. where we offer examples of when a hearing before a court is necessary in light of Article 47 (2) EU Charter.

The right to be heard within return proceedings is equally important since the individual faces expulsion and thus an imminent risk of *refoulement*, perhaps even more than in the asylum proceedings, which makes the right of the individual to be heard essential.

The purpose of the right to be heard is to enable the person to express his or her point of view regarding particular circumstances, before any individual measure is taken which would affect him or her adversely.

Although EU asylum and immigration laws set out several specific standards, problems of interpretation and application of the right to be heard have appeared particularly in national jurisdictions that allow for combined decisions to be taken (e.g. return decision taken at the same time with rejection of a renewal of residence permit or asylum application; or other negative decisions that are combined in a one-step procedure). In one-step administrative procedures, the individual is heard only once, in the first administrative proceedings, and is not also heard before his return or removal order (e.g. **France, Belgium**). Problems have also occurred in **Ireland** where subsidiary protection was initially treated as a separate administrative procedure that followed the asylum application, and no hearing was possible if the individual had already been heard within the asylum proceedings. This procedure was ultimately found unlawful by the CJEU (*M.M.(1)*<sup>96</sup>).

Recent problems concern the necessity of hearing the asylum seeker in the national courts. While in certain national jurisdictions judicial hearing plays a major role in appellate proceedings (e.g. in **Italy** a hearing is the norm), in other jurisdictions, a hearing before a court plays a minor role, being perceived as the exception (e.g. **Finland**). Differences also exist among the Member States as regards the powers of hearing by the national courts. While under the national procedural law, certain jurisdictions leave considerable freedom of decision to the national court (e.g. **Germany**), in other Member States, the hearing powers of the national courts have, especially after the so called ‘migration crisis’, been limited (e.g. Italy, **Belgium**). This Chapter will illustrate the impact of the CJEU jurisprudence on the hearing powers of national courts, which, in light of the right to be heard (interpreted as part of the general principle of rights of defence) has led to extended judicial hearing powers (see, e.g., **Belgium**, especially with regard to its return proceedings) or guaranteed the preservation of the hearing powers that judges used to have before the legislative reform tacking the effects of the ‘migration crisis’ (see **Italy**).

While in asylum proceedings, the guarantee of a judicial hearing has been assessed under the ambit of Article 47(2) EU Charter – the right to a fair trial, in return proceedings a hearing before the court was also treated as a possible effective legal remedy for violations of the right to be heard that may have occurred during the administrative phase.

## 2.1. The Right to be Heard during the Administrative Phase of International Protection Proceedings

### Main question addressed

**Question 1** *Does a third country national have an individual right to be heard during the subsidiary protection proceedings, when the latter is provided as a separate proceeding following the asylum proceedings? What is the content of the right to be heard of an applicant for subsidiary protection as developed by the CJEU?*

This cluster addresses the content of the right to be heard during the administrative phase of international protection proceedings, as conceptualised by the CJEU in the two preliminary rulings addressed by Irish Courts: *M.M. (1)*<sup>97</sup> and *M.M. (2)*<sup>98</sup>. In particular, the analysis will discuss

---

<sup>96</sup> C-277/11, *M.M.(1)*, ECLI:EU:C:2012:744.

<sup>97</sup> See above.

<sup>98</sup> C-560/14, *M.M.(2)*, ECLI:EU:C:2017:101.

whether cross examination of witnesses, full access to, and comment on the administrative authorities' arguments are part of the material content of the right to be heard in asylum proceedings. The judgments were delivered within the particular Irish legal framework which at the time of the judgments used to separate the proceedings for international protection from those for subsidiary protection.

### **Short overview of relevant EU secondary norms**

The Recast APD<sup>99</sup> introduced precise and detailed safeguards for the right to be heard during the administrative phase of asylum proceedings. For instance, a general right to a personal interview of the asylum seeker, before the Member State takes a decision on inadmissibility (Article 14). The absence of a personal interview is justified only in two exceptional circumstances: (a) when the determining authority is able to take a positive decision with regard to refugee status on the basis of evidence; and (b) when the applicant is unfit or unable to be interviewed owing to circumstances beyond his or her control. Important additional safeguards have been introduced by the Recast APD, such as interviews for dependent adults.

A list of guarantees of the right to be heard during first instance proceedings is provided by the Recast APD, such as:

- Right to a competent interpreter, free of charge (Article 12(1)(b));
- Right to have the interview with an examiner and interpreter of the same sex, at the request of the applicant (as long as the principle of non-discrimination based on sex is not violated) (Article 15(3) (b)(c));
- Right to an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview (Article 15(3)(c));
- Right to a personal interview in a language preferred by the applicant unless there is another language in which the interview can be held (Article 15(3)(c));
- Accurate recording of the applicant's statements during the personal interview (Article 17(1)); in particular a "*thorough and factual report containing all substantive elements or a transcript of every personal interview*";
- Right of the applicant to correct mistakes or misrepresentations of what was said during the interview or to clarify misunderstandings before a first instance decision is taken (Article 17(3));
- Right of applicants, their advisers, and counsellors to have access to the report, transcript or recording of the personal interview before a first instance decision is taken (Article 17(2) and (3)).

### **Short overview of the relevant CJEU jurisprudence**

In addition to these detailed EU secondary asylum provisions ensuring respect for the right to be heard during the administrative phase of international protection proceedings, the CJEU has had the

---

<sup>99</sup> Directive 2013/32.

opportunity to clarify whether the standards it developed on the right to be heard in its case law concerning competition and state aid, and smart sanctions, apply also to asylum proceedings.

In *M.M. (I)*, the CJEU held that “*the right to be heard of the applicant for asylum must apply fully to the procedure in which the competent national authority examines an application for international protection pursuant to rules adopted*” (para. 89).

The right to be heard has been developed in the jurisprudence of the Court of Justice and General Court since the 1980s as part of the rights of defence.<sup>100</sup> The legal framework of this case law concerned competition law, in particular state aid<sup>101</sup> and administrative sanctions adopted by the then European Community against individuals, such as sanctions in competition law<sup>102</sup>, and later on, sanctions adopted by the EU against persons suspected of terrorism.<sup>103</sup> In *OMPI (I)* the General Court defined the right to be heard within the context of financial sanctions adopted by the Council against individuals as including two guarantees<sup>104</sup>:

*the safeguarding of the right to be heard comprises, in principle, two main parts.*

*First, the party concerned must be informed of the evidence adduced against it to justify the proposed sanction ('notification of the evidence adduced').*

*Second, he must be afforded the opportunity effectively to make known his view on that evidence ('hearing').*

By the time the right to be heard was codified in the EU Charter (Article 41(2)), this right was already enshrined in EU law as a fundamental standard in administrative procedures, and part of the general principle of EU law of the rights of defence, whose observance is obligatory, even in the absence of express legislation.<sup>105</sup> Article 41(2) EU Charter states that “*every person has the right to be heard before any individual measure which would affect him or her adversely is taken*”. Therefore, the application of the Charter provision is an absolute one: it is not attached to any particular procedure, be it administrative, civil, etc.

It was not until 2012, in *M.M. (I)* (C-277/11<sup>106</sup>), that the CJEU had the occasion of addressing the right to be heard within the context of international protection administrative proceedings, and thus to clarify whether the guarantees it developed within the context of competition proceedings would be applied in the context of asylum law. While in the *M.M. (I)* preliminary ruling of 2012, the CJEU found that Article 41 EU Charter applied to asylum proceedings, in late 2014 (*Mukarubega and Boudjlida*), the CJEU adapted its approach and since then has consistently held that Article 41(2) EU Charter, which includes the right to be heard, only applies to institutions, bodies, offices and agencies of the EU.<sup>107</sup> However, the principle of good administration, which has a content

---

<sup>100</sup> The *rights of defence* were defined by the CJEU as including: the right to be heard; access to the file; principle of sound administration, objectivity and impartiality, see Cases T-191/98 and T-212 to 214/98, *Atlantic Container Line v. Commission*, ECLI:EU:T:2003:245.

<sup>101</sup> Case 301/87, *France v. Commission*, ECLI:EU:C:1990:67.

<sup>102</sup> Cases 100 – 103/80, *Musique Diffusion Française*, ECLI:EU:C:1983:158.

<sup>103</sup> See in particular the *OMPI* case T-228/02, ECLI:EU:T:2006:384.

<sup>104</sup> *OMPI*, para. 93.

<sup>105</sup> Case 301/87, *France v. Commission*, ECLI:EU:C:1990:67, para. 29.

<sup>106</sup> C-277/11, *M v Minister for Justice and Equality*, Chamber Judgment of 22 November 2012 preliminary reference of the Irish High Court, ECLI:EU:C:2012:744; see also the Opinion of the Advocate General Bot, points 30-45 on a comparison of the scope of the right to be heard in other administrative and criminal proceedings.

<sup>107</sup> C-560/14, *M v Minister for Justice and Equality*, Chamber Judgment, 9 February 2017, preliminary reference of the Irish Supreme Court, ECLI:EU:C:2017:101.

equivalent to Article 41 EU Charter, has been held to be applicable to the Member States when acting within the scope of EU law.<sup>108</sup>

The right to be heard has been held to be a component of the general principle of the rights of defence which apply to both administrative and judicial phases of asylum proceedings.

The content of the right to be heard has been the object of a considerable number of preliminary references sent by **Irish** courts (*M.M (1)*); and again in *M.M (2)*); *D. and A.*<sup>109</sup> *H. N.*<sup>110</sup> The considerable number of references for a preliminary ruling is due to the particularities that until recently characterised the procedure for granting international protection in Ireland (see the Opinion of AG Bot in *Danqua*).

“Whereas the majority of the Member States have adopted a single procedure in which they consider the application for asylum made by the person concerned in the light of the two forms of international protection, Ireland originally introduced two separate procedures for the purposes of examining, respectively, an application for asylum and an application for subsidiary protection, it being possible to make the latter application only if the former had been rejected” (AG Bot, Opinion in *Danqua*, C-429/15, para. 3).

In *M.M. (1)*, the CJEU affirmed “*the importance of the right to be heard and its very broad scope in the EU legal order, considering that that right must apply in all proceedings which are liable to culminate in a measure adversely affecting a person*” (para. 85). Furthermore, “*the observance of that right is required even where the applicable legislation does not expressly provide for such a procedural requirement*” (para. 86).

The CJEU clarified that the right to be heard “*also requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case, and giving a detailed statement of reasons for their decision*” (see Case C-269/90 *Technische Universität München*, ECLI:EU:C:1991:438, para. 14, and C-349/07, *Sopropé*, ECLI:EU:C:2008:746, para. 50).

The CJEU clarified that certain questions cannot be addressed by national authorities during the interview with an asylum seeker. For instance, although national authorities are entitled to carry out, where appropriate, interviews in order to determine the facts and circumstances as regards the declared sexual orientation of the asylum seeker, questions concerning the details of the sexual practices of the applicant are not permitted as this would infringe Article 7 EU Charter. Additionally, the CJEU pointed to the sensitive nature of questions related to a person’s sexuality and the reticence applicants may have in revealing intimate aspects of their life (*A.B.C*<sup>111</sup>).

---

<sup>108</sup> The remaining guarantees enshrined in Article 41 Charter apply to the Member States’ actions as part of the principle of good administration, which is broader than the rights of defence (*H.N.* para. 49)

<sup>109</sup> Case C-175/11, *D. and A.*, EU:C:2013:45.

<sup>110</sup> Case C-604/12, *N.*, EU:C:2014:302.

<sup>111</sup> C- 148/13 and 150/13, *A.B.C.*, ECLI:EU:C:2014:2406



## Short overview of the ECtHR jurisprudence

The ECtHR has also highlighted the importance of the right to be heard in administrative proceedings. In *I.M. v France*, the ECtHR assessed the quality of the French accelerated asylum procedure by taking into account the fact that the personal interview with the applicant only lasted half an hour, in the context that this was the first asylum application.<sup>112</sup> Additionally, the Court recognised that a lack of interpretation aid may affect the asylum applicant's ability to present his/her asylum claim. Access to interpretation services has been acknowledged by the ECtHR as an essential procedural safeguard in the context of an asylum procedure and absence of such services may lead to a violation of the right to an effective remedy as guaranteed under Article 13 ECHR.<sup>113</sup>

- *I.M. v France*, Appl. No. 9152/09, ECtHR Judgment of 2 May 2012;
- *Hirsi Jammaa and Others v Italy*, Appl. No. 27765/09, ECtHR Judgment of 23 February 2012;
- *M.S.S. v Belgium and Greece*, Appl. No. 30696/09, ECtHR Judgment of 21 February 2011.

**Question 1 – Does a third country national have an individual right to be heard during subsidiary protection proceedings, when these are provided as a separate domestic proceeding following the asylum proceedings? What is the content of the right to be heard of an applicant for subsidiary protection as developed by the CJEU?**

## Relevant CJEU Cases

- C-277/11, *M v Minister for Justice and Equality (M.M. (1))*
- C-560/14, *M v Minister for Justice and Equality (M.M. (2))*

In light of the EU general principle of rights of defence, of which the right to be heard is a part, should a judge recognise the right of an applicant for subsidiary protection to view and comment on a provisional draft decision rejecting his/her application prior to it being made final?

Has an applicant for subsidiary protection the right to an oral hearing before the administrative authority?

Has an applicant for subsidiary protection the right to call and cross-examine witnesses prior to the adoption of a final decision by the administrative authority?

## Relevant legal sources

### EU level

---

<sup>112</sup> *I.M. v France*, Appl. No. 9152/09, ECtHR Judgment of 2 May 2012.

<sup>113</sup> ECtHR, *I.M. v France*, para. 145; *Hirsi Jammaa and Others v Italy*, para. 202, Appl. No. 27765/09, ECtHR Judgment 23 February 2012; *M.S.S. v Belgium and Greece*, Appl. No. 30696/09, ECtHR Judgment 21 February 2011, para. 301.

Right to be heard as component of the general principle of the rights of defence.

Art. 41(2) EU Charter - This right includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

Article 4(1) Recast QD

### **National legal sources (Ireland)**

The Irish Refugee Act 1996 was in force at the time. In its procedure Ireland distinguished between two types of application, namely:

- (1) an application for asylum and, if there is a negative decision on that application,
- (2) an application for subsidiary protection.

In Ireland, each of those applications was dealt with in a distinct procedure with one procedure following the other. Each application carried a separate right of appeal. While a personal interview was expressly required by the 1996 Act during the proceedings for application for asylum, the 2006 Regulations, which governed the application for subsidiary protection, did not provide for the obligation to hold a personal interview when it came to consider the subsidiary protection claim. For the purpose of the second procedure the applicant was required to fill out a questionnaire.

This legislation was amended following the CJEU preliminary ruling in *M.M.(1)* and subsequently in *M.M.(2)*.

### **Facts of the case<sup>114</sup>**

The applicant was a Rwandan national of Tutsi origins. Subsequent to obtaining a law degree from the National University of Rwanda he claimed he was obliged to take a post in the Military prosecutor's office. He left Rwanda to study for a Master in Laws at an Irish university during which he completed research on the treatment of genocide allegations. Upon the expiry of his student visa he applied for asylum from the Irish authorities, claiming he was at risk from the Rwandan authorities, due to information he possessed in relation to the conduct of prosecutions (or failure to prosecute) following the Rwandan genocide. His asylum claim was rejected, as was an appeal before the **Refugee Appeals Tribunal (RAT)**, based primarily on credibility findings by the authorities. He then made an application for subsidiary protection to the Minister. A written application and correspondence took place but the application for subsidiary protection was likewise rejected, based substantially on the credibility finding of the RAT during the refugee application.

Mr M. argued that he was not heard in the course of examination of his application of subsidiary protection; furthermore, that he was not informed of the matters which "*the Minister regarded as relevant to the decision to refuse him subsidiary protection or of the date on which that decision would be taken. Moreover, in giving grounds for his decision, the Minister to a very great extent referred merely to reasons previously relied on in rejecting Mr M.'s asylum application.*" As regards the rejection of his asylum application in appeal, which preceded the application for

---

<sup>114</sup> The empirical evidence is based on the data published within the *ACTIONES Module on the Techniques of Judicial Interactions in the Application of the EU Charter in ASYLUM AND MIGRATION*, written by Madalina Moraru and Stephen Coutts and Geraldine Renaudiere (commentary of the judicial application of Article 41 EU Charter).

subsidiary protection, Mr M. submitted that “*he was denied an oral hearing on the ground that he had not made that application as soon as reasonably practicable after his arrival in Ireland and that he had not been able to provide any convincing reason for his failure to do so.*”

Given the lack of an oral hearing and information of the reasons for the negative decision on his subsidiary protection application, as well as lack of hearing during asylum appeal proceedings, Mr M claimed a breach of a right to be heard by the administrative authorities, which he contends it requires, as a general principle of EU law and even in the absence of specific legislation in that respect, that “*the person concerned be placed in a position in which he can effectively make known his views as regards the information on which the authorities intend to base their decision.*” A principle which he argued that is now affirmed by the Charter. Those principles would require, in his view, particular obligations under the ambit of Article 4(1) of the Qualification Directive: “[i]n cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application”. The applicant argued that the use of the words “*in cooperation with the applicant*” implied a right to be informed of and a right to comment on any provisional negative decision regarding his application for subsidiary protection.

It should be noted that the Asylum Procedures Directive applies to asylum applications. It also applies to applications for subsidiary protection where a single procedure is used to assess applications for asylum and subsidiary protection (a ‘one-stop shop’ system). Ireland operated a dual system at the material time, in which the two procedures were separate. An applicant was obliged to first make an application for asylum to the Office of the Refugee Applications Commissioner. This procedure involved an interview and written representations and the possibility of an appeal before the Refugee Appeals Tribunal (with an oral hearing). Only once this procedure had been completed and rejected, was he or she entitled to apply for subsidiary protection to the Minister for Justice. While a written application and representations may be made, there was no further interview or possibility for an oral hearing or interview. Instead, evidence collected during the asylum interview was used. There was no appeal.

In its request for a preliminary reference, the **High Court** was inclined to find against the applicant, relying specifically on a prior case of the High Court, *Ahmed v Minister for Justice, Equality and Law Reform* (High Court, 24 March 2011), in which it was noted that an application for subsidiary protection took place following a failed asylum application and that during the course of such an application, which frequently deals with the same material claims as any subsequent subsidiary protection claim, there is extensive correspondence and interaction with the applicant. Viewed as a continuation of the asylum application, the subsidiary protection proceedings were considered as including sufficient procedural rights to ensure that all the obligations under Article 4(1) of the Qualification Directive were met. There was therefore no obligation to provide a copy and an opportunity to comment on any draft decision for subsidiary protection, in the view of the High Court. The High Court was also against recognising an automatic right to be heard within a multiplicity of procedural steps.

The **High Court** however noted the existence of a Dutch Council of State Decision from 2007 that appeared to contradict the Irish High Court in *Ahmed* and provide precisely for a right to comment on a draft decision. In light of the importance of the Dutch Council of State and a desire to ensure consistency within the Common European Asylum System (CEAS), Hogan J decided to refer the matter to the CJEU.

Following the CJEU preliminary ruling in the *M.M.(I)* case, the High Court applied the findings of the CJEU and quashed the decision of the Minister to refuse subsidiary protection.

In its follow-up judgment (*MM v Minister for Justice (No 3)* [2013] IEHC 9 – *Follow-up judgment of the High Court*), the **High Court** was unclear as to the precise implications of the CJEU judgment. While noting it required that the right to be heard be respected in the subsidiary protection procedure, it was unclear what form this right would take and in particular if it necessitated an oral hearing or if a written ‘hearing’, i.e. permitting the applicant’s views to be taken into account, would suffice. Ultimately the High Court determined that following the judgment of the CJEU, the decision-maker in the subsidiary protection claim is not entitled to rely on prior findings of credibility made in the context of an asylum application without giving the applicant the opportunity to contest these findings. Similarly, the applicant must be given a fresh opportunity to revisit all aspects of the case relevant to the subsidiary protection application and a fresh assessment of any such factors must be made. An oral hearing would not always be required but may be required in certain circumstances, which the Irish legislation at that time did not permit.

The High Court noted that this would necessitate far reaching changes to the current procedure for subsidiary protection applications and invited the Oireachtas (the Irish parliament) to consider the dual nature of the Irish protection system.

The case was appealed to the **Irish Supreme Court** by the government and cross-appealed by Mr M., who argued that the right to be heard as recognised by the CJEU implied a right to an oral hearing and a right to call and cross-examine witnesses. The **Supreme Court**, questioning the precise implications of the right to be heard recognised by the CJEU in its initial judgment, stayed the matter and addressed a new reference to the CJEU.

### **Preliminary questions referred to the Court of Justice:**

*M.M (1)* - The **High Court** decided to stay the proceedings and to refer on 1 June 2011 the following question to the CJEU for a preliminary ruling:

*In a case where an applicant seeks subsidiary protection status following a refusal to grant refugee status and it is proposed that such an application should be refused, does the requirement to cooperate with an applicant imposed on a Member State in Article 4(1) of ... Directive 2004/83 ... require the administrative authorities of the Member State in question to supply such applicant with the results of such an assessment before a decision is finally made so as to enable him or her to address those aspects of the proposed decision which suggest a negative result?*

It should be noted that the referring court did not construct its questions in light of Article 41(2) of the EU Charter; instead the application of the Charter was invoked *ex officio* by the CJEU.

*M.M (2)* - The Supreme Court, by order of 24 November 2014, decided to stay the proceedings and to refer the following question to the CJEU for a preliminary ruling:

*Does the “right to be heard” in European Union law require that an applicant for subsidiary protection, made pursuant to Council Directive 2004/83/EC, be accorded an oral hearing of that application, including the right to call or cross-examine witnesses, when the application is made in circumstances where the Member State concerned operates two separate procedures, one after the other,*

*for examining applications for refugee status and applications for subsidiary protection, respectively?*

## **Reasoning of the Court of Justice**

### *Reasoning of the CJEU in the first preliminary reference – C- 277/11 (M.M. (1))*

In its reply, the CJEU dismissed the contention of the applicant that Article 4(1) of the Qualification Directive implied a right to view and comment on a draft decision. The meaning of the word co-operation referred more broadly to the joint responsibility of the State and the applicant to establish the facts relevant to his/her application. It was noted that the Asylum Procedures Directive did not apply to a system such as the Irish, in which the asylum and subsidiary protection applications were separate.

However, the CJEU went beyond the question posed by the **High Court** and considered the application of the general principle of Union law of the right to be heard, now found in Articles 41 (right to good administration), Article 47 (right to an effective remedy) and Article 48 (the presumption of innocence). As part of the CEAS, the granting of subsidiary protection must comply with general principles of EU law and the Charter. In the case of a dual system the right to be heard must be respected in both procedures. The Court appeared to take particular issue with the wholesale reliance by the Minister in assessing the application for subsidiary protection on the credibility finding of the RAT during the asylum procedure, without any further opportunity for the applicant to comment or contest these findings. (N.B. that since the 2014 *Boudjlida* preliminary ruling, the CJEU applies the right to be heard on the basis of the principle of the rights of defence, and no longer under Article 41 EU Charter; however, the guarantees developed by the CJEU in *M.M. (1)* are transferable to the rights of defence principle)

### *Reasoning of the CJEU in Case C-560/14, M v Minister for Justice and Equality, second preliminary reference (M.M.(2))*

In contrast to the reasoning of Advocate General Bot, the CJEU found that the right to be heard, which derives from the principle of EU law of the right of the defence, did not imply a right to a personal interview or an oral procedure within the context of an application for subsidiary protection. The purpose of the procedure was to ensure that the decision maker had full and complete access to the facts and understood the underlying factual matrix. This could be achieved by means of written submissions. Additionally, while noting the separate nature of the two procedures, the CJEU held that the personal interview conducted during the context of the asylum application, could be relevant and be used in the context of an application for subsidiary protection.

However, the CJEU did find that in certain circumstances, such as where an applicant is particularly vulnerable, the right to a defence could necessitate a personal interview. This would be applicable where a personal interview would be necessary in order to ensure that the decision maker had a full understanding of the facts relevant to the application and to the assessment of whether a serious threat existed that would qualify the applicant for the status of subsidiary protection.

Finally, the CJEU found that the right to be heard did not imply a right to call and cross-examine witnesses; such a right does not normally constitute part of the right of the defence in the context of administrative procedures.

Conclusion of the Court of Justice on the right to be heard of an asylum seeker (as resulting from both M.M. (1) and M.M. (2)):

- The CJEU held that there is no absolute right to a personal interview or an oral procedure within the context of an application for subsidiary protection, when the latter is a separate procedure following the rejection of the asylum application. (N.B. according to Article 14 of the Recast APD, the right to a personal interview is the general rule with only two limited exceptions during international protection proceedings).
- The CJEU found that the right to be heard did not imply a right to call and cross-examine witnesses; such a right does not normally constitute part of the right of the defence in the context of administrative procedures.
- The CJEU rejected an interpretation of the duty of cooperation under Article 4 QD and right to be heard as imposing a mandatory information of the applicant in a subsidiary protection after the individual has been refused refugee status and the competent national authority intends to reject that second application as well, that it intends to base its rejection.
- It has to be recalled, in M.M. string of cases the CJEU did not recognise an obligation to inform the applicant of the intention to reject an application and inform him of the arguments on which it will rely. However, it should be recalled that in *OMPI I*, the General Court held an obligation upon the EU institutions to notify of the evidence adduced before the adoption of a decision impacting negatively on the rights of the individual (see para. 93).

However, the EU right to be heard, as part of the general principle of the rights of defence, requires that:

- Given the fundamental nature of the applicant's right to be heard, it should be fully respected in both asylum and subsidiary protection proceedings, when these are separated. In *M.M. (1)*, the CJEU left it to the national court to decide whether the EU right to be heard is respected in the procedure which the application for subsidiary protection was assessed.
- The asylum seeker should be given sufficient opportunities to substantiate his/her asylum claim, for example by submitting written information.
- This right also requires the authorities to pay due attention to the observations submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case, and giving a detailed statement of reasons for their decision (*M.M. (1)*).
- In the specific circumstances where a decision on subsidiary protection takes place immediately after the asylum proceedings, an interview must be arranged if the competent authority is not in a position to reach a conclusion with full knowledge of the facts based on the available evidence. The interview must also be arranged if the personal circumstances of the applicant (in particular, any vulnerability due to age, health conditions or due to being a victim of violence) makes it necessary for him/her to provide comment in order to substantiate the application (*M.M. (2)*).

## Impact of the CJEU preliminary rulings on the M.M.(1) and M.M. (2) cases

### *Impact on the Irish jurisprudence and legislation*

The essential result of the preliminary ruling was a legislative amendment (operative from 24 November 2013), providing for a right to be heard in the context of subsidiary protection procedures, including a right to be informed of any recommendations to grant or refuse subsidiary protection, to be sent any supporting documentation, the right to request an oral hearing and to call witnesses upon appeal. The legislative amendment thus included a right to be heard which is substantially wider than the CJEU's conceptualisation which did not require the right to call of witnesses upon appeal, nor, indeed, an absolute right to an oral hearing.

Furthermore, the domestic procedure was again updated in 2016 with the coming into force of the International Protection Act 2015 (most of which became operative on 31 December 2016). This Act replaced the pre-existing dual system with a single procedure for assessing asylum and subsidiary protection claims in parallel. This change occurred in the context of a general overhaul and replacement of the legislative framework for asylum and subsidiary protection brought in by the 2015 Act.

### *Impact on the UK jurisprudence*

While the Irish legislative appeared to have embraced the CJEU's interpretation of the right to be heard, the UK legislative and courts have adopted a more restrictive interpretation of that right. In the UK, individuals have unsuccessfully invoked Article 41(2) EU Charter equivalent rights, in particular the right to be informed of reasons on the basis of which the administration will take a negative decision against the individual, in Dublin procedures,<sup>115</sup> and within proceedings refusing a travel permit to a refugee on grounds of national security<sup>116</sup>. The UK courts have closely followed the strict interpretation of the right to be heard developed by the CJEU in *M.M.(2)* in which the Court refused to recognise a right to cross examine witnesses or a mandatory right to inform of the arguments on the basis of which the administration aims to base its negative decision. It should be recalled that the CJEU has established case law since *OMPI(I)* whereby, "*the party concerned must be informed of the evidence adduced against it to justify the proposed sanction ('notification of the evidence adduced')*" (para. 93).

## **2.2. The Right to an Oral Hearing before a Court**

### **Short overview of relevant EU norms**

In the previous section we saw that the right to be heard applies to the administrative phase of international proceedings on the basis of the specific provisions of the Recast APD and on the basis of the general principle of the EU law of rights of defence. As for the judicial phase of international protection proceedings, there is no express general right to be heard before a court under the Recast APD. In *Sacko Moussa*, the CJEU clarified that Article 46 of Recast APD, the right to an effective remedy before a court or tribunal, does not include an absolute obligation to a hearing before a court

---

<sup>115</sup> United Kingdom, Court of Appeal, *R (AR) v Secretary of State for the Home Department* [2013] EWCA Civ 778, 28 June 2013, [2013] 3 CMLR 40.

<sup>116</sup> United Kingdom, High Court, *R (AZ) v Secretary of State for the Home Department* [2015] EWHC 3695.

or tribunal when challenging an administrative decision (para. 28). The CJEU held that Article 47 EU Charter does not require a national court or tribunal hearing an appeal against a decision rejecting a manifestly unfounded application for international protection to have a mandatory oral hearing before dismissing the appeal. It held:

*[...] where the factual circumstances leave no doubt as to whether that decision was well founded, on condition that, first, during the proceedings at first instance, the applicant was given the opportunity of a personal interview on his or her application for international protection, in accordance with Article 14 of the directive, and the report or transcript of the interview, if an interview was conducted, was placed on the case-file, in accordance with Article 17(2) of the directive, and, second, the court hearing the appeal may order that a hearing be conducted if it considers it necessary for the purpose of ensuring that there is a full and ex nunc examination of both facts and points of law, as required under Article 46(3) of the directive.*

Therefore, national legislation should leave the freedom to national courts to decide to hold an oral hearing if it is considered necessary for the purpose of fulfilling its obligations under Article 46(3) Recast APD, even in cases of manifestly unfounded applications.

As for the hearing of children, in *Aguirre Zarraga*<sup>117</sup>, the CJEU required that a child be able to express his views in legal proceedings:

*it is a requirement of Article 24(1) of the Charter that children should be able to express their views freely and that the views expressed should be taken into consideration on matters which concern the children, solely ‘in accordance with their age and maturity’, and of Article 24(2) of the Charter that, in all actions relating to children, account be taken of the best interests of the child, since those interests may then justify a decision not to hear the child. (para.63)*

### **Question 1 – Does an asylum seeker have a right to an oral hearing before the court?**

This question will address the nature of the right to an oral hearing before national courts and circumstances where it can be restricted.

This section includes two strands of case law discussed in chronological order. The first strand is represented by two judgments of the **Austrian Constitutional Court** who first recognised that the right to be heard of asylum seekers before national courts is part of Article 47(2) EU Charter and applied its standards as part of the constitutional right to a fair trial. The second judgment of the **Austrian Constitutional Court** offers an example of when the right to be heard before a national court is considered violated. While the Austrian Constitutional Court directly established the legal nature and effects of the right to be heard before a court in asylum proceedings on the basis of Article 47(2) EU Charter, via consistent interpretation technique, the second line of cases, which originate in Italy, gave rise to a similar solution on the nature and effects of the right to be heard before a court, reached, this time, via a preliminary reference (*Sacko Moussa*, addressed by **Tribunal of Milan**). The cases are discussed in their chronological order.

The above-mentioned cases have been selected as they reflect two different judicial interaction techniques (*consistent interpretation and preliminary reference*) chosen by national courts to

---

<sup>117</sup> C-491/10 PPU, ECLI:EU:C:2010:828.



address essentially similar constitutional issues: the nature and limits of the right to an oral hearing before national courts. The added value of the case law of the **Austrian Constitutional Court** is that it also offers a concrete example of when the right to be heard before a national court, which is not an absolute right, can be considered as having been violated by a national court (N.B. in *Sacko Moussa*, although the CJEU leaves the final decision to the referring court, the suggestion is that in that particular case, there seems to be no violation of the right to be heard despite the fact that the individual is not heard in person by the referring court).

1.1 Austria - Constitutional Court, 13 March 2013, U1175/12

Circumstances when the failure to hold a hearing in appeal proceedings (Asylum Court) violates Article 47(2) of the Charter. When are the facts of a case not sufficiently clear so that a hearing by the national court would be required? Do general statements without reference to the case in point represent sufficient grounds for the lack of credibility of the submission?

Relevant legal sources:

Article 3 ECHR;

Article 47(2) EU Charter;

Asylum Procedure Directive (2005/85/EC), Articles 8, 12;

Qualification Directive (2004/83/EC), Article 4

*Facts of the case*<sup>118</sup>

The applicant, citizen of Uzbekistan, applied for international protection in 2011 in Austria, together with his wife and their children. He stated that he had worked as a chauffeur for a Turkish businessman, who operated a chain of supermarkets. The latter was suspected of supporting the banned Islamic "Nurchilar" movement. The applicant himself had been subject to the same suspicions owing to his close working relationship with his boss. The applicant and his employer had then hidden from the police for approximately six months. Shortly before his departure searches had been made for the applicant, and his wife was threatened with imprisonment unless he gave himself up. As a result, the applicant and his family left the country.

The Austrian Federal Asylum Agency refused the applications for international protection. The applicant lodged an appeal against the negative administrative decision. In support of his appeal, he submitted before the Asylum Court numerous current reports on events in Uzbekistan in connection with the supermarket chain mentioned by the applicant.

The Asylum Court refused the appeal without holding an oral hearing. That Court denied that the applicant was threatened with persecution owing to his job as a chauffeur as he was not involved in the activities for which his employer was being sought (tax evasion, misuse of the favourable investment climate and "brotherly relationships"). At the same time, referring to the general statements, the Asylum Court did not consider it credible that the applicant had worked as a

---

<sup>118</sup> Facts based on summary from EDAL database (<http://www.asylumlawdatabase.eu/en>).

chauffeur for the company. It was an extremely responsible job and the applicant was still too young and inexperienced for this.

The applicant appealed against these decisions to the Austrian Constitutional Court and argued that the rejection of his appeal by the Asylum Court without an oral hearing, although he was heard before in first instance (administrative) proceedings violated Article 3 ECHR and Article 47 (2) of the EU Charter.

#### *Reasoning of the Austrian Constitutional Court*

The Austrian Constitutional Court came to the conclusion that the decision by the Asylum Court had violated the right of the applicant to equal treatment of foreigners and his right under the Constitution to an oral hearing, which was in accordance with Article 47(2) EU Charter. It should be noted that the Austrian Constitutional Court has recognised Article 47 EU Charter as part of the constitutional standard of review. In *U466/11 and others*, the Constitutional Court noted the close connection between the Charter and the ECHR which are, incidentally, both directly applicable as a source of constitutional rights in the Austrian legal order.<sup>119</sup> From this, the Court concludes, in effect, that the Charter can supply the appropriate standard of review for breaches of constitutional rights in Austria. The centralisation of such decisions in the hands of the Constitutional Court is taken to be an argument in favour of that interpretation. At least insofar as ‘rights’ from the Charter are concerned, the overlap of their content with the ECHR means that they should be translated into national constitutional standards; this may not, however, hold for the “principles” laid down by the EU Charter, requiring thus a case-by-case assessment (para 5.5). As for the application of Article 47 EU Charter, the Austrian Constitutional Court noted that it has a broader scope of application than its correspondent right in the ECHR: Article 6. While under Article 6 ECHR the right to a hearing only applies in civil and criminal law cases, Article 47 EU Charter extends to all judicial proceedings, including asylum proceedings, and thus applicants can benefit from the Charter’s fair trial safeguards in asylum related proceedings.

The Court emphasised that Article 47(2) EU Charter does not prescribe an absolute fundamental right, but rather one which accepts limitations, albeit limitations which must pass the test of the principle of proportionality in order to be found legitimate. Citing the case law of the ECtHR, the Constitutional Court finds that this right can be limited in exceptional circumstances and that the legitimacy of the limitation(s) has to be established on a case-by case basis. In another case, *U466/11 and others*, the Austrian Constitutional Court defined the circumstance where the right to an oral hearing can be limited. Namely, in circumstances where it has nothing to contribute to the written record, an oral hearing can be dispensed with. On this basis of this argument, the Constitutional Court found no violation of the Charter in that case. The situation was completely different in the present case. The Austrian Constitutional Court found that the statements by the Asylum Court on the lack of credibility are general and do not refer to the personal circumstances of the applicant. The general statements on local knowledge, the clothing and punctuality of chauffeurs did not have any weight in this particular case and can also not have an adverse effect on the credibility of the applicant, in particular because there are no definite statements relating to Uzbekistan. The contradictions identified by the Asylum Court are mere nuances of an otherwise coherent submission.

---

<sup>119</sup> While the ECHR was recognised equivalent constitutional status in the Austrian legal order, since 1964, thus enjoying directly applicable federal constitutional law, the EU Charter has been recognised similar status since 2012.

Section 41(7) Asylum Act regulated the failure to hold an oral hearing before the Asylum Court in those cases in which the parties have already been heard in the Court of First Instance and the facts of the case from the state of the file including the appeal seem to have been resolved or it is clear without any doubt from the investigations that the submission is contrary to the facts.

However, in this case, the Austrian Constitutional Court held that the facts presented were not sufficiently clarified. An oral hearing should therefore have been held. The applicant's right to an oral hearing before a court as enshrined in Article 47(2) EU Charter was found to have been violated by the Asylum Court.

#### *Use of judicial interaction technique*

Through the use of the consistent interpretation technique, the Austrian Constitutional Court recognised that Article 47 EU Charter enjoys domestic constitutional status. The Court linked the EU Charter with the jurisprudence of the ECtHR and by doing so indirectly strengthens also the horizontal dialogue between the CJEU and the ECtHR. The Austrian Constitutional Court considered Article 6 ECHR not to be directly applicable to this case, but referred to the jurisprudence of the ECtHR on Article 6 in order to derive standards for exceptional derogations from the right to fair trial. The Court referred to Article 13 ECHR in order to clarify that Article 47 EU Charter has a broader scope, since it applies also to international protection proceedings. This interpretation of Article 47 EU Charter, held in *U466/11*, was also followed in *U1175/12*. While in the former case, the Court did not find a violation of Article 47, in the latter, the Constitutional Court did find a violation of Article 47(2) EU Charter, using as an express ground for striking down the judgment of the Asylum Court.

**Outcome of the Judicial Interaction:** The Austrian Constitutional Court gives precise indications to the national courts on the role and effects of the Article 47(2) EU Charter within the national jurisdiction:

*summary, the Constitutional Court – after having referred a matter for a preliminary ruling to the Court of Justice of the European Union according to Article 267 TFEU as appropriate – takes the Charter of Fundamental Rights in its scope of application as a standard for national law (Article 51(1) EU CHARTER) and sets aside contradicting general norms according to Article 139 and/or Article 140 Federal Constitutional Act (B-VG). In this manner, the Constitutional Court fulfils its obligation to remove from the domestic legal order provisions incompatible with Community law, which is also postulated by the Court of Justice of the European Union (cf. ECJ 02/07/1996, Case C-290/94, Commission v Greece, [1996] ECR I-3285; 24/03/1988, Case 104/86, Commission v. Italy, [1988] ECR 1799; 18/01/2001, Case C-162/99, Commission v. Italy, [2001] ECR I-541; see also ECJ 07/01/2004, Case C-201/02, Wells, [2004] ECR I-723; 21/06/2007, Case C-231/06 -C-233/06, Jonkman, [2007] ECR I-5149). (Rz 43) (judgment in case U466/11, para. 44)*

#### CJEU preliminary ruling in Case C 348/16, Sacko Moussa

The Tribunal of Milan sought to ascertain, in essence, whether the Recast APD, in particular Articles 12, 14, 31 and 46 thereof, is to be interpreted as precluding a national court, hearing an appeal against a decision rejecting a manifestly unfounded application for international protection, from dismissing the appeal without hearing the applicant. In particular where the applicant has already been interviewed by the administrative authorities and where the factual

circumstances leave no doubt as to whether the decision rejecting the application was well founded.

### *Facts of the case*

On 20 March 2015, Mr Sacko arrived in Italy, from Mali, and lodged an application for asylum. On 10 March 2016, he was interviewed by the *Commissione Territoriale per il riconoscimento della protezione internazionale* (Regional Commission for the grant of international protection; ‘the Commissione territoriale’). On 5 April 2016, the Commissione Territoriale informed Mr Sacko that it was not going to grant him refugee status or to consider him eligible for subsidiary protection.

On 3 May 2016, Mr. Sacko appealed against the decision of the Commissione Territoriale before the referring court. The national court considers that the application is manifestly unfounded.

Under the Italian law applicable at that time (Art. 19, legislative decree no. 150/2011), the judge could have followed one of two optional procedural patterns: it may have held a hearing with the parties or it could have opted for deciding without hearing the applicant when it considered that the decision that could be reached on the basis of the evidence existing in the case file would be no different even if a further interview was conducted.

The referring court had no doubt concerning the manifestly unfounded nature of the action brought by Mr Sacko and its intention was to dismiss the case without a hearing.

However, the court had doubts as to the compatibility of the national legislation with EU law, in particular with Articles 12, 14, 31 and 46 of Recast APD, in particular the fact that national law allowed it to dismiss the action or find it inadmissible without a hearing.

### *Reasoning of the CJEU*

The point of departure of both the CJEU decision and the AG’s opinion is that while the personal interview of an applicant for international protection is mandatory at the administrative stage, in pursuance of Article 14 Recast APD, such a requirement is not explicitly foreseen with regard to the appeal procedures as set in Chapter V of Recast APD. However, the CJEU had to assess whether such an obligation of an oral hearing before the court in asylum proceedings is imposed by Article 47 EU Charter and/or by a systematic reading of Articles 12, 14, 31 and 46 of the Recast APD.

When assessing the requirements of oral hearing during appeal proceedings, both the CJEU and the AG, agreed that there is a close link between the appeal and the first instance phases, and thus the personal interview held during the administrative stage is of critical importance also for the judicial stage (see respectively para. 57 of the AG’s Opinion, para. 42 of the CJEU judgment).

Indeed, the close relation between the administrative and the judicial phases is such that the latter is considered by the Advocate General as having the primary purpose of reviewing the legitimacy of the administrative decision refusing the application for international protection. However, this is not the current understanding of the purpose of the judicial stage in international protection cases under Italian law. The judicial stage is seen as having the goal to ascertain whether the conditions for the granting of international protection are fulfilled, not to review the administrative decision. This is so, particularly as asylum adjudication falls under the jurisdiction of civil courts<sup>120</sup> rather than

---

<sup>120</sup> Under the Italian jurisdictions, international protection proceedings have been allocated to the civil courts, as they are considered as involving constitutional rights.

administrative ones (where the latter are normally conceived as in charge of judicial review of administrative acts under Italian law). This different conception of the role of the judicial phase in asylum proceeding cases and the idea that the judicial phase evaluates the facts and points of law of the asylum application autonomously with regard to the preceding administrative phase, although relying on the factual elements assessed in the administrative phase, may explain why the majority of Italian judges considered it necessary to have a personal hearing of the applicant in the judicial phase.<sup>121</sup>

On the contrary, other national jurisdictions<sup>122</sup> placed critical importance on the personal interview at the administrative stage, while considering that the hearing before the court should instead assess how well the administration fulfilled its duties to state reasons in fact and law, and to assess whether any errors of laws were committed (see for instance **Belgium**). Therefore, an evaluation of the transcript of the personal hearing carried out during the administrative stage by the appeal judges should be sufficient, rather than an automatic replication of a full oral hearing.

The Court took a different view and stated that it considered that the “*failure to give the applicant the opportunity to be heard in an appeal procedure constitutes a restriction of the right of the defence, which form part of the principle of effective judicial protection enshrined in Article 47 of the Charter.*” (para. 37)

However, since the right to a fair and public hearing is not an absolute right, restrictions can be established in certain circumstances.

In fact, the right of defence, as with other fundamental rights, may be restricted provided that the restrictions correspond to objectives of general interest pursued by the measure in question and that they do not entail, with regard to the objective pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (para. 38). Once again, the principle of proportionality must be taken into account.

In that regard, the Court relies on its previous judgments to the extent of holding that according to the ECtHR case-law (explicit reference was made to the judgment of ECtHR of 23 November 2006, *Jussila v. Finland*), Article 6(1) of the ECHR does not impose an absolute obligation to hold a public hearing and does not necessarily require that a hearing be held in all proceedings (para. 40).

Establishing whether the right to an effective remedy and fair trial requires a personal hearing of the applicant in the judicial phase of an asylum procedure is a question to be assessed in the light of the judge’s obligation to carry out the full and *ex nunc* examination of both the facts and points of law as required by Article 46 of Recast APD (para. 44).

It is essentially up to the judge to evaluate whether the information in the case-file – including where applicable the report or the transcript of the personal interviews – are sufficiently informative as to obviate the need for a personal hearing in the judicial phase.

---

<sup>121</sup> Under the Italian jurisdiction, international protection proceedings have been allocated to the civil courts, as they are considered to involve constitutional rights.

<sup>122</sup> See the position expressed by the Belgian government as summarised in the preliminary ruling. Additionally, see AG’s Opinion, para. 28: “This was a position expressed ultimately by the Belgian government according to which given the safeguards provided by the directive itself to ensure the transcription of the interviews conducted at the administrative stages, the European legislator has considered (logically) that it was unnecessary to require a further hearing at the judicial stage, irrespective of whether or not the application or the appeal are manifestly unfounded”

The pivotal role of the judge is further emphasized by the Court when it warns that EU member states legislators are not authorised to prevent that a court or tribunal ordering that a hearing be held where he considers necessary in order to ensure a full and *ex nunc* examination of both facts and points of law (para. 48).

The Court's reasoning is consistent with the AG's conclusions, however there are some discrepancies.

AG Campos Sánchez Bordona focuses more specifically on one dimension of the right to be heard. According to the Advocate General, the question is not whether the right to be heard in general must be guaranteed in the judicial phase of the asylum procedure but rather whether a specific type. According to the AG, the personal hearing of an asylum applicant may apply in the judicial phase, not because it is a component of the fundamental right of the asylum applicant to have an effective remedy, but because and to the extent that the judge considers it necessary for carrying out his duty to fully review the factual and legal circumstances of the applicant's situation in the interests of justice and fairness overall.

The Court departs from this reasoning since it seems to consider the right be heard (personally) in the appeals procedure to be part of the right of defence. Admittedly, in paragraph 37 the Court refers generally to the "*failure to give the applicant the opportunity to be heard in an appeal procedure*", without further qualification of the right to be heard. However, the subsequent paragraphs suggest that the CJEU is referring to the right to be heard personally.

Having qualified the right to be personally heard in the judicial phase of an asylum procedure as a component of the right of defence of the person lodging an international protection application, the Court admits nevertheless that this right is subject to limitations, according to the wording of Article 52 EU Charter.

These limitations consist precisely in the possibility for a judge to deem not necessary the hearing of the applicant, provided that this has occurred in the administrative phase and the judge does not deem necessary to conduct a new hearing for the purpose of ensuring full and *ex nunc* examination of facts and point of law.

It is not clear, though, which objectives of general interest justify a restriction of the right to be heard personally, that would allow the judge to dismiss the appeal without hearing the applicant whenever it deems the probative elements before him/her to be sufficient for deciding the appeal

In its preliminary reference, the referring court mentioned two different grounds that could justify a decision not to hear the applicant in person, namely: reasons of speed and economic savings. It is notable that the CJEU did not refer to either of these.

#### *Conclusions and outcome of the CJEU preliminary ruling*

The Court concludes by holding that Articles 12, 14, 31 and 46 of the Directive, read in the light of Article 47 of the Charter (the express reference to Article 47 of the Charter lacks in the conclusion of the AG's Opinion), must be interpreted as not precluding a national court from dismissing an appeal against a decision rejecting a manifestly unfounded application for international protection without hearing the applicant, provided that a hearing occurred in the administrative phase and the judge does not deem necessary to conduct the hearing for the purpose of ensuring full and *ex nunc* examination of facts and point of law.

### *Instances of judicial dialogue*

The Court refers to the ECtHR case-law to the extent of highlighting that Article 6 ECHR does not impose an absolute obligation to hold a public hearing and does not necessarily require that a hearing be held in all proceedings. (References to ECtHR, 23 November 2006, *Jussila v. Finland* CE:ECHR:2006:1123JUDO07305301).

### *Instances of internal judicial dialogue*

In its reference for a preliminary ruling, the Tribunal of Milano highlights that the majority of Italian caselaw is in favour of having a mandatory hearing of the applicant on the grounds that only this option would permit the respect of the right to effective remedy and the full and *ex nunc* examination of both facts and points of law, as required under Article 46(3), Recast APD. See, however, the opposite view of the Cassation court (Cass. Civ., sez. VI-1, ord. 8.6.2016, no. 11754).

### *Impact on national law*

After the Tribunal of Milan's preliminary reference and before the CJEU decision, the Italian legislator introduced major changes to the judicial phase of the asylum procedure.

According to Law No. 46 of 13 April 2017, the personal hearing of the asylum applicant, during the administrative stage, has to be video-taped.

In the judicial phase, the judge must in principle base his/her decision on the written observations presented by the parties and on the evidence collected during the administrative stage, which includes the video-tape of the applicant's personal hearing.

However, the new law introduced some derogations, allowing the judge to order the personal hearing of the applicant if he considers necessary to do so after the viewing of the video-tape or if the judge requires the parties to provide clarification.

Although the new provisions foresee the personal hearing of the asylum applicant at the judicial stage as an exception, they seem to grant the judge a sufficient discretion in deciding whether or not to order the personal hearing of the applicant in each case.

The new Italian provisions appear to comply with the requirements set by the CJEU in the *Sacko* case. This decision can be usefully invoked to avoid restrictive interpretations of the wording of the new law and to guarantee that the judge retains discretion in the matter against any future restrictive legislative changes.

### *Follow-up judgment of the referring court – Tribunal of Milano*<sup>123</sup>

Following the CJEU preliminary ruling, the Tribunal decided to proceed with the hearing on the basis of three factors:

- The long time elapsed since the lodging of the appeal;
- The evolution of the socio-political situation in Mali;
- The need to assess any elements of vulnerability that did not emerge during the administrative phase (relating, for example, to the young age of the applicant, just twenty years old when he arrived in Italy).

---

123

The Italian judge considered the story of Sacko Moussa consistent, with reference to statements made before the administration, and credible but nevertheless not suitable to justify the recognition of international protection, both with reference to refugee status and with reference to subsidiary protection. In fact, the complainant has deduced as reasons for the flight and the desire not to return to Mali, family conflicts relating to the assignment of assets belonging to his father. These are family issues that have not resulted in violence or threats against the claimant. It should then be added to these considerations that the impossibility for the appellant to ask for help from the state authorities has not emerged in any way.

Moreover, the situation in Mali, with particular reference to the area of origin of the applicant (Kayes), although characterized by instability, episodes of localized violence, and, in some cases, clashes between opposing factions, is not such as to suggest that there is a situation of serious and individual threat to the life and the person of a civilian resulting from indiscriminate violence in situations of internal or international armed conflict, capable of justifying the granting of subsidiary protection, pursuant to the national legislation (i.e. art. 14 lett. c) Legislative Decree 251/2007).

However, the judge considered that the situation in Mali was in any case sufficiently serious, and even in the central and southern parts of the country it was not stabilized, rather it has deteriorated in the last year. So, pending further developments, the judge identified the existence of serious humanitarian reasons that prevent the return of the applicant in the country of origin and has therefore accepted the appeal recognizing the right of the applicant to obtain the residence permit for humanitarian reasons pursuant to art. 5 paragraph 6 of Legislative Decree 286/98 (internal form of protection).

**Further national case law:** Judgment of the French Conseil d'État of 22 June 2017, no 400366, ECLI:FR:CECHR:2017:400366.20170622, *M. Hamza*, addressing the **right to be heard** as regards the right to an interpret and duties of the national judge; annulment of an administrative decision rejecting any form of international protection in circumstances of alleged inadequate translation cannot be done without the judge hearing the asylum seeker.

### 2.3. The Right to be Heard in Return Proceedings<sup>124</sup>

The right to be heard before the issuing of a return (expulsion) decision may be of high importance due to the irrevocable consequences of the return decision – the removal of the migrant to the country of origin. Thus, it is important to check that the expulsion would not lead to violation of his/her fundamental rights. In order to avoid such violations, it is important that the competent national authorities offer the individual the possibility to be heard. This is necessary when the migrant was not previously heard, or if a long time has passed since s/he was heard, in order to check if new elements, circumstances have intervened which may prevent the return.

---

<sup>124</sup> This section is developed on the basis of material gathered in the REDIAL Project.



## Short overview of EU norms

Article 41 EU Charter guarantees the right of every person to be heard before being subject to any individual measure that would affect him/her adversely. The Return Directive provides a detailed list of procedural safeguards granted to third-country nationals (TCNs) who are subject to return-related decisions (i.e. return decisions, entry-ban decisions, decisions on removal, decisions on detention, etc.).<sup>125</sup> However, the Return Directive (RD) does not expressly refer to the right to be heard of those third-country nationals before the adoption of any such decision, nor does it specify the consequences of an infringement of this fundamental right. Article 12 RD expressly refers to the duty to state reasons, in fact and in law, which, in practice, cannot be effectively fulfilled if the competent authority did not previously hear the TCN.

In several preliminary rulings,<sup>126</sup> the CJEU deduced a right to be heard for TCNs who are subject to return-related decisions, and established also the legal consequences of its violation within the framework of return procedures.<sup>127</sup>

It should be noted that the CJEU held that Article 41 EU Charter applies only to the EU institutions, bodies, offices, and agencies of the European Union. However, the Member States are obliged to respect the right to be heard when acting within the scope of EU law, on the basis of the general principles of the rights of defence.<sup>128</sup> It should be emphasised that the Court held that Member States are bound to respect the right to be heard even in the absence of an express EU or national legislation providing for it.<sup>129</sup> The guarantees enshrined in Article 41 Charter apply to the Member States' actions as part of the principle of good administration, which is broader than the rights of defence (*H.N.*<sup>130</sup>). Therefore, the general principles of EU law remain of importance, even after the entry into force of the EU Charter.<sup>131</sup> Similarly to international protection proceedings, Article 47 EU Charter is applicable and relevant for the judicial phase of return proceedings. However, unlike the asylum proceedings, the CJEU has not had the opportunity so far to clarify the nature (automatic or not) of the right to an oral hearing before the national court.

As a counterpart to the right to be heard, a TCN is required to co-operate with the competent authorities and to provide them with all relevant information, in particular all information that could might militate against a return decision being issued.<sup>132</sup> The CJEU acknowledged that Member States can place restrictions on the rights of the defence. It did so since these restrictions do not constitute unfettered prerogatives. But the restrictions must correspond to the objectives of general interest pursued by the measure in question. They, likewise, must not involve, with regard to the objectives pursued, a disproportionate and intolerable interference infringing upon the very substance of the guaranteed rights.

---

<sup>125</sup> See, in particular Articles 12-16 RD.

<sup>126</sup> C-166/13, *Mukarubega*, EU:C:2014:2336; C-249/13, *Boudjlida*, ECLI:EU:C:2014:2431, 11 December 2014; G&R C-383/13 PPU, EU:C:2013:533.

<sup>127</sup> G&R C-383/13 PPU, EU:C:2013:533.

<sup>128</sup> See C-141/12 and C-372/12, *YS and Others*, EU:C:2014:2081, para. 61; C-166/13, *Mukarubega*, EU:C:2014:2336, para. 44; Case C-249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, ECLI:EU:C:2014:2431, para. 32-33.

<sup>129</sup> Case 301/87, *France v. Commission*, ECLI:EU:C:1990:67, para. 29; *Boudjlida*, para. 39.

<sup>130</sup> According to the CJEU, "the right to good administration, enshrined in Article 41 of the Charter, that right reflects a general principle of EU law." (para. 49).

<sup>131</sup> More on the delimitation between the principle of effective judicial protection and the rights enshrined in Article 41, 47 and 48 can be found in the *ACTIONES Module on Effective Judicial Protection*.

<sup>132</sup> C-166/13, *Mukarubega*, EU:C:2014:2336; C-249/13, *Boudjlida*, ECLI:EU:C:2014:2431, 11 December 2014 etc.

In situations of combined decisions (e.g. ending legal stay and return decisions), the CJEU clarified that Member States are not obliged to hear the third-country national before the adoption of the return decision, as long as the individual has been effectively heard during the previous administrative procedure (e.g. asylum proceedings<sup>133</sup>). Mindful of the objective of the Return Directive, the Court held that the right to be heard should not be used for unduly prolonging return procedures.<sup>134</sup>

Finally, even if the right to be heard has been breached, it would render a return-related decision invalid, *“only insofar as the outcome of the procedure would have been different if the right was respected.”*<sup>135</sup> In another case, the Court emphasised the impact a violation of the right to be heard would have on other administrative duties. National courts have to be aware that *“where the person concerned is not afforded the opportunity to be heard before the adoption of an initial decision [...] compliance with the obligation to state reasons is all the more important because it constitutes the sole safeguard enabling the person concerned, at least after the adoption of that decision, to make effective use of the legal remedies available to him in order to challenge the lawfulness of that decision.”*<sup>136</sup>

In the following paragraphs, we will offer a brief overview of the preliminary references decided by the CJEU on the legal nature, scope, and content of the right to be heard in return proceedings and how they were applied by different Member States. The cases will be presented in chronological order, followed by conclusions on the effects of the preliminary references at the national level.

### **Question 1 – What is the legal status and content of the right to be heard in return proceedings?**

In the absence of an express right to be heard in the Return Directive, are national authorities required to secure this right during the administrative and judicial phases of return proceedings? If yes, under which legal basis?

What is the material content of the right to be heard?

What are the possible remedies in cases of violation of the right to be heard?

Is the cautious approach of the CJEU regarding remedies in the *G&R* case followed by national courts? If some national courts depart from the cautious CJEU approach, can this be interpreted as a signal for the CJEU to revisit its approach or is it up to the national courts to ensure implementation of the preliminary rulings in light of the specific national legal systems?

### Relevant Cases

---

<sup>133</sup> In *Mukarubega* a TCN was heard during the asylum proceedings and while in public custody; the adoption of the first return decision was taken at the same time as the refusal of the residence permit; while the second return decision was adopted at the same time as the rejection of the asylum application, without informing the applicant that following the rejection of the asylum application, the return decision could be taken at the same time.

<sup>134</sup> *Mukarubega*, para. 71.

<sup>135</sup> *G&R* C-383/13 PPU, EU:C:2013:533. National jurisprudence on the legal remedies against violation(s) of the right to be heard will be discussed in more detail under the section dedicated to Article 13 of the Return Directive.

<sup>136</sup> Case C-417/11 P, *Council v Bamba*, ECLI:EU:C:2012:718, para. 51.

- CJEU, *Mukarubega*, C-166/13, 5 November 2014
- CJEU, *Boudjlida*, C-249/13, 11 December 2014
- France, Council of State, *Halifa*, No. 370515, 4 June 2014
- France, Council of State, Judgment No. 381171, 9 November 2015

Facts (*Mukarubega case and Boudjlida case*)<sup>137</sup>

In March and April 2013, two French administrative courts submitted a request to the CJEU for a preliminary ruling.<sup>138</sup> In the first case, a Rwandan national, after being denied asylum in France, was refused permission to stay and was placed in administrative detention pending removal. Before the administrative Tribunal, the applicant claimed that her right to be heard had been infringed due to a lack of opportunity to present specific observations before the adoption of the first return decision - which was taken at the same time as the refusal of a residence permit.<sup>139</sup> In the second case an Algerian national was deemed to be staying illegally, since he had not applied for the renewal of his last residence permit, initially granted in France, for the duration of his studies.<sup>140</sup> In early 2013, after he made an application for registration as a self-employed businessman, the applicant was invited by the police to discuss that application. The circumstances of his arrival in France, the conditions of his residence as a student, details of his family and the possibility of his departure from France were discussed. On the same date, the Prefect of the 'Pyrénées-Atlantiques' issued a decision ordering Mr. Boudjlida to leave French territory, granting him a period of 30 days for his voluntary return to Algeria. The applicant challenged that decision before the French courts. He claimed that he did not have the right to be heard effectively before the adoption of the return decision. He claimed that he was not in a position to analyse all the information relied on against him, since the French authorities did not disclose that information to him beforehand and did not allow him an adequate period for reflection before the hearing. Further, the length of his interview by the police (30 minutes) was much too short, the more so when he did not have the benefit of legal assistance.

In the *Mukarubega* case, the ***administrative tribunal of Melun*** first decided to stay proceedings and to refer the following questions to the CJEU: it asked in substance whether the right to be heard, which is an integral part of the fundamental principle of respect for the rights of defence (enshrined, according to the court, in Article 41 EU Charter) should be interpreted as requiring that the administrative authorities, intending to issue a return decision, must enable the interested party to first present his/her observations. In the subsequent *Boudjlida* case the ***administrative tribunal of Pau*** asked the Court to clarify the extent of the right to be heard. In particular, whether it included a right for the foreign national concerned to be put in a position to analyse all the information relied on against him as regards his right of residence; to express his point of view, in writing or orally, with a sufficient period of reflection, and to enjoy the assistance of counsel of his own choosing.

---

<sup>137</sup> Extract from the *ACTIONES Module on the Techniques of Judicial Interactions in the Application of the EU Charter in ASYLUM AND MIGRATION*, by Madalina Moraru with Stephen Coutts and Geraldine Renaudiere.

<sup>138</sup> Requests for a preliminary ruling from the administrative tribunal of Melun in *Mukarubega*, C-166/13 and from the administrative tribunal of Pau in *Boudjlida*, C-249/13.

<sup>139</sup> CJEU, *Mukarubega*, C-166/13, 5 November 2014, EU:C:2014:2336

<sup>140</sup> CJEU, *Boudjlida*, C-249/13, 11 December 2014 EU:C:2014:2431

### First outcome at national level in distinct pending cases

The above-mentioned CJEU cases C-166/13 and C-249/13 were pending at the time the French Council of State was hearing the case. While both preliminary questions were addressed by first instance national administrative courts, the **French Council of State** did not wait for the outcome at the EU level and decided the case, being of the view that enough indications had been given in previous case-law of the CJEU.<sup>141</sup> The issue at stake was to determine if administrative authorities could issue a return decision together with a decision rejecting an application for a residence permit. In this particular case, the applicant was facing a return decision without being in a position to make specific observations. The applicant claimed that the return decision taken subsequently was in breach of their rights and therefore unlawful.

First, with regard to the ‘legal nature’ of the right to be heard, the **Council of State** excluded the application of Article 41 EU Charter. In its view, this provision does not apply to administrative decisions taken by national administrations, even if they act in the context of EU law (as later confirmed by the CJEU in case C-166/13). It recalls however that the right to be heard remains a general principle of EU law and that there is therefore no practical difference between invocation of Article 41 Charter or the right to be heard as a general principle. Then, deciding on the merits, the Council of State based its reasoning on case C-383/13, *G. and R*<sup>142</sup>. It pointed out in para. 98 of its judgment that “*according to European Union law, an infringement of the rights of the defence, in particular the right to be heard, results in annulment only if, had it not been for such an irregularity, the outcome of the procedure might have been different*”.<sup>143</sup> The **Council of State** considered that by applying for a residence permit, the applicant should have known that a potential consequence in case of refusal would be that the authorities might take a return decision. Hearing from the person a second time, before issuing the return decision, was therefore not required. According to *M.M.(I)*, public authorities are not obliged before to inform the applicant, before adopting its decision, that it proposes to reject his application and notify him of the arguments on which it intends to base its rejection. However, this is not the same thing to the decision of the Council of State. Being heard should provide the public authority with more evidence which is useful for the final decision, not (at least primarily) merely serve to inform the applicant of the consequence of the decision.

### Reasoning of the CJEU

In *Mukarubega* (C-166/11) and *Boudjlida* (C-249/13), the CJEU drew the following conclusions:

1. EU law does not specify whether, and under what conditions, observance of the right to be heard (which is inherent to the general principle of respect for the rights of defence) is to be ensured, nor does it specify the consequences of an infringement of that right.
2. Once the competent national authorities have determined that a third-country national is staying illegally in the national territory, they have to rely on provisions in national law

---

<sup>141</sup> France, Council of State, *Halifa*, no. 370515, 4 June 2014.

<sup>142</sup> CJEU, *G. and R.*, C-383/13, 10 September 2013, EU:C:2013:533, explicitly referred to by the Public “Rapporteur” in his opinion.

<sup>143</sup> See, to that effect, *inter alia*, *France v. Commission*, C-301/87, [1990] ECR I-307, § 31; *Germany v. Commission*, C-288/96, [2000] ECR I-8237, §101; *Foshan Shunde Yongjian Housewares & Hardware v Council*, C-141/08, [2009] ECR I-9147, § 94; *Storck v OHIM*, C-96/11, [2012] ECR I-0000, § 80.

explicitly providing for an obligation to leave the national territory and ensure that the person concerned is properly heard within the procedure relating to his/her residence application or, as the case may be, on the illegality of his/her stay.

3. The purpose of the right to be heard before the adoption of a return decision is to enable the person concerned to express his point of view on the legality of his stay and on whether any of the exceptions to the general rule (issuance of a return decision) are applicable. Similarly, under EU law, national authorities must take due account of the best interests of the child, family life and the state of health of the third-country national concerned and respect the principle of *non-refoulement*.
4. Lastly, it implies that the competent national authorities are under an obligation to enable the person concerned to express his point of view on the detailed arrangements for his return (such as the period allowed for departure and whether return is to be voluntary or coerced), with the possibility that the period for voluntary departure may be extended according to the specific circumstances of the individual case (such as the length of stay, the existence of children attending school and other family and social links).
5. Where the national authorities are contemplating the simultaneous adoption of a decision determining a stay to be illegal and a return decision, those authorities need not necessarily hear the person concerned specifically on the return decision, if that person had the opportunity to effectively present his/her point of view on the question of whether the stay was illegal and whether there were grounds which could, under national law, entitle those authorities to refrain from adopting a return decision.
6. A competent national authority is not required to warn a third-country national that it is contemplating adopting a return decision with respect to him, or to disclose to him the information which it intends to rely on to justify that decision, or to allow him a period of reflection before seeking his observations. EU law does not establish any such detailed arrangements for an adversarial procedure.
7. It is therefore sufficient if the person concerned has the opportunity effectively to submit his point of view on the subject of the illegality of his stay and reasons that might justify the non-adoption of a return decision.

An exception must however be admitted where a third-country national could not reasonably suspect what evidence might be relied on against him or would objectively only be able to respond to it after certain checks or steps were taken with a view, in particular, to obtaining supporting documents. Further, the Court states that return decisions may always be challenged by legal action, so that the right of defence of the person concerned against a decision that adversely affects him, is ensured.

### Instances of judicial dialogue

Before the judgments of the *Conseil d'Etat* and of the CJEU, the French Court of Appeal had different views on the circumstances when a violation of the right to be heard should be found. In some cases they even quashed the administrative decisions on the grounds of the right to be

heard.<sup>144</sup> It has to be pointed out that the CJEU refused to fully endorse the interpretation of the referring court, and did not limit the procedural autonomy of the Member States in this regard.

By first anticipating the CJEU case-law, the **French Council of State** seems to have first assumed that Article 41 EU Charter is applicable in cases falling within the scope of the Return Directive. However, the CJEU later ruled in C-166/13 that: “*it is clear from the wording of Article 41 of the Charter that it is addressed not to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (...) Consequently, an applicant for a resident permit cannot derive from Article 41(2)(a) of the Charter a right to be heard in all proceedings relating to his application*”.<sup>145</sup> The second judgment issued by the Council of State in 2015 was thus an opportunity to adjust its case law expressed in *Halifa* to be in conformity with the CJEU jurisprudence: it declared Article 41 EU Charter inapplicable but rather applied the equivalent general principle of the right of the defence.

#### Impact of CJEU decisions on national case law of the Member States other than the one of the court referring the preliminary question to the CJEU

#### BELGIUM

The **Belgian Council of Alien Law Litigation** (CALL) consistently applies the right to be heard as a general principle of EU law. Relying on cases C-349/07, *Sopropé* and C-277/11, *M.M.*, it underlines “*the importance of the right to be heard and its very wide working sphere in the EU legal order*”<sup>146</sup> (e.g. CALL, 126.219 of 25 June 2014). It has also consistently held that irregular migrants have to be heard in relation to each of the return-related decisions, which the administration adopts. For instance, the third country national must be heard not only as regards the withdrawal of the right to stay (CALL, 230.293/24.02.2015), but also as regards the order to leave the territory (CALL, 232.758/29.10.2015) and he or she must have the chance to express their view on the entry ban, adopted together with the removal order (CALL, 233.257/15.12.2015).<sup>147</sup> See the Belgian synthesis report on the second package of the Return Directive.

#### LITHUANIA

As regards the obligation to hear the TCN, the **Supreme Administrative Court of Lithuania**, for instance, established on the basis of Article 41 EU Charter and principle of good administration as laid down in EU law and Constitution a positive obligation for the public authorities to hear a TCN on aspects related to his/her family life; children (including both biological children and children of the partner); and any criminal record (causes, and conduct following up criminal conviction). *SAC, Z. K. v. Kaunas County Police Headquarters*, case No. A-2681/2012, decision of 3 September 2013; *M.S. v. Migration Department under the Ministry of Interior*, case No. A-69/2013, decision of 20 June 2013).

---

<sup>144</sup> Administrative Court of Appeal from Nancy no. 12NC01705 *M. Ouda*.

<sup>145</sup> CJEU, *Mukarubega*, *op.cit.*, para. 44.

<sup>146</sup> This jurisprudence also led to substantial modifications in the Aliens Office’s practices. The Belgian Aliens Office now sends a formal letter that invites foreign nationals to express their views before the withdrawal of their right to stay

<sup>147</sup> The CALL statements go, therefore, further in terms of guarantees than the minimum safeguards established by the CJEU in its case law.

## BULGARIA

Similarly, the **Bulgarian Supreme Administrative Court** held on the basis of the Return Directive, in the case of *Von Colson* and *El Dridi*, that the public authorities should hear the TCN as regards the following matters: the fact that the TCN spent his entire adult life in Bulgaria; that he had ties with his country of origin; his conduct during his stay in Bulgaria; and the ties and relationships he had established in Bulgaria etc. (SAC, *Michael Evgenevich Gladkih v the Director of Regional Directorate of Border Police – Smolyan* case).

## GERMANY

As for the applicable legal source, some national courts prefer to rely on the national constitutional principles that guarantee the right to be heard, instead of referring to the EU Charter of Fundamental Rights, since the guarantees ensured by the domestic constitutional principles are considered to be sufficient. The **German Federal Administrative Court** invoked the CJEU preliminary ruling in *Boudjlida* to justify its conclusion that the right to good administration enshrined in Article 41 EU Charter is addressed to EU institutions and bodies alone, and cannot be invoked, therefore, against domestic authorities (Federal Administrative Court, Decision of 27.10.2015, 1 C 33.14). This was also the conclusion of the **French Council of State** (see above), though it considered there was no practical difference between the invocation of Article 41 EU Charter and the right to be heard as a general principle of EU law.

## THE NETHERLANDS

As regards the content of the right to be heard, the **Dutch Council of State** held on the basis of the CJEU *Boudjlida* preliminary ruling that the authorities must hear the third-country national before taking a return decision, on four aspects in particular: (1) the legality of the person's stay; (2) the possible exceptions provided by Article 6 RD; (3) the personal circumstances enumerated in Article 5 RD; and (4) the modalities/arrangement of return (Council of State 20 November 2015, 201407197/1/V3). The right to be heard with regard to the issuing of return decisions can be guaranteed during the same hearing that is held before deciding on detention, seeing that the personal circumstances that are relevant before deciding on a return decision do not really differ from those that need to be taken into account by the administration before deciding on detention (Council of State, 5 November 2012, 201208138/1/V3). This is not the case with regard to the issuing of an entry ban. There, a separate hearing needs to be held, or specific questions with regard to the issuance of an entry ban need to have been posed to the third-country national (Council of State, 21 December 2012, 201205275/1/V3 and 201205900/1/V3).

### **Question 2 – What is the remedy for violations of the right to be heard in return proceedings?**

What are the consequences of violations of the right to be heard during the administrative phase in return proceedings?

### *Facts of the case*

The applicants, G. and R., were placed in detention by the Dutch authorities under a removal procedure. They each lodged judicial actions challenging the decisions to extend their respective detention. By judgments of 22 and 24 May 2013, the Rechtbank Den Haag, court of first instance, found that the rights of the defence had been infringed, but rejected their actions, on the grounds that the infringement in question did not give rise to the annulment of the extension decisions. G and R lodged appeals against those judgments before the Raad van State (Council of State). According to that Court, the rights of the defence were infringed, since the interested parties were not properly heard, under the conditions provided for by national law, before the adoption of the extension decisions. The ruling specifies that, under national law, the courts determine the legal consequences of such an infringement by taking into account the interests served by the extension of detention. Additionally, they are not required to annul a decision on extension of detention adopted without the interested party being heard beforehand, if the interest served by keeping the party concerned in detention is considered to be a priority.

### *Preliminary question*

The following questions were addressed by the national court: in Dutch law, if a national court holds that a detention decision must be annulled, the competent authorities cannot adopt a new decision and the concerned party must be immediately released. The Raad van State, thus, decided to stay the proceedings and to make a request for a preliminary ruling from the Court of Justice:

*can national courts determine the legal consequences of an infringement to the rights of the defence by taking into account the interests served by the extension of detention and, therefore, not annulling an extension decision adopted without the interested party being heard beforehand?*

### *Reasoning of the CJEU*

According to the CJEU, even if the referring court has established that the decision on the prolongation of detention infringed the right to be heard, this breach does not systematically render the decision unlawful. Accordingly, it does not automatically require the release of the third-country national concerned. Before drawing a conclusion on the ‘unlawfulness’ of the decision concerned, the referring court must assess whether, in the light of the actual 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*”<sup>149</sup>. In that respect, the Court recalls that the directive is intended to establish an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity. Likewise, the use of coercive measures should be expressly subject not only to the principle of proportionality, but also to the principle of effectiveness, with regard to the means used and the objectives pursued.

---

<sup>148</sup> Preliminary reference addressed by the Council of State, 5 July 2013, 201304861/1/T1/V3 and 201305033/1/T1/V3.

<sup>149</sup> To that effect, inter alia, Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 31; Case C-288/96 *Germany v Commission* [2000] ECR I-8237, paragraph 101; Case C-141/08 *Foshan Shunde Yongjian Housewares & Hardware v Council* [2009] ECR I-9147, paragraph 94; Case C-96/11 *P Storck v OHIM* [2012] ECR I-0000, paragraph 80.



## THE NETHERLANDS

In the **Netherlands**, before the implementation of the Return Directive, a violation of procedural requirements during the detention procedure did not automatically entail an annulment of the administrative decision. If procedural rules were found to have been breached, this did not compel the court to automatically declare the detention unlawful. Instead, the judge engaged in a balancing exercise, through which the s/he assessed the seriousness of the breach of procedure and to what extent the detained TCN's interests were infringed, against the wider interests served by the detention. For instance, the use of an unregistered interpreter at the hearing (taking place before detention is ordered) did not result in unlawful detention, as the TCN concerned had not explicitly stated whether and how he had been disadvantaged. In its assessment, the Council took account of the grounds for detention (*Council of State 3 July 2012, 201204997/1/V3*). The same balancing act was engaged in a case in which a detained TCN had not been able to speak with her lawyer alone. The **Council of State** considered the grounds for detention on the one hand (*inter alia* her refusal to cooperate), and the fact that she had not made clear whether and what negative consequences she had suffered as a result of the procedural breach, before concluding that the detention was not unlawful (*Council of State, 9 January 2012, 201111225/1/V3*). This rule applied to all kinds of procedural breaches, including breaches of procedure that taint the arrest prior to the detention (See *CONTENTION Dutch report*).

Following the CJEU judgment, the **Council of State** has ruled that the principles formulated in *G. and R.* also apply in the procedure that regulates the taking of a return decision by the administration. If the right to be heard has not been observed by the administration, the court should determine whether this has deprived the third-country national of the possibility to bring forward evidence or arguments which could have led to a different decision. If this is not the case, the judge hearing the appeal against the return decision will not quash the decision (*Council of State, 24 June 2014, 201309226/1/V3*).

## GREECE

In **Greece**, even if the administration did not hear the applicant, the Court does not necessarily annul the return decision when it might harm the objective of effectiveness pursued by the Return Directive; instead, it orders the administration to hear the person again and suspends the return/removal waiting on the issuance of a new decision (*Court of Thessaloniki, 717/2015, see report*).

## BELGIUM

In **Belgium**, explicit reference is made by the CALL to *G. and R.* to argue that if the right to be heard has been breached when issuing the return decision, national courts may annul the decision only if a TCN can “*show grounds that might have led the administration to adopt a different decision if the hearing had taken place*” (CALL, 128.272, 27 August 2014, see Belgian report).

## LITHUANIA

---

<sup>150</sup> The empirical evidence is provided by the REDIAL Project.

As regards the timing of the interview, this should be set so as to ensure that the right to be heard can be effectively exercised. The **Lithuanian Supreme Administrative Court** held that the administration does not only have an obligation to hear the third country national before adopting a particular administrative decision, but, in order to ensure an effective application of the right to be heard, the deadline given to the TCN cannot be very short, as it would render the right ineffective. For instance, a deadline of two days for submitting additional financial documentation relevant for the regularization of stay was considered insufficient by the Court. The arguments of the applicant that he had not had real opportunities to submit the requested financial documents in such a short period of time and that he had not had a possibility to appear in person before the Migration Department to explain his case were used by the court as proof that the deadline handed down by the administration was unreasonably short. (Judgment no 858/2015).

## 2.4. The Right to be Heard in Collective Expulsion Cases<sup>151</sup>

### Short overview of the ECtHR jurisprudence

Starting from the *Conka v Belgium* case (5 February 2002), the ECtHR has introduced within its case-law the principle according to which the deportation/expulsion of third country nationals is legitimate as far as it follows the assessment of the “particular circumstances of individuals concerned”. This requirement was developed under Article 4 of Protocol 4 of the ECHR. In the case *Hirsi Jamaa and Others v Italy* (Grand Chamber judgment, 23 February 2012) the Court stated that a deportation does not amount to a collective expulsion according to Article 4 of Protocol 4 ECHR when “*each person concerned has been given the opportunity to put arguments against his expulsion to the competent authority on an individual basis*” (para. 184). The same requirement applies irrespective of whether the lack of an expulsion decision made on individual basis was the consequence of individual’s own culpable conduct or not. In this case, the **Italian** national authorities did not perform any form of individual examination of each applicant’s individual situation, thus national authorities failed in ensuring sufficient guarantees allowing that individual circumstances were actually the subject of a detailed examination (para. 185).

In reaching its conclusion, the ECtHR took into account of the lack of training of the officials involved in carrying out individual interviews as well as the lack of legal and linguistic assistance afforded to the applicants. It is clear how here the right to a good administration and the right to defence were directly related to the conduct of national authorities.

In the case *Khlaifia v Italy* (Grand Chamber judgment, 15 December 2016), the ECtHR further clarified the applicable standards in collective expulsion cases on the basis of guarantees derived not only from Article 4 Protocol 4 ECHR, but also from Articles 5 and 13, in conjunction with Article 3 ECHR.

The standard of “individualized examination” was re-confirmed. It was intended as the “opportunity to put arguments against expulsion on an individual basis to the competent authority” (para. 239). The Court clarified that Article 4 Protocol 4 ECHR does not guarantee an absolute right to an individual interview, thus limiting the scope of the right to be heard in a way similar to the approach

---

<sup>151</sup> Sub-section written by Simone Penasa and Madalina Moraru.

taken by the CJEU. In order to satisfy the standard provided by Protocol 4 ECHR, the Court held that it is sufficient that the applicant has:

- (a) a genuine and effective possibility of submitting arguments against the expulsion; and
- (b) the right to have his arguments examined in an appropriate manner by the competent authorities (para. 248).

In the *Khlaifia* case, the right to a hearing and individualised assessment were guaranteed, as the applicants had been repeatedly identified, their nationality assessed, and they had been given the opportunity “genuinely and effectively” to submit arguments against their expulsion.

In terms of the right to an effective remedy by which to challenge their expulsion from the perspective of its collective aspect, the ECtHR found no violation: *“the Court sees no reason to doubt that, in the event of an appeal against a refusal-of-entry order, the Justice of the Peace would also be entitled to examine any complaint about a failure to take account of the personal situation of the migrant concerned and based therefore, in substance, on the collective nature of the expulsion”* (para. 272).

Finally, with regard to the right not to be detained unlawfully (Article 5(2) ECHR), the ECtHR considered that the refusal-to-enter order lacked any reference to the applicants’ detention or any legal or factual reasons for such measure being established (para. 119). Giving the fact that (a) the order merely stated that applicants entered by evading border controls and thus were returned; and (b) there was no promptness in communicating the order to the applicants (para. 120), there was no violation of Article 5 ECHR.

## 2.5. Guidelines for judges emerging from the analysis

<b>Right to be heard</b>	ADMINISTRATIVE STAGE ASYLUM	JUDICIAL STAGE ASYLUM	RETURN
STATUS	Automatic and mandatory with two exceptions when the interview on the substance may be omitted (see Article 14(2) Recast APD)	Not automatic, provided that the applicant has been heard personally in the administrative phase and that he can present written documentations in the judicial phase, according to the adversarial principle	Generally mandatory, with few exceptions (see below)
LEGAL BASIS	Article 14 Recast APD and general principle of EU law of rights of defence	Article 47(2) EU Charter and Article 46 Recast APD	Not expressly provided for the administrative phase but must be ensured as component of the general principle of rights of defence, or Article 47 EU Charter within judicial phase (so far, no case law before the CJEU on right to be heard)

			before the court)
CONTENT	The applicant must be able to make known his views before the adoption of any decision that does not grant the protection requested. Detailed guarantees during and after the personal interview are set out in Articles 14, 15 and 16 Recast APD	In certain circumstances, such as where an applicant is particularly vulnerable, the right to a defence could necessitate a personal interview, this would be applicable where a personal interview would be necessary in order to ensure that the decision maker had a full understanding of the facts relevant to the application and to the assessment of whether a serious threat existed that would qualify the applicant for the status of subsidiary protection	Right to be heard must be ensured in all the stages of the return proceedings, obliging the administration to enable the person concerned to express his point of view on the legality of his stay and the detailed arrangements for his return, while taking due account of the personal and family situation of the foreigner before deciding on the authorization to stay and/or a return decision.
REMEDY	Relative nullity; meaning nullity of the administrative decision if the outcome of the administrative procedure at issue “could have been different if the third-country national in question had been able to put forward information showing that a different decision would have been reached	Relative nullity unless the result would have been different	Relative nullity unless the result would have been different (different approaches at the national level)

- Article 41 EU Charter applies only to the EU institutions, bodies, offices, and agencies of the European Union. However, the Member States are obliged to respect the right to be heard when acting within the scope of EU law, on the basis of the general principles of the rights of defence.<sup>152</sup>
- Member States are bound to respect the right to be heard even in the absence of an express EU or national legislation providing for it, as a component of the general principle of the

<sup>152</sup> See C-141/12 and C-372/12, *YS and Others*, EU:C:2014:2081, para. 61; C-166/13, *Mukarubega*, EU:C:2014:2336, para. 44; Case C-249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, ECLI:EU:C:2014:2431, para. 32-33.

rights of defence (Case 301/87, *France v. Commission*, ECLI:EU:C:1990:67, para. 29; *Boudjlida*, para. 39; as well as *M.M. (2)*, para. 86).

- The remaining guarantees enshrined in Article 41 EU Charter apply to the Member States' actions as part of the principle of good administration, which is broader than the rights of defence (*H.N.*<sup>153</sup>).

The EU right to be heard as part of the general principle of the rights of defence requires that:

- Given the fundamental nature of the applicant's right to be heard, it should be fully respected in both asylum and subsidiary protection proceedings, when these are separated. In *M.M. (1)*, the CJEU left it to the national court to decide whether the EU right to be heard is respected in the procedure which the application for subsidiary protection was assessed.
- The asylum seeker should be given sufficient opportunities to substantiate his/her asylum claim, for example by submitting written information.
- This right also requires the authorities to pay due attention to the observations submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision (*M.M. (1)*).
- In the specific circumstances that a decision on subsidiary protection takes place immediately after the asylum proceedings, an interview must be arranged if the competent authority is not in a position to reach a conclusion with full knowledge of the facts based on the available evidence. An interview must also be arranged if the personal circumstances of the applicant (in particular, any vulnerability due to age, health conditions or being a victim of violence) makes it necessary for him/her to comment in order to substantiate his application (*M.M. (2)*).

The principles developed by the CJEU on the right to be heard in return proceedings can be applied by analogy also in the field of international protection proceedings:

- The purpose of the right to be heard before the adoption of an administrative decision entailing negative consequences for an individual is to enable the person concerned to express his point of view regarding the merits of the decision (e.g. the legality of his stay and on whether any of the exceptions to the general rule (issuance of a return decision) are applicable). Additionally, the purpose of the right to be heard is, inter alia, to enable that person to correct an error or submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content.
- National authorities must take due account of the best interests of the child, family life and the state of health of the third-country national concerned and respect the principle of *non-refoulement*.
- The right to be heard implies that the competent national authorities are under an obligation to enable the person concerned to express his point of view on the detailed arrangements for his return (such as the period allowed for departure and whether return is to be voluntary or coerced), with the possibility that the period for voluntary departure may be extended according to the specific circumstances of the individual case (such as the length of stay, the existence of children attending school and other family and social links).
- Where the national authorities are contemplating the simultaneous adoption of a decision determining a stay to be illegal and a return decision, those authorities need not necessarily

---

<sup>153</sup> According to the CJEU, "the right to good administration, enshrined in Article 41 of the Charter, that right reflects a general principle of EU law." (para. 49).

hear the person concerned specifically on the return decision, since that person had the opportunity to effectively present his/her point of view on the question of whether the stay was illegal and whether there were grounds which could, under national law, entitle those authorities to refrain from adopting a return decision.

- A competent national authority is not required to warn a third-country national that it is contemplating adopting a return decision with respect to him, or to disclose to him the information which it intends to rely on to justify that decision, or to allow him a period of reflection before seeking his observations. EU law does not establish any such detailed arrangements for an adversarial procedure.
- It is therefore sufficient if the person concerned has the opportunity effectively to submit his point of view on the subject of the illegality of his stay and reasons that might justify the non-adoption of a return decision.
- An exception must however be admitted where a third-country national could not reasonably suspect what evidence might be relied on against him or would objectively only be able to respond to it after certain checks or steps were taken with a view, in particular, to obtaining supporting documents. Further, the Court states that return decisions may always be challenged by legal action, so that the protection and defence of the person concerned against a decision that adversely affects him, is ensured.
- The right to be heard is not an absolute right and may be limited, provided that this restriction satisfies the requirements of proportionality;
- The infringement of the right to be heard does not automatically entail the annulment of the decision; the court must assess whether, in the light of the actual 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 the negative administrative decision would have been different;
- Following the CJEU judgment in *G and R.*, the **Dutch Council of State** has ruled that the principles formulated by the Court of Justice also apply in the procedure that regulates the taking of a return decision by the administration. If the right to be heard has not been observed by the administration, the court should determine whether this has deprived the third-country national of the possibility to bring forward circumstances which could have led to a different decision. If this is not the case, the judge hearing the appeal against the return decision will not quash the decision (Council of State, 24 June 2014, 201309226/1/V3).
- In the specific circumstances that a decision on subsidiary protection takes place immediately after the asylum proceedings, an interview must be arranged if the competent authority is not in a position to reach a conclusion with full knowledge of the facts based on the available evidence. The interview must also be arranged if the personal circumstances of the applicant (in particular, any vulnerability due to age, health conditions or being a victim of violence) makes it necessary for him/her to comment in full to substantiate the application (*M.M.* (2)).
- According to the CJEU preliminary ruling in *Sacko Moussa*, national legislation should leave the freedom to national courts to decide an oral hearing if it considers it necessary for the purpose of fulfilling its obligations under Article 46(3) even in cases of manifestly unfounded applications. For instance:

*where the factual circumstances leave no doubt as to whether that decision was well founded, on condition that, first, during the proceedings at first instance, the applicant*

*was given the opportunity of a personal interview on his or her application for international protection, in accordance with Article 14 of the directive, and the report or transcript of the interview, if an interview was conducted, was placed on the case-file, in accordance with Article 17(2) of the directive, and, second, the court hearing the appeal may order that a hearing be conducted if it considers it necessary for the purpose of ensuring that there is a full and ex nunc examination of both facts and points of law, as required under Article 46(3) of the directive.*

- The judge shall evaluate whether the information in the case-file – including where applicable the report of or the transcript of the personal interviews – are sufficiently informative as to exclude the need of a personal hearing in the judicial phase.
- Other corollaries of the principle of the rights of defence: national authorities should pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision, the obligation to state reasons for a decision which are sufficiently specific and concrete to allow the person to understand why his application is being rejected is thus a corollary of the principle of respect for the rights of the defence (*M.M. (2)*).

*Guidelines emerging from the ECtHR and CJEU on collective expulsion:*

- Article 4 of Protocol 4 ECHR guarantees the right to an individualized and genuine examination, which is respected when prior to the removal the individual is given the opportunity to put arguments against his/her expulsion to the competent authority on an individual basis; the right to an individual interview in all circumstances is not covered by the ECHR (no absolute right to be heard individually);
- The removal does not amount in a collective expulsion when the absence of an individualized examination is the consequence of the culpable conduct of the individual concerned;
- The right to an effective remedy against expulsion is guaranteed when the individual concerned has given adequate information and opportunity to appeal against the refusal-of-entry order;
- The right to be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him is violated when: (a) the refusal-to-entry order does not provide any reference to individual's detention or to legal or factual reasons for such measure; and (b) the order is not communicated promptly to the individual.

*Instances of judicial dialogue and their outcomes*<sup>154</sup>.

Perhaps one of the most rich cases in terms of use of judicial dialogue is the Irish string of 2 preliminary references address to the CJEU on the right to heard in subsidiary proceedings. In *M.M. (1)* the Irish Court drew on the reasoning of Cooke J in *Ahmed*. It also notes that, while not strictly bound by its own judgments, the **High Court** should, as a matter of judicial policy, follow them, unless there is good reason for diverging. The judgment also makes references to the **Dutch Council of State** judgment in ANB 07/14734 and 07/14733, contrasting that judgment with *Ahmed*.

---

<sup>154</sup> Extract from the *ACTIONES Module on the Techniques of Judicial Interactions in the Application of the EU Charter in ASYLUM AND MIGRATION*.

Although the **Irish High Court** did not endorse the interpretation of the right to be heard put forward by Mr M, it decided nevertheless to address preliminary questions based on the intention to ensure consistent interpretation of the right to be heard. The judgment of the **Dutch Council of State** indicated a judicial interpretation different from that previously followed by the Irish High Court, and so the Irish court considered it necessary to refer preliminary questions for the purpose of ensuring a coherent application of EU law.

In *M.M.(No 2)* extensive reference is made to *Debisi v Minister for Justice and Law Reform* [2012] IEHC 44, contrasting it with the judgment of the CJEU in Case C-277/11 *MM v Minister for Justice, Equality and Law Reform*.

The CJEU judgment in Case C-277/11 *M.M.(1)* is referred to by the High Court of England and Wales in *R (AZ) v Secretary of State for the Home Department* [2015] EWHC 3695. (see separate case summary).

The High Court in *M.M (No 2)* makes reference to the response of the CJEU in Case C-277/11 *MM v Minister for Justice, Equality and Law Reform*.

The High Court notes that the CJEU went beyond the question posed and raised the issue of a general right to a fair hearing.

There is a question as to whether the CJEU misconstrued the initial referring judgment of the High Court in *M.M. (1)* but as a consequence of judicial comity and the duty of loyal cooperation, the High Court presumes that the CJEU did not misunderstand its referring judgment.

As noted above the High Court was unsure what the precise implications of the application of a general right to be heard were in the prevailing circumstances. Nonetheless, it draws on broader aspects of the CJEU's judgment such as its clear disapproval of the automatic use of prior credibility findings made in an asylum procedure and its insistence on the need for the right to a hearing to apply in both procedures where two separate procedures are used for asylum and subsidiary protection claims respectively.

The exact contours of the right to be heard in such a context is questioned by the Supreme Court and a further reference is made to the CJEU on more specific issues relating to oral hearings and the right to call and cross-examine witnesses.



### 3. Ensuring the Right of Access to a Court

This section and the following ones address various safeguards of the principle of effective judicial protection, in particular, the rights of the defence, the principle of equality of arms, the right of access to a court or tribunal and the right to be advised, defended and represented (see judgment of 26 July 2017, *Sacko*, C-348/16, EU:C:2017:591, para. 32 and C-662/17 *E.G. v Republika Slovenija*, ECLI:EU:C:2018:847, para. 48). As clearly stated by the CJEU, the remedies provided by EU secondary legislation on asylum and the transposition legislation must be determined in a manner that is consistent with Art. 47 CFR, which constitutes a reaffirmation of the principle of effective judicial protection (judgment of 26 July 2017, *Sacko*, C-348/16, EU:C:2017:591, para. 31).

As the CJEU has recently held, the principle of effective judicial protection, which is affirmed in Article 47 EU Charter, comprises various elements. Among them, the Court includes the right of access to a tribunal (see CJEU, C-69/10, *Diouf*, para. 69; C-348/16, *Sacko*, para. 32). In addition to the right to access a court generally guaranteed under Article 47 EU Charter, the Recast Asylum Procedure Directive provides in Article 46 a right to an effective remedy before a court or tribunal. The Recast Asylum Procedure Directive (Recast APD) does not define what a court or tribunal means. However, guidelines on this can be found in the jurisprudence of the CJEU.

Access to a tribunal means not only the availability of an independent court / tribunal having jurisdiction and/or being capable of securing effective compensation, where appropriate, but also that the access may not be subject to conditions that make it impossible or extremely difficult to exercise the right of accessing a court in practice.

Impediments to an effective access to a tribunal or court may result from national *procedural norms* (for instance, the short time for lodging a complaint) or *material factors*, which prevent the individual from effectively exercising his right of access to a tribunal (e.g. language and economic requirements). In the case of asylum seekers and irregular migrants, Member States have to provide for compensatory remedies, which take the form of a state duty to provide for certain services (for instance, translation and legal aid), aimed at making the access to court effective.

The right to access to a court/tribunal is not an absolute right and it can be subject to limitations. Member States may set limitations provided that they pursue a legitimate aim and they are proportionate (Article 52(1) EU Charter).

The present chapter offers examples of how Article 47 EU Charter is a useful and necessary ground for reviewing the following:

- National legislation that does not provide any access before an independent judge in order to enforce a right envisaged by EU law (prohibitive limitation – Section 3.1)
- National legislation that creates new judicial or quasi-judicial bodies for asylum adjudication (procedural restrictive limitation – Section 3.2)
- National legislation that makes extremely difficult for the individual to get appropriate relief (procedural restrictive limitation – Section 3.3) with specific regard to time-limit in asylum proceedings;
- Administrative decisions or practices that result in hindering the rights of individuals to legal aid, thus preventing them to have effective access to a court in immigration and asylum claims (material restrictive limitation - Section 3.4)

### 3.1. Prohibitive Limitations to the Right of Access to an Independent Judge

This section is meant to consider to what extent Article 47 EU Charter may be a ground to review national legislation that prevents an individual from bringing an action before an independent court (prohibitive limitation). This issue has been raised in two national cases we will refer to. The first case is a preliminary ruling addressed by the **Polish Supreme Administrative Court** in a claim concerning the Visa Code Regulation. The second case concerns an Italian first instance decision and relates to detention of asylum seekers.

#### **Question 1 – Is there an obligation under Article 47 EU Charter to ensure access to a court hearing an appeal against the Consulate’s decision refusing the issuance of a visa?**

Should Article 32(3) of the Visa Code, which envisages a right to appeal against a negative decision regarding issuing a visa, be interpreted in light of Recital 29 of the preamble and Article 47 EU Charter, leading thus to create an obligation for a Member State to guarantee the right to an effective remedy before a Court, and not before the same administrative authority which denied the visa?

Polish Supreme Administrative Court submitting a request for preliminary ruling to the CJEU C-403/16 El Hassani<sup>155</sup>

#### *Relevant EU and national legal sources*

Article 32.3 Visa Code Regulation (EC) No 810/2009: “*Applicants who have been refused a visa shall have the right to appeal. Appeals shall be conducted against the Member State that has taken the final decision on the application and in accordance with national law.*”

Under Polish law the appeal against the Consulate’s decision refusing the issuance of a visa is examined by the same authority (otherwise known as a request to reconsider). No judicial appeal against this decision is provided for by law.

#### *Relevant CJEU cases*

- CJEU, C-23/12, *Mohamad Zakaria*, Fifth Chamber Judgment of 17 January 2013, ECLI:EU:C:2013:24

In *Zakaria* – a case concerning a third country national claiming that the Latvian border guards inspected his travel document in an offensive and provocative manner – the CJEU noted that the Schengen Borders Code Regulation requires border guards to perform their duties with respect of human dignity. Thus, in compliance with Article 47 EU Charter, a Member State ought to provide the appropriate remedy in case an individual alleges a violation of this right to be treated respectfully.

---

<sup>155</sup> The summary of the case has been prepared by Karolina Rusilowicz, lawyer at Helsinki Committee, for the European database of Asylum law ([www.asylumlawdatabase.eu/en/case-law/poland-ruling-supreme-administrative-court-28-june-2016-ii-osk-134616-submitting-request](http://www.asylumlawdatabase.eu/en/case-law/poland-ruling-supreme-administrative-court-28-june-2016-ii-osk-134616-submitting-request)) within the project “Legal exchange and mutual learning between asylum practitioners to promote fundamental right in the EU, co-funded by the EU and coordinated by the ECRE in partnership with the Helsinki Foundation for Human Rights.

- CJEU, C-432/05, *Unibet*, Grand Chamber of 13 March 2007, ECLI:EU:C:2007:163
- CJEU, C-33/76, *Rewe*, 16 December 1976, ECLI:EU:C:1976:167

### *Facts of the case*

A third country national applied for a Polish visa with the purpose of visiting his family. His wife and child live in Poland and are Polish nationals. The Polish Consulate refused to issue a visa to the applicant. The applicant appealed this decision. Under Polish law the appeal against the Consulate's decision refusing the issuance of a visa is examined by the same authority (otherwise known as a request to reconsider). The Consulate again refused to issue the visa, because of doubts as to whether the applicant would leave Poland before the visa expires.

The applicant appealed to the **Voivodeship Administrative Court in Warsaw**. The Court dismissed the complaint, as under Article 5 of the Law on Proceedings before Administrative Courts, the Administrative Courts are not competent in cases concerning visas issued by Consulates, excluding visas issued for family members of EU citizens. The applicant claimed that his rights codified in Articles 8, 13 and 14 ECHR had been infringed. As a third country national who was not a family member of an EU citizen in accordance with Polish legislation on EU citizens and their family members, the applicant was deprived of the right to an effective remedy before a court. The applicant does not have a right to submit a complaint to the **Voivodeship Administrative Court**, although he has a wife and a child in Poland, whilst family members of other EU nationals have such a possibility.

### *Reasoning of the Court*

Article 32(3) of the Schengen Visa Code provides for a right to appeal against a negative decision regarding issuing visa. However, it does not specify whether the appeal should take place before a tribunal.

Under Polish law, the consulate's refusal to issue a visa cannot be appealed before a Court or even before another administrative authority. The party may only request the consulate to reconsider his request.

The **Supreme Administrative Court** had doubts concerning the interpretation of Article 32(3) of the Visa Code in relation to Art. 47 CFR.

After having assessed, in light of *Fransson* judgment of the CJEU, that the EU Charter is applicable to the facts of the case, the Court highlighted that the provision constitutes a part of an EU Regulation, that is an act which generally does not need implementing measures and is applied directly. This is why clarifying the doubts regarding its interpretation is even more important. Notably, the Supreme Administrative Court doubted whether the Polish provision excluding judicial control of the consulate's decisions issuing of visas was compatible with Article 47 EU Charter.

This matter is related to the concept of procedural autonomy of Member States as to the extent to which they have an obligation to guarantee fundamental rights as defined in EU law. The procedural autonomy of Member States is understood as the competence of the state to designate the courts having jurisdiction and to determine procedural conditions governing legal actions intended to ensure the protection of the rights which individuals acquire by virtue of EU law. This principle is limited by Article 47 EU Charter. While establishing the standard of protection, the CJEU jurisprudence relating to effective judicial protection has to be taken into account. Effective judicial protection is a general principle of EU law, resulting from the constitutional traditions

common to Member States and protected under Articles 6 and 13 ECHR. The concept of an effective remedy has to be interpreted in line with the jurisprudence of the ECtHR regarding Article 13 ECHR. The decision to refuse the issuance of a visa can infringe the right to respect for family life protected by Article 8 ECHR and Article 7 EU Charter.

In the present case, the applicant relied on his family life rights because his wife and child were resident in Poland. The applicant argued that the lack of judicial oversight with regard to this decision, which could infringe the right to family life protected under the ECHR could result in an infringement of Article 13 ECHR.

The Supreme Administrative Court noted that, according to the CJEU, the EU law principles of equivalence and effectiveness may limit the principle of procedural autonomy of Member States. The principle of equivalence requires that the procedural conditions governing actions at law intended to ensure the rights which individuals acquire as a result of EU law cannot be less favourable than those relating to similar actions of a domestic nature. The principle of effectiveness requires that these conditions cannot make it impossible in practice to exercise the rights acquired as a result of EU law before national courts.

Exclusion of judicial control with regard to the Consulate's decisions refusing the issuance of a visa is doubtful in light of the obligation upon Member States to ensure an effective remedy against a decision refusing an individual a right acquired as a result of EU law. Since under Polish law, the appeal against a negative decision of the Consulate is done by reconsidering the case by the same authority in administrative proceedings, without respecting the principle of an adversarial process, the **Polish Supreme Administrative Court** decided to suspend the case and to refer a preliminary reference to the CJEU concerning the compatibility of the Polish provision with Article 32(3) EU Visa Code, read in light of Article 47 of the Charter. (status as of 11.09.2017 – pending preliminary ruling).

In short the Court requested the CJEU to clarify whether the right to appeal under the Visa Code interpreted in light of the Charter right to an effective remedy presupposes an obligation to provide for a judicial review of the administrative decision.

On 7 of September 2017, AG Bobek delivered his Opinion holding that Article 32(3) of Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code) must be interpreted as *“leaving it to each Member State to decide on the nature of the appeal against visa refusals provided that the appeal complies with the principles of equivalence and effectiveness.”* While Article 47(1) EU Charter must be interpreted in *“the way that Member States cannot exclude the possibility of judicial review of visa refusals by a tribunal within the meaning of Article 267 TFEU.”*

Following the AG's Opinion, the CJEU held that Article 32(3) Schengen Visa Code read in the light of Article 47 EU Charter must be interpreted as meaning that Member States are required to provide for an appeal procedure against domestic decisions refusing visas, although the procedural rules are a matter for the legal order of each Member State in accordance with the principles of equivalence and effectiveness. Those proceedings must, at a certain stage of the proceedings, guarantee a judicial appeal.

The CJEU in *El Hassani* agreed with Advocate General's opinion that Article 47 EU Charter requires the Member States to guarantee, at a certain stage of the proceedings, the possibility to bring a case concerning a final decision refusing a visa before a court. The Court noted that the second paragraph of Article 47 EU Charter provides that everyone is entitled to a hearing by an

independent and impartial tribunal. The concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision. This is not the case of the Polish consulate. Therefore, his decision must be subject to subsequent control by a judicial body that must, in particular, have jurisdiction to consider all the relevant issues.

### *Elements of Judicial dialogue*

Direct vertical judicial dialogue: preliminary reference, first addressed by the **Polish Supreme Administrative Court**

Indirect vertical judicial dialogue: the referring court cites several CJEU cases, namely: *Rewe*, C-33/76, ECLI:EU:C:1976:188; *Comet* 45/76, *Unibet* C-/432/2007; *Fransson* C-617/10, as well as to the principles of equivalence and effectiveness of EU rights.

### *Impact of the CJEU at national level*

The Ombudsman asked Minister of Foreign Affairs to prepare a draft amendment of the law on proceedings before administrative courts which would enable lodging appeals to the courts against Schengen visa refusals.

## **Question 2 – Is the right to an effective remedy permitting access to a court by individual application when the national legislation provides only for *ex officio* review?**

Is the right to an effective remedy to be interpreted as allowing a detained asylum seeker to challenge directly before a judge an order prolonging his detention, in cases where national legislation only provides for an *ex officio* review at regular intervals of time (each 60 days)?

### *Judgment: Tribunal of Turin, order 3790/2016, 24th May 2016*

### *Relevant legal sources*

#### **EU level**

Article 9(5), Recast Reception Conditions Directive :

“Detention shall be reviewed by a judicial authority at reasonable intervals of time, *ex officio* and/or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention”

#### **National legal sources**

Article 6, c. 8, Legislative decree no. 142/2015 according to which it is the questor (Italian public authorities pertaining to the Home affairs Minister) who must require the Tribunal to approve the asylum applicant’s continuing detention every 60 days. The maximum time an asylum applicant can be in detention is one year.

### *Facts of the case*

An Afghani national fled Afghanistan and arrived in UK at the age of 15, claiming international protection. At the age of majority, however, the UK public authorities denied his international protection claim and expelled him. He decided to move to Italy, with the intention of applying again for international protection. At the French-Italian border, he was intercepted by the Italian authorities and charged with a crime. Because of that, he was placed into custody, but following further inquiries, he was cleared of any charge. However, the Italian authorities issued an order to him to leave, followed by a detention order, on the grounds of a risk of his absconding. Detention was authorised by a lay judge on 27 November 2015, and then prolonged, first on 23 December 2015 and again on 23 January 2016.

On 1 February 2016, the Afghani national presented a request for international protection. Under Italian law, the jurisdiction as regards the detention of asylum seeker is vested in ordinary judges and not lay-judges (*giudice di pace*); the latter has jurisdiction only on irregular migrants' detention.

The detention decision had been approved by the ordinary judge first on 3 February 2016 and further prolonged after 60 days. In the meantime, the Italian public authorities had started the Dublin procedure for determining the EU Member State responsible for examining the asylum application.

Italian law does not provide the detainee asylum seeker *locus standi* to bring an action before a court to review detention or prolongation of detention decisions. Initial detention is for 60 days and must be validated *ex officio* by the ordinary judge. After this period, a prolongation may be ordered for 60 more days subject to an *ex officio* review conducted by an ordinary judge. The maximum period of detention for an asylum seeker is one year.

On 13 April 2016, the Afghani national brought an action before the ordinary judge for the review of his detention.

The Tribunal of Turin considered the action legitimate and, on the merits, it quashed the detention decision.

### *Reasoning of the Court*

The Tribunal commenced its reasoning by noting that according to Article 9(5) Directive 2013/33 (Recast Reception Conditions Directive) “*detention shall be reviewed by a judicial authority at reasonable intervals of time, ex officio and/or at the request of the applicant concerned, in particular whenever it is of a prolonged duration, relevant circumstances arise or new information becomes available which may affect the lawfulness of detention*”.

According to the judge, Article 9(5) Recast Reception Conditions Directive does not have direct effect, since it left to Member States a discretion to decide on the mechanism of their detention review. Notably, after the initial judicial review of detention, Member States can decide whether the judicial review of the prolongation of detention can be done *ex officio* or following an individual application.

The Italian legislator chose the first option: *ex officio* judicial review.

However, the Tribunal interpreted the Italian statutory provisions in light of the objective of Article 9(5) Recast Reception Conditions Directive. Although admitting the procedural discretion permitted by the EU secondary law provision, the judge emphasised the objective of the Directive, which is to allow the detained asylum seeker to have an effective and concrete possibility to address a judge for

the purpose of presenting new information or circumstances which may affect the lawfulness of the detention.

This extensive reading of the *locus standi* provisions of Italian law is particularly needed in a case, as that before the Court, where the detention is grounded on the difficulties arising in the determination of the responsible Member State according to Dublin Regulation rules, which do not result from the conduct of the asylum seeker.

Permitting the detained asylum seeker to access the court in order to challenge the ongoing detention might permit the administrative authorities to discover information that may result in a faster conclusion of the Dublin procedure.

The Tribunal's decision did not mention Article 47 EU Charter (right to an effective remedy) nor other functional national constitutional equivalents (such as Article 24 of the Italian Constitution – right of defence).

However, the right to an effective remedy is the core of the court reasoning. The Tribunal recalled that the detainee must have the possibility to access a court and to have an effective legal remedy, which, *in casu*, means to bring a direct complaint before the court, permitting the detained asylum seeker to present new information for reviewing the legitimacy of the prolongation of the detention.

#### *Conclusion of the Court*

The judge agreed the applicant had *locus standi* to bring an action for reviewing ongoing detention, despite national law granting only *ex officio* review at regular periods.

#### *Impact of the case*

Not many cases have been reported thus far where this issue has been raised. Other Italian courts had admitted the possibility to allow a detained asylum seeker to take a direct action to challenge the prolongation of detention. They did so assuming that, contrary to the Tribunal of Turin, Article 9(5) Recast Reception Conditions Directive has direct effect.

The decision above is noteworthy as the remedy is granted on the basis of a consistent interpretation of domestic provisions with the Recast Receptions Conditions Directive and in referring, though not explicitly, to the effective remedy principle.

Up to now, detention centres in Italy were not distributed uniformly throughout the country, but were located in few regions. As a consequence, decisions on the detention of both asylum seekers and irregular migrants were issued by only a few Tribunals. However, the recent Law Decree 13/2017 provides for the creation of new detention centres, to be located in every Italian region. This may result in an increase in the number of judicial decisions and the emergence of more stable line of caselaw.

#### *Elements of judicial dialogue and relevance of the judgment for other national jurisdictions*

As mentioned before, the Tribunal did not refer explicitly to Article 47 EU Charter, although the reasoning is indeed based on the consequences that can be derived from the principle of effective remedy.

Thus far, decisions from other Member States, raising the same issue, have not been reported. According to the *REDIAL Synthesis Report*, most of Member States provide for an *ex officio* review at reasonable intervals of time of the detention.<sup>156</sup> Except **Slovakia**, which allows the review whenever a detainee introduces such a request. This may suggest that the issue solved by the **Tribunal of Turin** could be raised also in other Member States.

### 3.2. Restrictive Limitations in Procedural Norms: Conformity of New Judicial and Quasi-Judicial Bodies with the Right to an Effective Remedy

This section addresses the question of which requirements a body has to fulfil in order to qualify as a ‘court’ under Article 47 EU Charter. This aspect involves the degree of independence of the judge in carrying out its duties with regard to other components of the State, bearing in mind that, while Article 13 ECHR requires the contracting parties to provide the person alleging a violation of a conventional right the access to a national authority in order to assess the alleged violation, Article 47 EU Charter is more demanding since it requires effective access before a Court.

#### Overview of relevant CJEU case-law

The landmark judgment of the CJEU on the issue of the competent court and tribunal to hear and examine EU law matters is the *Manfredi* case (C-295/04 and C-298/04). This case addressed liability for breach of competition and the possibility for an individual to exercise their right to seek compensation. In it the Court affirmed that:

*In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction to hear actions for damages based on an infringement of the Community competition rules and to prescribe the detailed procedural rules governing those actions, provided that the provisions concerned are not less favourable than those governing actions for damages based on an infringement of national competition rules and that those national provisions do not render practically impossible or excessively difficult the exercise of the right to seek compensation for the harm caused by an agreement or practice prohibited under Article 81 EC.<sup>157</sup>*

In addition to *Manfredi*, the CJEU had the opportunity to assess the requirements to be fulfilled by a court or tribunal in asylum adjudication in light of Article 47 EU Charter in the *HID* case.

#### Main questions addressed

The creation of new judicial bodies by the Member States in order to cope with an increasing number of asylum applications, although justified as necessary in order to secure the guarantees of the right to an effective remedy, has at times raised concerns regarding the fulfilment of requirements in Article 46 of the Recast Asylum Procedure Directive and Article 47 EU Charter on the right to an effective remedy.

---

<sup>156</sup>See European synthesis report on the judicial implementation of Chapter IV of the return directive Pre-Removal Detention, Madalina Moraru, G. Renaudiere, Redial Research Report, p. 35, available at: [http://cadmus.eui.eu/bitstream/handle/1814/45185/MPC\\_REDIAL\\_2016\\_05.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/45185/MPC_REDIAL_2016_05.pdf?sequence=1)

<sup>157</sup> CJEU, *Manfredi*, C-295/04 and C-298/04, 13 July 2006, ECLI:EU:C2006:461, para 72.



In 1996, **Ireland** established a new judicial body that could hear complaints against the administrative decisions on requests for international protection. The Refugee Appeals Tribunal was established. It was composed of lawyers nominated by the government, for limited duration and paid via separate contracts, and who could be removed on grounds not expressly provided by the legislation. The proceedings before the Tribunal were also different from general court proceedings in the sense that the administration was not required to be present. This composition and the links of the members of the Tribunals with the government as well as the contractual status of the members raised concerns regarding the independence of the Tribunal and the guarantees of the rights of defence, resulting in the *HID* case before the CJEU.

More recently, **Greece** chose to address the rising number of asylum application by creating a new body, whose members although majority judges, was considered administrative under the law. The **Independent Appeals Committee** is composed of ordinary administrative judges and representatives of the UNHCR, appointed, as in Ireland, by the government, who could remove them on the basis of grounds not expressly and clearly detailed by the legislation. The independence of the body and conformity with the right to an effective remedy was also raised.

While the independence and adversarial proceedings guarantees of the **Irish Refugee Appeal Tribunal** was reviewed by the CJEU in the *HID* case, the independence and constitutionality of the **Greek Independent Appeals Committees** were reviewed only by the **Greek Council of State**. Interestingly, the **Greek Council of State** did not cite the *HID* preliminary ruling, which set the standards regarding the conditions of independence for courts in the asylum context. On the other hand, the Greek Council of State cited the *Tall* judgment<sup>158</sup> for the purpose of highlighting the importance of the right to an effective remedy, which was interpreted as requiring the Member States to establish independent and impartial tribunal that would ensure a fast and effective remedy to the applicants, avoiding keeping them in uncertain legal situation for long durations.

**Question 1** *Was the Irish legislation establishing the Irish Refugee Appeals Tribunal compatible with Article 39 Asylum Procedure Directive (current Article 46 Recast Asylum Procedure Directive) and Article 47 EU Charter?*

**Question 2** *Was the creation of the Greek Independent Appeals Committees in conformity with the right to an effective remedy?*

**Question 1 – Is the Irish legislation establishing the Irish Refugee Appeals Tribunal compatible with Article 39 Asylum Procedure Directive (current Article 46 Recast Asylum Procedure Directive) and Article 47 EU Charter?**

*The H.I.D. preliminary ruling (C-175/11): what are the criteria to establish whether special tribunals are independent?*

*Relevant legal sources*

## **International legal provisions**

---

<sup>158</sup> The judgment is discussed further in the Chapter – Right to an effective remedy and suspensive effect of appeal.

Article 3 of the 1951 Geneva Convention states that the Contracting States are to apply the provisions of that Convention to refugees without discrimination as to race, religion, or country of origin.

### **EU level**

Article 47 EU Charter; Directive 2005/85 a minimum framework on procedures for granting or withdrawing refugee status: recital 8 and 27, Article 23(3) and 39(1).

### **National legal sources (Irish law)**

According to the Refugee Act 1996, the Irish asylum adjudication system was as follows (see paras. 24-30 of the AG's Opinion):

“The application for asylum was made to the Office of the Refugee Applications Commissioner (ORAC). Section 11 of the 1996 Act provided that a member of ORAC must interview the applicant and carry out such investigation and inquiry as is needed. S/he then compiles a report in which he makes a positive or negative recommendation as to whether refugee status should be granted to the applicant concerned and submits that report to the Minister for Justice, Equality and Law Reform (the Minister).

Under section 17(1) of the Refugee Act 1996, if the recommendation is positive, the Minister is obliged to grant the status of refugee to the applicant concerned. Where it is recommended that refugee status should not be granted to the applicant, the applicant may, pursuant to section 16 of the Act, appeal against ORAC's decision to the Refugee Appeals Tribunal.

The appeal before the Refugee Appeals Tribunal may involve an oral hearing before a member of the Tribunal. Following that hearing the Refugee Appeals Tribunal will confirm or reject the recommendation of ORAC. Where the Refugee Appeals Tribunal allows the appeal and considers that the recommendation must be positive, the Minister must grant refugee status under section 17(1) of the Act. Conversely, where the Refugee Appeals Tribunal considers that the recommendation must be negative, the Minister retains a discretion to decide whether or not to grant refugee status.

Under section 5 of the Illegal Immigrants (Trafficking) Act 2000 an applicant for asylum may question the validity of a recommendation of ORAC or a decision of the Refugee Appeals Tribunal before the High Court, subject to special conditions applied to asylum cases. It was under that provision that the main actions were brought before the referring court.

An appeal against the decision of the High Court lies to the Supreme Court, in accordance with that provision, only where the High Court issues a certificate of leave to appeal. To that end, section 46(3) of the Courts and Courts Officers Act 2002, as amended at the time of the facts of the main proceedings, provides that the High Court is to decide whether to certify leave to appeal within two months of the hearing. That period may, however, be extended.

It should also be noted that section 12 of the Refugee Act 1996 provides that the Minister may, where he considers it necessary or expedient to do so, give a direction in writing to ORAC and/or to the Refugee Appeals Tribunal requiring either or both of them, as the case may be, to accord priority to certain classes of applications. This priority may be determined, as in the present case, by reference to the country of origin or habitual residence of the applicants, or by reference to any family relationship between applicants or to the ages of applicants, in particular minors.”

### *Facts of the case*

Three Nigerian nationals, including a single mother with a child of 10 years old, entered Ireland and submitted asylum applications. The mother requested international protection on behalf of her minor daughter on the ground that “*the daughter faced threats of circumcision and death from her father’s family. The mother claimed that another daughter of the couple had been killed in 2007 after being subject to such treatment*” (para. 36 of the AG’s Opinion). The third Nigerian national, and adult, requested international protection on the ground that he had been ill-treated in his country of origin because of his sexual orientation. The asylum applications were rejected on the ground that they lacked credibility, and that the local police would provide sufficient protection. The negative decisions of the **Refugee Applications Commissioner** were unsuccessfully appealed before the **Refugee Appeals Tribunal**, and then before the **High Court**. The **High Court** was then required to determine an application by those applicants for leave to appeal to the **Supreme Court**.

Before the **Supreme Court of Ireland**, the applicants disputed the conformity of the Irish legislation which allowed for certain classes of asylum application to be examined with priority or accelerated procedure on the basis of the nationality of the applicants. Their complaint was based on the argument that although the Asylum Procedure Directive permits the use of accelerated procedures, this should not be automatically imposed on groups of individuals solely based on their nationality, as this is a discriminatory treatment prohibited by the 1951 Geneva Convention (Article 3). The second plea of the applicants is the one that is relevant for this section. Namely they contested the independence of the **Refugee Appeals Tribunal (RAT)**, and the lack of adversarial hearing of the asylum proceedings before that Tribunal. They argued that the appeal lodged before the RAT did not comply with the right to an effective remedy enshrined in the Article 36 of the Asylum Procedure Directive and Article 47 EU Charter.

### *Preliminary questions referred to the Court of Justice of the European Union*

It should be noticed that neither Article 39, nor current Article 46 of the Recast Asylum Procedure Directive define what is meant by the ‘*court or tribunal*’ which must ensure an effective remedy for rejected asylum seekers. While the Asylum Procedure Directive (2005/85) connected the meaning of the right to an effective remedy before a court or tribunal with the meaning of court under Article 267 TFEU (recitals 8 and 27), the Recast APD no longer includes this connection.

The applicants argued that the RAT did not fulfil the requirements of independence, due to the functional links with the government and its powers over the RAT. In particular, they pointed to the composition of the Tribunal and the rules of payment and removal of the members of the Tribunal. According to the Refugee Act 1996, the members of the Refugee Appeals Tribunal were nominated by the Minister for Justice, Equality and Law Reform among practising barrister or practising

solicitor with at least five years of experience. As such, they were government appointees. The Minister for Finance also had a say in the cases of the RAT, since with its consent, rapid disposal of the cases of the RAT could have been decided. The Tribunal Members (i.e. the decision-makers) were not nominated for life, but rather were appointed for an initial term of three years and, subject to the provisions of that schedule, upon such terms and conditions as the Minister for Justice, Equality and Law Reform may determine. The chairperson of the Refugee Appeals Tribunal carried out his duties under a written contract of service which set out the terms and conditions, which could be determined from time to time by the Minister for Justice, Equality and Law Reform, with the consent of the Minister for Finance. The ordinary members of the Refugee Appeals Tribunal could be removed from office by the Minister for Justice, Equality and Law Reform for reasons that were not defined precisely in the legislation. The Minister for Justice, Equality and Law Reform therefore appears to have had a wide discretion over appointments, and how long they lasted. It was unclear whether the decision to remove a member of the RAT was amenable to judicial review. Therefore, the composition, nomination, salary, and removal of the members of the RAT raised concerns regarding the independence of the RAT from the government, and thus the effectiveness of the remedies they could grant.

Additionally, the applicants complained of the lack of adversarial proceedings, since the administrative authorities technically did not have to be present before the RAT, but could send written observations and reports instead.

Since the application raised doubts regarding the meaning of EU law concept(s), whose meaning is autonomous, thus different from the national definition of a ‘court’, the Supreme Court addressed a preliminary questions to the CJEU in an attempt to clarify whether the RAT fulfilled the necessary requirements of a right to an effective remedy as generally required under Article 47 EU Charter and more specifically for asylum proceedings by the Asylum Procedure Directive (Article 39, now Article 46 in the Recast APD). The question reads:

*Is Article 39 of ... Directive [2005/85] when read in conjunction with its Recital (27) and Article 267 TFEU to be interpreted to the effect that the effective remedy thereby required is provided for in national law when the function of review or appeal in respect of the first instance determination of applications is assigned by law to an appeal to the Tribunal established under Act of Parliament with competence to give binding decisions in favour of the asylum applicant on all matters of law and fact relevant to the application notwithstanding the existence of administrative or organisational arrangements which involve some or all of the following:*

- The retention by a Government Minister of residual discretion to override a negative decision on an application;*
- The existence of organisational or administrative links between the bodies responsible for first instance determination and the determination of appeals;*
- The fact that the decision-making members of the Tribunal are appointed by the Minister and serve on a part-time basis for a period of three years and are remunerated on a case by case basis;*
- The retention by the Minister of powers to give directions of the kind specified in sections 12, 16(2B)(b) and 16(11) of the [Refugee Act 1996]?*

### *Reasoning of the Court of Justice*

Both the Advocate General and the CJEU agreed that the concept of a ‘court of tribunal’ within asylum adjudication should be interpreted as a court within the meaning of Article 267 TFEU.

Therefore, the court has to fulfil the CJEU's settled requirements for addressing preliminary references to the CJEU.

*Any body who fulfils cumulatively the following criteria:*<sup>159</sup>

1. *Established by law;*
2. *Permanent;*
3. *Jurisdiction is compulsory;*
4. *Procedure inter partes;*
5. *Applies the rule of law;*
6. *Independent;*
7. *Issues decisions of a judicial nature.*

**Broekmeulen**<sup>160</sup>: Appeal Committee, a private body, not recognised by Dutch law as a 'court' was considered by the CJEU to be a court within Article 267;

**Nordsee**<sup>161</sup>: arbitrator appointed by contract between parties, according to German law they decided according to law, their decisions had the force of *res judicata*, but CJEU decided it was not a court: it had no compulsory jurisdiction (parties can freely choose between an ordinary court and arbitration);

**Belov**<sup>162</sup>: Bulgarian Commission for Protection against Discrimination (equality body); CJEU found that it was not a court (does issue judicial decisions, but administrative; questionable independence).

Two of the above requirements (*procedure inter partes*, and *independency*) were contested in the case at hand.

As regards the procedure *inter partes*, the CJEU commenced its assessment by recalling that the procedural requirement is not an absolute criterion (para. 88) Thus, the participation of the Refugee Commissions to the appeal proceedings before the RAT is not an absolute requirement. The CJEU noted that the Commission can submit observations, reports which are discussed before the RAT. The CJEU considered that every party has the possibility of taking notice of any evidence presented before the RAT to defend his case.

As regards the independence of the Tribunal, the Court held that "*the concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision*" (para. 95). The AG and the CJEU examined whether the RAT fulfilled the requirements of both internal and external independence.

---

<sup>159</sup> This table was prepared by the Coordinator of the Re-Jus Casebook within the framework of the ACTIONES Project, in the Module on Introduction to Judicial Interaction Techniques. For further details, see Jaime Rodríguez Medal, 'Concept of a Court or Tribunal under the Reference for a Preliminary Ruling: Who can Refer Questions to the Court of Justice of the EU?', European Journal of Legal Studies, Issue 18.

<sup>160</sup> Case C-246/80, *Broekmeulen*, ECLI:EU:C:1981:218.

<sup>161</sup> Case 102/81, *Nordsee*, ECLI:EU:C:1982:107.

<sup>162</sup> Case C-394/11, *Belov*, ECLI:EU:C:2013:48.

External independence entails that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them.

The internal aspect of independence is linked to impartiality of the members and seeks to ensure a level playing field for the parties to the proceedings and their respective interests.

The Court went on to examine the RAT rules for appointment of members, salary, and contractual conditions, as well as the removal conditions. While it found that the decisions of the RAT are binding on the administration, thus reinforcing the independence of the RAT, the imprecise circumstances for removal of the members and lack of judicial review over the administration decisions regarding removal raise doubts regarding the Tribunal's independence. However, these doubts were dispelled in light of a rule which the Court deduced from the Asylum Procedure Directive. According to the second sentence of recital 27 in the preamble to the Directive, "*the effectiveness of the remedy, with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State considered as a whole.*" (para. 102). Therefore, the independence of the RAT has to be assessed within the whole of "*the Irish system of granting and withdrawing refugee status in order to determine whether it is capable of guaranteeing the right to an effective remedy as provided for under Article 39 of that directive.*" (para 103). The Court took into account the fact that the validity of the RAT's decisions could be questioned before the **High Court**, and the latter's decisions before the **Supreme Court**. The existence of these means of obtaining redress were deemed by the CJEU to be capable of protecting the RAT against potential temptations to give into external intervention or pressure liable to jeopardise the independence of its members. Therefore, the Court held that the criterion of independence is satisfied having regard to the Irish system as a whole.

Although the CJEU's preliminary ruling established general principles regarding the interpretation of the concepts of 'court or tribunal' within the ambit of the right to an effective remedy in asylum adjudication, the changing provisions of the Recast Asylum Procedure Directive might require further interpretation from the CJEU. In *HID* the CJEU determined the definition of 'court and tribunal' in light of the meaning of court within Article 267 TFEU, since a recital of Directive 2005/85 itself made this connection. That particular recital was not maintained in the Recast APD, and as a result the CJEU has the opportunity now to reconsider its definition and address also the academic critiques. While in *HID* the CJEU considered the independence of the court in relation to Article 267 TFEU, the referring court asked about the independence of the RAT in relation to the government against whose decision it adjudicates in appeal.<sup>163</sup>

### *Elements of judicial dialogue*

The preliminary reference technique helped to resolve an institutional issue regarding the conformity of the newly created judicial bodies, intended to handle the rising number of asylum applications, with the right to effective remedy. Although the CJEU took a relatively cautious approach due to recognising that the Asylum Procedure Directive left a considerable margin of discretion to Member States, the preliminary ruling is a reference judgment for the impact the right to an effective remedy can have on institutional and policy choices that are taken to tackle migration issues.

---

<sup>163</sup>See C. Costello and E. Hancox, "The Recast Asylum Procedures Directive 2013/32/ eu: Caught between the Stereotypes of the Abusive Asylum-Seeker and the Vulnerable Refugee" in V. Chetail, Philippe De Bruycker and F. Maiani (eds), *Reforming the Common European Asylum System The New European Refugee Law*, Brill (2016).

## **Question 2 – Was the creation of the Greek Independent Appeals Committees conform with the right to an effective remedy?**

*Hellenic Council of State, Decision 447/2017 of 10 April 2017<sup>164</sup>*

### *Facts of the case*

In 2016 the Asylum Appeals Committees were established as competent bodies for examining appeals against inadmissibility decisions taken by the Greek Asylum Service in first instance. The Committees were composed of three members: one person appointed by the National Committee for Human Rights, one member assigned by the UNHCR and a third member appointed by the government. After several decisions of the Appeals Committees rebutting the presumption of Turkey as a safe third country, two months after the introduction of the Committees, they were replaced with the ‘Independent Appeals Committees’ (IACs). These new Committees no longer had members appointed by the National Committee for Human Rights, but consisted of two judges (current members of the Greek judiciary) and one member appointed by the UNHCR. The IAC, in common with the Appeals Committees were second instance forums, where the right to be heard was very limited. The main points of contention in the case concerned the involvement of judges in an administrative body.

The National Commission of Human Rights, intervening, also contested the constitutionality of the new composition of IAC and the compliance of the new law with the right to an effective remedy before the Hellenic Council of State.

### *Reasoning of the Court*

According to Article 86 of Law 4399/2016, the IACs are quasi-jurisdictional bodies which examine the legal grounds and merits of appeals against negative decisions regarding the international protection. IAC members are nominated for a period of three years among ordinary judges from administrative courts. The members of these committees, as per Article 5 par.3 al.3 of the Law, are vested with the guaranties of functional and personal independence. In particular, the third member is nominated by UNHCR, and is, according to the Law, independent from the administration, also vested with the guaranties of functional and personal independence. The members could be removed for serious reasons. Furthermore, the suspension of the exercise of any other public office or professional activity is regulated by Article 5 (3) and (4) of the Law.

As to the contractual basis of the judges’ membership of the IAC, the Council of State held that the contract with a State body does not affect the independence of the IAC, since the judges, while members of the IAC, no longer have the status of a judge, and are submitted to the disciplinary provisions of the Code of State of Civil Administrative Servants and Employees of Public Entities,<sup>165</sup> and not to the corresponding provisions of the Code of Organization of the Courts and Status of Judicial Officers.

Furthermore, the Council of State held that compliance with the principle of impartiality is ensured by the fact that these Committees enjoy a third-party status as opposed to the parties involved and

---

<sup>164</sup> Issue selected and ReJus Template prepared by Ilias Kouvaras, Judge at the Administrative Court of First Instance of Kalamata.

<sup>165</sup> Article 5(3), final paragraph, of Law 4375/2016.

do not represent the administration. It is also stated that the competent Minister may bring an action only for annulment of the acts of those Committees.<sup>166</sup> Capacity of the third party and the principle of impartiality are not breached by the fact that the judges participating in the composition of the committees may, in the future, participate in the composition of the administrative appellate Court which will be called upon to try the cases of other parties seeking annulment of other acts of these committees.

The decisions of the IAC are binding on the parties and are final (can no longer be appealed). The procedure before the Committees fulfils the requirements of the rights of defence and *inter partes* proceedings.

In view of the above, the IAC were considered by the Council of State not to be courts within the meaning of the Constitution, but to constitute committees which exercise jurisdictional powers within the meaning of the constitutional provision of Article 89(2) and, as such, the participation of active judicial officers was permitted by the Constitution (Council of State 3503/2009, Civil Supreme Court – Plenary Session 371/2013):

*The jurisdictional nature of the powers exercised by them is not invalidated by the fact that:*

- a. Their acts are issued following a quasi-jurisdictional recourse;*
- b. Their acts are subject to an application for annulment before the competent administrative courts from the decisions of which derives obligation of compliance;*
- c. There is no provision for the delivery of the committees' judgments in public hearings but only for their communication to the applicants for international protection;*
- d. It is foreseen that the judicial officers of the committees can be replaced by the same procedure at their request;*
- e. The Administrative Director of the Refugees Authority has certain powers to ensure their proper functioning, but he does not exercise hierarchical control over the independent appeal committees or other power of direct or indirect interference to their work;*
- f. The competent Minister can exercise his regulatory organizational power given by the law to increase or even reduce the number of committees.*

#### *Elements of judicial dialogue*

The **Hellenic Council of State** referred to the right to an effective remedy enshrined in Article 46 of the Recast Asylum Procedure Directive and Article 47 EU Charter, as well as Article 13 ECHR as not only a parameter of compatibility of the Greek legislation establishing the IAC, but also as an objective which the Law aimed to ensure: i.e. the effectiveness of asylum adjudication in the circumstances of a rising number of asylum application. The CJEU preliminary ruling in the *Tall* case was also invoked in support of the necessity of ensuring effective remedy for asylum seekers, which, in the Council of State opinion justifies the necessity of the formation of these new administrative bodies.

### **3.3. Procedural Restrictive limitations: time-limits in asylum procedures**

Time limits in the asylum procedure are of the utmost importance.

---

<sup>166</sup> See Article 64(2) of the Law.



Concerns regarding restrictive time limits have been raised in fast track (accelerated) asylum procedures.

Speedy asylum procedures are considered to be both in the interest of the asylum applicant, so that s/he will have a prompt decision, and the Member States, so as to have a more efficient system for dismissing unfounded requests. However, time constraints in asylum procedures must nevertheless guarantee the accurate examination of the claim (see Article 31(2) of the Recast APD, according to which asylum procedure should be concluded as soon as possible, without prejudice to an accurate and complete examination of other asylum claims).

Although the Recast APD has harmonised the asylum procedural rules to a large degree, it introduced very few concrete time limits applicable in regular, accelerated or border procedures. Article 31(9) Recast APD states that time limits for the adoption of a decision in an accelerated procedure shall be reasonable and exceptions to the application of accelerated procedure are provided for certain vulnerable categories of asylum seekers (see Articles 24(3) and 25(6) of the Recast APD). Specific rules are set with regard to time limits within border procedures (see Article 43(3) of the Recast APD).

In many Member States, there is a strong link between the decision to apply an accelerated procedure in the administrative phase of an asylum claim and the attendant judicial stage of the appeal. As a matter of fact, the decision to apply an accelerated procedure rather than an ordinary procedure has serious consequences, in terms of procedures, on the subsequent judicial stage. For example, with regard to the time-limit to lodge the appeal before a judge since shorter deadlines are normally applied for submitting complaints against administrative decisions that are taken under accelerated procedures.

Article 46(4) Recast APD stipulates 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 pursuant to paragraph. The time limits shall not render such exercise impossible or excessively difficult. Member States may also provide for an ex officio review of decisions taken pursuant to art. 43 (border procedures)*”.

Therefore, the Member States enjoy considerable margin of discretion when providing concrete national time limits. In spite of this, national provisions dealing with time limit in asylum claims have to comply with the principles of equivalent and effectiveness of remedies, as highlighted by the CJEU in the *Danqua* and the *Diouf* cases.

**Question 1 – What is the impact of the principles of equivalence and effectiveness on domestic procedural time limits in asylum adjudication?**

Is the principle of effective remedy to be interpreted as precluding a national procedural rule which requires an application for subsidiary protection status to be made within a period of 15 working days of notification?

### *Facts of the case*

The *Danqua v. Minister for Justice* case arose in Ireland, which at the material time operated a dual system in which the procedure for assessing the refugee status was separate to the administrative procedure for assessing subsidiary protection. As a consequence, an applicant was required to make first an application for asylum before the Office of the Refugee Applications Commissioner (ORAC). If ORAC denied asylum status, the individual had the opportunity to apply for subsidiary protection within 15 days.

The applicant, Ms Danqua, submitted an application for asylum upon arrival in Ireland from Ghana. She claimed she would be subject to the Trokosis practice whereby certain family members are pledged to a shrine in indentured service in order to atone for the family's past sins. The application was rejected given the circumstances of the case, including the age of the applicant, as ORAC considered it would be unlikely she would be subject to the practice. Her credibility was rejected.

The applicant was illiterate and did not understand English. An attempt was made to find a translator for the applicant's native language in Ireland or the UK but was unsuccessful.

The Refugee Legal Service, the government-provided free legal aid service, declined to represent the applicant in an application for subsidiary protection or in a judicial review of the decision to refuse her asylum status as it did not consider either application would have a realistic likelihood of success. It later transpired the Refugee Legal Service was, at the time, systematically refusing to represent applicants on appeal in instances where an initial application was rejected on credibility grounds. The applicant received a letter informing her of her right to make an application for subsidiary protection within 15 days. One and a half years later, through private solicitors, she made such an application; this was rejected for being outside the time limit.

The applicant claimed the imposition of the 15 days' time limit breached the principle of equivalence, drawing a comparison with the procedure for the application for asylum, in which there is no time limit to make an application.

The High Court had rejected the application, noting that since the CJEU decision in Case C-604/12 *HN* EU:C:2014:302 applications for subsidiary protection could be made at the same time as an application for asylum or up to 15 days after a rejection. It was therefore equivalent or in fact a longer period in which to make an application for subsidiary protection.

The Court of Appeal was of the view that a valid issue had been raised but was unsure whether the principle of equivalence in fact applied. On the one hand, it noted that the two procedures are clearly comparable, both operating within an overall system of international protection and being in fact complementary and connected. On the other hand, it noted that the purpose of the principle of equivalence was to ensure equivalence between procedures for the protection of rights derived from Union law and rights derived from national law and yet asylum procedure was substantially, if not wholly, derived from Union law. The issue therefore was whether the principle of equivalence applies between procedures where both are governed by Union law. The Court made reference to the UK Supreme Court case of *FA (Iraq) v Secretary of State for the Home Department* [2011]

---

<sup>167</sup> Case based on materials provided within the ACTIONES Project by Stephen Coutts, ACTIONES Research Team.

UKSC 22, [2011] 4 All ER 503, in which the issue of the application of the principle of equivalence between asylum and subsidiary protection procedures had been raised, in that case in respect of the right to asylum. A reference to the CJEU had been made in the *FA(Iraq)* case, but had been withdrawn after the issue was resolved.

In *Danqua* the Court of Appeal decided to make a reference to the CJEU asking if the principle of equivalence applied between asylum and subsidiary protection procedures. It also posed subsidiary questions asking if the fact that the time limit was imposed by administrative rather than legislative means was relevant and if the fact that the time limit pursued a legitimate aim of minimising delays was also relevant to assessing its lawfulness.

### *Reasoning of the CJEU*

The CJEU held that the principle of equivalence was not applicable in the present case. The principle of equivalence operates to ensure that procedures designed to protect EU law rights were equivalent to comparable national law procedures. In the present case both procedures, namely asylum applications and applications for subsidiary protection, were based on Union law.

However, the CJEU considered it necessary to give the national court as full an answer as possible in order to provide it with all the materials necessary to decide the case. Prompted by a submission of the Commission, it assessed the 15 day limitation period in light of the principle of effectiveness.

The Court confirmed its established principle according to which, in the absence of EU rules concerning procedural requirements, Member States enjoy a wide margin of discretion. However, Member States's procedural autonomy is limited by the fact that the national procedures must not make impossible or excessively difficult the application of EU law (paras. 29 and 42).

With specific regard to time limits, the Court refers to its *Pontin* judgment holding that, in respect of national rules which come within the scope of EU law, it is for the Member State to establish those time limits in the light of the significance for the parties concerned of the decision to be taken, the complexities of the procedures and of legislation to be applied, the number of persons who may be affected and any other public or private interests which must be taken into consideration (para. 44).

It follows, then, in order to consider whether a 15 day time-limit renders it impossible or excessively difficult to lodge a subsidiary protection claim, due account shall be given to the difficulties that an applicant may face because of, *inter alia*, the difficult human and material situation in which he may find himself.

According to the Court, national procedural rules setting time limit must be assessed in the light of the principle of effective remedy and proportionality. In order to assess whether a national time limit is respectful of EU principles, a number of factors must be taken into account such as the complexity of the procedure and the specific human and material circumstances of the case. In the present case, the CJEU concluded that a 15-day limit is particularly short and does not ensure that all the applicants in the specific circumstances of the case are afforded a genuine opportunity to submit an application for subsidiary protection.

### *Impact of the CJEU preliminary ruling: follow-up judgment of the referring court*

In its application of the judgment of the CJEU, the **Court of Appeal** found that it flowed unambiguously from the judgment of the CJEU that the 15 days' limitation period breached the principle of equivalence and should be set aside. Counsel for the State argued that as the issue had not been raised in prior proceedings and did not form part of the reference to the CJEU that its finding on that issue was not binding on the Court of Appeal. The Court of Appeal rejected this argument, finding that it was bound to apply the finding of the CJEU and set aside the offending national law in line with the principle of primacy established in *Simmenthal*. It based this finding primarily on the duty of loyal cooperation found in Article 4(3) TEU. Relying on the judgment of the Court of Appeal of England and Wales in *Arsenal FC v Reed* [2003] EWCA Civ 696, the **Irish Court of Appeal** found that only where the CJEU had clearly misunderstood or misconstrued the underlying factual circumstances could a national court not apply the findings of the CJEU in the context of a preliminary reference.

The initial administrative decision refusing to accept Ms Danqua's application for subsidiary protection was quashed on judicial review.

#### Impact of CJEU decision on the legislation of the referring Member State

The legislative and regulatory framework in Ireland has largely overtaken the specific factual and legal circumstances of the case. Domestic regulations were firstly amended in 2006 to permit subsidiary protection applications to be made at the same time as asylum applications. The two procedures were ultimately merged into a single procedure by the International Protection Act 2015.

#### **Question 2 – What are the requirements of the right to an effective remedy on time limits in accelerated procedures and intensity of judicial review**

Is the right to an effective remedy under EU law to be interpreted as precluding national rules which mean that an applicant for asylum does not have a right to appeal to a court against the administrative authority's decision on the merits of the application for international protection under the accelerated procedure?

Is the right to an effective remedy to be interpreted as precluding procedural national rules in pursuance of which the selection of an accelerated procedure instead of the ordinary procedure entails a less favourable treatment for the applicant for asylum as regards the time-limit (15 days instead of 30) to lodge the appeal and the benefit of two levels of jurisdictions?

#### *Barim Samba Diouf v Minister du travail, de l'Emploi et de L'immigration, Court of Justice, decided in Case C-69/10*

##### *Facts of the case*

The applicant, Brahim Samba Diouf, was an asylum seeker whose claim was assessed by Luxembourg authorities under an accelerated procedure. Under domestic law, the administration's decision to apply an accelerated, rather than an ordinary, procedure had the consequence of reducing the time limit for lodging the judicial appeal to 15 days (instead of 30 days) and of

depriving the applicant of the possibility of a second instance appeal. The decision to assess the asylum claim within an accelerated procedure instead was one that could not be separately challenged before a Court.

On appeal, the applicant argued that the administration's decision to assess his claim under an accelerated procedure infringed his right to an effective remedy. He asserted that the short time limit to lodge the appeal did not give him enough time to present his arguments fully. The appeal judge made a preliminary reference to the CJEU in order to ascertain whether Article 39 of the Procedures Directive and/or the principle of an effective remedy should give the applicant a right to challenge the administrative decision to assess his claim under an accelerated procedure, provided that this entails a less favourable treatment for the applicant with regard to the applicable appeal procedure.

#### *Reasoning of the Court of Justice*

According to the CJEU, in light of Article 39 of Directive 2005/85, the decisions against which an applicant for international protection must have a remedy are those which entail rejection of the application for asylum on the basis of substantive reasons or, as the case may be, for formal or procedural reasons that preclude any decision on the substance.

It follows that decisions that are preparatory to the decision on the substance, which is the case with a decision to examine an application for asylum under an accelerated procedure, are not covered by that provision.

The Court then went on to consider whether the fact that there was no appeal against the administrative decision to use an accelerated procedure denied the applicant's right to an effective remedy.

In the view of the court, the absence of a remedy at that stage of the procedure does not constitute an infringement of the right to an effective remedy, provided that the legality of the final decision adopted in an accelerated procedure – and, in particular, the reasons which led the competent authority to reject the application for asylum as unfounded – may be the subject of a thorough review by the national court, within the framework of an action against the decision rejecting the application (para. 56).

With regard to the 15 day time limit to bring an appeal against the rejection of the asylum application in the accelerated procedure (instead of a period of one month, applied in the ordinary procedure), the Court stated that it “*does not seem generally to be insufficient in practical terms to prepare and bring an effective action and appears reasonable and proportionate in relation to the rights and interest involved*” (para. 67).

However, in this particular case the national court concluded that due to the specific individual circumstances of the case the time limit of 15 days was not sufficient for the applicant to prepare his defence. As such the national court upheld the action brought by the applicant and ordered the administrative authorities to re-examine the application under the ordinary procedure (para. 68)

#### *Conclusion of the Court of Justice*

Both the *Danqua* and the *Diouf* decisions indicate that national rules setting time-limits in relation to the asylum procedure must be assessed in the light of the right to an effective remedy. This entails the application of a proportionality test: the time limit must be assessed taking different elements into account, namely the individual position of the applicant, the complexity of the

procedure and of the legislation to be applied, etc. It is primarily up to the national judge to carry out this evaluation and to decide whether the time limit had the effect of overly hindering the right to an effective remedy.

In the *Diouf* case the applicant brought the appeal within the time limit. The Court did not address the issue of whether the judge may take the individual circumstances of the case into consideration in order to admit a late appeal, i.e. one submitted after the time limit set by the national legislator.

A further issue to be explored is the relationship between short appeal time limits and the investigative powers of a judge. If a judge has extensive investigation powers to assess the merits of the case, deficiencies that may arise in the administrative stage in an accelerated procedure may be mitigated by the judge, by applying his/her duty to cooperate with the asylum applicant in the assessment of the facts (Article 4(1) and Article 46(3) Recast APD) as well as the obligation to ensure a full and *ex nunc* examination of both facts and points of law.

If the judge does not have extensive investigation powers and the accelerated procedure does not permit an accurate and complete examination of the asylum claim, the remedy will be to quash the administrative decision and to order the re-examination of the case under ordinary procedure, as the Court held in *Diouf*.

#### *Elements of judicial dialogue*

The fact that time-limits for lodging an asylum application and/or an appeal in an accelerated procedure should be assessed taking of account the individual circumstances of the individual has also been stressed by the ECtHR in *I.M. v. France*, Appl. No. 9152/09, judgment of 2 February 2012<sup>168</sup>. While acknowledging that fast-track procedures may make it easier for a State to process applications that are unreasonable or manifestly unfounded, the ECtHR nevertheless highlighted that, in cases where these procedures are applied to individuals have made their first asylum claim, the short deadlines for submitting the application and the practical and procedural difficulties of producing evidence, especially when the asylum seeker is detained, may result in an infringement of their right to an effective remedy under Article 13 ECHR.

#### Further elaboration of Article 47 EU Charter requirements in regard to time limits in asylum and return proceedings

##### ITALY

In **Italy**, the courts admit the possibility of a late appeal where the individual, through no fault of his/her own, lacked knowledge of the time-limit. This occurs in cases where the person concerned is illiterate or due to a lack of knowledge of Italian has not been able to understand the content of the decision denying international protection. These cases are usually decided applying the general norms of the domestic civil procedure law, without reference being made to Article 47 EU Charter.

##### CZECH REPUBLIC

---

<sup>168</sup> See also ECtHR, *A.C. and Other vs. Spain*, no. 6528/11, 22 April 2014. On these aspects, see A.M. Reneman, *Speedy asylum procedures in the EU*, 25 *International Journal of Refugee Law*, 2013, issue 4, 717-748.

In the **Czech Republic**, an issue regarding time limits has arisen with regard to the detention of irregular migrants. The time to lodge an appeal against an expulsion decision is just five days. However, due to the lack of access to free legal assistance in Czech detention facilities, both the **Constitutional Court** and the **Supreme Administrative Court** have highlighted that in light of EU norms and Article 13 of the ECHR judges must consider appeals admissible and take decisions on the merits.

### **3.4. Access to Justice as a State Obligation to Remove Practical Barriers that Prevent an Individual from effectively Exercising the Right to an Effective Remedy: Legal Aid**

In order for an asylum applicant and/or an irregular third country national who is subject to a return decision, to have effective access to a judge, Member States have certain duties. These include a duty to provide information regarding the procedures as well as a duty to grant legal assistance, legal representation and legal aid.

Legal aid is different from legal assistance and legal representation; it means to provide free legal assistance and legal representation to individuals who cannot afford to pay.

With regard to legal aid in asylum claims, the Recast APD sets some safeguards in Articles 20 and 21. According to these provisions, Member States have an obligation to provide free legal assistance and representation only in the appeal procedure. There is no such an obligation during the administrative stage of the asylum claim; this is left to the discretion of Member States.

According to the Directive, the grant of legal aid is subject to limitations. For example, the Directive allows a Member State to provide legal aid only to persons who lack sufficient resources and/or only through the services provided by legal advisers or other counsellors who are specifically designated by national law to assist and represent applicants (see Article 21 Recast APD). Moreover, Member States are permitted to refuse legal aid where the applicant's appeal is considered by a court or tribunal or other competent authority to have no tangible prospects of success (Article 20(3)(1) Recast APD). If the decision to refuse legal aid is taken by an administrative authority, the applicant has the right to an effective remedy before a court against that decision (Article 20(3)(2) Recast APD). In any event, the Member State has to ensure that legal assistance and representation is not arbitrarily restricted and the applicant's effective access to justice is not hindered by its absence (Article 20(3)(3) Recast APD).

With regard to the return of irregular third country nationals, Article 13(2) of the Return Directive (2008/115) states that Member States shall ensure that necessary legal assistance and/or representation is granted on request free of charge in accordance with relevant national legislation.

The present session will consider some national cases where restrictive practices concerning legal aid have been substantially reviewed in light of the right to an effective remedy.

#### *Relevance of the ECHR jurisprudence*

With regard to the CJEU jurisprudence there are no cases specifically addressing the issue of legal aid in the area of asylum and immigration.

In relation to the ECtHR jurisprudence, it must be highlighted that the Strasbourg Court has considered the right to free legal assistance and representation as falling under Article 6 ECHR. In *Maaouia v. France*, the Grand Chamber held that immigration and asylum proceedings are neither civil nor criminal and, as such, the safeguards stemming from Article 6 ECHR did not apply.

However, the issue of free legal assistance is one that can fall under the protection of Article 13 ECHR, when read in conjunction with the other substantive rights of the ECHR that may be related to immigration or asylum claims (for instance Articles 3, 5, 8, 4 of Protocol 4 of ECHR).<sup>169</sup>

### **Question 1 – What is the impact of Article 47 EU Charter on national rules limiting access to legal aid in asylum claims**

Should Article 47 EU Charter be interpreted as requiring legal aid to be granted beyond the limited circumstances established by domestic law and judicial practice in asylum proceedings?

*Tribunal of Milan, Decree No. 35445, 28 June 2017*<sup>170</sup>

Relevant legal sources

#### **EU level**

Art. 21.3, Recast APD

#### **National legal sources (Italy)**

Presidential decree no. 115/2002, Art. 76 and ff.

Italian Code of civil procedure, Art. 182.

#### *Facts of the case*

Under Italian law, a person who intends to bring an action before a court and lacks the economic means to do so may make a request for legal aid to the bar association (*Consiglio dell'Ordine*) which is to be considered as an administrative instance. If the bar association's decision is negative, the individual concerned may challenge this decision before a judge - one who is also competent to render the final decision on the merits of the claim.

Under national law, both formal and substantive requirements apply to legal aid requests. A applicant must provide evidence demonstrating their lack of economic means. The request must be in a written form and signed by the person concerned. A lawyer must attest to the veracity of the signature. Failure to meet these requirements may mean the request is considered inadmissible. Requests for legal aid may also be rejected if the applicant's asylum appeal appears to be clearly unfounded on the merits.

---

<sup>169</sup> See for instance *G.R. v. the Netherlands*, where the Court found a violation of Art. 13, in combination with Art. 8 ECHR in relation to a Dutch provision that rendered it extremely difficult in practice for the individual to avail himself of an exemption from having to pay administrative charges in order to obtain a stay permit on family grounds.

<sup>170</sup> Case referred by Judge Martina Flamini, of Tribunal of Milan.



These requirements apply to all requests for legal aid; they are not specific to asylum claims.

In a case decided by the **Tribunal of Milan**, the bar association refused an asylum seeker's request for legal aid on the grounds that his appeal against the administrative decision was clearly unfounded and that the applicant's identity and the veracity of his signature had not been attested by a lawyer.

The applicant challenged the decision before the tribunal, which reversed the bar association's decision and granted legal aid.

#### *Reasoning of the Tribunal*

The judge referred to both Article 47 EU Charter and to Articles 6 and 13 ECHR to highlight the fact that the judicial system should protect individuals from arbitrariness.

According to the judge, the bar association's decision did not provide sufficient reasons why the asylum claim should be considered as manifestly unfounded.

Regarding the lack of a lawyer's confirmation regarding the identity of the applicant, the judge considered that this omission was not important in the overall context the case. In order to make an asylum claim, Italian law requires that a lawyer to attest the veracity of the client's signature and identity. Having fulfilled these requirements with regard to his primary claim procedure, the judge considered that the applicant's omission to do so in his legal aid request was therefore not a fatal error, given the substantial connection between the two claims.

#### *Conclusion of the Tribunal*

The judge referred to Article 47 EU Charter when considering the current practice of many bar associations - which systematically reject legal aid requests on grounds that the underlying appeal against the negative administrative asylum decisions is clearly unfounded - to be contrary to the right to an effective remedy. The judge also relied on the same Charter provision to interpret the national procedural rule in an expansive way, so as to avoid a declaration of inadmissibility.

#### *Other relevant national cases*

The **Italian Constitutional Court** has issued some decisions in relation to legal aid provisions in cases involving immigrants. In the Decision No. 144/2004, the Court interpreted the national provisions concerning the admissibility of a legal aid request advanced by an immigrant broadly, in a manner that removed the necessity for him to provide a fiscal code (a common bureaucratic Italian requirement). The Court cited the right of defence as set out in Article 24 of the Italian Constitution. In another decision (Decision No. 254/2007), the Constitutional Court deemed a national provision on legal aid unconstitutional for breaching the constitutional right of defence in so far as it did not cover the costs of an interpreter to assist a migrant charged with a criminal offence during the trial. The Constitutional Court also referred to Article 6 ECHR in its decision.

**Question 2 – Does Art. 47 EU Charter require a late appeal be admitted in cases where there was no effective access to legal aid?**

In the case of a national legislation that provides for a five-day time limit to lodge an appeal against a return decision, is the absence of free legal aid a good reason for the judge to admit late appeals, lodged after the time limit?

*Judgment of the Supreme Administrative Court of the Czech Republic of 30 June 2015, No. 4 Azs 122/2015*

Relevant legal sources

**EU level**

Article 13(3), Directive 2008/115/CE: “*The third country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance*”.

**National legal sources (Czech Republic)**

Article 41, Code of Administrative Procedure

*Facts of the case*

A detained third country national (TCN) initially lodged an appeal against his detention in the French language. He failed to lodge an appeal in Czech due to limited access for lawyers in his detention facility: the lawyer who visited him refused to formulate an appeal in Czech for him due to lack of time. The TCN’s appeal was rejected as inadmissible by both the first and second appeal courts, in spite of his expressly requesting an exception from the time period for lodging an appeal.

The **Supreme Administrative Court** quashed the judgments of both first and appeal courts on grounds of the requirements of Article 13(3) RD.

*Reasoning of the Court*

The **Czech Supreme Administrative Court** (SAC) highlighted the fact that in transposing Article 13(3) of the Return Directive into Czech law, the legislator did not sufficiently guarantee the effective access of TCNs to legal aid or representation. Access to legal representation was sporadically provided by NGOs. The SAC stressed that the Czech Alien’s Act does not oblige administrative authorities to ensure TCNs have access to legal aid. Therefore, there is no guarantee that every TCN subject to return proceedings would get legal aid in due time. This is particularly worrying, especially in the case of third-country nationals detained in closed facilities with limited access for lawyers.

The SAC urged the authorities to do as much as possible to achieve the aim expressed in the Return Directive at Article 13(3). The Court required the public authorities to guarantee that detention facilities are visited weekly by lawyers in order to allow the detained immigrant to have the chance to lodge an appeal on time. Because the competent administrative authorities were unable to demonstrate that the detention facilities effectively guaranteed the right to legal assistance, the SAC decided that the applicant was entitled to an exception to the obligation to lodge an appeal within five days. For this reason, the SAC quashed the appellate decision.

### *Conclusion and outcome at the national level*

The SAC decision ordered that the appeal lodged beyond the time limit be admitted. The decision is an attempt to remedy the shortcomings in the national system regarding access to free legal aid, an issue that has been also addressed by the **Czech Constitutional Court**.

In Judgment File No. I. ÚS 630/16 of 7 December 2016, the **Constitutional Court** noted that effective access to legal aid is one of the inherent features of the right to an effective remedy. Given the short time limit to lodge an appeal against an expulsion order (five days), whether or not an individual will have an effective remedy, within the meaning of Article 13 of the ECHR, against such a decision is dependent on the provision of qualified legal aid.

The Court held that it is the duty of the State, when conducting proceedings on the administrative expulsion of a person who is detained, and who has a well-founded danger of a violation of Article 2 or 3 ECHR in the country of origin, to ensure the person has effective access to legal aid.

The absence of effective access to legal aid during detention constituted a ground for granting the person's request for a waiver of the deadline for appeals in accordance with Section 41 of the Code of Administrative Procedure. The **Constitutional Court** added that its reasoning would also apply to the seven-day deadline for lodging an application for international protection.

### **3.5.Guidelines for judges emerging from the analysis**

The principle of effective judicial protection, comprises in particular: the rights of the defence, the principle of equality of arms, the right of access to a court or tribunal and the right to be advised, defended and represented (see judgment of 26 July 2017, *Sacko*, C-348/16, EU:C:2017:591, para. 32 and C-662/17 *E.G. v Republika Slovenija*, ECLI:EU:C:2018:847, para. 48). As clearly stated by the CJEU, the remedies provided by EU secondary legislation on asylum and the transposition legislation must be determined in a manner that is consistent with Art. 47 CFR, which constitutes a reaffirmation of the principle of effective judicial protection (judgment of 26 July 2017, *Sacko*, C-348/16, EU:C:2017:591, para. 31).

#### **Effective remedy and limitations to access a Court:**

- The section has considered to what extent Article 47 EU Charter provides a good basis for overcoming national legislation that denies, or limits, effective access to a judge;
- Settled CJEU case law recognises that Member States enjoy procedural autonomy provided that the principles of equivalence effectiveness are guaranteed;
- The Polish Supreme Administrative Court has made a preliminary reference to the CJEU in order to ascertain whether the exclusion of judicial review of visa decisions is in conformity with the right to appeal as set out in the Visa Code as interpreted in light to Article 47 EU Charter. The CJEU ruling is pending, but the AG's Opinion clearly stated that Article 47 EU Charter "*must be interpreted in the way that Member States cannot exclude the possibility of judicial review of visa refusals by a tribunal within the meaning of Article 267 TFEU.*" The AG's Opinion follows settled case law of the CJEU whereby domestic exclusion of judicial review of negative administrative decisions is considered not to be compliant with Article 47 EU Charter (see the recent CJEU case: Case C-562/12 *Liivimaa Lihaveis MTÜ*, ECLI:EU:C:2014:2229);

- The right to an effective remedy has been interpreted as permitted judicial review of detention by individual application even if national law provides only for *ex officio* judicial review. Although under Italian law, in cases of extended detention of asylum seekers, only *ex officio* judicial reviews are admitted, to be carried out at regular intervals of 60 days, the **Tribunal of Turin** allowed an individual action brought by a detained asylum seeker against an on-going detention, which was not expressly provided by the then Italian legislation.

### **Effective remedy and right to access an independent Court**

- In *HID and B.A.* (C-175/11) the CJEU highlighted that the independence of the judiciary has both an external and internal dimension. Whereas the former dimension means that the judge must be protected against external interventions or pressures liable to jeopardize the independent judgment as regards proceeding before them, the latter refers to the impartiality in ensuring a level playing field for the parties to the proceedings and their respective interests.
- However, the CJEU stresses that in order to assess the effectiveness of the remedy and independence of the judge, due account must be given to the administrative and judicial system of each Member State as a whole.
- The CJEU interpreted the concept of a ‘court’, under Art. 39 of the Asylum Procedures Directive, in line with the meaning of a court in Article 267 TFEU, as a recital of the Asylum Procedures Directive made itself this connection. This is no longer the case with the Recast Asylum Procedure Directive, where this particular recital has been omitted. It may also be argued that the two norms do not have the same function. Whereas Article 267 TFEU has as its primary function to ensure, through preliminary references, full effectiveness of EU law norms and because of that a broad interpretation of the concept of ‘court’ is needed, Article 46 of the Recast APD has as its primary function the review of an administrative decision by an independent judge in an area where absolute fundamental rights are at stake. This should suggest that the independence requirements in the latter case should be assessed with stricter scrutiny.

### **Effective remedy and strict time limits to lodge an appeal: asylum procedures**

- Both the *Danqua* (C-429/15) and the *Diouf* (C-69/10) CJEU decisions suggest that national rules setting time-limits in relation to the asylum procedure must be assessed in the light of the right to an effective remedy.
- It is permissible for there to be no independent right to challenge a decision of the State to submit an asylum claim to an accelerated procedure provided that the decision rejecting the application on its substance is itself subject to a thorough review by the national Court (*Diouf*, C-69/10, para. 56).
- The 15 day time limit to lodge an appeal against a decision to reject an asylum claim, under an accelerated procedure, is not in itself necessarily an insufficient time period to prepare an appeal and thus it cannot be considered in breach of the principle of effective remedy, *per se*.

- However, a judge must evaluate the individual circumstances of the case taking into account different factors such as the individual position of the applicant, the complexity of the procedure and of the legislation to be applied, any other relevant public or private interests (*Danqua*, C-429/15, para. 44).
- It is primarily up to the national judge to carry out this evaluation, according to the proportionality principle, and to decide whether the time limit had the effect of rendering the right to an effective remedy difficult to exercise.
- If the individual circumstances of the case indicate that the party did not have time enough to prepare his defence, the judge must be able to order the administrative authorities to re-examine the application under ordinary procedure (*Diouf*, para 68).
- Some issues remain to be clarified. The Court did not expressly consider the case where, due to specific and personal circumstances, the individual was not able to make the appeal in time. This could occur because of illiteracy, lack knowledge of the local language or because the individual was detained and did not have access to legal representation and/or legal aid in time.
- In some Member States (e.g. Italy, Czech Republic) these are good grounds to permit the appeal to be considered on its merit even if the deadline for lodging the appeal had been missed.

**Right to an effective remedy and positive duties on Member States to make access to a judge effectively available: legal aid.**

- The **Tribunal of Milan** (Decree no. 35445, 28 June 2017) referred to Article 47 EU Charter to the extent of considering the current practice of many bar associations - which systematically consider legal aid's requests to bring appeal against negative administrative asylum decisions as clearly unfounded - to be contrary to the right to an effective remedy.
- The **Tribunal of Milan** also relied on the same Charter provision to interpret the national procedural rule in an expansive manner so as to avoid a declaration of inadmissibility.
- The **Czech Supreme Administrative Court** (No. 4 AZS 122/2015, 30 June 2015<sup>171</sup>) decided that the applicant (an irregular TCN detained as a consequence of an order to leave) was entitled to an exception from the obligation to lodge an appeal within five days, due to the fact the competent administrative authorities did not demonstrate that the detention facilities effectively guaranteed the right to legal assistance. For this reason, the SAC quashed the appellate decision that considered the claim inadmissible.

---

<sup>171</sup> Case provided by the REDIAL Project.

## 4. Rights of Defence in Cases Regarding National Security

### 4.1. Short introduction: Comparative overview of issues at national and European level

In certain asylum and immigration cases<sup>172</sup>, the level of disclosure of evidence to the third country national, his lawyer, and sometimes even to the court is limited on the ground of public order or national security interests. This information may be kept secret due to the third country national being considered to be a danger for the national security or public order. There are various differences among the Member States as regards the level of disclosure of the secret information to the parties involved in a national security cases and the relevant procedures.<sup>173</sup>

While it is widely accepted that national courts should have as unrestricted as possible access to evidence, even the secret one, the extent of the access of the individual and his lawyers to such evidence is a debated issue. Since the individual and his lawyer have no (or limited) access to the evidence/information before the decision-maker, it is difficult for the individual to challenge the decision, based, as it is, on secret information. It is well established that access to the evidence on which the opposing side relies is essential for the full realisation of access to justice. Therefore, cases in which national security is invoked by the State, raise questions regarding conformity with the right to adversarial proceedings,<sup>174</sup> the principle of equality of arms,<sup>175</sup> the right of access to information (which is part of the principle of good administration), and the rights corresponding to the national authorities' duty to state reasons in fact and in law (principle of good administration). Furthermore, the presence of the individual concerned and of his lawyer is often denied or partially restricted during the court hearings, where only special advocates who have passed a national security clearance procedure are permitted represent the interests of the individual (e.g. UK). This situation, where it is coupled with the lack of suspensive effect of the appeal, raises issues concerning the right to be heard, right to a public hearing, and right to an effective remedy, which are part of the umbrella principle of the rights of defence and Article 47 EU Charter rights to a fair trial and effective remedy.<sup>176</sup>

At the same time, the effective realisation of security policies relies on a certain degree of secrecy. Therefore a difficult balancing of public interests and fundamental rights is requested from national courts in cases engaging the national security issue. The case law discussed herein shows the

---

<sup>172</sup> In cases concerning visa decisions, refusal of entry, entry bans, decisions related to residence permit, return decisions, as well as asylum adjudication.

<sup>173</sup> For an outline of the various national institutional, substantive and procedural patterns, see J. Chlebny, Public Order, 'National Security and the Rights of Third-Country Nationals in Immigration Cases', *European Journal of Migration and Law* 20 (2018) 115-134.

<sup>174</sup> The right of adversarial proceedings means that "both prosecution and defence must be given the opportunity to have knowledge of an comment on the observations filed and the evidence adduced by the other party.", see *Fitt v UK*, Application No. 29777/96, Judgment 16 February 2000 [GC], para. 21. This definition applies for both civil and criminal cases.

<sup>175</sup> The principle of equality of arms requires "each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent." C-580/12 P, *Guardian Industries Corp. and Guardian Europe Sàrlv European Commission*, ECLI:EU:C:2014:2363.

<sup>176</sup> See the Explanations to Article 47 EU Charter.

interconnectness between the various fundamental rights under the Charter, and the complexity of the many issues involved, for example :

- establishing the scope of application of the EU Charter (namely accurate identification of the connecting factor with EU law: is there an EU provision governing the matter?);
- establishing the precise fundamental right(s) and procedural guarantee at issue: the principle of good administration (duty to receive reasons in fact and law; right to be heard) and/or Article 47 EU Charter; the adversarial principle; the right to be heard;
- establishing the precise requirements of Article 47 EU Charter in such cases and its permitted limitations;
- balancing the objective of national security with the rights of defence, fair trial and effective remedy enshrined in Article 47 EU Charter;
- remedies for violations of Article EU 47 Charter.

The jurisprudence analysed over various asylum and immigration related projects (JUDCOOP, ACTIONES, REDIAL and currently also Re-Jus) reveals that an increasing number of national courts<sup>177</sup> are faced with assessing the above-mentioned complex questions within various administrative procedures such as: revocation of refugee status, refusal of travel permits to refugees and speedy removal of rejected asylum seekers.

Although the national institutional, substantive and procedural legal frameworks governing the assessment and impact of national security concerns on the legal status of third country nationals varies considerably, there are a number of similarities between the domestic legal provisions of Member States. These regard, in particular, the ‘fast-track’ emergency procedures governing the assessment of claims from individuals considered a threat to national security. A ‘fast-track’ procedure usually entails extensive limits on access to evidence and participation in court hearings for the individuals. As a form of limited remedy for the interference with fundamental rights, some Member States have introduced measures seeking to compensate. For example, the (limited) representation of the individual by special security-cleared advocates, who have more access to evidence than the applicant’s primary lawyer. However, variations exist among the Member States also regarding the precise time period for approval of the special advocates, the nature of the emergency procedure and the scope of disclosure of the evidence.

The approach of the national courts to finding solutions for these issues is varied. Some (e.g. the **UK Court of Appeal**) addressed preliminary questions to the CJEU in order to clarify the requirements of Article 47 EU Charter as regards disclosure of evidence (*ZZ C-300/11*). The Court of Appeal took this approach despite the fact that the ECtHR had previously had the opportunity to assess the UK legislation which provided for limited disclosure of evidence and special advocates in the case of *A. and others v UK*. The preliminary reference in the *ZZ* case clarified the standards required under Article 47 EU Charter, in conformity with the standard under Article 5(4) ECHR.

Although the *ZZ* case concerned the UK legislative scheme, the CJEU developed general principles to be followed in other jurisdictions in cases concerning limitations on access to evidence and court hearings due to national security concerns. In addition to the cross-border relevance of the CJEU preliminary ruling in *ZZ*, the judgment has also a cross-sectorial relevance, for example: in cases on

---

<sup>177</sup> From Member States such as: Croatia, Italy, Ireland, the Netherlands, Lithuania, Poland, Romania, and the UK.

sanctions against persons accused of involvement in terrorism; cases involving restrictions of the free movement rights of an EU citizen; cases concerning revocation of refugee status (see below case of the **Court of first instance of Hague**); refusals to issue a travel permit to a refugee (*R(AZ)*, **UK High Court**); and in return proceedings (see the judgments of the **Polish and Lithuanian Supreme Administrative Courts** discussed below). The issue also arises in cases of immigration or criminal detention based on national security where the reasons for the prolongation of detention are not shared due to the public interest (see the case of the **Constitutional Court of Croatia**<sup>178</sup>).

This section includes cases that reflect the impact (or lack thereof) of the *ZZ* ruling at national level. It should be mentioned that certain concepts and aspects of application of the Article 47 EU Charter guarantees were not clarified by the CJEU (e.g. the conformity of special advocates with the right to a fair trial and effective legal remedy, the meaning of ‘essential grounds’, the precise obligations of the administration under the EU principle of good administration versus those of the national judiciary under Article 47 EU Charter). This can explain to a certain extent the divergent national jurisprudence on the scope of application of the CJEU’s general principles developed in *ZZ*;<sup>179</sup> the lack of clarity present in national jurisprudence regarding the precise standards that national special advocate procedures need to comply with in order to be considered an effective compensatory technique; confusion regarding the meaning of the “essential grounds”.<sup>180</sup> This chapter will not limit its discussion to the difficulties and divergence that exists at the national level; the choice of cases has the aim of offering various solutions to tackle these problems.

## Short overview of EU and ECHR standards

### EU norms

The Recast Qualification Directive refers to ‘danger to the security of a Member State’ as a ground for:

---

<sup>178</sup> Nika Bacic Selanec, *ACTIONES* case note, Constitutional Court of the Republic of Croatia, U-III-1844/2011, 25 May 2011. Procedural safeguards in cases of detention on grounds of national security, such as oral hearing and disclosure of essential evidence, were at issue in a case of detention of third country nationals on grounds of national security in asylum proceedings. The **Constitutional Court of Croatia** held the Articles 22 and 29 Constitution and Article 5 ECHR were violated due to the lack of oral hearing, which should have been held by the Administrative Court, and which is also guaranteed by Article 74.10 Asylum Act. In its judgment the Court relied extensively on the standards set by the ECHR. The judgment dates from 2011, thus prior to the accession of Croatia to the EU. It is important to see that when balancing national security and rights of defence, the Constitutional Court recognises the essential nature of the rights of defence, which cannot be entirely dismissed.

<sup>179</sup> For instance, while the **Dutch Court of first instance of Hague** incorporated by analogy the rules set out by the *ZZ* preliminary ruling in their legality checks of the administrative procedure regarding revocation of refugee status, the UK Court of Appeal followed a more limited application of the *ZZ* preliminary rulings, based on the different effects of the negative administrative decisions and legal status of the third country national.

<sup>180</sup> Other national courts rely primarily on the national legal provisions without carrying out an additional check in light of the European norms and this has led to complaints being lodged by lawyers before the ECtHR (*A.M.N v. Romania*, no. 19943/13, 30 September 2014). While the lawyers in this case opted for a complaint before the ECtHR, in **Poland**, lawyers attempted to convince the **Supreme Administrative Court** to address preliminary questions to the CJEU to clarify the meaning of ‘essential grounds’. However the **Supreme Administrative Court** rejected the request. In such circumstances it is important to recall the strict requirements regarding the referral of preliminary rulings and the limited circumstances when supreme courts (which are commonly last resort courts) are exonerated from addressing a preliminary ruling. This issue will be discussed in sub-section III.



- denial of granting the refugee status (*Article 14(5)*);
- cessation of refugee status (*Article 14(4)*);
- revocation, ending or refusing to renew residence permit (*Article 21(3)*);
- rejecting/refusing travel documents to refugees (*Article 25(2)*).

These are all optional provisions: the Member States are permitted freedom whether or not to transpose them.

Article 23(1) of the Recast APD allows the Member States to withhold information from the applicant and his legal adviser, if that would jeopardise national security. Compared to the Asylum Procedure Directive (2005/85), the Recast provisions that are currently in force<sup>181</sup> have new guarantees for the rights of defence of the individual. In particular, Article 23(3) requires Member States to allow the courts access to secret information or sources in accordance with Article 46 of the Directive, discussed in Chapter V – right to an effective remedy. This provision has had an important impact at national level, since, previously, in several Member States the courts, in addition to the applicant and his legal advisor, had limited access to evidence (e.g. **Romania, Bulgaria**). Article 23(1) Recast APD requires the Member States to introduce in their national legislation the special advocate procedure; they must “*grant access to such information or sources to a legal adviser or other counsellor who has undergone a security check, insofar as the information is relevant for examining the application or for taking a decision to withdraw international protection*”.

Article 12(1)(2) of the Return Directive permits the limitation of the obligation to give factual reasons, “*in particular in order to safeguard national security, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences*”.

In addition, the EU Citizenship Directive (2004/38), by Article 27(1), provides that: “*Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends*”. Articles 30 and 31 also set out guarantees for securing good administration and rights of defence.

### *ECtHR case law*<sup>182</sup>

The ECtHR has developed an impressive body of jurisprudence regarding the requirements for limitations on ECHR rights on the basis of national security. Among the most relevant, in *Al Nashif*, the ECtHR held, relying on Articles 8, 9, and 13 ECHR, that a State must review whether invoking national security as the basis for restricting a person’s rights is reasonable and not arbitrary. In *Lupsa v Romania*, violations of Article 8 and 13 ECHR were found due to the fact that the national court could not review the decision that the person concerned was a danger to national security, it

<sup>181</sup> Note that Ireland and the UK have not opted in to the Recast Directive.

<sup>182</sup> For detailed summary of the ECtHR relevant jurisprudence on national security, see the official summary publication of the Council of Europe, <https://rm.coe.int/168067d214> ; for a comparative assessment of the ECHR and EU norms, please see FRA Handbook on European law relating to asylum, borders and immigration, pp. 110-112. See also, M. Reneman, *EU Asylum Procedures and the Rights to an Effective Remedy*, Oxford University Press, 2014, Use of Secret Information in Asylum Cases, p.341ff.

could not examine relevant facts, and evidence was confined to a “purely formal examination”. This was held by the ECtHR to be unacceptable.

In the case of *C.G. v. Bulgaria*<sup>183</sup>, a long-term resident was removed from Bulgaria for reasons of national security on the basis of a classified secret surveillance report. The ECtHR held that a non-transparent procedure, such as that used in the applicant’s case, did not amount to a full and meaningful assessment required under Article 8 ECHR. Furthermore, the Bulgarian courts had refused to gather evidence to confirm or dispel the allegations against the applicant, and their decisions had been formalistic, in the view of the Strasbourg court. As a result, the applicant’s case had not been properly heard or reviewed, as required under paragraph 1 (b) of Article 1 of Protocol 7 ECHR.

In *A. and others*<sup>184</sup> the ECtHR held that “*it was essential that as much information about the allegations and evidence against each applicant was disclosed as was possible without compromising national security or the safety of others*” (para. 218). The Court did not accept that full discretion of the administrative authorities to decide whether national security concerns justify the refusal to disclose documents to the applicant. The Court held that, given the open material consisted mainly of general assertions and SIAC’s decision to maintain the detention was based solely or to a decisive degree on closed material, the procedural requirements of Article 5(4) were not satisfied. Since Article 6 ECHR does not apply to asylum cases, the jurisprudence on non-disclosure of evidence in cases involving irregular migrants or asylum seekers has been developed by the ECtHR under Article 5(4) ECHR – which provides a basis to challenge the lawfulness of detention.

The *A and others* judgment is also important for its clarification of the conditions for derogations from Article 15 ECHR (derogation in time of emergency). The Court clarified that the use of indefinite detention without a charge for suspected terrorists imposed a disproportionate and discriminatory burden that was not fulfilling the requirements of Article 15 ECHR.

The ECtHR provided useful and concrete guidelines as regards balancing the right to family life and the public order/national security interests in *Boultif v Switzerland*<sup>185</sup> case.

As regards the level of disclosure of classified evidence and information to the individual and his lawyer, in *Regner v the Czech Republic*<sup>186</sup>, the Grand Chamber held that the non-disclosure of the grounds for revoking a security clearance to a high profile civil servant was not impairing the essence of the applicant’s right to a fair trial. The decisive arguments for the ECtHR were, first that the national courts had unlimited access to all the classified documents, and second, that the judicial review power of the national courts extended to all facts of the case, beyond the grounds relied on by the applicant.<sup>187</sup>

### *CJEU case law*

---

<sup>183</sup> *C.G. v Bulgaria*, Appl. No. 1365/07, Judgment of 24 April 2008.

<sup>184</sup> *A. and others v UK*, Appl. No. 3455/05, Judgment of 19 February 2009.

<sup>185</sup> *Boultif v Switzerland*, Judgment of 2 August 2001, Application No. 54273/00, para. 48.

<sup>186</sup> See *Regner v the Czech Republic*, Judgment of the Grand Chamber of 19 September 2017, Application No. 35289/11.

<sup>187</sup> It should be mentioned that the judgment of the Grand Chamber has been contested for departing from the CJEU standards of ensuring individual access to at least essential grounds of the administrative decisions, see the dissenting opinions.

As regards the evaluation of the danger which a refugee may pose to a Member State, the CJEU has had the opportunity to set guidelines in on the interpretation of Article 14(4) and 21(2) of the Qualification directive in *B and D*.

As regards the level of disclosure of evident to an individual in national security cases, the CJEU has adhered strongly to a mandatory threshold of minimum disclosure to the applicant, starting first in C-27/09, OMPI, then continuing in the Grand Chamber judgment in the case C-300/11, ZZ. This is the lead judgment establishing rules for cases involving national security, where limitation of the rights of defence is at issue. Although the case concerns expulsion of an EU citizen from a non-nationality Member States (Directive 2004/38), the CJEU conclusions are of constitutional importance, regarding the interpretation and application of the rights of defence (e.g. obligation to state reasons, access to evidence for the individual and his lawyer, limitation of the individual's presence during a hearing).

ZZ is a ground-breaking judgment with wide-ranging potential impact. The national case law discussed herein illustrates however that the impact of the CJEU is somewhat limited, in spite of its salient conclusions. National courts have also missed opportunities to address preliminary references on the clarification of the remaining unclarities from ZZ. For instance, addressing preliminary questions asking for a clarification of the meaning of the phrase 'essence of the grounds'. In particular, what grounds could be considered essential and the extent of their disclosure to the individual concerned.

In spite of a lack of post ZZ judgment from the CJEU clarifying the meaning of 'essential grounds'<sup>188</sup> that needs to be disclosed to the individual, some guidance can be found in the CJEU jurisprudence delivered in the field of terrorist related sanctions. For instance, in *Kadi II*, the CJEU considered that the extent of disclosure of evidence was not sufficient to guarantee the rights of defence:

*[...] the last of the reasons stated in the summary provided by the Sanctions Committee, namely the allegation that Mr Kadi had been the owner in Albania of several firms which funnelled money to extremists or employed those extremists in positions where they controlled the funds of those firms, up to five of which received working capital from Usama bin Laden, is insufficiently detailed and specific given that it contains no indication of the identity of the firms concerned, of when the alleged conduct took place and of the identity of the 'extremists' who allegedly benefitted from that conduct (para. 141)*

## Questions addressed

The *first Question* will discuss the requirements of Article 47 EU Charter regarding access to evidence according to the CJEU interpretation in the ZZ case. The section will continue by exploring the impact of the ZZ preliminary ruling on: the personal scope of the Article 47 EU Charter guarantees (*Question 1.b*); the conformity of the special procedure of nominating special advocates in national security cases with Article 47 EU Charter; Article 6 ECHR (*Question 2*); and the meaning of 'essential grounds' to be disclosed in national security cases (*Question 3*).

---

<sup>188</sup> Although Art. 21 of Directive 2004/38 was at issue in subsequent case law, such as C-165/14, Rendon Marin, and C-304/14, CS.

**Question 1 - What is the scope of disclosure of evidence under Article 47 EU Charter in national security cases?**

Question 1 a. - The CJEU preliminary ruling in ZZ (C-300/11) <sup>189</sup> – the level of disclosure corresponding to ‘essential grounds’

What evidence is the administrative authority required to disclose in national security cases?

How is the balance between the protection of the rights of defence and the national security to be struck by a court?

Facts of the case

The applicant, Mr ZZ, was a French and Algerian national. He was married to an UK national with whom he had eight children. While in Algeria, his right of residence in UK was cancelled. He was subsequently refused admittance to the UK and expelled on grounds of public security. He was then removed to Algeria. He appealed the decision refusing entry before the UK Special Immigration Appeals Commission in the UK (SIAC).

Full access to the evidence on which the refusal on entry was based was denied by the Secretary of State. SIAC noted that most of the evidence against Mr ZZ remained secret, while the disclosed evidence did not contain any critical information. Two hearings and two separate judgments were issued: one closed, the other public. During the closed hearing, ZZ was represented by special advocates who represented the interests of ZZ. They had access to the secret (‘closed’) evidence but could not share it with ZZ. The public judgment included as its reasons for the public security threat the fact that:

*ZZ was involved in activities of the Armed Islamic Group network and in terrorist activities in 1995 and 1996. As regards the facts that were disclosed to ZZ, according to that judgment items which ZZ admitted owning or to have owned were discovered in 1995 in Belgium, in premises rented by a known extremist where, inter alia, a quantity of arms and ammunition were found. In relation to other facts alleged by the Secretary of State, such as, in particular, stays in Italy and in Belgium, contact with certain persons and the possession of large sums of money, SIAC to a certain extent considered the position adopted by ZZ and the evidence adduced by him to be credible and pertinent. However, his denials of involvement in activities of the aforesaid network were not accepted by SIAC, for reasons which are explained in the closed judgment. (para. 31)*

SIAC concluded therefrom, in its open judgment, that, “for reasons which are explained only in the closed judgment”, it was “satisfied that the personal conduct of ZZ represents a genuine present and sufficiently serious threat which affects a fundamental interest of society[,], namely its public security[,], and that it outweighs his and [his family’s] right to enjoy family life in the [United Kingdom]” (para. 32).

---

<sup>189</sup> C-300/11, ZZ v Secretary of State for the Home Department, ECLI:EU:C:2013:363.

### *Preliminary questions referred to the Court*

The **UK Court of Appeal** asked the CJEU whether the domestic legislation which prohibited full disclosure of the essence of the grounds of the decision was in conformity with the principle of effective judicial protection as set out in Article 30(2) of Directive 2004/38, interpreted in light of Article 47 EU Charter, when national authorities, including domestic courts, found that disclosure such disclosure of the grounds would be contrary to the interests of State security?

*Does the principle of effective judicial protection, set out in Article 30(2) of Directive 2004/38, as interpreted in the light of Article 346(1)(a) [TFEU], require that a judicial body considering an appeal from a decision to exclude a European Union citizen from a Member State on grounds of public policy and public security under Chapter VI of Directive 2004/38 ensure that the European Union citizen concerned is informed of the essence of the grounds against him, notwithstanding the fact that the authorities of the Member State and the relevant domestic court, after consideration of the totality of the evidence against the European Union citizen relied upon by the authorities of the Member State, conclude that the disclosure of the essence of the grounds against him would be contrary to the interests of State security?*

### Relevant EU and national law

Article 30(1) of Directive 2004/38 provides that the person concerned must be notified of the decision in writing and in such a way that he is able to comprehend its content and the implications for him.

In addition, Article 30(2) provides that the person concerned must be informed, precisely and in full, of the public policy, public security or public health grounds which constitute the basis of such a decision, unless this is contrary to the interests of State security.

Article 31 of Directive 2004/38 obliges the Member States to lay down, in domestic law, the measures necessary to enable Union citizens and members of their families to have access to judicial and, where appropriate, administrative redress procedures to appeal against or seek review of any decision restricting their right to move and reside freely in the Member States on the grounds of public policy, public security or public health (see, to this effect, Case C-249/11 *Byankov* [2012] ECR, para. 53). In accordance with Article 31(3), the redress procedures must include an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based.

In order that the person concerned may make effective use of the redress procedures thereby established by the Member States, the competent national authority is required, as is laid down as a principle by Article 30(2) of Directive 2004/38, to inform him in the administrative procedure precisely and in full of the public policy, public security, or public health grounds on which the decision in question is based (ZZ, paras. 38-41).

The UK evidential procedures involving State security establish that the first appeal before SIAC is divided into two hearings: one public and one closed. Only special advocates (security cleared lawyers in special administrative procedures) can represent the individual during the closed hearings. These advocates can make submissions at the hearings, adduce evidence, cross-examine witnesses, and make written submissions. The individual cannot participate in the closed hearing and is not informed of the evidence, nor the arguments that are advanced at it. From the point at

which the special advocate first had sight of the closed material, he was not permitted to have any further contact with the applicant and his representatives, save with the permission of SIAC. In respect of each appeal against certification, SIAC can issue both an open and a closed judgment.<sup>190</sup>

### Reasoning of the Court of Justice

The intervening Governments argued that in light of Article 346(1)(a) TFEU, State security remains the sole responsibility of the Member States. Therefore, the area is one governed by national law and does not fall within EU competence. The CJEU clarified that *“although it is for Member States to take the appropriate measures to ensure their internal and external security, the mere fact that a decision concerns State security cannot result in European Union law being inapplicable”* (para. 38).

The CJEU commenced its reasoning by first summarising the requirements of Article 47 EU Charter for judicial review:

*[...] if the judicial review guaranteed by Article 47 of the Charter is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and in order to put the latter fully in a position in which it may carry out the review of the lawfulness of the national decision in question.* (para. 53)

It then provided a definition of the adversarial principle, which forms part of the rights of defence, and thus also of Article 47 EU Charter: *“the parties to a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them.”* (para. 54)

Therefore, if *“a judicial decision were founded on facts and documents which the parties themselves, or one of them, have not had an opportunity to examine and on which they have therefore been unable to state their views”*, the fundamental right to an effective legal remedy would be infringed (para. 56).

The CJEU continued by recognising that the rights of defence, including the adversarial principle, are not absolute rights. Therefore in exceptional circumstances, such as the interests of State security, these rights can be limited. However, such limitations need to take into account the sensitiveness of the balancing between, *“on the one hand, legitimate State security considerations regarding the nature and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person’s procedural rights, such as the right to be heard and the adversarial principle”* (para. 57).

Member States are required, first, to provide for effective judicial review both of the reasons invoked by the national authority with regard to State security and of the legality of the decision

---

<sup>190</sup> A detailed summary of the UK legislation and procedure is provided in *A and others v UK*, Application no. 3455/05, Judgment of 19 February 2009.

taken under Article 27 of Directive 2004/38 and, second, to prescribe techniques and rules relating to that review.

### *Impact on the follow-up case*

In the follow-up case, the **Court of Appeal** held that the appellant had not been given the minimum level of disclosure required by EU law (as interpreted by the CJEU). It remitted the case to the Special Immigration Asylum Commission for a new assessment in light of the CJEU decision in ZZ. Following the reasoning of the CJEU and in the related AG's Opinion, the **UK Court of Appeal** required that an appropriate balance be struck between national security interests and individual rights. It also invited the Special Immigration Asylum Commission to take into consideration the impact that non-disclosure may have on the appellant.

While the UK **Court of Appeal** followed the judgment of the CJEU closely, the UK **High Court** in a case, decided one year later, on refusal of general travel permit and then specific travel permit to a refugee, decided the CJEU's general principles stemming from the rights of defence developed in ZZ should be strictly limited in the case of refusal of general or specific travel permits of refugees. The main reasons behind the High Court's approach was based on the status of the individual, who was a refugee and not a EU citizen. It should be recalled that the procedural guarantees of Article 47 EU Charter do not differ depending on the legal status of individual, but they are equally recognised to all individuals falling under the jurisdiction of the EU and Member States acting within the scope of EU law.

### *Question 1.b –Implementation of the CJEU preliminary ruling*

The ZZ preliminary ruling is a landmark case on the scope of disclosure of evidence in national security cases and can serve as reference judgment in cases of non-disclosure of evidence based on national security leading to negative consequences for third country nationals, asylum seekers, or irregular migrants. However, the question whether the general principles developed by the CJEU apply also in other cases than restrictions to free movement of EU citizens, in particular in cases involving third country nationals, was not addressed by the CJEU. National courts seem to have developed a different approach on this issue (see below the *R(AZ)* judgment of the **UK High Court**, and judgment in the **Court of first instance of Hague**). While the **Dutch courts** apply the CJEU's principles on the application of Article 47 EU Charter, as developed in ZZ, equally to EU citizens and third country nationals of different legal status, the **UK High Court** differentiates between EU citizens and refugees and asylum seekers, endorsing a stricter application of the ZZ judgments in the case of R(AZ). It should be mentioned here that although the Charter recognises certain rights only for EU citizens (most of those in Title V), Article 47 is part of Title VI of the Charter, which provides for rights that are universal, intended to protect every person falling under the jurisdiction of the EU and its Member States.<sup>191</sup>

The fact that similar procedural guarantees regarding the protection of rights of defence have been upheld by the CJEU in both EU citizenship and targeted sanction cases involving third country nationals and EU citizens seems to suggest that they are applicable to all individuals, regardless of

---

<sup>191</sup> See explanations of the Charter.

their legal status of EU citizens or third country nationals (see the section on the overview of CJEU jurisprudence).

Another interesting aspect of the judgment of the UK High Court is that, unlike in ZZ where the **Court of Appeal** invoked Article 47 EU Charter, and the CJEU developed its judgment around the right to an effective remedy and rights of defence, in R(AZ), the **UK High Court** reasoning turned on Article 41 EU Charter, the right to good administration, as we discuss below.

1. High Court of England and Wales, R (AZ) v Secretary of State for the Home Department<sup>192</sup> - limited application of the ZZ preliminary ruling

*Facts of the case*

AZ, a Syrian national, was granted refugee status in the United Kingdom. He was subsequently refused a travel document. No particular reasons were given to him for this. He was later furnished with brief reasons indicating that the Secretary of State for the Home Department (SSHD) considered him to be involved in radical Islam and believed that he wished to return to Syria to engage in combat. Mr AZ was invited to make submissions regarding these claims and for his application to be reconsidered. He did so and it was again refused. He was granted a limited travel permit to visit Sweden to visit his ill father. His father however died on the day the permit was issued. He then applied for a permit to visit Jordan to attend his father's funeral. This was refused. He made an application for judicial review of the refusal to grant him a travel permit and advanced two grounds:

- 1) that he should be informed of the concerns of the SSHD prior to the making of a decision to refuse him a permit;
- 2) that he should be informed of more detailed reasons and evidence for a refusal.

*Reasoning of the UK High Court*

The Court commenced its reasoning by discussing the requirements of Article 41 EU Charter. The High Court first established that the requirements of good administration are applicable to the Member States on the basis of the general principle of EU law and not on the basis of Article 41 EU Charter which applies only to the EU institutions. On the basis of the CJEU preliminary rulings in Case C-604/12 *HN v Minister for Justice, Equality and Law Reform* and Case C-277/11 *MM v Minister for Justice, Equality and Law Reform*, Nicol J noted that the general principle of EU law of good administration is applicable to the Member States when acting within the scope of EU law, in particular in asylum decisions.

In interpreting the requirements of Article 41 EU Charter with respect to procedural justice, the Court relied on English precedents relating to fair procedures. This was justified, according to the High Court, by relying on Article 52(4) EU Charter stating that “*in so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the member states, those rights shall be interpreted in harmony with those traditions.*”

---

<sup>192</sup> S. Coutts, ACTIONES Case note, High Court of England and Wales, *R (AZ) v Secretary of State for the Home Department* [2015] EWHC 3695, Judicial Review, 18 December 2015, [2016] 4 WLR 12.



As to the content of the principle of good administration, the High Court found that the obligation to provide reasons is an integral part of the principle. However, in light of the *M.M (I)* preliminary ruling, this obligation did not give rise to an absolute right to be informed of all the concerns of a decision maker prior to the adoption of the decision, in particular in asylum claims.

The High Court found that the SSHD's invitation to Mr AZ to make submissions and reconsideration of his application for a travel document fulfilled the State's obligations flowing from the principle of good administration.

In relation to the second claim, the High Court noted that the right to be informed of the basis of a decision could be restricted on the grounds of national security. The right to be informed varied depending on the right involved and the legal context. The court distinguished the case of ZZ on the grounds that the rights involved were of a different nature (Union citizenship rights to free movement versus rights of refugees *in casu*) and the legal context was different (a specific obligation to provide reasons is contained in Directive 2004/38/EC). The court also relied on Case C-373/13 *HT v Land Baden-Wurtemberg* to find that different thresholds applied when differing rights were at stake. In doing so, the court explicitly adopted a teleological rather than literal interpretative approach (i.e. the term 'compelling reasons' was constructed as a lower threshold than 'serious reasons', given the nature of the right involved). The court noted that the refusal of a travel permit does not have as serious consequences for the applicant than, say a decision, to refuse a residence permit or the *refoulement* of a refugee, such as the case of *HT*: "*since the consequences of refusal of a travel document will also be less serious than refoulement, the circumstances in which that will be permitted will likewise be wider*".

Despite a request from the applicant, the High Court refused to address a preliminary reference to the CJEU, considering the issue to be sufficiently clear / 'acte clair'. In doing so it stated that "[t]he previous authorities from the CJEU itself and the UK courts enable me to reach a clear conclusion that this is not one of those cases where either of the applicant's procedural grounds succeeds" (para. 61), while noting (in para. 62) that in interpreting EU law special care should be taken and special considerations apply.

## 2. Court of first instance of The Hague, branch Zwolle, Judgment of 27 January 2015<sup>193</sup> - general application of the ZZ preliminary ruling

### *Facts of the case*

An Iranian national's refugee status was revoked and an entry ban for 20 years was issued against him on the basis of an investigation carried out by the Dutch intelligence agency. The evidence gathered showed that he had been an agent of an Iranian intelligence agency, and that he had continued to work for that agency during his residency in the Netherlands. The research by the Dutch intelligence agency had resulted in an individual report on the applicant, on the basis of which the decision to revoke his refugee status was taken. The report stated that the applicant was to be regarded as a danger to national security. The underlying documents and sources of the individual report were not disclosed to the applicant, but they were reviewed by the court.

---

<sup>193</sup> *Katy van Boven-Hartogh*, Court of first instance of The Hague, 14/4276, first instance, Judgment of 27 January 2015, case summarised for the ACTIONES Project.

*The Court of first instance of Hague* had to decide whether the Dutch authorities were allowed to base the decision taken against the applicant on this ‘secret’ information, which was not disclosed to the applicant. Another chamber of the same court previously decided that “*the limited disclosure of the documents underlying the individual report to the applicant was justified, to protect the sources, methods and techniques of the conducted research amongst other reasons. According to that chamber, the interests of state security outweighed those of the applicant.*”

#### *Reasoning of the Court*

The court explicitly referred to and cited the judgment of the CJEU in *ZZ*, and held that its judgment could only be based on facts and documents that had not been disclosed to the applicant insofar as this was absolutely necessary for reasons of state security. It held that the applicant would always have the right to be informed of the essence of the grounds on which the decision against him was based, taking into account the necessary confidentiality of the evidence.

The court ruled that the national procedure, consisting of two judgments – one on the limited disclosure of the documents and one on the decision taken against the applicant – satisfied the requirement of the CJEU concerning an effective judicial remedy. The court further held that, in conformity with the judgment in *ZZ*., the essence of the grounds for the decision had been disclosed to the applicant in the individual report in the form of concrete facts, such that it was clear to him why the Dutch authorities considered him to be a danger to national security. Article 47 EU Charter had therefore not been violated.

#### *Judicial dialogue*

Although not the referring court in the landmark case *ZZ*, the Dutch court of first instance of Hague carried out a careful judicial review of the administrative decision, which had revoked the refugee status, in order to ascertain that it was in conformity with the principles developed by the CJEU in *ZZ*. In line with the Charter and the CJEU case law, the Court applied *ZZ* to a case concerning a refugee, and thereby recognised the case’s general applicability to all individuals, irrespective of their legal status. This was in contrast with the judgment of the UK High Court, which seemed to find a more limited application of the *ZZ* preliminary ruling regarding the scope of application of the Article 47 EU Charter requirements.

### **Question 2 – Is the special procedure of nominating security cleared advocates in national security cases in conformity with Article 47 EU Charter and Article 6 ECHR?**

To counter-balance the limitation on the rights of defence, national legislators in many Member States have permitted applicant’s indirect access to evidence through security-cleared lawyers. These lawyers generally have access to the secret evidence and are able to plead on behalf of the third country national concerned, albeit not to discuss the evidence with him/her. In certain cases, the special advocate procedure does not prove effective, for example, where the domestic procedure for the authorisation of the lawyers takes such a long time that they may sometimes are not cleared in time for the emergency procedure in question. In the UK a panel of special advocates is created who are nominated by the State to appear in all national security cases on behalf of applicants, with full access to the secret evidence, whereas in other Member States (e.g. Romania) the advocates are not nominated automatically by the authorities, and thus the legal representative chosen by the individual, if he is not already on the list of special advocates, will have to pass the special security clearance procedure, which lasts longer than the duration of the administrative and court

proceedings. The *A.M.N.* case (**Romanian Supreme Court**) discussed below illustrates that, when national courts refuse to deal with issues concerning legislative incoherence in order to recognise remedies to fundamental rights violations by the legislator, third country nationals concerned must resort to the ECtHR for an effective remedy. The Romanian case is also interesting from the perspective of the total absence of any consideration of the application of Article 47 EU Charter and its requirements, as developed by the CJEU.

*Security clearance procedure for lawyers and its compatibility with Articles 6 and 13 ECHR - Romanian case (Appl. 5473/2/2012 pending before the ECtHR)*<sup>194</sup>

Compatibility of the special advocate procedure and the judicial practice which refuses to reconcile the internal legislative inconsistency between the long procedure of appointing the special advocate and the very short emergency procedure in light of the right to an effective remedy. In the absence of impact of ZZ at the national level is the ECtHR a better forum?

*Facts of the case*

A.M.N., a Pakistani citizen, entered Romania with a study visa of 90 days, which expired in February 2011. One month later, the Romanian Office for Immigration (ROI) encountered A.M.N. as an illegal resident and issued a decision ordering him to leave the territory of Romania in 15 days. Two days later he lodged an asylum application on grounds of having been subject to persecution in Pakistan. His asylum application was rejected by both ROI and first instance court. While the asylum proceedings were ongoing, he married a Romanian citizen and consequently requested a residence permit in Romania as family member of a Romanian citizen. Before the interview at the ROI, the Romanian Intelligence Service (RIS) requested the Court of Appeal of Bucharest (CAB) to declare him undesirable in Romania and to issue an entry ban of 10 years, in light of evidence indicating A.M.N. may have been involved in activities that may constitute a threat to national security. The RIS also requested his placement in custody / detention until his removal.<sup>195</sup>

The evidence submitted by RIS was classified as 'top secret' and was made available only to the CAB. The case was subjected to an emergency procedure. A.M.N. was served a summons to present himself before the CAB on 8 July 2011, with the hearing set for the next day. He argued before the CAB that he was not informed of the object of the proceedings. A Nepalese interpreter was present, despite the fact that he spoke only Urdu and a little English. The defendant asked for a postponement in order to hire an attorney and to read the indictment, which had not been communicated to him by the RIS. The Court approved only two hours of delay, because of the specific emergency procedure which governs this type of trial. Without taking advantage of the two hour delay he had been granted, the defendant deposited before the Court proof of his request of asylum and proof that he had also requested a right of residence as a family member of a Romanian citizen; he stated that his return in Pakistan would put his life in danger. The CAB approved the

<sup>194</sup> Case submitted by lawyer Diana Andrasoni, [ACTIONES Case note](#), Romanian High Court of Cassation and Justice, File No. 5473/2/2012, ECHR application no 19943/13, available in the [ACTIONES Database](#).

<sup>195</sup> The request was founded on Article 3, letter I and I of the Law No. 51/1991 regarding National Security and Article 44 of Law 535/2004 regarding prevention of and fight against terrorism and Article 85 of Emergency Ordinance no. 194/2002 regarding the legal regime of foreigners in Romania.

request of the RIS, declaring the defendant's presence in the State to be undesirable. It made an order prohibiting him from entering Romania and the EU for a period of 10 years, including a stipulation that his period in custody does not exceed 18 months. The reasoning of the CAB included only the following statement as regards access to evidence: "*Examining the information provided by the RIS classified as state secrete, level 'Top Secret', the Court finds that there is sufficient proof that the foreign citizen engaged in activities that are likely to endanger national security.*"

The CAB held that it did not make a difference whether he was an asylum-seeker or a family member of an EU citizen, since involvement in terrorist activities can lead in both circumstances to the person being declared undesirable. As to the limitation to the right to family life, the CAB held that it was necessary in light of the objective of ensuring national security, and found that the interference with the right was proportionate. Two weeks later A.M.S. was returned to Pakistan.

The day following his expulsion, a lawyer lodged an appeal on his behalf against the judgment of the CAB before the **High Court of Cassation and Justice** requesting the annulment of the measure declaring him undesirable and reduction of the entry ban. In support of his appeal, the lawyer argued that: (1) since he had less than one day to prepare his defence, he was thus placed in a situation where it was impossible to defend himself; (2) the translator present during the court proceedings did not speak his mother tongue, Urdu, but only English and Nepalese; (3) in the very short postponement given, he could not hire an attorney who could have a special permit and access the 'top secret' documents. Only an attorney with special permit could access those documents, and they need to undergo an approval procedure that lasts at least 60 days before obtaining the permit; therefore, the defendant could not access the papers that was held as evidence against him, making the judicial procedure a mere *pro forma* trial.

It was argued that A.M.S. had not been involved in terrorist activities, and had never been convicted of actions similar to terrorism in Romania. It was submitted that he was living with his spouse and had made several inquiries for obtaining the right of residence, one of them a pending case. By a definitive decision, the **High Court of Cassation and Justice** dismissed the applicant's appeal. It held that the CAB had correctly examined the aspects related to national security and the measures ordered were justified by the acts attributed to the applicant. Following the final decision of the High Court of Cassation and Justice, the lawyers of A.M.N lodged a complaint before the **European Court of Human Rights** (Case No. 19943/13), for violations of Articles 5(1)(f), 4 and 8 ECHR.

#### *Complaint before the ECtHR*

A.M.N. complained that his deprivation of liberty was in accordance with a text that does not meet the requirements of 'law' within the meaning of the Convention. In particular, he submitted that the domestic law was unpredictable and did not offer him the minimum level of protection against arbitrariness.

The domestic legal framework appears to be incoherent, since according to the Government Decree No. 585/2002 regarding the protection of classified documents, obtaining a permit of access to classified data requires a procedure lasting minimum 60 days while Governmental Emergency Ordinance No. 194/2002 provides that the procedure of declaring somebody *persona non grata* is an emergency procedure which is much faster. This legal contradiction could lead to a violation of the right to asylum, fair trial, the right to respect for private and family life; and it creates a

discrimination between the litigants of a normal trial and a trial involving classified information; the latter have no objective possibility to defend themselves or to have a fair trial.

Relying on Article 5(4) ECHR, the applicant complained that domestic law did not provide a remedy to effectively challenge his placement in detention, nor the administrative decision and judgment declaring him an undesirable person. He stated that the procedure before the CAB was unfair because of the confidentiality of the information used as evidence against him, whereby no facts or information were presented to him. He submitted that access to information classified as "secret" is not permitted to foreign citizens and access to counsel who has access to these documents only permitted by a decision of the court of appeal in this regard. Accordingly, he found himself unable to challenge the facts and the authenticity of the evidence against him.

Relying on Article 8 ECHR, he complained that its supervision by the RIS and the collection and storage of information constitute unlawful interference with his right to respect for his private life. In this regard, he indicated that the internal law does not describe the circumstances in which the RIS can monitor people and gather information about them and no limit is fixed in time as to the storage of the information collected and duration of retention. Furthermore, in the present case, the RIS's decision to monitor the complainant was not subject to any controls.

Lastly, the applicant argued that the expulsion order and entry ban infringed his right to respect for private and family life guaranteed by Article 8 ECHR. He stated that the interference with his right to respect for family life was disproportionate and arbitrary since the charges that justified the contested measures were never communicated to him. The case is now pending before the ECtHR.

#### *Standards to be considered*

In *A and others v UK*, the ECtHR held that for the special advocate procedure to be considered an effective technique to compensate for the interference with fair procedure rights, the special advocate must be able to perform the function of a legal representative in a useful way. This is only possible if the applicant is provided with sufficiently specific information about the allegations against him in order to give effective instructions to the special advocate. Furthermore, according to the UK legislation, special advocates are nominated *ex officio* in all national security cases which secures the individual the benefit of legal representation. Furthermore, other strategies designed to mitigate the unfairness of secret proceedings, such as non-confidential summaries, should generally be provided to the third country national during the administrative phase. An infringement of the right to be heard and the duty to state reasons at the administrative stage cannot be compensated during the appeal phase (see the *Aalborg Portland v Commission* C- 204/00, and similarly the approach of the *Supreme Administrative Court of Lithuania* discussed in the following section).

### **Question 3 – What is the meaning of ‘essential grounds’ to be disclosed in national security cases?**

This Question includes two cases, reflecting two approaches on the interpretation of the ‘essential grounds’ concept mentioned by the CJEU in the *ZZ* case: (i) the **Polish Supreme Administrative Court**, which rejected to request for a preliminary reference to be sent to the CJEU; and (ii) the **Lithuanian Supreme Administrative Court**, which made extensive use of the principle of consistent interpretation.

### 3.1 Refusal to address preliminary ruling that could clarify the ZZ requirements – Polish Supreme Administrative Court<sup>196</sup>

Relevant legal sources

#### **EU level**

Articles 47 and 51(1) EU Charter

Return Directive- Directive 2008/115/EC of 16 December 2008, Articles 12 and 13

#### **National legal sources (Poland)**

Articles 31(3), 45(1) and 78 of the Constitution of the Republic of Poland, Article 88(1)5 of the 2003 Law on foreigners, Articles 5(2) and 8 of the Law on protection of classified information

#### *Facts of the case*

A third country national with a permanent residence permit in Poland, was issued a return decision on the basis of classified information. The proceedings were initiated by the Internal Security Agency. The foreigner submitted a request to access the files both in the first instance and the second instance proceedings. He was refused access to any factual information that was used in support of the return decision in the administrative proceedings and was eventually removed from the country. His legal representative brought a claim before the **Voivodeship Administrative Court in Warsaw** and, later, before the **Supreme Administrative Court** arguing that refusing him access to classified information made it impossible to actively participate in the return proceedings, to present arguments against return and thus to effectively challenge the decision on return. It was argued that this entailed a violation of Article 1(1), Protocol 7 ECHR, and of Article 13(1) of the Return Directive as read with Article 47 EU Charter. In the complaint, the legal representative requested an interpretation of the relevant provisions of the Law on foreigners in the light of the Constitution by the **Constitutional Tribunal** and requested the Court to address preliminary questions to the CJEU for the purpose of clarifying whether limiting access to files is consistent with the right to effective remedy before a court. The preliminary questions thus aimed to seek clarification on the appropriate interpretation of Article 13(1) of the Return Directive in light of Article 47 EU Charter in cases where national security is at issue. Both the **Voivodeship Administrative Court in Warsaw** and the **Supreme Administrative Court** dismissed the complaints and also refused the request for a preliminary reference to be addressed to the CJEU.

#### *Reasoning of the Polish Supreme Administrative Court*

The Supreme Administrative Court observed that, contrary to what was claimed by the applicant, Article 1(1) of Protocol 7 did not give a basis for the third country national to be informed of the motives of the return order where reasons of security and public order are at stake, even after removal was enforced. The court considered that the national legislation provided sufficient guarantees for the rights of defence. This was because the court, as well as the administrative authorities, had access to the motives and evidence behind the decision and the court had a possibility to verify them in the context of the legal conditions in return proceedings. Their assessment was held to be binding and sufficient. Assessment of the authorities was subject to the

---

<sup>196</sup> Ruling of the Supreme Administrative Court from 9 September 2016 II OSK 61/15; ReJus template drafted by Karolina Rusiłowicz, lawyer, Helsinki Committee, Poland.

control of legality in administrative court proceedings, so there was a judicial review of the administrative decisions.

The Supreme Administrative Court identified as applicable the procedural guarantee of the right to access a court. This covers the possibility for the affected person to access case files as well as the possibility to be informed of the motives behind the decision and to formulate arguments against them. It stated that when the need to protect national security arises, the rights of the affected party in the proceedings are limited. In these circumstances, the party cannot be informed of the motives of the decisions and has to rely on the fair judgement of the State authority. If the authorities, within their competence, have decided that the classified data contains valuable, credible, and justifiable information that confirmed that the third country national concerned is a threat to the security of state and public order, then the above limitations are considered legitimate. The Supreme Administrative Court assessed the classified data in detail and in order to be absolutely sure of its conclusion, and requested the Internal Security Agency to provide additional information, which in the opinion of the Court confirmed the validity of the administrative decision.

With regard to the request of the legal representative for the third country national that the court submit a request for a preliminary ruling to the CJEU, the Supreme Administrative Court did not find it necessary to do so. It found that Article 12(1)2 of the Return Directive, which allows for the non-disclosure of certain facts of the return decision for reasons of national security, is a specific law applicable in return cases and, to that extent, it excludes the general safeguards envisaged in Article 47 EU Charter.

The Court stressed that the national law on protection of classified information envisaged the same limitation on the affected rights such that it was not necessary to rely on the EU law. To this extent the Court found not necessary to submit a request for a preliminary ruling to CJEU.

Both the first and second instance administrative courts rejected the complaints; however, neither of them referred to the ZZ preliminary ruling. Another case on sanctions against terrorist was cited. The RAC invoked the CJEU judgment in *Yassin Abdullah Kadi and Al Barakaat International Foundation*. (C-584/10 P, ECLI:EU:C:2013:518)

### *Standards to be remembered*

As regards the meaning of ‘essential grounds’ in national security cases involving non-EU citizens, the CJEU has not fully clarified its content. Examples of what ‘essential grounds’ could mean have been provided by the CJEU in *Kadi II*, which is a case on EU sanctions. Details of links to terrorist activists, time and location of a contested behaviour seem to be considered by the CJEU to be ‘essential grounds’ (see paras 141ff, also cited in the section on Overview of CJEU jurisprudence).

### *Obligation to refer preliminary rulings*<sup>197</sup>

Every national court or tribunal against whose decisions there are no judicial remedies under national law is obliged, as a court of last instance, to refer a question of EU law to the CJEU if it is relevant to the outcome of a pending case (Article 267(3) TFEU).<sup>198</sup> Additionally, if at issue is the validity of the EU law itself, all national courts, whether of first or last instance, are obliged to send a preliminary reference to the CJEU (Art. 267(3) TFEU).

---

<sup>197</sup> This sub-section is based on the ACTIONES General Module on Judicial Interaction Techniques.

<sup>198</sup> See Case C 99/00 *Lyckeskog*, paras. 14 et seq., Case C-210/06 *Cartesio*, ECLI:EU:C:2008:723, paras. 75 to 79.

Exhaustive exceptions to the obligation to refer were established by the *Cilfit and Others case*.<sup>199</sup> Namely, if “*the question raised is irrelevant (irrelevance) or that the provision of EU law concerned has already been interpreted by the Court (act éclairé) or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt (acte clair)*”. In order to determine whether an issue of EU law has already been sufficiently clarified or is sufficiently clear for national courts from the EU countries, the CJEU suggested that it should be considered whether there are “*conflicting lines of case-law at national level*” regarding the contested EU law concept/issue and also to assess whether this concept “*frequently gives rise to difficulties of interpretation in the various Member States*”. If these circumstances exist, then “*a national court or tribunal against whose decisions there is no judicial remedy under national law must comply with its obligation to make a reference to the Court, in order to avert the risk of an incorrect interpretation of EU law*”.<sup>200</sup>

### *Consequences of non-referral of preliminary questions*

Violating the duty to refer preliminary questions (Art. 267(3) TFEU - *last resort court* or 267(1) TFEU – *question regarding the validity of EU law*) may give rise to the liability of the Member State concerned to pay damages to individual plaintiffs on account of the national courts judgment (*Köbler*).<sup>201</sup> In *Traghetti Mediterraneo*<sup>202</sup>, the CJEU found that national legislation generally excluding liability of a Member State for damage caused to individuals by infringement of Union law committed by a national court to be contrary to EU law. While in *Ferreira da Silva*, the CJEU found that the **Supreme Tribunal of Portugal** had infringed its obligation to refer under Art. 267(3) TFEU due to their refusal to refer preliminary questions in a case concerning the interpretation of the concept of a ‘transfer of a business’ within the meaning of Article 1(1) of Directive 2001/23. Even if the refusal to refer was reasoned, the CJEU held in *Ferreira da Silva* that the **Supreme Tribunal of Portugal** erred in considering the interpretation of “transfer of a business” concept to be a clear / settled issue of EU law, since there were “*conflicting decisions of lower courts or tribunals regarding the interpretation of the concept*” and that “*concept frequently gave rise to difficulties of interpretation in the various Member States.*” (para. 45)

The ECtHR has also held that in certain circumstances the refusal to refer preliminary questions may entail a violation of the right to a fair trial. The ECtHR held that an unreasoned refusal to raise the preliminary question under Art. 267(3) amounts to a breach of Art. 6 ECHR.<sup>203</sup>

### **Consequences of non-referral – Member State’s non-contractual liability for damages:**<sup>204</sup>

#### 1. CJEU

*Köbler*: a non-referral can lead to the Member State being held liable according to the principle of state liability;

*Ferreira da Silva*: national procedural provisions which limit the possibility of an individual to claim damages following the unfounded refusal to refer preliminary questions of a court of last resort should be set aside (in casu *the Portuguese procedural law made the action for*

<sup>199</sup> Case C-283/81, EU:C:1982:335.

<sup>200</sup> Case C-160/14, *João Filipe Ferreira da Silva e Brito and Others v Estado português*, ECLI:EU:C:2015:565.

<sup>201</sup> Case C-224/01, *Köbler*, EU:C:2003:513.

<sup>202</sup> Case C-173/03, *Traghetti Mediterraneo*, ECLI:EU:C:2006:391.

<sup>203</sup> ECtHR: *Dhahbi v Italy*, App. No. 17120/09, op. cit.

<sup>204</sup> Extract from the *ACTIONES Module*, ibid.



*damages against the State for infringement of the obligation stemming from the failure to comply with the duty imposed by Art. 267(3) TFEU dependent on the prior setting aside, by the court or tribunal having jurisdiction, of the decision that caused the loss or damage*)<sup>205</sup>

2. *ECtHR – violation of Article 6 ECHR (access to a court)*

*Ullens de Schooten v. Belgium* – arbitrary refusal amounts to violation of Art. 6 ECHR

*Dhabi v Italy*: unreasoned refusal to address preliminary questions under Art. 267(3) amounts to a breach of Art. 6 ECHR (App. No. 17120/09)

According to the ECtHR, national courts have “*to state the reasons why they consider the question to be irrelevant or that the relevant EU law has already been interpreted by the CJEU or correct application of EU law is so obvious as to leave no scope for any reasonable doubt.*” (para.31)

*Schipani v Italy* (2015): same court as in *Dhabi* (**Italian Court of Cassation**) – had considered the arguments of EU law, but it omitted all references to whether the issue was an *acte clair* (Appl. No. 38369/09)

What is an effective remedy against a refusal to send a preliminary reference under the ECHR system?

(*Schipani v Italy*): CJEU in *Köbler* stated liability is not part of domestic remedies that need to be exhausted, as it was held to not be effective in that case.

### 3.2 Lithuanian Supreme Administrative Court reviewing in line with CJEU

The **Lithuanian Supreme Administrative Court** has a consistent practice of aligning its judicial review of administrative and judicial decisions in the field of migration to the CJEU’s principles and standards developed on the principle of good administration and right to an effective remedy. Moreover, regarding remedies for the violations of the rights of defence, its approach is more favourable to the protection of fundamental rights and respect for constitutional principles than that of the CJEU, due to the Supreme Administrative Court acting to ensure respect of both ECtHR and CJEU guidelines.<sup>206</sup> In cases on national security, much as the CJEU had done in the *ZZ* case, the Supreme Administrative Court concluded that it is not possible to base a refusal to give factual reasons to an applicant on the secrecy of the evidential materials alone.<sup>207</sup>

In case No. A662- 1575/2013, judgment of 21 January 2013, the Court emphasised that a decision cannot be based only on the information which constitutes a state or official secret, i.e. classified information. In cases where the only evidence used to substantiate the case is data held to be a state secret, and which has not been declassified, the Supreme Administrative Court held that it risks

<sup>205</sup> Furthermore, the CJEU stated that “a principle as fundamental as that of State liability for infringement of EU law cannot be justified either by the principle of *res judicata* or by the principle of legal certainty.”(para 59)

<sup>206</sup> For more details, see Dr. Jur. Irmantas Jarukaitis, Vice-president of the Supreme Administrative Court of Lithuania; Agnė Kalinauskaitė, LL. M., Legal Consultant of the Legal Analysis and Information Department of the Supreme Administrative Court of Lithuania, Suspensive Effect of Appeals before Administrative Courts of the Republic of Lithuania in Removal Cases, REDIAL blog commentary.

<sup>207</sup> Case provided by Irmantas Jarukaitis, Vice-president of the Supreme Administrative Court of Lithuania; judge at the Lithuanian Supreme Administrative Court for the REDIAL Project.

violating the right to a fair hearing provided by Article 6 ECHR. The Court held that a correct balance should be ensured between private interests of an individual and the public interest in accordance with the criteria established by the Constitutional Court, the CJEU and the judicial institutions of the European Union.

## 4.2. Guidelines for judges emerging from the analysis

Article 47 EU Charter is EU primary law which takes precedence over EU secondary legislation (e.g. Recast APD, Return Directive). Therefore, the provisions of the EU secondary instruments, such as Directives, have to be interpreted and applied in conformity with Article 47 EU Charter.<sup>208</sup> The national security cases also demonstrate the importance of Article 19(2) EU Charter<sup>209</sup>, the principle of *non-refoulement*, which admits no derogation due to its absolute legal nature.<sup>210</sup>

Article 47 EU Charter applies also irrespective of the degree of procedural autonomy recognised to the Member States, when the latter are derogating from EU provisions (see the CJEU when assessing the admissibility of the preliminary ruling in the ZZ case).<sup>211</sup>

### **General conclusions developed by the CJEU on limitations to the right to an effective remedy on the basis of national security concerns:**

1. Member States, even when acting within an area where they retain powers, such as State security, have to comply with Article 47 EU Charter, since they are derogating from EU law (*in casu* the EU Citizenship Directive).
2. Non-disclosure is justified only when ‘strictly necessary’ and only ‘in exceptional circumstances’ (ZZ, paras. 57 and 69).
3. Individuals must have the option to challenge both the validity of the reasons given by the public authorities and the validity of the decision based on the reasons related to national security (ZZ, para. 60).
4. The national court must have the right to review both the reasons for non-disclosure of evidence and the full decision of the public authorities. The CJEU rejected an argument that there be full discretion given to the administration over State security matters (ZZ, para. 62).
5. The public authorities need to prove that State security would in fact be compromised by full disclosure of the evidence to the person concerned.

---

<sup>208</sup> On the general obligation to interpret the provisions of EU secondary instruments in conformity with the Charter, see Cases C293/12 and C594/12, *Digital Rights Ireland*, ECLI:EU:C:2014:238.

<sup>209</sup> Article 19(2) EU Charter contains a prohibition to remove, expel or extradite any person 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 19(2) EU Charter corresponds to Article 3 ECHR, and so must be interpreted similarly according to Article 52(3) EU Charter.

<sup>210</sup> On the absolute legal nature of Article 19(2) EU Charter has been affirmed by the CJEU in *Abdida*, para. 46, see the chapter on the right to an effective remedy and suspensive effect of appeal.

<sup>211</sup> For a general application of this interpretation of Article 47 EU Charter requirements outside the field of asylum and immigration, see M. Safjan, A Union of Effective Judicial Protection: Addressing a multi-level challenge through the lens of Article 47 EU Charter, King’s College London, February 2014, and by the same author, Fields of application of the Charter of Fundamental Rights and constitutional dialogues in the European Union, EUI Centre for Judicial Cooperation.

6. The national court must have the option to request the full disclosure of the grounds on which the contested decision was taken to the person concerned, if it finds the limitations on disclosure are not justified or proportionate. If that authority does not authorise their disclosure, the court must proceed to examine the legality of such a decision on the basis of solely the grounds and evidence which have been disclosed to the individual (ZZ, para. 63).

7. The CJEU held that in the ZZ case:

*in the light of the need to comply with Article 47 of the Charter, that procedure must ensure, to the greatest possible extent, that the adversarial principle is complied with, in order to enable the person concerned to contest the grounds on which the decision in question is based and to make submissions on the evidence relating to the decision and, therefore, to put forward an effective defence. In particular, the person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry taken under Article 27 of Directive 2004/38 is based, as the necessary protection of State security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress as provided for in Article 31 of that directive ineffective.*

8. The CJEU unequivocally held that it is the duty of national court:

*to ensure that the person concerned is informed of the essence of the grounds which constitute the basis of the decision in question in a manner which takes due account of the necessary confidentiality of the evidence and, second, to draw, pursuant to national law, the appropriate conclusions from any failure to comply with that obligation to inform him. (para. 68)*

9. Implementation of the ZZ preliminary ruling by the referring court: The **Court of Appeal** held that the appellant had not been given the minimum level of disclosure required by EU law (as interpreted by the CJEU). It remitted the case to the Special Immigration Asylum Commission for a new assessment in light of the CJEU decision in ZZ. Following the words of the CJEU and the AG, the **UK Court of Appeal** required that an appropriate balance between national security interests and individual rights had to be struck. It also invited the Special Immigration Asylum Commission to take into consideration the impact of non-disclosure may have on the appellant.

### **General conclusions regarding the impact of the ZZ preliminary rulings on the personal scope of application of the principles developed by the CJEU under Article 47 EU Charter**

1. The ZZ preliminary ruling can be categorised as one of the principles that can have cross-border application (outside the territory of the Member States) as well as cross-sectorial application (e.g. in fields other than EU citizenship, such as asylum, migration, and immigration).
2. Given that the principles developed by the CJEU concern the requirements imposed by Article 47 EU Charter on the disclosure of evidence, the CJEU standards should be applied to all individuals within the territorial jurisdiction of the EU, irrespective of their legal status. Although the Charter recognises certain rights only to EU citizens (most of those in Title V), Article 47 is part of Title VI of the Charter, which provides for rights that are universal, meant to protect every person falling under the jurisdiction of the EU and its Member States.
3. The **Court of first instance of Hague** applied the requirements developed by the CJEU in

ZZ, on the application of Article 47 EU Charter, to a refugee whose status had been revoked by the administration. The Court held that its judgment could only be based on facts and documents that had not been disclosed to the applicant insofar as this was absolutely necessary for reasons of state security, and that the applicant would always have the right to be informed of the essence of the grounds on which the decision against him was based, taking into account the necessary confidentiality of the evidence.

4. The **UK High Court** seems to endorse a more nuanced, stricter application of the ZZ preliminary ruling, differentiating between the effects of the challenged administrative decision (*in casu* expulsion versus refusal of a travel permit) and the legal status of the individual concerned (EU citizen v refugee) (N.B. the universal application of Article 47 EU Charter).

### **General conclusions regarding the conformity of the special procedure of nominating security cleared advocates in national security cases with Article 47 EU Charter and Article 6 ECHR**

1. As a remedy for the limitation on access to evidence and court hearing in cases of national security, the Member States have introduced the mechanism of security cleared counsels ('special advocates') who have wider access to the secret evidence and court hearing.
2. The *A.M.N.* case (High Court of Cassation and Justice) illustrates that when national courts do not thoroughly consider limitations on rights of defence in light of both ECHR and EU standards, and do not engage with the issues concerning legislative incoherence for the purpose of establishing the correct balance between securing national security and fundamental rights, third country nationals must resort to the ECtHR for an effective remedy. One option for the national court would have been to consider addressing preliminary questions to the CJEU as regards the conformity of the national urgent procedure in national security cases and the special procedure of nominating special advocates in light of Article 47 EU Charter.

### **General conclusions regarding the meaning of 'essential grounds' to be disclosed in national security cases**

1. As regards the meaning of 'essential grounds' in national security cases involving non-EU citizens, the CJEU has not fully clarified its content. Examples of what 'essential grounds' could mean have been provided by the CJEU in *Kadi II*, which is a case on EU sanctions. Details on links to terrorist activists, time and location of a contested behaviour seem to be considered by the CJEU as 'essential grounds'. (see paras 141ff, also cites in the section on Overview of CJEU jurisprudence)
2. The Polish Supreme Administrative Court had the opportunity to address such a preliminary ruling, however it refused to. It found that Article 12(1)(2) of the Return Directive, which allows for the non-disclosure of certain facts underpinning the return decision for reasons of national security, is a specific law applicable in return cases and, to that extent, it excludes the general safeguards envisaged in Article 47 EU Charter.
3. A preliminary reference could have been addressed on the clarification of the standards of Article 47 EU Charter as regards the precise scope of disclosure of the essential grounds requirements set out first in the ZZ preliminary ruling.

## 5. The Impact of the Right to an Effective Remedy on Judicial Review Powers

This Chapter focuses primarily on cases involving detention measures under three different frameworks: asylum, the Dublin Regulation and return proceedings. The first section concentrates on the impact of Article 47 EU Charter and general principles of EU law, and relevant jurisprudence of the CJEU on the judicial powers of *ex nunc* and full assessment of facts and law. The *first Question* presents the conclusions reached by the CJEU in the *Mahdi* case. This preliminary ruling addressed the issue of the extent of judicial review powers in the case of prolongation of immigration detention. The conclusions reached by the CJEU are of importance, taking the form of principles that could be applied both in relation to return-related detention, but also to other detention measures, such as those adopted in asylum proceedings, since they address general questions of judicial review when the right to liberty is limited. Notably, what should the power of the national court be when reviewing the legality of a detention measures: should it be limited to reviewing the grounds raised by the administration, or should there be full review powers, including considering new arguments of law and facts not raised by the administration. The subsequent *two Questions* will look at how the *Mahdi* preliminary ruling was applied at national level in relation to return-related detention, and in other fields, reflecting the cross-sectoral importance of the preliminary ruling.

The *second section* of this Chapter will discuss the requirements of the principle of proportionality in the field of return and asylum detention. First, cases where alternative measures were imposed by the national courts, contrary to the wishes of the administration, will be summarised. The *Second Question* includes cases where national courts decided of their own motion to not prolong detention as requested by the administration, but to shorten the period as a requirement of the principle of proportionality. The third question includes cases where the national courts decided to set new remedies for unlawful detention, in the form of compensation.

The Chapter will continue with a discussion of cases that reflect the extension of judicial review powers on the basis of Article 47 EU Charter outside the field of detention measures. For instance, in the field of the Dublin III Regulation (No. 604/2013) ('the Dublin Regulation') (5.3 *Extending judicial review in Dublin transfer cases based on Article 4 EU Charter*) and in asylum adjudication (5.4 *Reformatory judicial powers necessary to ensure respect of the right to an effective remedy*). On the basis of Articles 4 and 47 EU Charter, national courts are required to balance an EU constitutional principle (principle of mutual recognition) with fundamental rights, leading to a duty on national courts to refuse Dublin transfers if "*there are substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum*" (C-411/10, *N.S. and others*, ECLI:EU:C:2011:865). Thus the transfer of an asylum seeker within the framework of the Dublin Regulation can take place only in conditions which exclude the possibility that that transfer might result in a real risk of the person concerned suffering inhuman or degrading treatment, within the meaning of Article 3 ECHR / Article 4 EU Charter. More recently, if there is a "real and proven risk of significant and permanent deterioration in the state of health of the person" a transfer can also not take place (see *C.K.* preliminary ruling discussed below).

The last issue shows an interesting extension of judicial powers (power to set remedies) in cases where the administration persistently refused to recognise a form of international protection found to be applicable by the national courts. As a result, on appeal, the national courts decided

themselves to recognise a form of international protection (refugee status or subsidiary protection), although according to the national legislation they do not possess such reformatory powers. The section includes two approaches on reaching a solution: (i) (*use of consistent interpretation*) the **Budapest Court** which decided itself on the basis of the right to an effective remedy; (ii) and (*use of preliminary reference*) the **Slovak Supreme Administrative Court** which decided to send a preliminary reference to the CJEU regarding the requirements of Article 47 EU Charter in such cases.

In addition to showing innovative interpretations of the right to an effective remedy and principle of proportionality, the selected cases also offer an inspiring reasoning on the role of national judges as part of the EU legal order. The reasoning of the **District Court of Przemysl (Poland)**, which will be discussed below, elaborates on the duties of national judge under EU law and CJEU jurisprudence and could offer inspiration to other national judges confronted with issues on compatibility of their national law with EU law.

### 5.1. *Ex nunc* and full assessment of facts and law

#### Question 1 - What are the judicial review requirements developed by the CJEU in *Mahdi*

What are the judicial review powers of a national court when reviewing a proposal of the administration to prolong immigration detention?

*Case C-146/14 PPU Mahdi, CJEU Judgment of 5 June 2014*<sup>212</sup>

#### *Facts of the case*

The applicant, Mr Mahdi, was arrested on 9 August 2013 at the border post of Bregovo in Bulgaria – he was returned by the Serbian authorities as he had crossed the border between Bulgaria and the Republic of Serbia illegally. Mr. Mahdi did not have any identity documents but presented himself as Bashir Mohamed Ali Mahdi. The same day Mr. Mahdi was made the subject of a coercive administrative measure “coercive taking to the border” and an entry ban. For the purpose of the implementation of these measures Mr. Mahdi was detained in a special facility for foreigners on 10 August 2013. On 12 August 2013 Mr. Mahdi signed a statement whereby he consented to return voluntary to his home country of Sudan.

On 13 August 2013 the competent authorities sent a letter to the Embassy of the Republic of the Sudan informing him of the measures which had been taken in respect to Mr. Mahdi. Subsequently, at a date not specified in the documents before the Court, a meeting took place between an embassy official and Mr. Mahdi in the course of which the official confirmed Mr. Mahdi’s identity but refused to issue him with an identity document permitting him to travel outside Bulgaria. The refusal was motivated by Mr. Mahdi’s unwillingness to return of his own free will to his country of origin. On 16 August 2013, Ms. Ruseva, a Bulgarian national, swore in an affidavit that

---

<sup>212</sup> Analysis prepared by Davide Strazzari with the help of Madalina Moraru.

accommodation and means of support during his stay in Bulgaria would be provided to Mr. Mahdi. On 26 August 2013 police checked and validated the affidavit. On 27 August 2013 the competent authority suggested to his superior that Mr. Mahdi's detention order be revoked and replaced with a less coercive measure – namely “reporting every week to the local office of the Ministry of Interior”. On 09 September 2013 that proposal was rejected by the Director of the Directorate “Migration” on the grounds that Mr. Mahdi had not entered in Bulgaria legally, that he was not in possession of a residence permit, that he had been refused refugee status on 29 December 2012 and that he had committed a criminal offence by crossing the border between Bulgaria and Serbia. Mr. Mahdi was kept in a detention centre for six months and the Court was charged with reviewing the State's request to prolong the initial period of six months' detention.

### *Preliminary questions addressed by the Sofia Administrative Court to the CJEU*

The first issue raised by the national court is whether Art. 15 of Directive 2008/115, read in conjunction with Art. 6 and 47 EU Charter, requires that the decision of a national administrative authority to extend the detention of a third country national must be in writing, and motivated by facts and law.

The second issue raised by the Bulgarian judicial authority concerns the nature and scope of the mandatory review carried out by a judicial authority in relation to the administrative decision that extends detention after the expiry of the initial period of detention.

A third issue raised by the national court deals with the substantive conditions required by the Directive 2008/115 in order to allow prolongation of detention. Namely, the national court asked the CJEU whether the lack of identity documents may be the sole ground for extending detention of a third country national and whether the very fact he has not obtained such documentation fulfils the criterion of a ‘lack of cooperation’ for the purpose of extending detention.

Finally, the national court asked the CJEU whether the Directive 2008/115 obliges Member State authorities to issue a residence permit to a third-country national when a reasonable prospect of removal no longer exists.

### *Conclusions reached by the CJEU*

1. The CJEU held that Article 15(3) and 15(6) of Directive 2008/115, read in the light of Articles 6 and 47 EU Charter, must be interpreted as meaning that such a decision must be in writing and motivated by facts and law.
2. Basing its reasoning on a systematic interpretation of Article 15(3) and 15(6) of Directive 2008/115, with no explicit reference to Article 47 EU Charter, despite the AG's Opinion, the CJEU held that the judicial review of a decision that extends an initial period of detention must permit the judicial authority to decide this on a case-by case basis. Judges must have full jurisdiction on the merits of whether the detention of the third-country national concerned should be extended, whether detention may be replaced with a less coercive measure or whether the person should be released. The judicial authority must have the power to take into account not only the facts and the elements adduced by the administrative authority but also any other facts, evidence and observation submitted by the person concerned.

3. The CJEU held that the lack of an identity document cannot, on its own, be a ground for extending detention. In such a case, it is for the national court to determine in light of the individual case whether less coercive measures may be applied effectively. The fact that a third national country has not obtained an identity document does not mean in itself that the person concerned has demonstrated a lack of cooperation that permits the extension of the initial detention. The CJEU requires the national court to pursue a detailed examination of the facts in order to evaluate if other reasons have determined the delay in the implementation of the removal order. This would include the effective efforts of the competent national authority to negotiate the individual's readmission to his country of origin.
4. The CJEU, in line with its previous case law (*Kadzoev*), rejected the interpretation of an obligation on Member States to issue a residence permit to a third-country national when a reasonable prospect of removal no longer exists. However, State authorities must provide the person concerned with a written confirmation of his current situation.

#### Role of Article 47 EU Charter and general principles in the CJEU preliminary ruling

According to the CJEU, Articles 6 and 47 EU Charter do not require that every decision taken in the course of administrative proceedings on returning third country nationals be in a written form and give reasons of fact and law. However, the CJEU stresses that Member States' discretion in the implementation of the Directive and their procedural autonomy are not unlimited, since they must ensure the respect of fundamental rights and the full effectiveness of the EU law they implement (para. 50).

To that extent, the CJEU underlines that Article 15 of Directive 2008/115 states that a (initial) detention decision of a third country national must be in writing and motivated by facts and law. According to the Court, these requirements are needed both to enable the third country national to defend his rights and to put the Court in a position to carry out a judicial review of the decision (para. 45).

The initial decision to detain a third country national and the decision to extend the term of this detention are similar in nature since both deprive the person concerned of his liberty (para. 44).

It follows, then, that in order to ensure the individual can exercise his fundamental right to an effective remedy (para. 46) and for the judge to effectively conduct his judicial review, the decision to extend detention must fulfil the same requirements that the Directive requires for a decision on initial detention. Thus, the former must be in writing and motivated in facts and law. This would guarantee the individual the same safeguards he enjoys when challenging the legality of an initial detention decision.

As to the nature and the scope of the judicial review of an administrative decision that extends initial detention of a third country national, the Court highlights (para. 57) that Article 15(3) of Directive 2008/115 states that in case of prolonged detention periods, reviews must be subject to the supervision of a judicial authority. However, this provision does not specify the nature of this examination.

The AG in its opinion had suggested that Article 15(3) of the Directive be interpreted in light of Article 47 EU Charter in order to grant the judicial authority a full jurisdiction with regard the supervision of administrative decisions that extend initial detention. While reaching the same conclusion of the AG, the CJEU followed different reasoning. The Court preferred to ground its



reasoning primarily on Article 15(4) and (6) of the Return Directive. As a consequence, the judicial authority has unlimited jurisdiction with regard to the merits of the decision and it may substitute its own evaluation for that of the administration, including the possibility to determine alternative measures to detention, even if such an alternative has not been requested by the administration. Besides, the judge is not limited to evaluate only the elements and facts provided by the administration, but he must take into consideration evidence adduced by the person concerned.

## **Question 2 - What is the impact of the *Mahdi* preliminary ruling on judicial review powers within return proceedings?**

### *Follow-up judgment of the Sofia Administrative Court – disapplication on the basis of the Mahdi preliminary ruling*

After the preliminary ruling of the CJEU in *Mahdi*, the Sofia Administrative Court ended the detention of Mr. Mahdi in the detention centre and imposed upon him a less coercive measure: “weekly appearance” at the office of the Ministry of Interior. The Court held that Mr. Mahdi’s legal status falls within the scope of Directive 2008/115 as circumstances which gave rise to the need for enforcement of the coercive administrative measures in this case - “coercive taking to the border” and “entry ban” were still present. In view of the commitment of the Embassy of the Republic of the Sudan to issue a travel document, the Court held that the causal link between the conduct of Mr. Mahdi and the issuing of an identity document no longer exists. In this regard, his detention is irrelevant to the process of his removal on the basis of Article 15(1)(b), (6)(a) Directive 2008/115. Regarding the ‘risk of absconding’ the Court noted the following facts to be relevant: the lack of an identity document; the illegal entry into the country and the attempt to cross the border illegally. In terms of factors against detention, the Court noted: his eight-year stay in the country; the fact that he had a dwelling and maintenance, the information the witness had provided regarding their relationship; the absence of any misconduct during his stay in the country. Based on this evidence, the Court held that there was no pressing need for Mr. Mahdi to continue to be held at the detention centre. The purpose of the coercive measure “coercive taking to the border” could be achieved with less coercive administrative measures, as a result of which the Court ended the detention.

### *Impact of Mahdi on the judicial review powers of national courts from the referring Member State (Bulgaria)*<sup>213</sup>

The main effect of the CJEU Judgment of 5 June 2014 in the *Mahdi* Case has been that the administrative authority began to issue decisions on extending the length of detention giving the factual and legal grounds, which were automatically submitted to the court for review. Thus, detainees are no longer in a disadvantaged position with regard to the right to effective remedies. As noted above, the second level judicial authority in Bulgaria had a limited scope of judicial review, that is, it establishes only whether the judgment of the first level jurisdiction is in conformity with the law and does not carry out fact-finding work.

---

<sup>213</sup> Extract from the REDIAL electronic journal on judicial interaction and the EU return policy, third edition : articles 15 to 18 of the return directive 2008/115.

As regards the CJEU conclusion that Article 15 (1) and (6) RD do not allow for national regulations like the Bulgarian one, according to which renewal of detention could be done solely on the ground that the TCN has no identity documents, the domestic jurisprudence was divergent (at least until January 2017). The **Bulgarian Supreme Administrative Court** gives preference to the CJEU conclusion, while other national courts follow a strict application of Article 44, Para.6 of the Law on Foreign Nationals in the Republic of Bulgaria, which provides for the lack of identity documents of the TCN as a separate (autonomous) ground of detention.

The CJEU pronouncement that the sole fact of refusing to sign a declaration for voluntary return by the TCN does not amount to a ‘lack of cooperation’ within the meaning of Article 15(6) of the Return Directive also has a similar divergent judicial implementation in Bulgaria.

Last, but not least, in relation to the preliminary ruling that Member States must provide the third country national with written confirmation of his situation in cases when the TCN has no identity documents and has not obtained such documentation from his country of origin, the Bulgarian authorities started to provide TCNs, upon release from detention, with a written confirmation as to the grounds on which they have been released. (See more in the Bulgarian REDIAL Report on pre-removal detention)

*Ruling of the Regional Court in Przemyśl, 23 May 2016, Case No II Kz 69/16 – disapplication of the national court – national judge as an EU judge<sup>214</sup>*

*Facts of the case*

The applicant was apprehended while trying to cross the border irregularly from Poland to Germany. He was placed in detention and return proceedings to his country of origin were launched. Afterwards he submitted an application for international protection, which was considered negative by both administrative instances (the Office for Foreigners and the Refugee Board). The applicant lodged a complaint against the negative international protection decisions to the Voivodeship Administrative Court in Warsaw. The Court has not yet ruled on the case.

After the Refugee Board issued their decision on the international protection application, the return proceedings were reopened. Both instances (The Commander of the Border Guard Unit and the Office for Foreigners) decided on the return of the applicant. The applicant lodged a complaint against the return decision to the Voivodeship Administrative Court in Warsaw. The Court has not yet ruled on the case.

Meanwhile, the District Court in Przemyśl prolonged the detention of the returnee for six months, relying in its ruling on Article 403, section 5 of the 2013 Law on Foreigners. The applicant appealed against this ruling to the Regional Court in Przemyśl.

---

<sup>214</sup> ReJus template prepared by Karolina Rusiłowicz. The summary of the case builds on an analysis that had been prepared for European Database of Asylum Law (EDAL, [www.asylumlawdatabase.org](http://www.asylumlawdatabase.org)) within the project “Legal exchange and mutual learning between asylum practitioners to promote fundamental rights in the EU” co-funded by the EU and coordinated by the European Council on Refugees and Exiles (ECRE) in partnership with the Helsinki Foundation for Human Rights with financial support from the Fundamental Rights and Citizenship Programme of the European Union.

### *Reasoning of the Regional Court*

The Regional Court held that the District Court relied on a national provision which is incompatible with article 15 (6) of the Return Directive (RD). Article 403, section 5 of the 2013 Law on Foreigners reads that, if a third country national lodged a complaint to the administrative court against a return decision together with a request for suspension of its execution, the period of stay in a detention centre can be prolonged to 18 months and the court can issue one ruling prolonging the detention for 6 months. However, under Article 15 (5) and (6) of the RD, the Member States can prolong the detention for the period exceeding the maximum of 6 months for another 12 months only under two exhaustive circumstances: the lack of cooperation of a third country national and delays in obtaining necessary documentation from third countries. Exercising the right to an effective remedy is surely not one of them, which has been made clear by the CJEU of the European Union in the case C-357/09 *Kadzoev*.

The Court held that there is settled case law of the CJEU that the Member States have formed a new legal order (EU). Because of its specific character no national legal provisions can interfere with it. The **Regional Court** then referred to the CJEU judgment in the case *Costa v. ENEL*, as a judgment where the CJEU ruled that EU law has absolute supremacy over national laws. Additionally, the judgment *International Handelsgesellschaft* was referred as grounds for rejecting the interpretation of national law in contrast with the EU law. Consequently, the validity of EU law cannot be undermined by claiming its incompatibility with the rules envisaged in the Constitution. Acceptance of supremacy of EU law and the CJEU jurisprudence is required also in light of Declaration No 17 to the Lisbon Treaty.

As regards the remedy to establish in this case, the Regional Court referred to the *Simmenthal* case, as requirement for setting aside national law that is incompatible with EU, without waiting for the national provision to be repealed. This is crucial to understand that the result of the supremacy rule is not the invalidity of the national provision but the obligation to refrain from applying it. This mechanism is additionally supported by Article 91 section 3 of the Constitution of the Republic of Poland.

The Court noted that disapplication is possible in this case since the provisions of the RD have direct effect, as confirmed by the CJEU in the *El Dridi* case. The provision fulfilled the requirements of direct effect: unconditional and sufficiently precise that it can be relied on by individuals.

Finally, when Poland joined the EU, a judge became a judge of EU law first and foremost. This interpretation is consistent with the rulings of the Supreme Court (see case III SK 23/12 and II KK 55/14).

### *Reasoning of the Court on the role of the principle of effectiveness of EU law (of general application)*

The Regional Court stated that when an EU Directive is transposed into the national legal order, the Member States cannot modify its provisions. It would be incompatible with the rule expressed in Article 2 (2) of the TFEU. The Member States are obliged to apply any general and specific measures which would enable implementation of the obligations set in the Treaties and other acts of the European institutions and to refrain from applying measures that would undermine the aims of the EU law. This is what is required under the rule of loyal cooperation or solidarity, on the basis of which the rule of effectiveness of EU law (*effet utile*) relies.

### *Instances of judicial dialogue*

In reaching the solution of quashing the first instance ruling on prolonging detention and establishing the releasing the applicant, the Regional Court referred extensively to the CJEU jurisprudence (*El Dridi*, *Kadzoev*) as requiring an exhaustive interpretation of the grounds for prolongation of the immigration detention. In order to establish the remedy (disapplication of national law) the Regional Court referred to additional jurisprudence of the CJEU (*Simmenthal*, *International Handelgesellschaft*). It is interesting to notice that the Court does not refer expressly to the Mahdi judgment, although it is a case on judicial review powers on prolongation of detention. However, the Regional Court reached a solution in accordance with the principle developed in Mahdi on the basis of earlier relevant jurisprudence of the CJEU (*El Dridi* and *Kadzoev*).

### *Impact of the CJEU preliminary ruling in Mahdi on other Member States than the referring one*

#### THE NETHERLANDS

The Mahdi preliminary ruling impacted on the Dutch judiciary in regard to the requirements of judicial motivation. The **Dutch Council of State** changed its view on the deference of the court regarding the control of the lawfulness of detention. According to the **Dutch Council of State**, the question as to whether less coercive measures can be applied is to be judged in full by Dutch courts (*Dutch Council of State*, Decision No. 201408655/1/V3 –REDIAL Dutch Report on pre-removal detention).

### **Question 3 - Cross-sectorial Impact of the Mahdi preliminary ruling – detention under the Dublin III Regulation**

Effects of the Mahdi preliminary ruling and the general principles of effectiveness of the right to an effective judicial remedy on the intensity of judicial review of a detention measure adopted within the Dublin III Regulation, in a Member State that has not transposed Article 28(2) of the Dublin Regulation, but applied by analogy the ground of detention under the legislation implementing the Return Directive.

The effect of the principle of proportionality on establishing alternatives to Dublin III Regulation based detention.

Example of assessing the legality of a detention measure in light of the rule of law requirements. (for more details see the *ELI Checklist on Detention of Asylum Seekers and Irregular Migrants and the Rule of Law*)

### *Administrative Court of the Republic of Slovenia, I U 1102/2016, 29.7.2016 – unlawful Dublin detention on the basis of Al Chodor and Mahdi*<sup>215</sup>

<sup>215</sup> ReJus Template prepared by Gruša Matevžič; Judgment delivered by Bostjan Zalar.

### *Facts of the case*

The Asylum authority limited the Applicant's freedom of movement for the purpose of a Dublin transfer. The Applicant in the past left the open reception centre twice and was already deported to Germany under the Dublin Regulation after a second attempt (first attempt of deportation failed because he absconded). The Applicant returned to Slovenia and applied for asylum for the fourth time. The Applicant stated that he does not want to go to Germany and that he would always come back. The Asylum authority concluded that he presents a serious risk of absconding.

### *Reasoning of the Court*

The Court took the opportunity to address all legal questions regarding deprivation of liberty for the purpose of a Dublin transfer.

#### *1. The basic sources of law for assessing the legality of detention*

Relevant sources are: Dublin Regulation (Article 28), EU Charter (Article 6), ECHR (Articles 5(1)(f), 5(1)(b), 5(2), 5(4) and 5(5) and Geneva Convention (Article 31).

Regarding the latter, the use of Article 28 of the Dublin III Regulation must be in accordance with the material conditions of detention under Article 31 of the Geneva Convention. In the present case, the relevant provision is the second paragraph of Article 31, under which the signatory states may not restrict the movement of the applicant, unless it is "necessary", or such restrictions can only be imposed until the status of an applicant in the country is legalized or until the applicant has not received permission to enter another country. Since according to EU law, an asylum seeker who is under the Dublin procedure is legally on the territory of Slovenia, the essential question for the Court to assess remains whether detention is necessary.

#### *2. Does the contested measure constitute a restriction of freedom of movement or deprivation of personal liberty*

During the court hearing, the Applicant described the circumstances of the detention, among others, that he cannot leave the Centre for Foreigners whenever he wants. The Court held that the contested detention must be assessed in light of the right to personal liberty under Article 19 of the Constitution and Article 6 of the Charter and Article 5 of the ECHR and not from the perspective of the right to freedom of movement. Since the applicant as an asylum seeker is not illegal in Slovenia, the legal basis for detention in the present case in light of the ECHR is Article 5(1)(b). According to this provision it is permissible to detain persons in order to "secure the fulfilment of any obligation prescribed by law." Such an obligation is imposed by the Dublin Regulation, namely that the applicant for international protection does not impede the implementation of the transfer procedure by absconding (Article 28(2) Dublin III Regulation).

#### *3. Interpretation of standards "substantial risk of absconding" in conjunction with the test of necessity and the purpose of detention under Article 28(2) of the Dublin III Regulation*

The argument of the Asylum authority that decision on detention falls under their discretionary power is incorrect. The Administrative Court mentioned that since 1999 onwards, it has consistently held the administrative decision to withdraw personal liberty of the applicant for international protection cannot be discretionary, a requirement imposed on the basis of international law and constitutional standards. The **Slovenian Supreme Court** confirmed this position stating that a

decision on detention cannot be based on discretion, but on whether the conditions prescribed in the Dublin Regulation are fulfilled.

The conditions are the following:

*A. The purpose of transfer: facilitating execution of a transfer procedure*

This means that the Asylum authority has to pay attention to whether an objective obstacle to the implementation of the transfer exist or not. If such an obstacle exists, the Court held that then the test of necessity reduces the justification of detention proportionally to the degree of probability of ensuring a successful execution of the transfer. The Supreme Court also stated that the Asylum office before ordering detention is obliged in the shortest possible time to acquire as much relevant information for their decision on detention as possible or that information they already possess is verified with due diligence.

*B. The standard of proof: a significant risk of absconding*

“Significant” must be interpreted closer to the standard of "substantial" threat than the standard of only "perceived" threat. This conclusion is apparent from a comparison with the **English** version ("Significant"), the **Italian** version ("notevole"), the **Croatian** edition ("velika opasnost") of this standard, while the **French** version talks about important or non-negligible danger ("un risque non négligable"). Specified risk of absconding, especially when it comes to single and healthy men, can often exist, but it is not sufficient to impose the detention measure. Risk of absconding must therefore be substantial or significant.

*C. Objective (legal) criteria for the risk of absconding<sup>216</sup>*

The essential question in these matters is how this risk is established or which specific circumstances are shown in the risk of absconding. The Dublin III Regulation requires Member States to precisely define these reasons in national law (Article 2(n) of the Dublin III Regulation). The Slovenian legislature did not abide by this obligation, therefore this question remains very open and allows large differences in national case-law on the wide or narrow interpretation of the risk of absconding. The Administrative Court held that for reasons of legal certainty and reliability as well as a more equal protection of rights, it is not acceptable in such cases to use, by analogy, arrangements under the Aliens Act-2, which were adopted by the Slovenian legislature when transposing Article 3(7) of the Return Directive. The standard of proof under the Return Directive is significantly lower than under the Dublin Regulation, since the Return Directive requires only "the existence of risk", while under the Dublin Regulation, the risk should be "substantial". Also, the Supreme Court noted that all the criteria listed in Article 68 of the Aliens Act-2 cannot be used, but only those that comply with the specific characteristics and objectives of the Dublin III Regulation. At least the third, fourth and fifth sentence of Article 68(1) correspond to an objective criterion for the definition of a risk of absconding in accordance with the requirements of the Dublin III Regulation (the alien's res judicata conviction for criminal offence; possession of foreign, forged or

---

<sup>216</sup> For a detailed assessment of CJUE (Chamber): Case C-528/15, [Al Chodor](#), ECLI:EU:C:2017:213, which was the basis for the Administrative Court assessment of the legality criteria, see the ACTIONES Module Judicial Dialogue Furthering the Application of the Charter in Asylum and Immigration. (commentary of judicial use of Article 6 EU Charter).

otherwise modified travel and other documents; the provision of false information or non-cooperation in the procedure).

The objective (legal) criteria for the risk of absconding is directly related to the criteria set out in Article 5 of the ECHR in terms of the assessment of the quality of legal provisions which prescribe detention. The assessment of legality under Article 5 of the ECHR means that the legal basis satisfies the requirements of legal certainty and predictability in the sense that the provision is accessible and sufficiently precise, predictable and that it prevents arbitrariness. It is important whether the poor quality of legal norms actually affected the decision. In cases *Abdolkhani and Karimnia v. Turkey* (para. 125-135) and in *Keshmiri v. Turkey* (para. 33) the Court noted that the government may rely on certain provisions of detention, but the Court found that these provisions are not related to deprivation of liberty in the context of deportation, but are related to the organization of stay for foreigners and therefore the Court ruled that detention in these cases had no legal basis. Since the Slovenian legislature has not fulfilled its obligations under the Article 2(n) of the Dublin III Regulation, the possibility of an analogous application of the Article 68 of the Aliens Act-2 is a very weak basis in terms of the objective criteria required. It can only be sufficient in a particular case if in light of the specific circumstances of the case there is no doubt about the existence of the risk of absconding.

#### *D. Individual assessment of the specific circumstances of the risk of absconding*

A significant risk of absconding must always be assessed on the basis of each individual case and circumstances relating to each applicant.

#### *E. The measure must be proportionate (necessary) and the application of a less coercive measure would be ineffective*

The standard of proportionality or necessity must be assessed having regard to the Article 52(1) of the Charter and the decisions of the Constitutional Court in case No. Up-1116/09-22 of 3.3.2011 (strict proportionality test), while the standard that it is not possible to use other less coercive means must be considered in conjunction with Article 8(4) of the Reception Conditions Directive. This provision says that "Member States shall ensure that the rules concerning alternatives to detention, such as regular reporting to the authorities, the submission of a financial guarantee, or an obligation to stay at a certain place are determined by national law." This requirement, in conjunction with recital 20 of the Dublin Regulation imposes on national legislators to regulate other effective measures that do not constitute detention. The only existing alternative to detention prescribed in International Protection Act-1 is the restriction of movement in the area of an open reception centre.

#### *F. The intensity of judicial review of the lawfulness of detention*

The CJEU in cases on detention established that national courts have to verify the legality of detention based on the standard of rigorous scrutiny. In the case of *Mahdi*, which relates to the question of the intensity and integrity of judicially reviewing the extension of a detention order of an alien who is irregular in the territory of the EU and is in the process of removal, the CJEU requires national courts to decide on "*all factual and legal elements /.../, for which it is necessary to thoroughly examine the facts of each case /.../ the judicial body must be able to take into account both the facts and the evidence relied upon by the administrative authority /.../ as well as any comments by a third country national. In addition, it must be able to note all the other elements that are important for the decision, if considered necessary. It follows that the powers of the judicial*

*authority in the context of the review cannot be limited to submissions by the administrative authority.”*

Regarding the facts of the concrete case, the Court concluded that despite the fact that the Asylum Authority did not refer to any of the objective criteria on the risk of absconding from Article 68 of Aliens Act-1, the Court could conclude that Article 68(5) (obstruction of the procedure) is relevant in the present case.

Regarding the use of alternatives, the Court notes that the Asylum authority used inappropriate argumentation why alternatives cannot be used in this case. The non-use of alternatives has to be justified based on the degree of the risk of absconding that results from the personal characteristics of the applicant and not by general statements that the security in the open reception centre cannot be sufficiently secured. Despite inappropriate argumentation used by the Asylum authority, the Court nevertheless agrees that the alternative cannot be used in the present case because the applicant presents significant risk of absconding.

## **5.2. The impact of the principles of proportionality and good administration on remedies to asylum and immigration detention**

The principle of proportionality is an express requirement provided by all EU secondary instruments allowing asylum and return detention (e.g. Article 15 Return Directive, Article 8(2) Recast Reception Conditions Directive, Article 28(2) Dublin III Regulation).

In addition, the principle of proportionality is a requirement under Article 52(1) EU Charter combined with Article 6 EU Charter and also a general principle of EU law.

In spite of the express obligation of Article 15(1) Return Directive, the domestic legislation of several Member States lack an equivalent obligation: e.g. **Italy**,<sup>217</sup> **Lithuania**, **Slovenia**<sup>218</sup> and **Spain**. In cases where domestic legislation does not require a mandatory assessment of the feasibility of alternative measures before adopting a detention measure, the judicial authorities of different Member States seem to have opposite approaches towards administrative practice. In **Italy**, the *Justices of Peace* (“giudici di pace”) usually strictly apply the legislation, confirming the administrative practice which commonly prefers the adoption of detention orders. In **Slovenia**, in spite of a lack of express obligations to assess the feasibility of alternative measures before adopting a detention order, the **Administrative Court** deduced from the constitutional principle of proportionality, an obligation for the Police to consider a more lenient measure before issuing a detention order. (*I U 799/2012*). More recently, the **Slovenian Administrative Court**<sup>219</sup> imposed an obligation upon the Police to verify, first, whether alternatives to detention might be carried out instead of detention. The Court described in detail a checklist on how administrative authorities should proceed with imposing restrictive measures (*judgment I U 392/2015 of 6 March 2015*). The Court referred to the *Arslan* case to highlight “the objective necessity” of a detention measure and

---

<sup>217</sup> REDIAL Italian Report on pre-removal detention, p. 14: “It is only a faculty (the Questore “can apply”) for the administrative authority to adopt an alternative measure to detention. Being a mere faculty of the administration, subsidiary to the main option of detention, a particular motivation regarding the non-application of alternative measures is not requested.”

<sup>218</sup> The Aliens Act provides that the police may, *ex officio* or at the request of a TCN, replace the detention measure with more lenient measures (Article 81 of the Aliens Act). See the REDIAL Slovenian Report on pre-removal detention.

<sup>219</sup> See. judgment II U 132/2015 of 15 April 2015.



to the *Mahdi* case as a basis for the competence of the court deciding on the proportionality of the initial detention, but also the prolongation of pre-removal detention (*judgment I U 392/2015 of 6 March 2015*). Similarly, the **Lithuanian Supreme Administrative Court** requires the courts to consider that the issue of granting or the refusal to grant an alternative measure belongs to the discretion recognised to the courts, and they may examine it without such a request addressed by the competent administrative authorities.<sup>220</sup> Lithuanian courts have also assigned other alternative measures than the one requested by the authorities.<sup>221, 222</sup>

Below are interesting cases where national courts have made use of the principle of proportionality in order to establish less restrictive (coercive) measure than the detention measure initially adopted by the national administrative authorities.

### **Question 1 – What is the impact of the principle of good administration on the legality of asylum detention**

The requirements of the principle of good administration on asylum detention

The Court annulling asylum detention measure on the basis of the administration violation of the right to have his or her affairs handled impartially, fairly and within a reasonable time, as part of the principle of good administration

#### *Supreme Administrative Court (SAC), Judgment No. A-1823-822/2015*

##### *Facts of the case*

The case dealt with the legality of detention of a foreigner. The applicant A.S. addressed Švenčionių district court asking to annul the ruling of Lazdijai district court of 7 November 2014 by which the applicant was detained. The applicant had argued before the first instance court that the grounds for his detention had disappeared. According to the applicant, the Migration Department had accepted his application and had started its consideration on the merits, thus, his stay in Lithuania had become legal. As regards the ground of his detention – the necessity to establish his true identity, the applicant had argued that the state is prevented to address the country of origin in order to determine an identity of asylum seekers, therefore, as the asylum seeker the applicant may not be detained under this ground, unless national authorities had shown what kind of steps they had made in order to establish his identity.

The first instance court by its decision of 14 January 2015 rejected the applicants request. The court pointed out that after leaving the country of origin in 2012 the applicant had visited many different EU Member States, in none of them he had submitted an asylum application. He had been detained in Poland in 2014, had been returned to Lithuania and only after that he had submitted the asylum application. According to the Court the applicant had admitted that his true aim is to reach relatives

<sup>220</sup> Decision of the Supreme Administrative Court of Lithuania case No. N143-3565/2008 of 21.07.2008.

<sup>221</sup> See the REDIAL Lithuanian Report on pre-removal detention, p. 8.

<sup>222</sup> Comparative assessment carried out by the Coordinator, Madalina Moraru, within the framework of the REDIAL Project. For more details see REDIAL Research Report 2016/05: European synthesis report on the Judicial Implementation of Chapter IV of the Return Directive – Pre-Removal Detention

in Germany, thus, the lodging of the asylum of the application may be treated as abuse of the asylum procedure. Taking into account these facts the Court concluded that there was a high probability of absconding and rejected the request of the applicant.

#### *Reasoning of the Supreme Administrative Court of Lithuania*

In its ruling of 19 February 2015, the Supreme Administrative Court noted that Lazdijai district court based its decision to detain the applicant on Art. 113 para 1(2) of the Law on the Legal Status of Aliens (the alien has unlawfully entered the Republic of Lithuania or illegally stays in it), whereas Švenčionių district court relied on Art. 113 para 2 (the risk of absconding during removal procedure) when rejecting the plea for release. According to the Supreme Administrative Court, Art. 113 para 1(2) may be invoked against an asylum seeker to the extent when there was a need order to establish and/or verify his identity/citizenship and/or to identify the grounds underlying his application for asylum (the information on the grounds could not be obtained without detaining the asylum applicant), also when his application for asylum is based on grounds manifestly unrelated to the risk of persecution in the country of origin or based on fraud or where the asylum applicant has been refused temporary territorial asylum. Art. 113 para 2 may be used as the ground of detention of a foreigner during removal procedures, if the detention is necessary for the taking of and/or enforcement of the relevant decision if the alien hampers the taking and/or enforcement of the decision and may abscond to avoid return, expulsion, or transfer.

The Supreme Administrative Court noted that the Migration department accepted the individuals' asylum applications for consideration on the merits, he had been given temporary territorial protection. The Supreme Administrative Court referred to the ECJ judgment in case *Mehmet Arslan v Policie ČR* (case C-534/11) and pointed out that in general the sole fact of the asylum seeker status did not preclude the possibility of detention of a foreigner. The Court, relying on its earlier practice, pointed out that under Art. 113 para 2 of the Law on the Legal Status of Aliens, the foreigner may be detained in order not to circumvent the removal procedure.

However, once evaluating the facts of the case the Court had noted that during the questioning by migration authorities the applicant provided answers to all questions, migration authorities had not provided the information, what kind of steps they have had taken in order to establish the applicants' authority. The Court stressed that that the applicant had grounded his asylum application by his unwillingness to serve in the army of the country of origin, there had been no information in the case file, that the applicant had requested the asylum in other EU Member States. The Supreme Administrative Court pointed out that there was no evidence in the case file that the applicant would try to abscond or to otherwise to obstruct the processing of his asylum application. The Court pointed out that the Charter establishes the principle of good administration, which means, among the other things, that institutions should conduct administrative procedure impartially, fairly and within reasonable time. The principle of good administration requires that the asylum application should not be processed for unreasonably long period of time and only formally. Given the fact that there were no indications in the case that State institutions made any efforts in order to establish the identity of the applicant and no evidence that the applicant might abscond the Supreme Administrative Court decided to quash the first instance court decision to detain the applicant.

#### *Element of judicial dialogue*

Consistent interpretation with the CJEU jurisprudence (*Arslan*) and instrumental use of the principle of good administration in the legality assessment of asylum detention.

## Question 2 – What is the impact of the principle of proportionality in detention cases: Alternative measures in return proceedings

The effect of the principle of proportionality on deciding ex officio on alternative measures to detention. Supreme Administrative Court striking down a detention measure on the basis of the principle of proportionality.

Example of consistent jurisprudence of a Supreme Administrative Court (Lithuania) of assessing the legality of asylum and return detention in light of both the principle of good administration and principle of proportionality.

Supreme Administrative Court of Lithuania, Judgment No. 3913- 822/2015<sup>223</sup>

### *Facts of the case*

The case concerned the detention of the applicant who illegally crossed the Lithuanian border without identity and travel documents. The applicant was detained on 18 September 2015 by the border guard when he tried to enter the territory of Lithuania. Upon inspection of the data base it appeared that the decision of return was already taken by authorities on 26 July 2015 because the applicant stayed in Lithuania after the expiry of the visa he was granted. Under that decision the applicant was obliged to leave Lithuania until 2 August 2015.

Ignalina County Court decided to detain the applicant for six months by its decision of 18 September 2015. The main claim in the applicants' appeal was the argument that detention is not proportionate measure, alternative measures to detention could be applied since his identity is known, besides, he had social ties in Lithuania.

### Reasoning of the Supreme Administrative Court<sup>224</sup>

The Supreme Administrative Court pointed out that under jurisprudence of the **Constitutional Court of Lithuania** detention of a person is considered as *ultima ratio*. The Court noted that identity of the applicant was established, the witness confirmed during the court hearing that she and the applicant have a child, the applicant has means of subsistence in Lithuania. The Court, taking into account these facts and pointing out, that there was no evidence that the applicant posed a threat to state security or public order, cooperated with state institutions in determining his legal status in Lithuania. The Court decided that an alternative measure (Art. 115 of the Law on the Legal

---

<sup>223</sup> Summaries of the cases provided by Irmantas Jarukaitis, Vice-President, Judge Supreme Administrative Court of Lithuania.

<sup>224</sup> For another interesting example on the use of the principle of proportionality as establishing alternative measures, see SAC - No. A-2457-858/2015: The applicant was detained for three months by Vilnius County Court because he had no valid visa or residence permit. The applicant who was a student in Lithuania, admitted that he failed to renew his residence permit in time, but still claimed that his detention was not proportional. The SACL as in the above case, noted that detention should be treated as *ultima ratio*. The Court noted that there were no doubts as regards the identity of the applicant, he cooperated with state authorities, there were no grounds to believe that he would abscond or obstruct determination of his legal status in Lithuania. Besides, he provided evidence that he had means of subsistence, the witness confirmed that she rents an apartment for the applicant. Because of those reasons the SACL reversed the first instance court decision and ordered the applicant to report at the closest territorial police office each Tuesday until decision concerning the renewal of his residence permit is taken.

Status of Aliens) should be applied and decided to reverse the first instance court by ordering the applicant to report at the closest territorial police office each Friday.

**Question 3 – What is the impact of the principle of proportionality in detention cases: Shorter detention period as a new remedy established ex officio by the national court**

In the light of the principle of proportionality applied by the CJEU, shall a national court decide a shorter detention period in asylum or return proceedings than the duration of the detention requested by the administration, even if the national legislation does not expressly provide such a reformatory power?

*Tribunal of Turin (est. Rigoletti), Judgment of 25<sup>th</sup> of May 2016*<sup>225</sup>

*Facts of the case*

Under the Italian law applicable to the case at the time, an asylum seeker could be maintained in detention even if he applied for international protection after he had already received an order to leave and been detained pending preparation for escort to the border. Under these circumstances, Article 21.2 legislative decree 25/2008 stated that on the request of public authorities the ordinary judge should validate the prorogation decision to detain the person concerned for a period of 30 days. The law did not provide, and still it does not, the possibility for the judge to apply a shorter time of detention due to the specific circumstances of the case.

In the case decided by Tribunal of Torino, the public authorities required the judge to validate a prorogation of detention for a period of 30 days. The detainee was an asylum seeker whose situation fell under the scope of the above-mentioned sect. 21.2. However, the defence of the asylum seeker opposed the prorogation request on the grounds of the health conditions of the asylum seeker that were deemed incompatible with detention. The defence produced medical documentations issued by a public health centre attesting mental disorder of the asylum.

The judge prolonged the detention for seven days only, instead of the 30 days required by the law. She also ordered the doctor of the detention centre to produce, within seven days, a report in order to assess whether the asylum seeker's health conditions were compatible with the detention in the centre.

*Reasoning of the Tribunal*

Although the national judge did not base his decision to prolong detention for a shorter period expressly on the principle of proportionality, this decision is worth mentioning.

The potential breach of the fundamental right to health of the person concerned has played a major role in the decision. This is in line with the Italian constitutional court case-law stating the right to health is a core value to be guaranteed to everyone, included irregular migrant included (Constitutional court 252/2001).

---

<sup>225</sup> ReJus Template drafted by Davide Strazzari and revised by Madalina Moraru.

Nevertheless, the case is also meaningful with regard to the right to effective remedy. It is important to note that the Italian law does not provide the detainee the possibility of applying for an autonomous review of the detention, in case of prorogation of detention. The assessment is provided *ex lege* by the judge every 30 or 60 days (depending on the fact the detained individual is an irregular migrant or an asylum seeker). Thus, if the judge had validated the detention for 30 days as required by the law, the person concerned would have not had the possibility to autonomously ask for a reviewing of the decision after a shorter period.

Thus, the Torino decision by imposing on the public authority a duty to assess whether the current health conditions of the detainee were compatible with the facilities offered in the detention centre and by validating prorogation of the detention for a shorter time, despite no expressly derogation was provided by the law, it have shaped a new procedural remedy. Namely, it granted the individual an adequate effective remedy, at the same time balancing the public interest in ensuring the effectiveness of the removal procedure of irregular migrants.

### Connection with other national jurisprudential trends<sup>226</sup>

The case-law on asylum and return detention shows that in the several Member States there is only a superficial assessment of the administration's duties (at most an assessment of manifest errors) in return and asylum detention cases. The possible reasons for the superficial application of a due diligence test and principle of proportionality might be, at least, in certain Member States, the absence of this kind of a requirement from the national legislation (e.g. **Czech Republic**),<sup>227</sup> or the specific legal culture of the Member State (e.g. Poland).

Despite the general trend in the formal assessment of the due diligence criterion, and application of the principle of proportionality, an impact of these principles under the developing jurisprudence of the CJEU can be identified.

The **Czech Supreme Administrative Court (SAC)** explicitly rejected the deferential review exercised by the **Municipal Court in Prague**, which held that it is up to the police to decide how to proceed with removal arrangements. The SAC held that such limited judicial control is not in line with the standards developed by the ECtHR as regards the prohibition on arbitrariness (paras. 22-31). Following this 2011 judgment, Czech administrative courts were not satisfied with the basic information that the police made some progress in removal arrangements. Instead, they require the police to show concrete steps taken in order to remove a TCN. Moreover, these steps must be included in the case file; otherwise they cannot be used as evidence before the courts.<sup>228</sup>

Another example of change in judicial practice meant to make the administration more accountable comes from the **Romanian Court of Appeal of Bucharest**. This Court delivered a landmark judgment, breaking the chain of judgments where prolongations of pre-removal detention with five

---

<sup>226</sup> Section builds on evidence collected in REDIAL, ACTIONES and ReJus Projects.

<sup>227</sup> While the English version clearly stipulates that “Any detention shall be ... only maintained as long as removal arrangements are in progress and executed with due diligence” (emphasis added), the Czech version reads as follows “*Jakékoli zajištění musí trvat ... pouze dokud jsou s náležitou pečlivostí činěny úkony směřující k vyhoštění*”, which means “Any detention shall be ... only maintained as long as actions towards expulsion are taken with due diligence”. This means that the “as-long-as-removal-arrangements-are-in-progress” criterion and the due diligence requirement were merged together and thus the due diligence criterion is not explicitly considered a separate criterion for review of actions taken by the Police. See [REDIAL Czech Report on pre-removal detention](#), p. 16.

<sup>228</sup> [REDIAL Czech Report on pre-removal detention](#), p. 17.

months were usually automatically admitted. The Court established a shorter prolongation period of three weeks detention. The Court held that the public authorities would thus be required to fulfil expeditiously and in an optimal manner the obligations to proceed with the TCN's removal. This meant in particular procuring identity documents for the TCN and identifying the means of transport. In this way, the competent authority would be forced to expedite the enforcement of a return decision issued some six years before (*decision* no. 3312 / 04.12.2014).

#### **Question 4 – What kind of remedies for unlawful detention: Compensation**

The common remedy for unlawful detention is immediate release. A less common remedy is compensation, as this is not automatically conferred, but the injured party has to apply separately before a new court (usually civil court). Two interesting judgments have been submitted by the Rejus Polish collaborator<sup>229</sup> establishing compensation for unlawful detention of asylum seekers adopted under an incorrect legal framework (return proceedings) in one of the cases in relation to vulnerable persons (victims of violence). The first case is interesting as it is the Supreme Administrative Court of Poland deciding contrary to previous courts that compensation was needed on the basis of Article 5(1)(f) ECHR. Although the Supreme Administrative Court does not expressly refer to Article 47 EU Charter, this is a case on establishing an effective remedy for violation of the right to liberty.

The outcome of the second case, decided by the Court of Appeal awarded an increase of the compensation to a single mother with two minor children. The increase is considerable, almost 10 times more, decided on appeal lodged by the applicant on similar grounds as the Supreme Administrative Court in the above-mentioned case.

*Supreme Court of Poland, 4 Feb 2015 no III KK 33/14*<sup>230</sup>

What are the requirements of the right to an effective remedy as regards establishing compensation for an unlawful asylum detention? What weight should be recognised to expert evidence (medial reports) when deciding on compensation?

#### *Facts of the case*

The applicant claimed compensation of 40000 PLN for unlawful detention before a civil court. According to the applicant, her detention was unlawful from the moment she applied for asylum from a detention centre when she declared she was a victim of violence (i.e. from 15.06.2011 until her release on 03 February 2012).

---

<sup>229</sup> Karolina Rusiłowicz from the Helsinki Foundation of Human Rights.

<sup>230</sup> The summary of the case had been previously prepared by the Re-Jus collaborator for European Database of Asylum Law (EDAL, [www.asylumlawdatabase.org](http://www.asylumlawdatabase.org)) within the project "Legal exchange and mutual learning between asylum practitioners to promote fundamental rights in the EU" co-funded by the EU and coordinated by the European Council on Refugees and Exiles (ECRE) in partnership with the Helsinki Foundation for Human Rights with financial support from the Fundamental Rights and Citizenship Programme of the European Union.

The Court of the first instance (Regional Court, *Sąd Okręgowy*) granted her complaint, but stated that the detention was unlawful from 02 December 2011, i.e. from the moment her detention was prolonged by the respective district court. The Court believed that because of its wording article 88 section 2 of the Law on granting protection to foreigners in the territory of Poland applies only to foreigners who are asylum applicants and then are subject to detention and not to third country nationals who applied for asylum after being placed in detention. The Court observed that in the beginning the applicant did not admit that she was a victim of violence. According to the medical opinion from 07 June 2011 she was able to stay in detention. Although according to the psychologist's opinion from 21 July 2011 it could not have been excluded that the applicant was subject to sexual violence, at that time there were no signs that the detention may pose a threat to her life or health. Such a conclusion was only possible at the time of prolonging the detention, i.e. on 02.12.2011 and the detention was unlawful from this moment on.

The applicant lodged an appeal against this judgment. The Court of Appeal found her appeal manifestly unfounded. In the cassation complaint to the Supreme Court the applicant asked to quash the judgment of the Court of Appeal and to request reconsideration of the case.

### *Reasoning of the Court*

The Supreme Court ruled that there can be no differentiation in the treatment of asylum seekers depending on whether they applied for asylum straight after crossing the border or after being placed in a detention centre. If a foreigner applied for asylum from a detention centre, they can be released on the basis of article 88 section 2 of the Law on granting protection to foreigners in the territory of Poland, which states that asylum seekers shall not be placed in a detention centre, if there is a presumption that they were subject to violence.

The conclusions of the psychologist's opinion from 21 July 2011 pointed that the presumption under article 88 sec 2 of the cited law had arisen. Of course, the content of the opinion might not have been enough to establish it without any doubt, especially since the psychologist mentioned the need for further diagnosis. However, the statement of the Court of Appeal that "the psychologist's observations were not evident enough in order to acknowledge the presumption that the applicant was a victim of violence" is unacceptable. In case of this presumption there is no need for "unequivocal evidence", since the legislator only requires a presumption.

The court cannot resign from an expert opinion if establishing a relevant fact for the case requires it. As a result, the court cannot reject all the opinions or conclusions of the only opinion in the case and adopt its own view to the contrary. If the Court of Appeal had any doubts regarding the psychologist's opinion, it should have requested the psychologist to complete the opinion or to call a new expert. Especially since the opinion in question cohered with the expert's opinion from 30.01.2012 prepared under request of the court which decided upon the release of the applicant as well as the opinion of the NGO psychologist from 03 November 2011.

### *Court of Appeal in Warsaw from 22 June 2016 II Aka 59/16<sup>231</sup>*

---

<sup>231</sup> The summary of the case had been previously prepared by the Re-Jus collaborator for European Database of Asylum Law (EDAL, [www.asylumlawdatabase.org](http://www.asylumlawdatabase.org)) within the project "Legal exchange and mutual learning between

Criteria to be taken into account when deciding the amount of compensation for unlawful detention. Establishing an amount considered as an effective remedy for the violation of the right to liberty in the case of vulnerable asylum seekers

### *Facts of the case*

A woman with two children came with a visa to Poland and applied for residence permit after the deadline. Because of this fact they were issued a return decision and the ban to enter Poland for a year. They left Poland and went to the Czech Republic, where they were detained and then readmitted to Poland.

The woman and two children were placed in detention in Poland on 10 November 2012. Their stay in detention was prolonged, despite applying for international protection on 5 December 2012. They were released on 12 February 2013 and directed to an open camp for asylum seekers. The applicant and her two children were granted refugee status on 27 May 2013 because of the violence (including sexual violence) they were subject to in the country of origin.

They submitted an application for compensation for unlawful detention, requesting 35000 PLN for each of them. The Regional Court in Warsaw admitted that their detention was unlawful from 12 December (the date on which the respective court decided on prolongation of their detention as irregular migrants, not taking into account that the woman and children became asylum seekers) until 12 February 2013 (the date of release). The Court granted 1000 PLN (app. 250 Euro) to each of the applicants for 63 days of unlawful stay in a detention centre. The applicants appealed this ruling stating that the court of first instance was wrong by claiming that the poor health condition of the applicants was mostly a result of the past events in the country of origin and not of the detention and that the conditions of detention were not that rigorous. They demanded 35000PLN of compensation for each of the detainee.

### *Reasoning of the Court*

The Court of Appeal stated that the findings of the court of the first instance cannot be contested. The court of the first instance was right to claim that the applicants' stay in detention was unlawful only between 12 December 2012 and 12 February 2013. The court of the first instance took into account the opinions of the psychologists and of the psychiatrist and shared their views. It was clear that the PTSD of the applicant was not only caused by the detention in Poland but also traumatic experience in Pakistan and in detention in Czech Republic. These opinions were however opposed to other opinions of the psychologists who claimed that the poor health condition of the applicants was exclusively due to detention. The Court of the first instance was right to consider them unprofessional. The Court of the first instance took into account all the available evidence and its assessment is convincing.

The problematic issue was the amount of the compensation which should be considered reasonable in this case. The amount is subject to the court's discretion, but the amount cannot be symbolic and cannot lead to unjust enrichment. While deciding on the amount the court has to take into account the living conditions and economic relations in Poland. It cannot be examined only taking into account the infringement of the legal provisions. The court of first instance took into account all the



circumstances which should influence the amount of the compensation but this assessment was not reflected in its judgment. The amount granted to the applicants was too low.

The court decided to grant the main applicant 10.000PLN and 15.000PLN to each of the children. With regard to the children, the court took into account not only their stay in detention but also in the hospital and the stress that the 10-year-old boy, not knowing the language, was subject to. His sister, 8-year-old, was particularly vulnerable and exposed to unpleasant experience while staying in detention with persons from different cultures and backgrounds. Higher amounts of compensation would be unjustifiable taking into account the living conditions in the detention centre, current economic relations of the citizens of Poland and the amount granted by the Polish courts in other cases.

### 5.3. Extending Judicial Review in Dublin transfers Cases based on Articles 4 EU Charter

The principle of mutual recognition requires national courts to refrain from reviewing decisions taken by other national courts. In the field of asylum, the principle has been codified in the Regulation 604/2013 (Dublin III Regulation), which establishes 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. The Dublin III Regulation is based on the principle of mutual trust, whereby all Member States should be considered, in principle, as compliant with EU law and fundamental rights, and thus as safe third countries. This means that in practice, the transfer of an applicant for international protection to the responsible Member State (determined according to the criteria set out in Chapter III) should be done without the in-merit examination of their claim. However, inter-state trust and the presumption of conformity with human rights is not absolute. Article 47 EU Charter does apply to, and must be respected at all levels of EU law adjudication, irrespective of the degree of autonomy recognised to the Member States. The previous Chapters showed that Article 47 EU Charter is sometimes balanced with national security concerns (national public interest), in other areas it has to be balanced with constitutional principles of the EU legal order (principle of mutual recognition). When searching for the points of balance between different requirements, neither the effective enforcement of rights nor the principles should be understood as absolute. This conclusion has been reached by the CJEU and ECtHR in jurisprudence developing since 2011.

Under Articles 4 and 47 EU Charter, the safety of Member States can be challenged, and national courts have to carry out an assessment of whether the Dublin transfer should be approved or not, in the following precise circumstances concerning human rights violations:

1. *Proof<sup>232</sup> of systemic deficiencies* in the asylum procedure and in the reception conditions of applicants in the Member State of transfer, which reach the level of a risk of violation of Article 4 CHARTER (M.S.S. v. Belgium and Greece, and N.S. v. Secretary of State for the Home Department, and M. E. and others v Refugee Applications Commissioner, the Minister for Justice, Equality and Law Reform) The

---

<sup>232</sup> The ECtHR and CJEU clarified what type of evidence can be considered as proof of systemic deficiencies: regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in the Member State of transfer; relevant correspondence sent by the United Nations High Commissioner for Refugees (UNHCR); reports of the EU's Commission and/or Council on the evaluation of the Dublin system.

conclusions reached by the ECtHR and CJEU in cases concerning Dublin transfers in Greece were codified in Article 3(2)(2) Dublin III Regulation.

2. *Proof of individual violations of Article 4 Charter*

The Dublin III Regulation does not contain an express provision requiring a Member State to refuse a Dublin transfer to the Member State where the asylum seeker would risk an individual violation of Article 4 which does not reach the threshold of systemic deficiencies in the asylum procedure and reception conditions. The CJEU judgments in the Puid and Abdullahi cases have been interpreted as confirming that the only limitation to Dublin transfers is the ‘systemic deficiency’ threshold of violations.

In *Tarakhel*<sup>233</sup>, the ECtHR has expressly rejected the ‘systemic deficiencies’ threshold as the only situation where Member State’s compliance may be challenged and an Article 3 ECHR violation triggered. The Court clarified that the “source of the risk does nothing to alter the level of protection guaranteed by the Convention...and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established”[104]. Hence, although ‘extreme poverty on a large scale in Greece at the time of *M.S.S.* judgment is in no way comparable to the current situation in Italy’ (para. 144), the Court still concludes that there are problems with reception capacities, in particular keeping families together, and living conditions. Consequently, and after examining the individual situation, the Court concludes that given children’s “extreme vulnerability” specific guarantees must be given to the family that they will be received in facilities and that they will be kept together in order to assure compliance with Article 3 (para. 120). In this case, the ECtHR found Switzerland in violation of Article 3 ECHR for not having obtained sufficient assurances that the family will be kept together and that there will be no risk of violation of their Article 3 ECHR guarantees if transferred to Italy.

In *C.K. and other*, the CJEU has attempted to bring its previous jurisprudence in line with the *Tarakhel* judgment of the ECtHR and clarified that:

1. *First both ‘systemic deficiencies’ and ‘individual violations’ of Article 4 Charter can act as limitation to Dublin transfer*

*Article 4 Charter must be interpreted as meaning that even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an asylum seeker within the framework of Regulation No 604/2013 can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that article;*

2. *The threshold of individual violations of Article 4 Charter in medical cases – ‘real and proven risk of significant and permanent deterioration in the state of health of the person’*
3. *Steps to be followed before suspending a Dublin transfer:*

The refusal is conditional upon the Member States’ authorities taking first “the necessary precautions, it results that to ensure that the transfer takes place in conditions enabling appropriate and sufficient protection of that person’s state of health. If, taking into account the particular seriousness of the illness of the asylum seeker concerned, the taking of those precautions is not sufficient to ensure that his transfer does not result in a real risk of a significant and permanent worsening of his state of health, it is for the authorities of the

---

<sup>233</sup> The case concerned the Dublin transfer of an Afghan family with six children, of which one newly born baby, from Switzerland to Italy.

Member States concerned to suspend the execution of the transfer of the person concerned for such time as his condition renders him unfit for such a transfer;

4. *Member States can assume responsibility to conduct their own examination of the asylum application by making use of the discretionary clause (Article 17 Dublin III Regulation) if “it is noted that the state of health of the asylum seeker concerned is not expected to improve in the short term, or that the suspension of the procedure for a long period would risk worsening the condition of the person concerned.”*

#### Impact of the C.K. and other preliminary ruling

Several national courts<sup>234</sup> have rejected the Dublin transfer of asylum seekers to Bulgaria and Hungary on the basis of Article 4 and 47 EU Charter and the *C.K. and others* preliminary ruling, finding individual or systemic deficiencies (the latter found only in Hungary). Violations of Articles 4 and 47 EU Charter have determined the national courts to thwart the balance in favour of respecting fundamental rights rather than making a strict application of the principle of mutual recognition.

### **F5.4. Reformatory Judicial Powers Necessary to Ensure Respect of the Right to an Effective Remedy**

#### **Question 1 – Can the right to an effective remedy require reformatory powers from national courts?**

##### 1.1 Consistent interpretation technique - Metropolitan Court of Public Administration and Labour, Judgment of 10 March 2016, 5.K.30.385/2016

##### *Facts of the case*

The applicant was persecuted and repeatedly tortured by the Al-Shabab for working in a cinema broadcasting movies, which is against Islam. The Immigration and Asylum Office (IAO) did not grant him refugee status, but only subsidiary protection. The reasoning was that the applicant could only evoke his lower social status, coming from a minority tribe, which in itself does not qualify as persecution and there were no grounds from the Geneva Convention. The fact that Al-Shabab did not allow the applicant to work in a cinema cannot be considered persecution as this was a conflict within the same religion (Islam) therefore it is not persecution on religious grounds. On the other hand, subsidiary protection was granted due to the general security situation in Somalia being considered insufficient. The Applicant appealed the decision.

##### *Reasoning of the Court*

Since 15 September 2015, courts in Hungary no longer have reformatory powers to change administrative decisions. However, in this case the Court overruled the IAO's decision and recognized the applicant as a refugee based on the following arguments:

---

<sup>234</sup> See, e.g. Romania (first instance court of Bucharest).

The judge firstly set forth that the Hungarian Fundamental Law acknowledges the supremacy of international law over domestic laws and in the case of conflict between the two, the Constitutional Court is entitled and obliged to quash the problematic domestic provision. As Hungary ratified the ECHR, it is part of domestic law as well. The court emphasized that timeliness is also an attribute of an effective remedy and given the circumstances that the legislator abolished the courts' power to change administrative decisions and address the violations of the rights of the applicant in a timely and direct manner, it needs to disregard the latest legal modifications.

The Court argued that as the ECHR and the Charter foresee that a remedy may only be effective if it is effectuated in a reasonable time, the Hungarian legislation must observe this requirement as well. Given the fact that asylum seekers are in a specifically vulnerable position within the host society, they must have their rights protected in an effective manner as the ECtHR ruled in *MSS v. Belgium and Greece*. The Court also noted that Article 31 of the Asylum Procedures Directive foresees that the refugee status determination procedure should be completed within the shortest reasonable time.

Given the fact that Hungarian legislation does not respect the above requirement of EU law, the court needed to remedy the situation, otherwise asylum seekers risk being stuck in an endless court review procedure, because the IAO continues to issue incorrect decisions and the court can only quash them, but cannot award refugee status. Such a limbo may lead to endless insecurity, which is not permitted given the extreme vulnerability of traumatized asylum seekers.

The Court ruled that the remedy can only be regarded effective if it is able to rectify the situation and if the courts are not vested with reformatory power this may lead to the ineffectiveness of the remedy.

### *Instances of judicial dialogue*

The Court applied the consistent interpretation technique by referring to the Article 6 of the TEU which states that the Charter has the same legal force as the Treaties, so its provisions are legally binding on EU institutions, offices and bodies and, with the exception of the United Kingdom and Poland, on Member States if they are acting for the purpose of implementing EU law. The granting or refusal of a refugee status means the application of the law of the European Union, including the Charter. The core issue of the case is effective remedy; therefore Article 47 of the Charter was held to be applicable.

The Court underlined that in case of conflict between a domestic and international norm the Court is obliged to adhere to the latter and set aside the former. Given the well-established right to an effective remedy in ECHR and the Charter, which also encompass the element of duration of the administrative and judicial procedures, the Court granted refugee status to the Applicant, despite having no reformatory powers according to the domestic legislation. To abide by this legislation would result in a never-ending appeal procedure thereby rendering the remedy ineffective. Remedies in such cases cannot be considered effective, if the remedy has to be used more than once to obtain an effective and definitive result.

### 1.2 Preliminary reference technique - CJEU - C-113/17 from Supreme Court of the Slovak Republic

The Supreme Court of the Slovak Republic referred preliminary questions to the CJEU on 6 March 2017 regarding the interpretation of Article 46(3) of the Asylum Procedures Directive and the

mandate of national courts to grant international protection in the case of successful appeals showing the ineffectiveness of the responsible administrative body.

The following questions are submitted to the CJEU for a preliminary ruling:

1. Must Article 46(3) of the [Recast APD] be interpreted to the effect that a national court deciding on the merits of an applicant's need for international protection may, on the grounds that a negative decision has been repeatedly set aside and the case referred back to an administrative body on the basis of a repeatedly successful appeal, which has thus been shown to be ineffective, decide itself to grant such protection to the applicant, even if it does not have such competence under national law?
2. If the answer to the first question is in the affirmative, does an appellate court competent to hear appeals concerning points of fact and law (the Najvyšší súd (Supreme Court) (Slovak Republic)) also have such jurisdiction?

## 6. Right to an Effective Remedy and Suspensive Effect of Appeal

The Recast APD, while introducing welcomed guarantees of effective judicial protection and the principle of *non-refoulement*, has not harmonised the domestic asylum appeal procedures. These are part of the core procedural autonomy recognised to the Member States. Consequently, there are major differences in the way appeal procedures are organised, and the intensity of judicial review powers of national courts. For instance, the Recast APD introduces a two-tier system option as regards the suspensive effect of appeal in accelerated asylum procedures. The Member States can either grant the suspensive effect of appeal automatically or via separate individual request (see the exceptions in Article 46(6) Recast APD). Additionally, the Recast APD does not clarify the question regarding the levels of jurisdictions Member States can have. Article 46 only request a right to an effective remedy before a court or tribunal. Furthermore, Member States have taken advantage of the margin of discretion and established accelerated procedures where the time limit for submitting an appeal is considerably shorter than in normal asylum proceedings, and certain Member States have also limited the judicial oversight of courts to an *ex tunc* review rather than *ex Nunc*. This used to be the case in **Belgium** and **France**, until the ECtHR and CJEU have found these legislations and practice to not be in line with Article 47 EU Charter and Articles 3 and 13 ECHR (discussed in the below sections).

The Return Directive, Article 13, contains even less safeguards, and Member States follow various appeal procedures in return proceedings<sup>235</sup>.

This chapter examines the requirements imposed by Article 47 EU Charter as regards the recognition of automatic suspensive effect of appeals in accelerated asylum proceedings and return proceedings. The section deals with both procedures, since the principles developed by the CJEU are similar. The section includes the relevant landmark CJEU judgments (*Tall* on accelerated asylum procedures, and *Abida* on return proceedings), additionally it includes the reactions of the national courts from various Member States. While the *Abida* preliminary ruling has not left room for interpretation, and seems to have brought clear and consistent effects on national jurisprudence, the *Tall* preliminary ruling seems to have had less effect in practice.

The jurisprudence discussed in this section shows the potential impact of the CJEU jurisprudence even in areas which are in principle, still falling under the procedural autonomy of the Member States. For instance, the **Dutch Council of State** asked the CJEU to clarify whether national asylum procedure where suspensive effect of appeal is subject to separate request is conform with Article 47 EU Charter (pending). And the divergent jurisprudence of the **Polish Supreme Administrative Court** on the interpretation of administrative decisions that should benefit of automatic suspensive effect indicate that further clarifications are needed as regards the effects of Article 47 EU Charter as developed by the CJEU in *Tall*.

A second issue addressed in this section regards the interpretation of the scope of application of the right to remain under Article 46(5) Recast APD. Namely, does Article 47 EU Charter require that

---

<sup>235</sup> For a comparative assessment of the domestic appeal procedures in return proceedings see more in the REDIAL 2<sup>nd</sup>, available online here, [http://cadmus.eui.eu/bitstream/handle/1814/43924/MPC\\_REDIAL\\_2016\\_04.pdf](http://cadmus.eui.eu/bitstream/handle/1814/43924/MPC_REDIAL_2016_04.pdf)

the suspensive effect of appeal shall automatically apply also to the second and third instance appeals against the first instance judicial decision?

## 6.1. The Right to Remain on the Territory and Suspensive Effect of Appeal

### Short overview of EU legal framework

Compared to Article 39 of the Asylum Procedures Directive (2005/85/EC), Article 46(5) of the Recast Asylum Procedure Directive, expressly provides for the automatic suspensive effect of appeals against decisions adopted by the administrative authorities in international protection proceedings. Article 46(4) has codified the principle of effectiveness of EU law and requires "reasonable time limits and other necessary rules" for the applicant to exercise his or her right to an effective remedy. These provisions should be translated as meaning: practical accessibility to the appeal of the third country nationals (this is particular relevant in cases of detained asylum seekers, translation of the initial decisions, and the sufficient and adequate time period for lodging appeals).

In addition to the automatic suspensive effect of the appeal, Article 46(3) codified the European jurisprudence on judicial review powers of national courts. Currently national courts hearing an appeal have an unlimited jurisdiction to review the lawfulness — in law and in fact — of the decision/judgment by examining the merits of the reasons which led the competent authority to consider the application to be unfounded or abusive.

In limited and precise circumstances, the Recast APD allows for an exhaustive list of exceptions from the automatic suspensive effect of appeals (Article 46(6)<sup>236</sup>).

In such procedures, the suspensive effect of the appeal may be made subject by the Member State to a separate request to stay the execution of the negative decision. When applying these accelerated procedures at the borders, Member States have to provide legal and linguistic assistance and stay the expulsion for at least one week, according to Article 46(7). The judge must also review the negative decision in terms of fact and law while examining the request for staying the execution. According to Article 46(8), applicants must be allowed to remain in the territory pending the outcome of the procedure on interim measures under Article 46(6) and (7), except for the cases of subsequent applications mentioned in Article 41(1).

Importantly, Article 20 Recast APD requires for free legal assistance and representation throughout appeal proceedings.

The APD has introduced several essential guarantees which have been developed by the CJEU on the basis of Article 47 EU Charter (see below *Tall*). These additional clarifications and guarantees are particularly important in the framework of special proceedings (e.g. accelerated procedures) where the Directive introduces several limitations and exceptions.

In light of the recent race to the bottom of certain national legislations limiting the levels of jurisdiction that can hear appeals against the administrative decisions, it is important to underline that the written and jurisprudentially developed safeguards apply to the appeals procedure as a whole. This means that if the national asylum system provides for several appeal mechanisms, it is

---

<sup>236</sup>Namely, manifestly unfounded or unfounded applications, inadmissible applications, rejected applications previously implicitly withdrawn or abandoned and applicants from a 'European safe third country'.

the sum of all these mechanisms that is to be regarded when assessing whether domestic remedy is or not effective in light of the Article 47 EU Charter requirements (see below the *H.I.D.*, *Diouf* cases).<sup>237</sup>

### Short overview of relevant CJEU jurisprudence

In *Diouf*, the CJEU held that the right to an effective remedy applies only to a final decision rejecting the application on the substance, thereby excluding preparatory decisions (paras. 41-43). Thus, the Court did not find it necessary to recognise a right to an effective remedy to the asylum seeker against the decision to apply an accelerated procedure, as long as the reasons for the decision to accelerate “*should be amenable to review when the final decision was challenged.*” (56) Furthermore, according to the CJEU (*Tall*, para. 51), the characteristics of the Asylum Procedures Directive based right to an effective remedy must be determined in a manner that is consistent with Article 47 EU Charter.<sup>238</sup> As the CJEU stated in *H.I.D. and B.A.*, accelerated procedures cannot affect the fundamental guarantees to which any asylum seeker is entitled.

Although the Recast APD allows for exceptions from the automatic suspensive effect of appeal in specific circumstances (such as accelerated proceedings), these are subject to compliance with Article 19(2) – principle of non-refoulement, and Article 47 EU Charter – the right to an effective remedy.

While limitations of the automatic suspensive effect of appeal are possible in exhaustive circumstances and if Article 19(2) EU Charter is not at issue, the full and *ex nunc* judicial review powers of the national courts cannot be limited. *Tall*, *Conka v Belgium*, *I.M. France*, and *Decision 1/2014 of the Belgian Constitutional Court* are all supportive of such an interpretation.

### ECtHR case law

- *Sow v. Belgium*, App. 27081/13, 19 January 2016
- *AC et. Al. v. Spain*, Appl. No. 6528/11, Judgment of 24 April 2014
- Violation of 3 and 13 ECHR because a Spanish court decided within a week on the main appeal, while another court still had to decide on the request for interim relief.
- *I.M. v France*, Judgment of 2 May 2012, Appl. No. 9152/09
- lack of effective remedy in fast track asylum application, first asylum application made; violations of Articles 3 and 13 ECHR due to the fact that although “*the remedies of which the applicant had made use had been available in theory, their accessibility in practice had been limited to the automatic registration of the asylum application under the fast track procedure, the short deadlines (5 days for lodging an asylum application, 48 hours for the appeal) and the practical and procedural difficulties in producing evidence, given that he had been in detention and applying for asylum for the first time. The applicant’s*

---

<sup>237</sup> See also M. Reneman, Chapter 6 - The Right to Remain on the Territory of the Member State, in EU Asylum Procedures and the Rights to an Effective Remedy, OUP 2014.

<sup>238</sup> According to the hierarchy of EU norms, the provisions of the EU Charter are hierarchically superior to EU secondary acts.



*application to the administrative court had been adversely affected by the conditions in which he had to prepare it and the inadequate legal and linguistic assistance provided. Furthermore, the interview with the competent authority lasted only 30 minutes, despite the fact that the case was complex and concerned a first-time asylum claim.*”<sup>239</sup>

- *Adbolkani and Karimnia v Turkey*, Judgment of 22 September 2009, Appl. No. 30471/08, paras 108 and 111–117;
- *Gebremedhin v France*, Judgment of 26 April 2007, Appl. No. 25389/05, paras 58–67: in cases of a risk of violation of Article 3 ECHR, the appeal must have a suspensive effect not only ‘in practice’ but also according to the legislation. In line with the previous judgment in *Conka*, the ECtHR held that established practice or jurisprudence does not have the guarantees of a written law.
- *Conka v Belgium*, Judgment of 5 February 2002, Appl. No. 51564/99, paras 75–83.

## **Main questions addressed by recent national jurisprudence**

**Question 1** Does Article 47 jointly with Article 19(2) EU Charter require an automatic suspensive effect of appeal in accelerated asylum procedure?

*1.1 CJEU Preliminary ruling in Tall (Belgium) standards on the automatic suspensive effect of appeal based on the absolute nature of the principle of non-refoulement*

*1.2 Clarification of Tall implications in cases where the administrative decision rejecting an asylum application includes also an obligation to return*

*1.3 Judgment of the Supreme Administrative Court of Poland –divergent jurisprudential line*

**Question 1 – Does Article 47 EU Charter require an automatic suspensive effect of appeal in accelerated asylum procedure?**<sup>240</sup>

Shall the appeal against a refusal of a subsequent asylum application have automatic suspensory effect on grounds of Articles 19(2) and 47 EU Charter?

Can the non-automatic feature of the appeal be justified on account that it is limited to subsequent asylum applications/accelerated asylum procedure?

Does Article 47 EU Charter limit the discretion recognised to the Member States to accelerate certain asylum proceedings?

<sup>239</sup> See the ECtHR [press release](#).

<sup>240</sup> This section is based on materials gathered within the ReJus, ACTIONES and REDIAL Projects. The author would like to thank Geraldine Renaudiere, Adjointe au chef de secteur LCP, Secrétariat général des affaires européennes, France for commentaries to the Belgian jurisprudence and legal developments.

## **CJEU preliminary ruling in *Tall* and its impact on Belgian jurisprudence and legislation – confirmation of automatic suspensive effect of appeal based on the principle of non-refoulement**

### *Facts of the case (including legal and jurisprudential context of the preliminary reference)*

After the final rejection of his first asylum application in November 2013, Mr. Tall, a Senegalese national, introduced a second asylum claim, relying on evidence which he presented as being new. This second asylum application was not taken into consideration by the Belgian immigration authorities ('Commissioner general for refugees and stateless persons'). Following this refusal, his access to social assistance was terminated. He was then ordered to leave the territory. Several days later, Mr. Tall lodged two appeals: one before the **Council of Aliens Law litigation** (hereafter, the CALL) against the decision refusing to take into consideration his second application for asylum; another before the **Labour court of Liège** concerning withdrawal of his social assistance. Before the Court, Mr Tall argued that the Belgian law established a discriminatory treatment between appeals formulated against refusals of first asylum application and appeals against refusal of subsequent application. The extreme urgency procedure characterised by very short time limits for lodging appeals and limited judicial oversight in cases of subsequent application violates the right to an effective remedy of these asylum seekers. In the following paragraphs, the legal and jurisprudential context will be summarised up to the point in time of Mr Tall appeal.

The 2012 Belgian law recognised different characteristics to the appeal against a refusal to consider an asylum application depending on whether it was the first application or a subsequent application. If the later circumstances were applicable, the appeal was subject to an 'annulment procedure', establishing shorter deadlines for the appeal, limited judicial oversight (*ex tunc* assessment) and without automatic stay of execution of the appealed decision (the stay of the execution had to be requested through the 'extremely urgent procedure'). Following the entry into force of the 2012 Law, a jurisprudential trend developed, whereby Belgian courts would not strictly respect the 'extremely urgent procedure' but, they would accept stay of execution introduced after the five days limit if Article 3 ECHR was invoked. Furthermore, in such cases the courts would also agree to take into account elements that were unknown by the administration (see [commentary](#)).

On January 16, 2014, the **Belgian Constitutional Court**<sup>241</sup> annulled the 2012 Law on account of disproportionately limiting the right to an effective remedy and thus violating the Articles 3 and 13 ECHR. The Court held that the jurisprudential development did not offer the necessary guarantees that a law would offer, since courts can still diverge and the administration can enforce a removal if the request to stay the execution was lodged after the five days prescription time. In addition, the Court held that although a different treatment of asylum seekers coming from 'safe countries of origin' could be established on the grounds of the nationality of the asylum seeker, the CJEU held in *H.I.D. and B.A* that accelerated procedures must respect the basic principles and fundamental guarantees enshrined in the Asylum Procedures Directive and the EU Charter of Fundamental Rights (Article 47). This would require that any limitation of fundamental rights need to fulfil the requirements of a legitimate public objective, being necessary and proportional. The Court concluded that although the nationality of asylum seekers can be an objective criterion in principle, in practice, the limitation imposed by the Belgian law is a disproportionate interference with the

---

<sup>241</sup> Constitutional Court, 1/2014, 16 January 2014.

right to an effective remedy, since it limits both the time period to lodge an appeal and the limitation of judicial oversight.

The interpretation of the conformity of the annulment and extreme urgency procedure, with the right to effective remedy by Belgian Constitutional Court was correct as reflected by the *ECtHR* delivered on 19 January 2016, regarding the effectiveness of legal remedies in Belgium. In *Sow*, the Court explicitly recalled that, when Article 3 ECHR is at stake, only the remedies with automatic suspensive effect are deemed effective, “given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialized.”<sup>242</sup> The Court reiterated the same requirement in *M.D. and M.A.*, where it called upon the Belgian authorities to examine closely the risk faced by the applicant in the light of the documents submitted in support of his/her asylum request and to provide for automatic suspensive remedies.<sup>243</sup> Although the Court did not find a violation of Article 13 in those cases, it had ruled previously that the Belgian ‘extremely urgent procedure’ for applying for a stay of execution, as it existed before the Law of 2014, did not meet the standards provided by the Convention.<sup>244</sup>

Following this judgment, the Belgian Government passed a new law in 2014<sup>245</sup>, which eliminated the differentiated features of appeals in asylum proceedings, and recognised a similar automatic suspensive effect to the request for suspension, which need to be introduced within the 10 days of the notification of the order to leave the territory. The law also provided for rules regarding its transitional application.

Therefore, although the first and second asylum application were rejected under the ambit of the 2012 Law, the 2014 Law was in force at the time the Labour Court was seized with the appeal lodged by Mr Tall. The appellant asked the **Court to address preliminary references to the Belgian Constitutional Court and the CJEU asking for the clarification on the compatibility of the 2012 Law with the Constitution and, respectively, EU law.**

The **Belgian Constitutional Court**<sup>246</sup> did not pronounce on the substance of the reference, since it took note of the 2014 Law which had eliminated the differentiated treatment and considered that Mr Tall satisfies the criteria of the transitional application of the Law, thus the Court considered that Mr Tall would be able to lodge a new appeal under the 2014 Law against the same negative administrative decision.

The *Labour court (Liège)* admitted also the request of Mr Tall to address a preliminary reference asking the CJEU whether the Belgian legal rules applicable prior to the 2014 Law are compatible with EU law (Asylum Procedure Directive and Article 47 EU Charter).

### *CJEU preliminary ruling*

---

<sup>242</sup> ECtHR, *Sow v. Belgium*, App. 27081/13, 19 January 2016, para. 47. See also *Jabary v. Turkey*, App. 40035/98, 11 July 2000, para. 50.

<sup>243</sup> ECtHR, *M.D. and M.A. v. Belgium*, App. 58689/12, 19 January 2016.

<sup>244</sup> ECtHR, *Singh v. Belgium*, App. 33210/11, 2 October 2012; *M.S.S. v. Belgium*, App. 30696/09, 21 January 2011, paras 386-390.

<sup>245</sup> Law of 10 April 2014 laying down various provisions concerning the procedure before the Council of Aliens law litigation and before the Conseil d’État, amending the Law of 15 December 1980, *Mon. B.*, 21 mai 2014 (see CJEU, *Tall*, C-239/14, EU:C:2015:824, par. 30-34).

<sup>246</sup> Constitutional Court of Belgium, Judgment No 56/2015 of 7 May 2015

Before the CJEU, the Belgian Government and the European Commission argued that the preliminary question should be dismissed as inadmissible since the recent legislative amendment solved this issue by recognizing equal procedural treatment between the first application of asylum and subsequent asylum applications, thus leaving the preliminary reference without object.<sup>247</sup> In support of their claim they argued that the *Belgian Constitutional Court* recognized retroactive application of the Law, at least in regard to pending subsequent asylum application, as was the case of Mr. Tall.<sup>248</sup>

Among the conditions for the admissibility of the preliminary reference, there is the requirement that the dispute is pending and genuine. The CJEU decided to admit the preliminary reference on the ground of the presumption of relevance<sup>249</sup>, of which national courts benefit under Article 267 TFEU, but also under the duty of sincere cooperation (Article 4(3) TEU). The CJEU followed its long-settled presumption of relevance<sup>250</sup> in favour of the national court, and trusted the choice done by the national court which found the necessity of having a reply from the CJEU.<sup>251</sup>

However, the CJEU refused to pronounce on the retroactive application of the 2014 Law in the case of Mr Tall, since this is a question of national law which falls outside the competence of the CJEU.

The CJEU interpreted the preliminary reference as, in essence, concerning the conformity of the appeal in “fast track” or accelerated asylum proceeding with the requirements of Article 47 EU Charter. In particular, the CJEU was asked to assess whether Article 47 EU Charter requires, within the fast track asylum procedure, a suspensory effect of the appeal, regardless of the number of asylum application made; unlimited jurisdiction of the court hearing the appeal, and access to social benefits pending the appeal. It was thus an opportunity for the CJEU to clarify the *Diouf* case,<sup>252</sup> which dealt with similar issues, within the ambit of asylum proceedings.

Although the CJUE upheld the discretion recognised to the Member States in *Diouf*, whereby they are not required to confer a full examination and suspensive appeal in accelerated procedure where the applicant submits new asylum application without presenting new evidence<sup>253</sup>, it enhanced the

---

<sup>247</sup> Law of 10 April 2014 laying down various provisions concerning the procedure before the Council of Aliens law litigation and before the Conseil d’État, amending the Law of 15 December 1980, *Mon. B.*, 21 mai 2014 (see CJEU, *Tall*, C-239/14, EU:C:2015:824, par. 30-34).

<sup>248</sup> Constitutional Court of Belgium, Judgment No 56/2015 of 7 May 2015.

<sup>249</sup> The presumption that questions referred by national courts for a preliminary ruling are relevant may be rebutted only in exceptional cases, where it is quite obvious that the interpretation of EU law that is sought bears no relation 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 (judgment in *FOA*, C354/13, EU:C:2014:2463, para.45, *Tall*, para. 34)

<sup>250</sup> Case C-338/85, *Pardini v. Ministero del commercio con l’estero*, Case C-104/79, *Foglia v Novello*, judgment of 11 March 1980

<sup>251</sup> For more details on the conditions for addressing a preliminary reference, see the ACTIONES Module on Judicial Interaction Techniques, the [JUDCOOP Handbook](#).

<sup>252</sup> CJEU, *Samba Diouf*, C-69/10, 28 July 2011, EU:C:2011:524. The case is discussed under the section on Return Proceedings, here below.

<sup>253</sup> See, CJEU: “must be stated at the outset that the differences that exist, in the national rules, between the accelerated procedure and the ordinary procedure, the effect of which is that the time-limit for bringing an action is shortened and that there is only one level of jurisdiction, are connected with the nature of the procedure put in place. The provisions at issue in the main proceedings are 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)

protection of the right to an effective remedy by restating the conclusions reached in the *Abdida* preliminary ruling delivered a year prior to the *Tall* judgment<sup>254</sup>.

Regardless of the type and number of asylum applications submitted, if these are followed by return proceeding, then this will need to offer an appeal with suspensory effect “*when it is brought against a return decision whose enforcement may expose the third-country national concerned to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, thereby ensuring that the requirements of Articles 19(2) and 47 of the Charter are met in respect of that third-country national*”<sup>255</sup>. On the other hand, the CJEU concluded that “*Article 39 of the Directive 2005/85 does not require an automatic suspensive remedy against a decision such as the one at issue in the main proceedings, when the enforcement of which is not likely to expose the third-country national concerned to a risk of ill-treatment contrary to Article 3 ECHR.*”

In conclusion, the recognition of an automatic suspensive effect of an appeal depends on whether the enforcement of the challenged decision is likely to expose the third-country national concerned to a risk of ill-treatment contrary to Article 4 EU Charter or Article 3 ECHR, and does not depend on the legal qualification of the decision or the type of asylum procedure within which the decision was adopted (i.e. regular, accelerated, border).

#### *Impact of the CJEU preliminary ruling*

In *Tall* the CJEU interpreted the provisions of Article 39 of the Recast Asylum Procedure Directive confirms the CJEU interpretation, which comes few months after the end of the transposition period of the Directive. Article 41(1) of the Recast Asylum Procedure Directive 2013/32<sup>256</sup> clarified the right of States to derogate from the right of the applicants to remain in the territory in the event of a subsequent application, explicitly stating that the States can derogate only if the rejection does not imply a return decision resulting in direct or indirect *refoulement*. This interpretation of the CJEU also confirms the interpretation previously adopted by the Belgian Constitutional Court.

Further relevant case law: The implications of the CJEU judgment in the *Tall* case have been further clarified by the CJEU in a preliminary ruling addressed by the Dutch Council of State – C-175/17

#### **Pending preliminary ruling from Dutch Council of State – clarification of the implications of the *Tall* preliminary ruling at national level**

---

<sup>254</sup> CJEU, *Abdida*, C-562/13, 18 December 2014, EU:C:2014:2453, para. 40-45.

<sup>255</sup> CJEU, *Tall*, C-239/14, para. 58. See, to that effect, CJEU, *Abdida*, para. 52 and 53.

<sup>256</sup> Article 41 reads as follows: “Member States may make an exception from the right to remain in the territory where a person: (a) has lodged a first subsequent application, which is not further examined pursuant to Article 40(5), merely in order to delay or frustrate the enforcement of a decision which would result in his or her imminent removal from that Member State; or (b) makes another subsequent application in the same Member State, following a final decision considering a first subsequent application inadmissible pursuant to Article 40(5) or after a final decision to reject that application as unfounded.

Member States may make such an exception only where the determining authority considers that a return decision will not lead to direct or indirect *refoulement* in violation of that Member State’s international and Union obligations.”

Given that several Member States have taken advantage of the options permitted by Article 46(6) of the Recast APD to secure suspensive effect of appeal via individual separate request, uncertainties regarding the conformity of these legislations with Article 47 EU Charter and Article 19(2) have started to arise at national level in light of the preliminary rulings of the CJEU in *Tall*.

On 6 of April 2017, the **Dutch Council of State** has thus addressed preliminary questions to the CJEU in an attempt to clarify the CJEU requirements under *Tall* (C-175/17).

These are the questions referred to the Court:

Must Article 13 of 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 (OJ 2008 L 348, p. 98; ‘the Return Directive’), read in conjunction with Articles 4, 18, 19(2) and 47 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that under EU law, if national law makes provision to that effect, in proceedings challenging a decision which includes a return decision within the meaning of Article 3(4) of Directive 2008/115/EC, the legal remedy of an appeal has automatic suspensory effect where the third-country national claims that enforcement of the return decision would result in a serious risk of infringement of the principle of non-refoulement? In other words, in such a case, should the expulsion of the third-country national concerned be suspended during the period for lodging an appeal, or, if an appeal has been lodged, until a decision has been delivered on that appeal, without the third-country national concerned being required to submit a separate request to that effect?

Must Article 39 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13; ‘the Procedures Directive’), read in conjunction with Articles 4, 18, 19(2) and 47 of the Charter of Fundamental Rights of the European Union, be interpreted as meaning that, under EU law, if national law makes provision to that effect, in proceedings relating to the rejection of an application for asylum within the meaning of Article 2 of Directive 2005/85/EC, the legal remedy of an appeal has automatic suspensory effect? In other words, in such a case, should the expulsion of the asylum-seeker concerned be suspended during the period for lodging an appeal, or, if an appeal has been lodged, until a decision has been delivered on that appeal, without the asylum-seeker concerned being required to submit a separate request to that effect?

### **On 26 September 2018, the CJEU delivered its judgment:**

Article 39 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, and Article 13 of 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, read in the light of Articles 18, 19(2) and 47 of the Charter of Fundamental Rights of the European Union, must be

interpreted as not precluding national legislation which, whilst making provision for appeals against judgments delivered at first instance upholding a decision rejecting an application for international protection and imposing an obligation to return, does not confer on that remedy automatic suspensory effect even in the case where the person concerned invokes a serious risk of infringement of the principle of non-refoulement.

### **Judgment of the Supreme Administrative Court of Poland –divergent jurisprudence on whether suspensive effect should be recognised to an appeal against negative asylum decision on the basis of Articles 47 and 19(2) EU Charter<sup>257</sup>**

#### *Facts of the case*

The applicant submitted an application for refugee status. The first instance authority (the Head of the Office for Foreigners) refused to grant him refugee status and subsidiary protection (without issuing a return order). After an appeal, the second instance authority (the Polish Refugee Board) upheld the decision.

The applicant appealed to the **Regional Administrative Court in Warsaw**. The appeal included a request to suspend execution of the appealed decision, since its execution would lead to irreparable consequences for the applicant. The Regional Administrative Court in Warsaw refused to suspend the execution of the decision of the Polish Refugee Board.

In the cassation complaint to the **Supreme Administrative Court**, the applicant advanced that the execution of the negative decision on asylum will result in the issuance of a return decision, which could be enforced before the Court hears the case. In such a case, he would not be able to participate in the court proceedings concerning his asylum case.

#### *Reasoning of the Polish Supreme Administrative Court*

Under the Law on proceedings before administrative courts, an administrative court can suspend the execution of the appealed decision upon the request of the applicant, if the execution of the decision would cause a substantive damage or have irreversible effects. Such decisions must be enforceable in their nature, which means they should impose obligations or provide rights. The Supreme Administrative Court has developed two strands of diverging jurisprudence. Notably, certain judgments considered the refusal to recognise international protection as not qualifying as a decision which could cause in itself damage or irreversible effects. (see the judgments of 21 April 2015 no II OZ 309/15, from 7 May 2015 no II OZ 378/15, from 8 May 2015 no II OZ 402/15 and 28 January 2015 no II OZ 41/15).

---

<sup>257</sup>Rejus Template and material by Karolina Rusiłowicz, lawyer Helsinki Foundation of Human Rights. The summary of the case had been prepared for European Database of Asylum Law (EDAL, [www.asylumlawdatabase.org](http://www.asylumlawdatabase.org)) within the project “Legal exchange and mutual learning between asylum practitioners to promote fundamental rights in the EU” coordinated by the European Council on Refugees and Exiles (ECRE) in partnership with the Helsinki Foundation for Human Rights with financial support from the Fundamental Rights and Citizenship Programme of the European Union.

The reasoning of the Supreme Administrative Court in this line of jurisprudence relies on the interpretation of the Law on Foreigners as not making the decision taken by the Polish Refugee Board refusing the applicant protection directly leading to expulsion. In case of non-compliance of the obligation to leave in 30 days included in the negative administrative decision, a person cannot be deported. If the obligation to leave Poland is not fulfilled, it constitutes a basis for the Border Guard to launch return proceedings. Only this decision can be forcibly executed.

The Court does not accept the argument advanced by the applicant that the execution of the decision refusing protection should be suspended because the decision on return, issued in the future, can be enforced before the present proceedings finish. The Court held that temporary protection cannot be anticipated, while the applicant can request suspension of the return decision before a court once it is issued.

The Supreme Administrative Court held that granting temporary protection is not justified by the argument that standards of the fair procedure and right to court require personal participation of the applicant in the proceedings before a court. Taking into account the character of the procedure before an administrative court - within which facts of the case are not being established, but only points of law can be litigated and the applicant is represented by a professional legal representative – it cannot be stated that absence of the applicant would limit his right to court.

In another line of jurisprudence, the **Supreme Administrative Court** considers the negative decision as entailing a clear obligation to leave the territory of Poland (according to the May 2014 Law) within 30 days from the day the decision of the Polish Refugee Board is served. This obligation is not formulated directly in the decision itself, but is based on the legal provisions in place. This has also been the consistent approach of lawyers as regards the effects of the administrative decisions rejection refugee or subsidiary protection status.

In *Tall*, the CJEU recognised an automatic suspensive effect of appeals for negative decisions in accelerated procedures, if their enforcement is likely to expose the third-country national concerned to a risk of ill-treatment contrary to Article 4 EU Charter or Article 3 ECHR. The implications of the Tall preliminary ruling within the Polish legal framework is thus debatable.

## **Question 2 – What is the scope of suspensive effect of appeal under the right to an effective remedy – one or two levels of jurisdiction?**

*2.1 Divergent Italian jurisprudence: Bari Court of Appeal as representative of a wider scope of suspensive effect of appeal; Tribunal of Torino as representative of the right to an effective (suspensive effect of appeal) covering only appeal before the first instance court*

*2.2 Estonian Supreme Court (Riigikohus) – restrictive scope of suspensive effect of appeal*

Is the asylum applicant's right to remain in the country pending the outcome of the appeal judicial decision, according to Article 46 of the Recast APD, to be interpreted in the sense that the suspensive effect shall automatically apply also pending the second instance appeal against the first instance judicial decision?



## Short overview of relevant EU norms, CJEU and ECtHR decisions

Since in principle the expulsion of an individual claiming international protection may expose him to irreparable harm and to a breach of the *refoulement* principle, there is a need to allow the asylum applicant to stay in the territory of the concerned Member State during the entire asylum procedure.

The Recast APD expressly provides for such a safeguard pending the administrative phase of an asylum claim (Article 9) and, with regard to the judicial phase, during the time necessary to lodge the appeal before a court or tribunal and during the outcome of this remedy (Article 46(5)), although this is subject to relevant exceptions (see especially Article 46(6)).

Article 46(1) in stating that the MS shall ensure the applicant to have a right to an effective remedy before a Court against a decision taken on the application for international protection lists the most typical types of these decisions. The list does not include expressly a first instance judicial decision taken on an asylum claim. However, the CJEU in *Samba Diouf* (paras. 41-42) held that the list is not exhaustive and any decision that amount to a final decision rejecting the application on the substance must be subject to review.

On the other hand, in the same case the CJEU held at para. 69 that “...*Directive 2005/85 does not require there to be two levels of jurisdiction. [...] The principle of effective judicial protection affords an individual a right of access to a Court or Tribunal, not to a number of levels of jurisdiction*”.<sup>258</sup> This might suggest that the Recast APD does not apply to the appeals of a judicial first instance decision, leaving these stages under the empire of procedural national law.

The issue whether Article 46 of the Recast APD, read in conjunction with Article 47 EU Charter - right to an effective remedy, shall be interpreted in the sense of guaranteeing to an asylum applicant the right to remain pending the second instance appeal judicial decision and/or even the decision of a last resort court (Supreme Court) has been raised before **Italian** and **Estonian** courts.

The Italian case-law is divided into three different positions, but the majority of the judges consider that the lodging of an appeal against a first judicial decision entails an automatic suspensive effect of the first instance decision.

On the contrary, Estonian case-law follows the opposite view.

### **Bari Court of Appeal (civil chamber), order, case No. 1209/2017**

#### *Facts of the case*

The Bari Court of Appeal declared inadmissible the request of the recurrent to stay the execution of the first instance judicial decision denying him international protection, on the ground that the suspensive effect of the challenged decision is automatically granted by the law, once the applicant has lodged the appeal. Accordingly, a request of an interim relief is inadmissible, except for those situations listed in Article 46(6) Recast APD.

---

<sup>258</sup> For a similar more recent opinion, see *A.M. v the Netherlands*, Appl No. 29094/09), Judgment of 5 July 2016.

### *Reasoning of the Court of Appeal*

Until 2011, Italian law expressly provided that the appeal against the first instance judicial decision of an asylum applicant had no automatic suspensive effect. However, the party could make such a request and the judge had the possibility to grant interim relief provided that there were serious and well-founded grounds.

In 2011 this provision has been repealed. The applicable law at the time of the facts was Article 19 of the legislative decree 150/2011, as further amended in 2015. This provision, read in conjunction with Article 35 of the legislative decree no. 25/2008, suggests that the automatic suspensive effect of the decision refers only to the decisions issued by the *Commissione Territoriale* (the administrative body in charge of the administrative phase in the asylum claim).

Although the systematic reading of Article 19 of the legislative decree 150/11 and Article 35 of the legislative decree 2008/25 would lead to exclude their application in a case of appeal against a first instance judicial decision on an asylum claim, the Bari Court of Appeal interpreted extensively these provisions and it considered them to be applicable to the facts of the case. According to the judge, this reading of the relevant norms is based on the need to interpret them in conformity with the constitution and with relevant EU and international norms.

A first ground that justifies the extensive reading of the above-mentioned norms relies on the need for celerity in asylum cases. Italian law requires the judge to decide the case within 60 days. If the Court of Appeal had to pronounce on an interim relief request, the decision on the merit would be inevitably delayed. Thus, granting automatic suspensive effect avoids the appellate judges to waste time in deciding interim relief requests.

A second ground mentioned by the judge is the need to ensure conformity in interpreting national norms with ECHR provisions and ECtHR relevant case law. The Bari Court of Appeal refers to Article 3 ECHR and to the principle of *non-refoulement* and quotes the ECtHR in the *AC et. Al. v. Spain* decision (22 April 2014) where the ECtHR held that the state parties have the duty to grant the applicant a right to remain until an irrebuttable decision has been taken with regard to his application<sup>259</sup>.

Finally, the Court considers this interpretation as consistent with the right to effective remedy, under Article 46 of the Recast APD.

### *Conclusion*

The court declares inadmissible the interim relief request of the asylum applicant since the suspensive effect of the first judicial decision is already provided by the law.

### *Impact on national cases and recent evolution*

---

<sup>259</sup> See para. 6 of the operative part of the judgment: “la Cour estime que l’État défendeur doit garantir le maintien des requérants sur le territoire espagnol pendant l’examen de leurs causes et jusqu’à la décision interne définitive sur leurs demandes de protection internationale.”

As earlier mentioned, the majority of the Italian judges hearing such cases, has applied an extensive reading of the relevant national norms, using arguments similar to those put forward by the Bari Court of Appeal<sup>260</sup>. Other decisions denied the *ex lege* suspensive effect of the first instance decision and also excluded that the applicant can make a request of interim relief under Italian general procedural law principles.<sup>261</sup> A third option that has been followed by Italian courts is that of denying the automatic suspensive effect but to admit the possibility to require the suspension as an interim relief. Such a remedy would not derive from EU law, but from national law.<sup>262</sup> In that regard, the **Torino Tribunal** (15 May 2017, est. Contini) applied this reasoning and gave precise reasons in order to exclude the EU law relevance in the matter.<sup>263</sup>

The new law-decree 13/2017 (concerted into law 46/17) has completely changed the legal framework. The new statute has abolished the right to appeal the first instance judicial decisions before the appellate courts, leaving the possibility to appeal them only before the Court of Cassation, which reviews only law and procedural errors. The recourse before the Supreme Court has no automatic suspensive effect. The applicant that lodges the appeal before the Supreme Court may require the judge, who rendered the first instance decision, an interim relief for suspending the first instance decision, provided that there are sound grounds.

Doubts about the conformity of the new provisions with EU law have been promptly cast. The Milano Tribunal decided to raise a preliminary reference to the CJEU challenging the legitimacy of the above-mentioned national provisions with regard to Art. 22 and Art. 46 of the Recast APD, Art. 47 EU Charter, Art 4.3 and 19 of the TEU and the general EU law principles of equivalence and effectiveness.

The CJEU has already highlighted In *Diouf* (C-69/10, EU:C.2011:524, § 69) and more recently in *Gnandi* (C-181/16, § 57) that neither Article 39 of Directive 2005/85, nor Article 47 of the Charter, read in the light of the safeguards laid down in Article 18 and Article 19(2) of the Charter, require there to be two levels of judicial decision.

While recognizing the wide discretion left to Member States in regulating the issue, the Milano Tribunal observed that when MS exercise their discretion, they are nevertheless subject to the respect of both the equivalence and effectiveness principles and fundamental rights. This finding is also in line with the Opinion expressed by AG Bot in the *X* case (C-175/17, EU:C:2018:34, para.43).

Having considered that EU law applies, the Milano Tribunal submitted two preliminary questions:

---

<sup>260</sup> See Court of Appeal Brescia, sez. II, civ, ord. 28.2.2016, CA Bologna 23.9.2016, CA Napoli 6.11.2014, CA Venezia 23.8.16.

<sup>261</sup> See C.A Torino, ord. 8.7.2016.

<sup>262</sup> CA Cagliari, est. Marogna, ord. 4.2.2016.

<sup>263</sup> According to the Tribunale di Torino, art. 46.3 of the Recast APD states that “in order to comply with [46.1], Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law [...] *at least* in appeal procedures before a Court or tribunal of first instance”. This explicit limitation to the appeal procedures before a Court or tribunal of first instance, as the words “at least” would suggest, leads the judge to consider that art. 46 safeguards, included the right to remain pending the appeal of the decision, are to be interpreted in the sense they apply only to the first instance stage of the appeal judicial procedure. This does not preclude the national legislator to provide some safeguards for the asylum applicant during the appellate stage of a first instance decision, but this is not an obligation stemming from EU norms.

First, in case national provisions do provide a right to appeal the first instance judicial decision rejecting international protection status, as it is the case with the Italian legislation, should such a remedy have an automatic suspensive effect, having regard to the right to an effective remedy?

Second, in case the application for a second instance judicial review does not provide an automatic suspensive effect with regard to the first instance decision, is it compatible with EU law that a national provision that makes the granting of the suspensive effect dependent on a decision taken by the same judge that delivered, or took part to the delivering of, the first instance judgment and based on the soundness of the appeal?

The Tribunal of Milano based its reasoning on the following grounds.

First, the right to an effective remedy, as provided by Art. 47 of the Charter, means the individual must have the possibility to be effectively granted by a court a remedy that fully satisfies his request/claims. By denying an automatic suspensive effect in case of appeal against the first instance decision denying international protection status, the individual would be exposed to the risk of expulsion and removal before having a final decision on his status. Thus, even if the appeal were successful, the applicant would not be granted any effective satisfaction/recovery.

Second, making the granting of the suspensive effect conditional upon the leave of the judge who delivered the first instance decision might be in breach of Art. 47(2) EU Charter, which entitles the individual to the right to a fair hearing conducted by an independent and impartial judge.

Finally the Italian provisions do not respect the equivalence test. According to the Milano Tribunal, there is no other internal remedy where the decision to stay the effects of the challenged judicial decision is taken by the same judge who delivered the first instance decision on grounds related to the soundness of the appeal.

### **Estonian Supreme Court (Riigikohus), decision 2 March 2017 case No. 3-3-1-54-16<sup>264</sup>**

#### *Fact of the case*

Article 25.1 (1) of the Estonian Act on International Protection stipulates: “The decision on rejection of an application or revocation of international protection may be contested in the administrative court within ten days as of the announcement of the decision. /---/ Upon contestation of the decision made with regard to an application for international protection an applicant has the rights and obligations specified in this Act within the time limit for an appeal and during the judicial proceedings, including the right to stay in the territory of Estonia until the final decision is made.”

The final decision is defined in Article 3.1 (2) of the Act: A final decision for the purposes of this Act is a decision of the Police and Border Guard Board with regard to the dismissal of an application or revocation of international protection, the appeal against which has been dismissed by the administrative court.

Despite this definition, the law allows appeal against the decision of the administrative court to the Court of Appeal and later to the Supreme Court. A decision of the administrative court will not

---

<sup>264</sup> Rejus template submitted by Judge Villem Lapimaa, Court of Appeal of Tallinn.

come into force until the Court of Appeal and Supreme Court have dismissed appeals against the decision of the first instance court.

### Reasoning

The Supreme Court held that the Recast APD, 5th chapter, does not require that an applicant should have a possibility to lodge an appeal against the decision of the 1st instance court rejecting the applicants appeal against a negative decision of the government.

The Supreme Court held that although the Estonian procedural law allows full appeal to the Court of Appeal and to the Supreme Court also in asylum cases, these appeals cannot be considered as remedies within the meaning of APD.

Therefore, once the applicant's appeal is dismissed by the first instance court the applicant ceases to enjoy the status of an asylum applicant and becomes a person subject to removal (i.e. even before the appeals are finally settled), even if second instance court appeals continue in due course.

**Futher caselaw:** in C-175/17 and C-180/17, the CJEU clarified that Article 47 EU Charter does not require a two level of appeal in asylum or return proceedings, however should the Member States follow such a procedure, than the EU Charter rights have to be respected, in particular Article 19(2) and 47 EU Charter.

## 5.2 Suspensive effect of appeal in return proceedings

### Short overview of the EU norms

Unlike current Article 46 Recast APD, Article 13 of the Return Directive (RD) does not establish as a general rule automatic suspensive effect of appeal. Instead it leaves the choice to the Member States whether to provide for an automatic or by interim relief.<sup>265</sup> Secondly, unlike Article 46, Article 13 Return Directive does not guarantee a right to an effective remedy before a court or tribunal, but instead it has endorsed the formulation of Article 13 ECHR: “competent judicial/administrative authority or “another competent body composed of members who are impartial and who enjoy safeguards of independence”.

The standards of the right to an effective remedy provided by Article 13 RD have been raised by the CJEU on the basis of Article 47 EU Charter.

In *Abdida*<sup>266</sup>, the CJEU required that the remedy provided in Article 13 RD must be determined in a manner that is consistent with Article 47 EU Charter, which recognises a right to an effective judicial remedy. Since Article 13 RD does not exclusively grant a right to an effective judicial remedy, a domestic legislation that implemented this provision by way of providing a legal remedy

---

<sup>265</sup> The TCN concerned can request the suspension, the court can review it and establish whether to grant it or not.

<sup>266</sup> See para. 45.

only before an administrative body might be considered to be in violation of Article 47 EUEU Charter.<sup>267</sup>

This sub-section will discuss the requirements imposed by Article 47 EU Charter as regards the automatic nature of the suspensive effect of appeals in return proceedings. First line of case law shows that Article 47 when invoked together with Article 19(2) EU Charter requires an automatic suspensive effect of appeal (*Abdida*). The second line of case shows that Article 47 EU Charter can require an automatic suspensive effect of appeal also when invoked jointly with relative fundamental rights (Article 8 ECHR, Article 7 EU Charter). The sub-section will also show how to implement it at the national level, by introducing several national judgments that have referred to it.

The jurisprudence herein discussed will reveal a fruitful judicial dialogue between the Belgian Labour Courts and the CJEU which ultimately impacted not only on the jurisprudence of these court, but also on the more reluctant Council of Aliens Law Litigation (*Conseil du contentieux des étrangers*). Following a uniform interpretation of Article 47 Charter requirements in return and asylum proceedings, the Belgian Constitutional Court also saw itself forced to recognise this amended judicial practice and require the legislator to intervene and codify it in legislative provisions. The interpretation of the Supreme Administrative.

## Main questions addressed

- Question 1** What are the Article 47 EU Charter requirements of an automatic suspensive effect of appeal in return proceedings?
- Question 1** 1.a Automatic on the basis of absolute fundamental rights – Article 19(2) EU Charter (*Abdida and Gnandi CJEU and its impact at national level*)
- Question 2** 1.b Automatic on the basis of relative fundamental rights – Article 8 ECHR Article 7 Charter (*Supreme Court of Estonia, Judgment of 22 March 2016*)

## Question 1.a – Automatic suspensive effect of appeal on the basis of absolute fundamental rights – Articles 19(2) and 47 EU Charter

### Case C-562/13, *Abdida*, judgment of 18 December 2014

---

<sup>267</sup> CJEU, para. 45: “None the less, the characteristics of such a remedy [Article 13 Return Directive] must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection (see, to that effect, judgments in *Unibet*, C432/05, EU:C:2007:163, paragraph 37, and *Agrokonsulting-04*, C93/12, EU:C:2013:432, paragraph 59), and provides that everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.” See in this regard the **Austrian** High Administrative Court: in compliance with Art. 47 EU Charter, legal aid in the return procedure is obligatory even if it is not foreseen by the European and/or national legislation ([Ro 2015/21/0032, 3 September 2015](#)). The same applies to the competent authority that needs to be impartial and independent in the meaning of Article 47 EU Charter ([Ro 2011/22/0097, 31 May 2011](#)).

Automatic suspensive effect of appeal in return/removal proceedings on the grounds of Articles 19(2) EU Charter – principle of non-refoulement and Article 47 EU Charter – right to an effective legal remedy

### *Facts of the case*

Initially, Mr Abdida was recognised a right of residence based on medical grounds and received social assistance. Subsequently, his application for leave to reside was rejected on the ground that his country of origin has adequate medical infrastructure, he was granted emergency medical care, but withdraw social assistance.

The Brussels Labor Court asked the CJEU whether the asylum related directives or the Charter require the Member State 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 concerned to leave the territory of that State’, and medical and social assistance pending the examination of the appeal against a refusal of a permit to stay for medical reasons.

### *Reasoning of the CJEU*

In the light of the interpretation already given to the Qualification Directive in a judgment delivered that same day, case *M'Bodj*<sup>268</sup>, the CJEU excluded the applicability of the Qualification Directive, Asylum Procedure and Reception Conditions Directives procedures, holding that neither refugee, nor subsidiary protection can be recognised on medical grounds. However, the CJEU did not dismiss the preliminary questions as inadmissible, but it reformulated the questions addressed by the national court as related to the application of the Return Directive and the EU Charter. The CJEU held that the challengeable act can be characterised as be classified as a ‘return decision’ within the meaning of Article 3(4) of Directive 2008/115. The CJEU continued that setting out the requirements that a remedy to an appeal against a return decision needs to fulfil under Article 13 Return Directive.

First of all, “*a third country national must be afforded an effective remedy to appeal against or seek review of a decision ordering his return*” (para. 43).

Secondly, there has to be an “*authority or body with power to adjudicate on such an appeal*” which “*may temporarily suspend enforcement of the return decision that is being challenged, unless a temporary suspension is already applicable under national legislation*”.

Although the CJEU interpreted that Article 13 of the Return Directive does not require that an appeal against a return decision has automatic suspensive appeal, it also held that these provisions need to be interpreted “*in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection* (see, to that effect, judgments in *Unibet*, C432/05, EU:C:2007:163, paragraph 37, and *Agrokonsulting*, C93/12, EU:C:2013:432, paragraph 59)” (para. 45). Additionally, Article 13 of the Return Directive needs to be interpreted in a manner consistent also with Article 19(2) of the Charter. According to Article

---

<sup>268</sup> C542/13, ECLI:EU:C:2014:2452.

52(3) EU Charter, the requirements set out under Article 19(2) EU Charter were interpreted by the CJEU in light of the jurisprudence developed by the ECtHR regarding prohibition of expulsion under Article 3 ECHR in medical cases (*N. v. the United Kingdom* [GC], no. 26565/05, § 42, ECHR 2008). The CJEU found that the ECtHR recognised an “*entitlement to remain in the territory of a State in order to continue to benefit from medical, social or other forms of assistance and services provided by that State, [when] a decision to remove a foreign national suffering from a serious physical or mental illness to a country where the facilities for the treatment of the illness are inferior to those available in that State*” (para. 47).

These ECtHR derived requirements would translate under the EU legal order in an obligation of refusing enforcement of a return decision entailing the removal of a third country national suffering from a serious illness to a country in which appropriate treatment is not available (Article 5 of Directive 2008/115).

After interpreting the requirements under Article 19(2) EU Charter in light of requirements under Article 3 ECHR, the CJEU interpreted the requirements under Article 47 EU Charter in light of Article 13 ECHR and the jurisprudence of the ECtHR interpreting the effective remedies requirements in such cases (paras. 50-53).

*‘The European Court of Human Rights has held that, when a State decides to return a foreign national to a country where, there are substantial grounds for believing, he will be exposed to a real risk of ill-treatment contrary to Article 3 ECHR, the right to an effective remedy provided for in Article 13 ECHR requires that a remedy enabling suspension of enforcement of the measure authorising removal should, ipso jure, be available to the persons concerned (see, inter alia, European Court of Human Rights, judgments in *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 67, ECHR 2007-II, and *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 200, ECHR 2012). 53 It follows from the foregoing that Articles 5 and 13 of Directive 2008/115, taken in conjunction with Articles 19(2) and 47 of the Charter, must be interpreted as precluding national legislation which does not make provision for a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third country national concerned to a serious risk of grave and irreversible deterioration in his state of health.*

### *Conclusions of the Court*

The CJEU judgment sets thus three main requirements:

1. An obligation of refusing enforcement of a return decision entailing the removal of a third country national suffering from a serious illness to a country in which appropriate treatment is not available (*Article 5 Return Directive*).
2. Recognising an automatic suspensive effect to an appeal against a decision ordering a third-country citizen, suffering from a serious illness, to leave their territory when the execution of the decision may expose that person to a real risk of serious deterioration and irreversible for his health (*Article 13 Return Directive*); and
3. provide the concerned third-country national, in order to ensure that emergency health care and essential treatment of illnesses can indeed be provided pending the appeal (*Article 14 Return Directive*).



All these rights were recognised to irregular migrants based on Articles 19(2) and 47 EU Charter as interpreted in light of the requirements set by the ECtHR under Articles 3 and 13 ECHR.

Clarification of the *Abdida* judgment in the *Gnandi* case (C-181/16)

Although the CJEU established that a return decision can be adopted after the first negative decision on an asylum application, even if the legal remedies in asylum proceedings have not been exhausted, the return decision and possible removal have to comply with the right to an effective remedy and the principle of non-refoulement. Article 47 and 19(2) Charter require the Member States to grant an asylum applicant the right to challenge the execution of a return decision at least before one judicial body. The Court confirmed that this appeal should have automatic suspensive effect.

Furthermore, the Member States are required to provide an effective remedy in accordance with the principle of equality of arms, which means, in particular, that all the effects of the return decision must be suspended during the period prescribed for lodging such an appeal and, if an appeal is lodged, until a decision is taken by the judicial body. To comply with its obligations, Member States must go beyond simply refraining from enforcing the return decision. In particular, it is necessary that the period for voluntary departure does not start running as long as the person concerned is allowed to stay and that the person is not placed in pre-deportation detention. Moreover, Member States must inform the applicant, in a transparent manner, about his or her right to appeal against a negative decision and about the nature of this appeal.

Impact on national case law in MS other than the one of the court referring the preliminary question to the CJEU

BELGIUM<sup>269</sup>

Following the positive answer of the CJEU, various cases emanating from Labour Tribunals held that seriously ill foreigners keep their right to social assistance pending the examination of their appeal. Additionally, the Belgian Council of Alien Law Litigation recognised that an automatic suspensive effect should also be available to appeals against order to leave the territory when the applicant's illness is that serious that a removal might amount to a *refoulement* prohibited by Article 3 ECHR (CALL, 156.951, November 2015)<sup>270</sup>. Suspensive effect, however, is not available against decisions refusing the right or authorization to stay in Belgium<sup>271</sup> (CALL, 159.427, 28 December 2015). The automatic suspensive effect was initially recognised in the absence of national legislation, and directly on the basis of the CJEU *Abdida* preliminary ruling. Whilst the **Constitutional Court** (1/2014, 16 January 2014) welcomed this judicial practice, it also stressed the need for a legislative amendment introducing the guarantees under the right to an effective remedy. On 10 of April 2014, a legislative amendment was brought to the Aliens Law, whereby an

---

<sup>269</sup> Based on *European Synthesis Report on the Judicial Implementation of Chapter III of the Return Directive – Procedural safeguards*.

<sup>270</sup> The cases are available in the [REDIAL Database](#).

<sup>271</sup> Here for humanitarian and medical reasons, according to Article 9ter of the Aliens Law.

automatic suspensive effect is recognised to the request for suspension, which need to be introduced within the 10 days of the notification of the order to leave the territory<sup>272</sup>.

After the adoption of ‘Law of 10 April 2014’, but before its entry into force of 21<sup>st</sup> of May 2014, another Belgian Labour Court addressed preliminary questions to the CJEU on the effectiveness of the remedy of the appeal in multiple asylum application proceedings – *Tall* case

The issue of the suspensive effect of appeals in asylum and return procedures has been the subject of a fruitful judicial dialogue between the Belgian Labour Courts and the CJEU. This ultimately affected not only on the jurisprudence of these courts, but also on the practice of the **Council of Aliens’ Law Litigation** (CALL) and was endorsed by the **Belgian Constitutional Court**. In addition to consistent judicial interpretation and adaptation, vertical and horizontal judicial dialogue also led to legislative amendments. Following the explicit request of the Belgian Constitutional Court, the legislator was forced to codify the suspensive effect of remedies in legislative provisions. The repeated preliminary references sent by the Belgian Labour Courts, asking for the recognition of minimum uniform procedural guarantees for appeals in administrative proceedings, have also forced the CJEU to re-consider its previous case law *Samba Diouf*, C-69/10<sup>273</sup> and *M’Bodj*, C-542/13, so as to reinforce the status of Article 47 EU Charter, especially when Article 19(2) EU Charter is at stake, and to ensure compliance with the ECtHR jurisprudence on exceptional *non-refoulement* of seriously ill TCNs (*N v UK*) and the suspensive effect of remedies (*Hirsi Jamaa and Others v. Italy*).

## ESTONIA

On 22 March 2016, the **Supreme Court** of **Estonia** found that in cases where there is a need to protect a person’s private and family life, the suspension of the removal order might also be an appropriate measure to ensure the efficiency of a legal remedy. In case of the expulsion of a complainant to a State, where he/she does not have any contacts and a place to live, his/her participation in the proceedings is essential for ensuring the respect of the complainant’s private and family life. However, in its reasoning, the Court neither referred to the Return Directive nor to the corresponding case law of the CJEU on Article 13 or 9 RD. Instead, it cited abundant case law from the ECtHR about Article 13 ECHR and emphasised the need for the appeal to have a suspensive effect when the execution of the measure concerned would run counter to the provisions of the Convention and that the effects would be potentially irreversible for the applicant. In its judgment, the Supreme Court of Estonia went further than the minimum requirements established by the CJEU. While *Abdida* is a case where the violation of an absolute right (risk of ill-treatments in a medical case) was at issue, in this case, the relative human right of family life was the matter at hand. Following a proportionality assessment, the Court found that the immediate removal of the TCN concerned would entail a disproportionate restriction, amounting to an almost absolute denial of the right to family life. This was held to be by the domestic court precluded by the ECHR.

---

<sup>272</sup> Loi du 10 avril 2014 portant des dispositions diverses concernant la procédure devant le Conseil du Contentieux des étrangers et devant le Conseil d’État, Mon. B., 21 mai 2014

<sup>273</sup> The CJEU considered, indeed, that Member States were not required by EU Law to provide for a specific or separate remedy against a decision to examine an application for asylum under an accelerated procedure. This does not deny the applicant for asylum the right to an effective remedy, provided that the reasons which led that authority to examine the merits of the application under such a procedure can in fact be subject to judicial review in any action brought against the final decision rejecting the application.

Other national courts did not wait for the CJEU's judgments in *Abdida* and *Tall*; they opted for a proactive approach and offered suspensive remedies for foreigners facing expulsion, either as a rule or under specific circumstances:

The **Czech Supreme Administrative Court** grants, in practice, suspensive effect (even to cassation proceedings) when, upon request, the applicant shows that: (1) the decision issued would cause far greater harm to him/her compared to other applicants placed in a similar situation; (2) that the suspensive effect would not breach any important public interests (SAC 1 Azs 160/2014-25, 19 November 2014). According to the **Czech Constitutional Court**, a judicial review should be afforded to applicants when the suspensive effect of appeals in removal proceedings is denied, even though at first, the Senate of the Court claimed it was a question of preliminary nature, unlikely to be reviewed by administrative courts. (CC, I.ÚS 145/09, 21 February 2012).

In **Italy**, a judicial practice emerged in the absence of explicit provisions from the Consolidated Text on Immigration regarding the suspension of expulsion orders during appeal proceedings. Referring to a previous judgment from the **Constitutional Court** (CC, 161/2000), some lower courts (*e.g.* Court of Aosta, 17 October 2012) admitted the possibility of suspending the execution of removal orders “under special and exceptional circumstances” after having identified “the most suitable instruments, within the Italian legal system” to suspend the enforcement of the challenged order. By contrast, subsequent judgments from the **Italian Supreme Court** reduced the scope of this so-called “precautionary protection” by limiting judicial power to very special and exceptional circumstances. This was so as not to undermine the legal prerequisite for pre-removal detention or the effectiveness of ongoing administrative procedures (SC, 11442, 23 May 2014 and 15414, 5 December 2001). That being said, since the judgment in *Khailifa and Others v. Italy*, the ECtHR made it clear that a general exclusion of the suspensive effect of remedies against expulsion is contrary to Article 13 ECHR and does not satisfy the criterion established in *De Souza Ribeiro*.<sup>274</sup>

However, even where the suspensive effect of remedies is provided for by the Law, it is up to national courts to establish whether the legal requirements are met in each individual case, before effectively suspending an order to leave the territory. While in **Lithuania** suspension can be granted at any stage of the procedure, the adoption of *interim measures* is subject to a prior assessment by the courts on whether the applicant has sufficient grounds to claim for suspension, notably alleging strong social, family or economic ties and relations with the country (SAC, AS822-768/2013, 9 October 2013). In **Slovenia**, conditions for issuing *interim measures* (amounting to suspension of the order to leave the territory by the courts) are rather strict: the applicant must show that the execution of the return decision would cause damage to the applicant, which would be difficult to repair; the court must, through the principle of proportionality, take into account the protection of general interests. On the issues of the burden and standard of proof, the case-law of the **Supreme Court** on interim measures is more stringent than the case-law of the **Slovenian Administrative Court**.

---

<sup>274</sup> The ECtHR stated in this case that the effectiveness of the remedy for the purposes of Article 13 required imperatively that the complaint should be subject to close and independent scrutiny and that the remedy should have automatic suspensive effect, in respect of: (a) complaints concerning a removal measure entailing a real risk of treatment contrary to Article 3 and/or of a violation of the person's right to life safeguarded by Article 2 of the Convention; and (b) complaints under Article 4 of Protocol No. 4.

**Question 1.b – Can there be an automatic suspensive effect of appeal on the basis of relative fundamental rights: Articles 8 ECHR and 7 Charter**

*Estonia, Supreme Court, Judgment of 22 March 2016*<sup>275</sup>

Can there be a suspensive effect of appeal in removal procedures on the grounds of Articles 8 and 13 ECHR?

Do Articles 7 and 47 EU Charter requires a suspensive effect by individual application?

*Facts of the case*

The complainant is a citizen of Russian Federation who came to live in Estonia when he was 4 years old. He served several prison sentences in Estonia. The Police and Border Guard annulled his long-time residence permit and on 18 December 2014 issued him an order to leave the country. He contested the order to leave Estonia. The Administrative Court admitted his application for suspensive effect and suspended the execution of the contested order of expulsion. An appeal was lodged to the Circuit Court. This Court found that there were no grounds of applying the suspensive measure and annulled it. According to the ruling of the Circuit Court, the appeal of the complainant has no realistic prospect of success. This judgment was challenged before the Supreme Court, the TCN claiming that it is necessary that he participates in the oral court hearing to convince the court that his family and private life in Estonia needs to be protected. The complainant also argued that he does not have a place to live and an income in Russia. He claimed there is no evidence that he represents a risk to public order. Furthermore, the complainant noted he had not committed a crime in a long time.

*Reasoning of the Court*

The Supreme Court cited the case law of the ECtHR on Article 13 of the ECHR and the need for the appeal to have a suspensive effect (*De Souza Ribiero v. France*, Appl. 22689/07, 13 December 2012; *Baysakov and others v. Ukraine*, Appl. 54131/08, 18 February 2010; *Čonka v. Belgium*, Appl. 51564/99, 5 May 2002). It indicated that the concept of an effective remedy under Article 13 ECHR required that the remedy could prevent the execution of measures that were contrary to the Convention and whose effects were potentially irreversible.

The Court found that according to the practice of the ECtHR, in cases where there is a need to protect a person's private and family life, the suspension of the removal order might be the only measure capable of ensuring an effective legal remedy. In the case of expulsion of a complainant to a state where he does not have any contacts and a place to live, his participation in the proceedings is essential for ensuring respect of his private and family life.

---

<sup>275</sup> Case submitted by judge R. Kitsing.

The Supreme Court concluded that suspending the execution of the order to leave is essential to ensuring that the complainant could efficiently take part in court proceedings assessing the merits of the order to leave.

It should be noted that the Charter was not mentioned. Only Article 13 ECHR was cited, which does not have an independent status but must be connected to another provision of the Convention in order to be applicable. Usually in the field of asylum and removal Articles 3, 5, 8 ECHR or Article 4 Protocol 4 ECHR have been invoked. This connection is not made in this case and, surprisingly, nor is Article 47 EU Charter invoked, although it would have been easier to establish its scope of application, since the right to fair trial and effective remedy has an independent status in the Charter. In this case, the Return Directive or the LTR Directive could have been applied and thus triggering the application of the Charter. A similar effect to Article 8 and 13 ECHR could have been achieved via Article 7 and 47 EU Charter.

### *Elements of Judicial dialogue*

The Court only considers the domestic regulation about suspensive effect of expulsion orders with the jurisprudence of the ECtHR, although relevant jurisprudence has been established also by the CJEU, even if not particularly on similar facts as the present case. In 2014, the CJEU ruled in *Abdida* that automatic suspensive effect should also be available to appeals against an order to leave the territory where the applicant's illness is so serious that a removal might amount to a refoulement prohibited by Article 3 ECHR. Similarly, to the Estonian practice, Slovenian law provides that suspension of the order to leave the territory can be granted by national courts on the initiative of the applicant under conditions regulated in Article 32 of the Administrative Dispute Act. This is achieved by the adoption of an interim measure at any stage of the procedure. However, the conditions for granting an interim measure are rather strict: the applicant must show that the execution of the return decision would cause irreparable damage to the applicant and the court must, through the principle of proportionality, also take into account the protection of general interests. Similarly, as in Estonia, national courts seem to have different views on the whether to grant or refuse suspensive effect. However, whereas in Estonia, the aforementioned case shows that the Supreme Court is more in favour of recognising a suspensive effect when fundamental rights are at issue, in Slovenia, the case-law of the Supreme Court on interim measures is more stringent than the case-law of the Administrative Court, as regards the burden and standard of proof.<sup>276</sup>

### *Outcome of the judicial dialogue*

Recognition of suspensive effect of appeal against the removal order on grounds of Article 13 ECHR (should have been cited in connection with Article 8 ECHR). Equivalent protection under Articles 7 and 47 EU Charter (Article 52(3) EU Charter).

## **1. Guidelines for judges emerging from the analysis**

What does the right to an effective remedy under Article 47 EU Charter jointly with Article 46 Recast APD entail as regards the right to remain on the territory?

---

<sup>276</sup> Evidence submitted by Judge Bostjan Zalar.

- Generally, the automatic right to remain in the territory pending the outcome of the appeal (Article 46(5)) or until the appeal time has expired.
- Although the CJEU upheld the discretion recognised to the Member States in *Diouf*, whereby they are not required to confer a full examination and suspensive appeal in accelerated procedure where the applicant submits new asylum application without presenting new evidence<sup>277</sup>, it enhanced the protection of the right to an effective remedy by restating the conclusions reached in the *Abdida* preliminary ruling delivered a year prior to the *Tall* judgment.<sup>278</sup> Therefore the principles developed by the CJEU on the suspensive effect of appeal in return proceedings on the basis of Articles 19(2) and 47 EU Charter apply also to asylum proceedings.
- In accelerated asylum procedure, although Member States have retained the freedom to restrict the right to effective remedy (e.g. shorter time limits to lodge appeals, no automatic suspensive effect, limited judicial review powers), the restrictions have to be in line with the requirements of Articles 19(2) and 47 EU Charter. Notably, national courts have to assess the national implementing provisions not only in light of Article 46 of the Recast Asylum Procedure Directive, but also in light of Article 47 EU Charter.
- Article 47 together with Article 19(2) EU Charter requires, within the fast track asylum procedure, a suspensory effect of the appeal, regardless of the number of asylum applications made; it also requires unlimited jurisdiction of the court hearing the appeal, and access to social benefits pending the appeal.
- According to the *Tall* preliminary ruling, when Article 19(2) EU Charter is at stake, Article 47 EU Charter requires that only the remedies with automatic suspensive effect are deemed effective, “*given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialized.*”
- The appeal with suspensory effect is necessary “when it is brought against a return decision whose enforcement may expose the third-country national concerned to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, thereby ensuring that the requirements of Articles 19(2) and 47 EU Charter are met in respect of that third-country national.” (*Tall*)
- The recognition of an automatic suspensive effect of appeals depends whether the enforcement of the challenged decision is likely to expose the third-country national concerned to a risk of ill-treatment contrary to Article 4 EU Charter or Article 3 ECHR, and does not depend on the legal qualification of the decision or the type of asylum procedure within which the decision was adopted (i.e. regular, accelerated, border) (*Tall*).
- While the suspensive effect of appeal can be subject to restrictions, in the sense of being subject to a separate request, the full and *ex nunc* judicial review cannot be limited.
- Suspensive effect should be provided by law, not only in practice (whether administrative or judicial) (*Čonka v. Belgium*, para 83)

---

<sup>277</sup> See, CJEU: “*must be stated at the outset that the differences that exist, in the national rules, between the accelerated procedure and the ordinary procedure, the effect of which is that the time-limit for bringing an action is shortened and that there is only one level of jurisdiction, are connected with the nature of the procedure put in place. The provisions at issue in the main proceedings are 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)

<sup>278</sup> CJEU, *Abdida*, C-562/13, 18 December 2014, EU:C:2014:2453, para. 40-45.

- The principles of effectiveness and Article 46 Recast APD require that time limits must be reasonable. Therefore, although Member States retain discretion to set out the time limits for appeal, they shall not render an applicant's ability to access an effective remedy impossible or excessively difficult. Reasonableness and proportionality of time limits should be assessed in the abstract as well as in the individual circumstances of the case (*Diouf* para 66). The time limits for lodging the appeal "*must be sufficient in practical terms to enable the applicant to prepare and bring an effective action.*" (*Diouf*)

What does the right to an effective remedy under Article 47 EU Charter entail under the return proceedings:

- The effects of Article 47 EU Charter are higher in return proceedings compared to asylum proceedings, due to the fact that the Return Directive does not have an equivalent Article 46 Recast APD general rule of automatic suspensive effect.
- The CJEU has addressed the suspensive effect of appeal in return proceedings following a rejection of a residence permit (*Abdida*). On the basis of the absolute principle of non-refoulement (Article 19(2) Charter) and the right to an effective remedy (Article 47 Charter), the CJEU established a **mandatory automatic suspensive effect** of the appeal until the claim of risk of refoulement has been closely and rigorously assessed by the determining authority.
- In *Sow*, the ECtHR explicitly recalled that, when Article 3 ECHR is at stake, only the remedies with automatic suspensive effect are deemed effective, "*given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialized.*"<sup>279</sup> According to the ECtHR, automatic suspensive effect is not only required when there is complaint regarding Article 3. It has also been held necessary to when rights under Article 2 and Article 4 of Protocol No. 4 are invoked (*Hirsi v Italy*, *Conka v Belgium*)
- In addition, suspensive effect of appeal has been successfully argued before national courts on legal bases other than Articles 47 and 19(2) Charter. The **Supreme Court of Estonia** has recognised automatic suspensive effect of appeal against a removal order on the basis of Articles 8 and 13 ECHR. In light of Article 52(3) EU Charter a similar interpretation should also be applied to Articles 7 and 47 EU Charter.

Impact of the CJEU preliminary rulings at national level:

- Disapplication of national law that did not recognise suspensory effect of appeal in accelerated proceedings (**Belgium**) and return proceedings (**Belgium**);
- Extension of the suspensory effect of appeal in return proceedings also on in cases of potential violations of relative rights (**Estonia**);
- Extension of automatic suspensory effect of appeals in accelerated proceedings, although the national legislation recognised only by way of individual request, on the basis of Article 47 EU Charter, Articles 3 and 13 ECHR and principle of celerity of asylum proceedings (**Italy**, partial jurisprudence);
- Clarification of the extent of implications of *Tall* and *Abdida* on procedures that provide suspensory effect of appeal only by interim relief.

---

<sup>279</sup> ECtHR, *Sow v. Belgium*, App. 27081/13, 19 January 2016, para. 47. See also *Jabary v. Turkey*, App. 40035/98, 11 July 2000, para. 50.

## 7. Age assessment and effective judicial remedy against age assessment procedure and outcomes<sup>280</sup>

### 7.1. Age assessment: Effective remedies against age assessment and the scope of judicial review of unfair administrative evaluation

Age assessment is a relevant issue that appears within different phases of international protection proceedings and has a direct impact on, *inter alia*, the credibility assessment of asylum seekers, their reception conditions, and alternative measures to immigration detention. Due to the fact that (unaccompanied) minors are entitled to special guarantees under EU asylum law and Article 24 EU Charter, and that certain Member States have established more favourable treatment for minors, age assessment has become a primordial issue in asylum adjudication. As most asylum seekers leave their country of origin without documents, the statements of the individual are usually the only proof of the third country national's age. Evidential methods and the judicial review powers of the national courts in regard to reliable determination of the age of the asylum seeker or immigrant are currently under debate before national and European courts. Age assessment comes also into view as incidental but potentially decisive issue within other contexts, such as for instance detention and criminal cases (see Tribunal of Turin below). In the light of the concrete enforcement of the principles enshrined in Articles 47 and 41 EU Charter, the existence of a specific remedy for challenging both the way in which the administration conducts age assessment and the way in which competent authorities make use of its outcomes within broader administrative (or even criminal) decisions, comes into view.

At the national level, it is difficult to find a specific legal ground on the basis of which to challenge the administration for the way in which the assessment (and its enforcement and evaluation within specific procedure) is conducted, thus threatening the possibility for the individuals that are subject to age assessment to directly challenge it in terms of both procedural and substantive guarantees.

An increasing number of questions are raised before national courts and also the ECtHR (see the *Darboa* case below). For instance, questions such as:

- what is the most reliable, feasible and adequate technique and procedures;
- is medical assessment the most appropriate means of determining the age, and is it in conformity with the fundamental rights to human dignity, best interests of the child;
- what are the duties of administrative authorities and national courts in establishing the age claimed by the individuals, reception conditions and alternative(s) to detention.)

National judges are increasingly facing these issues, within a legal framework which varies significantly at the national level. In the cases analysed in this section it will emerge how, even if not directly enforced, principles such as the right to an effective remedy (Article 47 EU Charter) and the right to a good administration (Article 41 EU Charter) play a decisive role. These rights are particularly relevant in cases in which judges must assess the way in which administrative authorities exercise their own discretionary power in determining the age of the applicants,

---

<sup>280</sup> Chapter drafted by Simone Penasca, with the help of Madalina Moraru.



especially when factual circumstances at stake are unclear and contradictory (identification, lack of documents, uncertainty with regard to medical assessment, contradictory declaration of individual). Here judges can assume a deferential approach, by acknowledging a wide margin of appreciation of the administration; otherwise, as cases analysed seems to show, judges can assess the way in which public administration has exercised its discretionary power on the specific and autonomous ground of the lawfulness (fairness and suitability compared to factual elements). For a more detailed insight, see the final part of the Issue.

In terms of effective judicial protection, the most relevant issue raised by age assessment regards the right to appeal against an unlawful age assessment. It is relevant with regard to both the quality of the procedure and the violation of individual's rights, especially the right to be informed and notified on assessment results, which represents a precondition for the effective enforcement of the right to an effective remedy in this context.

It is worth mentioning also the right to a reasonable length of age assessment procedure and the duty for national authorities to properly guarantee the right to a good administration during the procedure, in terms of length of the assessment, accessibility to evidence and outcomes by the individual involved (see Article 41 EU Charter).

At the EU law level, concrete judgments of the CJEU lack. Notwithstanding, it is possible to derive from EU secondary law a set of principles and rights which can orient national judges when checking legitimacy of age assessment procedures and outcomes (see below for a more detailed reference).

In particular, according to Article 25, paragraphs 5 and 6, of the Recast APD if, even after medical examination, Member States are still in doubt concerning the applicant's age, they shall assume that the applicant is a minor. Unaccompanied minors are informed prior to the examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for international protection, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination. The Directive provides that the refusal of an unaccompanied minor to undergo a medical examination cannot be the sole reason for rejecting his application for international protection.

With specific regard of the protection of victims of human trafficking, Directive 2011/36/EU clarifies that the child's best interests shall be a primary consideration. The same principle is provided by Article 24(2) EU Charter, as well as by Article 25(6) of the Recast APD. Directive 2011/36/EU (Anti-Trafficking Directive) provides also that Member States shall ensure that, where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection (Article 13(2)).

The ECtHR has been called recently to decide cases in which various issues concerning age assessment procedures were addressed. In particular, in the case *Mahamed Jama v Malta* (2015), the appellant was detained despite the fact that at the time she was an alleged minor. The Court focused on the length of the age assessment procedure, in the light of the number of cases the Maltese Government should have faced in the relevant period of time, in order to understand whether the period was reasonably compatible with State's good faith behaviour (para. 147). After having considered the concrete procedure through which assessment has been performed, the Court considered that the applicant's detention during the relevant period was in compliance with Article

5(1) of the Convention. However, the Court expressed reservations about the duration of such age-assessment procedures. With specific regard of the time passed in detention during the age assessment procedure, the Court stated that considering that age assessment is a preliminary step of an asylum assessment, as regrettable as the delay in determining the applicant's age may have been in the present case, the seven months of detention until her age was determined, as well as the subsequent two weeks until her asylum claim was verified, are related to the grounds of detention mentioned in Article 5 ECHR (para.150).

In *Abdullahi Elmi and Aweys Abubakar v Malta*, the applicants' complaint concerned the fact that they were detained despite the fact that at the time they had claimed to be minors (and later found to be so). Therefore, the ECtHR, among other grounds of appeal, had to assess whether detention was arbitrary, or whether it was carried out in good faith, thus compatible with Article 5(1)(f) of the Convention. Expressly referring to *Jama* case, the Court considered that, if detention of minors is not arbitrary and unlawful *per se*, an issue may however arise, *inter alia*, in respect of a State's good faith, in so far as the determination of age may take an unreasonable length of time - indeed, a lapse of various months may also result in an individual reaching his or her majority pending an official determination (para. 144). Having regard to the concrete circumstances of the case (para. 145), the Court considered that the delays in the present case, particularly those subsequent to the determination of the applicants' age, raise serious doubts as to the authorities' good faith. In the light of the right to an effective remedy against age assessment outcomes, in the present case the Court highlights the lack of any procedural safeguards for the applicants (para.146), recalling the absence of an effective and speedy remedy under domestic law by which to challenge the lawfulness of their detention (para. 123). It thus found a violation of Article 5(1) of the Convention. It must be recalled also that until the date of lodging of the application, that is eight months after their arrival in Malta, the applicants had not received a written decision informing him of the outcome of the age-assessment procedure, and they were still in detention (para. 19).

In the pending case *Darboe and Camara v Italy*, the ECtHR applied the rule 39 procedure in order to protect two unaccompanied minors (aged 17) hosted in a reception centre for asylum seekers in which the living conditions are not adequate for them. Therefore, they asked the Court to activate the rule 39 procedure, ordering Italian authorities to transfer them in a more adequate centre, where EU and national legal standards are complied. The Italian Government argued that, as a result of an x-rays examination, the two asylum seekers resulted as adults, thus they were legitimately hosted in a reception centre for adults.

The applicants raised serious concerns on the lawfulness of the age assessment procedure, that had failed to comply with Directive 2005/85/EU, Directive 2011/36/EU, and relevant national regulation (Presidential Decree no. 234/2016). They highlight particularly that: a) the x-rays examination does not indicate the margin of error originated by the enforced technique, considering that Italian law provides that when the margin is above 2 years a presumption of minor age must prevail; b) age assessment is merely grounded on the hand's x-rays, while Italian regulation asks for a multidisciplinary approach with a paediatrician visit and psychological evaluation; c) the method employed (Greulich-Pyle) is less feasible and reliable compared with other more updated techniques (TW3); d) interestingly enough in terms of effective remedy, the outcomes have not been communicated to the applicants, as well as the judicial measure which attested the age of individual; e) during the procedure, the applicants have been considered as major of age, thus violating the Italian regulation which provides that they must be treated as minors until the completion of the procedure.

### Relevant CJEU case

- MA & Others v UK (C-648/11)

### Relevant ECtHR case

- *Mahamad Jama v Malta*, 26 November 2015 (detention during age assessment and effective remedy against unlawful detention)
- *Abdullahi Elmi and Aweys Abubakar v Malta*, 22 November 2016 (unreasonable length of time and lack of formal decision on age assessment – lack of effective remedy)
- *Darboe and Camara v Italy*, pending (rule 39, unaccompanied minors, reception conditions, age assessment)

### Main questions addressed

- Question 1** Shall a judge ascertain whether the age assessment has been conducted properly and lawfully by competent national authorities, according to the EU Law and national standards?
- Question 3** Can the applicant file a judicial complaint by addressing autonomously and directly the legitimacy and fairness of age assessment procedure? Or shall a complaint against age assessment procedure represent an autonomous ground of appeal against administrative measure to which age determination is functional (i.e. detention, determination of status, access to reception facilities)?
- Question 4** If so, shall the judge refer exclusively to the suitability of standard used by national authorities, or shall the judge make use also of other standards, referring to the scientific expertise?

### Relevant legal sources

#### **EU level**

Art. 47(1), EU Charter, Right to an effective remedy and to a fair trial

Art. 24(2), EU Charter, The rights of the child

Article 25(5) and (6), *Guarantees for unaccompanied minors*, of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)

Art. 4(5), *Assessment of facts and circumstances*, of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

Art. 13, *General provisions on assistance, support and protection measures for child victims of trafficking in human beings*, of Directive 2011/36/EU of the European Parliament and of the

Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

### **National legal sources (Italy)**

Law No. 47/2017 (Law on unaccompanied minors' protection), Article 5 – Identification of unaccompanied minors

Art. 19(2 and 3), *Guarantees for unaccompanied minors*, of Legislative Decree no. 25/2008 (Implementation of Directive 2005/85/EC):

2. In case of doubt, unaccompanied minor can be subject, at any stage of the procedure and prior his/her consent or with the consent of his/her legal representative, to non-invasive medical assessments in order to assess his/her age. If assessment does not allow to determine the exact age, specific rules will apply.
3. Minor must be informed about the possibility that his/her age should be determined through a medical assessment, the kind of examination and the possible effects on the outcomes of the application. The refusal cannot represent a reason neither for denying his/her application, nor for the adoption of the decision.

Art. 2, *Definitions*, of Legislative Decree no. 142/2015 (Implementation of Directive 2013/33/EU):

...Unaccompanied minor: the foreigner who is under age and who is, for whatever reason, within the national territory without any legal assistance or representation.

Presidential Decree 234/2016, setting out a procedure for age assessment of unaccompanied children victims of trafficking

### **Question 1 – The Evaluation of the Appropriateness of Standards Implemented during the Age Assessment Procedure**

1. Shall a judge ascertain whether the age assessment has been conducted properly and lawfully by competent national authorities, according to the EU Law and national standards?
2. Shall a complaint against age assessment procedure represent an autonomous ground of appeal against administrative measures to which age determination is functional (i.e. detention, determination of status, access to reception facilities)?

### *The facts*

#### **Tribunal of Turin, Third Section (criminal), 27 January 2014**

A third country national is charged with the offence of false statement to a public officer on his own identity (Article 495 Criminal Code), as he declared to be minor of age (16). According to an x-rays exam, the assessment on his bone age corresponds to a real age higher than 18 years. Therefore, the Tribunal must assess whether the x-rays examination on the wrist of the defendant is per se a sufficient, reliable and appropriate ground in order to overturn the statements of the defendant, that previously declared a lower age.

### *Reasoning of the Tribunal*

The Tribunal refers to a standard introduced by the Court of Cassation (*Corte di Cassazione, ex multis*, Sez. I, no. 35890, 18 July 2012; sez. I, no. 2993, 23 June 1993), according to which the outcomes of an x-rays examination satisfactory evidence to declare the full age of the defendant, even when documental certifications declare the opposite.

Notwithstanding, the Tribunal does not follow the Italian Court of Cassation case-law, on the ground that age assessment through x-rays examination is a highly controversial and sensitive issue. The Tribunal refers to the administrative policy set forth by Italian authorities that recommends identifying a presumption of minor age in case of doubt or uncertainty (see the Memorandum of the Ministry of Interiors, 2007; Opinion of the Italian Supreme Council of Health, 2009). According to the reported evidence, the mere x-rays examination cannot represent satisfactory proof able to withdraw beyond any reasonable doubt the defendant's statement declaring his minor age. The Tribunal recognises that each method for age assessment is conditioned by a number of factors, which made them merely able to determine a variable range within which it is possible to insert the age of an individual.

With specific regard to the wrist's examination, such method, even if statistically reliable, may suffer in the specific concrete case for a variably broad margin of error, which may depend from the technique, the machinery or the professional's expertise. The range becomes even more complex and unpredictable when considering how specific characters of the individual examined may impact on the examination outcomes. Only whether this method finds corroboration in other pieces of evidence it will have a decisive evidential relevance.

### *Conclusion of the Court*

In conclusion, the Court held that the absence of further elements able to confirm the outcomes of x-rays examination, the probative force of the latter cannot be regarded, within the individual circumstances of the case, as a reliable proof beyond any reasonable doubt. Therefore, the Tribunal discharges the defendant because the existence of facts has not been proven. It is worth noting that this is a case in which age determination is assessed within a criminal case, in which the applicant is charged with a crime of false declaration to public officer with regard to his age (for more insightful analysis see below). Thus, here the judicial review on the fairness and suitability of the evaluation made by competent public authorities of age assessment outcomes represents an autonomous and decisive ground that gives the appellant a specific remedy against his charges. The Judge in this case attributes to public administration a particular responsibility, which must find adequate evidence within administrative decision-making process, in fairly and adequately interpreting age assessment outcomes. Thus, this cannot be an automatic reception of medical assessment, but the administration must exercise its discretionary power taking into account all factual circumstances. Age assessment seems to put more responsibility to administration in terms of burden of proof.

### *Impact of the case on national case-law/legislation*

After the judgment of the **Tribunal of Turin**, other Tribunals implemented the same approach, thus consolidating a case-law which considers age assessment procedures based merely on medical

investigations inadequate, unreliable, and incomplete in order to evaluate the effective age of an asylum seeker.

In 2016, the **Giudice di pace in Rome** (15 May 2016) with regard to a case involving an unaccompanied minor that illegally entered in Italy, in the light of the “supreme interest of the child” (New York Convention), withdrew the expulsion order against the minor, on the ground of a physically non-invasive assessment which attested the compatibility of minor’s development with an age of 17 years (holistic and multidisciplinary age assessment) and it is characterised, in the same way that an invasive assessment based on x-rays examination (two years of range).

The **Juvenile Tribunal in Venice** (3676/16, 23 December 2016), facing a conflict between the appellant’s attestation and the outcomes of an x-rays- examination, has established that the x-rays examination represents a debatable and uncertain procedure and that the legal order provides for the presumption of minor age in case of doubt (see DPR 488/88, Art. 8.2). Instead of the mere examination of the radiography, it would have been advisable to implement a multidimensional approach, which considers also the visit of a paediatrician and the specific subjective factors of the individual (i.e. education, genetics, family environment). It expressly makes reference to the Judgment of the Tribunal of Turin.

At the legislative level, it is worth underlining that Italian Parliament recently passed Law no. 47/2017 on “Protection measures for unaccompanied foreign minors”. Article 5 provides for principles with regard to the procedure of identification of unaccompanied minors by reforming the Legislative Decree no. 142/2015, which gave implementation to the Recast Directives 2013/33/EU and 2013/32/EU. According to Article 5 of Law No. 47/2017, when – after having performed an interview with a minor in order to investigate his/her personal and familiar history – “legitimate/well-grounded doubts” persist with regard to the age of the individual, the age is certified firstly through identity papers. When well-grounded doubts still persist, social and medical examinations can be ordered by the competent judicial authority (the *Procura della Repubblica* of the Juvenile Tribunal). The individual must be informed of this procedure in a language which he/she is able to understand and according to his/her maturity and literacy level; the assistance of a cultural mediator must be provided. In particular, he/she must be informed on the type of examinations, possible outcomes, and consequences, as well as on the possible consequences of a refusal to undergo the examination. The examination must be performed according to a multidisciplinary approach; the outcomes must be communicated to both the individual and to the person that has the guardianship.

The margin of error of the assessment must be also certified in the final report. When also at the end of the assessment doubts persist, the minor age must be presumed. Against this decision, it is possible to lodge an appeal, which is decided within an accelerated procedure of maximum 10 days (*in via d’urgenza*). It must be underlined that the Law does not identify the competent judge.

### Elements of judicial dialogue

Although the Italian judgment has not been expressly mentioned by other courts, it undoubtedly expresses a general common trend within EU, which founds direct ground on the EU Law provisions quoted above. Other national jurisdictions have come to assessing the legitimacy of age assessment procedures carried out by national authorities, as this issue is becoming one of the most challenging and crucial in terms of effective protection of rights at the national level, also due to scientific uncertainty linked to these procedures.

## UNITED KINGDOM

In the landmark case of *Merton* the UK High Court ([2003] EWHC 1689 (Admin.)) was been asked to give guidance as to the requirements of a lawful assessment by a local authority of the age of a young asylum seeker claiming to be under the age of 18 years. The High Court determined that medical investigation for age assessment in cases of unaccompanied children is unnecessary, due to its lack of certainty and reliability. Therefore, the High Court introduced a set of minimum procedural standards, according to which in cases where the age of an applicant is not clear, and no reliable documentary evidence is available, the credibility of the applicant, physical appearance and behaviour must be assessed. Age assessment must also consider the general background of the applicant, which includes ethnic and cultural considerations, family circumstances, and education. This seems to be in line with the recalled Italian case-law.

In *A.A., R. (on the application of) v Secretary of State for the Home Department & Anor* ([2016] EWHC 1453 (Admin) (20 June 2016)), the **UK High Court** decided an appeal against unlawful detention of an unaccompanied minor and damages for false imprisonment. With regard to the age assessment procedure performed by competent immigration officer, the Court dismissed the exception of the Secretary of State, that claimed that the fact that the immigration officer has a discretion as to whether to detain an individual means that he has a discretion to determine the age of the individual. According to the Court, “*the discretion does not extend to assessing the age of the child which is separate issue and which is not expressed to be subject to the discretion of the immigration officer or under the authority of the immigration officer*”. Therefore, it states a general principle which seems to limit the administration’s discretion at the time of performing the age assessment, making direct reference to the Croydon case: even if age assessment represents a difficult exercise to carry out and it may generally have equivocal conclusions, this difficulty is not a valid reason for not determining the issue as a matter of objective fact (para/ 49). The determination of age entails the determination of the concrete meaning of the words “unaccompanied child” contained in the 1971 Immigration Act. This must be construed as a matter in fact, instead of through the “reasonable belief of the immigration officer exercising his authority to detain” (para. 3). The case is especially relevant as it shows how administrative judges may overcome the limits of judicial review powers as regards age assessment, by assuming a more proactive approach before the public administration’s evaluations.

Accordingly, the legitimacy of age assessment outcomes shall be the object of judicial review and the unpredictable and uncertain nature of the procedure does not prevent it from being the object of review by courts rather than for other kinds of decision maker (see also the Croydon case).

In 2016, the **UK Court of Appeal** (*London Borough of Croydon v Y*, Court of Appeal, 26 April 2016, [2016] EWCA Civ 398) assumed that the refusal to give consent to medical examinations within an age assessment procedure based exclusively on physical appearance, can be considered unreasonable, thus recalling a “duty” to cooperate to the procedure when it is necessary to enable the authority in charge with age assessment to defend the challenge of its outcomes. The fact that dental x-rays examination is controversial and unreliable does not represent per se a factor able to refuse the order, but it represents an element of fact to be discussed during a hearing.

## SPAIN

In terms of administrative discretion in interpreting age assessment, it is worth mentioning the judgment of the **Spanish Supreme Court** (no. 3186/2013, 17 June 2013). In the cited case, the Court upheld the appeal of an unaccompanied minor against the denial of international protection,

as the procedure amounted in a real and effective state of lack of defence. Decisive in affirming the violation of the right to defence of the appellant has been the misrepresentation of age assessment outcomes. It is worth underling that in the present case the failure in observing age assessment good practices does not depend on an error or lack of skills of the health professionals involved, but it derives directly from the exercise of discretion made by administrative authority: the medical report adequately highlighted the range of error of the hand's x-rays examination, providing that the appellant should have been considered as 17 years old. Notwithstanding, as recognised by the Court, the administrative official in charge did not interpret adequately the medical report, which clearly expressed the possibility to interpret medical outcomes in a way compatible with the minor age of the appellant. By acting unfairly, the official did not comply with the well-established principle according to which in case of doubt the individual must be considered as being of a minor age (Directive 2003/9/EC). Further interviews with the appellants, issued in order to evaluate his request, have been thus conducted as if the applicant was of age, without letting him know him about his right to be assisted by a court-appointed counsel (*avvocato d'ufficio*). Accordingly, the Court annulled the decision which denied protection to the appellant.

## LITHUANIA

The **Supreme Administrative Court** (22 September 2015, case A-3673-822/2015) has been called to decide whether the applicant should be further kept in detention while his return procedures were ongoing, after having illegally entered into the Country. The applicant claimed that he was a minor and that his identity had been established, therefore a measure alternative to detention should be applied. An independent expert in the case gave his opinion that the applicant was over 20 years old, and likely to be 20 to 25 years old. The ID card was submitted to the case by a woman who claimed to be the applicant's mother; however, there was no evidence that the woman was indeed the mother of the applicant, or that the ID card was not fraudulent.

The **Supreme Administrative Court of Lithuania** took into account the fact that the identity of the applicant had not been established, that he changed his statements concerning his name and date of birth, that according to the expert's opinion he was an adult, and concluded that his detention was necessary in order to take a decision on his return. Thus, the Court upheld the decision of the first instance court to keep the applicant in detention for another three months. It must be underlined that the Court also stressed the importance of the principle of good administration (it expressly refers to Art. 41 EU Charter), and reminded that the competent institutions would not be able to rely on the circumstance that they are not receiving an official answer from an embassy regarding the veracity of the applicant's ID document for an unlimited time.

## **7.2. Guidelines for judges emerging from the analysis**

The role of courts in guaranteeing the effective nature of the remedy provided against an unlawful age assessment procedure is essential, especially due to a lack of common standards within the EU Member States and having in mind the fundamental principles enshrined in the EU law:

- a) the prominent role of the best interest of the child, which is expressly ratified at the EU level (Article 24 EU Charter);
- b) the presumption of minor age in case of uncertain outcomes of the age assessment;
- c) medical assessment as a last resource procedure and need for a multidisciplinary and holistic evaluation. The judgments analysed seem to show the consolidation, at the judicial level if not at the legislative one, of common trends among national jurisdictions, which are used to



enforce the European standard recalled above. It is worth underlining the recognition of the right to be assisted during the procedure and duly and promptly informed on the age assessment outcomes, in order to effectively exercise the right to appeal against the decision.

Having this background in mind, the cases briefly analysed seem to show that judicial review in this context is not limited to procedural aspects, but can also go to check the legitimacy of the evaluation made by public administration on the ground of assessment outcomes (fettering of discretion). From the perspective of the right to an effective remedy, it can be said that age determination can be the object of judicial review as an autonomous and specific (separate) ground of appeal, even when age assessment is functional to other administrative decisions (i.e. detention of unaccompanied minor, see UK High Court case analysed above). As a matter of common trend within the jurisdictions analysed, this is particularly relevant from the perspective of the right to an effective remedy, as it gives the right to challenge administration's measures (detention, access to reception system, determination of individual status) directly and autonomously on the ground of the illegitimacy of age assessment procedure or the way in which competent public officers made use of assessment outcomes within broader administrative determinations, as well as autonomous ground of motivation within criminal cases (see Tribunal of Torino). It matters also in terms of the principle of good administration when declined in terms of fairness and fettering of discretion.

In light of this, it should be particularly underlined that:

- d) The merit of the decision can also be the object of review by judges as it cannot be the outcome of a mere exercise of discretionary power of the competent authority (see *case Anor* in the **UK**). Administrative authorities are called to interpret adequately the assessment outcomes, according to the principle of good faith (**Spanish Supreme Court**).
- e) Judges can also assess not only the legal but also the scientific rationale and reliability of the age assessment procedures implemented by national authorities, thus providing individuals (in many cases, unaccompanied minors) with an effective remedy against an inconsistent determination of age (**Italian cases**).
- f) In specific cases, a duty to cooperate for the alleged minor can be determined, refusal to give consent to medical examinations within an age assessment procedure based exclusively on physical appearance, can be considered unreasonable, thus recalling a "duty" to cooperate to the procedure when it is necessary to enable the authority in charge with age assessment to defend the challenge of its outcomes (**UK Court of Appeal**).

## 8. Impact of Article 47 EU Charter and general principles of EU law on Asylum and Immigration Adjudication: comparative preliminary remarks

The Casebook assessed European and national jurisprudence comparatively. It aimed to go beyond a mere analysis of top down or bottom up approach and explore the EU law influence in a comparative perspective. Meaning not only finding how different national jurisdictions have implemented the CJEU and ECtHR jurisprudence, Articles 47 EU Charter, and general principles of EU law and compare the influences on national legal systems, but also how national legal systems have influenced the solutions in other legal systems. The research is still at an early stage, but some preliminary remarks can be already observed.

The structure of this section is as follows:

### I. Asylum proceedings: judicial reviews powers

1. Mapping the type of jurisdiction competent in asylum proceedings
2. Impact of Art. 47 and general principles on the breadth of judicial competences
3. Levels of jurisdictions in asylum adjudication in the Member States<sup>281</sup>
4. Impact of Art. 47 and general principles on the levels of appeal in asylum proceedings

### II. Return proceedings: Judicial review powers

## Mapping the type and levels of jurisdiction in asylum and return proceedings

### Mapping the type of jurisdiction in asylum proceedings

In the fields of asylum and immigration, the competent judicial authority to review the administrative decisions taken during the asylum proceedings is, commonly, an administrative court.<sup>282</sup> **Italy** represents an exception, where asylum adjudication is attributed to civil judges, while immigration adjudication to Giudice di Pace (Justice of Peace), which are judges deciding only in return related cases, and being hired on the basis of a contract. Exceptionally, in **Romania** civil judges are competent to hear in a court in Bucharest based on the decision taken by that court

---

<sup>281</sup> Additional data available in Grega Strban et al.j, Return Procedures Applicable to Rejected Asylum-Seekers, Refugee Survey Quarterly, 2018, 0, 1–25.

<sup>282</sup> This is the case, for instance, in Belgium (Council for Alien Law Litigation, which has exclusive jurisdiction to hear appeals against individual decisions concerning the access to the territory, residence, establishment, and removal of foreigners); Croatia (Art. 32(2) of the Act on International and Temporary Protection. There are four Administrative Courts in Croatia (in Zagreb, Rijeka, Split, and Osijek); Cyprus, the Czech Republic, Finland, Germany, Greece, Lithuania, the Netherlands, Poland, Romania, Slovenia, and Spain). The Civil Tribunal in Italy and regional general courts in Slovakia (but with a specific territorial competence in Bratislava and Kosice)<sup>59</sup> are competent to review administrative decisions and their judgments are final.

regarding allocation of asylum adjudication.<sup>283</sup> In **France**, it is the competence of a specialised court, namely the Cour nationale du droit d’asile, while in **Hungary**, the specific regional Labour and Public Administration Court is competent.<sup>284</sup> In **Slovakia**, regional general courts (but with a specific territorial competence in Bratislava and Kosice) are competent to review administrative decisions and their judgments are final.<sup>285</sup>

Therefore, on status determination, administrative courts are generally those hearing the appeal against the administrative authorities in the Member States. Most often, they are hearing the first appeal. However, in certain Member States, a first appeal is heard by a second administrative body: **Greece** – the Independent Appeals Committee (a quasi-judicial body hearing inadmissibility cases); **Poland** – the Refugee Board<sup>286</sup>; **Ireland** - Refugee Tribunal (considered as equivalent to a court). The fact that appeals can be heard by organs other than courts has raised issues concerning the independence of the courts, and also whether they can be considered as offering a right to an effective remedy within the understanding of Article 46 Recast APD and Article 47 EU Charter (see *Issue – Access to court*)

While the same administrative authority is usually responsible for issuing both asylum and return decision, more variety exists at the judicial level (appeals). In several Member States return adjudication is allocated to a different court than the one hearing international protection cases (e.g. **Belgium, Romania**). The Member States where the same court is competent to hear both asylum and return cases is usually due to the fact that, in these jurisdictions, the return decision is considered an integral part of the asylum decision, therefore an appeal against a rejected asylum application is also an appeal against a return decision. (e.g. **Netherlands and Finland**).<sup>287</sup>

In the field of asylum and immigration detention, the allocation of judicial competences among the Member States is considerably more varied. While asylum detention is decided by the same court that decides on status determination in certain Member States (e.g. the **Netherlands, Romania**), in other Member States, asylum detention is allocated to general district courts in (e.g. **Hungary, Poland**) or criminal courts (**Belgium**).

As for the return detention, the allocation of jurisdiction among the Member States is furthermore complicated.

Criminal	Civil	Administrative		General courts	Other
		Specialised on asylum and immigration	General		
BE, ES, FR, PL (only in	DE	NE, AT, BG, SE	Most of the	HU	IT: Giudice di pace

<sup>283</sup> See Grega Strban et al., Return Procedures Applicable to Rejected Asylum-Seekers, Refugee Survey Quarterly, 2018, 0, 1–25.

<sup>284</sup> Data collected from discussion with the national judges part of the ReJus Working Group and Grega Strban et al. Return Procedures Applicable to Rejected Asylum-Seekers, Refugee Survey Quarterly, 2018, 0, 1–25

<sup>285</sup> Art. 54 of the Law on Asylum (Legea privind azilul) No. 122/2006, Official Gazette of Romania, No. 428, 18 May 2006 with modifications

<sup>286</sup> A second appeal is then heard by the Voivodeship Administrative Court in Warsaw, whose decisions can be appealed before the Supreme Administrative Court.

<sup>287</sup> See the EMN 2016 [Synthesis Report](#) for the EMN Focussed Study - The Return of Rejected Asylum Seekers: Challenges and Good Practices.

apprehension cases)			MSs		
---------------------	--	--	-----	--	--

As to levels of jurisdiction hearing asylum and return cases (i.e. number of appeals), national legislatures have limited the number of appeals available to asylum seekers and returnees. For instance, in **Italy**, Decree 13/2017 decreased the levels of appeal from three to two; after the first instance appeal, there is only an appeal before the Court of Cassation limited only to cases of errors of law.<sup>288</sup> In other countries, although the legislature did not limit the levels of jurisdictions, the national courts adopted a restrictive interpretation of Art. 46 of the Recast APD, by recognising a suspensive effect of the appeal only to the first instance appeal (see **Supreme Court of Estonia**, 3-3-1-54-16, of 2 March 2017).

In conclusion, Member States have adopted different approaches as regards the type of court competent to hear asylum and return related cases, and levels of appeals, which is generally permitted by EU law under the procedural autonomy principle. The type of domestic jurisdiction seems to influence the extent of the scope and intensity of judicial review (investigative/probatory powers), and jointly with the constitutional and national legal specificities also influences the reformatory powers of national courts. This section shows that, in spite of the procedural margin of manoeuvre left to the Member States under the procedural autonomy principle, Art. 47 EU Charter and the general principle of effective judicial protection, as interpreted by the CJEU and national courts, require that national courts have a common judicial review powers, irrespective of the type and levels of their jurisdiction, constitutional and national specificities. (as it will be showcased in the following paragraphs)

## Investigative powers

There seems to be two types of investigative powers that administrative courts can exercise under the national procedures in asylum and return related cases: *adversarial powers* (typical of the common law tradition), where the judge plays a lesser role in establishing facts, exercising a role similar to that of an arbiter<sup>289</sup>; *inquisitorial powers*, where judges can play a proactive role in the determination of the necessary proof (personal hearing of the party, new COI, hear testimonies<sup>290</sup> or experts if they consider useful and necessary), **Germany** being the representative of this model.

*Issue 1 - Impact of the principle of effectiveness and right of fair trial on asylum evidential procedural rules* will show the various changes occurred at national level operated by national courts on the basis of the EU primary law (principle of effectiveness) and EU secondary legislation (Article 4 QD), and CJEU (e.g. the ‘sliding scale’) and ECtHR jurisprudence. It seems that a European common core of investigative judicial powers is developing, empowering certain national courts, whose powers are limited to adversarial proceedings.

<sup>288</sup> Similarly, the Czech Asylum Act has been amended, almost at the same time as the Italian Decree, and limited the levels of appeal for asylum detention (see Section 46a (9) of the Czech Asylum Act of 15 August 2017)

<sup>289</sup> See, R. Thomas, *Administrative Justice and Asylum Appeals*, A Study of Tribunal Adjudication (Hart 2011).

<sup>290</sup> For instance, testimonies could not be heard in Malta, while only under limited circumstances in Greece; see ACA 2010 General Report on Asylum and Immigration law: the national judge between national and European standards.

## Scope of judicial review powers (scope of assessment)

National courts enjoy various scope of judicial review powers. The differences consist mostly on: whether the courts have an *ex nunc* or *ex tunc*<sup>291</sup> judicial review powers; cassatory or reformatory powers<sup>292</sup>. Italy is an exception, since civil judges are competent and they have full powers of assessment, including hearing in asylum adjudication.

It seems that the nature of the competence affects the scope and intensity of judicial control also of pre-removal detention measures. The widest powers of assessment are perhaps held by civil and criminal judges/courts who order pre-removal detention, unlike administrative courts which only control the detention order issued by the administration. Civil and criminal courts can decide on all aspects of the pre-removal detention cases, including: weighing the principle of proportionality; establishing alternative measures; and replacing the decision of the administration with that of their own. On the other hand, administrative judges cannot decide the adoption of pre-removal detention, they only control the detention order proposed by the administration. They also have more limited powers of control, for instance, they can usually assess only manifest errors committed by the administrative authorities, they can annul their decisions, if such errors are found, but cannot substitute the decision of the administration with that of their own.

In addition to the problems resulting from the different allocation of judicial review of pre-removal detention among the Member States, problems arise also from the division of judicial control of return related measures within the same Member State. For instance, though civil and criminal courts have more extensive powers of judicial control of pre-removal detention, they cannot assess the lawfulness of the return/removal order, as these measures fall under the competences of administrative courts. An unusual judicial configuration exists in **Belgium**, where criminal courts can assess the legality of the removal orders, but they cannot annul them, as this falls under the competences of the administrative court (Aliens Litigation Court). Unlike criminal courts in other countries, they do not make decisions on the adoption of the detention order, but only control it, since the detention order is interpreted in Belgium as an accessory to the removal order, which falls under the competences of the Aliens Litigation Court.

Under the impact of the principles of the primacy of EU law, effectiveness and proportionality, as well as Article 47 EU Charter, and sometimes also due to the use of judicial interaction techniques, such as: the preliminary reference, the disapplication of national law, consistent interpretation, and referral to foreign domestic judgments. trend of unification of judicial competences and extending judicial scrutiny powers over return related decisions is developing. For instance, increasingly national courts start to: assess all aspects of facts and law in cases of pre-removal detention both in first orders or for prolongation of detention; carry out a careful assessment of the proportionality of the administrative detention measure; establish alternative measures for themselves; assess the lawfulness of both pre-removal detention and other connected return-related measures (see *Issue – Detention*).

Article 47 EU Charter, and the principle of effectiveness of EU law, principle of primacy of EU law, as well as the jurisprudence of the CJEU have contributed to the extension of judicial assessment powers of national courts in asylum adjudication. The Issue on Detention will show

---

<sup>291</sup> Example of *ex tunc* judicial review powers: Poland.

<sup>292</sup> The majority of asylum courts of the Member States have only cassatory powers, meaning they are competent to overturn the decision with detailed guidelines to be followed, but their judgment on recognising a certain form of international protection are not directly executory.

that the CJEU preliminary ruling in *Mahdi* transcends the field of pre-removal detention, and has been invoked by national courts by way of analogy also to detention measures adopted in other fields, such as under the Dublin Regulation.

### **Intensity of judicial review powers (remedial powers)**

As regards remedial powers, it seems that the majority of administrative asylum adjudication courts have only the power to quash administrative decisions and resend the case to the administration for re-assessment. Few administrative national courts have reformatory powers (establishing a new remedy/measure, such as recognition of a form of international protection), such as Germany, France, Belgium, Italy. Usually, the court with widest investigative powers, also have reformatory powers. The principle of effectiveness of EU asylum related rights and Article 47 EU Charter have been invoked by national courts as legal basis for allocating reformatory powers, where the administrative has consistently refused to take upon their quashing decisions and recommendation (see Hungary, while a pending preliminary ruling has been recently addressed by the Slovak Supreme Administrative Court, Issue - *Reformatory judicial powers necessary to ensure respect of the right to an effective remedy*)

As previously highlighted, in most EU countries, the judicial review of pre-removal detention was allocated to administrative courts, which have traditionally more limited powers of review than civil and criminal courts. This picture has considerably evolved due to the reinforcement of the judicial review function of the national courts, which can be explained by the influences of European law (*Return Directive*), and especially by the right to effective judicial review (Article 47 EU Charter) and effective legal protection (Articles 6 and 13 ECHR) as interpreted by the CJEU and ECtHR.

One of the landmark cases leading to the extension of review powers of national courts in pre-removal detention is the *Mahdi* case. According to AG Szpunar in *Mahdi*, “*the judicial authority must be in a position to determine whether the grounds forming the basis of the detention decision are still valid and, as the case may be, whether the conditions for extending detention are fulfilled. In order to comply with Article 47 of the Charter, the national court must have unlimited jurisdiction with regard to the decision on the merits.*” Consequently, the national courts must be able to decide on:

- an extension of detention;
- on replacement of detention by a less coercive measure or
- on the release of the person concerned.

Additionally, “*the judicial authority must have power, if necessary, to require the administrative authority to provide it with all the material concerning each individual case and to require the third-country national concerned to submit his observations. [...] Consequently it is for the national court to assume unlimited jurisdiction with regard to the substance of the case. Thus, as*

*it may apply Article 15 of Directive 2008/115 directly it must, if necessary, disregard the provisions of national law which have the effect of preventing the assumption of unlimited jurisdiction.”*<sup>293</sup>

As a consequence, the administrative judge has taken on a new role in the institutional framework and is better equipped to intervene effectively in administrative decision-making, balancing various interests (public interest of effective expulsion and the protection of the rights of individuals).

**Several forms of extension of judicial review powers can be identified under the impact of the CJEU jurisprudence, Article 47 EU Charter and principle of effectiveness and ECtHR jurisprudence:**

- Wider power of domestic judges to control the content of the administrative act following a legislative transfer of competences from the administrative to the criminal judge due to the previous negative jurisprudence of the ECtHR against **France**<sup>294</sup>; or by the *ex officio* extension of power by administrative courts in the absence of legislative empowerment (**Bulgaria, Slovenia**) under the impact of the CJEU jurisprudence, in particular the *Mahdi* preliminary ruling;
- Replacing formal judicial control with a meaningful and in-depth judicial review of the evidence and substantial merits provided by the administration in their decisions on pre-removal detention (instances in **Lithuania**, Romania<sup>295</sup>, **Cyprus** and the **Czech Republic**, which have not reached, though, the level of generalised domestic practices). This practice has occurred under the impact of the principle of individual assessment, and principle of effectiveness of EU law, Article 47 EU Charter, and principle of good administration.

The ECtHR standards of prohibition of arbitrariness in cases of deprivation of liberty have been invoked by the **Czech Supreme Administrative Court**, explicitly rejecting the deferential review exercised by the **Municipal Court in Prague**, which held that it is up to the police to decide how to proceed with removal arrangements. Following this 2011 judgment, the Czech administrative courts were no longer satisfied with the basic information that the police made some progress in removal arrangements. Instead, they require the police to show concrete steps taken in order to remove a TCN. Moreover, these steps must be included in the case file; otherwise they cannot be used as evidence before the courts (REDIAL Czech Report on pre-removal detention, p. 17.)

The preliminary ruling delivered by the CJEU in the *Mahdi* case has also played a salient role in reshaping domestic procedural norms on the allocation of powers between the administrative authorities and national courts in the referring jurisdiction, but also in other domestic jurisdictions. One should keep in mind that the CJEU held in *Mahdi* that the judicial authority has the power to take into account the facts stated and evidence adduced by the administrative authority which has brought the matter before it. This includes any facts, evidence and observations which may be

---

<sup>293</sup> Judgments in *Simmenthal* (C-106/77, EU:C:1978:49, paragraph 21) and *Solred* (C347/96, EU:C:1998:87, paragraph 29). See also AG Szpunar in *Mahdi* (ibid.), paras. 73-79.

<sup>294</sup> The jurisprudence of the ECtHR on Article 5(4) ECHR standards in immigration detention (*A.M. and others v France*) has recently played a salient role in having the French legislature confer extended judicial review powers to the *Juge des libertés et de la détention*. In this case, the Strasbourg Court identified problems with the limited judicial control of the pre-removal detention of children in the French jurisdiction, which determined that the French legislature should amend the legislation in force before the summer of 2016 and should recognise the wider powers of judicial review over the legality of pre-removal detention on the part of French criminal judges: for more details on their concrete powers, see the [REDIAL French Report on pre-removal detention](#)

<sup>295</sup> **Court of Appeal of Bucharest**, [case no. 3312 / 04.12.2014](#)

submitted to the judicial authority in the course of proceedings. Additionally, it can consider *ex officio* also other circumstances within the ambit of the individual assessment which national courts have the power to exercise.

On the basis of the *Mahdi* preliminary ruling, the **Bulgarian judiciary** disapplied the domestic law (*Law on Foreign Nationals in the Republic of Bulgaria, Article 46a, para. 4*) which says that judicial renewal of detention following the lapse of the first six months takes place in a closed hearing without the participation of the TCN. With few exceptions, the practice of convening an open hearing with the participation of the detained TCN has become stable case law in Bulgaria. This follows the two precedent-setting judgments of the **Supreme Administrative Court** in the cases *Kapinga* (Decision of 27 May 2010, in case No. 2724/2010) and *Tsiganov* (Decision of 8 February 2011 in case No. 14883/2010). In those cases the Supreme Administrative Court invoked *inter alia* Article 47 EU Charter (the right to a public hearing in particular), together with Article 15 RD, Article 5(4) and Article 13 ECHR (REDIAL Bulgarian Report on pre-removal detention).

The differences highlighted call for non-legislative means of harmonization to achieve some degree of convergence among legal systems characterized by different procedural rules. Checklist as the one produced by ELI can significantly improve the definition of common procedural and substantive standards. See ELI statement available at [www.europeanlawinstitute.eu](http://www.europeanlawinstitute.eu).

### **Preliminary conclusions on judicial dialogue in asylum and immigration**

Judicial dialogue has contributed to solving complex, sensitive problems in asylum and immigration; it is also the driver of innovation and change for both substantive and procedural rules at the national level.

The cases discussed in this Casebook show that if there is an initial vertical judicial dialogue, i.e. between a national court and the CJEU, the resulting preliminary ruling can still leave certain issues unclear (this is particularly the case where preliminary rulings invoke the principle of deference<sup>296</sup>). The Polish cases on limitations of the rights of defence in national security cases show that another preliminary reference may be necessary to further interpret the principles developed by the CJEU in the *ZZ* case (i.e. the question of ‘essential grounds’) (see *Issue – Rights of defence in national security cases*). Additionally, the application of a preliminary ruling at the domestic level might also differ between the Member States due to their specific national rules; this may mean an additional preliminary ruling is required to clarify the impact of *ZZ* in particular countries. This was the case with the preliminary ruling from a Dutch court on the clarification of the impact of the CJEU preliminary rulings in *Tall* and *Abdida* concerning the compatibility of the Dutch asylum and immigration systems with Articles 19(2) and 47 EU Charter, whereby a suspensive effect was primarily recognised by way of individual separate request (see *Issue – The Right to an Effective Remedy and Suspensive Effect of Appeal*). It seems best to look at judicial dialogue as a recursive instrument, whose ultimate goal is to offer concrete guidance to the national courts, and also to help them to achieve a solution that addresses both national and European normative exigencies. The principle of supremacy of EU law means that it is binding on both national courts, but also on the CJEU; the latter’s task is to help national courts reach judgments that ensure full compliance with EU primary and secondary law.

---

<sup>296</sup> T. Tridimas, ‘The ECJ and the National Courts: Dialogue, Cooperation and Instability’ in Anthony Arnall and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 403.



Apart from the principle of *non-refoulement*, which as an absolute fundamental right requires the unrestricted application of the guarantee of suspensive effect of an appeal, all the other guarantees discussed by this Issue can be limited following the requirements of Article 52(1) EU Charter. Two important principles are however to be remembered, which cannot suffer from any restriction, according to Article 47 EU Charter, principle of effectiveness of EU law as interpreted by the CJEU: the unrestricted judicial power to assessment the facts and law in full, and *ex nunc*; and the full judicial power to decide whether to hear or not individual subject to negative administrative decisions. No domestic national procedural or substantive law can restrict such powers, although strong opposition to such development seem to exist in certain national jurisdiction.