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ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter

MODULE 5 – ASYLUM AND MIGRATION

IN THE FRAMEWORK OF THE PROJECT “ACTIVE CHARTER TRAINING THROUGH INTERACTION OF NATIONAL EXPERIENCES” (ACTIONES)



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MODULE 5- JUDICIAL DIALOGUE FURTHERING THE APPLICATION OF THE EU CHARTER IN ASYLUM AND MIGRATION

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MODULE 5 – ASYLUM AND IRREGULAR MIGRATION

Part I – Analysis of the legal area

I. Short evolution of the European asylum and irregular migration law

The organisation of asylum and return procedures has long been considered as belonging to the core of national sovereignty. However, with the abolition of the internal borders between the Member States, the EU has started a process of harmonisation of national rules on asylum and return procedures, developing a system of legal rules known as the Common European Asylum System (CEAS). The first common initiatives took the form of inter-governmental measures, rather than EU acts. In 1990 two treaties were adopted: the *Schengen Implementing Convention*¹ and the *Dublin Convention*,² the latter mainly focusing on the determination of the State responsible for examining asylum applications. According to the Dublin Convention, the asylum seeker did not have a right to determine the Member State where to apply for asylum. Instead the State responsible for assessing his/her application was determined on the basis of purely objective criteria agreed on by States, without regard to the preferences of asylum-seekers, a rationale that has been maintained up to the present.

In 1991, the Commission published a Communication on the Right of Asylum proposing a comprehensive asylum system.³ However, the Member States did not endorse the Commission's initiative, which, in the first Treaty on the European Union – Maastricht Treaty, referred to asylum purely as a 'matter of common interest' within the Third Pillar,⁴ excluded from parliamentary overview and judicial control.⁵ Given the critiques of the limitations contained in the Maastricht Treaty to the asylum legal framework, the 1997 Treaty of Amsterdam shifted asylum from the third pillar, which was an inter-governmental one, to the first pillar- that of the European Community.

Since 1999, asylum has been brought under the Area of Freedom, Security and Justice, being governed by five year programmes whereby several measures were adopted concerning, *inter alia*: conferral of refugee status and other forms of international protection, asylum procedures and the determination of the State responsible for examining asylum

¹ Convention Implementing the Schengen Agreement of 14 June 1985 on the Gradual Abolition of Checks at the Common Borders (Schengen Implementing Convention), OJ (2000) L 239/19, 19 June 1990 (entry into force 1 September 1993).

² Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, OJ C 254/1, 15 June 1990 (entry into force 1 September 1997).

³ Discussion Paper on the Right of Asylum, in Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on the Right of Asylum, SEC(91) 1858 Final, 11 October 1991, 9, para 2.

⁴ Justice and Home Affairs.

⁵ For academic critiques on the Maastricht Treaty provisions on asylum, see E. Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18(3-4), IJRL, 634-635, 640.

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requests.⁶ The establishment of a common European asylum system was completed by the Tampere Conclusions (1999) of the European Council which had first introduced the notion of the Common European Asylum System.⁷ A process of harmonisation began, whereby minimum common standards were adopted as a first step towards building the CEAS. In its first phase of legislative harmonisation, the EU adopted a substantial number of EU legal acts: *four Directives*⁸ and *two Regulations*⁹, in less than 5 years, a particularly short period of time. The approach of the first wave of CEAS legifiration was to keep the harmonisation to a minimum possible.

The shortcomings of choosing a minimalist harmonisation process soon began to emerge. The large number of derogations and minimum level of harmonisation led in practice to significant variations on the recognition of refugee status among the Member States, even in cases of asylum seekers coming from the same third country and inevitably led to the undermining of the foundational objective of the CEAS, namely establishing common standards on asylum.¹⁰ Additional criticism originated from both practitioners and academics regarding the alleged incompatibility between the EU secondary legal provisions and the international legal norms as provided by the Geneva Convention relating to the Status of Refugees and, as well as for lowering the international and regional human rights standards of protection of asylum seekers.¹¹

⁶ See Article 63 of the EC Treaty. For more details on the historical evolution of the CEAS; see, V. Chetail in V. Chetail, Philippe De Bruycker and F. Maiani (eds) *Reforming the Common European Asylum System*, (2016) Brill.

⁷ European Council, Tampere European Council 15 and 16 October 1999, Presidency Conclusions, para 13.

⁸ The first directive adopted was Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12, 7 August 2001 (*Temporary Protection Directive*); secondly, the *Reception Conditions Directive* was adopted (Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18, 6 February 2003); thirdly, the *Qualification Directive* was adopted (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12, 30 September 2004); last Directive adopted concerned the rules governing *asylum procedures* (Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13, 13 December 2005).

⁹ The Dublin Convention was replaced by Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50/1, 25 February 2003 (*2003 Dublin Regulation*); Regulation No. 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 31/1, 15 December 2000 (*EURODAC Regulation*).

¹⁰ As observed by UNHCR, 'the chances of an individual asylum-seeker finding protection in the EU can vary nearly seventy-fold, depending on where he or she applies.' See, E. Feller, Remarks at the Public Hearing on the Future of the Common European Asylum System, 7 November 2007, Brussels, reprinted in (2008) 20 IJRL 216–217.

¹¹ UNHCR, 'Lubbers Warns EU Asylum Law May Erode International Standards', Press Release, 24 November 2003; : European Council on Refugees and Exiles (ecre), *Broken Promises – Forgotten Principles. An ecre Evaluation of the Development of EU Minimum Standards for Refugee Protection. Tampere 1999 – Brussels*

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A second phase in the harmonisation process of asylum rules was triggered by the 2004 Hague Programme on ‘Strengthening Freedom, Security and Justice in the European Union’.¹² At the Commission’s initiative, the Council adopted the European Pact on Immigration and Asylum in September 2008 which had the objective of building ‘a Europe of asylum’.¹³

2008 was an important year also because of the adoption of a legal instrument closely linked to asylum procedures, namely the *Return Directive* (2008/115/EC).¹⁴ The Return Directive sets out common standards to be followed by Member States when returning irregular third-country nationals (TCNs), including those whose asylum applications have been rejected by final decisions. The Member States had as a deadline for transposition the end of 2010, with the sole exception of Article 13(4) which had to be implemented by end of the following year. While the EU secondary instruments of the CEAS have been subject to revision in 2013, the Return Directive has remained unchanged until the present day.¹⁵

The coming into force of the Lisbon Treaty has brought salient changes in the field of asylum and irregular migrations. The Lisbon Treaty sets a new normative framework where the notion of CEAS is expressly provided as an EU objective (Article 78(2) TFEU). In addition the Lisbon Treaty gave the principle of mutual recognition constitutional status and expanded the law making powers of the EU. Notably, the EU acquired the power to adopt not just ‘minimum’ but ‘common’, uniform standards on asylum,¹⁶ acting by way of qualified majority voting. The human rights standards have been raised with the entry into force of the Charter of Fundamental Rights (*hereinafter Charter*), which has the legal status of EU primary law. This means that both EU secondary legal acts and national implementing measures will have to conform with the fundamental rights standards enshrined in the

2004; C. Dias Urbano de Sousa and P. De Bruycker (eds), *The Emergence of a European Asylum Policy* (Bruylant 2004).

¹² Accordingly, ‘[t]he aims of the Common European Asylum System in its second phase will be the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection. It will be based on the full and inclusive application of the Geneva Convention on Refugees and other relevant Treaties, and be built on a thorough and complete evaluation of the legal instruments that have been adopted in the first phase.’ - Council of the European Union, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 13 December 2004, OJ C 53/1, 3 March 2005.

¹³ Memorandum from the Presidency of the European Union to the Council of the European Union, European Pact on Immigration and Asylum, 13440/08, 24 September 2008, 11.

¹⁴ 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 348/98 24.12.2008.

¹⁵ In March 2017, the European Commission adopted two soft law instruments aimed at securing a more effective implementation of the EU’s return policy: a Communication including a renewed Action Plan on return (Communication from the Commission to the European Parliament and the Council on a more effective Return Policy in the European Union – a [Renewed Action Plan](#), COM/2017/0200 final) and Recommendations (Commission Recommendation of 1.3.2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, C(2017) 1600. Both soft law instruments contain concrete recommendation for the Member States in regard to the implementation of the Return Directive.

¹⁶ Article 78(2) TFEU.

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Charter. Furthermore, Article 78(1) TFEU unambiguously reaffirms that the common asylum policy ‘must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties’, thus requiring that EU secondary legislation also complies with international human rights conventions.

In the CEAS, the principle of mutual recognition plays an important role especially when enforcing the Dublin Regulation. It requires the Member States to fully recognise asylum applications, and decisions taken on applications for asylum in other Member States, as if they were taken in the same Member State. The logic is that the extraterritoriality of these decisions is accepted only if there is sufficiently high level of mutual trust among the Member States. For this reason the principle of mutual trust is a necessary prerequisite for a successful application of the principle of mutual recognition. However, the presumption of conformity with human rights which the Member States enjoy under these two constitutional principles,¹⁷ is not absolute. The CJEU has on several occasions confirmed that the presumption of conformity with human rights under the principle of mutual trust is not absolute. In certain circumstances concerning systemic or individual violations of absolute human rights (prohibition of ill treatment and principle of non-refoulement), the presumption of conformity with human rights can be rebutted, and thus the two principles disapplied.¹⁸ In practice, this means that the asylum seeker is no longer returned to the otherwise responsible Member State, but his asylum application is processed in the Member State where he/she is located. The principles of mutual recognition and mutual trust – the foundation of mutual recognition¹⁹ – do not presuppose absolute presumption of conformity with human rights of the Member States. Member States are required to give precedence to the principle of *non-refoulement* and absolute human rights which do not admit restriction.²⁰

In addition to substantial amendments, the CEAS institutional framework has been strengthened with the establishment of the European Asylum Support Office (EASO). This new agency has the threefold mandate of ‘supporting practical cooperation on asylum’,

¹⁷ See, in particular, *Opinion 2/13*, EU:C:2014:2454, paras. 168-191, which is the latest in a string of judgments of the CJEU, addressing issues such as the nature, scope of application and effects of ‘mutual trust’ and its relation with the principle of mutual recognition of national judgments.

¹⁸ See: C-411/10 and C-493/10, *N.S. and others*, EU:C:2011:865, and for more recent cases, see *Casesheet no. 1 – Article 4 EU Charter as limitation to transfers of asylum seekers under the Dublin Regulation III system: ‘individual violations test’ or ‘systemic deficiencies’ test*.

¹⁹ See, in particular, *Opinion 2/13*, EU:C:2014:2454, paras. 168-191, which is the latest in a string of judgments of the CJEU, addressing issues such as the nature, scope of application and effects of ‘mutual trust’ and its relation with the principle of mutual recognition of national judgments.

²⁰ See, for instance, *Tarakhel v Switzerland*, Appl. No. 29217/12, ECtHR, 4 November 2014; *M.S.S. v Greece and Belgium*, Appl. No. 30696/09, ECtHR, Judgment of 21 January 2011; C-411/10 and C-493/10, *N.S. and others*, EU:C:2011:865.

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providing ‘support for Member States subject to particular pressure’, and ‘contribute[ing] to the implementation of the CEAS’.²¹

Maybe the most significant amendment from the perspective of the judiciary is the increase in the possibility of judicial dialogue. Following the elimination of the pillars structure, national courts can refer preliminary questions to the CJEU in all the matters now gathered under the Area of Freedom, Security and Justice (AFSJ), including the CEAS.²² Since December 2009, national courts from all the Member States (and of all levels) have the power or obligation to refer preliminary questions on asylum and irregular migration matters.²³

Following the entry into force of the Lisbon Treaty, the second phase of harmonisation of asylum norms continued under a strengthened institutional framework at the EU level. A new *Qualification Directive* was adopted in 2011 and had to be implemented by Member States by December 2013.²⁴ On 26 of June 2013, revised *Asylum Procedures* and *Reception Conditions* Directives and revised *EURODAC* and *Dublin Regulation* were adopted.²⁵ These recast Directives repeal the first generation of asylum Directives and Regulations. However, Ireland remains subject to the latter, which has made selective use of its possibility to opt out of new EU legislation in the area of freedom, security and justice as laid down in Protocol No. 21 on the position of the United Kingdom and Ireland annexed to the TEU and the TFEU. Ireland had also opted out from the 2003 Reception Conditions Directive. The UK and Ireland have opted in to the recast Dublin and EURODAC Regulations, which also apply

²¹ See respectively Sections 1, 2 and 3 of Chapter 2 of the Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132/11, 29 May 2010.

²² Matters such as immigration, asylum, visas, police and judicial cooperation. The latter two matters were part of the third pillar before the entry into force of the Lisbon Treaty.

²³ On the distinction between power and obligation to address a preliminary ruling, see the *ACTIONES General Module (2) – Judicial Interaction Techniques*, 2.2. *Preliminary reference*.

²⁴ 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), OJ L 337/9, 20 December 2011 (*Recast Qualification Directive*).

²⁵ Namely, the *Recast Reception Conditions Directive* - 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 (recast), OJ L 1980/96, 29 June 2013; *Recast Asylum Procedures Directive* - 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), OJ L 180/160, 29 June 2013; *Dublin III Regulation* - 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 (recast), OJ L 180/31, 29 June 2013; *Recast Eurodac Regulation* - Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013 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 and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (eu) No. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast), OJ L 180/1, 29 June 2013.

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to the Schengen Associated States (Norway, Iceland, Lichtenstein and Switzerland). In accordance with Protocol No. 22 on the position of Denmark, annexed to the TEU and TFEU, the recast legislation will not apply to Denmark, except the recast Dublin and EURODAC Regulation.’

The recast CEAS instruments introduced more common standards, in a more precise way, and increased procedural safeguards and protection of human rights of asylum seekers. For instance, just to mention some of the most salient of the many amendments:

- The protection contained in the *absolute right to prohibition of torture and ill-treatments* has been enhanced by providing a limitation to Dublin transfer where ‘there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatments within the meaning of Article 4 of the Charter’ (Article 3(2)(2) of Dublin III Regulation). This provision codifies the conclusions reached by the CJEU in the *N.S. and others* case.²⁶
- The *right to family and/or private life* has been strengthened by extending the personal scope of ‘family members’, including now also the biological as well as the adoptive parents, regardless of whether the children were born out of marriage or wedlock (Article 2(c) of the Recast Reception Conditions Directive and Article 2 (j) Recast Qualification Directive); Article 15 of the Recast Asylum Procedures Directive expressly provides among the personal and general circumstances, which the authority carrying out the interview has to take into consideration, the gender, gender identify and sexual orientation; furthermore Article 15(3)(b) provides that, wherever possible, the interview should be conducted by a person of the same sex as the applicant; according to Article 25(5) of the Recast Asylum Procedures Directive, the medical examination of the age of the alleged minor applicant has to be “performed with full respect for the individual’s dignity, be the least invasive examination and carried out by qualified medical professionals”;
- The *right to effective remedies* is strengthened by way of ensuring suspensive effect to all appeals in asylum procedures (Article 46 Recast Reception Conditions Directive), free legal assistance, and a right to effective remedy in case free legal assistance is given by an authority which is not a court or tribunal; the new Article 46 no longer makes a distinction between asylum and subsidiary protection, in relation to appeal procedure, establishing the same rules for both applications for international protection; furthermore, the appeal must provide ‘full and *ex nunc* examination of the elements of fact and law’, this means that further declarations must be taken into account in the process of review or appeal against a negative decision on asylum or during a subsequent asylum procedure; Article 46 makes clear that applicants for international protection have an automatic right to remain in the

²⁶ See more in Casesheet no.1.

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territory, until the expiry of the deadline for submission of the appeal or if the appeal was lodged within the time limit, pending the outcome of the appeal.

- The *right to good administration* is also strengthened by requiring a mandatory personal interview and imposing an obligation on the administration to produce a detailed report of the interview;
- *Increased procedural safeguards* are provided in relation to detention of asylum seekers (e.g. detention cannot be applied for the sole reason of the application for international protection; each decision of detention must be based on individual, objective and impartial assessment of the case and detention can be employed only if other, less coercive alternatives, such as regular reporting to the authorities, cannot be applied effectively (Article 8(4) Recast Reception Conditions Directive).

The Recast Directives and Regulations codified many of the requirements previously set out by the European supranational courts.²⁷ However, they also missed an opportunity to codify certain rules regarding the territorial application of the Asylum Procedures Directive, and clarify the definition of subsidiary protection in light of the *Elgafaji* judgment of the CJEU.²⁸ Therefore the jurisprudence of the CJEU before the second amendment of the CEAS still remains relevant.

The CJEU preliminary ruling in *Elgafaji* had already provided clarification 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) of the Recast Qualification Directive regarding the conditions for receiving subsidiary protection, the CJEU concluded that the existence of a serious and individual threat should not be subject to the condition that ‘*the applicant adduces evidence that he or she is specifically targeted by reason of factors particular to his personal circumstances; the existence of such a threat can exceptionally be considered to be established 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 the territory of that country or region, face a real risk of being subject to that threat.*’²⁹

²⁷ See more details in the following section - Use and outcome of judicial dialogue (JITs) in the field of asylum and irregular migration.

²⁸ C-465/07, *Elgafaji*, ECLI:EU:C:2009:94.

²⁹ 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 C-465/07, *Elgafaji v. Staatssecretaris van Justitie (Netherlands)*, [2009] ECR, I-921, 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

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The **UK Court of Appeal** closely followed the CJEU findings in *Elgafaji*, and did not limit the definition of “internal armed conflict” to that provided by the public international law norms. Lord Justice Sedley 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).³⁰ The **Federal Administrative Court of Germany** goes even further in its interpretation and offers an example of both vertical and horizontal judicial dialogue, when deciding on the meaning of “internal armed conflict” on the basis not only of the CJEU judgment in *Elgafaji*, but also the *UK Court of Appeal judgment in QD*. The Court concludes that ‘*In view of the ECJ’s interpretation of the concept of indiscriminate violence but also in 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]³¹.

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” (*Diakite* C-285/12). The CJEU concluded that the notion of ‘internal armed conflict’ is an autonomous notion with a definition distinct from that given by international humanitarian law. The CJEU adopted an interpretation similar to the one previously constructed by the UK Court of Appeal, and underlined that “internal armed conflict” is an EU law notion 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 IHL. The Court mentioned that, first, there is no need to qualify the agents in conflict. Secondly, it is only necessary to establish whether the conflict can be characterized by a ‘*degree of indiscriminate violence, so high*’ as to indicate on a solid level that the return in the country 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.’

by virtue of exposing an individual to such violence. See *NA v. The United Kingdom*, ECHR (2008), Appl. No. 25904/07, para. 115.

³⁰ *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>

³¹ 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

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Another lost opportunity for codification, concerns the limitations to the suspensive effect of appeals in asylum procedures (Article 46 Recast Asylum Procedures Directive). The exceptions contained in the Recast Procedures Directive must be interpreted in conformity with the jurisprudence of the Court of Justice which ruled that even when the directives recognize a certain discretion to the Member States, Article 47 together with Article 19(2) of the Charter require Member States to provide for a suspensive effect when the return of the TCN would ‘expose the concerned citizen of a third country to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’ (*Tall, C- 239/14*). Therefore when such concerns are proved, suspensive effect, even in accelerated asylum proceedings, should be recognised.

Even if the CJEU’s conclusions in these judgments were not codified, national courts are bound to take into consideration the relevant CJEU and ECtHR judgments when interpreting and applying the domestic legislation transposing the Recast CEAS instruments.

The migration crisis has put the recast CEAS instruments to the test and showed persistent gaps, particularly regarding the functioning of the Dublin Regulation and the principle of mutual recognition, and more generally the principle of solidarity among the Member States.³² In order to help Italy and Greece with the processing of asylum application, the EU adopted the first two Decisions on intra-EU relocation schemes to other Member States, which aim to relocate, on a voluntary basis, 120,000 asylum seekers from Italy and Greece to other Member States.³³ Articles 7 and 8 of these Decisions refer to the hotspots which are established in the frontline Member States: Italy and Greece.³⁴ These temporary emergency measures adopted under Article 78(3) TFEU were backed by other proposals for long-term measures such as: replacement of the Dublin system with a permanent scheme of distribution of asylum seekers among Member States³⁵ and the greater use of Frontex in return procedures.³⁶

³² The legal basis of the principle of solidarity is Article 80 TFEU.

³³ Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, OJ L 239, 15.9.2015, p. 146–156; Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248, 24.9.2015, p. 80–94.

³⁴ A definition of hotspots is provided in the Commission Explanatory Note, <http://www.statewatch.org/news/2015/jul/eu-com-hotspots.pdf>

³⁵ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a crisis relocation mechanism and amending 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 COM/2015/0450 final - 2015/0208 (COD).

³⁶ For an analysis of these EU measures addressing the migration crisis, see the blog post of Francesco Maiani, *Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System?*, available online at <http://eumigrationlawblog.eu/hotspots-and-relocation-schemes-the-right-therapy-for-the-common-european-asylum-system/>. Frontex has been replaced in 2016 with the European Border and Coast Guard, see Regulation 2016/1624 of the European Parliament and of the Council of 14 September 2016 OJ L 251/1.

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The 2015 Relocation Decision was not welcomed by certain Member States (Hungary and Slovakia)³⁷, which decided to lodge actions of annulment challenging the legality of the Decision.³⁸ These Member States complained of the policy options in which solidarity was institutionalised by the Council, namely accepting a certain quota of asylum-seekers and financially contributing to support other Member States accepting the responsibility of handling the asylum applications. European and national courts have now the difficult task of assessing the legality of policy options and instruments adopted by the EU institutions in reaction to the migration crisis. The jurisprudence discussed in this module and that in the [ACTIONES database](#) shows that when national governments and legislators are circumventing fundamental rights and more generally the rule of law, national courts become the forum where individuals seek to obtain their legal and fundamental rights. The judicial dialogue with the CJEU and the EU Charter are valuable instruments in the hands of national judges to ensure the rule of law requirements.

II. The specificities of the use of the EU Charter of Fundamental Rights in the Common European Asylum System law and implementation of the Return Directive

1. Overview – introductory remarks

Several of the Charter provisions have, so far, been raised in asylum and irregular migration: *human dignity* (Article 1); *prohibition of torture and ill-treatments* (Article 4); *right to liberty and security* (Article 6); *right to private and family life* (Article 7); *freedom of thought, conscience and religion* and *right to conscientious objection* (Article 10); *right to asylum* (Article 18); *principle of non-refoulement* (Article 19(2)); *right to good administration* (Article 41); *right to a fair trial and an effective judicial remedy* (Article 47); the application of the EU Charter to UK and Ireland under Article 51 (e.g. *N.S. and others*); as well as the principle of proportionality in cases of limitations of fundamental rights (Article 52).

Many of these fundamental rights have a corresponding provision in the European Convention of Human Rights (ECHR). Whereas the right to asylum, right to good administration and the right to conscientious objection are specific to the Charter, other fundamental rights are enshrined in the ECHR as well: *prohibition of ill treatment and torture* (Article 4 Charter and Article 3 ECHR); *right to liberty* (Article 6 Charter and Article 5 ECHR); *right to private and family life* (Article 7 Charter and Article 8 ECHR); *freedom of thought, conscience and religion* (Article 10 Charter and Article 9 Convention); *Prohibition of collective expulsion* (Article 19 Charter and Article 4 of Protocol 4 Convention); *right to*

³⁷ The 2015 Relocation Decisions were adopted by qualified majority voting; Slovakia, Hungary, Czech Republic and Romania voted against the decision.

³⁸ Action brought on 3 December 2015 — Hungary v Council of the European Union (Case C-647/15) (2016/C 038/56) and pending case C-643/15 (Slovakia's action of annulment of the Asylum seekers relocation Decision).

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fair trial and effective remedies (Article 47 Charter and Article 13 Convention invoked usually in combination with other Convention rights, such as: Articles 3, 5 or 4 of Protocol 4³⁹). Differences exist also in the application of corresponding fundamental rights. For instance the Charter based right to a fair trial and effective remedy provides for the right to an effective remedy before a court of tribunal, unlike the Convention based right to effective remedy which guarantees access before an (impartial and independent) authority.⁴⁰ Additionally, the right to a fair trial and effective remedy do not apply to asylum and irregular migration cases (Article 13 ECHR has been considered in asylum and migration cases but only in conjunction with other provisions of the Convention, such as Articles 3, 5(1)(f), 8, and Article 4 Protocol 4, since the right to fair trial applies only to civil and criminal law cases, excluding public and administrative ones).

The application of Charter rights has specific requirements which differentiate them from the application of Convention rights. Article 51(1) lists the addressees of Charter obligations, stipulating that the Charter applies to both EU organs and the Member States when they ‘implement’ EU law provisions. According to Article 51, the provisions of the EU Charter are applicable only within the scope of EU law, which means, in essence, that there has to be a connection with primary or secondary provisions of EU law. The only threshold requirement, therefore, is whether EU law applies to the particular circumstances.⁴¹

2. Scope of application of the Charter – effects of Protocols No. (21) and (30)

The field of asylum has been particularly significant for the issue of clarifying the scope of application of the Charter. Notably, it has offered the context to the CJEU to clarify the effects of Protocol No. (30) regarding the application of the Charter in UK and Poland. In the joined cases C-411/10 and 493/10, *NS and ME*, the CJEU confirmed that “*Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol*” (para. 119). The decision of the Court of Justice was accepted, albeit with some misgivings by the High Court of England and Wales in *R (AB) v Secretary of State for the Home Department* (Case note 52).⁴² Despite his assertion that it is ‘absolutely clear that the contracting parties agreed that the Charter did not create one single further justiciable right in our courts’, Mostyn J applied the judgment in *NS*.⁴³ However, in light of the failure of the applicant’s claim under Article 3 of the European Convention on Human Rights (ECHR), Mostyn J did

³⁹ In particular the requirement that a remedy against a removal measure must have suspensive effect, e.g. *Čonka v. Belgium*, ECHR (2002), Appl. No. 51564/99, para. 79; *Gebremedhin v. France*, ECHR, (2007), Appl. No. 25389/05, para. 58.

⁴⁰ See more on this under the section on Article 47 EU Charter.

⁴¹ More information on the scope of application of the EU Charter and the triggering factors can be found in the *ACTIONES Module on Scope of Application of EU Charter*.

⁴² *R (AB) V Secretary of State for the Home Department* [2013] EWHC 3453, -2014] 2 CMLR 22.

⁴³ *Ibid* paras 12-14.

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not feel it necessary to examine the claim under the Charter.⁴⁴ The applicant's claim ultimately failed on the grounds of credibility.

The scope of application of the Charter has been further limited as regards Ireland and UK due to Protocol No. (21) which permits them to opt-out of the CEAS package and Return Directive.

There has been no express Court of Justice decision to date on the application of Protocol (No 21) or on any of the consequences flowing from the differentiated position of the UK and Ireland in relation to Title V.⁴⁵ In the cases collected for the *ACTIONES Project*, the question of opt-outs and the application of the Charter has arisen in two **Irish** cases. Firstly, in *Smith v Minister for Justice*⁴⁶ the Charter was not deemed applicable to deportation orders. The finding was based on the consideration that "[t]he revocation of a deportation order...does not involve, as such, any implementation of Union law. It is the exercise by the State of its sovereign entitlement to decide who shall remain within the territory of the State."⁴⁷ Whereas this is undoubtedly true in the present case, it is submitted that such a clear-cut conclusion is only possible in light of the non-applicability of the Returns Directive to Ireland.⁴⁸ Secondly, in *CA v Minister for Justice and Equality*⁴⁹ the issue of the scope of application of the Charter in light of the use of an opt-out was relevant. In proceedings challenging the 'direct provision' scheme for providing for asylum seekers material needs, the applicant claimed such a system violated her rights under the Charter, arguing that it applied generally within asylum law in light of Ireland's participation in the CEAS in substantial parts, furthermore she argued that Ireland's opt-out operated as a *derogation* from Union law and thus, even in areas in which Ireland had not participated in line with Protocol (No 21)⁵⁰ it was bound by fundamental rights as contained in Union law, including in the Charter. As detailed in the case file below, the Court rejected the submissions of the applicant, instead finding the opt-out was in fact an opt-out as such, meaning that in the relevant area Ireland was not in fact acting within the scope of Union law within the meaning of Article 51(1) Charter.⁵¹

3. Scope of application of the Charter – identification of the applicable EU law provision (factor triggering the application of the EU Charter)

Another issue concerning the scope of application of the Charter raised by the *ACTIONES* case law regards the correct identification of the EU legal provision(s) and EU

⁴⁴ Ibid, para 69.

⁴⁵ Although see *HN* (*ACTIONES Database*).

⁴⁶ *Smith v Minister for Justice, Equality and Law Reform* [2012] IEHC 113. A subsequent appeal to the Supreme Court upheld the decision of the High Court, but did not address issues of the scope of application of the Charter. See *Smith v Minister for Justice, Equality and Law Reform* [2013] IESC 4, [2013] 2 JIC 101.

⁴⁷ *Smith (High Court)*, para 24.

⁴⁸ Returns Directive, recital (27).

⁴⁹ *CA v Minister for Justice and Equality* [2014] IEHC 532, [2014] 11 JIC 1407.

⁵⁰ Or in this case its predecessor Protocol (No 4) on the position of the United Kingdom and Ireland (1997) as annexed to the Treaty on European Union and Treaty establishing the European Community.

⁵¹ *CA* (*ACTIONES Database*)

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Charter provision applicable to the subject matter of the case. Determining the existence of an EU law instrument/provision is the first step when considering the application of the EU Charter. There are several EU secondary legal instruments harmonising the areas of asylum and immigration, which could act as the factor triggering the application of the EU Charter.⁵²

It is important to underline that national measures derogating from the EU law provisions still fall under the scope of EU law and require conformity with the EU Charter. The identification of the applicable EU law is more complex when the facts bring the case at the intersection between several different legal regimes. For instance, a TCN might enter the territory of a Member State irregularly, decide to lodge an asylum application and then marries an EU citizen. Following the rejection of his asylum application, he or she lodges a request to be recognised a right of residence based on his/her status of family member of the EU citizen. If the application of the Charter is assessed only within the latter circumstances (family member of an EU citizen), than if the EU citizen has not previously exercised his/her rights of free movement, Directive 2004/38 is not applicable, and consequently neither the Charter.⁵³ This sort of situations seem to increasingly develop in the context of immediate expulsion of TCNs or withdrawal of right of residence and refusal to permit entry to the territory of the Member State where the wife (family) is located (see case law in the [ACTIONES Database](#)).

It should be noted that, if the challenged administrative measure is an expulsion order or entry ban, the Return Directive applies and triggers thus the application of the Charter. Recently, the *Belgian Conseil du Contentieux des Etrangers* (Council for Aliens Law Litigation) has addressed a preliminary reference to the CJEU asking clarification on the application of Article 7 and 24 of the Charter in relation to third country nationals, who are family members of 'stationary' Belgians and have been subjected to entry bans, without consideration being given to their family life, the best interests of their children still resident in the Member State of the EU citizen. Given the fact that entry bans are applicable

⁵² 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; 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; 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; 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; 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 348/98 24.12.2008; in addition there are also the provisions governing the Schengen visas and borders.

⁵³ An exception situation is the *Zambrano* like cases (C-34/09, ECLI:EU:C:2011:124), see also the more recent case of *Chavez-Vilchez* (C-133/15, ECLI:EU:C:2017:354), where the fundamental freedoms do not need to have been previously exercised. However this is applicable, so far, only within the TCN parent - EU Citizen child relationship.

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throughout the Schengen territory, this widespread practice was argued by the CALL to jeopardise the effective enjoyment of fundamental rights of not only the TCN, but also of the EU citizenship rights of the Belgians 'stationary' citizens. Therefore, the Belgian CALL has addressed a number of questions on the interaction between Article 20 TFEU, Articles 5 and 11 of the Return Directive and Articles 7 and 24 of the Charter (CEC February 8, 2016, No. 161 497; CJEU C-82/16, *K. and others v. Belgische Staat*)

4. Identifying 'rights' v 'principles'

Another salient issue regarding the application of the Charter in asylum and immigration cases relates to the identification and effects of 'rights' v 'principles'.

It should be noted that the Charter contains both "rights" and "principles". According to Article 51(1) of the Charter the rights shall be "respected", whereas "principles" shall be observed. Article 52(5) of the Charter provides that principles should inform the positive actions of the EU institutions and the Member States when implementing EU law. As stated by the Explanations, some Articles of the Charter contain both elements of a right and of a principle.⁵⁴ Articles 18 and 24 of the Charter have raised controversies regarding their legal status. As to Article 18 Charter, the CJEU has not yet directly answered the questions regarding its scope of application, content and effects. On the other hand, Advocates Generals have recognised that Article 18 establishes a right to asylum which has direct effect.⁵⁵ So far the CJEU has not clarified the nature, scope and legal effects of Article 18 (see more details under sub-section on Article 18 Charter).

The legal status of Article 24 Charter has also been subject to controversies, but more in domestic jurisprudence than in the CJEU case law. Certain jurisdictions seem not to recognise the status of a 'right' enjoying direct effect in domestic cases (e.g. Ireland and Netherlands, see the case law discussed under sub-sections on Articles 24 and 7 Charter). However, others have taken a clear stance considering the rights of children in the context of Article 24(2) Charter as a fundamental right, and not a principle. In *Abdul*⁵⁶, the **UK Upper Tribunal** clearly held that Article 24(2) of the Charter creates a free standing right. In terms of remedies, the judgment in *Abdul* concluded that violations of this right, where public authorities fail to take it into consideration in their decision, 'may constitute a material error of law'. This judgment brings light to the often raised question of the legal status and effect of Article 24 of the Charter, which has been a quite contestable issue in domestic jurisprudence.

It seems that national courts vary in their opinions on the legal status and force recognised to 'the best interests of the child'. The **UK Supreme Court and Upper Tribunal**

⁵⁴ For more details on the differences between Charter based 'rights' and 'principles', see *Module 1- The EU Charter of Fundamental Rights: Scope of Application, Relationship with the ECHR and National Standards, Effects* in this Handbook.

⁵⁵ In Case C-465/07 *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, Advocate General Maduro, in his Opinion of 9 September 2008, recognised the right and its direct effect, see paras. 21, 26-30 and 33 (delivered before the Charter became legally binding); similarly, see *Cimade, Groupe d'information et de soutien des immigrés (GISTI) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, C-179/11, Opinion of Advocate General Sharpston, para. 56.

⁵⁶ *Abdul* [2016] UKUT 106 (IAC).

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fully endorse the status of primary consideration of the best interests of the child (Article 24(2) of the Charter) and the free-standing rights set out in Article 24(1) and 24(3). The **Tallinn Circuit Court** recognises a similar primary consideration to the best interests of the child when assessing the proportionality of limitations to Article 5 ECHR/Article 6 Charter and Article 8 ECHR/Article 7 Charter, and expressly refers to Article 24 of the Charter. While Dutch courts seem to take different positions. While the administrative courts follow the aforementioned positive trend, the **Dutch Council of State** interprets Article 24 of the Charter as a principle which gives the courts only a right to control the wide margin of discretion permitted to the administration but without giving concrete and directly effective rights to individuals. The Dutch Council of State seems to contest the status of right to Article 24 Charter, and considers it as a principle subject to the margin of discretion of the administration. The gist of the Court's argumentation relies on the argument that Article 24 Charter is a reiteration of several provisions from the UN Convention on the Rights of Children which are broadly phrased and without concrete and precise obligations imposed on the States.⁵⁷ While the **Irish Court of Appeal** seems to adopt a dismissive approach to the application of Article 24 of the Charter, considering not a primary consideration during immigration procedures but only as one consideration among many that can be taken into account.⁵⁸ This is mainly due to the fact that, although Ireland has signed the UNCRC, it has not adopted implementing legislation transposing the requirements of the UN Convention.⁵⁹

In light of these different domestic judicial interpretations of Article 24 of the Charter it is important to mention that Article 24 Charter has an independent legal status from Article 3 UNCRC and that Member States are required to give full effect to Article 24 as well as to the ECtHR interpretation of Article 8 ECHR in relation to ensuring the best interests of children (Article 52(3) Charter).

In addition to Articles 18 and 24 Charter, the *principle of non-refoulement* laid down in Article 19(2) Charter has also been subject to debate, although less so than the fundamental rights mentioned above. Its independent legal status and nature as a 'right' have been contested by the **Croatian Constitutional Court**.⁶⁰ In cases concerning extraditions of TCNs to their States of origin, the Croatian Constitutional Court had to assess whether the *principle of non-refoulement* could prohibit extradition of those convicted of crimes after the rejection of an asylum application. The Croatian Constitutional Court considered that the principle of non-refoulement does not have direct and practical effects of a "prohibition" of expulsion in a situation where asylum has not been approved. The principle is considered to apply only within the context of processing asylum applications. The Court, without recourse to any EU

⁵⁷ For more details see Sub-Section on Article 24 CHARTER.

⁵⁸ Ireland has not implemented the UNCRC which in Article 3 recognises the best interests of the child as a primary consideration.

⁵⁹ *Dos Santos v. Minister for Justice and Equality* [2015]; *Suppiah & Ors, R (on the application of) v Secretary of State for the Home Department* [2011] EWHC 2 (Admin) (11 January 2011), see paras. 148 and 210.

⁶⁰ Case law and summary submitted by Nika Bacic Selanec, Research Assistant, Department of European Public Law, Faculty of Law of the University of Zagreb, Croatia, e.g. Judgment No. U-III-1168/2014

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or international human rights instruments or jurisprudence (and without considering to address preliminary questions to the CJEU), conducted the constitutional analysis in the absence of Article 19(2) Charter. It should be noted that the principle of non-refoulement enshrined in Article 19(2) Charter has legally independent status and establishes an absolute fundamental right derived from Article 4 Charter, and it should not be treated as a principle lacking direct effects in national cases. The Explanations to Article 19(2) Charter clearly set out that the Article codifies obligations under Article 3 of the ECHR, as developed by the ECtHR.

5. The various functions of the Charter in the CEAS and return proceedings

5.1 Standard of interpretation of EU law, developing new standards and rights, not expressly provided by EU secondary legislation

For instance in *M.A. and others (C-648/11)*, the CJEU held that Article 24(2) **Charter** requires that an asylum application of an unaccompanied minor is processed in the Member State where he is located even if no family member is present (a rule to be read under Article 8 of Dublin III Regulation). In *Boudjlida*, the CJEU developed the **right to be heard** within return proceedings, resulting from a combined interpretation of Articles 41 and 47 Charter. (see further details under the sub-sections on Articles 41 and 47 Charter).

5.2 Standard of validity of EU secondary legislation

The validity of several asylum detention grounds (Article 8(3) Reception Conditions Directive⁶¹) has been challenged in light of the right to liberty as enshrined in Article 6 Charter and Article 5(1)(f) and (2)-(5) ECHR. Where a question of validity of EU secondary legislation is submitted before a national court, they are obliged to address a preliminary reference, since only the CJEU has the authority to declare a Union act invalid (Article 267(b) TFEU and *Foto-Frost* doctrine⁶²). In *J.N.*, a Dutch court raised the validity of Article 8(3)(e) of the Reception Conditions in light of both Articles 6 Charter and 5(1)(f) ECHR. It is worth noting that Article 6 Charter does not expressly provide for the exceptions and procedural guarantees enshrined in Article 5 ECHR, however, Article 52(3) Charter requires that the two Articles are interpreted similarly.

Article 5(1)(f) ECHR provides for two exhaustive grounds for detention: to prevent unauthorised entry into the country or with a view to deportation or extradition. Article 8(3) of the Reception Conditions Directive provides instead for 6 possible grounds of asylum detention. In *J.N.*, the CJEU held that Article 8(3)(e) (Directive 2013/32) meets the ECHR requirements, since the Article provides that:

❑ Detention grounds must be laid down in national law;

⁶¹ The protection of national security or public order, Art. 8(3)(e), see – Case C-601/15 PPU *J.N.*; recently, the grounds of verification his or her identity or nationality and risk of absconding (see pending C-18/16, K.)

⁶² For more details see *ACTIONES Module on Judicial Interaction Techniques*.

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- ❑ Article 8(1) prevents detention solely on the ground of having lodged an application for international protection; and
- ❑ Article 8(2) requires detention to be ordered only where necessary, on the basis of an individualised assessment, and where no less coercive measures could be effectively applied.
- ❑ Further limitations and procedural safeguards are set out in [Article 9](#).

The CJEU concluded that ‘pending asylum proceedings do not preclude that detention was for the purpose of deportation, as a rejection could lead to implementation of a deportation order that had already been ordered, so return proceedings were still ‘in progress’ according to Article 5(1) f) ECHR.’ This interpretation was held to be in line also with the recent judgment of the ECtHR in *Nabil v Hungary*.⁶³

While the CJEU has upheld the conformity of these EU secondary provisions, the case is important, particularly in the current political context, for reminding the EU institutions and agencies that it is not only the Member States’ activities that are scrutinised in light of the EU Charter, but also the actions of the EU institutions themselves, and their particular policy and legislative choices in the migration field.⁶⁴

5.3 Standard of *interpretation of national law*

The judgment of the **Constitutional Court of Slovenia** discussed under sub-section on Article 19(2) Charter offers an example of using the Charter rights to set the appropriate standards of fundamental rights protection under the national constitution. The [CC of Slovenia](#) interpreted Article 8 Constitution in light of Article 19(2) Charter when assessing the constitutionality of the previous Article 106 International Protection Act, which limited the type of evidence in cases of renewal of subsidiary protection. In that case the renewal of subsidiary protection could not be made on grounds other than that on which the protection was initially recognised (*in casu*, subsidiary protection was initially granted for serious and individual threat to a civilian's life; refusal to renew was based on indiscriminate violence).

Following rejections by the Administrative and Supreme Courts, **the Constitutional Court declared the national provision unconstitutional on the grounds of** the absolute nature of the *principle of non-refoulement* and obligation of *ex nunc* assessment. This interpretation is in line with the ECtHR’s subsequent judgment in the *F.G. v Sweden case*. **The ECtHR** requires that national authorities have an obligation to assess all information brought to their attention of their own motion, even if the applicant does not wish to rely on certain evidence (*in casu*, conversion from Islam to Christianity in Sweden). The Court also set an obligation of *ex nunc* assessment of facts and evidence in such cases.

⁶³ *Nabil and Others v. Hungary*, Applic. No. 62116/12, Judgment of 22 September 2015.

⁶⁴ See, for instance, also Cases T-192/16 and T-257/16 where individuals challenged the validity of the EU Turkey Statement.

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5.4 Standard of **validity of national legislation** - Charter used as grounds for disapplication of national legislation

The suspensive effect of appeal in asylum and return proceedings, as a procedural safeguard under Article 47 Charter, has been clearly recognised by the CJEU in the *Abdida* and *Tall* preliminary rulings (*Casesheet 19*), which have had an important impact also on national jurisprudence and legislation. It is now clear that national legislation is contrary to Article 47 Charter as interpreted by the CJEU if it does not recognise an appeal to the asylum or return related decision with a suspensive effect - either automatically or by individual application, if the administrative procedure of expulsion/transfer would expose the individual to a risk of being subjected to torture or other ill treatments in the country of origin/transfer. (see further sub-section on Article 47 Charter).

This has been, for instance, the case in Belgium, following the Abdida and Tall preliminary rulings. The courts disapplied Belgian law which did not recognise suspensive effect of appeal against the administrative decision refusing leave to remain and/or subsidiary protection for medical reasons and ordering the person concerned to leave the territory of the country of origin (Abdida, C-562/13).

5.5 Standard of **review of public authorities' conduct**

The Czech Constitutional Court assessed the practice of the domestic authorities when enforcing the removal of uncooperative foreign nationals in light of Article 4 Charter standards (casesheet 3). It found that the following practices:

- failure to give notice of the time of departure;
- use of tear gas;
- use of handcuffs; and
- his transportation in the airport using a luggage trolley

together with the failure to investigate allegations in an expeditious and thorough manner constituted violation of the prohibition of ill treatment protected by both the national Constitution and Article 4 Charter.

Additionally, national courts seem to assess the conformity of asylum procedures from the perspective of the best interests of the child, without necessarily differentiating between Article 8 of the Convention and Articles 7 or 24 Charter regarding remedies and legal status.⁶⁵ A landmark judgment on prioritising the family reunification of unaccompanied minors under Article 8 ECHR instead of following a formal operation of Dublin III reunification procedures originates from the UK Upper Tribunal in the *ZAT and others*.⁶⁶

⁶⁵ With the exception of the Council of State, which interprets Article 24 of the Charter as not establishing a fundamental right, but as representing principles which do not establish precise obligations on the Member States. See the second case sheet discussed under this section.

⁶⁶ UK Upper Tribunal, [*The Queen on the application of ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM v. Secretary of State for the Home Department*](#), R/15401/2015; JR/154015/2015

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5.6. *Extending judicial review powers*

The CJEU jurisprudence on the use of the Charter impacted on the power of national judges. The majority of EU countries allocate the responsibility of reviewing asylum and return related proceedings to administrative judges. The cases discussed in this Module reflect that the Charter enables judges to not only quash administrative decision infringing Charter rights, but also to shape administrative decisions deciding on new alternative measures to asylum or pre-removal detention orders, or devise procedural rules in accordance with Articles 47 Charter, as well as with the general principles of rights of defence. (see Case C-146/14 PPU *Mahdi*, ECLI:EU:C:2014:1320)

III. The Outcome of Judicial Interaction(s) in Asylum and Irregular Migration

The coming into force of the Lisbon Treaty has brought salient changes in the field of asylum and irregular migrations. Maybe the most significant amendment is the increase of judicial dialogue between national courts and the CJEU over matters falling under the Area of Freedom, Security and Justice (AFSJ). Following the elimination of the pillar structure, national courts can refer preliminary questions to the CJEU in all the matters now gathered under the AFSJ.⁶⁷ Thus, national courts of all the Member States (and of all levels) have the power or obligation to refer preliminary questions on asylum matters.⁶⁸ This new power has proven of enormous benefit for national courts.⁶⁹ The preliminary references addressed by national courts in the field of asylum and migration deal with sensitive questions on how to balance the right of the States to control foreign nationals' entry into and residence in their territory and their interests in preventing abuses of the asylum and immigration law with the requirements of the rule of law and protection of human rights offered to migrants by international law, EU law and the ECHR.

Although national courts of all jurisdictional levels have only recently acquired the power to dialogue with the CJEU, asylum and irregular migration law is a field that has given rise to numerous preliminary references. Submissions for preliminary rulings in the cases that have

⁶⁷ Matters such as immigration, asylum, visas, police and judicial cooperation the latter two matters were part of the third pillar before the entry into force of the Lisbon Treaty. For more general information on how to draft a preliminary reference and its functions, see [Module 2 – Judicial Interaction Techniques](#).

⁶⁸ On the right v obligation of national courts to refer preliminary rulings, please see [Module 2 – Judicial Interaction Techniques](#).

⁶⁹ See the high number of preliminary references sent by courts on asylum proceedings since 2009, some of which raised issues of violation of non-derogable human rights, such as prohibition of torture and inhuman and degrading treatment, as in Joined cases C-411/10 and C-493/10 NS and ME, judgment of 21 December 2011. For more details on preliminary references in the area of asylum law, see FRA “Handbook on European law relating to asylum, borders and immigration”; see also E. Guild and V. Moreno-Lax, “Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Cooperation with UNHCR”, No. 59 / September 2013.

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been decided so far⁷⁰ have come from Austria (2), Belgium (4), Bulgaria (2), Czech Republic (2) France (2), Germany (4), Hungary (2), Ireland (3), Italy (9), Luxembourg, Netherlands (3), Sweden (2), UK (1), and one decision was based on the joined cases of submissions from UK and Ireland.⁷¹ The number of preliminary references on asylum and immigration where the Charter is at the forefront continues to grow.⁷² The 2015 migration crisis which led to the amendment of the EU and national policies and legislation on asylum and immigration⁷³ has contributed to a surge in domestic and European litigation concerning fundamental rights of asylum seekers and irregular migrants. For instance, in addition to the preliminary reference, which has been the litigation tool resorted to by vulnerable individuals and direct complaints before the ECtHR, direct action of annulment before the EU General Court has been employed against the controversial EU-Turkey agreement.⁷⁴

The outcome of the vertical judicial dialogue in asylum and immigration is not sector specific, instead it has left a mark on the EU constitutional edifice. The several preliminary rulings addressed by Italian courts on the conformity of the Italian criminal detention of irregular migrants with the Return Directive have led to the clarification of the division of vertical powers between the EU and the Member States. In *El Dridi*, the CJEU placed limits on criminal law powers of the Member States. Although the Member States retain their powers over criminal matters, they cannot criminalise irregular entry or stay if to do so would jeopardise the effective implementation of the Return Directive.⁷⁵ Following the CJEU preliminary rulings in *El Dridi* and *Achgubabian*, the Italian and French legislative provisions allowing penal imprisonment of third country nationals for the duration of more than one year were eliminated. We see thus the direct result of legislative amendment stirred by the vertical judicial dialogue between national courts and the CJEU, for the purpose of ensuring effective implementation of EU secondary legislation and respect of fundamental rights as guaranteed under these provisions.

Other preliminary rulings confirm EU constitutional principles, such as the timely application of Directives. In *Kadzoev*, the CJEU confirmed the timely application of the Return Directive provisions regarding length of detention of migrants that commenced before the entry into force of the Directive but continued after this point.⁷⁶ In *Al Chodor*, a preliminary reference addressed by the **Czech Constitutional Court** (*Casesheet 4*), the Court clarified the conditions for the direct applicability of an EU Regulation, when its application is dependent on further implementing measures (i.e. Article 2(n) in conjunction with Article

⁷⁰ Preliminary reference up until March 2017.

⁷¹ Data last checked in February 2016.

⁷² There is a number of pending preliminary requests, *inter alia*: Case C-225/16, *Ouhrami*; Case C-181/16, *Gnandi*; Case C-82/16, *K and others*; Case C-60/16.

⁷³ S. Peers, [The Urbanisation of EU asylum law: the latest EU asylum proposal](#).

⁷⁴ Cases T-192/16 and T-257/16.

⁷⁵ Case C-47/15, *Affum*, Judgment of ECLI:EU:C:2016:408. In this preliminary reference, the French legislation providing imprisonment of one year for mere illegal entry was held to be incompatible with the Return Directive.

⁷⁶ Case C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)*, ECLI:EU:C:2009:741, para. 39.

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28(2) Dublin III Regulation). Through the mechanism of preliminary ruling, several national courts ‘consulted’ the Court of Justice on the scope of application of Article 41 Charter, namely whether its application is limited to the EU institutions, bodies and agencies, or it also applies to the Member States when acting or derogating from EU law (e.g. Irish High Court in case *M.*, French administrative Courts of Pau and Melun in cases *Mukarubega* and *Boudjlida*, the Dutch Raad van State in *G. and R.*, the Belgian Council of State in *Benallal* etc.) In *Boudjlida*, the CJEU clarified that *Article 41 of the Charter is not addressed to the Member States but solely to the institutions, bodies, offices and agencies of the European Union (para. 41)*. However the right to be heard is applicable to the Member States’ action falling under the scope of EU law on the basis of it being part of the general principle of EU law of the rights of defence.

The CJEU preliminary rulings regarding fundamental rights in asylum and return proceedings have had a significant impact on national jurisprudence. Finally, the case of *A, B & C* is a classic example of direct judicial dialogue between a superior national court, in this case the **Dutch Council of State**, and the Court of Justice, which lead to making full use of the potential of the Charter to shape national processes and procedures. The preliminary reference seeks direct answers from the Court of Justice in relation to sensitive matters of asylum procedure and permissible forms of questioning. It affords the Court of Justice a good opportunity to reiterate principles regarding the role of the applicant and the authorities in establishing grounds for applications for international protection and to provide more details regarding possible limitations on asylum procedures flowing from the Charter. It is interesting to note that in the follow-up judgment, the Council of State while directly applying the judgment of the Court of Justice, goes beyond that judgment, placing an obligation on national authorities to not only refrain from certain practices but to identify the actual procedures used and their application in assessment of credibility.

On the application of Article 41 Charter in return proceedings, the **Belgian Council of Aliens Law Litigation** has changed its interpretation of the scope of application of Article 41 Charter- right to be heard, following the *M.M* ruling.⁷⁷ While it used to hold the right to be heard to be applicable solely to the EU institutions, bodies and agencies, following the *M.M.* and *Boudjlida* preliminary rulings, the right to be heard is interpreted as applicable also to the Member States when acting within the scope of application of EU law.⁷⁸ A similar major reform of the asylum legislation occurred in Ireland following the *M.M.* and *H.N.* preliminary rulings. The Irish dual asylum system has significantly changed in order to permit applicants for international protection to lodge both asylum and subsidiary protection claims without having to wait for the asylum application to be finalised and applying the right to be heard (*Casesheet 15*). This case is particularly interesting as the preliminary reference addressed by the **Irish High Court** in *MM* was the result of a horizontal judicial dialogue. Following a

⁷⁷ Case C-277/11 *M.* EU:C:2012:744.

⁷⁸ L. Leboeuf, REDIAL Belgian Report on Procedural Safeguards in Return Proceedings, available at <http://euredial.eu/publications/national-synthesis-reports/>.

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judgment from the **Dutch Council of State**, the Irish High Court was no longer sure whether the Irish legislation was in conformity with the standards of the right to be heard in asylum and subsidiary protection procedures.

In a more *indirect* way, the **UK Court of Appeal** explicitly referred to the CJEU's case law when assessing the extent of the right to be heard in preliminary exchanges on transfers of asylum seekers under Dublin II regulation (*Kastrati, M. etc.*). Similarly, the **High Court of England and Wales** refrained from submitting a question to the CJEU in a case where an asylum seeker was refused a travel document without being (prior and fully) informed of the motives of the decision. Instead, it based its reasoning on the existing case-law of the CJEU (e.g. *HN, M., ZZ v. Secretary of State for the Home Department, HT. v. Land Baden-Wurtemberg etc.*)⁷⁹. Finally, horizontal judicial interaction also took place between national courts (from the same and different EU Member States), as notably illustrated by the Irish High Court's Judgment in case IEHC 547 (18 May 2011). In its reasoning, the Court explicitly referred to its previous national case law as well as to a contradictory case rendered previously by the **Dutch Council of State** on the same topic. In order to reconcile both jurisprudences, the **High Court** thus decided to address a request for a preliminary ruling at the CJEU.

The increase of preliminary references in asylum and irregular migration might also be the case of introducing the urgent preliminary reference, which has proved to be very useful in cases of deprivation of liberty of individuals. The time and costs concerns involved by making a preliminary reference have been reduced since 2008 when the urgent preliminary ruling was introduced.⁸⁰

The vertical judicial dialogue has also impacted on the EU legislation. For instance:

- Article 7 of the Recast Qualification Directive was amended following the rules set in the *Abdulla preliminary ruling (C-175/08)*: first of all it provides that the requirements therein stipulated have to be cumulatively fulfilled and are exhaustive - only the State or parties or organizations (including international organizations) controlling the State or a substantial part of its territory, can be considered legitimate actors that can provide international protection; secondly, a new requirement is introduced, whereby the actors that provide international protection have to be willing and able to offer protection in accordance with Article 7(2). Additionally, the protection against persecution and serious harm must be effective and of a non-temporary nature (Article 7(2) Recast Qualification Directive);
- Following the conclusions reached by the CJEU in *Abdulla*, the Recast Qualification Directive introduced a limitation to the circumstances of cessation of refugee status; accordingly, cessation of the refugee status does not occur if the person can invoke compelling reasons arising out of previous persecution for refusing to avail himself or

⁷⁹ These specific cases are all commented under sub-section on Article 41 EU Charter.

⁸⁰ See Article 23a of Protocol 3 of the statute of the CJEU.

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herself of the protection of the country of nationality, or, being a stateless person, of the country of former habitual residence. (see Art. 11(3))

- Following the preliminary rulings of the CJEU in *El Dridi*, and *Zh. And O.*⁸¹, Member States are obliged under both the asylum Directives and Return Directive to carry out an individual, objective and impartial examination of the circumstances of the case before taking decisions that could affect the rights of the third country nationals.

Preliminary references can thus be used by a national court in order to test the validity of its own preferred construction of domestic norms in light of fundamental rights (*Diouf, Abdida, Tall – Case notes 19*). If that construction is confirmed by the CJEU, its ruling will impose on all national courts, including the highest ones, that specific interpretation which is consistent with EU law, or even the duty to set aside conflicting acts for which a consistent interpretation is not possible (see Case note 18 and case law under sub-section on Article 41 Charter)

National courts have a double mandate, as both EU and ECHR courts. Therefore when implementing EU secondary provisions, they have to ensure conformity with both the Charter and the Convention as they are interpreted by the two supranational courts in Luxembourg and Strasbourg. In most instance, the CJEU and ECtHR have mutually adapted their jurisprudence in order to ensure uniform standards on the application of fundamental rights. However, there have been instances where the two courts have developed different views. This has been the case of the interpretation of fundamental rights as limitation to Dublin transfers. While in 2011, the two supranational courts developed a similar test for establishing limitation to Dublin transfers (see the ‘systemic deficiencies’ in *M.S.S. v Belgium and Greece, N.S. and others*), in 2013, the CJEU developed an approach that would place its jurisprudence in conflict with the ECtHR Soerig jurisprudence.

In *Puid and Abdullahi*, the CJEU confirmed that the ‘systemic flaws’ in the asylum and reception procedural systems threshold developed in the *N.S. and others* case is the necessary threshold that violations of the ill-treatment prohibition have to reach in order to stop Dublin transfers. It seems the Court rejected the threshold of individual violations of Article 4 Charter as benchmark for refusing to execute Dublin transfer.

In 2014, the ECtHR clearly held in *Tarakhel v Switzerland* that the *N.S.* ‘systemic deficiencies’ test should include also an individual examination of the case, in particular a ‘thorough and individualised examination of the situation of the person concerned’ in the State of destination.⁸² And that individual violations of the Article 3 ECHR should be sufficient to rebut the EU law based presumption of conformity with fundamental rights.⁸³

⁸¹ Case C-554/13, *Zh. And O.*, ECLI:EU:C:2015:377.

⁸² *Tarakhel v Switzerland*, paras. 101, 104 and 121.

⁸³ *Tarakhel v Switzerland*, para. 104: ‘In the case of “Dublin” returns, the presumption that a Contracting State which is also the “receiving” country will comply with Article 3 of the Convention can therefore validly be rebutted where “substantial grounds have been shown for believing” that the person whose return is being ordered faces a “real risk” of being subjected to treatment contrary to that provision in the receiving country.’

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In the absence of a hierarchical relation between the judgments of the ECtHR and CJEU, it is left to the national courts themselves to identify ways of bringing about greater coherence.

The **UK Supreme Court found an interpretation that would bring the two approaches of the CJEU and ECtHR in consonance** (*EM (Eritrea)* [2014] AC 1321). The UK Supreme Court underlined that the CJEU conclusions in *NS and others*, as regards the requirements for limiting Dublin transfers, have to be interpreted in line with the ECtHR judgment in the *Soering* case, meaning that the CJEU conclusion that ‘*only systemic deficiencies in the listed countries asylum procedures and reception conditions will constitute a basis for resisting transfer to the listed country cannot be upheld. The critical test remains that articulated in Soering – v – United Kingdom [1989] 11 EHRR 439. The removal of a person from a Member State of the Council of Europe to another country is forbidden if it is shown that there is a real risk that the person transferred will suffer treatment contrary to Article 3 of ECHR.*’ (para. 35)

The judgment is framed as a balance that needs to be struck between two legal regimes which, while not in conflict, may be in ‘tension’, namely the ECHR (and the Human Rights Act 1998 applying the ECHR in UK law) and the Dublin System (and the broader CEAS).

A solution may be found in addressing a preliminary reference to the CJEU seeking clarification of its interpretation in light of the standards developed by the ECtHR in relation to the prohibition of inhuman and degrading treatment. For instance, in *J.N.*, the **Dutch Council of State** faced with a possible divergence between the ECtHR standards and those laid down by the Reception Conditions Directive asked the CJEU to solve this potential conflictual issue. Finally the Slovenian Supreme Administrative Court addressed a preliminary ruling to the CJEU in *C.K.* (C-578/16) pressing the CJEU to put an end to the divergent interpretation and clarify the test to be followed by national courts. (see casesheet No. 1).

To conclude, not even EU constitutional principles such as ‘mutual trust’ or ‘mutual recognition’⁸⁴ can ‘undo’ Charter duties, nor can they modify their nature and extent.

The source of the risk does nothing to alter the level of protection guaranteed by the Convention or the Convention obligations of the State ordering the person’s removal. It does not exempt that State from carrying out a thorough and individualised examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established. The Court also notes that this approach was followed by the United Kingdom Supreme Court in its judgment of 19 February 2014 (see paragraph 52 above).’

⁸⁴ On the EU constitutional nature of the principle of mutual trust, see Opinion 2/13 on the Accession of the EU to the ECHR, ECLI:EU:C:2014:2454.

Part II – Landmark European and national jurisprudence

ARTICLE 4 CHARTER – Prohibition of torture, inhuman and degrading treatment

Overview of issues on Article 4 Charter

Article 4 of the Charter contains a single sentence: ‘No one shall be subjected to torture or to inhumane or degrading treatment or punishment’. Its wording thus corresponds *verbatim* to Article 3 of the European Convention on Human Rights (ECHR), entitled ‘Prohibition on Torture.’ Article 3 ECHR is a non-derogable right and cannot be set aside even in times of war or public emergency. The correspondence between Article 3 ECHR and Article 4 Charter is acknowledged by the explanations to the Charter. Article 4 Charter should therefore be interpreted consistently with the jurisprudence of the European Court of Human Rights (ECtHR) as required by Article 52(3) Charter.

Article 4 Charter is relevant in a number of different situations in the context of asylum and immigration law.

This section includes three casesheets which concentrate on the following issues: 1) the threshold of Article 4 Charter violations which requires limitation or refusal of Dublin transfers: ‘systemic deficiencies’ and ‘individual violations’; 2) the responsibilities of national courts under the duty of cooperation (Article 4 Qualification Directive) to assess the existence of violations of Article 4 Charter as possible grounds for recognition of international protection in circumstances of limited evidence brought by the applicant; 3) standards of assessment of ill treatment inflicted by the police of an EU country when enforcing a removal order of an irregular migrant.

In a Nutshell

Requirements of Article 4 Charter and Article 3 ECHR

When assessing the effect of Article 4 Charter on Dublin transfers, the Court of Justice has consistently held, that ‘Member States must [...] make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law’ (*NS & ME*, para. 77). This is in line with the place reserved to fundamental rights within the hierarchy of legal sources, as founding values of the Union (Article 2 TEU) and as standards of validity/legality of EU acts (Article 6 TEU and 263 TFEU).

Following the preliminary reference sent by the **Supreme Court of Slovenia**, the CJEU has clarified that Article 4 Charter must be interpreted as meaning that **the transfer of an asylum seeker within the framework of Regulation No 604/2013 can take place only in conditions which first, exclude the possibility that due to the systemic deficiencies in the asylum procedure and reception conditions of the responsible Member States, the asylum seeker would risk being exposed to ill treatment; and secondly, that the transfer**

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might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that article;” (see casesheet no.1). Therefore, the CJEU requires both a systemic deficiencies and individual violation test to be performed by national courts in cases of Dublin transfers. The CJEU also set the thresholds when medical cases might entail a violation of Article 4 Charter.

National Application of Article 4 Charter

The national cases reported by the judges and lawyers participating in the ACTIONES Working Group concerned the following issues:

- Standards of assessing the existence of a risk of ill treatments in cases of returning irregular TCNs. When assessing the general security and political situation in the third country of return, the **Romanian court** referred to several reports produced at European level on the situation in Congo regarding protection of fundamental rights, in particular the prohibition of ill treatment (reports produced by UNSC, EP, NGOs). These reports were cited with the purpose of substantiating the decision to halt the return to the country of origin, thus respecting the third country national’s fundamental rights as enshrined in Article 4 Charter.
- A case of the **Czech Constitutional Court** which referred to Article 4 Charter and Article 3 ECHR when assessing the conduct of the public authorities handling the return of a third country national. The Court reminded the authorities of the need to respect the rights to human dignity and to be treated in a humane manner when transporting an individual in the context of a non-voluntary return decision, including the need to inform an individual of the time and manner of the return in adequate time.
- The **Irish High Court** has made a novel use of the Court of Justice decision in *N.S. and others*, using the findings in this judgment as support for the credibility of an applicant regarding his travel movements and in particular his account of his period spent in Greece. The finding of the Court of Justice in *N.S. and others* that there exists a systematic violation of Article 4 Charter in Greece was used to confirm the reasonableness of the applicant’s failure not to apply for asylum in Greece and therefore affirm his credibility.
- There has been limited interpretation and application of Article 4 Charter by domestic courts in the casesheets submitted by the members of the ACTIONES working group. Two reasons may account for this. Firstly, violation of the prohibition on torture and inhumane and degrading treatment are likely to arise in either non-refoulement cases generally or in analogous cases involving transfer within the Dublin System. Both of these situations are dealt with separately, either under Article 19(2) Charter or under the Dublin System. Secondly, as is evident from case *no.270/39/2011* of the **Romanian Court of Appeal** and the judgment of the **Czech Constitutional Court** (see *casesheet no.2*), national courts appear more comfortable relying on Article 3 ECHR rather than directly on the Charter, perhaps demonstrating, as is clear from the

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judgment of the **Czech Constitutional Court**, that national courts effectively view these provisions as identical in their effect, at least in the situations covered by the above cases

The *C.K. and other case* (see **casesheet no.1**) is of utmost importance for the clarifying the effects of Article 4 Charter and for settling the judicial disagreement that has emerged since 2013 between the CJEU and ECtHR.

Conclusion - Judicial Dialogue

There is little direct engagement with jurisprudence of the Court of Justice on Article 4 Charter in the cases submitted by the members of the ACTIONES working group, with the notable exception of Dublin transfer cases.

Interesting use of consistent interpretation is used by the **Irish High Court** case of *FO v RAT* in which case the judgment of *NS and others* is used in an assessment of credibility, with the **High Court** using the finding of the Court of Justice regarding problems faced by the asylum reception system in Greece as supporting claims made by the applicant. In this regard the judgment performs the same function as reports and other official documents issued by non-judicial organisations and NGOs. Another interesting use of consistent interpretation was performed by the **Italian Court of Cassation** in order to establish the precise requirements of national courts under the duty of cooperation in cases where limited evidence or lacking arguments from the applicants of international protection. The **Supreme Court of Cassation** reversed the judgment of the **Court of Appeal of Bologna** on the basis of the CJEU preliminary rulings in the *Elgafaji*⁸⁵ and *Diakité*⁸⁶ cases, finding that the authorities are under a duty to take into account general information regarding the country of origin and the applicant.

There is more engagement by national courts with judgments of the ECtHR most clearly by the **Czech Constitutional Court** in *I. ÚS 860/15* and the Romanian judgment in *Case no. 270/39/2011*. In these cases dealing with conditions of removal and the application of the principle of *non-refoulement* respectively, the judgments of the ECtHR are used as binding precedent in the interpretation of Article 3 ECHR, with national courts analysing the judgments of the ECtHR in order to identify relevant legal principles and tests that are subsequently applied to the facts of the case (see especially the judgment of the **Czech Constitutional Court** in *I. ÚS 860/15*).

⁸⁵ Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* EU:C:2009:94.

⁸⁶ Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* EU:C:2014:39.

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Casesheet 5.1 – Article 4 Charter as limitation to transfers of asylum seekers under the Dublin Regulation III system: ‘individual violations’ or ‘systemic deficiencies’ threshold?

Reference cases

ECtHR

1. (Grand Chamber), judgment of 21 January 2011, [M.S.S. v Belgium and Greece](#), application no. 30696/09
2. (Grand Chamber), judgment of 4 November 2014, [Tarakhel v Switzerland](#), Application no. 29217/12

CJEU

1. (Grand Chamber), judgment of 21 December 2011, Joined cases C-411/10 and C-493/10 [NS and others](#), preliminary references sent by *UK Court of Appeal and High Court of Ireland*
2. (Grand Chamber), judgment of 14 November 2013, Case C-4/11, Puid, preliminary reference sent by
3. (Grand Chamber), judgment of 10 December 2013, Case C-394/12, Abdullahi, preliminary reference sent by
4. (Chamber), judgment of 16 February 2017, Case C-578/16 PPU, [C.K. and others](#), preliminary reference sent by Slovenian Supreme Court

National courts

1. UK Supreme Court, Judgment of 19 February 2014, [R \(on the application of EM \(Eritrea\)\) \(Appellant\) v Secretary of State for the Home Department](#) (Respondent)
2. Judgments of the Constitutional Court and Supreme Court of Slovenia in *C.K. and others case*

Core issues

- Regulation 604/2013 ([Dublin III Regulation](#)) 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. According to the jurisprudence of the ECtHR and CJEU developed since 2011, the safety of Member States can be challenged, and national courts have to carry out an assessment of whether the Dublin

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transfer should be approved or not, in the following precise circumstances concerning human rights violations:

1. *Proof 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 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. *Type of evidence 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;
3. *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. On the other hand, the ECtHR requires that "[t]he expulsion of an asylum seeker by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country." - [Soering v UK](#). In [Tarakhel](#)⁸⁷, 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

⁸⁷ The case concerned the Dublin transfer of an Afghan family with six children, of which one newly born baby, from Switzerland to Italy.

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.

→ The different interpretations of the CJEU and ECtHR have given rise to divergent interpretation at the domestic level, with certain national courts accepting only the ‘systemic deficiencies’ threshold of violation of Article 4 Charter as limitation to Dublin transfer (see the **UK Court of Appeal** in the *EM Eritrea* case) and others following both the ‘systemic deficiencies’ and ‘individual violations’ threshold of violations of Article 4 Charter (**UK Supreme Court** in *EM Eritrea* case). Following a similar disagreement between the **Slovenia’s Supreme and Constitutional Courts**, the former addressed a preliminary reference to the CJEU asking to clarify the threshold in cases of violations of Article 4 Charter and whether, in cases of a risk of individual violation of Article 4 Charter, Member States have an obligation under Article 17 (the discretionary clause) to refuse the Dublin transfer. The CJEU 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:*

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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 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.**”

- Possible solutions to judicial conflicts between the ECtHR and CJEU based on horizontal and vertical interactions among national courts.
- Bottom-up judicial influence of national courts on the ECtHR: UK Supreme Court’s judgment in *EM(Eritrea)* influenced the ECtHR reasoning in the *Tarakhel* judgment.

At a glance – *C.K. and others* case

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
• Slovenia	<ul style="list-style-type: none"> Asylum Dublin III Regulation 	<ul style="list-style-type: none"> Dublin III Regulation (604/2013) 	<ul style="list-style-type: none"> Constitutional Court of Slovenia Supreme Court of Slovenia 	<ul style="list-style-type: none"> Preliminary reference Disapplication consistent interpretation with both CJEU and ECtHR jurisprudence 	<ul style="list-style-type: none"> In the case, no violation was found by the Supreme Court; the Dublin transfer was executed

Timeline representation



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Case(s) description

a. Facts

C.K., a national of the Syrian Arab Republic, and H.F., a national of the Arab Republic of Egypt, entered the territory of the European Union by means of a visa validly issued by the Republic of Croatia. After a short stay in that Member State, they crossed the Slovenian border equipped with false Greek identification. At that time, C.K. was pregnant. When the baby was born all three applied for asylum in Republic of Slovenia and argued for the application of Article 17 of Dublin III Regulation. The Ministry of the Interior, however, refused to examine the applications for asylum and ordered the transfer of the family to the Republic of Croatia based on the Dublin III Regulation (Article 12). They applied to the **Administrative Court** which annulled that decision and referred the case back for re-examination by instructing the competent authorities to obtain an assurance from the Republic of Croatia that C.K., H.F. and their child would have access to adequate medical care in Croatia.

After such an assurance was given by Croatia, the Ministry of Interior again examined their applications for asylum and ordered the transfer of the family to the Republic of Croatia. The appellants brought the case before the **Administrative Court** requesting the suspension of a decision on their transfer due to health problems of C.K. who had been suffering psychiatric difficulties since giving birth. The Court annulled the decision on transfer and decided to suspend the enforcement of that decision until a final judicial decision had been adopted. The Ministry of Interior brought an appeal against the judgement before the **Supreme Court** which confirmed the transfer decision. The appellants then lodged a constitutional complaint arguing that Croatia is not a safe country for them because they would not be provided adequate accommodation and medical care correspondent to their personal circumstances (in particular the presence of a new-born baby and the mental health needs of the mother). Furthermore, the movement would adversely affect the mother's state of health.

The **Constitutional Court** interpreted Article 17 of the Regulation as requiring examination of applicants' personal situation in relation to the principle of non-refoulement and decided that by not taking into account applicants' personal situation when making a decision on transfer, the right to the equal protection in law as laid down by the Constitution was breached to the applicant. The judgement of the Supreme Court was set aside and the case was referred back to that court.

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In new proceedings, the **Supreme Court** decided to stay the proceedings and referred questions regarding the interpretation of the Dublin III Regulation to the CJEU for a preliminary ruling. After having received the preliminary ruling, the Supreme Court upheld the appeal by the defendant and dismissed the appeal of the applicants as being unfounded. With this decision, the order of transfer of the family to the Republic of Croatia by the Ministry of Interior was upheld.

b. *Legal issues*

The **Administrative Court of Slovenia**, the **Supreme Court** and the **Constitutional Court** had to decide on whether the transfer to Croatia of a couple with a newly born baby and where the mother suffered from depression and periodic suicidal tendencies, should be executed. The three Courts decided differently on the matter. The **Administrative Court** first required the Ministry of Interior to provide assurances that the Croatian authorities will take all the necessary measure to ensure the state of health of the applicants would not deteriorate. Subsequently, this Court suspended the administrative decision to transfer the couple until a final decision on the merits was reached. The **Supreme Court** followed the strict interpretation of the CJUE jurisprudence and Dublin III Regulation, accepting as legitimate grounds for refusing a Dublin transfer, only the exceptional circumstances of ‘systemic deficiencies’ as set out in Article 3(2) Dublin III Regulation, and supported by the CJEU jurisprudence from the *N.S. and others* and *Abdullahi* cases. The **Constitutional Court** acknowledged that although the Dublin III Regulation is based on the principle of mutual trust, whereby all Member States count as safe third countries and that the safety of the Member State can be challenged in two circumstances: ‘systemic deficiencies’ (which are not present in Croatia) and ‘individual violations’. The **Constitutional Court** expressly referred to the *Tarakhel* judgment of the ECtHR as the legal ground for the ‘individual violation of Article 3 ECHR’ test in cases of Dublin transfers. In light of recital 32 of the Dublin III regulation, which expressly states that the Member States are bound by their obligations under instruments of law, then Article 3(2) Dublin III Regulation is only but one of the circumstances where transfer to another Member State is not permissible. The Court concluded that the principle of non-refoulement derives from Article 3 ECHR and would require in the specific case an examination of the applicant’s state of health and personal situation in the Republic of Slovenia, and not only how her state of health would be in Croatia, as was decided by the Supreme Court. The **Constitutional Court** decided that the Supreme Court did not consider these circumstances, which are important in terms of respect of the principle of non-refoulement, and therefore it infringed the applicants' right to equal protection under Article 22 of the Constitution. It thus required the Court to re-assess the case in light of these constitutional requirements interpreted in light of Article 3 ECHR and *Tarakhel* and *Soering* case law of the ECtHR.

It can be recalled that in C-4/11, [Puid](#) and C-394/12, [Abdullahi](#), both delivered in 2013, and both concerning Dublin transfers to Greece, the CJEU held that the presumption of compliance by the Member States with fundamental rights could be rebutted only in the

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presence of a “systemic deficiency in the asylum procedure and in the reception conditions of asylum-seekers” in the receiving Member States such that the Member State of transfer would be obliged to refuse the transfer. At the end of 2014, the ECtHR, assessing a Dublin transfer to Italy of an Afghan family with newly born baby and other 5 children, in 2014, concluded that its test developed in the *M.S.S. and others* “does not exempt [national authorities] from carrying out a thorough and individualized examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman and degrading treatment be established”. [*Tarakhel*](#) case (application n°29217/12).

National courts identified a potential conflict between the interpretation of Article 3 ECHR by the ECtHR in Dublin transfers and Article 4 CHARTER by the CJEU in similar cases. A similar disagreement as the one between the **Constitutional** and the **Supreme Courts of Slovenia** existed in the **UK** between the **Court of Appeal** and the **Supreme Court**. The UK Court of Appeal decided to solve the conflict of interpretation by giving preference to the CJEU ‘systemic deficiencies’ test, where “proof of individual risk, however grave, and whether or not arising from operational problems in the state's system, cannot prevent return under Dublin II.” On the other hand, the UK Supreme Court had a different view, aiming to reconcile the potentially conflicting interpretation of the two European supranational courts, by interpreting the *N.S. and others* preliminary ruling in light of established jurisprudence of the ECtHR, such as the landmark *Soering* case. Under such an assessment, both operational, systemic failures in the national asylum systems and individual risks of being exposed to treatment are contrary to Article 3 ECHR and Article 4 EU Charter and should be considered as legitimate thresholds for the limitation of the principle of mutual trust.

Ultimately, after receiving a referral from the Constitutional Court, the Supreme Court of Slovenia decided to address a preliminary ruling to the CJEU, asking *inter alia* clarification on: whether decision of a Member State to examine itself an application for international protection on the basis of Article 17(1) of Regulation No 604/2013 comes within the scope of EU law; and whether systemic flaws in the asylum procedure and in the reception conditions for asylum seekers, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter, is the only situation in which it is impossible to transfer the applicant to that Member State, or whether there are other situations in which it is impossible to transfer the applicant to the Member State responsible, namely where, owing to the applicant’s state of health, the transfer itself constitutes a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter.

Importantly the Supreme Court also sought answers to the issue of whether the Supreme Court itself or the Constitutional Court constituted the court of last resort that should have addressed the preliminary reference.

c. Reasoning of the CJEU

The CJEU clarified that a Member State is implementing EU law, within the meaning of Article 51(1) of the Charter, when it makes use of the discretionary clause set out in Article

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17 Dublin III Regulation, previously Article 3(2) Dublin II Regulation (in line with the CJEU judgment in *N. S. and Others*).

As to the debate on whether only systemic deficiencies or also individual violations are protected under Article 4 Charter, the CJEU clarified that “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.’

In the specific circumstances concerning a medical case, the CJEU concluded that a **‘real and proven risk of significant and permanent deterioration in the state of health of the person’ would need to be proved as threshold for individual violations of Article 4 Charter.**

However, the refusal to transfer is conditional upon the Member States’ authorities taking first **“the necessary precautions, 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 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.**”

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.**” Then *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)

d. Outcome at national level (follow-up judgment of the referring court)

In relation to Article 17(1) of the Regulation, the **Supreme Court of Slovenia** referred to the interpretation made by CJEU and concluded that the discretionary clause is a right of a state on the basis of its sovereignty and not its duty. If it is noticed 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, the requesting Member State may choose to conduct its own examination of his application by making use of the ‘discretionary clause’ laid down in Article 17(1). However, that provision, read in the light of Article 4 of the Charter, cannot be interpreted, in a situation such as that at issue in the main proceedings, as meaning that it implies an obligation on that Member State to make use of it in that way. In the present case, however,

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no evidence existed that C.K.'s health situation would be particularly serious and could have such significant and irreversible consequences.

Supreme Court therefore upheld the appeal by the defendant and changed the judgement of the Administrative Court in a way that action brought by appellants was dismissed as unfounded. With that decision, the order of transfer of the family to the Republic of Croatia by the Ministry of Interior was upheld.

Analysis

a. Role of the Charter

In its preliminary reference, the Supreme Court started first by asking for clarification on the scope of application of EU law, in the absence of which the Charter would not be applicable. The national court asked whether the Member States should be considered as acting within the domain of EU law when exercising their discretionary powers expressly permitted by EU secondary legislation (Article 17 Dublin III Regulation). The CJEU, conformed the application of the *N.S. and others* conclusion also to the sovereignty clause as set out in Dublin III Regulation. Therefore, Member States do act within the scope of EU law even when acting within their discretionary powers permitted by EU secondary legislation.

Following the CJEU preliminary ruling, the Supreme Court held that the decision on the transfer of applicants was made on the basis of Dublin III Regulation, which has to be implemented in accordance with the Charter provisions. The Court expressly referred to Article 4 of the Charter and interpreted its application in the case in line with the reasoning provided for the CJEU preliminary ruling. When discussing the relation between Article 4 of the Charter and Article 3 ECHR the Supreme Court relied on Article 52(3) of the Charter, explaining that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, 'the meaning and scope of those rights shall be the same as those laid down by the said convention'.

b. Judicial dialogue

The case is of great relevance due to the various judicial interaction techniques used to settled various lines of divergent jurisprudence at different levels.

Of great importance is the **bottom-up judicial dialogue** revealed by the ECtHR judgment in the *Tarakhel* case. In order to establish the threshold for the violation of Article 3 ECHR that would require a refusal to execute a Dublin transfer, the Strasbourg Court looked at the jurisprudence of the EU countries' courts. The Court noted that that several German administrative courts, for instance the **Stuttgart Administrative Court** (on 4 February 2013), the **Gelsenkirchen Administrative Court** (on 17 May and 11 April 2013) and the **Frankfurt am Main Administrative Court** (on 9 July 2013) have ruled against the return of asylum seekers to Italy under the Dublin Regulation, irrespective of whether they belonged to categories deemed to be vulnerable. In its judgment of 9 July 2013 (no. 7 K [560/11.F.A](#)) in

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particular, the **Frankfurt Administrative Court** held that the shortage of places in Italian reception centres and the living conditions there would be liable to entail a violation of Article 3 of the Convention if a 24-year-old Afghan asylum seeker were sent back from Germany to Italy. In its judgment the **Administrative Court** held as follows: “the court must examine the foreseeable consequences of sending a claimant to the receiving country bearing in mind both the general situation there and the claimant’s personal circumstances, including his or her previous experience.”

Secondly, the ECtHR cited the judgment of the **UK Supreme Court** in a case concerning three Eritrean asylum seekers and one from Iran challenging their return to Italy. The **UK Supreme Court** unanimously overturned the judgment of the **UK Court of Appeal** and held that both the systemic deficiencies and individual violations thresholds in cases of risk of violations of Article 3 ECHR due to a Dublin transfer should be retained as applicable tests to be followed by national courts.

Preliminary reference as means to settled judicial disagreement existing at both domestic and European levels: The disagreement between various national courts from the same Member States and between different Member States, as well as between the CJEU and ECtHR concerning the threshold for the violation of Article 4 Charter that could limit a Dublin transfer, has been clarified by way of a preliminary reference. Following the judgment of the **Constitutional Court of Slovenia**, a disagreement surfaced among the Supreme and the Constitutional Courts on the applicable fundamental rights standards stemming from a different understanding of these courts of the apparently conflicting jurisprudence of the CJEU and ECtHR. In this way, the Supreme Court triggered an updating of the CJEU jurisprudence in light of the latest developments in the ECtHR jurisprudence.

It is interesting to note that in the follow-up judgment, the Supreme Court held that reference to case *Tarakhel v. Switzerland* in connection to Article 3 of the ECtHR was not appropriate in the present case since the circumstances of two cases were different. When interpreting Article 3 of the ECHR it quoted case *Paposhvili v. Belgium* according to which “illness may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible”.

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Casesheet 5.2 – Conduct of an EU country’s police in executing a removal order deemed to reach the threshold of ill treatments by the Constitutional Court

Reference cases

ÚS 860/15 – Czech Constitutional Court

Core issues

- Whether various acts of immigration officials in the course of a resisted removal action amounted to inhumane and degrading treatment prohibited by Article 3 ECHR and Article 4 CHARTER (substantive violation);
- Whether the relevant investigative authorities had violated the complainant's rights under Article 3 ECHR and Article 4 CHARTER by failing to investigate and prosecute the alleged crime arising from the above mentioned alleged substantive violations (procedural violation);
- The **Constitutional Court of the Czech Republic** sets the standards to be followed by domestic authorities when enforcing removals of foreign nationals, including standards for the investigation of alleged ill-treatment. The court also stressed the importance of preventing conflict situations through communication and sufficient preparation of the third country nationals for deportation.

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
• The Czech Republic	• removal of a third country national	• n/a	• Constitutional Court	• Consistent interpretation with Art. 3 ECHR and 4 CFR and ECtHR jurisprudence	• authorities required to conduct a repeated investigation of the case.

Timeline representation



Case(s) description

a. Facts

The complainant in the case is a Cameroonian, resident in the Czech Republic for a number of years, and who had overstayed his visa. His residence was therefore deemed illegal and he was issued a return decision. After contesting the decision, the first return decision was quashed and a new decision ordering him to leave the Czech Republic was issued by the administrative authorities. At this stage he was detained by the Police.

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A flight was arranged for him to return to Cameroon, unattended. He was informed of the departure the evening prior to the scheduled flight. The morning of his departure he resisted removal. After some physical altercations, tear gas was used on the complainant. He was transported within the detention facility partially naked, while officers attempted to cover him with a sheet. He was attended by a doctor at this stage and deemed well, with slight injuries to his eyes. He was then handcuffed and brought to the airport where he refused to cooperate. Officers used a luggage trolley to transport him within the airport as a wheelchair was not available. Eventually, the pilot of the flight on which he was scheduled to depart refused to allow him on board in light of his physical resistance. Upon his return to the detention facility he was seen again by a doctor who treated him again for mild injuries to his eyes (conjunctivitis). It should be noted that in addition to these facts the complainant alleged physical and violent coercion at the stage of his removal, including kicking and punching. He also alleged the handcuffs were too tightly attached, leading to injuries to his wrists. Due to the passage of time before his complainant was lodged there is no corroborating medical evidence for these allegations.

He was later returned to Cameroon without incident, where he made a complaint against the police authorities to the General Inspection of Security Forces (GISF). The GISF investigated the matter and found no grounds to proceed with a prosecution, evidence being difficult to obtain at that point (for example destruction of CCTV footage) and the actions of the Police being considered appropriate in the circumstances.

The third country national made a complaint to the Constitutional Court alleging violation of his rights under Article 3 ECHR and Article 4 Charter by his treatment by the Police authorities and by the failure of Czech authorities to prosecute the offence.

b. Legal issues

- Whether various acts of immigration officials in the course of a resisted removal action amounted to inhumane and degrading treatment and a violation of Article 3 ECHR and Article 4 CHARTER (substantive violation).
- Whether the relevant investigative authorities had violated the complainants rights under Article 3 ECHR and Article 4 CHARTER by failing to investigate and prosecute the alleged crime arising from the above mentioned alleged substantive violations (procedural violation).

c. Reasoning of the Constitutional Court

When assessing the allegation of the substantive violation of Article 3 ECHR, the Constitutional Court outlined the classic test developed by the ECtHR, noting that degrading treatment may arise from a series of acts or treatments that may not individually constitute a violation of Article 3 ECHR but cumulatively may reach the appropriate threshold. Four specific acts were considered:

- the failure to give the complainant adequate notice of the time of his departure;
- the use of tear gas;
- the use of handcuffs; and

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- his transportation in the airport using a luggage trolley.

Firstly, the Court found that the failure to give an individual the subject of an expulsion order adequate notice regarding the time and manner of his departure potentially breached fundamental rights and in particular tended to treat the complainant like a ‘thing’ to be transported rather than a human being and failed to take proper account of his interests. Individually, such a failure may not amount to a breach of Article 3 ECHR but in combination with other factors may, as it contributes to the humiliation of the complainant.

Secondly, the Court found that the use of teargas in a confined space where the individual concerned did not pose a threat to either himself or to others was not appropriate and in those circumstances amounted to a breach of Article 3 ECHR in line with the relevant jurisprudence of the ECtHR. The allegations of physical abuse was not addressed as no objective evidence, beyond the testimony of the complainant, was available.

Thirdly, the Court found that the use of handcuffs was permitted in order to apprehend and control an individual in appropriate circumstances, again in line with relevant ECtHR jurisprudence. The allegation that the handcuffs were fixed too tightly could not be addressed as no objective evidence, beyond the testimony of the complainant, was available.

Fourthly, the Court found that the use of the luggage trolley to transport the complainant did not amount to a breach of Article 3 ECHR given the uncooperative attitude of the complainant and the use of a wheelchair by the officials once one was available.

Nonetheless, in light of the use of teargas and the failure to inform the complainant in good time of the time of his departure the Court found that there had in fact been a violation of his rights under Article 3 ECHR and Article 4 CHARTER.

In relation to the procedural complaint, the Court found that the authorities had not investigated the allegation in an expeditious and thorough manner. In particular the delays in investigation were comparable to those in the ECtHR case of *Kummer v Czech Republic*. The result of these delays was that evidence was unavailable and that medical examinations of the complainant took place too late. Furthermore, the Court found that in deciding whether a case is ‘defensible’ the Court found that the standard of proof for persons who are detained is lower than those who are not detained. Normally, an individual should submit independent medical evidence. This is not available in the case of those in detention, in which case their testimony as to injuries received should suffice.

Analysis

a. Role of the Charter

The legal analysis takes place under Article 3 ECHR rather than Article 4 Charter. The Charter is mentioned only at the beginning as a ground of complaint but does not figure in any of the legal analysis. It is assumed this refers to Article 4 Charter as the corresponding provision to Article 3 ECHR.

b. Judicial dialogue

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Significant use is made of ECtHR jurisprudence in both formulating general tests for assessing a substantive and procedural breach of Article 3 ECHR and in applying those tests to the specific circumstances of the case (especially complaints on the use of teargas and handcuffs).

c. Remedies

A substantial and procedural violation of Article 3 ECHR was found. The **Constitutional Court** required the public authorities to investigate any complaint about ill-treatment very promptly and with due diligence. If a person is deprived of liberty, the authorities are obliged to secure evidence (medical examination, photo documentation) on their own motion and very promptly.

The **Constitutional Court** directed the relevant authorities to conduct a repeated investigation of the case.

d. Relevance of the case

The **Constitutional Court** sets the standards to be followed by domestic authorities when enforcing removals of foreign nationals, including standards for the investigation of alleged ill-treatment. The Court also stressed the importance of preventing conflict situations through communication and sufficient preparation of the third country nationals for deportation.

Standards furnished by the European Committee for the Prevention of Torture (CPT) and ECtHR were quoted.

e. Additional relevant cases

ECtHR: Bureš v. the Czech Republic, no. 37679/08; Bouyid v. Belgium, Application no. 23380/09; Farbtuhs v. Latvia, Application no. 4672/02; Ireland v. United Kingdom, Application no. 5310/71; Ribitsch v. Austria, Application No. 18896/91; V United Kingdom (Application no. 24888/94); Gäfgen v Germany (2008) (Application no. 22978/05); M.S.S. v Belgium and Greece [GC], Application No. 30696/09; Kummer v The Czech Republic, Application No. 32133/11.

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Casesheet 5.3 – Circumstances where national courts have a duty of *ex officio* investigation beyond the facts brought by the applicant for international protection

Reference case

*Iyahan v Minister for Internal Affairs and Ors, Supreme Court of Cassation of Italy, judgment of 10 April 2015, file No. 7333/2015.*⁸⁸

CJEU: C-285/12, *Diakité*, ECLI:EU:C:2014:39

ECtHR: *F.G. v Sweden*, Appl. No. 43611/11, Grand Chamber Judgment of 23 March 2016

Core issues

Duty of cooperation of 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 faced there; Defining the requirements under the duty of cooperation in light of the CJEU *Elgafaji*⁸⁹ and *Diakité*⁹⁰ cases;

Developments of the *duty of cooperation in light of the ECtHR F.G v Sweden case.*

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
• Italy	• Subsidiary protection • Duty of authorities to investigation	• Qualification Directive	• Italian Court of Cassation.	• Appeal • Conform interpretation	• Quashing of Court of Appeal judgment • Requiring an ex officio investigation of the general situation in Nigeria (CO) for the purpose of determining whether it could be qualified as reflecting generalised or individual violence

Timeline representation



Case(s) description

a. Facts

⁸⁸ C. Salamone, ACTIONES Case note, *Iyahan v Minister for Internal Affairs and Ors* (Supreme Court of Cassation of Italy, 10 April 2015) App no. 7333/2015.

⁸⁹ Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* EU:C:2009:94.

⁹⁰ Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* EU:C:2014:39.

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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 that had already claimed 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 before the **Supreme 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 and that there was a duty on the national authorities to take such facts into account when assessing an application for subsidiary protection.

b. Legal issues

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 be taken into account by judicial authorities on their own motion.

The **Supreme 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 and the applicant.

It found that while the applicant has a general duty to submit as soon as possible all elements necessary to substantiate his claim, 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 qualification for subsidiary protection*. 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*”.⁹¹ These relevant facts may in turn be used in assessing the credibility of the applicant. Finally, the Court cited the **Court of Justice** judgments of *Elgafaji*⁹² and *Diakité*⁹³ noting that “*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*.

c. Outcome at national level

In applying these findings to the present case the Supreme Court 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

⁹¹ 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 and the content of the protection granted [2004] OJ L 304/12 (Qualification Directive), art 4(3)(a).

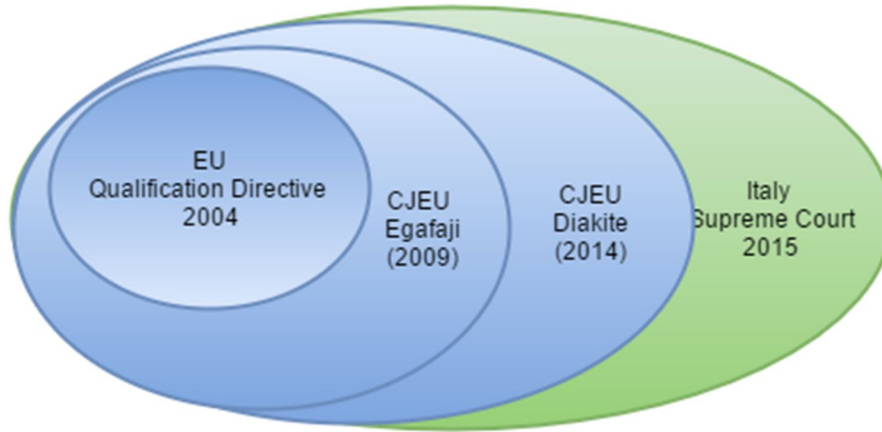
⁹² Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* EU:C:2009:94.

⁹³ Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* EU:C:2014:39.

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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 removal to Nigeria and therefore should qualify for subsidiary protection.

Analysis



a. Role of the Charter

The Court does not mention the Charter of Fundamental Rights explicitly but instead cites relevant CJEU caselaw (*Elgafaji* and *Diakite*)⁹⁴ and the provisions of the Qualification Directive.⁹⁵ The Court does refer to Articles 2 and 3 ECHR.

b. Judicial dialogue

The Italian Supreme Court reverses the judgement of the Court of Appeal because it did not take into account the interpretation of the Qualification Directive provided by the CJEU in cases *Elgafaji* and *Diakite*.

c. Additional relevant cases

The interpretation followed by the **Italian Supreme Court** and the CJEU differs partially from the position of the ECtHR articulated 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

⁹⁴ *Elgafaji* and *Elgafaji* and *Diakite*.

⁹⁵ Qualification Directive, in particular Article 4.

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on and to substantiate such a risk”.⁹⁶ In relation to the burden of proof, the ECtHR holds a broad “principle of information”, while the CJEU and the Italian Supreme Court states that “facts” have to be adduced by the applicant, although it should be noted that it remains for the judicial authority to make a legal determination in relation to these facts.

⁹⁶ *FG v Sweden* App no 43611/11 (ECtHR, 23 March 2016), paras 126-127.

ARTICLE 6 CHARTER - Right to liberty and security

Overview of issues under Article 6 Charter

One of the most controversial issues in asylum and immigration has been the detention of migrants. These cases raise particular concerns regarding several fundamental rights of the asylum seekers and irregular migrants, in particular: the protection of the right to liberty and security; access to court and legal aid; effective remedies; claiming the right to asylum,⁹⁷ access to social and economic rights, as well as family life and best interests of the child.⁹⁸ Article 6 Charter has a correspondent right in Article 5 ECHR, thus according to Article 52(3) Charter, the standards set by the ECtHR under Article 5 ECHR have to be taken into consideration as a minimum threshold of protection under Article 6 Charter.

Compared to Article 5 ECHR, Article 6 Charter does not include express exceptions where asylum and immigration detention are possible, such as: detention for the purpose of preventing an unauthorised entry into the country (Article 5(1)(f) ECHR first indent); detention with a view to deportation or extradition (Article 5(1)(f) ECHR second indent). Instead, as mentioned above, authorised circumstances of deprivation of liberty of asylum seekers and irregular migrants are expressly laid down in EU secondary legislation. Recently, the conformity of several of the asylum detention grounds provided in Article 8(3) Reception Condition Directive has been challenged by national courts in light of Article 6 Charter interpreted in line with Article 5(1)(f) ECHR. The **Dutch Council of State** challenged the validity of asylum detention on grounds of public order and national security (Art. 8(3)(e) of Directive 2013/13) with Article 5(1)(f) ECHR, on account that the EU asylum detention ground is not among the two exhaustive grounds provided by Article 5(1)(f) ECHR.⁹⁹ In light of the correspondence between Article 5(1)(f) ECHR and Article 6 Charter, national courts are required to interpret Article 6 Charter consistently with the jurisprudence of the ECtHR.¹⁰⁰ The CJEU found that Article 8(3)(e) Reception Conditions Directive complies with the requirements of the right to liberty as set out in Articles 6 and 52(1) Charter and Article 5(1)(f) ECHR in the specific circumstances of that case.¹⁰¹ In the specific case, the asylum seeker lodged the application for international protection during the return proceedings. Therefore CJEU concluded that the detention could be interpreted as falling under the second circumstances provided by Article 5(1)(f): in view of expulsion or extradition: “*pending asylum proceedings do not preclude that detention was for the purpose*

⁹⁷ See in particular, *I.M. v France*, Appl. No. 9152/09, Judgment 02 May 2012.

⁹⁸ See more cases under the sub-section on Article 24 EU Charter.

⁹⁹ Case C-601/15, *J.N.*, ECLI:EU:C:2016:84.

¹⁰⁰ In accordance with Article 52(3) CHARTER.

¹⁰¹ It first held that Art. 8(3)(e) (Dir. 2013/32) meets the ECHR requirements: detention grounds must be laid down in national law; Article 8(1) Reception Conditions Directive prevents detention solely on the ground of having lodged an application for international protection; and Article 8(2) requires detention to be ordered only where necessary, on the basis of an individualised assessment, and where no less coercive measures could be effectively applied. Furthermore, limitations and procedural safeguards are set out in Article 9 Reception Conditions Directive.

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of deportation, as a rejection could lead to implementation of a deportation order that had already been ordered, so return proceedings were still ‘in progress’ according to Article 5(1) f) ECHR.” (see J.N. in [ACTIONES Database](#))

The Court will have the opportunity to clarify the conformity of the first two asylum detention grounds in Article 8(3) Reception Conditions Directive in cases where the asylum application was lodged outside return proceedings, namely while in prison for the criminal offence of irregular entry and use of false passport. (see the pending *C-18/16, K.*)

In addition to using Article 6 Charter as standard of validity of EU secondary legislation, the CJEU referred to Article 6 Charter as standard of interpretation of an EU law concept (determining the meaning of ‘law’ in regard to the definition of significant risk of absconding as grounds for detention in Dublin procedures) (see *casesheet 4, Al Chodor*, below).

The CJEU has also dealt with: rights of detained asylum seekers during Dublin procedure (Case C-179/11 *Cimade and GISTI v Ministre de l’Intérieur*), concluding that access to social benefits rights should remain applicable throughout the entire Dublin procedure, until the asylum seeker has effectively reached the territory of the receiving country; criteria for deciding when asylum versus return proceedings should apply (*Kadzoev*,¹⁰² *Arslan*¹⁰³); the relationship between pre-removal and criminal detention (*Achughbadian*); legitimate alternatives to detention: fine yes, home confinement not (*Sagor*)¹⁰⁴. However the Court has not used Article 6 Charter in these cases.

In a nutshell

Requirements under Article 6 Charter

The right to liberty and security is a relative fundamental right, therefore both asylum and immigration detention are possible as long as these measures respect the safeguards required by Article 52(1) Charter, namely: 1) the limitations must be provided by law; 2) respect the essence of the right; 3) genuinely meet the objectives of general interest; 4) necessity; and 5) proportionality. The EU legislator has provided for an exhaustive list of detention grounds of both asylum seekers and irregular migrants, which were aimed at ensuring respect for Article 52(1) Charter requirements. Article 15(1) of the Return Directive (2008/115) provides for two exhaustive grounds for the detention of irregular migrants: 1) risk of absconding; 2) avoiding or hampering the preparation of return or removal (detailed practice and standards can be found in the [REDIAL European Synthesis Report on immigration detention](#)). As for asylum seekers, the EU provided for express detention grounds only during the second phase of the CEAS legislative development. Article 8(3) of recast [Reception Conditions Directive](#) provides for an exhaustive list of six detention grounds

¹⁰² Case C-357/09 PPU, *Said Shamilovich Kadzoev (Huchbarov)*, ECLI:EU:C:2009:741.

¹⁰³ Case C-534/11, *Arslan*, ECLI:EU:C:2013:343.

¹⁰⁴ For more details on the CJEU case law on detention during return or removal proceedings, see [REDIAL materials](#).

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of asylum seekers: a) in order to determine or verify his or her identity or nationality; b) risk of absconding; c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory; d) when there are reasonable grounds to believe that an application for international protection is made only in order to delay or frustrate the enforcement of the return decision; (e) when protection of national security or public order so requires or f) during Dublin procedures. Article 28(2) of [Dublin III Regulation](#) provides that an asylum seeker subject to Dublin procedures can be detained only if there is a 'significant risk of absconding' from the proceedings.

The *Reception Conditions Directive*, *Dublin III Regulation* and the *Return Directive* all prohibit detention solely on grounds of seeking asylum, being subject to the Dublin procedure, or mere irregular entry or stay.¹⁰⁵

Certain common principles are provided by the relevant EU secondary legislation as mandatory requirements to be applied by national public authorities before taking detention measures. First, detention measures cannot be taken automatically, instead public authorities must carry out an individual assessment of the circumstances of each case. Only if detention proves necessary to fulfil the objective of the relevant EU legislation (principle of necessity), and the same result cannot be achieved through a less coercive measure (principle of proportionality) then detention measures can be adopted. When considering the proportionality of the detention measure, the public authorities must taken into consideration the foreseeable length of detention and the behaviour and vulnerability (age, state of health) of the applicant.¹⁰⁶ Asylum and immigration detention must be for as short a period of time as possible.¹⁰⁷

National application of Article 6 CHARTER

At national level, the majority of issues concerning asylum and immigration detention involve misapplication(s) or a failure to apply the standards already provided for in EU secondary legislation, rather than using Article 6 CHARTER to clarify the standards in EU or national legislation. This seems to be confirmed also by the jurisprudence of the ECtHR. This Court found violations of Article 5(1)(f) due to the lengthy detention of asylum seekers - *Singh v. the Czech Republic* (two and a half years in detention pending deportation procedure); inadequate reasoning and arbitrariness of detention (*Rusu v. Austria*); lack of necessary examination of alternatives to detention, and detention when there is no realistic prospect of removal is contrary to Article 5(1)(f) (*Mikolenko v. Estonia*); detention of an

¹⁰⁵ See: Article 8(1) Reception Conditions Directive; Article 28(1) Dublin III Regulation; Article 15 Return Directive. The CJEU has repeatedly held that public authorities have to carry out an individual assessment of the circumstances and cannot base their decisions on general or abstract facts, as well as prohibiting immigration detention on the basis of mere illegal entry or stay (C-16/11, *El Dridi*, ECLI:EU:C:2011:268; C-329/11, *Achughbabian*, ECLI:EU:C:2011:807; C-357/09, *Kadzoev*, ECLI:EU:C:2009:741)

¹⁰⁶ See, in particular, Art. 8(2) Reception Conditions Directive, Art. 28(2) Dublin III Regulation, Article 15 Return Directive.

¹⁰⁷ See Art. 8(4) Directive 2013/13, Art. 28(4) Dublin III Regulation, Article 15 Return Directive; Case C-528/15, *Al Chodor*, ECLI:EU:C:2017:213, para. 34.

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unaccompanied child (*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*); detention of minors in unsuitable facilities (*Muskhadzhiyeva and Others v. Belgium*); two days delay for informing the applicant on his right and following steps was considered too long (*Saadi v. the United Kingdom*); automatic and on-going detention of irregular migrants despite the making of asylum applications (*Kerim and others v Bulgaria*); detention of asylum seekers based on return related decision, without individually addressing the criteria set out in domestic law (*Nabil and other v Hungary*);¹⁰⁸ assessment of reasonable length of detention according to particular circumstances of each case (*Auad v. Bulgaria*).

The cases submitted for consideration in the ACTIONES Project deal with three major themes: 1) detention of asylum seekers; 2) detention of irregular migrants and 3) overlaps and/or interaction between asylum and return detention legal regimes.

A first thread of cases deals with the specific issues of absence or inadequate legislative definition of the ‘risk of absconding’ as a ground for asylum and immigration detention, the legality of administrative detention, and effects of finding a risk of absconding, particularly in return proceedings (*see casesheet 4*).

A second thread of cases addresses the issue of the legality assessment of initial detention and then prolongation of detention of irregular migrants under the removal procedure. The judgment of the **Court of Appeal of Bucharest** is, on the one hand, a good example of introducing the Return Directive and the jurisprudence of the ECtHR and CJEU within the domestic test of assessing legality of immigration detention. On the other hand, it can be considered a step backwards for the protection of the right to liberty of migrants subject to immigration detention, due to its giving effect to decisions of the **Romanian Constitutional Court** which do not consider public custody measures as detention measures affecting the right to liberty, but as administrative measures affecting only free movement within the Romanian territory (see the [ACTIONES Database](#), under Article 6 CHARTER).

The third and last thread of cases addresses issues arising from the overlap and interaction between asylum and immigration detention. There are numerous cases where TCNs are first detained as irregular migrants and their detention is subsequently continued after they lodge an asylum application. Although the CJEU has, so far, clarified on three occasions that the detention of the irregular migrants under the Return Directive cannot automatically be prolonged after he/she lodged an application for international protection, cases are still present at national level. The grounds and objectives for asylum detention are different from those of immigration detention. However a certain overlap exists and these are the cases where issues regarding legality and arbitrariness of migrants detention arise (see the [ACTIONES Database](#), under Article 6 CHARTER, and see [REDIAL materials](#).) For instance, the **Supreme Administrative Court of Estonia**¹⁰⁹ had to assess the proportionality of the detention of an asylum seeker on the grounds that the application had been lodged for

¹⁰⁸ Appl. No. 62116/12, Judgment of 22 September 2015.

¹⁰⁹ R. Kitsing, ACTIONES case note, Supreme Court of Estonia, Judgment of 29 January 2015, see <http://judcoop.eui.eu/data/?p=data&fold=8&subfold=8.13>.

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the sole purpose of delaying removal. The Court held that administrative courts can rely on the circumstances of the application and other materials examined at the court hearing in such cases. They are not bound solely by the facts mentioned in a request of detaining a person.

As to identifying whether the asylum application was filed with the aim of delaying or frustrating his/her removal, the Court reproduced the guidelines mentioned by the AG and the CJEU in *Arslan*: the circumstances of his/her arrival to the country; circumstances of filing an application, also the time of filing an application; earlier statements about his/her country of origin; the actual credibility of his/her statements, which give grounds to suspect that the person may not be available in the case of the rejection of his/her application.

One of the matters which justifies the detention of an asylum seeker is the risk of absconding, although it is not a basis for detaining a person in itself. Directive 2013/33 does not give any detailed guidelines regarding the meaning of a 'risk of absconding'. The Supreme Court has indicated that when detaining a person it is not necessary that the risk of absconding is actual. However, detention cannot be applied in a case where the risk of absconding is low.

Conclusions – Judicial Dialogue

In regard to the issue of asylum and immigration detention, national courts seem to refer to both the Charter (Article 6) and the Convention (Article 5(1)(f)) in a balanced fashion, in contrast to cases involving prohibition of torture and ill treatment where only the relevant Convention provision tends to be mentioned. Increasing reference to Article 6 CHARTER in domestic jurisprudence is due to the growing domestic practice of resorting to asylum and immigration detention. However, rather than Article 6 CHARTER as such, national courts refer to the provisions of the CEAS instruments and the rules set out by the CJEU and ECtHR on legality of asylum and immigration detention. The EU secondary legislation provides for extensive safeguards and requirements, which are not always fulfilled at national level, as reflected also by casesheet 4. By using various judicial interaction techniques: comparative reasoning, disapplication, preliminary reference, national courts have played a significant role in securing the respect of the right to liberty of applicants for international protection and irregular migrants.

Judicial dialogue has helped to clarify the standards for using the risk of absconding as ground for asylum and immigration detention (e.g. *Al Chodor*); clarified the validity of EU based asylum detention ground with the right to liberty; and more generally the standards and threshold of protection under the right to liberty. Although comparative reasoning and preliminary reference are increasingly used by national courts for the purpose of ensuring uniform application of EU law and fundamental rights, there still is considerable divergence in practice.

An interesting string of cases, where there seems to be varied judicial practice, are those where abusive asylum applications are held to justify detention or continuation of

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administrative detention under the return or asylum legal regime (see *the Supreme Court of Estonia Judgment of 29 January 2015*, *Court of Rome Judgment 5107/2014*, *French National Asylum Tribunal*, *Administrative Court of Montpellier in the I.M. v France*¹¹⁰ case, *Dutch courts in J.N.*) In the case of *J.N.*, the Dutch authorities and courts based their decision on the numerous criminal offences committed by the applicant and the numerous asylum applications made, the first of which was assessed under the regular procedure. For other courts it was sufficient that the asylum application was lodged immediately after the removal order to find an abuse of asylum procedure leading to continuation of detention and fast track asylum trial (see the French courts in *I.M. v France*, *Court of Rome*¹¹¹). The ECtHR (*I.M. v France* and *M.E. v France*) and the CJEU (*J.N.*) gave indications of what can be considered abusive asylum application and whether they can justify detention (within the fast track asylum procedure, suspending or ending return procedure). Repeated asylum applications where no new facts are brought coupled with previous criminal offences have been widely considered as evidence of abusive asylum applications aimed at delaying and/or jeopardising return/removal. At the same time, The ECtHR does not consider an asylum application submitted after the removal order, especially if it is the first application lodged, an abusive application capable of justifying detention and fast-track asylum trial.¹¹²

¹¹⁰ Appl. No. 9152/09, Judgment of 2 May 2012.

¹¹¹ The case is discussed under sub-section *Impact of preliminary rulings in Arslan and Kadzoev on national jurisprudence*. The Court of Rome held that the fact that the asylum application was lodged at the moment of entry into the Italian territory indicates that there is no risk of absconding that could legitimise detention. This implies that should the application be lodge later, a risk of absconding might be presumed.

¹¹² *I.M. v France*.

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Casesheet 5.4 – Article 6 Charter and 5 ECHR used as standards of interpretation of the significant risk of absconding as grounds for asylum seekers detention in Dublin procedures

Reference cases

CJUE (Chamber): Case C-528/15, [Al Chodor](#), ECLI:EU:C:2017:213

Core issues

Do objective criteria on the basis of which public authorities can presume a “significant risk of absconding”, as grounds for detention of asylum seekers during Dublin proceedings, need to be defined in the national legislation, or administrative practice and constant jurisprudence can be considered ‘law’?

The “risk of absconding” is a common ground for detention of migrants under both asylum and return procedures and is identically defined under all these legal frameworks. (see Article 8(3)(b) *Recast Reception Conditions Directive*; asylum seekers under Dublin procedure, Article 28(2) *Dublin III Regulation*; irregular migrants under removal proceedings, Article 15(1) *Return Directive*).

The definition of “risk of absconding” is one of the most problematic issues that national courts face. For instance, certain Member States have not implemented this ground as a legitimate ground for detention. **Czech and German courts** had to assess the legality of asylum detention on the basis of a “risk of absconding” that was not defined in the national legislation, or inappropriately defined.

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
• Czech Republic	• Dublin III proceedings	• Dublin III Regulation 2013/604	• Czech first instance court • Supreme Administrative Court	• Preliminary reference • Comparative reasoning: referral to foreign judgments	• annulment of asylum seeker detention subject to Dublin procedures

Timeline representation



Case(s) description

a. Facts

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Three Iraqis of Kurdish origin, a father and his two children, were caught by Czech authorities without identity documents, and were issued detention order for 30 days on account of a risk of absconding their Dublin transfer to Hungary where they were previously fingerprinted and had entered the asylum system. They lodged asylum application claiming they fled persecution from the Islamic State, travelled through Turkey and Greece, mentioned that they had signed several documents in Hungary, and left the asylum accommodation after two days since they wanted to join family members in Germany.

Pending their transfer to Hungary, a Czech first instance court annulled the detention order as invalid since the Czech legislation did not provide for objective criteria for assessing the risk of absconding within the meaning of Article 2(n) of the Dublin III Regulation. That court accordingly ruled that the detention was unlawful. Following their release, the Al Chodors left Hungary. The Foreigners Police Section challenged the judgment of the first instance court before the Supreme Administrative Court, who decided to stay the proceedings and address a preliminary question to the CJEU: *“Does the sole fact that a law has not defined objective criteria for assessment of a significant risk that a foreign national may abscond [within the meaning of Article 2(n) of the Dublin III Regulation] render detention under Article 28(2) [of that regulation] inapplicable?”*

b. Legal issues

The main legal issues raised by the *Al Chodor* case concern, first whether the Member States need to transpose Articles 28 and 2(n) Dublin III Regulation regarding the definition of the risk of absconding as grounds for detention during Dublin proceedings, since the detention provisions are laid down in a Regulation, which according to Article 288 TFEU does not need transposition. Additionally, it raises the issue of the determination of the meaning of ‘law’, which is one of the two requirements for using the risk of absconding as grounds for asylum detention under Dublin III Regulation. Article 2(n) Dublin III Regulation defines the risk of absconding as ‘objective criteria’ which need to be defined by the Member States in their national laws.

The **Czech Regional Court** ruled that, although the applicability of Article 28 Dublin III is not subject to transposition since it is provided in an EU Regulation which commonly do not require transposition, Article 28 is an exception. Article 2(n) expressly requires the Member States to provide in their national law “objective criteria” for the assessment of the risk of absconding. The **Regional Court** concluded that following a teleological interpretation of the Czech Alien Act, a mere irregular entry and/or stay would legitimise detention, which is contrary to Article 28(1) Dublin III Regulation. Since the Czech Aliens Act does not provide either expressly or implicitly the objective criteria for the definition of the risk of absconding as required by Dublin III Regulation, then public authorities cannot order detention based on mere administrative practice. The Regional Court found that detention measures to be unlawful directly on the basis of Article 2(n) and 28 of the Dublin III Regulation.

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In its assessment of legality of the detention order, the Czech first instance court expressly referred to the judgments delivered by the **Federal Court of Justice of Germany** (judgment of the Bundesgerichtshof, 26 June 2014, Case V ZB 31/14) and the **Administrative Court of Austria** (judgment of the Verwaltungsgerichtshof, 19 February 2015, Case RO 2014/21/0075-5) which had previously found that detention in Dublin proceedings is unlawful since the national legislation did not provide for objective criteria in the national legislation. In order to establish the requirements deriving from EU secondary legislation, the Czech first instance court looked at the approach taken by courts from other EU countries.

On appeal, the **Czech Supreme Administrative Court**, being of a different opinion than the Regional court, decided to address a preliminary reference to the CJEU asking for clarification of the required legal nature of the act that should provide the definition of the risk of absconding.

c. Reasoning of the CJEU

The CJEU first assessed whether the Member States are requirement to transpose Articles 28 and 2(n) of the Dublin III Regulation, or the rule established by Article 288 TFEU whereby Regulations do not need transposition is applicable also in this case. In agreement with the AG and the Czech first instance court, the CJEU held that since objective criteria are not provided by Article 2(n) and 28 Dublin III Regulation, the elaboration of those criteria is a matter of national law, and thus, in an exception to Article 288 TFEU, Member States are required to transpose the EU provisions setting out the ground for detention in Dublin procedures. (para. 28)

Secondly, the CJEU determined the meaning of the notion of ‘law’ provided by Article 2(n) Dublin III Regulation as one of the two exhaustive requirements for using the risk of absconding as a ground for detention. Given that the various national language versions of Article 2(n) Dublin III Regulation refer to other ‘legislation’ (specific legal act) or ‘law’ (general sense), the Court had to establish whether the definition of ‘objective criteria’ should be provided in legislation or if other legal acts, such as in the Czech Republic, administrative practice and jurisprudence, could be considered as ‘law’ for the purposes of the Regulation.

The CJEU first recognised that detention of asylum seekers for the purpose of securing a Dublin transfer constitutes a limitation of the exercise of the right to liberty enshrined in Article 6 Charter. (para. 36). It recalled the guarantees that any limitation of Charter rights has to fulfil under Article 52(1) Charter: “limitation on the exercise of that right must be provided for by law and must respect the essence of that right and be subject to the principle of proportionality” (para. 37). Since Article 6 Charter corresponds to Article 5 ECHR, Article 52(3) Charter requires that account must be taken of Article 5 ECHR as the minimum threshold of protection of the right to liberty under Article 6 CHARTER. Subsequently, it recalled the standards set by the ECtHR: ‘*any deprivation of liberty must be lawful not only in the sense that it must have a legal basis in national law, but also that lawfulness concerns the quality of the law and implies that a national law authorising the deprivation of liberty must*

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be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness.’ (para. 38) In establishing the meaning of “law”, the CJEU applied the ECtHR standards under Article 6 Charter, which consists of: ***compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness.*** (para. 40) It found that ‘only a provision of general application’ could meet these requirements. In agreement with the first instance Czech court and other national courts cited by the former, the CJEU found that ‘settled case-law confirming a consistent administrative practice on the part of the Foreigners Police Section, such as in the main proceedings in the present case’ does not meet the safeguards required by Article 6 Charter, in particular protection against arbitrariness. The consequence being that detention on the basis of a risk of absconding, where the objective criteria are not set in a provision of general application, cannot be based on Article 28(2) of Dublin III Regulation.

d. Outcome at national level (follow-up judgment of the referring court)

While the *Al Chodor* case was pending before the CJEU, the Czech legislator amended the national legislation so as to meet the requirements of “objective criteria” defined by the law.

Although the *Al Chodor* case concerned the implementation of a regulation, parallels can be drawn with the implementation of the ‘risk of absconding’ criteria under the Return Directive. Notably, the conditions of *clarity, predictability, accessibility and protection against arbitrariness* have to be met by the domestic provision transposing the notion of the risk of absconding within the framework of pre-removal detention. The CJEU clarified that administrative practice, even if consistent (such as administrative acts) do not fulfil these requirements. Therefore Member States which adopt pre-removal detention in the absence of a legal provision of general application, are acting contrary to EU law. (more details on the judicial implementation of risk of absconding, objective criteria in immigration detention, see [REDIAL Electronic Journal](#)).

Analysis

a. Role of the Charter

Article 6 Charter is used first as a standard of interpretation of the EU concept of ‘law’, one of the requirements for using the risk of absconding mentioned in Article 28 Dublin III Regulation as grounds of detaining asylum seekers subject to Dublin transfers. Secondly, Article 6 Charter is also used as standard for assessing the legality of the national practice of detaining asylum seekers.

When applying Article 6 Charter, the CJEU took into consideration the standards set by the ECtHR under Article 5 ECHR.

b. Judicial dialogue

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The case involved three important judicial interaction techniques, mentioned in their chronological order: 1) comparative reasoning, the Czech first instance court supported its reasoning with the judgments of two foreign national courts (Germany and Austria) who had dealt with similar issues of EU law implementation; 2) disapplication of national practice and priority given to fundamental rights and EU legislation as interpreted by various national courts; 3) a preliminary reference sent by the Czech Supreme Court for the purpose of clarifying the EU notion of ‘law’ in asylum detention.

c. Remedies

Annulment of administrative detention order as unlawful and arbitrary due to absence of transposition of Articles 28 and 2(n) Dublin III Regulation.

d. Impact of CJEU decision

Interestingly, in cases regarding the definition of the “risk of absconding” in asylum and immigration proceedings, the judgments of several national courts have had more impact, so far, than the jurisprudence of the CJEU.

The risk of absconding is defined in an identical manner under both the Return Directive and Dublin III Regulation. The “risk of absconding” as legitimate ground for detention must fulfil two conditions, namely that of including “objective criteria...defined by law.” As previously mentioned, several Member States did not provide for a definition of the ‘risk of absconding’ in their national legislation implementing the Return Directive ([Czech Republic](#), [Belgium](#), [Malta](#), [Austria](#), [Greece](#)) or the Dublin Regulation (Czech Republic). Germany fell into this category but this gap was remedied following a landmark judgment of the **German Federal Civil Court**. In spite of its reticence to refer to EU secondary law and relevant CJEU jurisprudence, the **Federal Civil Court** held that the legislature had failed to fulfil the requirements set out by the Return Directive, namely to expressly provide for objective criteria in the domestic legislation (*Decision of 18 February 2016 – V ZB 23/15*). Following this judgment, the legislature amended section 2(14) of the Residence Act, which now includes concrete objective criteria (see [REDIAL German Report on pre-removal detention](#), p.5). A similar judgment was decided by the Federal Civil Court in relation to the legislator’s failure to define expressly and by law the risk of absconding in the framework of Dublin based detention measures. (*Decision of 26/06/2014 – V ZB 31/14 for Dublin cases*)

e. Additional relevant cases

ECtHR decisions: *Nabil and others v Hungary*

National decisions: German Federal Civil Court: *Decision of 18 February 2016 – V ZB 23/15*; *Decision of 26/06/2014 – V ZB 31/14 for Dublin cases*

Outcome of Judicial Application of Article 6 EU Charter

The *J.N.* preliminary reference showed that the EU Charter is used not only as a standard of review for domestic legislation and administrative practice, but also for the EU secondary legislation itself. Although the CJEU held the provision permitting detention of asylum seekers based on national security and public order to be in conformity with Article 6 Charter, the case demonstrates that national courts are scrutinising the legality of asylum and

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immigration detention not only in light of its conformity with EU secondary legislation, but also directly with the EU Charter and the Convention. EU secondary legislation, similarly to national implementing legislation, must comply with the fundamental rights requirements set out in the Charter and in the equivalent provisions set out in the ECHR, as they are interpreted by the Strasbourg Court.

Individual assessment, necessity, and proportionality requirements are gradually included in the legality assessment of migration detention carried out by national courts following the jurisprudence of the CJEU and ECtHR (see *the judgments of the Court of Appeal of Bucharest 6, Supreme Administrative Court of Lithuania*, [ACTIONES Database](#)). Detention based on a broadly defined “risk of absconding” is rejected by national courts as contrary to either the Recast Reception Conditions Directive, the Dublin III Regulation or the Return Directive as interpreted by the CJEU.

The CJEU preliminary ruling in *Al Chodor* has finally clarified that Member States need to transpose the concept of “risk of absconding” in national legislation if they want to legitimately use it as ground for asylum and immigration detention. Objective criteria need to be provided in “a provision of general application”, excluding as a legitimate source of the ground “settled case-law confirming a consistent administrative practice”.

The jurisprudence of the ECtHR is taken into account when interpreting the requirement deriving from Article 6 EU Charter. In addition to examples of best practice, the case law submitted by the national judges and lawyers also includes domestic judgments refusing to follow the CJEU preliminary rulings, or incorrectly applying them. Certain of these judgments are the result of divergent judicial approaches between domestic superior courts and the European supranational courts. For instance the Romanian Constitutional Court refused to consider public custody measure as detention measures limiting the right to liberty (see the judgment of the Court of Appeal of Bucharest), thus placing ordinary courts in a difficult position.

ARTICLE 7 Charter – Respect for Private and Family Life

Overview of issues concerning Article 7 Charter

Article 7 of the Charter contains a right to respect for private and family life, home and communication. Related rights are contained in Article 8 CHARTER (*to the protection of personal data*), Article 9 CHARTER (*the right to marry and found a family*), Article 10 CHARTER (*freedom of thought, conscience and religion*) and Article 24 (*rights of the Child*). Article 7 Charter corresponds to Article 8 of the European Convention on Human Rights (ECHR) and thus should be interpreted in light of Article 8 ECHR and the relevant jurisprudence of the European Court of Human Rights (ECtHR) in accordance with Article 52(3) Charter. Article 7 Charter is relevant in a number of situations in immigration and asylum law.

The right to a family life and the need to protect the family unit is reflected in many instruments of the immigration and asylum *acquis*. Including the [Family Reunification Directive](#) itself, the [Dublin III Regulation](#), the [Qualification Directive](#), the [Reception Condition Directive](#) and the [Returns Directive](#).

Secondly, Article 7 Charter can impose obligations on national authorities in the context of admission and expulsion decisions where the individual concerned or other individuals have formed a family or private life. There are few cases of the Court of Justice interpreting Article 7 Charter in this regard. However, as noted above Article 7 Charter corresponds to Article 8 ECHR and should be interpreted in light of the jurisprudence of the ECtHR.

Finally, in an important case of the Court of Justice the privacy element of Article 7 Charter has been relevant for national authorities when deciding what measures can be taken to investigate the credibility of an asylum application under the Qualification Directive, and in particular a claim for persecution based on sexual orientation.

In a Nutshell

Requirements under Article 7 Charter and Article 8 ECHR

There is limited jurisprudence of the Court of Justice in relation to Article 7 Charter (with the notable exception of *A, B & C*¹¹³ discussed below). The following overview of the requirements of Article 7 Charter therefore draws primarily on the application of Article 8 ECHR, in light of which Article 7 Charter should be interpreted. Article 8 ECHR imposes requirements on national immigration and asylum authorities in relation to expulsion, and to a lesser extent admission decisions. Finally, the Court of Justice of the European Union has imposed requirements on national authorities regarding the nature of permissible questioning

¹¹³ Joined Cases C-148/13 to C-150/13 *A, B and C v Staatssecretaris van Veiligheid en Justitie* EU:C:2014:2406.

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in the context of an application for asylum on the basis of the privacy element contained in Article 7 Charter.

In relation to admission decisions the ECHR does not contain a general right for an individual or a spousal couple to choose where to live, but rather protects a right to private and family life more broadly. Thus in the *East Africa Cases*¹¹⁴ it was determined that where a family life did exist between the applicant couples but that it was possible for that family life to be maintained in the country of origin of the husband, refusal to issue residence permits would not constitute a violation of Article 8 ECHR. In general, the ECtHR is more willing to impose an obligation to admit children where a parent is already settled on the territory of a contracting state. In exceptional cases where it would be impossible for the family life to be continued in another state an obligation may arise in the context of Article 8 ECHR.¹¹⁵

Similar considerations arise in relation to ***expulsion decisions***. Whereas Article 8 ECHR does not provide a general right to reside in a particular state, if a family life has been formed in the contracting state, expulsion may constitute a breach of Article 8 ECHR. Such a breach may be justified under Article 8(2) ECHR provided it meets the criteria listed therein:

- The expulsion decision must be provided for by law; this requirement include additional procedural requirements in order to prevent the arbitrary use of power:
 - The right for a motivated decision;
 - The right to view and contest the factual basis for the decision; and
 - The right to contest this in adversarial proceedings – particularly relevant in the case of expulsion decisions taken on foot of national security concerns.¹¹⁶
- It must serve a legitimate purpose; This criteria is normally met, particularly if the expulsion decision is made following a criminal conviction or for reasons of public order.
- It must be necessary; and
- It must be proportionate.

Finally, the expulsion must be *proportionate* and must balance the rights of the individual to his or her family (or in more limited cases private) life and the public interest. In carrying out such a balancing exercise the decision making authority must take into account the nature of the family life enjoyed by the individual concerned, his level of integration, period of residence in the host contracting state, the age and history of the individual and various other elements.

In assessing the *public interest* the decision making authority must take into account

¹¹⁴ *East African Asians v United Kingdom* (Apps 4403-19/70, 4434/70, 4486/70, 4501/70) (1970) Yearbook 928.

¹¹⁵ See Bernadette Rainey, Clare Ovey and Elizabeth Wicks, *Jacobs, White and Ovey - The European Convention on Human Rights* (6 edn, OUP 2014) 353.

¹¹⁶ See [CG & Ors v Bulgaria](#) (App 1365/07), 24 April 2008.

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the seriousness of the crime and the risk posed by the individual to public security and public order.

Finally, the possibility of the family life to be continued in another state (such as the state to which the individual will be deported) must also be assessed, bearing in mind the fact that Article 8 ECHR does not provide a general right to reside in a particular state, but rather simply that family life should be maintained and protected. A definitive statement of the nature of the balancing exercise and the criteria to be taken into account can be found in the cases of *Moustaquim* and *Al-Nashif*.¹¹⁷

Finally, Article 7 Charter can also impact on the assessment procedure for an asylum claim, in particular limiting the nature of permissible questioning. In the case of *A, B and C* the Court of Justice held that under Article 7 Charter national authorities are not permitted to question applicants on their sex life. At the same time Articles 7 and 1 (on human dignity) Charter prevent applicants from performing sex acts, producing films of their sexual activity or undertaking medical testing to prove their sexual orientation.¹¹⁸ In the follow up national judgment, the **Dutch Council of State** implemented the judgment of the Court of Justice, but went further seeking to identify not only those measures that could not be taken under Article 7 Charter but also the actual measures employed by the national authorities in assessing the credibility of claims.

National Application of Article 7 Charter

Article 7 Charter appears in a number of judgments submitted by the judges and lawyers of the ACTIONES working group and is used in a number of different ways to secure differing outcomes in national cases. Firstly, the application of Article 7 CHARTER (and indeed the Charter as a whole) is excluded in the Irish case of *Smith v Minister for Justice, Equality and Law Reform*.¹¹⁹ While ostensibly a case dealing with a Union citizen child and a third country national parent, i.e. a *Zambrano* type situation¹²⁰ rather than an asylum and immigration case strictly speaking, it is a removal decision and does raise two questions that are of relevance to this module. Firstly, it demonstrates the *sensitivity of deportation and the general control of borders* as reflecting broader questions of sovereignty. It is interesting to note that the **Irish court** excluded the application of the Charter entirely as it deemed the situation as falling within the sovereign power of the state and hence outside the scope of Union law. Secondly, in a related point, this was possible as a

¹¹⁷ *Moustaquim v Belgium* (App 12313/86), 18 February 1991, Series A No 193, (1991) 13 EHRR 802 and *Al-Nashif v Bulgaria* (App 50963/99), 20 June 2002, (2003) 36 EHRR 655.

¹¹⁸ *A, B and C*.

¹¹⁹ *Smith v Minister for Justice, Equality and Law Reform* [2012] IEHC 113.

¹²⁰ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* EU:C:2011:124, [2011] ECR I-1177. For clarification see Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* EU:C:2011:734, [2011] ECR I-11315.

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matter of law because of the particular situation of Ireland and it's opting out of the Return Directive.

In relation to many of the cases in this section, particularly those of the **Greek** and **Romanian courts**, Article 7 Charter is not mentioned explicitly but rather these courts cite the analogous provision of the ECHR, namely Article 8 ECHR. A majority of these cases tend to deal with classic expulsion situations in which Article 8 ECHR is invoked in order to resist expulsion with the applicant's claiming a possible violation. The cases provide a good range of examples of the application of Article 8 ECHR. The **Greek case 1817/2015** demonstrates a classic instance of a settled and secure family life being protected by the use of Article 8 ECHR rights.

Possible limitations on Article 8 ECHR rights in the context of national security concerns are explored in the [*Romanian case of Case no 5473/2/2012*](#). In this later case, the decision resulting in expulsion arises from law and was adopted in accordance with procedures. It is therefore considered justified under Article 8 ECHR. Finally, while the **Romanian case of 12356/233/2013** is primarily concerned with the rights of the child under Article 24 CHARTER, Article 8 ECHR is used to bolster the conclusions of the court and to found a right to remain for both the child and the mother.

One clear and interesting use of Article 7 Charter is provided by the Dutch case of *A, B & C*,¹²¹ notable for a number of reasons. Firstly, it is focused on the privacy dimension of Article 7 Charter rather than the question of a family life. Secondly, and in a related fashion, it is used not in expulsion cases or removal cases but rather in the preliminary stage of investigating a claim for protection and in particular to limit the form of questioning that national authorities may engage in when seeking to establish the credibility of certain claims. It therefore demonstrates the potential reach of Article 7 CHARTER across the asylum process and its link to fundamental questions of human dignity. In *A, B & C* the **Court of Justice** held that **Article 1 CHARTER** (human dignity) and **Article 7 CHARTER** limited the type of questions and evidence permissible in the assessment of an asylum claim, in particular excluding detailed questions relating to an applicant's sex life and other evidence relating to sex acts. In the follow-up decision, the **Dutch Raad van State** went further than the Court of Justice in requiring information not only on the type of questions that were not asked but also relating to the form and type of questions that were put to the applicants in the assessment.

Conclusion - Judicial Dialogue

As mentioned above, a number of cases submitted in this section privilege references to the ECHR rather than the CHARTER and thus reference the jurisprudence of the ECtHR rather than the Court of Justice. **Two techniques of judicial dialogue** are evidenced in these cases.

¹²¹ *A, B and C*.

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Firstly, the **jurisprudence of the ECtHR is used as a classic source of binding precedent**, as reflects its nature as a supranational court with binding and ultimate interpretative authority over the ECHR.

Secondly, **the jurisprudence of the ECtHR is used by the Romanian courts in exercises of consistent interpretation, interpreting rights under the Romanian constitution in line with ECtHR jurisprudence.** This is made possible by provisions in the Romanian constitution providing for primacy of international agreements. As such it is an interesting example of the interaction between different (national and supranational) legal orders, a certain level of receptivity of a national constitutional order and the impact this may have on the interpretation and application of fundamental rights. A particularly strong example of this interaction is *case no. 34549/4/2013* in which a presumption of good faith applicable in asylum applications is extended to family reunification applications under the influence of the ECHR.

The *Greek case of 1817/2015* displays a further interesting combinative manoeuvre, here between EU secondary legislation and the ECHR. The obligation to hear the applicant contained in EU law is used to bolster the right to family life contained in Article 8 ECHR, with a specific obligation to hear the applicant in relation to her family life being imposed on the national authorities.

Finally, the case of *A, B & C* is a classic example of **direct judicial dialogue between a superior national court, in this case the Dutch Council of State, and the Court of Justice, to arrive at a conclusion making full use of the potential of the Charter to shape national processes and procedures.** The preliminary reference seeks direct answers from the Court of Justice in relation to sensitive matters of asylum procedure and permissible forms of questioning and affords the Court of Justice a good opportunity to reiterate broad principles regarding the respective roles of the applicant and the authorities in establishing grounds for applications for international protection and to provide more details regarding possible limitations on application procedures flowing from the Charter. It is interesting to note that in the **follow-up judgment of the Council of State**, the Council, while applying the judgment of the Court of Justice, goes beyond that judgment, placing an obligation on national authorities to not only refrain from certain practices but to identify the actual procedures used and their application in assessments of credibility.

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Casesheet 5.5 – The right to privacy as limitation to credibility assessment questions

Reference cases

CJEU: C-148-150/13, [A, B, C](#). Grand Chamber judgment of 2 December 2014, ECLI:EU:C:2014:2406

Follow-up judgment: Dutch Council of State, 201208550/1/V2, 201110141/1/V2, 201210441/1/V2¹²²

Core issues

Asylum application – persecution on the grounds of sexual orientation – credibility assessment – permissible measures in assessing credibility - Article 7 CHARTER – right to privacy

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
• The Netherlands	• Right to Privacy • Persecution on grounds of sexual orientation	• Qualification Directive 2004/83/EC • Article 7 CFR	• Raad van State, Netherlands • Court of Justice of the European Union	• Preliminary Reference	• Annulment of administrative decision

Timeline representation



Case(s) description

a. Facts

All three applicants made applications for asylum based on persecution as homosexuals in their countries of origin. All three applications were rejected on grounds of credibility as to the true sexual orientation of the applicants. One applicant had failed to indicate his sexual orientation on his initial application. Others gave statements that were vague and inconsistent. Upon rejection, one applicant provided videos of him engaging in sex acts and another offered to undergo medical examination in order to 'prove' his sexual orientation. The referring Court had concerns regarding the nature of questioning and proof and the compatibility of assessment of a claim regarding the sexual orientation of an applicant with the requirements of **Articles 1** (human dignity) and **7** (privacy) of the **Charter** and therefore

¹²² Catherine van Boven-Hartogh, ACTIONES Case note, Dutch Council of State, 201208550/1/V2, 201110141/1/V2, 201210441/1/V2.

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referred the matter to the Court of Justice having regard to **Article 4 of the Qualification Directive** and the Charter.

b. Legal issues

Whether the manner in which national authorities assess the credibility of an alleged sexual orientation is compatible with the Qualifications Directive and the Charter of Fundamental Rights.

c. Reasoning of the CJEU (if applicable)

The Court of Justice held that assessments of application for asylum, including credibility assessments, must be conducted in compliance with Charter rights and in particular Article 7 Charter. While the details of asylum application procedures are generally a matter for national law, a number of conditions flow from Union law. The assessment of any application should be conducted in cooperation with the applicant and it is for the applicant to advance any particular claims including regarding sexual orientation. Furthermore, assessments must be conducted in compliance with the Charter, in particular Article 7 Charter on the right to privacy, and authorities may be required to modify their procedures in order to ensure compliance. Account should also be taken of Article 4(5) of the Qualification Directive detailing circumstances where documentary evidence may not be required, the authorities being permitted to rely on the statements of the applicants.

In relation to the specific situation of individuals claiming a particular sexual orientation, the Court outlined the limitations that may exist on the type of questioning and the assessment of this credibility. Firstly, it held that questioning based on ‘stereotypical’ notions may constitute a starting point, but only a starting point for an assessment. To hold otherwise and in particular reject an application based solely on the fact that an applicant is unaware of certain organisations would be contrary to the need to conduct an individual assessment, having regard to the specific circumstances of the applicant. Secondly, it held that detailed questions regarding sex acts would violate Article 7 Charter. Thirdly, it found that authorities cannot accept videos of sex acts, the performance of sex acts and of medical ‘tests’ regarding sexual orientation. Aside from the questionable probative value of such evidence, accepting it would violate the applicant’s human dignity under Article 1 Charter. Moreover, it would encourage others to submit similar evidence leading to a de facto requirement of such evidence. Finally, it found the fact of non-disclosure of sexual orientation earlier in the application process would not be fatal to credibility, having regard to the sensitivity of the subject matter.

d. Outcome at national level

The **Raad van State** held that in general, the credibility assessment as conducted by the competent Dutch authorities was in line with the judgment of the CJEU and thus with EU law. The authorities do not ask questions about sexual activities of the foreign national and do not take into account any evidence such as films.

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However, the **Raad van State** also held that, whereas the CJEU ruling gives a general framework within which the competent authorities of the Member States carry out the actual assessment, the Dutch authorities had failed to show how this assessment was carried out in individual cases. It was not only relevant to know what the authorities did not do or ask, but also what questions they did ask, how the answers to these questions were weighed and how the statements that lacked credibility concerning the problems the foreign national had already faced because of his alleged sexual orientation influenced the credibility of the claim of sexual orientation as such. Because all this was insufficiently clear, the administrative courts were not able to effectively rule on the credibility assessment in a given individual case. The decisions in the cases before the court were therefore annulled due to insufficient grounds for their decision being provided by the authorities.

Analysis

a. Role of the Charter

Article 7 Charter and in particular the right to privacy limits the form of questions that could be asked and the types of proof that could be requested when assessing the credibility of a claim of sexual orientation.

b. Judicial dialogue

The national court sought clarity on the manner in which the competent authorities are allowed to carry out an assessment of the credibility of an alleged sexual orientation, in order to protect the fundamental rights enshrined in the EU Charter and at the same time achieve a higher level of harmonization of asylum procedures within the Union. The national court integrated the preliminary ruling delivered by the Court of Justice in *A, B and C*, a preliminary reference sent by the same Dutch court.

c. Remedies

The initial administrative decisions refusing asylum status were annulled.

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Casesheet 5.6 – The role of ‘family life’ protected by Article 7 Charter in keeping together an asylum seeker with the daughter-in-law who is dependent on her under Dublin III Regulation provisions (Article 16 – dependent persons, Article 17 – discretionary clause)

Reference cases

CJEU, C-245/11, K., Grand Chamber judgment of 6 November 2012, EU:C:2012:685

Core issues

Situations of dependency where Member State(s) has an obligation to keep together an applicant for international protection and her relative who does not fall under the category of persons enumerated in Article 16 – dependent persons of Dublin III Regulation;

CJEU establishes on the basis of Article 7 Charter a duty on the Member States to keep together an asylum seeker with her daughter in law, who although has her husband with her, is dependent on the asylum seeker due to her illness and newly born child, under Article 15(2) of Regulation 343/2003/EC (Dublin II Regulation).

Relevance of the CJEU Grand Chamber judgment in K. and others under the current Dublin III provisions: given the restrictive definition of category of persons who can provide assistance under Article 16 – dependent persons of Dublin III Regulation (child, sibling, parent) unlike previous Article 15 Dublin II Regulation (open definition of ‘relative’), is the obligation to keep together the asylum seeker with the daughter in law still relevant under Dublin III Regulation? If yes, is the obligation deriving from Article 16 or of Article 17 – discretionary clause?

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
• Austria	• Asylum and immigration	• Regulation 343/2003/EC (Dublin II Regulation)	• Court of Justice of the European Union	• Preliminary Reference	• Quashing the administrative decision to transfer the asylum seeker in Poland.

Timeline representation



Case(s) description

a. Facts

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K arrived in Poland via Byelorussia after having left her country of origin of Chechnya. Upon arrival in Poland she applied for asylum. While the asylum application was being processed she moved to Austria where her son, daughter-in-law and grandchildren were residing after having already been recognised refugee status. K's daughter-in-law had been the victim of rape in Chechnya and as a result contracted HIV. She also suffered from post-traumatic stress disorder and had suffered other physical illnesses making her incapable of caring for her children without assistance. In Chechnya, K and her daughter-in-law had formed a close relationship, with the daughter-in-law confiding in K in relation to the rape and her HIV infection. K's daughter-in-law had only informed her husband of her HIV status and feared violent treatment on the basis of family and cultural norms if other members of her family became aware of the rape.

K applied for asylum in Austria but was refused on the basis that an asylum claim was already pending in Poland. K appealed the decision to the Asylgerichtshof which referred two questions relating to the interpretation of Articles 15(2) and 3(2) of Regulation 343/2002/EC, the so-called humanitarian and sovereignty clauses respectively. In particular whether an obligation to keep the asylum seeker and the daughter in law result from these Articles in conjunction with Articles 3 and 8 ECHR and Articles 4 and 7 Charter.

b. Legal issues

Whether a Member State could be obliged under certain circumstances to accept an application for asylum on the basis of Article 15(2) Regulation 343/2002/EC, in particular where there exists a risk of violation of fundamental rights in particular Article 4 CHARTER on human dignity and Article 7 CHARTER on family life, including in situations where no formal request has been received from the Member State otherwise responsible.

Whether a Member State may be obliged to accept an application for asylum on the basis of Article 3(2) Regulation 343/2002/EC where there exists a risk of a violation of fundamental rights, in particular those found in Articles 4 and 7 CHARTER.

What role should the jurisprudence of the European Court of Human Rights play in the interpretation of Articles 4 and 7 CHARTER.

c. Reasoning of the CJEU

The Court of Justice found that Article 15(2) Regulation 343/2002/EC was applicable in the present circumstances. In particular it found that:

- The relationship of 'dependency' mentioned in Article 15(2)¹²³ could be one where the asylum seeker is dependent on the person already legally present in the relevant Member State *or* visa-versa, meaning situations of dependency such as

¹²³ Article 15(2) Dublin II Regulation reads as follows: "*In cases in which the person concerned is dependent on the assistance of the other on account of pregnancy or a new-born child, serious illness, severe handicap or old age, Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States, provided that family ties existed in the country of origin.*"

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those at issue in the present case, where the asylum seeker is the one providing the care. This was based on a textual reading of Article 15(2) and a teleological reasoning which privileged the maintenance of ‘family life’.

- The definition of family member contained in Article 15(2) is wider than that found in Article 2(i) Regulation 343/2002/EC. The daughter-in-law or the grandchildren of the asylum seeker must be covered by the concept of ‘another relative’ stipulated by Article 15(2) Dublin II Regulation. This interpretation was deduced from the obligation to preserve ‘family unity’.
- Article 15(2) of Dublin II Regulation applies even when the asylum seeker was already present in the relevant Member State where family members reside. This finding was based on a teleological reading, implying the provision should apply both in 'bringing family members together' and to 'keep' family members together.
- In contrast to Article 15(1), situations falling within the scope of Article 15(2) Dublin II Regulation normally imply an obligation on the part of the relevant Member State to accept the asylum application. Only in exceptional circumstances (which were not mentioned in the present case) could such an obligation be set aside.
- Unlike in Article 15(1) situations, for Article 15(2) Dublin II to apply, the Member State who would otherwise be responsible does not need to make a formal request to the second Member State on whose territory family members already reside. Such a requirement is not mentioned in the text of Article 15(2). In any case, this request was interpreted as a formality which would run contrary to the obligation to ensure a swift determination of the asylum claim, incumbent under Dublin II Regulation.

In light of the above finding regarding Article 15(2) Dublin II Regulation, the Court found it unnecessary to address the second question regarding Article 3(2).

d. Relevance of the CJEU under the revised Dublin III Regulation

The CJEU Grand Chamber judgment in the *K. case* was delivered in light of the humanitarian clause as set out in Dublin II Regulation. However a few months before the delivery of the judgment, the revision of Article 15 Dublin II Regulation was already approved. Article 15(2) Dublin II Regulation became the current Article 16 – dependent persons of the Dublin III Regulation.¹²⁴ Among the changes introduced by Article 16, is also

¹²⁴ Article 16 - Dependent persons reads as follows: “1. *Where, on account of pregnancy, a new-born child, serious illness, severe disability or old age, an applicant is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant, Member States shall normally keep or bring together the applicant with that child, sibling or parent, provided that family ties existed in the country of origin, that the child, sibling or parent or the applicant is able to take care of the dependent person and that the persons concerned expressed their desire in writing.*

2. *Where the child, sibling or parent referred to in paragraph 1 is legally resident in a Member State other than the one where the applicant is present, the Member State responsible shall be the one where the child, sibling or parent is legally resident unless the applicant’s health prevents him or her from travelling to that Member State*

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the restrictive definition of the category of persons who can provide assistance. Namely only the child, sibling and parent who are legally resident in the Member State where the asylum seeker is located are mentioned, while Article 15 of the Dublin II Regulation referred to the open notion of ‘another relative’. This permitted the CJEU to broadly interpret the notion in light of the ‘family unity’ so as to also include also the daughter-in-law of the asylum seeker among the category of ‘dependent persons’. The conclusion reached by the CJEU, finding an obligation on Member States to keep the asylum seeker with the daughter-in-law in the circumstances of the case, cannot be set aside by the reformulation of Article 15 Dublin III Regulation, since this would be contrary to Article 7 Charter. Under current Dublin III Regulation provisions, this obligation could be deduced from either a broader interpretation of Article 16 or an obligation deriving under the discretionary clause (Article 17 Dublin III Regulation). Situations of ‘dependency’ that were covered by the case of K., which are now excluded from a strict application of Article 16 Dublin III regulation, must be examined under the discretionary clause of Article 17 Dublin III Regulation.

Analysis

a. Role of the Charter

The objective of maintaining family life, reflecting one of the safeguards protected by the right to a family life found in Article 7 Charter figures prominently in the reasoning of the Court. As a legal ground for ‘maintaining and preserving family unity’, the Court refers to the recitals and the provisions of Dublin II Regulation primarily and additionally to the Charter provisions.

b. Judicial dialogue

The case is the result of a preliminary reference from the Austrian Asylgerichtshof. In its preliminary reference, the Austrian regional court expressly referred to obligations deriving from both Articles 3 and 8 ECHR and Articles 4 and 7 of the Charter that might require national authorities additional obligations than those expressly stipulated by the Dublin II Regulation. Therefore the national court is behind the active promotion and use of the EU Charter.

c. Remedies

for a significant period of time. In such a case, the Member State responsible shall be the one where the applicant is present. Such Member State shall not be subject to the obligation to bring the child, sibling or parent of the applicant to its territory.

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 45 concerning the elements to be taken into account in order to assess the dependency link, the criteria for establishing the existence of proven family links, the criteria for assessing the capacity of the person concerned to take care of the dependent person and the elements to be taken into account in order to assess the inability to travel for a significant period of time.

4. The Commission shall, by means of implementing acts, establish uniform conditions for the consultation and exchange of information between Member States. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).”

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Quashing the administrative decision of transferring the asylum seeker to Poland.

d. Additional relevant cases

N.S. figures prominently in the reasoning of the Advocate General but is not mentioned by the Court of Justice. Additional relevant case law underlining the importance of the right to family life in cases of different treatment of refugees and beneficiaries of subsidiary protection concerning family reunification include: *Pajić v Croatia*, ECtHR Judgment of 23 Feb 2016, Application No. 68453/13; *Taddeuci v Italy*, ECtHR Judgment of 30 June, 2016, Application No. 51362/09; *Biao v Denmark*, ECtHR Judgment of 24 May 2016, Application No. 38590/10.

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Casesheet 5.7 - National Security and Article 7 Charter

Reference cases

Case no. 5473/2012, Court of Appeal of Bucharest

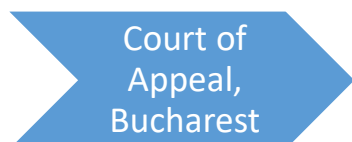
Core issues

Long term residence permit issued to students – Irregular stay – International protection claim denied – Application for an extension of the right to residence due to his marriage to a Romanian citizen – Application denied due to activities of the nature to present a threat to national security

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
• Romania	• Refusal of residence • Reasons of national security	• NA	• Court of Appeal, Bucharest	• Consistent Interpretation	• Ordering detention and removal

Timeline representation



Case description

a. Facts

AMN, Pakistani citizen, resided in Romania on the basis of a study visa valid for the Medicine and Pharmacy University of Iasi. In March of 2011 AMN was found illegally present. He was issued with a return decision to depart from Romania within 15 days but failed to comply. He submitted an asylum application, which was rejected. During this period he enjoyed a temporary right of residence on the basis of his status as a claimant of international protection. In May of 2012 he submitted an application to the Romanian Bureau for Immigration for an extension of his right of residence based on his marriage to a Romanian citizen. The application was rejected on the ground of national security. AMN contested the decision rejecting his application for an extension of his residence permit claiming a breach of his rights under Article 8 ECHR.

b. Legal issues

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Whether the applicant's Article 8 ECHR rights can be interfered with for reasons of national security.

c. Reasoning of the Court

Based on classified evidence supplied by the state intelligence agency (the SRI) and accepted by the Court, it was held that AMN engages in activities the nature of which constitutes a threat the national security.

In light of national law and Romania's UN obligations in the context of the international fight against terrorism, the fact that AMN claimed a right of residence as the spouse of a Romanian citizen does not exclude the possibility of issuing a declaration stating him to be an undesirable person. Furthermore, rejection of his right of residence does not constitute a breach of Article 8 ECHR. Even if the measure is an infringement of his private and family life, it is provided for by law, has a lawful purpose and it is necessary in a democratic society and is therefore justified. Procedural guaranties are in place meet the requirements of Article 6 ECHR.

d. Outcome at national level (follow-up judgment of the referring court)

The Court declared AMN an undesirable person on the grounds of national security for a period of 10 years and ordered that AMN be taken into custody for a maximum of 18 months until his removal from the territory of Romania.

Analysis

a. Role of the Charter

Article 8 ECHR standards are applied.

b. Judicial dialogue

The technique of consistent interpretation was used in order to argue why it was allowed to intrude in the Applicant's private and family life, without to infringe his fundamental right, and also, without to violate the fundamental right to asylum, protected by the national Constitution and also by Article 8 ECHR.

c. Outcome

Order of detention and removal.

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Casesheet 5.8 – unmarried couple benefiting of the right to family reunification

Reference case

Case no. 34549/4/2013, Court of first instance of Romania

Core issues

Right to family reunification - Directive 2003/86/EC – Right to respect for family life – Taking into consideration the children’s best interest – conditions for the operation of the presumption of good faith – unmarried couple benefiting of family reunification

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
• Romania	• Family reunification	• Directive 2003/86/EC	• Court of First Instance, Bucharest	• Reference	•

Timeline representation



Case(s) description

a. Facts

The complainant, BK, an Afghan citizen, was granted refugee status. He then made a family reunification request. In his application he mentioned that he is married to Mrs GG and has 6 children with her, namely T, E, B, R, R and N. They are identified in Mrs GG’s ID, where the children are indicated only by their surnames. By Decision of the IGI, the family reunification request was refused on the grounds that the complainant did not establish a relationship and that his statements were inconsistent with an interview given in 2002 as part of the procedure awarding him refugee status.

Mr. BK began proceedings contesting the decision of the IGI during which he submitted evidence proving a biological relationship between him and five of the six children. The final child, B, could not be found in time for the medical test and no DNA samples of B were available in order to prove a biological link.

b. Legal issues

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- Whether a presumption of good faith operates in the context of family reunification applications.
- Whether an unmarried couple can benefit from provisions relating to family reunification.

c. Reasoning of the Court

The Court found that the relevant provisions of the Romanian constitution should be interpreted consistently with international agreements to which Romania is a party, including the United Nations Convention on Human Rights.

Article 15 of Law no.122/2006 contains a presumption of good faith applicable in asylum applications in the absence of documentary evidence if a number of conditions are met.

In *Marckx v. Belgium* (request no.6833/74) the ECtHR recognized that support and encouragement of the traditional family is in itself legitimate or even praiseworthy. However, in pursuit of this goal, recourse must not be had to measures whose object or result is, as in the present case, to prejudice the "illegitimate" family; members of an "illegitimate" family enjoy the guarantees contained in Article 8 ECHR on an equal footing with the members of the traditional family.

The Court noted that Mr BK enjoys refugee status and is present in Romania and that medical testing demonstrated a biological relationship with five of the six children. For the purposes of assessing whether the children were in fact minors, the date of the application should be taken into account rather than that of the judgment. The position of the applicant and his children should not be prejudiced by delays outside their control. Regarding the sixth child, B, the Court found that he should be recognised as the child of BK in light of the statements of Mr BK, the inclusion of B on the official identification and travel documents of Mrs GG and the issuance of a birth certificate in his name.

The Court found the presumption of good faith is applicable to a request for family reunification. While Article 15 refers only to an application for asylum procedure, the Court held that that a request for reunification of the family is a first step in a possible asylum procedure concerning the family members not present in Romania.

Regarding Mrs. GG, the expert report states that she is the mother of the 5 children mentioned above. The above reasoning regarding the paternity of the sixth child, B, alongside the operation of the presumption of good faith would indicate that B was born from a relationship between Mrs GG and Mr BK. In any case, even assuming that the marriage is not proved, the Court held that the complainant, Mrs GG and the six children form a natural family, which must benefit from the same protection as the legal family under the Romanian Constitution. A similar conclusion flows from the application of Article 8 ECHR, as interpreted in *Marckx v. Belgium*.

While national and European legislation allow different rules regarding cohabitants and to exclude them from the benefit of family reunification, these provisions do not apply in this case. These provisions however have the objective of preventing the arrival of persons who have no connection to the beneficiary of the international protection and who seek leave to

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enter and remain in Romania solely on the basis of a simple statement in the sense of the existence of a relationship of cohabitation. The facts, alongside the operation of a presumption of good faith in the present case, demonstrate a real family life up to and including the present day between the applicants.

Analysis

a. Role of the Charter

The Charter is not mentioned explicitly.

b. Judicial dialogue

The ECtHR judgment of *Marckx v Belgium* was applied though the use of consistent interpretation in light of constitutional provisions providing for conform interpretation of rights comparable to those found in international agreements. The reference was made in order to support the decision of the national court to grant similar protection to an “illegitimate family” (unregistered partners with 6 children), as to the protection allowed for legitimate families (married with children).

Outcome of Judicial Application of Article 7 Charter

The main outcome of the cases submitted for the working group tend to confirm the on-going application of Article 8 ECHR in the context of family reunification cases particularly in the case of expulsion and, to a lesser extent, admission procedures and also deal with the more sensitive issue of refusal of residence on grounds of national security. The one important development under Article 7 Charter relates to the questioning practices and the limitations imposed on those practices under the privacy element of Article 7 CHARTER, as outlined by the Court of Justice in *A, B & C*.¹²⁵ In particular the main findings of the judgments submitted to the working group can be summarised as follows:

- A presumption of good faith exists regarding the establishment of a family life and in particular regarding the paternity of children, particularly where a pre-existing relationship is present between the parents of the children and DNA tests have demonstrated paternity in relation to other children of the mother.¹²⁶
- National security interests can justify the expulsion or non-renewal of a residence permit for an individual where it is provided for in law and sufficient procedural safeguards exist.¹²⁷

¹²⁵ Ibid.

¹²⁶ Case No. 34549/4/2013 of the Court of First Instance, Bucharest 4th section.

¹²⁷ Case No. 5473/2/2012 of the Court of Appeal, Bucharest.

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- Proportionality requirements may require a flexible procedure regarding renewal of residence permits where to hold otherwise might violate the individual's right to family life.¹²⁸
- Determination of the existence of a family life on the basis of marriage should be assessed in light of the circumstances of the case and in particular can be discounted where evidence exists of a marriage of convenience. This is particularly the case where the individuals do not speak a common language and have a limited experience of a common life.¹²⁹
- Asylum applicants may not be questioned on the details of their sex lives nor can evidence, including videos, of sex acts be accepted.¹³⁰
- Failure to reveal sexual orientation early in an application for asylum is not necessarily fatal to credibility of an applicant.¹³¹
- Administrative authorities must provide details regarding the form of questions posed to ensure that respect for private life and human dignity is maintained.¹³²

¹²⁸ Case No. 1817/2015 of the Administrative Court of First Instance, Thessaloniki.

¹²⁹ Case No. 268/44/2012 of the Court of Appeal, Galați.

¹³⁰ *A, B and C* (n 113).

¹³¹ *Ibid.*

¹³² Council of States, Netherlands, 201208550/1/V2, 201110141/1/V2, 201210441/1/V2

ARTICLE 10(1) CHARTER – Freedom of thought, conscience and religion

Overview of issues concerning Article 10 Charter

Article 10 of the Charter refers to the freedom of thought, conscience and religion and corresponds to Article 9 of the European Convention on Human Rights (ECHR). In accordance with Article 52(3) Charter, Article 10 Charter should therefore have the same scope and meaning of Article 9 ECHR.

Religion is one of the grounds of persecution outlined in Article 1A of the Geneva Convention and is one of the relevant reasons for granting refugee status under the Qualification Directive. It has been interpreted by the Court of Justice in *Y and Z* in which it noted that the Directive protects individuals from infringements of their rights under Article 10 Charter. However, not all infringements of the right of freedom of religion constitute persecution for the purposes of the Qualification Directive. If an infringement could be justified under the Charter and ECHR it will not constitute persecution. Even unjustified acts must reach a certain level of seriousness in order to qualify as persecution. In particular any such infringements should constitute a risk of inhuman or degrading treatment. National authorities should not however make a distinction between ‘core’ and ‘non-core’ elements of religious belief or practice and the possibility of abstaining from certain religious practices should not form part of any assessment under the Directive. According to the CJEU, “the system provided for by the Directive, when assessing whether, in accordance with Article 2(c) thereof, an applicant has a well-founded fear of being persecuted, the competent authorities are required to ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subject to acts of persecution.” (para.76) Similarly, prohibitions on public acts of worship may constitute persecution. The gravity of any infringement should also be based on a subjective assessment of the importance of the practice to the individual concerned. The Court concluded that “*In assessing an application for refugee status on an individual basis, those authorities cannot reasonably expect the applicant to abstain from those religious practices.*” (para. 80)

Asylum application on religious persecution are particularly difficult to assess since they require evaluation of the inner convictions of the asylum seeker, which raises numerous difficulties for examiners to ascertain, as proved by the case heard by the Dutch Council of States. (case no. **201109839/1/V2**. discussed below) The **Dutch Council of State** had to assess the appropriateness of a credibility assessment carried out by national authorities regarding conversion to Christianity.

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Casesheet 5.9 – Art. 10(1) Charter influencing the (methods of) assessment by competent national authorities of the credibility of an alleged religious conviction, either assumed by birth or through conversion.

Reference cases

Council of State, the Netherlands, case 201109839/1/V2, judgment of 23 May 2013¹³³

CJEU, Y and Z, C-71/11 and C-99/11, (Persecution on grounds of Religion), Judgment of 5 Sept 2012 EU:C:2012:518.

Core issues

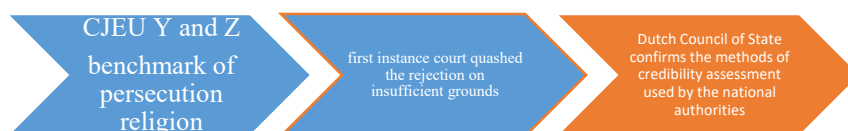
Conformity of methods of conducting the credibility assessment of an alleged religious conviction with the requirements of EU law, including Article 10(1) Charter.

Deciding on whether to address a preliminary reference on the application of the CJEU judgment in Y and Z to the present case on the issue of the credibility assessment or whether the acte clair doctrine outlined in the case of CILFIT was applicable (meaning a national court of last instance is not required to make a reference to the Court of Justice where the interpretation of the provision of Union law is sufficiently clear, having regard to the particularities of Union law). The Council of State of Netherlands decided that the judgment in Y and Z was sufficiently clear. However, as pointed out by the national judge, an ACTIONES collaborator,¹³⁴ the Y and Z judgment refers not to the assessment of the credibility of applicants but rather to determining which acts may constitute persecution for the purposes of awarding asylum.

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
• the Netherlands	• Asylum	• revised Qualification Directive (2011/95)	• Dutch Council of State	• Consistent interpretation	•

Timeline representation



¹³³ Catherine van Boven-Hartogh, ACTIONES Case note, Judicial Division of the Dutch Council of State, 201109839/1/V2, supreme, 24 May 2013.

¹³⁴ Catherine van Boven-Hartogh, Judge at the District Court of Zeeland-West-Brabant, Netherlands.

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Case(s) description

a. Facts

The applicant allegedly converted from Islam to Christianity in his country of origin, Iran. The Dutch authorities denied his application for asylum because the conversion was deemed not credible. The Court of First instance annulled the decision, because the authorities had relied too heavily on the applicant's (incomplete or wrong) answers to factual questions about Christianity where these have nothing to do with the faith and inner conviction of the applicant. Since the applicant had explained how and why he converted, how he expresses his faith and did not display a complete lack of knowledge about Christianity, the authorities had given insufficient grounds for denying his application. The authorities – the Minister for Immigration and Asylum – appealed this decision to the Judicial Division of the Council of State.

b. Legal issues

The legal issue at hand is whether the manner in which the Dutch authorities carry out the credibility assessment of an alleged religious conviction is compatible with the requirements of EU law as set in the Qualification Directive (Article 4), Article 10(1) CHARTER and the jurisprudence developed by the CJEU, in particular *Y and Z*.

c. Reasoning of the Dutch Council of State

The **Dutch Council of State** had to review whether the conversion to Christianity claimed by the applicant was credible, and whether the administrative authorities erred in their finding a lack of credibility due to incomplete or wrong answers given by the applicant to questions concerning Christianity. The Court concluded that the authorities correctly took into account that the applicant had converted, which was the result of a conscious and deliberate choice. Also, they did not predominantly base their decision on factual questions, but also on statements regarding the process of conversion. The questions about the applicant's baptism and church visits were in fact not factual questions but related to the conversion, as these elements form an integral part of the conversion by the applicant and the meaning his new faith holds to him. The authorities could therefore reasonably expect the applicant to give detailed statements about these aspects. This was particularly the case considering the applicant comes from a country in which conversion to a religion other than Islam is punishable by law and unacceptable within society, rendering the consequences of conversion more serious.

Given this reasoning, and taking into account the judgments of the CJEU in cases C-71/11 and C-99/11, *Y and Z*, and case C-283/81, *CILFIT*, the Court saw no reason to request a preliminary ruling on the matter. The Court held there was no doubt the credibility assessment of the Dutch authorities was compatible with the rights enshrined in the EU Charter and the duty to cooperate contained in Article 4 of the Qualification Directive.

Analysis

c. Role of the Charter

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A sufficiently serious violation of Article 10 CHARTER is deemed to constitute persecution within the meaning of the Qualification Directive in light of the CJEU preliminary ruling in *Y and Z*.

d. Judicial dialogue

The judgement engaged in consistent interpretation with CJEU jurisprudence and application of the *CILFIT doctrine* in deciding whether to address a preliminary ruling. The Dutch case is an example of the application of the *acte clair* doctrine outlined in the case of CILFIT, meaning a national court of last instance is not required to make a reference to the Court of Justice where the interpretation of the provision of Union law is sufficiently clear, having regard to the particularities of Union law. The Council of State therefore was of the opinion that the judgment in *Y and Z* was sufficiently clear in its application. However, as pointed out by the national correspondent, Catherine van Boven-Hartogh, *Y and Z* refers not to the assessment of the credibility of applicants but rather in determining which acts may constitute persecution for the purposes of awarding asylum.

The national court referred to the ECtHR in the case of *N v Sweden*, 20 July 2010, app. No. 23505/09 when it ruled that the authorities can reasonably expect the applicant to give detailed statements on aspects like baptism and church visits.

e. Remedies

No remedies *in casu*.

f. Additional relevant cases

CJEU: *X, Y and Z*, C-199/12, C-200/12 and C-201/12, EU:C:2013:720 (Homosexuality – grounds);

A, B and C, Joined Cases C-148/13 to C-150/13, EU:C:2014:2406 (Homosexuality – credibility assessment)

ECtHR: *F.G. v Sweden* (reticence in relying on religious conversion as grounds for persecution, duty of cooperation of national authorities)

For guidelines on burden sharing and methods of credibility assessment, see: [*Credibility Assessment in Claims based on Persecution for Reasons of Religious Conversion and Homosexuality: A Practitioners Approach*](#) written by judges Uwe Berlit, Harald Doerig & Hugo Storey, judges at the German Supreme Administrative Court, Storey is a senior judge at the UK Upper Tribunal.

ARTICLE 10(2) Charter – right to conscientious objection in asylum proceedings (acts and reasons for international protection status)

Overview of issues concerning Article 10(2) Charter

Article 10(2) of the Charter recognises the right to conscientious objection. Article 10 paragraph 2 of the Charter explicitly recognises the right to conscientious objection, whereas Article 9 of the ECHR protects the general right to freedom of thought, conscience and religion. Both Article permit limitations.

The cases submitted for consideration to the ACTIONES Project dealt with the issue of Ukrainian nationals fleeing the country on account of refusing to serve military service against their co-nationals following the Ukrainian war. **National courts from Netherlands and Lithuania** were faced with the issue of whether they can grant refugee status to ‘conscientious objectors’ that might face punishment if returned to Ukraine. In deciding this issue, the Dutch court relied on the CJEU standards developed in the *Shepherd* case.¹³⁵ This preliminary ruling addressed the **definition of conscientious objector who can benefit from refugee status** under Articles 9(2)(e) and 12(2) of the Qualification Directive. The Directive gives examples of what could be regarded as an “act of persecution.” According to Article 9(2)(e), an act of persecution is the “*prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2).*” According to this later provision, exclusion clauses cover both war crimes and crimes against peace. This provision raises several questions connected to the right protected by Article 10(2) CHARTER. For instance, if military service does not include an act falling under the exclusion clauses but is irreconcilable with a person’s conscience, can this be qualified as an act of persecution; and what are other forms of relevant harms for conscientious objection. These questions as well as the involvement necessary to trigger the threshold of war crimes appeared in a case before a German court.

Mr Shepherd, a US citizen, voluntarily enlisted and subsequently extended his military service in the US’s army. He was sent first to Germany and then to Iraq to serve as a helicopter maintenance mechanic. He never directly participated in combat activities. After receiving his second travel order to return to Iraq, he left the army on account that he can no longer fulfil its military duties as he considered the Iraq war illegal and he refused to engage in war crimes. After spending two years in hiding, he then applied for asylum in Germany, on account that if returned to the US, he will face criminal prosecution and desertion will affect his life “by putting him at risk of social ostracism in his country.” (para. 17) The German Migration Office rejected his asylum application and Mr Shepherd challenged the refusal before the referring court (**Administrative Court of Munich**). The questions which the

¹³⁵ Case C-472/13, Judgment 26 February 2015, ECLI:EU:C:2015:117.

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referring court had to answer was whether the harm he will face if returned to the US would amount to persecution within the meaning of Article 9 Qualification Directive.

The German referring court addressed 8 preliminary questions, seeking guidance from the CJEU on how to interpret Article 9(2)(e) and its relationship with Article 12(2) of the Qualification Directive (QD), and whether its test,¹³⁶ previously applied in cases of persecution due to desertion, is adequate or in need of amendment. In short, the reference contained the following questions: **(1)** whether Article 9(2) QD based ‘military service’ includes only direct participation in combat tasks or also duties confined to logistical, technical support for the unit without actual combat; **(2)** whether the commission or acts of crimes set out in Article 12(2) must be systematic in the conflict, or may be committed on an individual basis; **(3)** whether the excluded acts must continue into the future, or it is sufficient that they occurred in the present; **(4)** what is the relevance of the prosecutions of the excluded acts whether before the ICC or national courts; **(5)** does an authorisation of war by the international community or UNSC preclude refugee protection; **(6)** whether the activities of the asylum seeker need to reach the threshold of war crime or crime against humanity or can refugee protection be granted even before that threshold is reached; **(7)** whether the asylum seeker needs to first avail of the ordinary procedure for conscientious objection, or is refugee protection also a possibility in the case of a particular decision based on conscience; **(8)** whether ‘dishonourable discharge from the army, the imposition of a prison sentence and the social ostracism and disadvantages associated therewith constitute an act of persecution within the meaning of Article 9(2)(b) or (c) of Directive 2004/83/EC’ (para. 21)

The CJEU found that:

(1) Article 9(2)(e) QD does cover logistical or support personnel, even if they do not directly participate in direct combat activities, but only indirectly in the commission of such crimes (paras.35-37);

(2) The fact that the asylum seeker could not be prosecuted under criminal law, in particular before the International Criminal Court, cannot preclude protection arising from Article 9(2)(e) of Directive 2004/83 (para. 37);

(3)- (4) The crimes provided by Article 12(2) QD do not need to include exclusively ‘war crimes that have already been committed or are such as to fall within the scope of the International Criminal Court’s jurisdiction, but also those in which the applicant for refugee status can establish that it is highly likely that such crimes will be committed’ (para. 39); however “there needs to be a sufficient body of evidence which alone is capable of establishing, in view of the circumstances in question, that the situation of that military service makes it credible that such acts will be committed” (para. 40);

(5)-(6) the legitimisation of a certain military intervention by international consensus or by a UNSC mandate/resolution together with a domestic legislation which effectively prosecutes war crime would make it unlikely that a soldier would commit war crimes. (para. 41) “The

¹³⁶ This test commonly included: 1) determination of the level of involvement of a member of the armed forces in military operation; 2) determination of penalties for his desertion.

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existence, in the legal system of those States, of legislation penalising war crimes and of courts which ensure the effective punishment of those who commit such crimes is liable to render implausible the hypothesis that a soldier of one of those States could be led to commit such crimes and, accordingly, may in no case be disregarded.” (para. 42)

On the legality of the war in Iraq, the CJEU concluded that, the Iraq war was legal since armed intervention was authorised by a UNSC resolution, thus reflecting the consensus on the part of the international community. Although, the Court recognised also the possibility that acts contrary to the very principles of the Charter of the United Nations might be committed in war operations, the fact that the armed intervention takes place in such a context must be taken into account.” (para. 41)

(7) As regards the connection between availing of the ordinary procedure for conscientious objection and refugee protection, the CJEU concluded that “refusal to perform military service must constitute the only means by which the applicant for refugee status could avoid participating in the alleged war crimes” (para. 48); therefore, if the applicant had at its disposal a procedure obtaining conscientious objector status he should have first availed of it in order to be eligible for refugee status. The fact that Mr Shepherd voluntarily enlisted and subsequently re-enlisted, means that he had not availed himself of a procedure for obtaining conscientious objector status. “The only exception to this would be where the applicant could prove why an analogous procedure was not available to his/her specific claim.” (paras. 44, 45)

(8) As regard the question of whether a prison sentence, dishonourable discharge or social ostracism for military desertion could constitute acts of persecution under Article 9(2)(b) and (c), the Court concluded that national authorities essentially need to determine whether prosecution and penalties for refusal of military service are disproportionate. (para. 50) *In casu*, the CJEU only verified necessity and proportionality *stricto sensu*. The CJEU held, that a possible custodial sentence of 100 days to 15 months, or even five years for desertion from the US for military was not so disproportionate or discriminatory so as to amount to acts of persecution. (para.52) According to the Court, “nothing in the file submitted to the Court suggests that such measures clearly go beyond what is necessary for the State concerned to exercise its legitimate right to maintain an armed force.” (para. 54) Lastly, “the social ostracism and disadvantages associated therewith’ invoked in the referring court’s question seem only to be the consequences of the measures, prosecution or punishment referred to in Article 9(2)(b) and (c) of QD and cannot, therefore, be regarded as acts of persecution for the purpose of those provisions.” (para. 54)

The CJEU adopts a strict definition, whereby only those that have availed of the procedure of conscientious objector, where available at domestic level, are eligible for refugee status, without however giving indication of the definition of conscientious objector. The judgment is however in line with Article 10(2) Charter, which leaves the definition and legal nature of the right to conscientious objection to national laws.

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The *Advocate General*, on the other hand, provides a detailed assessment of the jurisprudence of the ECtHR, Article 10(2) Charter¹³⁷ and the UNHCR Guidelines No 10 in order to determine a **definition of ‘conscientious objector’**. According to the Advocate General, the following persons can be considered as ‘conscientious objector’ eligible for refugee protection, and can be part of a particular social group within the meaning of Article 10(1)(d) QD:

1. *Absolute objectors* – those with a conviction of sufficient cogency, seriousness, cohesion and importance which creates an insurmountable conflict with the obligation to serve an army (based on ECtHR jurisprudence – *Bayatyan v Armenia*, no. 23459/03, e.g. pacifists); (point 54)¹³⁸
2. *Partial objectors* - Persons with a particular conflict on legal, moral or political grounds or who object to the means and methods used to prosecute that conflict; or ‘refuses on very personal grounds because he is required to fight against his own ethnic group’ (point 55);¹³⁹

It is up to the competent authorities to determine on the basis of the evidence presented to them, subject to review by the national courts whether the individual objection is one of conscience and principle rather than of convenience, or whether the person is just a deserter.

¹³⁷ See AG Opinion in *Shepherd*, point 51: ‘The expression ‘conscientious objector’ does not appear in the text of Article 10(1) of the Charter, which closely mirrors Article 9(1) of the ECHR. The European Court of Human Rights has nevertheless ruled that opposition to military service — where it is motivated by a serious and insurmountable conflict between the obligation to serve in an army and a person’s conscience — constitutes a conviction of sufficient cogency, seriousness, cohesion and importance to be protected by Article 9(1) of the ECHR. Article 10(1) of the Charter should therefore be interpreted in a similar manner. Article 10(2) of the Charter does identify and recognise the right to conscientious objection in accordance with the national laws governing the exercise of this right.’

¹³⁸ Those who ‘share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it’ for the purposes of the first indent of Article 10(1)(d). Their stance is clear and unequivocal. They are not prepared, under any circumstances, to contemplate the use of force. Because their position is so clear-cut, it is readily believable.’ – point 54 of the AG Opinion

¹³⁹ ‘Those who have a more nuanced objection to the use of force are in a more difficult position. Precisely what they are opposed to on grounds of conscience will vary from one person to another. One may object to a particular war; another to the means and methods employed in a given conflict; a third may refuse on very personal grounds because he is required to fight against his own ethnic group. Because there is no absolute objection to the use of force, but only a partial objection, such individuals may find it correspondingly more difficult to establish that their individual position is credible; that their individual objection is one of conscience and principle rather than of convenience. They may thus have greater difficulty in bringing themselves within the first indent of Article 10(1)(d).’ – point 55 of the AG Opinion

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Casesheet 5.10 – Definition of conscientious objector (refusal to participate in acts of war) as part of recognition of refugee status

Reference cases

*Court of first instance of the Hague, Middelburg branch, Netherlands, Judgment of 11 August 2015*¹⁴⁰

Case C-472/13, Sheperd, Judgment of 26 February 2016, ECLI:EU:C:2015:117

Core issues

Conditions for a conscientious objector (refusal to participate in acts of war) to be recognised refugee status.

Impact of the CJEU preliminary ruling in the Sheperd case on jurisprudence of national courts from other Member State than the referring one (Dutch court).

Following the Shepherd ruling, the Dutch authorities changed the test followed in cases of asylum claims lodged on grounds of conscientious objection to participation in war crimes. The armed conflict no longer needs to be condemned by the international community if the military forces in question have been, are or will most likely be involved in war crimes. It is up to the person concerned to prove this. The legal issue at hand is whether the amended policy and the burden of proof is compatible with the Shepherd ruling of the CJEU

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
• the Netherlands	• Asylum	• revised Qualification Directive (2011/95)	• Dutch Council of States	• Consistent interpretation	• the asylum seekers did not sufficiently prove that the Ukrainian army could indeed be linked to war crimes

Case(s) description

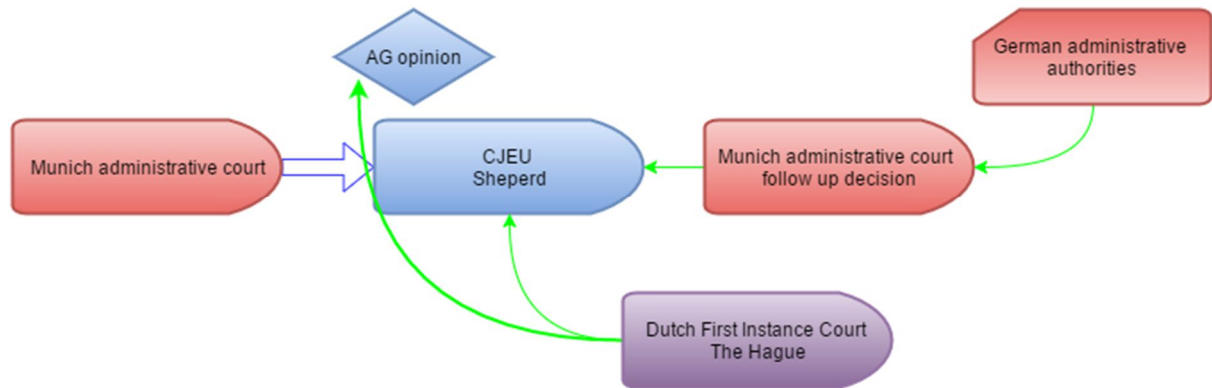
a. Facts

A man from Ukraine fled because he did not want to serve in the Ukrainian army given the recent insurgency in the east of the country. He applied for asylum on the basis of being a conscientious objector, because he does not want to be forced to take up arms against his own people. Before he left Ukraine, representatives of the army tried to serve him with military notice, which he avoided. His application was denied. Although the Dutch authorities believed that he could be called in for military service if he returned to Ukraine, it took the view that this would not necessarily be the case. Therefore the authorities considered he did

¹⁴⁰ Catherine van Boven-Hartogh, ACTIONES case note, Court of first instance of the Hague, Middelburg branch, Netherlands.

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not fulfil the conditions for obtaining refugee status, without however looking at the requirements for conscientious objectors and the *Shepherd* case.



b. Legal issues

Before the *Shepherd* judgment of the CJEU, Dutch law required one of the following conditions to be met in order for a conscientious objector to be recognised as refugee:

- The person concerned has a well-founded fear for disproportionate or discriminatory punishment because of his objection or desertion based on one of the grounds mentioned in Article 1A of the Refugee Convention;
- The person concerned is a conscientious objector because of his religious or other convictions which have led to his objection or desertion, whilst there was no opportunity to fulfil a non-military service instead;
- The person concerned has refused to take part in a military action which has been condemned by the international community as incompatible with the fundamental norms of humane conduct or conduct during an armed conflict. This also applies when the person concerned has a well-founded fear of having to fight against his own people or family.

Following the CJEU preliminary rulings, the test was amended so as to reflect the standards set by the CJEU. Therefore, the person no longer had to prove that the armed conflict was condemned by the international community if the military forces in question have been, are or will most likely be involved in war crimes. The Dutch Council of State had to assess whether this policy amended was fully in line with the *Shepherd* judgment as applied in the individual circumstances.

c. Reasoning of the Dutch Council of State

The Court ruled that it was likely that the applicant would indeed have to serve in the military upon return, since the INS believed that the applicant could be called up for military service and also believed that the authorities had already tried to serve him with a notice of military service once before. There was also public information supporting the view of the applicant.

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The court continued to check whether the applicant fulfilled one of the conditions for the Dutch conscientious objectors test (mentioned above), and whether these conditions were compatible with the *Shepherd* ruling.

As to the first condition, the court held that the applicant did not substantiate his claim.

As to the second condition, the court held that the applicant only stated that he did not want to participate in armed military action against his own people. He did not oppose the military or military action as such. The court then referred to the conclusion of Advocate General Sharpston in the *Shepherd* case, paras. 52-55.

As to the third condition, the court held that the amendment of the Dutch policy to include armed conflicts in which the military has been, is or most likely will be involved in war crimes is compatible with the *Shepherd* ruling, referring especially to paragraphs 43 and 46 of that ruling. The Court ruled that the applicant had not sufficiently proven that the Ukrainian army could indeed be linked to war crimes. The appeal was considered to be unfounded.

Analysis

a. Role of the Charter

Following the Charter based rationale of the AG, the national court referred to Article 10 paragraph 2 of the EU Charter, in which the right to conscientious objection is recognised in accordance with the national laws governing the exercise of this right, sharing also its broad definition of ‘conscientious objector’. However the AG and also the national court went beyond the limited wording of the Charter and gave extensive meaning to the conscientious objector within the particular context of recognition of refugee status by considering both absolute and partial objectors as eligible for refugee status. This case also relates to Article 4 of the EU Charter, namely whether a conscientious objector will, upon return, be subjected to torture or to inhuman or degrading treatment or punishment.

The national court referred only to Article 10(2) of the Charter and followed the AG reasoning on the definition of conscientious objector.

b. Judicial dialogue

The national court used the consistent interpretation judicial interaction technique in order to check whether the then Dutch policy, as amended following *Shepherd* judgment, was in conformity with the definition of ‘war crimes’ within the meaning of Article 9(2)(c) QD provided by the Court. In its assessment the national court also interpreted the Dutch policy in line with the ‘conscientious objector’ test established by the AG.

c. Outcome (impact of the CJEU preliminary ruling)

Following the *Shepherd* ruling, the Dutch authorities changed the policy described above. Currently, the armed conflict no longer needs to be condemned by the international community if the military forces in question have been, are or will most likely be involved in war crimes. It is up to the person concerned to prove this. The legal issue at hand is whether the amended policy and the burden of proof is compatible with the *Shepherd* ruling of the CJEU.

ARTICLE 18 CHARTER - right to asylum

Overview of issues concerning Article 18 Charter

Article 18 of the Charter provides for the right to asylum, which shall be guaranteed with due respect for the rules of the *Geneva Convention of 28 July 1951* and the *New York Protocol of 31 January 1967 relating to the status of refugees*. Within the European and international human rights law, Article 18 CHARTER is unique. Since the *Universal Declaration of Human Rights* (Article 14 UDHR), the Charter is the first document to contain a separate and express right to asylum.¹⁴¹ The *Geneva Convention* recognizes the principle of *non-refoulement*¹⁴² and implicitly the right to seek asylum but not the right to enjoy asylum. Similarly, the *European Convention of Human Rights and its Protocols* only recognise a prohibition of expulsion if there is a real risk of torture or ill treatment in the country of origin under the auspices of Article 3 ECHR and prohibition of collective expulsion under Article 4 of Protocol 4, but not a right to asylum as such.¹⁴³

The scope of application, content and effects of Article 18 Charter have been the subject of much debate. It should be noted that the Charter contains both “rights” and “principles”. According to *Article 51(1) Charter*, the rights shall be “respected”, whereas “principles” shall be observed. According to Article 52(5) Charter, principles should inform the positive actions of the EU institutions and the Member States when implementing EU law. As stated by the Explanations, some Articles of the Charter contain both elements of a right and of a principle.¹⁴⁴ Whether that may be the case with Article 18 of the Charter is still a debated issue, as the CJEU has not yet directly answered the questions regarding the scope of application, content and its effects. On the other hand, Advocates General have recognised that Article 18 establishes a right to asylum which has direct effect.¹⁴⁵

The scope of application and effects of Article 18 Charter have been raised by national courts from Bulgaria, Germany and, more recently, Belgium in preliminary references concerning: the determination of the Member State responsible for processing an asylum application under Dublin II Regulation (*Halaf*)¹⁴⁶; the determination of persons who, due to involvement or connection with terrorist organisation or activities, can be excluded

¹⁴¹ See D. McGoldrick, ‘The Charter and United Nations Human Rights Treaties’ in S. Peers & A. Ward (eds), *The EU Charter of Fundamental Rights* (2004) 83, 113-114.

¹⁴² Article 33 para. 1 Convention Relating the Status of Refugees (1967 Geneva Convention).

¹⁴³ *Chahal v. The United Kingdom*, ECHR (1996) Appl. No. 22414/93, para. 73.

¹⁴⁴ For more details on the differences between Charter based ‘rights’ and ‘principles’, see *Module 1- The EU Charter of Fundamental Rights: Scope of Application, Relationship with the ECHR and National Standards, Effects* in this Handbook.

¹⁴⁵ In *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, C-465/07, Advocate General Maduro, in his Opinion of 9 September 2008, recognised the right and its direct effect, see paras. 21, 26-30 and 33 (delivered before the Charter became legally binding); similarly, see Case C-179/11 *Cimade, Groupe d’information et de soutien des immigrés (GISTI) v. Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration*, Opinion of Advocate General Sharpston, para. 56.

¹⁴⁶ Case C-528/11, *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet*, ECLI:EU:C:2013:342.

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from the refugee protection or have their international protection status revoked (*B and D, H.T., Lounani, see the casesheet below*); clarifying the existence or absence of an obligation to grant a humanitarian visa to persons who wish to enter the EU countries' territory with a view to applying for asylum under Article 18 CHARTER (Case C-638/16 PPU *X and X v État belge*¹⁴⁷). In none of these cases, did the Court clarify the scope, nature and effects of Article 18 CHARTER. In *Halaf*,¹⁴⁸ a case concerning an Iraqi national subject to a Dublin transfer from Bulgaria to Greece, the CJEU considered it is not necessary to answer this question, since Article 18 CHARTER would be relevant only if it had been established that the sovereignty clause from the Dublin II Regulation is conditional upon the Member State responsible to process an asylum application, to respond to the take back of the asylum seeker concerned.¹⁴⁹ In *X and X v État belge*, the case of a Syrian family applying for humanitarian visas to access asylum in Belgium, the Court found the situation was not covered by EU law¹⁵⁰ and thus the Charter was not applicable. In the three cases discussing the level of connection there needs to be between the activities of an asylum seeker or beneficiary of international protection and terrorist activities, the Court based its judgment only on secondary legislation, even if incidental questions were raised by the referring Court.¹⁵¹ The Charter and constitutional right of asylum were referred by the national courts in the follow-up to the preliminary ruling.

Before going into the details of the cases discussed under this sub-section, it is important to underline that the EU fundamental right to asylum should be interpreted in light of the Qualification Directive as including access to both refugee and subsidiary protection. According to the Directive, the grounds for these two legal statuses are specific and recognising refugee or subsidiary protection should be based on an individual assessment of the facts. Refugee protection should be given priority, while the grounds for subsidiary protection are expressly provided in Article 15 of the Recast Qualification Directive. Cases where subsidiary protection is recognised on the basis of the same reasoning and facts that a lower court has held as grounds for refugee status should be avoided.¹⁵² The importance of differentiating between refugee and subsidiary protection was underlined by the **Italian Supreme Court (Corte di Cassazione)**. On the basis of the CJEU cases in *Elgafagji* (C-465/2007) and *Diakité* (C-285/12), the **Supreme Court** addressed the difference between the status of refugee and that of a person requiring subsidiary protection on the basis of a different level of personalisation of threat. This aspect was then used to support the reasoning

¹⁴⁷ Case C-638/16 PPU *X and X v État belge*, ECLI:EU:C:2017:173.

¹⁴⁸ Case C-528/11, *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet*, ECLI:EU:C:2013:342.

¹⁴⁹ Ibid, para. 39.

¹⁵⁰ The required visa could not be one of limited territory and time, such as a humanitarian visa, since lodging asylum application would require a longer duration and if refugee status is recognised this would be contrary to the temporary character of the purpose of humanitarian visas.

¹⁵¹ Also in *N.S. and others*, the CJEU refrained from pronouncing on Article 18 CHARTER implications.

¹⁵² See for instance case no. 2311/182/2014 decided first by the court of Baia-Mare as the first instance court and on appeal by the Tribunal of Baia-Mara from Romania, 12.06.2015 (available in the [ACTIONES database](#))

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regarding the active role of the judge in the investigation of additional information regarding the country-specific conditions (pursuant art. 8 d.lgs 25/2008).¹⁵³

National application of Article 18 Charter

The cases submitted by the national judges, lawyers and academics of the ACTIONES Working Group relate to the legality of exclusion, cessation, revocation of refugee protection based on security concerns, such as involvement in terrorist organisations or activities, war crime or criminal convictions for serious crimes who pose serious danger to the security of the residing Member State. These issues pose questions related to the validity and legality of limitations of the right to asylum as set out in Article 18 CHARTER.

However, the exclusion provisions of *Article 12 (2) Qualification Directive* depart to a certain extent from the *Refugee Convention*. For instance, *Article 12(2)(b)* adds to the requirement provided by the *Refugee Convention*, that a person who has “committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee”, is excluded as long as the serious non-political crime was committed from “*the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political motive, may be classified as serious non-political crimes*”.¹⁵⁴

Given these differences between the EU and the international framework, the exclusion as well as the revocation of refugee clauses triggered several preliminary rulings from national courts which raised questions concerning the interpretation and more precisely the test that public authorities would need to carry out in order to establish when an asylum seeker or refugee falls or not under Article 12(2)Qualification Directive, respectively Article 14 Qualification Directive. The preliminary rulings of the CJEU in cases referred by the **German Federal Administrative Court** as well as the follow-up judgments concern the scope of application of the right to asylum as provided by the Charter and national constitutional law.

Another legislative tool conferred to the Member States by the Qualification Directive to deal with threats of international terrorism is the Article 24(1), which according to the *travaux préparatoires* of Directive 2004/83, was inserted following the attacks in the United States of America on 11 September 2001. ‘*That provision was thus introduced in order to offer Member States the possibility to restrict, under certain specific conditions, the movement of third country nationals within the Schengen area, with the goal of combating terrorism and thus containing threats to national security and public order. It follows from those considerations that Article 24(1) implicitly makes it possible for Member States, as long as the conditions it prescribes are fulfilled, to revoke a residence permit granted*

¹⁵³ Corte di Cassazione, 22111/2014, supreme court, 17 October 2014 (see casesheet 2, and [ACTIONES database](#)).

¹⁵⁴ For more details on the comparative assessment of Article 12(2) and Article 1F Refugee Convention, see E. Guild and M. Garlieck, ‘Refugee Protection, Counter-terrorism, and exclusion in the European Union’, *Refugee Survey Quarterly*, Vol. 29, No. 4.

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previously.¹⁵⁵ While Article 12(2) and 14 QD deal with access to refugee protection as such, Article 24(1) of the QD refer to the advantages attached to refugee protection. In *H.T.*, the CJEU held that ‘*where there are compelling reasons of national security or public order within the meaning of that provision, or pursuant to Article 21(3) of that directive, where there are reasons to apply the derogation from the principle of non-refoulement laid down in Article 21(2) of the same directive*’ (para. 55), the residence permit conferred to refugees can be revoked or not prolonged.¹⁵⁶

Another string of cases originate from Romanian courts and concern the relation between the right to asylum and the principle of non-refoulement. The **first instance court of Bucharest**¹⁵⁷ had to assess the applicant's claim for asylum or subsidiary protection, based on the statement, which was contested by the administrative authority (IGI), that if returned to Iran after he was convicted in Romania for a drug trafficking crime, he could be sentenced to the death penalty. Contrary to the administrative authorities, the first instance court of Bucharest found that the applicant would face a high risk of being executed if returned to Iraq. It did not however grant refugee status because the applicant did not meet the requirements under domestic asylum law. Also, the claim for subsidiary protection was rejected on the basis of an exclusion clause, regarding the fact that the applicant was considered to constitute a ‘danger to the community’ due to the crime of high-risk drug trafficking. The Court stated that Romania was still bound by its non-refoulement obligations and, if the administrative authorities were to issue an order to return the applicant to Iran, it could be challenged before the **Court of Appeal** by the applicant in order to suspend the return, thus obtaining a tolerated status for the applicant in Romania.

The casesheet discussed in this section concerns the relation between Article 18 of the Charter and Articles 12(2), 14 and 24 of the QD has been raised in domestic case law related to the limitations of access to refugee protection for those suspected of participation in terrorist acts, war crimes, and other international crimes.

Conclusion – Judicial Dialogue

So far the preliminary references sent by national courts asking for clarification of the scope, nature and effects of Article 18 Charter have not led to concrete guidelines from the CJEU, which has avoided clarify the implication of the Charter based right to asylum. Based on the drafting history of Article 18 Charter and jurisprudence of European Courts (see in particular ECtHR: *Hirsi v Italy*, *Sharifi v Italy* and *Khlaifia v Italy*), the right to asylum seems to be interpreted, so far, as a right to seek asylum, rather than a right to asylum as such. The recent preliminary ruling of the CJEU in *X and X v État belge* also clarifies that the Charter

¹⁵⁵ Case C-373/13, *H. T. v Land Baden-Württemberg*, ECLI:EU:C:2015:413, para. 52.

¹⁵⁶ Case C-373/13, *H. T. v Land Baden-Württemberg*, ECLI:EU:C:2015:413.

¹⁵⁷ First instance court of 4th district, Bucharest, appealed before the Tribunal of Bucharest (partially quashed), Judgment of 12 February 2015; C. Drăgușin, ACTIONES Case note, First instance court of 4th district, Bucharest Case no. 34671/4/2013.

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rights are applicable only in so far as there is EU law covering the field. The right to asylum cannot therefore be used to expand the EU competences.

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Casesheet 5.11 – B. and D. “Denial or revocation of refugee protection due to involvement in terrorist activities”

Reference cases

CJEU, C- 57/09 and C-101/09, *B. and D.*, 9 November 2010, ECLI:EU:C:2010:661

Case C-373/13, *H.T.*, ECLI:EU:C:2015:413

Case C-573/14, *Lounani*, ECLI:EU:C:2017:71

Core issues

Denial or revocation of refugee protection based on the membership and active support of a terrorist organisation and/or involvement in guerrilla armed fights led by such an organisation

The preliminary references sent by the German Federal Administrative Court sought clarification on whether the membership and active support of a terrorist organisation and/or involvement in guerrilla armed conflict conducted by such an organisation constitute a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of Article 12(2)(b) and (c) of Directive 2004/83.

The CJEU clarified that membership in a terrorist organisation does not automatically constitute a serious reason for considering that the respective person has committed ‘a serious non-political crime’ or ‘acts contrary to the purposes and principles of the United Nations’, but that serious reasons for considering that a person has committed such a crime or has been guilty of such acts is conditional on an assessment on a case-by-case basis of the specific facts.

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction/Technique	Remedy
• Germany	• asylum	• Article 12(2)(b) and (c) of Directive 2004/83 • Article 18 CFR	• administrative courts • higher administrative courts • federal administrative court • CJEU	• preliminary reference	• consistent interpretation

Timeline representation



Cases description

a. Facts

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In October and November 2008, the **German Federal Administrative Court** addressed two preliminary references to the CJEU regarding the clarification of the exclusion and revocation of refugee status clauses under Article 12(2)(b) and (c) and Article 14(3)(a) of the Qualification Directive.¹⁵⁸ The cases concerned two Turkish nationals of Kurdish origin (B. and D.). While B's right to refugee status was rejected due to his past involvement in armed guerrilla warfare, D.'s right to refugee status was initially recognised, but later revoked due to his past active involvement in PKK, of which he was a senior official. It should be noted that both DHKP/C and PKK are listed by the EU and UN as organisations involved in terrorist acts.

The references sought guidance on determining whether a person's membership of an organisation listed as involved in terrorist acts and/or its active involvement in that organisation activities qualify as 'serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations' within the meaning of Article 12(2)(b) or (c) of Directive 2004/83.¹⁵⁹

b. Legal issues

In the case of D., the **Higher Administrative Court** had held that the applicant's right to refugee protection could not be revoked. Even though he had been a senior official in PKK and as such participated in serious non-political crimes, the revocation of refugee status would be conditional on the person concerned representing a present danger to the host state. Since D. had renounced all terrorist activities, he would no longer present such a danger. Thus, in his case, the conditions for revocation of refugee protection would not be fulfilled. The **German Federal Administrative Court** referred the question to the CJEU, along with the questions whether the exclusion from refugee status is conditional upon an assessment of proportionality.

c. Reasoning of the CJEU

The CJEU started by providing a definition of 'serious non-political crime'. It ruled that terrorist acts, which are characterised by their violence towards civilian populations, even if committed with a purportedly political objective, fall within the meaning of serious non-political crimes under Article 12(b) (para. 81). They may also fulfil the criteria of the exclusion clause in Article 12(c), because in Resolutions 1373 (2001) and 1377 (2001) the UN Security Council takes as its starting point the principle that international terrorist acts are contrary to the purposes and principles of the United Nations (para. 82-3).

The Court continued by holding that mere membership in an organisation listed as involved in terrorist activities is not sufficient to exclude the person from refugee protection. An individual assessment of the personal responsibility of the person in question is required. Finally, the Court concluded that exclusion from refugee status is not conditional on the

¹⁵⁸ Cases C-57/09 and C-101/09, *B. and D.*, ECLI:EU:C:2010:661.

¹⁵⁹ For more details, see Prof. Dr. Harald Dörig, 'Opinion German Courts and their Understanding of the Common European Asylum System', *IJRL*, Vol 25 (2013) 2.

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person concerned representing a present danger to the host state (para. 105) or on an assessment of proportionality in relation to the particular case (para. 111).

The CJEU has confirmed the conclusions reached in *B. and D.* in the subsequent *H.T.* case.¹⁶⁰ The latter case concerned a Turkish national recognised refugee status since 1993 due to reasons of persecution he would face if returned to Turkey due to his prior political activities of support of PKK. Due to his activities of ensuring financial support to PKK (gathering donations and selling the periodical published by PKK), he was sanctioned first by a fine, restriction of his free movement and invalidation of his residence permit. The **Baden-Württemberg Higher Administrative Court** asked the CJEU to clarify the conditions under which residence permits of refugees can be revoked, in particular clarification of what constitutes compelling reasons of national security or public order' provided by Article 24(1) QD. The *H.T.* judgment reaffirms the *B. and D.* test that "an individual assessment of the specific facts concerning the actions of both the organisation and the refugee in question" needs to first be carried out by the public authorities (para. 99). Mere membership of an organisation involved in terrorist activities is not sufficient, there must be an 'active participation in violent acts or direct participation in funding those acts'. It seems that Mr. T.'s participation in collecting money for PKK is generally not enough to revoke the residence permit.

In the subsequent *Lounani* case, the CJEU provided further clarification on what types of terrorist activities can fall under Article 12(2)(c) QD and on the extent of involvement in terrorist activities (Jihadism) that can trigger this exclusion clause.¹⁶¹ The Court held, firstly, that, in the absence of a specific reference to the Qualification Directive, it is not a prerequisite for the ground for exclusion of refugee status that the applicant has been convicted of one of the terrorist offences referred to in Article 1(1) of Framework Decision 2002/475. Secondly, participation in the activities of a terrorist group does not require that the person concerned committed, attempted to commit or threatened to commit a terrorist act. Accordingly, those acts for which Mr. Lounani was convicted (providing logistical support to a terrorist group by the provision of, inter alia, material resources or information; forgery of passports and fraudulent transfer of passports; active participation in the organisation of a network for sending volunteers to Iraq) could fall within the scope of the exclusion clause despite the fact that there is no direct link between Mr. Lounani's activities and specific acts of terrorism. Thirdly, the CJEU reaffirmed the need for an individual assessment, excluding the automatic application of the exclusion clause due to a criminal conviction. The Court held, however, that such a criminal conviction would be of 'particular importance' in any such assessment regarding the application of the exclusion clause.

d. Outcome at national level (follow-up judgment of the referring court)

The **German Federal Administrative Court** remanded the cases to the **Higher Administrative Court** for further consideration of whether the high-ranking PKK-member

¹⁶⁰ Case C-373/13, *H.T.*, ECLI:EU:C:2015:413.

¹⁶¹ Case C-573/14, *Lounani*, ECLI:EU:C:2017:71.

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and the Turkish left-wing activist had participated in crimes in the sense of article 12(b), or had such an influential position in the terrorist organisation that their acts could be regarded as fulfilling the criteria of article 12(c).¹⁶² The German Court also agreed with the Court of Appeal for England and Wales that a criminal conviction is not necessary in order to determine that a person fulfils the criteria of article 12(c). The PKK activist had belonged to the forty-one-member executive committee of the PKK, but the lower court had not examined the duration of his membership of that committee.

After the cases had been remanded, the **Higher Administrative Court** diligently investigated the crimes committed by the PKK during the period when the asylum seeker had held a leading position within the organisation.

On the basis of these findings, the court concluded, in July 2013, that the PKK high-ranking official should be excluded.¹⁶³ For the left-wing activist, the Higher Administrative Court decided differently. It pointed out that the person did not have a leading position in the organisation, his task was restricted to the transport of goods and to guiding guerrilla fighters to fixed places.¹⁶⁴

In a subsequent decision the **German Federal Administrative Court** stressed that there has to be detailed information regarding the position held by the asylum seeker in the terrorist organisation, and what political, logistical or financial support he gave. The court clarified that the requirement of having taken part in a ‘serious non-political crime’ can be fulfilled, if it is established that the asylum seeker has aided a criminal offence. Support in the preparation of terrorist acts can suffice if the individual contribution has been of a certain importance.¹⁶⁵

Analysis

a. Role of the Charter

The follow-up decision of the **German Federal Administrative Court** contains an interesting reference to Article 18 of the Charter (Right to Asylum). In its preliminary reference to the CJEU, the German Court also posed the question of whether it is compatible with the Qualification Directive for a Member State to recognise that a person excluded from refugee status pursuant to Article 12(2) of the directive has a right to asylum under its constitutional law. The CJEU clarified that Article 3 of the Qualification Directive must be interpreted as meaning that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive. In its follow-up decision the German Federal Administrative Court consequently examined whether the right to asylum under German constitutional law entails a risk of

¹⁶² BVerwG 10 C 26.10 (PKK) and BVerwG 10 C 27.10 (DHKP/C), <<http://www.bverwg.de/informationen>>

¹⁶³ Higher Administrative Court of Northrhine-Westfalia, Judgement of 2 July 2013, 8 A 5118/05.A, para. 144 and following.

¹⁶⁴ Ibid, 8 A 2632/06.A, para 201 and following.

¹⁶⁵ BVerwG 10 C 13/11.

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confusion with the refugee status. The Court concluded that the right to asylum under German constitutional law corresponds substantially to the refugee status according to the directive. The right to asylum does not provide for a protection status of a different kind, e.g. based on family or humanitarian motives. The Court continues by stating that if there are grounds for exclusion of refugee protection under the Qualification Directive, the right to asylum under German constitutional law has to be excluded as well. This application of the exclusion clauses of the Directive to the right to asylum does not pose any issues of constitutionality since it follows from the transformation of EU law into national law. The right to asylum under Article 18 of the Charter is considered a guarantee that EU provisions grant effective protection of fundamental rights against the power of the Union and can thus be regarded as substantially equal to the protection of the German Constitution. Therefore, the EU Directive, which grants broader grounds for excluding refugee status, is granted supremacy over German constitutional law.

b. Judicial dialogue

In its reasoning, the German Federal Administrative Court applies the technique of consistent interpretation to ensure conformity of the national provision on revocation of refugee status in the light of EU law (the Qualification Directive), confirming an earlier decision.¹⁶⁶ It recognised the supremacy of EU law even over national constitutional law and stressed that where it is not possible to interpret the basic law to asylum in a manner consistent with the Qualification Directive, the exclusion clauses contained therein still have to be applied as a result of the supremacy of EU law.¹⁶⁷

c. Impact of CJEU decision

Following the decision of the CJEU in B. and D., several German Administrative Courts have decided on the exclusion of refugee protection with reference to the CJEU judgement.¹⁶⁸ It has been stressed that in cases of revocation of refugee protection the requirements of protection against deportation have to be examined.¹⁶⁹

¹⁶⁶ BVerwG 10 C 2.10.

¹⁶⁷ BVerwG 10 C 26/10, para. 33.

¹⁶⁸ BVerwG 1 C 16.14, Higher Administrative Court München 10 C 12.497.

¹⁶⁹ Administrative Court Freiburg, A 6 K 139/12.

ARTICLE 19 CHARTER – Protection in the event of removal, expulsion or extradition

Article 19(1) – Prohibition of collective expulsion

Overview of Article 19(1) issues

Article 19 of the Charter provides in its first paragraph a prohibition of collective expulsion. An equivalent prohibition is contained in Article 4 of Protocol 4 of the ECHR. The ECtHR has so far developed precise standards that States have to follow in order to avoid violations of this provision.¹⁷⁰ The relation between Article 19 Charter and Article 4 Protocol 4 is very close, the ECtHR referring to the EU Charter in declaring Italy's responsibility for failure to fulfil its international refugee law obligation and highlighted that the non-refoulement principle is also enshrined in Article 19 Charter.¹⁷¹ According to Article 52(3) Charter, Article 19(1) Charter should be read in light of Article 4 Protocol 4 as interpreted by the ECtHR.

According to the [Fundamental Rights Agency Handbook on EU law in asylum, borders and immigration](#) (p.86) and the [2015 Annual Report on Asylum and Migration in the EU](#), any form of expulsion, removal or any interception activity that prevents entry into the territory, including territorial waters of the Member States may result in collective expulsion, if the expulsion, removal or interception is not based on an individual assessment and if effective remedies against the decision are unavailable. The ECtHR held that this prohibition also applies on the high seas.¹⁷² According to the ECtHR, 'Collective Expulsions', 2016 Factsheet, "Collective expulsion" is defined as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.'¹⁷³

So far, amongst EU Member States, Belgium and Italy have been found to have violated the prohibition of collective expulsion. While the Fundamental Rights Agency 2015 Report signals that further violations of the prohibition of collective expulsion might have occurred during the 2015 migration crisis.

Article 19(2) – principle of non-refoulement

Overview of issues concerning Article 19(2) Charter

Article 19(2) Charter provides that no one may be removed, expelled or extradited to a State where they would be subjected to the death penalty, torture or other inhuman or

¹⁷⁰ The ECtHR landmark cases are ECtHR, *Čonka v. Belgium*, No. 51564/99, 5 February 2002; *Sharifi v Italy*, Appl. No. 16643/2009, Judgment of 21.10.2014, and *Hirsi v Italy*, Appl. No. 27765/2009, Judgment of 22.2.2012.

¹⁷¹ See *Hirsi v Italy*, Appl. No. 27765/2009, Judgment of 22.2.2012.

¹⁷² *Sharifi v Italy*, Appl. No. 16643/2009, Judgment of 21.10.2014, and *Hirsi v Italy*, Appl. No. 27765/2009, Judgment of 22.2.2012.

¹⁷³ For more information on the standards under Article 4 Protocol 4, please see the ECtHR [Factsheet](#) on collective expulsions of February 2016.

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degrading treatment or punishment. According to the explanations on the Charter, Article 19(2) Charter incorporates the standards developed by the ECtHR under Article 3 ECHR.

The protection against *refoulement* envisaged in the Charter covers everyone without exception (unlike Article 33 of the Convention related to the Status of Refugees of 1951¹⁷⁴), and its territorial reach depends only on Article 51 Charter.

The cases submitted for consideration to the ACTIONES project refer to several themes:

- the relation between the *principle of non-refoulement* and the institution of criminal extradition of third country nationals (cases originating from **Croatian Supreme and Constitutional Courts**);
- the interaction between the *principle of non-refoulement* and conferral of international protection;
- the *principle of non-refoulement* as legal ground for the constitutionality review of national provisions limiting evidence and reasons that a third country national can invoke for the purpose of renewing subsidiary protection;
- the *principle of non-refoulement* as legal grounds for the legality review of national provision not recognising a suspensive effect of the appeal against the removal order in cases of third country nationals suffering from serious illness, who have been refused a form of legal stay.

In a Nutshell

Requirements of Article 19(2) Charter and Article 3 ECHR

In the *Abdida* ([C-562/13](#)) case, the CJEU developed several requirements that the legal remedy against return related decisions should fulfil on the basis of Articles 19 and 47 Charter, Article 3 ECHR, even if not expressly provided for in Article 13 of the Return Directive:

1. Member States' authorities have an obligation to refuse enforcement of return related decisions 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(c) Return Directive*¹⁷⁵);
2. Recognising an automatic suspensive effect to an appeal against a decision ordering a third-country national, 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

¹⁷⁴ Personal scope of application is limited to refugees.

¹⁷⁵ According to Article 5(c) Return Directive, Member States are required, “when implementing this Directive, to take due account of, *inter alia*: (c) the state of health of the third-country national concerned.” Article 5(c) together with Articles 19(2) and 47 Charter, require according to the CJEU in the *Abdida* case to not return/remove third country national suffering from serious illness where adequate treatment is not available in their country of origin.

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3. Provide the concerned third-country national with emergency health care and essential treatment of illnesses pending the appeal (*Article 14 Return Directive*).

All these rights were recognised as being enjoyed by irregular migrants based on Articles 19(2) and 47 Charter in light of the requirements set by the ECtHR under Articles 3 and 13 ECHR together with the provisions of the Return Directive.

National Application of Article 19(2) Charter

The two casesheets presented in this section reflect some of the important legal effects that the principle of non-refoulement can have on the interpretation of EU and national legislation. **It is of utmost importance to mention that although Article 19(2) Charter is entitled ‘principle’, the Article enshrines an absolute right.** The title of ‘principle’ has confused certain domestic courts from newly entered Member States, considering it as a mere principle lacking direct effect in national proceedings. The **Croatian Constitutional and Supreme Courts** held that it cannot be used as a legal grounds for disapplying national legislation,¹⁷⁶ although the Explanations of Article 19(2) Charter and the CJEU jurisprudence clearly recognise the *principle of non-refoulement* as a right enjoying direct effect.

As rightly pointed out by the **Constitutional Court of Slovenia**, the principle of non-refoulement as protected by Article 19(2) Charter and Article 3 ECHR is an absolute right. (see the first case sheet of this section) The **Constitutional Court** interpreted Article 18 of the Constitution in light of Article 19 Charter and found the national provisions limiting the evidence and reasons that a person can bring in support of his claim for renewal of subsidiary protection unconstitutional. The **Brussels Labour Tribunal** addressed the preliminary reference in the *Abdida* case in which the CJEU clarified that, although the EU secondary legislation does not expressly provide for certain procedural guarantees (such as suspensive effect of appeal against removal orders), Article 19(2) Charter must be interpreted in such a fashion that would ensure respect of these procedural guarantees in cases where the return of the seriously ill third country national would endanger his health and life due to the lack of adequate medical treatment in the country of origin.

Conclusion - Judicial Dialogue

The judicial dialogue, whether in the form of addressing a preliminary reference or consistent interpretation of national law in light of EU law and jurisprudence, led to the clarification of the effects of the EU Charter within the ambit of international protection proceedings and return proceedings. The CJEU developed new substantive norms that were not clearly prescribed by the Return Directive, which need to be respected by national courts (see the consistent interpretation technique in the ***ACTIONES Module on Judicial***

¹⁷⁶ Constitutional Court of the Republic of Croatia, 17 December 2013, U-III-5890/2013, case reported by *Nika Bacic Selanec*, member of the ACTIONES Working Group. Constitutional Court of the Republic of Croatia, 17 December 2013, U-III-5890/2013, case reported by *Nika Bacic Selanec*, member of the ACTIONES Working Group.

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Interaction Techniques). While the Constitutional Court of Slovenia helped to eliminate procedural requirements whose effect might ultimately have led to a violation of the principle of non-refoulement.

In the follow up to *Abdida*, the Belgian Labour Tribunals applied their *Simmenthal* obligations strictly to disapply national legislation conflicting with the Return Directive, as interpreted by the CJEU. Similar approach was followed by the Constitutional Court of Slovenia, even in the absence of a previous preliminary reference.

The consistent disapplication of conflicting national legislation by national courts contributed to the adoption of a legislative amendment that would bring the national legislation in line with EU requirements (Art. 19(2) Charter within international protection proceedings and within return proceedings).

In *Abdida*, the CJEU also engaged in extensive indirect judicial interaction. It looked at the ECtHR jurisprudence on principle of non-refoulement in medical cases under the ambit of Article 3 ECHR (such as the *N v UK* case), in order to draw similar requirements under Article 19(2) Charter in similar cases. Similar extensive referrals to the ECtHR was made by the Constitutional Court of Slovenia, which referred extensively to the ECtHR jurisprudence in order to establish the requirements under Article 19(2) Charter, in light of which the Court interpreted Article 18 of the Constitution, concerning the prohibition of torture and inhuman and degrading treatments.

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Casesheet 5.12 – Incompatibility of national procedural rules on renewal of subsidiary protection with Article 19 Charter

Reference case

Constitutional Court of Slovenia, U-I-189/14, Up-663/14

Core issues

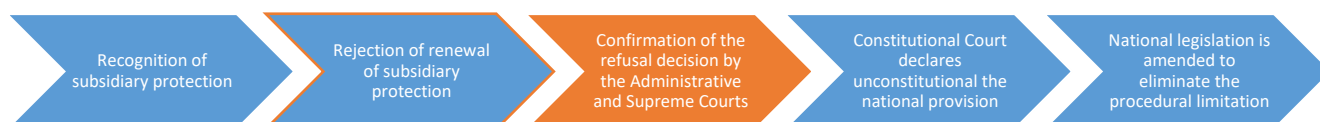
Whether Article 106 of the International Protection Act of Slovenia, which limits the evidence brought in favour of the renewal of subsidiary protection, is compatible with the constitutionally protected right of the prohibition of torture and the principle of non-refoulement as laid down in Article 19 Charter.

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

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
• Slovenia	• subsidiary protection • evidence brought for renewal of subsidiary protection	• Art. 19(2) CFR	• Administrative Court • Supreme Court • Constitutional Court	• disapplication	• unconstitutionality of national provisions limiting evidence brought for renewal of subsidiary protection

Timeline representation



Case(s) description

a. Facts

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. His status was granted on the basis of the second indent of Article 28. An assessment of whether the conditions contained in the third indent (internal armed conflict) were fulfilled was not made by the competent organ. In the process for the renewal of the subsidiary protection, the applicant again referred to the second and third indents of Article 28 of the

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International Protection Act. The competent organ 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 refusals to renew subsidiary protection, the applicant lodged a complaint before the **Constitutional Court**, claiming that his constitutionally protected rights were 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 exist real danger that in case of return the person will be subject to inhuman treatment.

b. Legal issues

The applicant was granted a subsidiary protection in Slovenia. He was refused renewal of this the status by the competent authority on the grounds that, in line with Article 106 of the International Protection Act of Slovenia, he was unable to provide any new evidence or reasons for the renewal of subsidiary protection. After appeals to the **Administrative** and **Supreme** Courts were rejected, the applicant appealed to the **Constitutional Court**, claiming that constitutionally protected rights on inviolability of human life, prohibition of torture, equal protection of rights, right to judicial protection, right to personal dignity and safety and other fundamental rights were violated. The Constitutional Court reviewed the application from the point of view of the prohibition of torture, which includes the principle of non-refoulement, and expressly referred to Article 19 Charter providing for the protection in the event of removal, expulsion or extradition.

c. Reasoning of the Constitutional Court of Slovenia

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, is 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 Charter is also applicable to situations of cessation of subsidiary protection, since the situation is governed by the Revised 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.

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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 that is in the process of subsidiary protection has to have the opportunity to state all reasons and circumstances that are relevant for the prolongation of the status of protection. The applicant should therefore be able to state new circumstances which occurred after the decision that granted him or her subsidiary protection was granted, in case the removal would risk subjecting the individual to torture or other ill treatments.

The Constitutional Court concluded that Article 18 of the Constitution contains an absolute prohibition of returning individuals if there is a real danger that in case of return 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 able 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.

Analysis

a. Role of the Charter

Article 18 of the Constitution containing the prohibition of torture and inhuman and degrading treatments was interpreted in light of Article 19 Charter. The EU principle of non-refoulement was held to be applicable since the rejection of renewal of subsidiary protection is governed by the Revised Qualification Directive and Article 45 of the Revised Asylum Procedure.

b. Judicial dialogue

The Constitutional Court made an interesting application of the *consistent interpretation technique* in order to decide on 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 Charter 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.

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The Constitutional Court made use also 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.

c. Remedies

Article 106 of the International Protection Act, excluding 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 Charter and Article 3 ECHR.

d. Impact of the judgment (possible)

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 only those reasons that led to the original grant of subsidiary protection.

e. Additional relevant cases

ECtHR decisions: *Chahal v. The United Kingdom*, 15 November 1996; *HLR v France*, 29. April 1997; *Mamatkulov and Askarov v. Turkey*, 4 February 2005; *Salah Sheekh v The Netherlands*, 11. January 2007; *Saadi v. Italy* 28. February 2008; *Sufi and Elmi v. The United Kingdom* 28. June 2011.

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Casesheet 5.13- refusal of subsidiary protection on medical grounds; non-refoulement in medical cases; fruitful judicial dialogue between CJEU and ECtHR

Reference case

Case C-562/13, *Abdida*, CJEU judgment of 18 December 2014, ECLI:EU:C:2014:2453

Request for preliminary ruling [Cour du travail de Bruxelles, 25 October 2013](#)

National follow-up decision, [CALL, 156.951, November 2015](#)

Core issues

Whether national legislation which does not automatically make available a remedy suspending enforcement of a removal order, in the case of a third country national suffering from serious illnesses, is compatible with EU law on asylum and immigration and the EU Charter.

A TCN suffering from a serious illness, whose return to their country of origin might expose him or her to a risk of grave and irreversible deterioration in their state of health should benefit from an effective remedy with automatic suspensive effect of the return/removal procedure on the grounds of Articles 19(2) and 47 CHARTER and Article 13 Return Directive.

National legislation disapplied by national courts as incompatible with the CJEU preliminary ruling in *Abdida*. The Law was later amended, following a judgment of the Constitutional Court.

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
• Belgium	• immigration	• Qualification Directive, Return Directive	• Brussels Labour Tribunal • CJEU	• consistent interpretation • horizontal judicial dialogue among CJEU and ECtHR • disapplication • preliminary reference	• access to social benefits • suspensive effect of the appeal against the removal order

Timeline representation



Case(s) description

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FUNDAMENTAL RIGHTS & CITIZENSHIP PROGRAMME

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a. Facts

Mr Abdida, a Nigerian national diagnosed with HIV, was granted a right of residence based on medical grounds and received social assistance. His subsequent 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 his social assistance was withdrawn. Mr Abdida's appeal against the administrative decision did not carry suspensive effect. He lodged a complaint regarding the withdrawal of his social rights and the absence of suspensive effects pending trial in light of which the Brussels Labour Court referred two preliminary questions to the CJEU.

The **Brussels Labour 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.

b. Legal issues

Whether national legislation which, on the one hand, does not make available a remedy automatically suspending enforcement of a removal order and, on the other hand, limits provision for the basic needs of the person concerned to emergency medical assistance for the entire duration of the judicial proceedings, is compatible with EU law on asylum and immigration and the EU Charter.

c. Reasoning of the CJEU

In the light of the interpretation already given to the Qualification Directive in a judgment delivered that same day (*M'Bodj*), the CJEU excluded the application of the Qualification Directive, Asylum Procedure and Reception Conditions Directives procedures to medical cases, holding that neither refugee nor subsidiary protection can be recognised on medical grounds. The CJEU did not however dismiss the preliminary questions as inadmissible but 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 a ‘return decision’ within the meaning of Article 3(4) of Directive 2008/115. The CJEU continued by setting out the requirements that a remedy in the form of 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.”

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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 Articles 19(2) and 47 of the Charter.’ According to Article 52(3) Charter, the requirements set out under Article 19(2) 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 create within the EU legal order an obligation to refuse 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) Charter in light of requirements under Article 3 ECHR, the CJEU interpreted the requirements under Article 47 Charter in light of Article 13 ECHR and the jurisprudence of the ECtHR interpreting the effective remedies requirements in such cases (paras. 50-53).

It concluded 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.

d. *Outcome at national level* (follow-up judgment of the referring court)

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 an order to leave the territory when the applicant’s illness is so serious that a removal might amount to a *refoulement* prohibited by Article 3 ECHR (**CALL, 156.951, November 2015**).¹⁷⁷ Suspensive effect, however, is not available against decisions refusing the right or authorization to stay in Belgium¹⁷⁸ (**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.

¹⁷⁷ The cases are available in the [REDIAL Database](#).

¹⁷⁸ Here for humanitarian and medical reasons, according to Article 9ter of the Aliens Law.

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On 10 of April 2014, a legislative amendment was brought to the Aliens Law, whereby an 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.

Analysis

a. Role of the Charter

Article 19(2) was found applicable in cases of where third country nationals object to their removal on medical grounds. The CJEU held that subsidiary protection cannot be granted on the basis of medical grounds, however medical reasons, such as seriously grave illness would need to be taken into account when assessing respect of the principle of non-refoulement.

b. Judicial dialogue

Horizontal judicial dialogue among the CJEU and ECtHR: The CJEU considered whether an assessment of the prohibition of refoulement is required under the Return Directive. Citing the ECtHR jurisprudence in *N v. UK*, the Court affirmed that, in exceptional cases, the removal of a third-country national suffering from a serious illness to a country in which appropriate treatment is not available may infringe the principle of non-refoulement.

On the basis of Article 52(3) Charter, the standards of protection of human rights which have an equivalent in the EU Charter should also be read in the context of corresponding ECHR rights. The interpretation of Article 3 ECHR by the ECtHR in *N v. UK* should therefore be included under the ambit of Article 19(2) Charter and Article 5 RD. In cases where the return of a TCN may lead to serious and irreparable harm, the Court has found “that a third-country national must be able to avail himself, in such circumstances, of a remedy with suspensive effect, in order to ensure that the return decision is not enforced before a competent authority has had the opportunity to examine an objection” alleging infringement of non-refoulement in both the Return Directive and the Charter (Articles 19(2) and 47). (para. 50)

Preliminary reference addressed by Brussels Labour Tribunal to establish the conformity of national legislation in light of EU secondary legislation and the Charter.

Consistent interpretation in the follow-up national judgment, as the Labour Tribunal held that seriously ill foreigners keep their right to social assistance pending the examination of their appeal, and also a suspensive effect of the appeal was recognised against the order to leave the territory when the applicant’s illness is so serious that a removal might amount to a *refoulement*.

c. Remedies

Access to social benefits and suspensive effect of the appeal against an order to leave the territory when the applicant’s illness is so serious that a removal might amount to a *refoulement*.

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d. Impact of CJEU decision:

The CJEU judgment sets thus three main requirements:

1. An obligation to refuse 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 with emergency health care and essential treatment of illnesses pending the appeal. (Article 14 Return Directive)

All three rights were recognised as applying to irregular migrants based on Articles 19(2) and 47 Charter as interpreted in light of the requirements set by the ECtHR under Articles 3 and 13 ECHR.

e. Additional relevant cases

ECtHR decisions cited by the CJEU:

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). 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.

See also the case *Tall* in the section on Article 47 CHARTER.

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Casesheet 5.14 – Incompatibility of national rules on refusal of subsidiary protection with Article 19(2) Charter

Reference case

Court of Cassation, Italy, 49242/2017

Core issues

Whether Article 20 d.lgs. 251/2007 (implementing Directive 2004/83/CE), as modified by d.lg.s 18/2014 (implementing Directive 2011/95/UE), which provides the expulsion of the applicant of subsidiary protection for national security purposes, is compatible with the principle of non-refoulement as laid down in Article 19 Charter.

At a glance

Country	Area	Reference to EU law	Legal and/or judicial	Judicial	Remedy
• Italy	• subsidiary protection	• Art. 19(2) CFR • Art. 3 ECHR	• Supreme Court	• disapplication	• disapplication and duty of interpretation in compliance with international

Timeline representation

Enforcement of security measure of expulsion

Refusal to examine the application for a revocation of the security measure and for an admission to subsidiary protection status

Confirmation of the refusal decision by the Tribunale di Sorveglianza

Court of Cassation declares the duty of examination of the application and of a partial disapplication or consistent interpretation

Case(s) description

a. Facts

Lucky Haruna, a Nigerian national, who is serving his sentence of six years and eight months of detention for drugs related crimes, submits an application for the revocation of the security measure of expulsion (adopted in 2013) and for the recognition of the subsidiary protection status. His application is not examined on the merits by the Magistrato di Sorveglianza and by the Tribunale di Sorveglianza, in second degree. Mr Haruna appealed before the Corte di Cassazione (Court of Cassation) against the negative decision of the Tribunal.

b. Legal issues

Whether the Italian legislation (Art. 20 D.lgs. n. 251/2007), which provides the expulsion of the subsidiary protection seeker in case of a risk to the national public security, is

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compatible with the principle of non-refoulement as guaranteed by EU Charter and European Court of Human Rights.

c. Reasoning of the Court of Cassation

The Court of Cassation examined the effects of the principle of non-refoulement on the judicial review powers of national judges of the application for subsidiary protection of a person convicted for drug related crimes, served with an expulsion order due to being considered as a threat to the national security.

The Court assessed that the refusal to examine the subsidiary protection claim is unjustified, because the subsidiary protection application concerns circumstances that limit the execution of the security measure. The application, indeed, is intended to recognize a legal status to the applicant that would constitute an obstacle to expulsion. Therefore the examination of the possible execution of the expulsion measure based on security grounds is a duty of the criminal law judge.

The Italian Court of Cassation then stated the principles of law that will guide the powers of the judge (*giudice del rinvio*) in the analysis of the relation between the security measure of expulsion and the the application for subsidiary protection. In more detail, the Court stressed the necessity to examine the requirements of Art. 19(2) EU Charter when implementing Article 20 of the d.lgs. 251/2007, which provides for an exception to the principle of non-refoulement in cases of a risk to the national security and in case of a crime committed in Italian territory. The Court underlined that Article 19(2) EU Charter is hierarchically superior to the provisions of national law, and the latter have to be interpreted and applied in conformity with the provisions of the EU charter.

The Court found that since the Italian legislation at issue can be interpreted as falling within the scope of EU law, in particular the Qualification Directive (2011/95/EU) and its predecessor (2004/83/CE), the requirements of the principle of non-refoulement as laid down in Article 19(2) EU charter have to be respected.

Article 19(2) Charter was interpreted as providing an absolute and mandatory right, which would thus require also the examination of the subsidiary protection claim. Article 19 Charter and Article 3 ECHR recognize a minimum level of protection that prevent the expulsion, also in the case of a proved social dangerousness or in the case of a crime committed in Italy. The Supreme Court affirmed the following principles of law: a) when assessing the application for early withdrawal or non-compliance of the expulsion security measure, the Magistrate and the Surveillance Tribunal are required to examine the applications introduced by the party, by resolving, where necessary and incidentally, any matter concerning the existence of the conditions for admission to the status of refugee or of a person entitled to subsidiary protection; b) the provision of art. 20 of Legislative Decree no. 251/2007 in so far as it allows for the expulsion for reasons of internal order and security does not apply to instances in which the individual runs a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment if returned to his country of origin.

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In this particular case, the Court of Cassation concluded that Article 19(2) Eu Charter requires an obligation on the part of the national judges to disapply Art. 20 of the Legislative decree 251/2007 in favour of the direct application of the principle of non-refoulement. The Court of Cassation establishes the duty of the criminal law judge to examine both the application for revocation of expulsion and for the recognition of subsidiary protection and the necessity of interpreting the national legislation on expulsion of the subsidiary protection seeker in compliance with Article 3 ECHR and Article 19(2) Charter.

Analysis

a. Role of the Charter

The Court of Cassation found that since the applicable Italian legislation can be interpreted as falling under the scope of EU law (Qualification Directive and Recast Asylum Procedure Directive), than Article 19(2) EU Charter is applicable to the circumstances of the case. It also reminded about the principle of supremacy of EU primary law over national legislation, which could require the national judges to interpret the provisions of national legislation (even when enacted within the permitted margin of discretion) to respect the provisions of the EU Charter. Article 20 d. lgs. 251/2007 should be interpreted in conformity with Article 19 Charter, even if it provides a derogation from prohibition of expulsion in cases of risks to the national security and crimes committed on the Italian territory. In this case, the EU principle of non-refoulement required concrete duties from the criminal law judge: interpretation and if conform interpretation does not suffice to ensure compliance with Article 19(2) EU Charter, than the principle of supremacy of EU law, would require the national judge to disapply the Italian provision in favour of the direct application of the principle of non-refoulement.

b. Outcome and judicial dialogue

The First Criminal Chamber of the Court of Cassation stated that the expulsion order of the alien under the single text on narcotics cannot be enforced if there is a serious risk that the expelled person will be subjected to the death penalty, inhuman or degrading treatment in the country of origin, stating the irrelevance, for this purpose, of the assessment of the seriousness of the offense and of the social danger.

The Court of Cassation referred extensively to the jurisprudence of the CJEU and ECtHR on the hierarchy of legal sources and requirements imposed by the principle of non-refoulement under Article 19(2) Charter and 3 ECHR.

c. Remedies

Article 20 was held to be incompatible with Article 19 Charter and Article 3 ECHR. This provides a duty of interpretation in compliance with Article 19 Charter and Article 3 ECHR and a duty of disapplication of Article 20 if its application is contrary to the absolute rights provided by the EU principle of non-refoulement.

d. Additional relevant cases

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ECtHR decision: *Saadi vs. Italy*; *Tuomi vs. Italy*.

ARTICLE 24 CHARTER – the rights of the child in asylum and return procedures

Overview of issues concerning Article 24 Charter

The rights of the children have been given expression in Article 24 the Charter, which includes three paragraphs: “(1) Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his and her parents, unless that is contrary to his or her interests.” [emphasis added]

It should be noted that Article 24(2) of the Charter expressly refers to the best interests of the child as a requirement for the public and private authorities to give primary consideration in their decisions. This would therefore include also immigration procedures.

According to the explanations of the Charter, Article 24 of the Charter is based on the Convention on the Rights of the Child concluded in New York on 20 November 1989 and ratified by all Member States. Therefore, any decision concerning a child, regardless of his/her legal status must be based on respect for the rights of the child as set out not only in the Charter but also in the UN Convention on the Rights of the Child (CRC). All Member States have signed the Convention, however Ireland has not adopted domestic implementing legislation, which has led to a downgrading of the legal status and force of the ‘best interests of the child’ in immigration proceedings.¹⁷⁹

According to the FRA Handbook on asylum and migration, ‘the best interests of the child’ is of fundamental importance, and public authorities must make this as a primary consideration when taking actions related to children. The right also underpins specific provisions of EU legislation in relation to unaccompanied minors.¹⁸⁰

The rights and interests of the child are of particular importance in asylum and return procedures in relation to unaccompanied minors. These rights might also come jointly with or under the right to family life under Article 7 Charter and Article 8 ECHR. It can be observed that the best interests of the child are recognised under the ambit of Article 24(2) of the Charter as a status of ‘primary consideration’ while under Article 8 ECHR, the ECtHR has referred to the best interests of the child as a requirement which needs to be given ‘sufficient weight’.¹⁸¹ However, in practice, both the CJEU and the ECtHR have prioritised children’s

¹⁷⁹ See, in particular the *Dos Santos v. Minister for Justice and Equality* [2015] IECA 210 and *C.I. v. Minister for Justice and Equality* [2015] IECA 192. The latter case can be found in the ACTIONES database.

¹⁸⁰ Handbook on European law relating to asylum, borders and immigration, edition 2014, p.217, available online at http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_en.pdf.

¹⁸¹ The requirement to give sufficient weight to the best interests of the child in the proportionality assessment under Article 8 is a settled principle under the ECtHR jurisprudence: *Boultif v. Switzerland* [2001] ECHR 49;

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rights in immigration proceedings and reached similar remedies where migration or deportation measures were negatively impacting on the best interests of children.

In the *Tarakhel v Switzerland* judgment (para. 99), the ECtHR held that:

[the] Court has established that it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant (see Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, no. 13178/03, § 55, ECHR 2006-XI, and Popov v. France, nos. 39472/07 and 39474/07, § 91, 19 January 2012). Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status. The Court has also observed that the Convention on the Rights of the Child encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents (see to this effect Popov, cited above, § 91).

The CEAS instruments¹⁸² and Return Directive¹⁸³ have specific provisions dedicated to ensuring respect of best interests and rights of unaccompanied minors considered as vulnerable groups.¹⁸⁴

The CJEU has had the opportunity to consider the application of Article 24 right as regards unaccompanied minors subject to Dublin transfers in the *MA, BT and DA v. Secretary of State for the Home Department*.¹⁸⁵ The case concerned three unaccompanied minors who submitted asylum application in Italy and the Netherlands, before arriving in the UK, and, who opposed their return to these Member States, although they did not have family legally present in the UK. In establishing the Member State responsible for assessing the asylum application under Article 6 of Dublin II Regulation, the CJEU referred to Article 24(2) Charter. It held that “*although Article 6(2) of Regulation No 343/2003 does not expressly refer to the best interests of the child, it cannot be interpreted in such a way that it disregards that fundamental right.*” (paras. 58, 59) Within the context of the referred case, the Court concluded that Article 24(2) of the Charter requires that the procedure for determining the Member State responsible cannot be prolonged unnecessarily, “and to ensure that unaccompanied minors have prompt access to the procedures for determining refugee status.” (para.60)

The CJEU concluded that in the absence of a family member legally present in a Member State, the State in which the minor is physically present is responsible for examining such a

Nunez v. Norway Appl. no. 55597/09 (ECtHR, 28 June 2011); *Jeunesse v. the Netherlands*, Appl. no. 12738/10 (ECtHR, 3 October 2014).

¹⁸² Article 25 of Recast Asylum Procedure Directive; Articles 11(3) and 24 of the Recast Reception Conditions Directive; Article 31 of the Recast Qualification Directive; Articles 6, 8, 11 of Dublin III system (Regulation (EU) No. 604/2013).

¹⁸³ See in particular Article 10.

¹⁸⁴ See Article 3(9) Return Directive.

¹⁸⁵ *MA, BT and DA v. Secretary of State for the Home Department*, C-648/11, Judgment of the CJEU of 6 June 2013, preliminary reference by the UK Court of Appeal, ECLI:EU:C:2013:367.

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claim. Article 24(2) Charter was held to be a aid to interpretation in secondary legislation that impacts on minors, even when the later does not expressly refer to rights or best interests of the child. Therefore, the CJEU preliminary ruling, although it concerned the interpretation of the Dublin II Regulation provisions, is of relevance also for the rights of children in other asylum or return procedures.

Unlike the EU Charter of Fundamental Rights, the protection of the rights and interests of children are not expressly stated in the ECHR. However, they are taken into account by the ECtHR, in its case law delivered under Articles 3 and 8 ECHR. *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* is one such landmark case, where the Strasbourg Court found several violations of Articles 3 and 8 ECHR by Belgium for detaining an unaccompanied five-year-old minor at a transit centre for adult foreigners; for actual removal and for the conditions in which she was removed to her home country. The very removal of the minor was held to constitute, in the circumstances of the case, inhuman treatment.¹⁸⁶ This is particularly, due to the ‘specific needs and their extreme vulnerability’ of minor asylum seeker which are in need of “special protection.”¹⁸⁷

Within the framework of Dublin transfers, the rights of children are considered by national courts more frequently under the auspices of Article 8 ECHR than Article 24 Charter, which is said to mirror Article 7 of the Charter. National courts seem to assess the conformity of asylum procedures from the perspective of the best interest of the children, without necessarily differentiating between Article 8 of the Convention and Article 7 or 24 Charter in terms of remedies and legal status.¹⁸⁸ A landmark judgment on prioritising the family reunification of unaccompanied minors under Article 8 ECHR instead of following a formal operation of Dublin III reunification procedures originates from the UK Upper Tribunal in the *ZAT and others (discussed below)*.¹⁸⁹

National Application of Article 24 Charter

The cases analysed under this section involve the rights of children who are unaccompanied minors either seeking asylum or subject to removal procedure or who are detained while their asylum applications are processed. Other cases touching incidentally on the rights of children can be found under the section on Article 7 of the Charter. In addition, the ACTIONES database includes also an interesting case where there is a pending preliminary reference (C-133/15 pending case *Chavez-Vilchez and others*), concerning the rights to welfare and social benefits of the mother of a child who is an EU citizen, and who

¹⁸⁶ *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, Appl. No. 13178/03, Judgment of 12 October 2006.

¹⁸⁷ *Tarakhel v. Switzerland*, Appl. No. 29217/12, 4 November 2014, para. 119.

¹⁸⁸ With the exception of the Council of State, which interprets Article 24 of the Charter as not establishing a fundamental right, but mere principles which do not establish precise obligations on the Member States. See the second case sheet discussed under this section.

¹⁸⁹ UK Upper Tribunal, [*The Queen on the application of ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM v. Secretary of State for the Home Department*](#), R/15401/2015; JR/154015/2015.

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does not have the right of residence, under Dutch legislation.¹⁹⁰ Similar cases have arisen in the UK, where the Supreme Court had to balance the best interests of children, who are UK citizens, and thus also EU citizens, and who are affected by the decision to remove or deport one or both of their parents, aliens with no right to residence.¹⁹¹ The best interests of the child were considered as overriding considerations, which outweigh the fact that the mother conceived the children while in an already precarious legal status (in asylum procedure, or after being rejected refugee/subsidiary protection).

This string of cases involves, in particular, Article 24(3) of the Charter. In *Abdul*, the President of the UK Upper Tribunal clearly held that Article 24(3) of the Charter creates a free standing right. In terms of remedies, the judgment in *Abdul* concluded that violations of this right, where public authorities fail to take it into consideration in their decision ‘may constitute a material error of law.’¹⁹² This judgment brings light to the often raised question of the legal status and effect of Article 24 of the Charter, which has been a quite contestable issue in domestic jurisprudence. The Dutch Council of State seems to contest its status of right and considers it as a principle subject to the margin of discretion of the administration, mainly due to the argument that Article 24 Charter is a reiteration of several provisions from the UN Convention on the Rights of Children which are broadly phrased and without concrete and precise obligations imposed on the States. While the Irish Court of Appeal downgrades the legal status and force of the best interests of the child in immigration proceedings, due to the fact that although Ireland has signed the UNCRC, it has not adopted implementing legislation transposing the requirements of the UN Convention.¹⁹³

It seems that national courts vary in their opinions on the legal status and force recognised to the best interests of the child. The UK Supreme Court and Upper Tribunal fully endorse the status of primary consideration of the best interests of the child (Article 24(2) of the Charter) and the free-standing rights set out in Article 24(1) and 24(3). The Tallinn Circuit Court¹⁹⁴ recognises a similar primary consideration to the best interests of the child when assessing the proportionality of limitations to Article 5 ECHR/Article 6 Charter and Article 8 ECHR/Article 7 Charter, and expressly refer to Article 24 of the Charter. In regard to the detention of a family with minor children, the Supreme Administrative Court of Estonia cited Article 11(2) of the Directive 2013/33 and indicated that the detention of a minor can only be justified by extraordinary circumstances, for example, a serious threat to the public order (suspicion of terrorism, complete impossibility to stay separately from a person who has to be unavoidably detained). Taking into consideration the circumstances of the case, the Supreme Court held that a considerable risk of absconding cannot be

¹⁹⁰ The Supreme Administrative Court in Utrecht, ECLI:NL:CRVB:2015:665.

¹⁹¹ UK Supreme Court, *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 (1 February 2011).

¹⁹² *Abdul* [2016] UKUT 106 (IAC).

¹⁹³ *Dos Santos v. Minister for Justice and Equality* [2015]; *Suppiah & Ors, R (on the application of) v Secretary of State for the Home Department* [2011] EWHC 2 (Admin) (11 January 2011), see paras. 148 and 210.

¹⁹⁴ Tallinn Circuit Court, Judgment of 23 December 2015; R. Kitsing, ACTIONES case note, Tallinn Circuit Court, Judgment of 23 December 2015.

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established. It is not likely that a group who wants to stay together and consists of two adults and six minors (one of them newly born) would continue its journey and attempt to evade the authorities. In light of the best interests of the children, the Court held that the best solution is not to separate the group. The Court continued by ruling that it is not proportionate to keep the group in a detention centre. Even if the family evades the authorities and leaves the country the need to protect the Schengen system does not outweigh the rights of the minor and newly born children to a fostering state. The fact that detention of the minors is an easy solution for the State to monitor immigrants cannot be considered a proportionate justification for limiting the liberty of a person. The Court decided to release the applicant with her four under-aged children from the detention centre and indicated that the other members of the same group will also be released from the detention centre (rules in separate judgment of the same court).

In Netherlands, the courts seem to have taken opposite views on the effects of Article 24(2) Charter. While the administrative courts follow the aforementioned positive trend, the Council of State interprets Article 24 of the Charter as a principle which only gives the courts a right to control the wide margin of discretion enjoyed by the administration and does not grant concrete and directly effective rights to individuals. The Irish Court of Appeal seems to adopt a dismissive approach to the application of Article 24 of the Charter as one consideration among many rather than a primary consideration to be taken into account during immigration procedures.¹⁹⁵

Opposite views on the role of Article 24 Charter in regard to recognition of subsidiary protection to a mother with a newly born baby were reported in a case originating from Romania. The *Galați County Court*¹⁹⁶ had to assess whether the deportation of a pregnant woman would breach her rights and the rights of her future child under the Charter, the UN Universal Declaration of Human Rights (UNDH) and Convention on the Rights of the Child. While the first instance court confirmed the administrative authority's decisions finding a lack of credibility, it overturned the decision rejecting international protection and granted the plaintiff the right of asylum on grounds that the return would infringe Article 8 ECHR and Article 24 Charter. The first instance Court held that under national and international legislation and the jurisprudence of the ECHR, the right to contact between a child and his or her parents is a fundamental right and states must undertake positive measures for its effective enforcement. On appeal, the Court found that the conditions for awarding subsidiary protection were not fulfilled in the present case given the absence of any real risk. It further held that family reunification and the protection of the best interests of the child can be upheld in the present situation through a different form of administrative decision. The Court

¹⁹⁵ Ireland has not implemented the UNCRC which in Article 3 recognises the best interests of the child as a primary consideration.

¹⁹⁶ *Decision no. 353/2014, following an appeal to the Galați Court, Decision no. 11927/2013*, case reported by lawyer P. Matei.

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of Appeal allowed the appeal, overruling the judgment of the County Court and rejecting the complaint as unfounded.

In light of these different domestic judicial interpretations of Article 24 of the Charter it is important to mention that Article 24 Charter has an legal status independent from Article 3 UNCRC and that Member States are required to give full effect to Article 24 Charter as well as to the ECtHR's interpretation of Article 8 ECHR in relation to ensuring the best interests of children (Article 52(3) Charter).

Conclusions – Judicial Dialogue

Through the preliminary reference procedure (*M.A. and others*), the CJEU had the opportunity to clarify the effects of Article 24(2) Charter in Dublin II procedures. The Court extended the FR protection by deriving an obligation not to transfer unaccompanied minors if they do not have family members in the Member State of transfer.

First instance and Supreme Courts from UK (the referring state in *M.A. and others*) and other Member States have referred to the *M.A. and others* preliminary ruling, however reaching different results. Therefore, although using the same judicial interaction technique - consistent interpretation, the role of Article 24 Charter is not uniformly applied across the various asylum proceedings. In Dublin procedures, it seems that Article 24 Charter and Article 8 ECHR have been applied to enhance the fundamental rights standards of unaccompanied minors, rejecting Dublin transfers on the basis of these provisions. In return proceedings, Article 24 Charter was not recognised as preventing the deportation of a minor suffering from post-traumatic stress. (**Dutch Council of State**, Judgment of 20 January 2014¹⁹⁷) The jurisprudence submitted by the ACTIONES collaborators reflect that consistent interpretation is not sufficient to achieve similar effects of Article 24 Charter across all EU countries and asylum proceedings. The use of preliminary reference to clarify the scope and effects of Article 24 Charter beyond the specific facts of the *M.A. and others* case is thus recommended.

The Romanian case showed an interesting use of quashing administrative decision rejecting international protection directly on the basis of ECtHR case law regarding the fundamental right to maintaining contact between a child and his or her parents. In particular it stressed the fact that states may be required to undertake positive measures to ensure its effective enforcement.

¹⁹⁷ Case reported by Judge Catherine van Boven-Hartogh.

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Casesheet 5.15 – rights of unaccompanied minors to unite with family members as part of right to family and private life; best interests of children and their right to family life to override the formal Dublin procedure for the purpose of family reunification

R (ZAT) v Secretary of State for the Home Department

Core issues

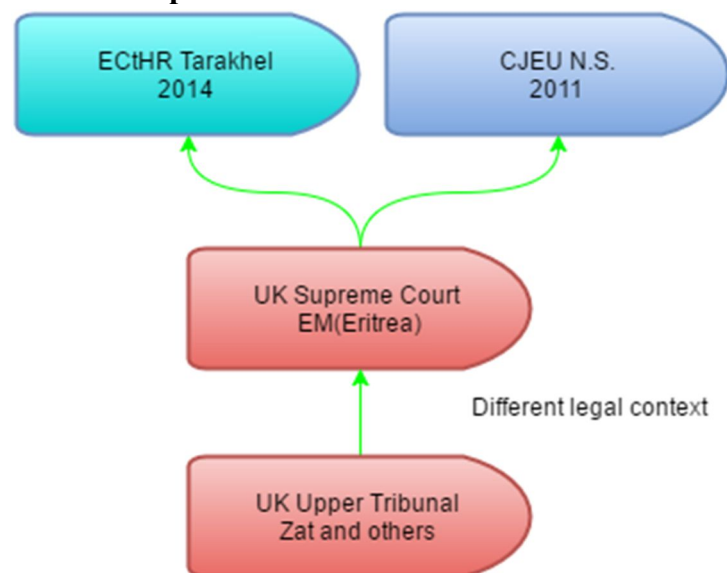
Interaction between Article 8 ECHR with Article 24 Charter following the CJEU preliminary ruling in MA;

UK Upper Tribunal creative use of consistent interpretation to preserve both the right to family life and Dublin III based reunification procedure

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
<ul style="list-style-type: none"> United Kingdom 	<ul style="list-style-type: none"> Dublin Transfer Rights of minors 	<ul style="list-style-type: none"> Regulation 604/2013/EU (Dublin III) Article 7 Charter 	<ul style="list-style-type: none"> Upper Tribunal (Immigration and Asylum) - England and Wales 	<ul style="list-style-type: none"> Reference to ECtHR judgments Reference to CJEU judgments 	<ul style="list-style-type: none"> The initial administrative decision refusing leave to enter the UK is quashed

Timeline representation



Case(s) description

a. Facts

There were seven applicants. Applicants 1-4 were living in the ‘jungle’ – a temporary and ad hoc refugee settlement on the outskirts of Calais at the time of the application. Applicants

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1-3 were minors, whereas applicant 4 suffered from mental illness and was dependant on another applicant. Applicants 5-7 were present in the United Kingdom and enjoyed refugee status, two of whom were engaged in gainful employment. Applicants 1-4 were related as siblings in various combinations to applicants 5-7.

Applicants 1-4 did not make any applications for asylum in France. The evidence suggests and was accepted by the tribunal (with the proviso that a different conclusion may be reached by the primary decision maker) that there was significant problems for minors in making applications for asylum in France and that moreover there were delays in the operation of the Dublin system in France. Furthermore, it was uncontested that the living conditions of individuals in the ‘jungle’ were deplorable and involved unhealthy conditions lacking basic sanitation, electricity, water supplies etc. and that moreover it was an insecure place for vulnerable persons with reports of widespread acts of violence, including trafficking and rape.

Applicants 1-4 sought judicial review of a decision by the Secretary of State refusing to grant leave to enter the UK on the basis of Article 8 ECHR based on the sibling relationship with legally recognised asylum seekers in the UK. Rather, the Secretary of State maintained that the individuals in question should make an asylum claim in France and a subsequent application for transfer to the UK based on the Dublin III Regulation.

b. Legal issues

Whether an individual has an immediate right for leave to enter the United Kingdom based on Article 8 ECHR or whether a prior application for transfer would have to be made in the Member State in which he/she was present in accordance with the Dublin Regulation.

c. Reasoning of the Court

The judgment is framed as a balance that needs to be struck between two legal regimes which, while not in conflict, may be in ‘tension’, namely the ECHR (and the Human Rights Act 1998 applying the ECHR in UK law) and the Dublin System (and the broader CEAS). In deciding on an individual case where these two systems may pull in opposite directions the Court found (and this appears to have been already accepted as a common point by the parties) that a proportionality assessment should be conducted, in doing so the Court cites the judgment of the Supreme Court in *EM*, interpreting *NS* in the UK.

The proportionality assessment is conducted as a classic balancing act between the individual rights concerned (here Article 8 ECHR rights to a family life) and the public interest concerned. Under the public interest the traditional interest of the integrity of the immigration process and the sovereign right of the state to control borders is supplemented by an interest in the application and maintenance of the Dublin system which should constitute a ‘potent factor’ in any proportionality assessment. Furthermore, the Court notes that such cases necessarily involve an assessment of the individual circumstances and are ‘intensely fact sensitive cases’.

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In the present case, the proportionality assessment results in a finding that a refusal to allow entry would constitute a disproportionate violation of the applicants Article 8 ECHR right *if* they were asylum applicants. The Court therefore orders that if the applicants were to apply for asylum in France, the decision of the Secretary of State refusing leave to enter should be quashed. This is taking into account the particular personal circumstances of the applicants, their living conditions in the jungle and the delays associated with the operation of the Dublin regulation.

Analysis

a. *Role of the Charter*

Mention is made of Article 7 Charter as a subsidiary point in the applicant's submissions but is not elaborated upon. The judgment is decided on the basis of Article 8 ECHR. No further mention is made of the Charter (beyond an indirect reference to *NS* and *EM*).

b. *Judicial dialogue*

There are two primary instances where the judgment draws on the jurisprudence of other courts.

Firstly, in outlining the substance of the right under Article 8 ECHR to 'positive' action on behalf of the state to permit family reunification by permitting an individual to join a family member in the state. Here reference is made to the ECtHR's judgments in *Tuquabo – Tekle v the Netherlands* (App no 60665/00) and *Mayeka and Mitunga v Belgium* [2008] 46 EHRR 23 in particular.

Secondly, the tribunal draws on the judgments of the Court of Justice in Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Dept* EU:C:2011:865, [2011] ECR I-13905 but especially on *EM (Eritrea)* [2014] AC 1321 in determining the appropriate approach to a situation where ECHR obligations and CEAS obligations may be in tension. Here the Tribunal follows the *EM* conclusion of a *Soering* type test, requiring an individual assessment as a complement to the systemic deficiencies test outlined in *NS*. (Reference is also made in passing to Case C-394/12 *Abdullahi* EU:C:2013:813 but is deemed not to add anything to the assessment.)

c. *Remedies*

Original administrative decision refusing leave to enter the United Kingdom is quashed.

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Outcome of Judicial Application of Article 24 Charter

Article 24 of the Charter was used as a standard for assessing the legality of detention of under-aged and newly born children whose parents have applied for asylum in Estonia. The Tallinn Circuit Court held the measure to be a disproportionate interference with their human rights – right to liberty, rights of the child.

In *M.A. and others* Article 24 CHARTER was used by the CJEU in conjunction with the Dublin II Regulation to derive a right to stay in the last Member State and not to be transferred for unaccompanied minors. Within Dublin procedures, the UK court used Article 8 ECHR for keeping together unaccompanied minors with their family, although the formal requirements under the Dublin procedures were not met.

ARTICLE 41 CHARTER- Right to good administration in asylum and return procedures

Overview of issues concerning Article 41 Charter

Article 41 of the Charter guarantees the right to good administration as a fundamental right of every person, whether a citizen of the Union or otherwise. Accordingly, every person falling under the jurisdiction of the EU “has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.” The right to good administration is an umbrella right including the following guarantees:

- a. the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- b. the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
- c. the obligation of the administration to give reasons for its decisions.

In [*Mukarubega*](#)¹⁹⁸ and [*Boudjlida*](#)¹⁹⁹, the CJEU made clear that Article 41 Charter does not apply to the actions of the Member States. However, the right to be heard does apply, when the Member States are acting within the scope of EU law on the grounds of the principle of rights of defence. 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.*²⁰⁰). Therefore the general principles of EU law remain of importance, even after the entry into force of the EU Charter.²⁰¹

As recalled in [*Sopropé*](#)²⁰², the authorities of the Member States must comply with the EU general principles every time they take decisions which come within the scope of EU law. Observance of the right recognised by these general principles is therefore required even where the applicable legislation does not expressly provide for such a procedural requirement (see *case sheet on the right to be heard in return proceedings*).

It is important to mention that some of the guarantees secured by Article 41 Charter are also guarantees protected under the right to a fair trial (Article 47 Charter), such as the right to be heard and the obligation to give reasons. Article 41 Charter and the principle of good administration guarantees the observance of these rights during the administrative phase, while Article 47 Charter is applicable during the judicial phase of asylum and immigration proceedings. The delimitation is not always clear cut in practice as revealed by [*ZZ*](#) type of cases concerning administrative decisions taken without sharing all the evidence

¹⁹⁸ Case C-166/13, *Mukarubega*, EU:C:2014:2336.

¹⁹⁹ Case C-249/13, *Boudjlida*, EU:C:2014:2431.

²⁰⁰ 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).

²⁰¹ 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*.

²⁰² Case C-349/07, *Sopropé*, (post-clearance recovery of customs import duties), ECLI:EU:C:2008:746, paras. 36-38.

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with the third country nationals due to national security concerns.²⁰³ The interaction between the principle of good administration, rights of defence and Article 47 Charter is often present in asylum and immigration proceedings, due to the specificities of these proceedings entailing similar guarantees and steps before both administrative authorities and national courts. The issues raised are complex, such as faults in securing the right to be heard in administrative proceedings which might have to be corrected during the hearing before the national courts; or circumstances in which a full hearing during the administrative phase may relieve the national courts from hearing the asylum seeker in person. (see [Sacko](#)²⁰⁴)

Article 41 Charter is brought up with increasing frequency in the jurisprudence of the CJEU regarding asylum and immigration. **French, Irish, Dutch and Belgian** courts have addressed preliminary references in the course of which the CJEU had the opportunity to clarify the following issues:

- the *legal status of the right to be heard* (*Mukarubega and Boudjlida*);
- *content of the right to be heard* (*Boudjlida*, [M.M. \(1\)](#)²⁰⁵) and [M.M. \(2\)](#)²⁰⁶);
- *procedural requirements for the application of the right to be heard invoked for the first time in appeal before the supreme court* ([Benallal](#)²⁰⁷) for a commentary of the case, please see [REDIAL Eletronic Journal: Rights and Remedies in return proceedings](#).
- *remedies for violation of the right to be heard* ([G. and R.](#)²⁰⁸).

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.](#)²⁰⁹ [H. N.](#)²¹⁰. The considerable number of those references for a preliminary ruling can be explained by 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, point 3).

²⁰³ See case sheet 6 in the *ACTIONES Module on Effective Judicial Protection* commenting the Case C-300/11 *Z.Z.* and on the issue of non-disclosure of evidence on national security grounds, see section on Article 47 CHARTER in this Module.

²⁰⁴ The case is a preliminary reference addressed by the Tribunal of Milano asking whether Article 46 of the Asylum Procedure Directive interpreted in light of Article 47 CHARTER requires a mandatory right to be heard of the asylum seeker before a national court in appeal proceedings against a refusal of the asylum application as manifestly unfounded, when the asylum seeker was already heard in full during the administrative phase.

²⁰⁵ Case C-277/11, *M.M. (1)*, EU:C:2012:744.

²⁰⁶ Case C-560/14, *M.M. (2)*, ECLI:EU:C:2017:101.

²⁰⁷ Case C-161/15, *Benallal*, EU:C:2016:175.

²⁰⁸ Case C-383/13 PPU, *G. and R.*, EU:C:2013:533.

²⁰⁹ Case C-175/11, *D. and A.*, EU:C:2013:45.

²¹⁰ Case C-604/12, *N.*, EU:C:2014:302.

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It is important to emphasise that unlike Article 47 Charter, which has a corresponding right in the ECHR (Article 6 ECHR), Article 41 Charter does not have a separate corresponding ECHR right. Article 6 ECHR guarantees do not apply to public administrative proceedings.²¹¹

In a Nutshell

Requirements of Article 41 Charter as clarified by the CJEU

In addition to the Charter, the right to good administration guarantees are also secured by specific EU secondary legislation ([Asylum Procedure Directive](#), see Articles 12-18; [Dublin III Regulation](#), Articles 3-7; [Return Directive](#), Chapter III). The CJEU has clarified these guarantees and, in certain cases, added concrete requirements not expressly provided by the EU secondary legislation. In immigration law, the Return Directive refers neither *expressis verbis* to the Member States' obligation to respect the right to be heard of the irregular migrants before taking an individual measure likely to affect the person concerned, nor regulates the legal consequences when this right has been breached by the competent authorities. However, according to the CJEU, the legal source of the obligation to respect the right to be heard in the course of the return procedure derives from the general principle of the rights of the defence.²¹² (see, also the *Boudjlida* and *G. and R.* cases for the return proceedings).

The CJEU's findings on the right to be heard in administrative proceedings tend to overlap in asylum and immigration law; which is not surprising as both areas might in practice be interconnected, *e.g.* rejected asylum seekers subject - subsequently or at the same time - to a return decision issued by competent authorities.

Legal grounds of the right to good administration

The CJEU notably stated 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.*"²¹³ The CJEU concluded that the right to be heard applies to the Member States' actions when acting within the scope of EU law on the basis of the general principle of the rights of the defence.

²¹¹ S. Prechal, "The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?" in *Fundamental Rights in International and European Law: Public and Private Perspectives*, Paulyssen, Takacs, Lazic; Van Rompuy (eds), ASSER Springer 2016.

²¹² Case C-383/13 PPU, *M. G., N. R. v Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2013:533, para. 32.

²¹³ See Joined Cases C-141/12 and C-372/12, *YS and Others*, EU:C:2014:2081, para. 61; Case 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.

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By doing so, the CJEU seems to draw back from its initial position adopted in the asylum context: in case *M.M (I)*, the Court relied on the very wording of Article 41 Charter to conclude that such a provision was of general application.²¹⁴ The right to be heard in all proceedings is deemed to be affirmed not only in Articles 47 and 48 of the Charter, which ensure respect of both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41, which guarantees the right to good administration during administrative proceedings. In the Court's view, it derives from these provisions that *"the right, thus understood, of the applicant for asylum to be heard must apply fully to the procedure in which the competent national authority examines an application for international protection pursuant to rules adopted in the framework of the Common European Asylum System."*

In regard to the right of the individual to *have access to administrative files*, the CJEU concluded that limitations to this right, when provided by the EU secondary legislation have to be strictly interpreted. Common grounds for the limitation of this right are national security, defence, public security grounds (see Article 12(1)(2) of the Return Directive). Limitations cannot have the effect of a total lack of information of the evidence used by the administration against the individual. According to the *ZZ* case,²¹⁵ the CJEU requires that the essence of the grounds be shared by the administration with the individual.²¹⁶

Content of the right to good administration

So far, the jurisprudence of the CJEU addressed mostly the right to be heard as part of Article 41 Charter right to good administration guarantees. The right to be heard, as interpreted by the CJEU, guarantees in both proceedings (asylum and return) *the opportunity*

²¹⁴ Case C-277/11, *M.*, ECLI:EU:C:2012:744, para. 82-83.

²¹⁵ Case C-200/11, *ZZ*, ECLI:EU:C:2013:363. The case is commented in ACTIONES Module on effective judicial protection. It can also be found in the [ACTIONES Database](#).

²¹⁶ At the domestic level the precise level of disclosure of evidence practice by the administration and accepted by the national courts varies among the Member States. See, for instance, the UK courts following *ZZ*, Dutch case commented in the section on Article 47 CHARTER, and the Polish case. For instance, **Regional Administrative Court (RAC) in Warsaw (No File IV SA/Wa 1074/14)**: the RAC had to assess whether the non-disclosure of information and prohibition of right of access to files of the irregular migrant subject to a return decision and entry ban was in conformity with the national legislation and the Return Directive. In *casu*, the person concerned was not informed of the essence of the grounds on which a return decision was taken. The classified documents that constituted the basis of the decision were also not disclosed to the person concerned. However, the court accepted this evidence, even if not disclosed to the individual. In this case, neither the alien nor the lawyer could have had access to relevant documents that were considered to be under the protection of State's secrets. The RAC relied in its judgement on the Judgement of the Polish Supreme Administrative Court (File No II OSK 2293/10), in which the relevant documents were not presented either to the party or to his lawyer because of the need to keep them confidential. The RAC took the restrictive view that the confidentiality of the documents, although it limits the principles of fair trial and equality of arms between the parties to the proceedings, is nevertheless legally founded. First of all, due to the fact that the right to a fair trial is not an absolute right and the principle of non-refoulement will not be violated if the TCN is returned. The Court emphasised that the removal of the appellant did not entail a risk of violation of 'basic human rights of the alien', as a result of return to the country of origin. In support of his reasoning, the RAC invoked the joined cases of the CJEU (Joined Cases C-402/05P and C-415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation*, ECLI:EU:C:2008:461. It concluded that this restriction is in line with Articles 12 and 13 of the Return Directive.

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*to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely.*²¹⁷

That 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.*²¹⁸

As noted by AG Mengozzi, the right to be heard has a dual function: “*first, to enable the case to be examined and the facts to be established in as precise and correct a manner as possible and, second, to ensure that the person concerned is in fact protected. It is intended in particular to ensure that any decision adversely affecting a person is adopted with full knowledge of the facts and the objective thereof is, in particular, to enable the competent authority to correct an error or to allow the person concerned to produce such information relating to his personal circumstances as will tell in favour of the decision’s being adopted or not, or of its having a given content rather than another.*” ([Opinion](#) AG Mengozzi, M.M. (2), point 30)

The CJEU rejected the recognition of an automatic right to interview and right to call or cross-examine witness when the interview takes place in all proceedings of subsidiary protection within the specific Irish two separate procedures for refugee and subsidiary protection. However, the CJEU acknowledged that “[a]n interview must nonetheless be arranged where specific circumstances, relating to the elements available to the competent authority or to the personal or general circumstances in which the application for subsidiary protection has been made, render it necessary in order to examine that application with full knowledge of the facts, a matter which is for the referring court to establish.” (see, C-560/14, [M.M. \(2\)](#), para. 57)

Remedies to violation of the right to be heard

According to the CJEU preliminary ruling in the [G. and R.](#) (C-383/13, ECLI:EU:C:2013:533) case, even in situations where the referring court has established that the decision on prolongation of detention infringed the right to be heard, it does not necessarily render the decision unlawful. Accordingly, it does not automatically require the release of the third-country national concerned. Before making any conclusion regarding 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 would have been brought to an end’.

In that respect, the Court notes that the directive is intended to establish an effective removal and repatriation policy, based on common standards, for persons to be returned in a

²¹⁷ See, *inter alia*, Case C-277/11, *M.M (1)*, EU:C:2012:744, para. 87; Case C-166/13, *Mukarubega*, EU:C:2014:2336, para. 46; Case C-249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, ECLI:EU:C:2014:2431, para. 36 etc.

²¹⁸ Case C-277/11, *M. M.(1)*, EU:C:2012:744, para. 88; Case C-166/13, *Mukarubega*, EU:C:2014:2336, para. 48.

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humane manner and with full respect for their fundamental rights and dignity. Likewise, the use of coercive measures should be 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. On the specific implementation of the *G. and R.* findings of the CJEU by national courts, see the [REDIAL Electronic Journal: Rights and Remedies in return proceedings](#), p.27.

National Application of Article 41 Charter

In addition to the issues brought up in the jurisprudence of the CJEU, national courts were confronted with several other issues as was revealed by the jurisprudence submitted by the national judges and lawyers participating in the ACTIONES Working Group. As illustrated by the case law from **Estonian and Lithuanian courts**, Article 41(2) Charter is either used as an *additional source of interpretation* or corresponding guarantees are invoked on the legal grounds of the general principles of good administration and the duty of investigation.

In Lithuania, it is readily apparent from the case-law of the **Supreme Administrative Court** (SAC) that the provisions of the Charter are mostly relevant in the areas of asylum, public administration and judicial trials. In its case-law, it is most common for the SAC to refer to both the national Constitution and the Charter. On 7 July 2015, the Court had to rule on a refusal from the Migration Department to renew a residence permit of an applicant. It justified this refusal on the ground that the person concerned failed to provide relevant information regarding his future activities in the Lithuania or regarding his current place of residence. In first instance, the **Vilnius Regional Administrative Court** quashed the decision, stating that it was only based on assumptions, allegations and no established facts; the refusal to renew the residence permit therefore violated Article 8 of the Lithuanian Law on Public Administration and Article 41 Charter by giving the applicant “*irrationally short term delay for presenting relevant data and information*”. This reasoning was upheld by the SAC. The Supreme Court explicitly referred to Article 41 Charter as expressing a general legal value which should be taken into account when interpreting and applying the principle of good administration in Lithuania. By doing so, the Court used the technique of ‘consistent interpretation’ to reveal the principle of good administration enshrined in Article 8 of the Lithuanian Law on Public Administration in the light of the Charter.²¹⁹ The same reasoning was followed in a case concerning an under-age applicant who requested the termination of his administrative detention. Here again, through the consistent interpretation technique, the SAC translated Article 41 of the Charter into the domestic principle of good administration in the area of migration and asylum law.²²⁰

²¹⁹ Supreme Administrative Court of Lithuania, administrative case No. eA-2266-858/2015, Appellate instance, 7 July 2015. See E. Spruogis, ACTIONES Case note.

²²⁰ Supreme Administrative Court of Lithuania, administrative case No. A-3673-822/2015, appellate instance, 22 September 2015. See E. Spruogis, ACTIONES Case note.

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Although other national courts do not refer as frequently as the Supreme Administrative Court of Lithuania to Article 41 Charter or the general principles of good administration and rights of defence, they do give effect to guarantees enshrined within these principles on the basis of EU secondary legislation and jurisprudence of the CJEU and ECtHR. Article 4 of the Qualification Directive has been one of the sources for establishing good administration duties on competent public authorities. For instance, the **Tallinn Circuit Court** deduced a duty to carry out an impartial and individual investigation when assessing asylum application on account on the Qualification Directive and jurisprudence of the CJEU (C-411/11 P, *Altner v. Commission*; C-439/11 P, *Ziegler v. Commission*; C-604/12, *HN v. Minister for Justice, Equality and Law Reform*).²²¹ In a subsequent case, a Malian national claimed before the same court that the Police and Border Guard Board rejected his asylum application on the basis of inaccurate and abstract information, without granting him a prior right to be heard. In the present case, the Court only relied on national sources to underline the shared burden of proof between the parties: **when the applicant is not able to bring sufficient evidence of his persecution, the administration is entitled to collect general information about the country of origin**, e.g. through international sources.²²² Similarly, the **Italian Supreme Court** (Corte di Cassazione)²²³ relied on Article 8 of the Asylum Procedure Directive and jurisprudence of the ECtHR (*Seferovic v Italy*, and *Hrust v Italy*) to enforce the duty of information which the public authorities have in relation to migrants caught at sea. The Court annulled a detention order of a Nigerian national who was found at sea without documents and was detained and issued with an expulsion order without having been previously informed of the right to lodge an asylum application by the competent authorities.

The **UK High Court**²²⁴ had to assess whether the refusal of a general travel permit to a Syrian refugee based on the grounds of being involved in radical Islam violated the applicant's right to be informed of the Ministry's reasons prior to taking the refusal and the right to be informed of detailed reasons and evidence. The **High Court** first held that these rights are part of Article 41 Charter applicable also to the national authorities when acting within the scope of EU law. It found that the standards of the right of information prior to and after the taking of the administrative decision impacting negatively on the individual's right are set out by the CJEU in C-604/12 *HN*, C-277/11 *M.M (I)*, and C-300/11 *ZZ*. The UK High Court concluded that these preliminary rulings do not recognise an absolute right to provide reasons during administrative procedures, however, according to Article 41 Charter, there should be an invitation for submissions and reconsideration of the claim.

Right to provide reasons for decision: 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

²²¹ Tallinna Ringkonnakohus (Tallin Circuit Court), No. 3-12-2067, 27 February 2014.

²²² Tallinna Ringkonnakohus (Tallin Circuit Court), No. 3-14-52815, 8 September 2015

²²³ Judgment 5926/25.03.2015, submitted by Judge Martina Flamini.

²²⁴ United Kingdom, High Court of England and Wales, *R (AZ) v Secretary of State for the Home Department* [2015] EWHC 3695, 18 December 2015, [2016] 4 WLR 12.

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grounds of national security and that the right to be informed varied depending on the right involved and the legal context, relying on Case C-300/11, *ZZ (France) v Secretary of State for the Home Department*, C-584/10P, C-593/10P and C-595/10P, *EC v Kadi*. He distinguished the case of *ZZ (France)* on the grounds that the rights involved were of a different nature (Union citizenship rights to free movement vs. rights of refugees) and the legal context was different (a specific obligation to provide reasons is contained in Directive 2004/38/EC). He also relied on Case C-373/13 *HT v Land Baden-Württemberg* to find that different thresholds applied when differing rights were at stake.²²⁵ He 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 to ‘refoule’ a refugee, such as in 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”).

Conclusions – Judicial Dialogue

While the very application of Article 41(2) Charter to national authorities thus remains controversial, the right to be heard, as interpreted by the CJEU as part of the general principle of the rights of defence, guarantees in both proceedings (asylum and return) the opportunity for every person to make his/her views effectively during an administrative procedure and before the adoption of any decision liable to affect his/her interests adversely.²²⁶ While the rest of Article 41 Charter guarantees apply as part of the general principle of EU law of good administration.

National courts have used the consistent interpretation technique to read the domestic principle of good administration in light of Article 41 Charter right to good administration, general principles of EU law of rights of defence and the jurisprudence of the CJEU.

However, as regards the scope of application of Article 41(2) Charter, it remains uncertain whether this provision should be deemed a relevant legal source from which a right of applicants to be heard in national administrative proceedings can be derived. While the **French Council of State** has aligned its case-law with the latest CJEU’s rulings excluding the application of Article 41(2) Charter in such matters,²²⁷ the **Lithuanian Supreme Administrative Court** continued to rely on this specific provision in case No. eA-2266-858/2015 as expressing the general legal value of good administration guaranteed by EU Law.

But it is on the very content of the right to be heard that judicial interaction among European and national courts is most significant: through the mechanism of preliminary rulings, several national courts ‘consulted’ the Court of Justice on the practical implication of the right to be heard as well as the legal consequences in case of violation (e.g. **Irish** High Court in case *M.*, **French** administrative Courts of Pau and Melun in cases *Mukarubega* and

²²⁵ In doing so, the High 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).

²²⁶ See, *inter alia*, *M.*, C 277/11, EU:C:2012:744, para. 87, C-166/13, *Mukarubega*, EU:C:2014:2336, para. 46; C-249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, ECLI:EU:C:2014:2431, para. 36 etc.

²²⁷ France, Council of State, No. 381171, 9 November 2015.

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Boudjlida, the Dutch Raad van State in *G. and R.*, the Belgian Council of State in *Benallal* etc.).

In a more *indirect* way, the **UK** Court of Appeal explicitly referred to the CJEU's case law when assessing the extent of the right to be heard in preliminary exchanges on transfers of asylum seekers under Dublin II regulation (*Kastrati, M.* etc.). Similarly, the High Court of **England and Wales** refrained from submitting a question to the CJEU in a case where an asylum seeker was refused a travel document without being (prior and fully) informed of the motives of the decision. Instead, it based its reasoning on the existing case-law of the CJEU (e.g. *HN., M., ZZ v. Secretary of State for the Home Department, HT. v. Land Baden-Wurtemberg* etc.).

Finally, horizontal dialogue also took place between national courts (from the same and different EU Member States), as notably illustrated by the **Irish** High Court's Judgment in case IEHC 547 (18 May 2011). In its reasoning, the Court explicitly referred to its previous national case law as well as to a contradictory case rendered few years previously by the **Dutch** Council of State on the same topic. In order to reconcile both jurisprudences, the High Court thus decided to address a request for a preliminary ruling at the CJEU.

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Casesheet 5.16 – Right to be heard in asylum and subsidiary protection proceedings

Reference cases

CJEU, C-277/11, [M v Minister for Justice and Equality](#), Chamber Judgment of 22 November 2012 preliminary reference sent by the Irish High Court, ECLI:EU:C:2012:744

CJEU, C-560/14, [M v Minister for Justice and Equality](#), Chamber Judgment, 9 February 2017, preliminary reference sent by the Irish Supreme Court, ECLI:EU:C:2017:101

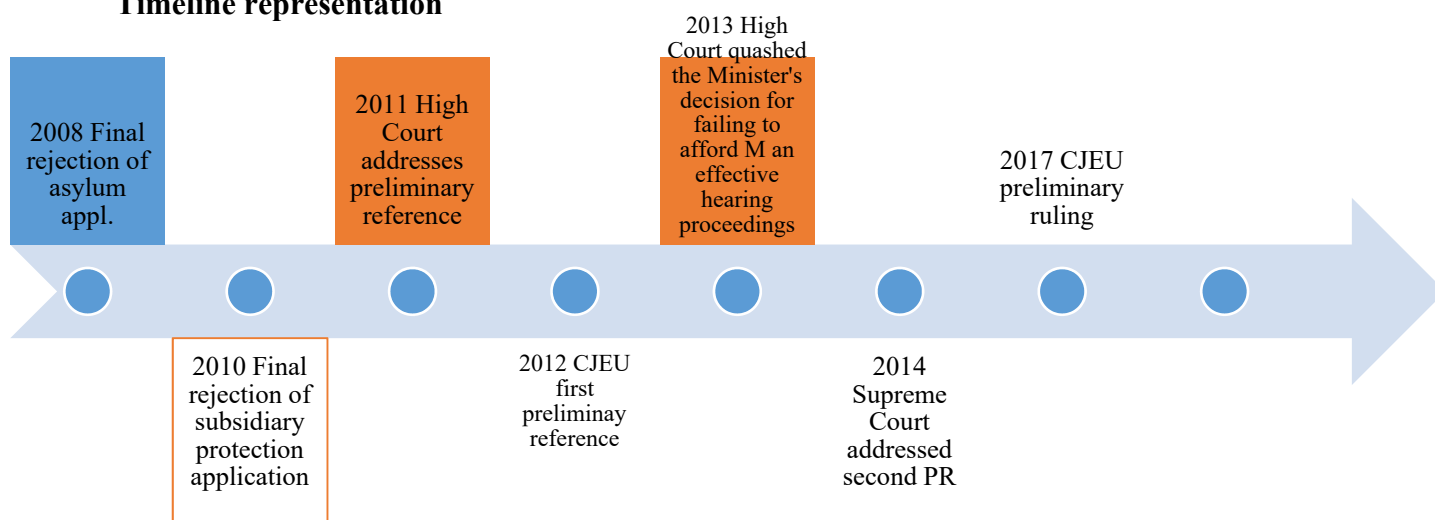
Core issues

- Whether an applicant for subsidiary protection has a right to view and comment on a provisional draft decision rejecting his/her application prior to it being made final.
- Whether an applicant for subsidiary protection has the right to an oral hearing and the right to call and cross-examine witnesses prior to the adoption of a final decision.

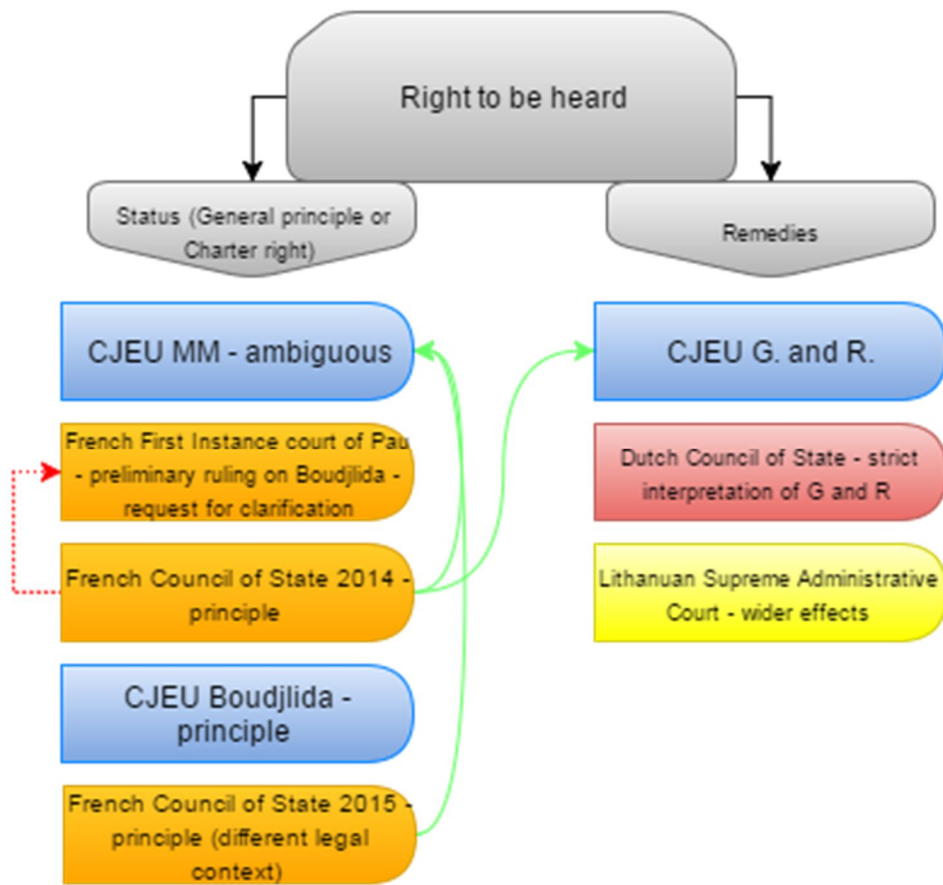
At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
<ul style="list-style-type: none"> Ireland 	<ul style="list-style-type: none"> Immigration and asylum law Subsidiary Protection Procedural rights 	<ul style="list-style-type: none"> Article 41 CFR Rights of the defence Directive 2004/83/EC 	<ul style="list-style-type: none"> Irish High Court Irish Supreme Court CJEU 	<ul style="list-style-type: none"> Preliminary references Disapplication 	<ul style="list-style-type: none"> Judicial Review of administrative decision

Timeline representation



MODULE 5- JUDICIAL DIALOGUE FURTHERING THE APPLICATION OF THE EU CHARTER IN ASYLUM AND MIGRATION



Case(s) description

a. Facts

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 from 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.

He claimed a breach of a right to be heard which he claimed was contained in Article 4(1) of the Qualification Directive stating that "[i]n cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application". The use of the words

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“in cooperation with the applicant”, the applicant claimed, implied a right to be informed of and a right to comment on any provisional negative decision regarding his application.

It should be noted that the 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 at the material time operated a dual system, in which the procedures are separated out. An applicant was therefore obliged to first make an application for asylum to the Office of the Refugee Applications Commissioner. This procedure involves an interview and written representations and the possibility of an appeal before the Refugee Appeals Tribunal with an oral hearing. Only once this has been processed and rejected is he or she entitled to apply for subsidiary protection to the Minister for Justice. While there is a written application and representations may be made there is no further interview or possibility for an oral hearing. Instead evidence collected during the asylum application is used. There is no appeal.

In its initial judgment, referring the matter to the Court of Justice, 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 there is therefore sufficient procedural rights to ensure that any obligation under Article 4(1) of the Qualification Directive is met. There is therefore no obligation to provide a copy and an opportunity to comment on any draft decision for subsidiary protection.

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 Court of Justice. At this stage there is no mention of the Charter.

b. Reasoning of the CJEU in the first preliminary reference – C 277/11

In its reply, the Court of Justice 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 cooperation referred more broadly to the joint responsibility of the authorities and the applicant to establish the facts relevant to his/her application. It noted that the Procedures Directive did not apply to a system such as the Irish, in which the asylum and subsidiary protection applications were separate.

However, in an effort to give a more useful answer, the Court of Justice 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 represented in Articles 41 (right to good

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administration), 47 (right to an effective remedy) and 48 (the presumption of innocence). **As part of the CEAS, the granting of subsidiary protection must comply with general principles 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.

MM v Minister for Justice (No 3) [2013] IEHC 9 – Follow-up judgment of the High Court

In the follow up judgment disposing of the case, **the High Court applied the findings of the Court of Justice and quashed the decision of the Minister to refuse subsidiary protection.**

In its judgment the High Court was unclear of the precise implications of the Court of Justice 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’ would suffice. Ultimately the High Court determined that following the judgment of the Court of Justice 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.

The High Court noted that this would necessitate far reaching changes to the current procedure for subsidiary protection applications and invited the Oireachtas 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 M. M., who argued that the right to be heard as recognised by the Court of Justice implied a right to an oral hearing and a right to call and cross-examine witnesses. The Supreme Court, unclear regarding the precise implications of the right to be heard recognised by the Court of Justice in its initial judgment, stayed the matter and made a fresh reference to the Court of Justice.

Case C-560/14, [*M v Minister for Justice and Equality*](#), second preliminary reference

In contrast to the reasoning of Advocate General Bot, the Court of Justice found that the right to be heard, which flowed from the general 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 Court of Justice, noted that the personal

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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 Court 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 Court of Justice 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.

c. Outcome at national level (follow-up judgment of the referring court)

Latest follow-up judgment not yet available.

Analysis

a. Role of the Charter

Following the first judgment of the Court of Justice, the case was deemed to fall within the scope of the Charter. The status being granted fell within the CEAS under the Qualification Directive. The right to be heard (contained in Articles 41, 47 and 48) therefore applied, despite the non-application of the Procedures Directive in the present case.

In its second judgment the Court of Justice relied exclusively upon the general principles of EU law and in particular the right of the defence to found a right to be heard in subsidiary protection applications. The Charter was therefore not relied upon. It is worth noting the discussion of the AG Bot of the right to be heard in the present case. He notes firstly that a debate is currently underway regarding the applicability of Article 41 CHARTER to the member states but that secondly in any case the right to be heard could be founded alternatively on Article 41 CHARTER and the general principle of the right to the defence.

b. Judicial dialogue

In *M (No 1)* the Court draws 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*.

In *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 Court of Justice in Case C-277/11 *MM v Minister for Justice, Equality and Law Reform*.

The Court of Justice judgment in Case C-277/11 *MM* 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).

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

The High Court notes that the Court of Justice 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 Court of Justice misconstrued the initial referring judgment of the High Court in *M (No 1)* but as a consequence of judicial comity and the duty of loyal cooperation the High Court presumes that the Court of Justice 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 present circumstances. Nonetheless, it draws on broader aspects of the Court of Justice'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 Court of Justice on more specific issues relating to oral hearings and the right to call and cross-examine witnesses.

c. Remedies

Final outcome not yet determined.

d. Impact of CJEU decision

Following the judgment of the Court of Justice in Case C-277/11 *M*, new regulations were adopted for use in subsidiary protection procedures. These new regulations, operational from 24 November 2013, provided more extensive rights 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 and to request an oral hearing and to call witnesses upon appeal.

Furthermore, regulations were updated in 2015 to replace the dual system with a single procedure for assessing asylum and subsidiary protection claims in parallel. This was carried over into legislation in the context of a general overhaul and replacement of the legislative framework for asylum and subsidiary protection in the International Protection Act 2015. The main part of the Act was commenced on 31 December 2016.

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Casesheet 5.17: The right to be heard in return procedures

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, No. 381171, 9 November 2015

Core issues:

Determination of the legal basis applicable to the right to be heard in return procedures: Part of the general principle of the rights of defence, defined as the right that “*guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely*”

EU law neither specifies the concrete application of that right nor the consequences of its infringement.

Asked by the French administrative courts, the CJEU yet stated that competent national authorities are under an obligation “to enable the person concerned to express his point of view on the legality of his stay and the detailed arrangements for his return” and “to 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*.

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
<ul style="list-style-type: none"> France 	<ul style="list-style-type: none"> migration (return) 	<ul style="list-style-type: none"> article 47 CFR general principle of EU law 	<ul style="list-style-type: none"> Adm. courts Council of State CJEU 	<ul style="list-style-type: none"> preliminary reference 	<ul style="list-style-type: none"> Applying the guidelines developed by the CJUE, the French courts held that the right to be heard had been respected by the administration

Timeline representation



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Case(s) description

a. Facts

In March and April 2013, two French administrative courts submitted a request to the CJEU for a preliminary ruling.²²⁸ 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.²²⁹ 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.²³⁰ In early 2013, after he made an application for registration as a self-employed businessman, the claimant 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.

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 the defence (enshrined, according to the court, in Article 41 Charter) to be interpreted as requiring that the administrative authorities, intending to issue a return decision, to enable the interested party to first present his/her observations. The *administrative tribunal of Pau* then asked the Court to clarify the extent of the right to be heard. In particular, whether it included for the foreign national concerned the right 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.

²²⁸ Requests for a preliminary ruling from the administrative tribunal of Melun in case *Mukarubega*, C-166/13 and from the administrative tribunal of Pau in case *Boudjlida*, C-249/13.

²²⁹ CJEU, *Mukarubega*, C-166/13, 5 November 2014, EU:C:2014:2336

²³⁰ CJEU, *Boudjlida*, C-249/13, 11 December 2014 EU:C:2014:2431

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b. First outcome at national level

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 on the present case, assuming that enough indications were given in previous case-law of CJEU.²³¹ 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. Applicants 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 of the 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*²³². 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*”.²³³ The Council of State therefore 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 the person a second time, before issuing the return decision, was therefore not required.

c. 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 in the **general principle** of respect for the rights of the defence) is to be ensured, nor does it specify the consequences of an infringement of that right;

²³¹ France, Council of State, *Halifa*, no. 370515, 4 June 2014 (Judge M. Clement for ACTIONES)

²³² CJEU, *G. and R.*, C-383/13, 10 September 2013, EU:C:2013:533, explicitly referred to by the Public “Rapporteur” in his opinion.

²³³ 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.

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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 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, 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;
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 protection and defence of the person concerned against a decision that adversely affects him, is ensured.

d. Second outcome at national level

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In a case related to asylum, where the complexity lied in potential contradictions between article 28 of directive 2005/85/EC²³⁴, national law and the EU primary law, the main issue was to determine if the authority in charge of deciding on asylum cases could omit the personal interview by considering the “*application as manifestly unfounded*” pursuant to French law.²³⁵

Firstly, the **Council of State** referred to the text of the asylum procedures directive to confirm that it was not necessary to provide an interview according to articles 12, 23 and 28 of the directive.²³⁶ Since the case of *Perreux*,²³⁷ it is possible to challenge a national law that contradicts EU law and ask for direct effect of EU law norms. Whilst Art. L. 723-3 of the French Code only refers to an “*application as manifestly unfounded*”, the directive defines more specific possible consequences of a failure to provide a personal interview. The Council of State did not disregard Art. L. 723-3, but, by citing the directive’s provisions extensively, it is clear that Art. L. 723-3 is to be read in conjunction with the latter.

By analysing the combination of the three relevant articles of the directive, the Council of State comes to the conclusion that it was possible to omit a personal interview on the basis of EU secondary legislation. However by linking the notion of ‘manifestly unfounded’ to national provisions the directive introduced some uncertainty. For instance, article 28 of the directive states that “*Member States may also consider an application as manifestly unfounded, where it is defined as such in the national legislation*”. It was argued by the applicant that national legislation should have defined “manifestly unfounded” so that these provisions could be used. The Council of State considered that this provision does not require specific transposition but only refers to the fact that national legislation may – or may not – use the possibility opened by the directive. The Council of State then analysed the potential breach of Art. 13 of ECHR: at the stage of the administrative proceedings, a breach of Article 13 is not identified. The same applies for articles 47 and 48 of the Charter.

Lastly it came to Article 41 of the Charter. The Council of State explicitly clarifies the issue that was blurred in case *Halifa*, decided in anticipation of cases *Mukarubega* and *Boudjlida* of CJEU. According to *Halifa*, Article 41 does not apply at national level, however the general principle (equivalent of Article 41) does.

Analysis

a. Role of the Charter

The above-mentioned cases are all linked to the right to be heard in administrative proceedings, although the final case implicitly refers to the compatibility between the Charter

²³⁴ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

²³⁵ L. 723-3 of Code on the Entry and Stay of Foreign Nationals and the Right of Asylum.

²³⁶ France, Council of State, n. 381171, 9 November 2015.

²³⁷ Council of State, *Perreux*, n. 298348, 30 October 2009.

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and the provisions of the asylum procedures directive. Departing from the CJEU findings in *M. M.*,²³⁸ the **French Council of State** excluded the application of article 41 of the Charter to decisions taken by national administrative authorities, even when acting in the context of EU law. Only the general principle of the right of the defence should be taken into consideration.

b. Judicial dialogue

By first anticipating the CJEU case-law, the **French Council of State** left a point unclear in the decision: it seems to assume that Article 41 of the 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*”.²³⁹ The second judgment issued by the Council of State in 2015 was thus an opportunity to adjust its case law expressed in *Halifa*, in conformity with the CJEU jurisprudence: it declared article 41 of the Charter inapplicable but rather applied the equivalent general principle of the right of the defence.

More generally, it is on the very content of the right to be heard that judicial interaction among European and national courts is the most significant: through the mechanism of preliminary rulings, several national courts ‘consulted’ the Court of Justice on the practical implication of the right to be heard as well as the legal consequences in case of violation (e.g. **Irish High Court** in case *M.M.*, **French administrative Courts of Pau and Melun** in cases *Mukarubega* and *Boudjlida*, the **Dutch Raad van State** in *G. and R.*, the **Belgian Council of State** in *Benallal*, the **Irish Supreme Court** in *M.*).

c. Impact of CJEU decision

The CJEU recent findings on the right to be heard in administrative proceedings have had a significant impact on national jurisprudence in asylum and migration law. Despite the lack of an explicit provision in the return directive, it is now clearly established by the **CJEU that the right to be heard must be ensured in all administrative 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.** In a more indirect way, the **UK Court of Appeal** explicitly referred to the CJEU’s case law when assessing the extent of the right to be

²³⁸ CJEU, *MM v Minister for Justice, Equality and Law Reform*, C-277/11, 22 November 2012, EU:C:2012:744

²³⁹ CJEU, *Mukarubega*, *op.cit.*, para. 44.

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heard in preliminary exchanges on the transfer of asylum seekers under Dublin II regulation.²⁴⁰

d. Additional relevant cases

CJEU, *Nianga*, C-199/16 (pending)

CJEU, *M.*, C-560/14, 9 February 2017, EU:C:2017:101

CJEU, *G. and R.*, C-383/13, 10 September 2013, EU:C:2013:533

Outcome of Judicial Application of Article 41 Charter – right to good administration

- The rights enshrined under Article 41 CHARTER: *right to be heard by the administrative authorities; right to have access to files; obligation of the administrative authorities to state reasons* are binding on the Member States when acting within the scope of EU law on the basis of the principle of good administration and rights of the defence (*Mukarubega, Boudjlida, H.N.*). The right to be heard during the administrative phase of asylum and return proceedings is necessary in order to fulfil the requirements of both the Asylum Procedure Directive (Articles 8-10), Article 12 of the Return Directive, and of the general principles of EU law of the rights of defence;
- The right to be heard guarantees in both proceedings (asylum and return) the opportunity for every person to make his/her views known effectively during an administrative procedure and before the adoption of any decision liable to affect his/her interests adversely. (*M.M. (I)*, para. 87; *Mukarubega*, para. 46; *Boudjlida*, para. 36);
- Irregular migrant(s) must be heard in relation to any return-related decisions adopted by administrative authorities (return decision, removal order, detention order, entry ban etc.);

Content of the right to be heard in the administrative phase of asylum proceedings as established by the CJEU preliminary rulings:

- *The asylum seeker should be given sufficient opportunities to substantiate his asylum claim, for example by submitting written information;*
- The EU right to be heard requires the applicant to be granted the opportunity to comment on the report of the personal interview. *The applicant should have timely access to the report of the interview in order to be able to exercise his right to be heard (Case T-228/02) OMPI, para.93)*

²⁴⁰ CJEU, *Kastrati*, C-620/10, 3 May 2012, EU:C:2012:265 ; *MM v Minister for Justice, Equality and Law Reform*, C-277/11, 22 November 2012, EU:C:2012:744 etc.

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- *The hearing must contain questions that would determine the feasibility of the alternative measures to asylum detention. In cases that the administration adopts a detention decision, it has the obligation to provide reasons why it did not adopt alternative measures.*
- 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. The interview must also be arranged if the personal circumstances of the applicant (in particular, any vulnerability due to age, health conditions or for being a victim of violence) makes it necessary for him/her to comment in full on the elements capable of substantiating the application. (M.M. (2))

Content of the right to be heard in the administrative phase of the immigration proceedings as established by the CJEU preliminary rulings:

- The TCN must be able to express his or her point of view on the legality of his or her stay and on whether any exception(s) to the expulsion are applicable in the specific circumstances of each individual case (Boudjlida, para. 47);
- The TCN must be given the opportunity to express his view on any facts that could justify the authorities to not adopt a particular return-related decision (Boudjlida, para. 55).
- The TCN must be able ‘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’ (Boudjlida, para. 37);
- National authorities *must hear the TCN at least as regards the following issues*: the best interests of the child, family life and the state of health of the third-country national concerned while respecting the principle of non-refoulement (Boudjlida, para. 48);
- The hearing must contain questions that would determine the feasibility of alternative measures;
- *The obligation to state reasons for a decision* which are sufficiently specific and concrete to allow the person to understand why his or her application is being rejected is a corollary of the principle of respect for the rights of the defence and in particular, the right to be heard. (M.M (1), para.88)
- The competent national authorities are under an obligation to enable the person concerned to express his point of view *on any detailed arrangements for his return*, such as: ‘the period allowed for departure and whether return is to be voluntary or coerced. It thus follows from, in particular, Article 7 of Directive 2008/115, paragraph

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(1) [...] that Member States must, where necessary, under Article 7(2) of the directive, extend the length of that period appropriately, taking into account 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' (*Boudjlida*, para. 51);

- The *TCN has a duty to co-operate with the competent authorities and to provide them with all relevant information*, in particular all information, which might justify a return decision not being issued (*Boudjlida*, para. 50). This duty corresponds to the TCN's right to be heard. The rights of the defence do not constitute unfettered prerogatives and may be restricted by Member States, provided that the restrictions correspond to the objectives of general interest pursued by the measure in question and that they do not involve, with regard to the pursued, a disproportionate and intolerable interference which infringes upon the very substance of rights guaranteed (*G&R*, para. 33; *Boudjlida*, para. 43);
- The *non-respect of the right to be heard* renders a return related decision invalid only insofar as the outcome of the procedure would have been different if the right was respected' (*G. and R.*)
- 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 TCN 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 2 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 was used by the court as proof that the deadline handed down by the administration was unreasonably short. ([Judgment no 858/2015](#)).

ARTICLE 47 CHARTER – Right to an effective remedy

Overview of issues concerning Article 47 Charter

Article 47 of the Charter provides the right to an effective remedy and to a fair trial. Although the content of Article 47 Charter is similar to Articles 6 and 13 of the ECHR, it contains several variances which make it an independent and distinct from the Convention right to fair trial and effective remedy. First of all, the substantive scope of application is different, since Articles 6 and 13 ECHR apply only to cases concerning the determination of a person's civil rights and obligations or any criminal charge, while the ECtHR has ruled out the application of these rights to cases concerning entry, stay and deportation of aliens.²⁴¹ Additionally, Article 13 ECHR does not have an independent status, it is applicable only in conjunction with one of the substantive rights included in the ECHR. On the other hand, the substantive scope of application of Article 47 Charter is not limited by the nature of the rights at issue, its procedural guarantees apply to all EU derived rights.²⁴² The question remains whether, with regard to Article 52(3) of the EU Charter, Article 47 of the EU Charter can offer more or different protection to individuals in these cases. It should be noticed that the principle of judicial review enshrined in Article 47 Charter requires a review by a tribunal. This provides broader protection than Article 13 of the ECHR which guarantees the right to an effective remedy before a national authority and not necessarily a court.²⁴³

National application of Article 47 Charter

The cases submitted by the ACTIONES collaborators raise pressing, topical issues such as: the balance between the right to an effective remedy and national security within the current context of increasing terrorist threats (*issue 1*); the suspensive effect of appeals in asylum and return proceedings when there is a risk of ill treatment in the country of origin or disconnection with family from the Member State of residence (*issue 2*); the right to interpreters during asylum and return proceedings. The cases submitted for consideration to the ACTIONES Project reveal that sometimes it is difficult to establish which procedural right should be applied to a particular procedural issue. The scope of disclosure of evidence in asylum procedures when there are national security concerns has been considered an issue falling under both Article 41 and Article 47 Charter (see section 1 and 2).

1. National security as limitation to disclosure of evidence and access to court in asylum and return proceedings

²⁴¹ *Maaouia v. France*, Appl. No 39652/98.

²⁴² The explanations on Article 47 clarify that '[i]n Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, 'Les Verts' v European Parliament.' (judgment of 23 April 1986, [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union.

²⁴³ See Explanations on Article 47 Charter.

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Secret evidence substantiating the involvement of persons in terrorist activities raises issues related to the scope of application of several interrelated fundamental rights: right to asylum, right to good administration and right to a fair trial and an effective remedy. Usually the first limitation is placed on the right to good administration, which although not applicable under Article 41 Charter, is applicable as a general principle of EU law to the Member States activities (see *M.M.* case). When there is evidence of terrorist related activities, Member States prohibit disclosure of the information to the individual concerned, regardless of the type of administrative procedure being used. Certain national jurisdictions do not provide any evidence in their justification of the decision taken, while some provide only the essential grounds. A limitation is therefore also placed on the duty to state reasons which is part of the right to good administration.

Since the individual has limited, or no access to the evidence/information, this raises issues connected with the right to a fair trial and effective remedy. It is difficult for the TCNs concerned to challenge a decision which is based on secret information. Therefore, it is often argued that the right to adversarial proceedings and principle of equality of arms are also violated.

The *ACTIONES* cases showed the interconnectivity of these various fundamental rights which are at stake in asylum and return proceedings. To counter-balance the limitation on these fundamental rights, national legislators have permitted access to evidence through security-cleared counsels who have access to the secret evidence and can plead on behalf of the TCN concerned. Certain domestic legislators have not provided an efficient counter-balance since the domestic procedure for the authorisation of the lawyers lasts longer than the emergency procedure under which TCNs claims are processed. The *A.M.N. case* (Romanian Supreme Court) shows that when national courts refuse to deal with issues concerning legislative incoherence in order to recognise remedies to fundamental rights violations by the legislator, TCNs concerned 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 Charter and of its interpretation in these cases provided by the CJEU in the *Z.Z.* case.

A.M.N. concerns a Pakistani citizen who, although subject to a pending proceeding regarding his request to be recognised a right of residence as family member of a Romanian citizen, was issued with expulsion order and entry ban in an emergency procedure on grounds of national security. At issue is the conformity of the national legislation and judicial practice with the requirements of the right to an effective remedy in emergency procedure governing the decisions based on national security grounds. In particular, the fairness of the special advocate procedure and the judicial practice which refused 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. Following the refusal of the Supreme Court to remedy these inconsistencies, the lawyer lodged a complaint before the ECtHR for violation of Articles 6 and 13 ECHR based on the limited access to evidence used in national security cases for both lawyers and complainant and the fact that the urgent

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judicial procedure makes it very difficult to accommodate the procedure for accrediting lawyers for these special procedure. In this case, the lawyer resorted only to the Convention procedural route.

A different approach was followed by the Dutch court (*case note 17*) which referred to the Z.Z. preliminary ruling as the standard for the application of Article 47 Charter in cases of revocation of refugee status and entry bans on grounds of national security. The Court found that the amended practice of the Dutch administration of presenting the TCN concerned with an individual report including also the essence of the grounds for its decision represents a balanced limitation of Article 47 and the need to ensure protection of national security. Unlike the UK Court of Appeal in Z.Z.,²⁴⁴ the Dutch Court did not set different thresholds for the possible limitation of Article 47 Charter depending on the status of the individual and the administrative decision at stake.

The fact that these minimum procedural guarantees have been upheld by the CJEU in both EU citizenship²⁴⁵ and targeted sanction cases involving TCNs, seems to suggest that they are applicable to all individuals, regardless of their legal status of EU citizens or third country nationals.

The scope of disclosure of evidence and access to fair trial and effective remedy in cases where national security concerns are incidental is a sensitive topic which has been raised before many domestic courts (see **Croatian, Dutch, Polish, Romanian and UK courts**). Some of these courts (UK Court of Appeal) decided to address preliminary questions to the CJEU in order to clarify the requirements of Article 47 CHARTER as regards the level of disclosure of evidence required in cases where third country nationals are considered a threat to national security (see the Z.Z. case commented in ***ACTIONES Module on Effective Judicial Protection***).²⁴⁶ Dutch courts incorporated the rules set out by the Z.Z. preliminary ruling in their legality checks of the administrative procedure. 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).

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**²⁴⁷ 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.

²⁴⁴ In *AZ*, the UK Court of Appeal held that the right to be informed (Article 41) varied depending on the nature of the rights at stake (EU citizenship right to free movement v refugee's rights) (see *ACTIONES Database*).

²⁴⁵ See the Case 300/11 ZZ, ECLI:EU:C:2013:363.

²⁴⁶ Case 300/11 ZZ, ECLI:EU:C:2013:363.

²⁴⁷ Nika Bacic Selanec, *ACTIONES case note*, Constitutional Court of the Republic of Croatia, U-III-1844/2011, 25 May 2011.

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The issues of balancing the objective of national security with the right to a fair trial and effective remedy in asylum and migration cases have therefore raised several salient issues regarding the application of the Charter and judicial dialogue.

First of all it raises an issue of interaction between the various fundamental rights under the Charter:

- 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 of the case?);
- establishing the precise fundamental right(s) at issue: Article 41 Charter and/or 47 Charter?;
- establishing the precise requirements of Article 47 Charter in such cases and the permitted limitations;
- effects of violations of Article 47 Charter.

As to judicial dialogue, the cases discussed under this section reveal that, while certain national courts refer to the Charter, and CJEU jurisprudence interpreting the requirements set by Article 47, other courts refer exclusively to the Convention, without motivating their choice on the absence of any applicable EU law and thus of the Charter. Furthermore other courts prefer to settle the issue purely on domestic rules, or misinterpreting the requirements established by the ECtHR.

Although the CJEU left procedural autonomy to the Member States to lay down the applicable procedural rules, national courts have an obligation to balance the requirements of State security with the requirements flowing from the right to effective judicial protection. The obligation to inform the concerned individuals of at least the essence of the grounds of the decision taken by the public authorities is a minimum procedural guarantee recognised by the CJEU for the individuals in these proceedings (see the commentary of the Z.Z. case above)

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Casesheet 5.18: Revocation of refugee status based on involvement in terrorist activities – Limited disclosure of evidence and access to effective remedy

Reference case:

Court of first instance of The Hague, branch Zwolle, 14/4276, Judgment of 27 January 2015

Core issues

Revocation of a refugee status and entry ban of 20 years based on involvement in terrorist activities;

Limited access to evidence based on national security grounds interpreted in the light of Article 47 Charter;

Use of secret information and urgent procedure when national security is at stake in asylum and return proceedings

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
• The Netherlands	• asylum • irregular migration	• article 47 CFR	• Court of first instance of the Hague	• reference to CJEU ruling (ZZ)	• Court found Art. 47 CFR to not have been violated

Timeline representation



Case(s) description

a. Facts

An Iranian national's refugee status was revoked and an entry ban for 20 years was issued against him on the basis of the investigation carried out by the Dutch intelligence agency, showing he was 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 was taken. The individual 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. A separate chamber of the court had decided earlier that the limited disclosure of the documents

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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. Now, in the main proceedings, the *Court of first instance* 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.

b. Outcome at national level

The court explicitly referred to and cited the judgment of the *CJEU in Z.Z.*²⁴⁸, 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, 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.

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 *Z.Z.*, 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 had therefore not been violated.

Analysis

a. Role of the Charter

The scope of disclosure of evidence and access to a fair trial and an effective remedy in cases where national security concerns are incidental is a sensitive topic, which has been raised before many domestic courts. The domestic legal provisions of these Member States seem to provide for similar “fast track” emergency procedures governing the assessment of claims from individuals considered a threat to national security, access to evidence limited to special security cleared advocates, immediate detention followed by expulsion and entry bans. Variations exist regarding the precise time period of the approval of the special advocates and emergency procedure and the level of detail in the evidence released to the individual concerned. However, the conformity of the domestic practice(s) on the level of disclosure of evidence, e.g. in procedures on revocation of the refugee status and extradition of asylum seekers, is to be reviewed by national courts in light of the right to a fair trial and effective remedy. Some courts thus decide to explicitly rely on Article 47 Charter.

b. Judicial dialogue

In the present case, the court of first instance refers to the Charter and to the CJEU jurisprudence interpreting the requirements set by Article 47. The Court incorporated the

²⁴⁸ ECJ, ZZ, C-300/11, 4 June 2013, EU:C:2013:363.

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rules set out by the Z.Z. preliminary ruling in its assessment of the legality of the administrative procedure. According to the CJEU's case law, 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". As regards judicial proceedings, 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. However, non-disclosure of evidence can be justified in exceptional circumstances, when it is 'strictly necessary'. However, individuals must have the possibility of challenging the validity of both the reasons given by the public authorities and of the decision based on those reasons related to national security. National courts should be entitled to review these aspects, requiring public authorities to prove that State security would in fact be compromised by full disclosure of the evidence to the person concerned.²⁴⁹ The court of first instance concluded that article 47 Charter was not violated in the present case.

c. Impact of CJEU decision

Although under EU law leaves Member States enjoy procedural autonomy to lay down the applicable procedural rules, national courts have an obligation to balance the requirements of State security with the requirements flowing from the right to effective judicial protection. The obligation to inform the concerned individuals of at least the essence of the grounds of the decision taken by the public authorities is a minimum procedural guarantee recognised by the CJEU for the individuals in these proceedings. In the present case, the Dutch court found the administrative decision to be in conformity with these minimal requirements. By contrast, the High Court of England and Wales deemed Article 41 Charter applicable to the right to information and motivation during asylum proceedings²⁵⁰. The judge found however that Article 41 does not imply a right to be informed of the concerns of a decision-making authority prior to the issuing of the decision in all circumstances, in particular in asylum claims, relying on CJEU case *MM*. It also noted that the invitation for submissions and reconsideration of the claim fulfilled any such obligations flowing from Article 41 Charter. As for the duty to provide reasons for any administrative decision, the judge admitted restrictions on the grounds of national security, depending on the right involved and the particular legal context. In addition, there appears to be some disagreement between national courts on whether these procedural guarantees need to be recognised to all TCNs, irrespective of their legal status, or only to EU citizens, as was the situation in the CJEU case Z.Z.. While Dutch first instance courts recognise them to EU citizens, asylum seekers and irregular migrants, the **High Court of England and Wales** argued they should be recognised primarily to EU citizens.

²⁴⁹ CJEU, ZZ, op.cit., par. 57-69.

²⁵⁰ United Kingdom, High Court of England and Wales, *R (AZ) v Secretary of State for the Home Department* [2015] EWHC 3695, 18 December 2015, [2016] 4 WLR 12

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d. Additional relevant cases

Romanian High Court of Cassation and Justice, File No. 5473/2/2012:

ECtHR, *A.M.N v. Romania*, no. 19943/13, 30 September 2014

ECtHR, *Saleck Bardi v. Spain*, no. 66167/09, 24 May 2011

ECtHR, *Anayo v. Germany*, no. 20578/07, 21 December 2010: concerned the return of third-country nationals in which children were involved. The ECtHR found a breach of Article 8 of the ECHR in that there were defects in the decision-making process, such as a failure to consider the best interests of the child or a lack of coordination between the authorities in determining such interests.

ECtHR, *C.G. and Others v. Bulgaria*, no. 1365/07, 24 April 2008: concerned a long-term resident who was removed 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 of the ECHR. Furthermore, the Bulgarian courts had refused to gather evidence to confirm or dispel the allegations against the applicant, and that their decisions had been formalistic. 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 No. 7.

2. Suspensive effect of appeal in asylum and return proceedings

An issue which has been present before national courts from many of the EU countries concerns the recognition of suspensive effect of the appeal against administrative decisions in return and accelerated asylum proceedings, in particular the question of whether Member States should refrain from expelling an applicant until the decision on the appeal against the asylum decision or return/removal order has been taken. In these cases the suspensive effect of the appeal plays a crucial role, since its absence may entail the risk of an irreparable harm for the third country national who might be exposed to the risk of ill-treatments in the country of origin. While the majority of these claims involve an expulsion to non-EU countries, increasing claims have been recently raised regarding suspension of appeal in Dublin transfers, thus in relation to EU countries (e.g. cases of Dublin transfer to Hungary).

The added value of the Charter is of particular importance in this field, since EU secondary legislation does not require an automatic suspensive effect of the appeal against all asylum and return related decision.²⁵¹ Instead, the secondary EU asylum and return provision allow the recognition of suspensive effect of appeal via separate individual application (interim relief), while suspension of second level of appeal (before second instance courts) is not expressly regulated.

The CJEU has addressed the suspensive effect of appeal in return proceedings following a rejection of a residence permit (*Abdida*, see *casesheet no. 13*) and expulsion following rejection of asylum application in accelerated procedures (*Tall*, see *below*). 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 suspensive effect of the appeal until the claim of risk of refoulement has been closely and rigorously assessed by the determining authority (see *casesheet 18*, below).

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 second case commented on below originates from the **Supreme Court of Estonia** and deals with the suspensive effect of appeal against a removal order on the basis of Articles 8 and 13 ECHR. In light of Article 52(3) Charter a similar interpretation should also be applied to Articles 7 and 47 Charter.

The cases discussed in this section reveal that the Articles 7 or Article 19(2) in conjunction with Article 47 Charter establish an obligation on the part of the Member States not to expel a third country national if there is a risk of violation of the absolute principle of non-refoulement or the right to family life. The obligation of investigation should be carried out automatically in these case. However this is not possible in all Member States, as some of allow for suspensive effect of appeal by separate application (interim procedures). (The

²⁵¹ See Article 9(3) Directive 2013/32/EU (Asylum Procedure) and Article 13 Directive 2008/115/EU (Return Directive).

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conformity of these national procedures and the relevant EU secondary legislation which the former transpose have been challenged by Dutch courts in light of Article 47 Charter).²⁵²

In order to ensure the requirements set by the CJEU, in particular the effectiveness of the remedy, the expulsion should not be carried out during the period of appeal.

The jurisprudence discussed under the issue of suspensive effect of appeals in asylum and return proceedings has revealed 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 repeated preliminary references sent by the Belgian Labour Courts asking for the recognition of uniform minimum procedural guarantees for appeal procedure in all asylum and return proceedings has also forced the CJEU to consider adapting its previous *Diouf* practice. Although the *Tall* judgment reinstates the standards set in *Diouf* for the right to an effective remedy in accelerated asylum procedure, it represents a step forward for fundamental rights of migrants as Article 47 Charter is recognised as a reinforced status when Article 19(2) Charter circumstances are applicable.

While certain national courts are very mindful of the requirement of Article 47 Charter and promote it equally in proceedings regarding EU citizens, family member of EU citizens, asylum seekers or irregular migrants, other national courts seem to be more hesitant and refer only to the Convention standards on the right to fair trial and effective remedy. (see, for instance, the case note on the judgment of the Supreme Court of Estonia) Since their choice of Article 13 ECHR instead of Article 47 Charter is not expressly reasoned, it is difficult to conclude whether it is due to a decision establishing that there is no connecting factor triggering the application of the EU Charter or because the Convention confers more adequate protection. Alternatively, this judicial reasoning might be the result of the longer existence of the Convention with which national courts are more confident in terms of knowledge on the scope of application and standards. In spite of the Convention's longer existence compared to the Charter, the application of the Convention right to effective remedy seems to still pose problems in certain Member States (see the Estonian and Romanian case notes).

²⁵² See preliminary reference addressed by the Dutch Council of State, <https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=90773>.

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Casesheet 5.19 – Tall: The right to an effective remedy in accelerated asylum procedure

Reference case

CJEU, C-239/14, Tall, 17 December 2015, EU:C:2015:824

Core issues:

Suspensive effect of appeals in asylum and return proceedings

Interpretation of Article 47 Charter requirements in these fields

The Belgian Constitutional Court recognised the amended judicial practice and required the legislator to intervene and codify it in legislative provisions.

The repeated preliminary references sent by the Belgian Labour courts asking for the recognition of uniform minimum procedural guarantees for appeal procedure in all asylum and return proceedings also forced the CJEU to consider adapting its previous *Diouf* practice. Although the *Tall* judgment reinstates the standards set in *Diouf*, it represents a step forward for fundamental rights of migrants as Article 47 Charter is recognised a reinforced status when Article 19(2) Charter circumstances are applicable.

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
• Belgium	• asylum	• article 47 CFR	<ul style="list-style-type: none"> • Legislator • Constitutional Court • Labour courts • CJEU 	• preliminary reference	• directive 2005/85 and art. 47 and 19(2) found non-violated

Timeline representation



Case(s) description

a. Facts

After the final rejection of his first asylum application, Mr. Tall, a Senegalese national, introduced a second asylum claim, which was not taken into consideration by the Belgian immigration authorities and the ‘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

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consideration his second application for asylum; another before the *Labour court (Liège)* concerning withdrawal of his social assistance. Similarly to the *Abdida* case, only the Labour court addressed preliminary questions to the CJEU²⁵³.

The referring court asked the CJEU whether the Asylum Procedure Directive, read in conjunction with Article 47 Charter, prohibits Belgian law (existing before the entry into force of Law 10 April 2014), which limits the examination that national courts can undertake under an appeal in subsequent asylum application, deprives the appeal of suspensive effect and the individual of access to social benefits pending the appeal. The Belgian Government and the European Commission argued 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.²⁵⁴ 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.²⁵⁵

b. Reasoning of the CJEU

The CJEU held the preliminary reference admissible on the ground that it does not have competence to pronounce on the transitional application of the national law; secondly on the presumption of relevance of the preliminary reference of which national courts benefit under Article 267 TFEU, but also under the duty of sincere cooperation (Article 4(3) TEU).

At issue is, in essence, the conformity of a “fast track” or accelerated asylum proceeding with the requirements of Article 47 Charter. In particular, the CJEU was asked to assess whether Article 47 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,²⁵⁶ which dealt with similar issues.

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, 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.²⁵⁷

²⁵³ CJEU, *Abdida*, C-562/13, 18 December 2014, EU:C:2014:2453, where the Higher labour Court of Brussels requested for a preliminary ruling.

²⁵⁴ 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).

²⁵⁵ Constitutional Court of Belgium, Judgment No 56/2015 of 7 May 2015.

²⁵⁶ CJEU, *Samba Diouf*, C-69/10, 28 July 2011, EU:C:2011:524.

²⁵⁷ CJEU, *Abdida*, C-562/13, 18 December 2014, EU:C:2014:2453, para. 40-45.

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Regardless of the type and number of asylum applications submitted, the follow-up return proceedings 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.”²⁵⁸

c. Outcome at national level

Following the CJEU ruling in *Abdida*, the **Belgian CALL** recognised that an automatic suspensive effect should be available to appeals against orders to leave the territory when the applicant’s illness is so serious that a removal might amount to a *refoulement*, prohibited by Article 3 ECHR.²⁵⁹ Suspensive effect, however, is not available against decisions refusing the right or authorization to stay in Belgium.²⁶⁰ The automatic suspensive effect was initially recognised in the absence of national legislation, and directly on the basis of the CJEU *Abdida* preliminary ruling. Belgian courts notably considered that applicable procedure, where the suspensive effect could be sought through the introduction of a request for suspension, complied with the CJEU jurisprudence.²⁶¹ Whilst the **Constitutional Court** welcomed this judicial practice²⁶², it also stressed the need for a legislative amendment introducing the guarantees under the right to an effective remedy.²⁶³ On 10 of April 2014, a legislative amendment was brought to the Aliens Law, whereby an 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. On the 19 January 2016, the ECtHR issued two important decisions 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.”²⁶⁴ 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.²⁶⁵ Although the Court did not find a violation of Article 13 in those cases, it had

²⁵⁸ CJEU, *Tall*, C-239/14, para. 58. See, to that effect, CJEU, *Abdida*, para. 52 and 53.

²⁵⁹ CALL, 156.951, 25 November 2015. See REDIAL Belgian report on Procedural Safeguards (package II), available [here](#).

²⁶⁰ E.g. for humanitarian and medical reasons, according to Article 9ter of the Belgian Aliens Law; see CALL, 159.427, 28 December 2015, REDIAL Belgian report, p. 6.

²⁶¹ CALL, 151.686, 3 September 2015.

²⁶² Initiated after the M.S.S. Judgment by the CALL in a judgment dated the 17 February 2011, where the Council referred to article 13 ECHR to improve the effectiveness of remedies against orders to leave the territory

²⁶³ Constitutional Court, 1/2014, 16 January 2014.

²⁶⁴ 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.

²⁶⁵ ECtHR, *M.D. and M.A. v. Belgium*, App. 58689/12, 19 January 2016.

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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.²⁶⁶

Analysis

a. Role of the Charter

While certain national courts are very mindful of the requirement of Article 47 Charter and promote it equally in proceedings regarding EU citizens, asylum seekers or even irregular migrants, other national courts seem to be more hesitant and refer only to the Convention standards on the right to fair trial and effective remedy (articles 6 and 13 ECHR). Since their choices for Article 13 ECHR instead of Article 47 Charter are never expressly motivated, it is hard to conclude that it is because they consider the Convention as conferring a broader and more adequate protection or because they are more familiar with this legal instrument. In any case, the CJEU reiterated in *Tall* that Article 47 Charter constitutes “a reaffirmation of the principle” of effective judicial protection 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”. It results from the explanations relating to Article 47 of the Charter that the first subparagraph of that article is based on Article 13 ECHR. Explicitly relying on the relevant case law of the ECtHR, pursuant to Article 52(3) of the Charter, the Court interprets Article 19(2) Charter in the light of the Strasbourg Court’s jurisprudence on Article 3 ECHR: where there are substantial grounds for believing that the returnee (asylum seeker or not) will be exposed to a real risk of ill-treatment in the country of destination, the right to an effective remedy requires that a remedy enabling suspension of enforcement of the measure authorising removal should, *ipso jure*, be available to that foreign national. The CJEU thus clearly incorporates and appropriates in the EU legal order the key principles consecrated by the European Court of Human Rights.²⁶⁷

b. Judicial dialogue

The jurisprudence discussed under the issue of suspensive effect of appeals in asylum and return proceedings (*Abdida*, *Tall*) has revealed a fruitful judicial dialogue between the Belgian Labour courts and the CJEU which ultimately impacted not only on the jurisprudence of these courts, but also on the (more reluctant) Council of Aliens Law Litigation. Following a uniform interpretation of Article 47 Charter requirements, even the Belgian Constitutional Court considered itself obliged to recognise this amended judicial practice and to require the legislator to intervene and codify it in legislative provisions.

²⁶⁶ ECtHR, *Singh v. Belgium*, App. 33210/11, 2 October 2012 ; *M.S.S. v. Belgium*, App. 30696/09, 21 January 2011, paras 386-390.

²⁶⁷ ECtHR, *Čonka v. Belgium*, ECHR (2002), App. 51564/99, para. 79, *Gebremedhin [Gaberamadhien] v. France*, no. 25389/05, § 67, ECHR 2007-II, and *Hirsi Jamaa and Others v. Italy*, 27765/09, § 200, ECHR 2012-II.

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Finally, the repeated preliminary references sent by the Belgian Labour courts forced the CJEU to consider adapting its previous *Diouf* practice: Although the *Tall* judgment reinstates the standards set in *Diouf* for the right to an effective remedy in accelerated asylum procedure, it represents a step forward for the fundamental rights of migrants, as a reinforced status for Article 47 Charter is recognised when Article 19(2) Charter circumstances are applicable.

c. Additional relevant cases

ECtHR, *Sow v. Belgium*, App. 27081/13, 19 January 2016
ECtHR, *M.D. and M.A. v. Belgium*, App. 58689/12, 19 January 2016
ECtHR, *M.S.S. v. Belgium*, App. 30696/09, 21 January 2011
ECtHR, *Sultani v. France*, App. 45223/05, 20 December 2007²⁶⁸
CJEU, *Abdida*, C-562/13, 18 December 2014, EU:C:2014:2453
CJEU, *Samba Diouf*, C-69/10, 28 July 2011, EU:C:2011:524
Supreme Court of Estonia, 22 March 2016 (see ACTIONES database)

²⁶⁸ On fast track asylum procedures and compliance with Art. 13 ECHR.

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Casesheet 5.20 – Suspensive effect of appeal against expulsion order on the basis of Articles 8 and 13 ECHR

Reference cases

Supreme Court of Estonia, Judgment of 22 March 2016²⁶⁹

Core issues

Suspensive effect of appeal in removal procedures on grounds of Article 8 and 13 ECHR; suspensive effect by individual application; equivalent protection under Article 7 and 47 CHARTER

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique	Remedy
• Estonia	• removal proceedings	• Return Directive; LTR Directive	• Administrative Court • Circuit Court of Tallin • Supreme Court	• consistent interpretation	• recognition of suspensive effect of appeal against the removal order

Case(s) description

a. Facts

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.

b. Legal issues

²⁶⁹ R. Kitsing, ACTIONES Case note Supreme Court of Estonia, Judgment of 22 March 2016.

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The main issue before the Estonian courts is the recognition of a suspensive effect of an appeal against an expulsion order within the framework of interim proceedings in order to ensure the complainant efficiently takes part in court proceedings and the protection of his family life.

c. Reasoning of the Court

The Supreme Court cited the case law of the ECtHR on the 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 notion 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.

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.

Analysis

a. Role of the Charter

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 Charter.

b. 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

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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 notes 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 standards of proof.²⁷⁰

c. Outcome

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 Charter (Article 52(3) Charter)

Outcome of Judicial Application of Article 47 Charter

- Although the CJEU left procedural autonomy to the Member States to lay down the applicable procedural rules, national courts have an obligation to balance the requirements of State security with the requirements flowing from the right to effective judicial protection. The obligation to inform the concerned individuals of at least the essence of the grounds of the decision taken by the public authorities is a minimum procedural guarantee recognised by the CJEU for the individuals in these proceedings (Z.Z. preliminary ruling)
- Fairness of procedure for security clearance of special advocate in national security related proceedings.
- Articles 7 or 19(2) Charter in conjunction with Article 47 Charter establish an obligation on the part of the Member States to not expel a third country national if there is a risk of violation of the absolute principle of non-refoulement or the right to family life. (*Tall* and caselaw of the ECtHR) The obligation to investigate should be carried out automatically in these case. However this is not possible in all Member States, as some allow for the suspensive effect of appeal by separate application (interim procedures). (The conformity of these national procedures and the relevant

²⁷⁰ Evidence submitted by Judge Bostjan Zalar.

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EU secondary legislation which the former transpose have been challenged by Dutch courts in light of Article 47 Charter).²⁷¹

- In order to ensure the requirements set by the CJEU, in particular the effectiveness of the remedy, the expulsion should not be carried out during the period of appeal.

²⁷¹ See preliminary reference addressed by the Dutch Council of State, <https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=90773>.

IV. Hypotheticals

Hypothetical n. 1

Case Study on Asylum Claims based on Homosexuality and Religion²⁷²

Reza (28) is an Iranian national, Mathi (25) is a Pakistani. Both have applied for asylum in Italy. They claim to be homosexual partners for five months.

(1) Reza is married in Iran and has two little sons there. He left Iran by plane and arrived in Rome in December 2015. He asks for asylum and claims to be homosexual. In Iran homosexuality is a criminal offence. Homosexual acts are punishable by a sentence of 10 years to life and the sanctions are actually applied. The Italian authorities refuse refugee status as well as other forms of protection because they regard Reza to not be credible. But even if he had homosexual affections he could be expected to return home and hide them by continuing his life with his wife and children.

In his appeal to the Italian court of first instance he argues he has sent pictures showing him performing sexual acts with his partner Mathi in Rome to the administrative authorities reviewing his case and he has also deposited them as evidence in his complaint before the first instance court. He claims that he has always been attracted by men, but suppressed his sexual affection in Iran in order to prevent punishment and to protect the reputation of his parents.

(2) Mathi came to Italy in January 2016 and asked for asylum because he feared religious persecution. He is a member of the Ahmadiyya community. This religious community (or 'sect') was founded in Punjab in 1889 by Mirza Ghulam Ahmad. They regard themselves as the true Muslims, because in addition to Mohammed they also believe in their founder Ahmad as a further prophet. The majority Muslims, however, regard them as heretics (wrongful believers). Members of the Ahmadiyya community are subject to serious restrictions on their practice of religion, particularly by the criminal prohibitions under the Pakistan Penal Code against using religious terms and rituals of Islam in the practice of their faith, professing their faith in public, and proselytising for it. Furthermore religious extremists commit acts of violence against Ahmadis to a conspicuous degree. But this - in general - only happens if the Ahmadis practise their religion in public and call themselves Muslims. They may do their worship in assembly halls and have a number of seats reserved in Pakistan's parliament protecting their minority rights according to the Pakistan Constitution.

There are contradictory statements about Mathi's religious practise in his home village in Pakistan. He said he had prayed and conducted missionary activities. The German embassy says he had not been known as a practising Ahmadi. In Germany, he supports a local Ahmadi community by working as an electrician and by performing administrative work (registration

²⁷² Prepared by Harald Dörig, Madalina Moraru.

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of young Ahmadis, etc). But he has not tried to go in public with his faith and perform missionary activities.

The Italian authorities refuse refugee status as well as other forms of protection because Mathi's religious activities would not expose him to risk in Pakistan. He always was a person practising his religion according to the rules of his home country and could be expected to do so after return to Pakistan. It is out of dispute that Mathi will not face persecution in Pakistan for homosexuality.

How would you decide on the asylum applications in these two different cases?

Consider the following issues when giving your legal reasoning

CASE of REZA

- a. What is the ground of persecution?
- b. Is criminal punishment an act of persecution? Does criminal punishment need to be enforced in practice to be an act of persecution within the meaning of the Qualification Directive?
- c. How do you assess the extent of the risk of persecution (see Case note 21 and 22 of the ACTIONES Module)
- d. What fact finding exercise is the national court required to perform in this case?
- e. What questions do you raise during the credibility assessment?
- f. What is the black list of questions (clear violations of Charter) when carrying out the credibility assessment?

CASE of MATHY

- a. What is the ground of persecution?
- b. Do you consider the Ahmadiyya community as professing a 'religion'? consider the definition of Recast QD 10(1)(b))
- c. When does interference with freedom of religion that is guaranteed by Article 10(1) of the Charter may constitute an 'act of persecution' within the meaning of Article 9 Recast QD?
- d. To what extent can an asylum seeker be expected to 'conceal' or 'restrain' their religion in their country of origin so as to avoid persecution?
- e. How do you carry out the credibility assessment?
- f. Would the fact that Mathy has 'kept his faith a private matter' in domestic asylum proceedings influence on your decision on the risk of religious persecution?
- g. What kind of evidence would you request in order to test the existence and level of religious persecution?

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Variation of facts Level II – procedural safeguards applies for both Reza and Mathi

Facts: Mathi and Reza arrived in Italy in September 2015 but did not claim asylum on arrival, allegedly due to ignorance of the asylum system. Their arrest in Germany in October 2015, while visiting a friend, and their transfer to the Italian authorities led them to be detained and be subject of administrative removal orders. While in detention, they applied for asylum, on the basis of advice as to the process, and appealed against the removal order.

Their asylum applications were dealt with under the fast-track procedure. The Italian authorities refused the applications due to a lack of clarity in witness statement, and the fact that the supporting documentation was un-translated. The first instance court upheld the decision of administration.

Mathi and Reza complain that their removal would expose them to a risk of treatment contrary to Article 3 ECHR and 4 CFR (inhuman or degrading treatment), and that the application of the fast-track procedure to their asylum claim was a violation of Article 47 CFR and Article 13 ECHR (right to an effective remedy).

How would you decide on Mathi complaint? Mention the precise steps you will follow in your legal reasoning

Hypothetical n. 2

Case Study on Judicial Control of Detention Order and Transfer Decision under the Dublin III Regulation

The Interplay between EU law, ECHR and National Law²⁷³

On 15 January 2016 at 7.00 a.m. Mr. X entered illegally Member State “A”. Immediately after crossing the border, Mr. X was stopped and checked by the police. The police established that Mr. X had forged his Somalis identity document. During the apprehension, Mr. X told a police that he travelled alone from Sudan for about one year and a half and that he would like to ask for asylum. He mentioned that his date of birth (1 January 1998), which is indicated in the forged passport, is correct. An hour later, at the border premises of the police station, the police took his fingerprints and after receiving two hits from the EURODAC, which showed that Mr X asked for asylum already in the Member States “B” and “C”, the police ordered, on 15 January 2016 at 19.00 p.m., the detention of Mr. X at the special border-police premises. At the same time, Mr. X was informed orally that detention is based on Article 28(2) of the Dublin III Regulation. Three days later (on 18 January) he also received a written decision on detention with a motivation that there is a considerable risk of absconding in the given case, since Mr. X in two other occasions within the short period of 35 days already filed asylum applications in two other neighbouring countries “B” and “C”. On 22 January 2016, Mr. X was questioned by the determining (competent) authority of the Member State A with the assistance of an interpreter about his identity and reasons for asylum application. At the end of this interview, Mr. X was delivered a standard leaflet with relevant information as required under Article 4 of the Dublin III Regulation in English, which was a language that Mr. X supposedly understood. Three days later (on 25 January 2016), Mr. X was notified through a written decision that on the 31 January 2016 he will be transferred to the Member State “C”, since the Member States C took charge of Mr. X's application. Upon the initiative of Ms Y, who is a younger cousin of Mr. X and who has the legal status of asylum seeker in the Member State “A”, a refugee counsellor from a NGO visited Mr. X at the detention premises. During this visit, the refugee counsellor announced the competent authority that she will act as legal representative *pro bono* of Mr. X and will file a complaint against the transfer decision to the Administrative Court of the Member State “A”. With the same occasion, the legal representative filed a written request for interim measure against the transfer order on the basis of the General Administrative Procedure Act before the competent administrative authority, in order to prevent a damage caused to the fundamental rights of Mr X by the transfer to Member States C. She asked the competent administrative authority to postpone the transfer until the first instance court would adjudicate the case. She did not receive any answer or decision from the competent authority on her request. Within a short statutory time limit(s), she filed a lawsuit(s) / appeal(s) against the transfer decision and against the detention order to the competent first instance court(s).

²⁷³ Prepared by Judge Boštjan Zalar and Madalina Moraru.

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A. FIRST INSTANCE COURT PROCEEDINGS AS REGARDS JUDICIAL CONTROL OF THE TRANSFER DECISION

In the lawsuit, which was filed on the 28 January 2015, a legal representative explained that Mr. X's right to access to judicial control of detention was already violated during the period of 20 days that he had spent in detention centre as an unaccompanied minor in the Member State "C", where living conditions were inhuman and degrading. She argued - with the support of a reference to the judgment of the ECtHR in the case of *Ahmed v. Malta* – that Mr. X, while being detained in the Member State "C", he had no individual sleeping place; there were no natural light, air or ventilation in the room; he was detained with five adults; there has been an access to outdoor exercise, but only for 1 hour per day. Furthermore, since Mr. X has a younger cousin Ms Y, who is an unaccompanied minor (born in 1 January 2009) in the Member State "A", Mr. X's application should be decided in the Member State "A", so that Mr. Y could stay with Mr. X as a family member.

In support of her complaint before the first instance court, requesting also a motion for interim measure, the legal representative raise the following main five legal argument:

1. The competent administrative authority violated the second paragraph of Article 3(2) of the Dublin III Regulation²⁷⁴, because the defendant should not transfer Mr. X to the Member State "C", since there are systemic flaws in the Member State C concerning a lack of effective access to judicial control of detention. In support of this argument, a plaintiff refers to one chamber judgment of the ECtHR, where violation of Article 5(4) of the ECHR has been established against the Contracting State "C", because in that case an applicant did not have a reasonable chance to get a speedy judicial review concerning the lawfulness of his detention.
2. The competent administrative authority should not transfer Mr. X to the Member State "C", because Mr. X already experienced degrading treatment (Article 3 of the ECHR) during his stay in detention in the Member State "C" and, therefore, the competent authority acted illegally since it did not use the so-called sovereignty clause under Article 17(1) of the Dublin III Regulation.
3. By way of its decision to transfer Mr. X to the Member State "C", the competent authority violated Article 16(1) of the Dublin III Regulation and the right to family life of Mr X and his younger cousin Ms Y., who is 17 years old and unaccompanied minor and as an asylum seeker has a right to remain in the territory of the Member State 'A'. The legal representative of Mr X argues that under Article 8 of the ECHR the notion of family life may encompass other *de facto* family ties apart from those defined by law, provided that the personal relationship has a sufficient constancy to create *de facto* family ties (*Lebbnik v. the Netherlands*). The legal representative also submitted a written expression of a desire of Ms Y to remain together with Mr. X. Furthermore, the legal representative argued that also the CJEU in relation to a discretionary clause under Article 15(2) of the Dublin II Regulation (343/2003) held

²⁷⁴ Regulation No. 604/2013 of the European Parliament and 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 (recast).

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that Member States may have an obligation to take charge of family members outside the limited scope of family members defined in Article 2(i) of the Dublin II Regulation (Case C-245/11, K, paras. 38, 40, 41, 46).

4. The competent administrative authority did not take into account any other element within the concept of the best interest of a child from the UN Convention of the Right of a Child (Article 3(1)). The contested decision of the competent administrative authority is thus illegal as regards unaccompanied minor, Ms Y, who is present in the Member State A and could be joint with Mr. X. The legal representative further invokes the judgment of the Grand Chamber in the case of *Neulinger and Shuruk v. Switzerland* (2. 6. 2010, para. 135) by saying that the ECtHR in this case notes that “currently there is a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interest must be paramount (see /.../ in particular Article 24(2) of the EU Charter of Fundamental Rights)”.
5. In the request for interim measure, the legal representative of Mr. X merely repeated the explanation of damage that Mr. X already suffered during the detention in the Member State C and should be prevented to happen again by staying the execution of a transfer until a court will pass its judgment on the merits. Furthermore the legal representative argues that Article 27(3)(a) of Dublin III regulation recognizes a right to remain to Mr X in State A pending the outcome of the appeal. The jurisprudence of the CJEU (*Abida and Tall*) and of ECtHR (*Gebremedhin v. France*; *Čonka v. Belgium*; *Abdolkhani and Karimnia v. Turkey*) requires an automatic suspensive effect of the appeal in order to allow the court the opportunity to exercise a close and rigorous scrutiny in order to examine the substance of the complaint and afford proper reparation. Since the national law of the Member State “A” does not guarantee an automatic suspensive effect of a legal action (lawsuit/appeal) before the court, the interim measure should be granted.

In its response to the lawsuit (appeal) of the applicant (plaintiff) against the transfer decisions, the defendant (administrative authority) argues as follows:

1. An eventually successful claim under the second paragraph of Article 3(2) of the Dublin III Regulation can only relate to systemic flaws as regards a risk of inhuman and degrading treatment within the meaning of Article 4 of the Charter, which is an absolute right, while the claim in the given case relates to a right to judicial control of lawfulness of administrative detention order (Article 5(4) of the ECHR and Article 9(3) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation), which is not an absolute right. Furthermore, the defendant argues that Mr. X did not provide any substantial proof that there exists systemic flaws in the legal system of judicial control of detention in the Member State “C”, so that plaintiff's argument which is based on a second paragraph of Article 3(2) should be rejected as manifestly ill-founded.
2. Primarily, the defendant argues that the sovereignty clause set out in Article 17(1) of the Dublin III cannot be enforced in court proceedings. In the opinion of the

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defendant, this is a discretionary power of the administrative authority, which is not justiciable. However, in case that the first instance court will decide that a sovereignty clause in some human rights cases can be enforceable before a court, then the defendant argues that even if a plaintiff did experience conditions in detention as they were described, those conditions did not reach the threshold of degrading treatment as this is regulated in the Recast Reception Directive. Namely, the plaintiff does not say that he was not kept separately from ordinary prisoners and other third-country nationals who have not lodged an application for international protection (the first and the second paragraph of Article 10(1) of the Recast Reception Directive); he does not say he did not have access to open-air space (Article 10(2) of the Recast Reception Directive); he does not say that he could not communicate with the UNHCR or with other relevant organisation (Article 10(3) of the Recast Reception Directive) or family members, legal advisers or counsellors (Article 10(4) of the Recast Reception Directive); furthermore detention of unaccompanied minors is permissible in exceptional circumstances under Article 11(3) of the Recast Reception Directive and the defendant was in detention in the Member State “C” for only 20 days. The defendant also makes reference to the judgment in the case of *Georgiev v Bulgaria*. Since the Member State “C” is at the external border of the EU, it currently experiences considerable difficulties in coping with the increasing influx of migrants and asylum seekers, especially in the context of current economic crisis. Therefore, the plaintiff who alleges that as a detainee, while he has been unaccompanied minor, was a victim of degrading treatment in the Member State “C”, failed to prove that allegation.

3. The defendant argues that according to the definition of ‘family’ in the Dublin III Regulation the plaintiff and his younger cousin, although she is still unaccompanied minor, cannot form a family. Furthermore, Ms Y has a legal guardian in the Member State “A” and, in addition, she also has a refugee counsellor as a legal representative in her asylum procedure. Therefore, Ms Y is not dependent from Mr X in terms of Article 16(1) of the Dublin III Regulation. Furthermore, Article 16(1) of the Dublin III Regulation only states that certain relatives shall “normally” be kept together and therefore, this is not a legal obligation. For that reason, the defendant argues that it did not have any obligation to establish whether strong family ties between Mr. X and Ms. Y existed before a transfer decision was taken.
4. The defendant argues that the principle of the best interest of a child from Article 6 of the Dublin III Regulation is not applicable in this case, because Mr. X is not a minor and a transfer decision affects only Mr. X. However, in case that the first instance court would decide that the principle of the best interest of a child is applicable in this case, the defendant argues that all guarantees for minors that are set in Article 6 of the Dublin III Regulation are met in this case: Ms Y has a legal representative (Article 6(2)); the minor's well-being and social development (Article 6(3)(b) is taken care off, including safety and security considerations (Article 6(3)(c); there are no legal conditions for family reunification (Article 6(3)(a)) and her personal views were taken into consideration (Article 6(3)(d)), although they were not followed. Furthermore, the defendant claims that the Grand Chamber's judgment of the ECtHR in the case of *Neulinger and Shuruk* is not relevant in this case, since it relates to relations between a child and his/her parents and not to immigration or refugee law dispute. The

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defendant also argues that the best interest of a child is not a human rights, but merely a principle (Article 24(2) of the Charter), which need to be applied in conjunction with Article 52(5) of the Charter. Instead the defendant invokes the judgment of the CJEU in the case of *Parliament v. Commission*, which relates to the interpretation of the Council Directive 2003/86/EC on the right to family reunification.

5. The defendant argues that since the plaintiff does not have an arguable claim as regard protection against degrading treatment (Article 3 of the ECHR) an automatic suspensive effect of a lawsuit against the transfer decision is not needed. In case that the first instance court will consider that the plaintiff has an arguable claim, the defendant further argues that under the EU law an automatic suspensive effect is not a necessary requirement. It is sufficient that an applicant has a right to apply for suspensive effect (Article 26(2) of the Dublin III Regulation). Given that the plaintiff deliberately does not want to substantiate the motion for interim measure, because of a wrongful argument that there should be an automatic suspensive effect, the defendant argues that motion for interim measure to suspend a transfer until the court decides the case should be denied for the lack of necessary substantiation.

How would you decide this case?

Questions for facilitating a discussion as regards eventual judicial reasoning(s) in the case of this Dublin III transfer decision:

1. An eventually successful claim under the second paragraph of Article 3(2) of the Dublin III Regulation can only relate to systemic flaws as regards a risk of inhuman and degrading treatment within the meaning of Article 4 of the Charter, which is an absolute right, while the claim in the given case relates to a right to judicial control of lawfulness of administrative detention order (Article 5(4) of the ECHR and Article 9(3) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation), which is not an absolute right. Furthermore, the defendant argues that Mr. X did not provide any substantial proof that there exists systemic flaws in the legal system of judicial control of detention in the Member State “C”, so that plaintiff's argument which is based on a second paragraph of Article 3(2) should be rejected as manifestly ill-founded.

→ Which requirement would you apply for limiting/refusing Dublin transfers: CJEU – ‘systemic deficiencies’ in the asylum procedure and receptions systems (*N.S. and others*, *Puid* and *Abdullahi*); or ECtHR – individual violations of Article 3 ECHR (*Soering v UK* and *Tarakhel v Switzerland*)? See possible solutions and information in Case note 1 of the ACTIONES Module and ZAT case note – limitations to Dublin transfer based on relative human rights (case note 32).

2. Is it possible in your country that a plaintiff could successfully invoke the sovereignty clause under Article 17(1) of the Dublin III Regulation in the court procedure in order

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to prevent a transfer and to secure that another violation of basic human right would occur to the plaintiff in Member State C due to a lack of access to judicial control of detention in Member State C?

3. Which definition of a ‘family’ would be decisive in a legal dispute before your court: the definition given in the Dublin III Regulation or a broader definition under the case-law of the ECtHR? Would you consider addressing a preliminary reference to the CJEU to clarify the notion of ‘family member’ under the Dublin III Regulation? *See the Case note on ZAT and others delivered by the UK Upper Tribunal.*
4. Would the principle of the best interests of the child be applicable in your country in this case? Why? *See the case notes discussed in under section on Article 24 CFR in the ACTIONES Module*
5. How would your court reconcile any possible difference as regards an individual’s, such as Mr X, right to (automatic) suspensive effect of a legal remedy (appeal) under the EU Charter, Dublin III Regulation and national legislation? *See section on Article 47 CFR in the ACTIONES Module*

Consider whether you would have formulated differently the complaint of Mr X?

B. FIRST INSTANCE COURT PROCEEDINGS AS REGARDS JUDICIAL CONTROL OF DETENTION ORDER

In the lawsuit/appeal against the detention order issued in the Member State “A”, the applicant argues the following five arguments:

1. He has been detained in the Centre for Aliens even before his asylum application was officially registered or taken into formal consideration;
2. He has not been interviewed nor informed about the Dublin III Regulation before he was detained (Articles 4 and 5 of the Dublin III Regulation) and thus a requirement of “an individual assessment” (Article 28(2) of the Dublin III Regulation) was not fulfilled;
3. He argues that the Member State “A” has not yet defined objective criteria for the risk of absconding in national law, although this is a mandatory requirement under Article 2(n) of the Dublin III Regulation, and therefore, he should not be detained at all;
4. As regards eventual availability of effective less coercive measures (Article 28(2) of the Dublin III Regulation in conjunction with Article 9(4) of the Recast Reception Directive) the contested decision merely states that, in principle, the only possible less coercive measure in comparison to detention in the Centre for Aliens is a measure of restriction of freedom of movement within the territory of Asylum Home; however, in the opinion of the applicant the defendant insufficiently states that statistically this measure is not effective to keep asylum seekers who are in the process of transfer within the borders of the Member State “A”;
5. The applicant argues that despite the very poor argumentation of the detention order,

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the court should conduct a rigorous scrutiny test of the detention order and he refers to the standards of the CJEU in the case of *Mahdi* (C-146/14 PPU, paras. 62-64);

6. Since detention is illegal, the applicant claims that the court should order an immediate release (second sub-paragraph of Article 9(3) of the Recast Reception Directive in conjunction with Article 28(4) of the Dublin III Regulation; Article 6 CFR; Article 5(4) of the ECHR).

As a response to the arguments of the plaintiff, the defendant (the administrative authority) argues before the court that from the moment the applicant had actually expressed his intention to ask for asylum, he has been considered as an asylum seeker and thus subject to eventual detention under the Dublin III Regulation.

The Administrative authority admits that the applicant was not informed or interviewed before detention order was issued, but this procedural shortcoming did not affect the legality of detention order itself. In this respect, the Administrative Authority refers to the position of the CJEU in the cases of *Boudjlida* (paras. 39, 43) and *M.G. and N.R.* (paras. 39-41).

As regards the definition of objective criteria for the risk of absconding in national law, the defendant argues that it is true that these criteria are not regulated in the Asylum Act, which regulates legal issues of asylum seekers. However, criteria for the risk of absconding are regulated for the irregular migrants in the Aliens Act and may be applicable also in the case of risk of absconding in relation to the Dublin III Regulation. The Aliens Act defines as a risk of absconding the situation, when a third country national illegally staying in the country files a multiple applications merely to postpone the removal order and the particular situation in the given case is similar to that, which is regulated in the Aliens Act. The defendant argued that the Supreme Court of Member States A has previously interpreted Article 2(n) of Dublin III Regulation, as including not only legislation but also judicial and administrative practice. According to this broad interpretation of the notion of 'law', the Supreme Administrative Court held that the practice of the police with regard to the detention of asylum seekers under Article 28 of the Dublin III Regulation was foreseeable, not arbitrary, and based on law. The Supreme Court concluded that, first, it would be overly formalistic to require a legislative definition of 'serious risk of absconding', and secondly, even in the case of a legislative definition of the risk of absconding, in practice, this would not enhance the legal certainty. Furthermore there is no need to implementing legislation defining the risk of absconding, as the provision is set out in a Regulation which is directly applicable, unlike EU Directives.

As regards the effectiveness of less coercive measure, the defendant relies on statistical data that the majority of asylum applicants when their freedom of movement has been restricted within the territory of the Asylum Home, escaped, because the Asylum Home has only one security agent at the reception of the Asylum Home.

As regards the intensity of judicial review, the defendant argues that the case of *Mahdi* does not impose a rigorous scrutiny test, because in that case the CJEU merely sets the framework of the scope of judicial review, but not the intensity of judicial review. In the *Mahdi* case, the CJEU states that a judicial authority must be able to rule on all relevant matters of fact and of

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law in order to determine whether a detention is justified. This requires an in-depth examination of the matters of fact specific to each individual case. Where the detention is no longer justified, the judicial authority must be able to substitute its own decision for that of the administrative authority and to take a decision on whether to order an alternative measure or the release of the third-country national concerned. To that end, the judicial authority must be able to take into account both the facts stated and the evidence adduced by the administrative authority and any observations that may be submitted by the third-country national. Furthermore, a judicial authority must be able to consider any other element that is relevant for its decision should it so deem necessary. Accordingly, the powers of the judicial authority in the context of an examination can under no circumstances be confined just to the matters adduced by the administrative authority concerned. Any other interpretation would result in ineffective examination by a judicial authority and thereby would jeopardize the achievements of the objectives pursued.²⁷⁵ In the opinion of the defendant, this is just the definition of the scope of judicial review, but not the definition of the required intensity of judicial review. The defendant thus refers to the test of the general principle of effectiveness, which is that protection of right must not be “*practically impossible or excessively difficult*” (C-246/09, *Bulicke*, paras. 25-26). The defendant also argues that less stringent judicial control is confirmed also by the case-law of the ECtHR in relation to detention under Article 5(1)(f) of the ECHR. “*Article 5(4) of the ECHR does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the lawful detention of a person according to Article 5(1) of the ECHR. The reviewing court must not have merely advisory functions but must have the competence to decide the lawfulness of the detention and to order release if the detention is unlawful. The requirement of procedural fairness under Article 5(4) does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5(4) procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question. Thus, the procedure must be adversarial and must always ensure equality of arms between the parties. An oral hearing may be necessary, for example in cases of detention on remand.*”²⁷⁶

Finally, as regards the claim for immediate release of the applicant, the defendant argues that since under the national law the administrative authority has a regular right to appeal against the judgment of the first instance court, the applicant may only be released after the judgment becomes final.

What could be possible directions of court's reasoning as regards all six basic arguments of the plaintiff and of the defendant (see also the list of legal sources below) in the case of judicial control of the detention order?

²⁷⁵ C-146/14 PPU, *Mahdi*, 5 June 2014, paras. 62-64.

²⁷⁶ *A and Others v. the United Kingdom*, para. 204; *Reinprecht v. Austria*, para. 31.

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Questions for facilitating a discussion as regards eventual judicial reasoning(s) in the case of judicial control of the transfer decision:

1. Can detention of asylum seekers subject to Dublin procedures be taken before the official registration of asylum application?
2. Is the lawfulness of detention dependent on whether the interview carried out after the registration of the asylum application and detention of the asylum seekers proves that detention was necessary?
3. Is there a legitimate ground for the detention of Mr X?
4. Do you agree with the Supreme Court of Member State A on the definition of the risk of absconding?
5. Do you find the defendant's justification for refusing alternative measures sufficient to justify detention?
6. What is the legal remedy in case you find detention unlawful?

Level II – risk of absconding is defined within the national legislation implementing Dublin III Regulation, however it is so broadly defined that almost any illegal entry or crossing of border qualifies as risk of absconding. In such circumstances, would you consider carrying out an individual assessment checking if there is a concrete risk of absconding? (see case law on the implementation of the risk of absconding in ACTIONES Module under sub-section on Article 6 CFR.

Hypothetical n. 3

National Security Concerns limitation to right to good administration, right to be heard, right to fair trial and effective remedy

Facts: M.N. is an Afghan citizen, who entered the territory of the member State X, with a visa of studies. One month after the expiry of his visa, he was caught by the police and ordered to leave the territory of Member State X in 15 days. Two days later he lodged an asylum application on grounds of having been subjected to persecution in Afghanistan. His asylum application was rejected by both the administrative authority and first instance court as not sufficiently proving a risk of persecution. During the asylum proceedings he married a citizen of Member State X and requested residence permit in that State as family member of an EU citizen. Up until that date, his wife has not exercised her free movement rights. Before the interview set for the request of residence, the Intelligence Service (IS) of Member State X requested the Court of Appeal to expel him and issue an entry ban of 10 years, in light of solid evidence indicating that M.N. has possibly been involved in activities that may constitute a threat to national security. The IS also requested his placement in public custody until his removal.

The evidence submitted by IS was classified as 'top secret' and was made available only to the Court of Appeal. The request was judged in an emergency procedure by Court of Appeal. M.N. received a summon to present himself before the Court of Appeal one day before the day of the hearing. He argued before the Court of Appeal that he was not informed of the object of the proceedings. The interpreter present at the hearing did not speak Dari, but only Urdu. Therefore the hearing was in Romanian and English.

The defendant asked for a delay in order to hire an attorney and to read the indictment and prepare his arguments since he had only one day to consult it. The procedure for security clearance of lawyers who can participate in national security cases takes several weeks. The court delayed the hearing for the end of the day, because of the specific emergency procedure which governs this type of trials. Given the limited delay conferred, the applicant preferred to continue the trial and presented as evidence: his request of asylum; proof that he requested the right of residence as a family member of an EU citizen, and added that his return in Afghanistan would put his life in danger. The Court of Appeal admitted the request of the IS and expelled the applicant, issuing also an entry ban of 10 years. His detention was prolonged until his removal. The Court of Appeal motivated its decision on the grounds that the top secret information provided by the IS proves that there is sufficient proof that the M.N. engaged in activities that are likely to endanger national security. The Court of Appeal held that it does not make a difference whether he is an asylum seeker or family member of an EU citizen, since involvement in terrorist activities can lead in both circumstances to the person being expelled. As to the limitation to the right to family life, the Court of Appeal limited to say that it is necessary in light of the objective of ensuring national security and the expulsion with detention which cannot exceed 18 months and entry ban of 10 years is proportionate.

Questions

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There is a possibility to lodge an appeal before the Supreme Court, which, so far, in these cases, has usually upheld the decision of the IS. What would be the main legal arguments in your appeal before the Supreme Court.

In particular consider:

- which EU legal provisions are applicable;
- is the Charter applicable to the case?
- Do you know of any European and national case law establishing the procedural safeguards applicable in this case? (see Case notes Case notes 43, 44, 45, 46 and 38 of ACTIONES Module?)

Consider the following issues:

1. M.N argues that has not been involved in terrorist activities, was never condemned for actions collateral to terrorism in Romania. He added that he was living with his spouse and had made several inquiries for obtaining the right of residence, one of them being still a pending case.

ANNEX I -LIMITATIONS ON THE APPLICATION OF THE EU CHARTER PROTOCOLS 21 and 30 (The Position of Ireland and UK)

Overview

In addition to the general rules surrounding the application of the Charter of Fundamental Rights (the ‘Charter’) and the interpretation of Article 51 Charter,²⁷⁷ two specific issues arise in relation to the more general application of the EU Charter, in light of Protocol No. (21) - permitting several Member States to opt out from Title V of the Treaty on the Functioning of the European Union (TFEU), and Protocol No. (30) - on the application of the Charter to the UK and Poland. This section will assess the case law on the application of these Protocols in relation to Ireland and UK, however parallels can be drawn also in relation to Poland, at least as regards the application of Protocol No. (30).

Whereas Protocol No. (30) applies generally to the Charter rather than being specifically related to immigration and asylum issues, its clarification and interpretation by the Court of Justice of the European Union (hereafter ‘Court of Justice’ or CJEU) has taken place in the context of adjudicating the impact of fundamental rights concerns and the application of the CHARTER in the context of the Dublin System.²⁷⁸

Protocol (No 21)

Protocol (No 21) is a general opt-out from Title V of the TFEU concerning the Area of Freedom, Security and Justice. The opt-out replaced the partial opt-out operating in relation to the old Title IV TEC on immigration and asylum matters pre-Lisbon and was extended to criminal law matters and police and judicial cooperation to compensate for the loss of the veto following the collapsing of the pillar structure and the extension of the general decision making procedures to the former third pillar areas (the so-called ‘communitarisation’ of Justice and Home Affairs).

Under Protocol (No 21) the UK and Ireland enjoy a general opt-out from any legislation proposed under Title V. If they wish to participate in a given measure they must notify their intention to the Council within 3 months. An attempt will then be made to adopt the measure with the participation of the requesting Member State but if this is not possible within ‘a reasonable time’, the Council may proceed without the requesting Member State. The UK

²⁷⁷ See handbook Module I.

²⁷⁸ Consisting of the Dublin Regulation, currently in its third permutation as Regulation 604/2013 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 (recast) [2013] OJ L180/31 and the fingerprint database known as ‘Eurodac’, now governed by Regulation 603/2013/EU on the establishment of ‘Eurodac’ and amending Regulation 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice [2013] L 180/1.

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and Ireland may also participate at any time in an adopted measure in accordance with the usual rules regarding enhanced cooperation. If a measure is adopted amending existing legislation that is applicable to the UK and/or Ireland a special procedure applies. If the UK and/or Ireland wishes to participate in line with its opt-in, it will be bound by the amending measure. If the UK and/or Ireland however do not wish to opt-in to the measure then the Council must consider if the measure can in fact be adopted without the participation of the UK and/or Ireland without rendering it 'inoperable'. If the measure cannot be adopted without the participation of the UK and/or Ireland then the Council shall adopt a declaration to that effect and the UK and/or Ireland is given a period of two months to opt-into the measure. If after two months the relevant Member State has not opted into the measure then the *existing* measure will be deemed not to apply to the relevant Member State. The Council shall decide on how the financial costs entailed by such a withdrawal of the UK and/or Ireland shall be shared.

This special procedure is particularly relevant in light of the measures the UK and Ireland have opted into within the area of immigration and asylum and the decision to update the Common European Asylum System (CEAS) following the institutional changes contained in the Treaty of Lisbon. Ireland and the UK have effectively opted-out of all legislation on immigration law, including the Returns Directive.²⁷⁹ Ireland and the UK opted into all the first generation asylum legislation,²⁸⁰ with the exception of Ireland's opt-out from the Reception Conditions Directive.²⁸¹ Ireland and the UK however have not opted into the second generation of CEAS legislation ('CEAS II'), with the exception of the Dublin III Regulation²⁸² and the accompanying recast Eurodac Regulation.²⁸³ Nonetheless, no declaration was made by the Council regarding the inoperability of the legislation in accordance with Protocol (No 21). The result is that CEAS I legislation therefore continues to apply to the UK and Ireland, with the exception of the Reception Conditions Directive, from which Ireland has opted-out, and the Dublin System into which both states have opted-into in its latest iteration.²⁸⁴ At the same time neither Member State is subject to immigration legislation.

A final particularity applies in the case of Ireland and its decision to operate two separate procedures for applications for asylum and subsidiary protection respectively. The original

²⁷⁹ See Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98, recitals (26) and (27).

²⁸⁰ Principally 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 and the content of the protection granted [2004] OJ L 304/12, Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18, Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13 and Regulation 343/2003/EC establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1.

²⁸¹ Reception Conditions Directive, recital (20).

²⁸² Dublin III Regulation.

²⁸³ Eurodac Regulation II.

²⁸⁴ With the exception of the Reception Conditions Directive in relation to Ireland, as noted above.

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Procedures Directive applies only to applications for asylum.²⁸⁵ However, if a Member State operates a ‘one-stop-shop’ procedure, considering the position of the applicant under both statuses simultaneously, then the provisions of the Procedures Directive necessarily applies to the single procedure. Ireland, alone amongst the Member States, operated a ‘dual system’ whereby an application for subsidiary protection could only be made after a negative decision in an application for asylum. The Procedures Directive applied to the procedure to award asylum status but did not apply to the procedure assessing the application for subsidiary protection, although as a status flowing from Union law,²⁸⁶ the general principles of Union law, including the right to good administration *did* apply, leading to certain procedural rights for applicants, as confirmed by the Court of Justice.²⁸⁷ This anomalous situation has since been brought to an end with the entry into force of the International Protection Act 2015 and the operation of a one-stop shop system.²⁸⁸

There has been no express Court of Justice decision to date on the application of Protocol (No 21) or on any of the consequences flowing from the differentiated position of the UK and Ireland in relation to Title V.²⁸⁹ In the cases collected for the ACTIONES Project, the question of opt-outs and the application of the Charter has arisen in two Irish cases. Firstly, in *Smith v Minister for Justice*²⁹⁰ the Charter was not deemed applicable to deportation orders. The finding was based on the consideration that ‘[t]he revocation of a deportation order...does not involve, as such, any implementation of Union law. It is the exercise by the State of its sovereign entitlement to decide who shall remain within the territory of the State.’²⁹¹ Whereas this is undoubtedly true in the present case, it is submitted that such a clear-cut conclusion is only possible in light of the non-applicability of the Returns Directive to Ireland.²⁹² Secondly, in *CA v Minister for Justice and Equality (Case note 51)*²⁹³ the issue of the scope of application of the Charter in light of the use of an opt-out was relevant. In proceedings challenging the ‘direct provision’ scheme for providing for asylum seekers material needs, the applicant claimed such a system violated her rights under the Charter, arguing that it applied generally within asylum law in light of Ireland’s participation in the CEAS in substantial parts, furthermore she argued that Ireland’s opt-out operated as a *derogation* from Union law and thus, even in areas in which Ireland had not participated in

²⁸⁵ The recast version applies to both asylum and subsidiary protection applications. See Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast) [2013] OJ L 180/60, art 3.

²⁸⁶ Qualification Directive.

²⁸⁷ Case C-604/12 *HN v Minister for Justice, Equality and Law Reform* EU:C:2014:302. See further this Handbook.

²⁸⁸ International Protection Act 2015.

²⁸⁹ Although see *HN*.

²⁹⁰ *Smith v Minister for Justice, Equality and Law Reform* [2012] IEHC 113. A subsequent appeal to the Supreme Court upheld the decision of the High Court, but did not address issues of the scope of application of the Charter. See *Smith v Minister for Justice, Equality and Law Reform* [2013] IESC 4, [2013] 2 JIC 101.

²⁹¹ *Smith (High Court)*, para 24.

²⁹² Returns Directive, recital (27).

²⁹³ *CA v Minister for Justice and Equality* [2014] IEHC 532, [2014] 11 JIC 1407.

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line with Protocol (No 21)²⁹⁴ it was bound by fundamental rights as contained in Union law, including in the Charter. As detailed in the case file below, the Court rejected the submissions of the applicant, instead finding the opt-out was in fact an opt-out meaning that in the relevant area Ireland was not in fact acting within the scope of Union law within the meaning of Article 51(1) Charter.²⁹⁵

Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom

Concerned with an extension of Union competence and a change in the impact of Union fundamental rights in their domestic legal systems, during the negotiations leading to the adoption of the Treaty of Lisbon the United Kingdom and Poland secured a Protocol ‘clarifying’ the application of the Charter to those States. Protocol (No 30) contains a number of recitals, reaffirming various provisions of the Charter in relation to its scope and its inability to extend the competence of the Union and contains two substantive Articles. Article 1(1) states that the Charter ‘does not extend’ the ability of national or Union courts to find provisions of UK or Polish law inconsistent with the Charter. Article 1(2) refers specifically to Title IV of the Charter (‘Solidarity’) and ‘for the avoidance of doubt’ affirms that nothing in that title shall create new justiciable rights in domestic legislation. Finally Article 2 provides that to the extent the Charter refers to national law, it shall only apply to the extent that the rights or principles it provides are recognised in Polish or UK law.

Academic opinion was largely of the opinion that, given its wording and in light of the recitals, Protocol (No 30), Article 1(1) did not constitute a general opt-out from the Charter for the UK or Poland, making its provisions inapplicable in those Member States. There was somewhat more disagreement regarding the impact of Article 1(2) and Article 2 but generally a consensus emerged that the practical impact of the Protocol would be minimal, especially in light of the continuing applicability of general principles of Union law.²⁹⁶ This conclusion, at least in relation to the more general Article 1(1), was confirmed by the Court of Justice in *NS and Others v Secretary for State for the Home Department*²⁹⁷ in which the Court of Justice found that the Protocol ‘does not call into question the applicability of the Charter in the United Kingdom’.²⁹⁸ Rather Article 1(1) of the Protocol ‘explains Article 51 of the Charter with regard to the scope therefor and does not intend to exempt the...United Kingdom from

²⁹⁴ Or in this case its predecessor Protocol (No 4) on the position of the United Kingdom and Ireland (1997) as annexed to the Treaty on European Union and Treaty establishing the European Community.

²⁹⁵ *CA*, para 11.9.

²⁹⁶ For a concise literature review of academic opinion relating to Protocol (No 30) see Steve Peers, ‘The ‘Opt-out’ that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights’ (2012) 12 HRL Rev 375.

²⁹⁷ Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Dept* EU:C:2011:865, [2011] ECR I-13905.

²⁹⁸ *Ibid* para 119.

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the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.’²⁹⁹ The decision of the Court of Justice was accepted, albeit with some misgivings, by the High Court of England and Wales in *R (AB) v Secretary of State for the Home Department (Case note 52)*.³⁰⁰ Despite his assertion that it is ‘absolutely clear that the contracting parties agreed that the Charter did not create one single further justiciable right in our courts’, Mostyn J applied the judgment in *NS*.³⁰¹ However, in light of the failure of the applicant’s claim under Article 3 of the European Convention on Human Rights (ECHR), Mostyn J did not feel it necessary to examine the claim under the Charter.³⁰² The applicant’s claim ultimately failed on the grounds of credibility.

²⁹⁹ Ibid para 120.

³⁰⁰ *R (AB) V Secretary of State for the Home Department* [2013] EWHC 3453, -2014] 2 CMLR 22.

³⁰¹ Ibid paras 12-14.

³⁰² Ibid, para 69.

Annex II - List of ACTIONES Module cases

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Article Charter	Issue	Case	Member State	Outcome of Charter and Judicial Dialogue
Art. 4 – torture and ill treatments	1. Dublin III: Individual violation of Art. 4 as limitation to Dublin transfer(s), in addition to the benchmark of systemic deficiencies in the asylum reception conditions and procedure in the Member State of transfer	1. Case C-578/16 PPU, C.K. and others <i>ACTIONES case note 1</i>	1. Slovenia (Supreme and Constitutional Court)	Role of the Charter: used as grounds of interpretation of discretionary clause in Article 17 Dublin Regulation; grounds for possible new obligations for the Member State(s) not to transfer asylum seekers Role of Judicial Dialogue: Preliminary reference addressed to settled judicial disagreement at two levels: 1) between ECtHR and CJEU on the threshold/benchmark of Art. 4 CFR violations that require a refusal to enforce a Dublin transfer; 2) disagreement between Supreme and Constitutional Court on the obligations incumbent on national courts deriving from the jurisprudence of the European supranational courts; Outcome: both systemic deficiencies and individual violation(s) of Art. 4 CFR act as barriers to Dublin transfers; national courts have an obligation to annul Dublin transfers if systemic deficiencies in the asylum procedures or reception conditions of the

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	<p>2. Duty of cooperation/ex officio consideration of subsidiary protection</p> <p>Obligation of <i>ex officio</i> investigation of national courts on possible Article 4 violations;</p>	<p>2. Iyahan v Minister (making use of <i>Elgafaji</i> and <i>Diakite</i> preliminary rulings)</p> <p><u><i>ACTIONES case note 5</i></u></p>	<p>2. Italy (Supreme Court)</p>	<p>Member State of transfer are found, or if there is substantial proof of a risk of individual violation(s) of Art. 4 CFR; obligations deriving under Art. 3(2)(2) or Art. 17 Dublin III Regulation;</p> <p>Additional useful cases: (Grand Chamber), judgment of 4 November 2014, <i>Tarakhel v Switzerland</i>, Application no. 29217/12</p> <p>Role of the Charter: Arts. 2 and 3 ECHR provide for standards that should be applied under Art. 4 CFR and Art. 4 of the Qualification Directive – duty of cooperation</p> <p>Role of Judicial Dialogue: The Italian Supreme Court reverses the judgement of the Court of Appeal because it did not take into account the interpretation of the Qualification Directive provided by the CJEU in cases <i>Elgafaji</i> and <i>Diakite</i>.</p> <p>Outcome: national courts have an obligation to assess of their own motion the existence of an indiscriminate violence in the country of origin, and consider ex officio subsidiary protection.</p> <p>Additional useful cases: CJEU: C-285/12,</p>
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	<p>3. Enforcing return/removal orders:</p> <p>Ill treatments by a Member State police (connection with recently decided <i>Zotul</i> case of the ECtHR).</p>	<p>3. Czech Constitutional Court, 2015</p> <p><u><i>ACTIONES case note 4</i></u></p>	<p>3. Czech Republic</p>	<p>Diakité, ECLI:EU:C:2014:39 ECtHR: F.G. v Sweden, Appl. No. 43611/11, Grand Chamber Judgment of 23 March 2016</p> <p>Role of the Charter: standard of review of public authorities' conduct when returning (uncooperative) irregular migrants</p> <p>Role of Judicial Dialogue: The CCC consistently interpreted the prohibition of ill treatment stipulated by the Constitution in light of both Art. 4 CFR and the standards developed by the ECtHR under Art. 3 ECHR for the purpose of establishing <i>standards that need to be followed by domestic authorities when enforcing removals of (uncooperative) foreign nationals.</i></p> <p>Outcome: Both substantive and procedural violations of Art. 4 CFR/Art. 3 ECHR and national constitutional provisions were found by the CCC due to the following conducts of the police authorities:</p> <ul style="list-style-type: none"> ➤ the failure to give notice of the time of departure; ➤ the use of tear gas; ➤ the use of handcuffs; and ➤ his transportation in the airport using a
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				<p>luggage trolley</p> <p>+Failure to investigate allegations in an expeditious and thorough manner</p> <p>Additional useful cases: <i>Bureš v. the Czech Republic</i>, no. 37679/08</p>
Art. 6 – right to liberty	<p>1.Detention under Dublin III</p> <p>Charter used as standard of interpretation of grounds of detention in Dublin procedure (interpretation of the concept of ‘law’ for the definition of ‘significant risk of absconding’ Arts. 28 and 2(n) Dublin III Regulation)</p>	<p><i>Al Chodor</i> (C-528/15)</p> <p>Casesheet 4</p>	<p>Czech Republic</p> <p>(Supreme Court)</p>	<p>Role of the Charter: standard of interpretation of ‘law’ as requirement for the application of the risk of absconding as grounds for detention in Dublin procedures. Article 6 CFR is also used as standards of validity of national practice detaining on grounds provided in administrative and judicial practice rather than legislation</p> <p>Role of Judicial Dialogue: comparative reasoning (citing foreign judgments to support the decision to annul administrative detention); disapplication of national practice as contrary to EU law; preliminary reference to clarify the concept of risk of absconding.</p> <p>Outcome: amendment of the Czech legislation for the purpose of providing objective criteria in the national legislation</p> <p>Additional useful cases: German Federal Civil Court: <i>Decision of 18 February 2016 – V ZB 23/15</i>; <i>Decision of 26/06/2014 – V ZB 31/14 for Dublin cases</i></p>

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	<p>2. Asylum detention grounds</p> <p>Charter as standard of validity review of EU secondary legislation (Art. 8(3)(e) Reception Conditions Directive)</p>	<p><i>J.N.</i> (C-601/15) no longer in the Module, but in the database <u>(pending C-18/16, K. similar preliminary questions in regard to Art. 8(3)(a)-(b))</u></p>	<p>The Netherlands (Council of State)</p>	<p>Role of the Charter: Standard of validity of Art. 8(3)(e) Reception Conditions Directive – asylum detention on the basis of public order or national security</p> <p>Role of Judicial Dialogue: preliminary reference addressed by the Dutch Council of State questioning the validity of EU secondary legislation in light of the right to liberty as laid down in Art. 6 CFR <u>and</u> 5(1)(f) ECHR.</p> <p>Outcome: CJEU found the asylum detention ground to be in conformity with Arts. 6, 52(1) CFR and 5(1)(f) ECHR, since the detention ground was found to respect the requirements of Art. 52(1) CFR and, although Art. 5(1)(f) ECHR does not expressly provides for the ground of public order or national security, the CJEU interpreted the specific circumstances of the case (asylum application lodged during return proceedings) as falling within the scope of Art. 5(1)(f) second indent -</p> <p>Additional useful cases: Nabil and Others v. Hungary (no. 62116/12)</p>
	<p>3.Guidelines</p>	<p>for</p>		

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	establishing abusive asylum application, as justification for detention	<i>the CJEU (Arslan, J.N.) and ECtHR (I.M. v France) commented under the Conclusions Judicial Dialogue</i>		
Art. 7 – right to private and family life	1. Obligation of keeping or bringing together relatives under DUBLIN III Right to family life as ground for refusal to enforce a Dublin transfer	1. K. and others (C-245/11) ACTIONES case note 5	Regional administrative court from Austria	Role of the Charter: Art. 7 CFR used to clarify the notion of ‘relative’ within the framework of keeping together an asylum seeker with the dependent person; daughter in law was considered as falling under the scope of the notion of ‘relative’ within the ex Dublin II Regulation provision on dependent person, this interpretation should be maintained even if Dublin III Regulation restricted the category of persons of asylum seekers that can benefit of the right to be kept together with the dependent persons. (either under Article 16 or 17 Dublin III Regulation) Role of Judicial Dialogue: preliminary reference Outcome: obligation to keep together the asylum seeker with the daughter in law, although another MS would be responsible according to Art. 17 Dublin III Regulation.

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	<p>2. Asylum – credibility assessment</p> <p>The right to privacy limited acceptance of proof in credibility assessment of international protection claims</p>	<p>2. A, B, C (C-148-150/13) <i><u>casesheet 6</u></i></p>	<p>Council of State Netherlands</p>	<p>Role of the Charter: Article 7 CFR and in particular the right to privacy limits the form of questions that could be asked and the types of proof that could be requested when assessing the credibility of a claim of sexual orientation</p> <p>Role of Judicial Dialogue: preliminary reference</p> <p>Outcome: initial administrative decisions refusing asylum status were annulled</p>
	<p>3. Immigration detention</p> <p>Limitation of Art. 7 CFR on the basis of national security</p>	<p>3. Case no. 5473/2012, Court of Appeal of Bucharest <i>(casesheet 7)</i></p>	<p>Romania (Court of Appeal of Bucharest)</p>	<p>Role of the Charter: standard for assessing the legitimacy of the national practice of detention and removal in cases of national security.</p> <p>Role of Judicial Dialogue: use of consistent interpretation in order to assess whether the limitation of Art. 7 CFR on the basis of national security is in conformity with both Art. 7 CFR and the fundamental right to asylum, protected by the national Constitution and also by Article 8 ECHR.</p> <p>Outcome: confirming the detention and removal</p>

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	<p>4. Family reunification</p> <p>Unmarried couple benefiting of the right to family reunification; presumption of good faith</p>	<p>4. Case no. 34549/4/2013, Court of first instance of Romania</p> <p><i>Casesheet 8</i></p>	Romania (Court of first instance)	<p>Role of the Charter: used to recognise higher standards than under the EU legislation; recognition of a presumption of good faith, family relation and recognition of a right to family reunification with a sixth child</p> <p>Role of Judicial Dialogue: The ECtHR judgment of <i>Marckx v Belgium</i> was applied though the use of consistent interpretation in light of constitutional providing for conform interpretation of rights comparable to those found in international agreements.</p> <p>Outcome: similar protection to an “illegitimate family” (unregistered partners with 6 children), as to the protection allowed for legitimate families (married with children).</p>
Article 10 – Freedom of thought, conscience and religion	<p>1. Determination of act of persecution/and credibility assessment</p> <p>Article 10 in the determination of methods</p>	1.case 201109839/1/V2 (use of <i>Y and Z</i> (C-71/11 and C-99/11) <i>casesheet 9</i>	1. Netherlands, Council of State	<p>Role of the Charter: A sufficiently serious violation of Article 10 CFR is deemed to constitute persecution within the meaning of the Qualification Directive per Y and Z. Art. 10 CFR used in credibility assessment of persecution on religious grounds</p> <p>Role of Judicial Dialogue: consistent</p>

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	<p>of assessment of the credibility of persecution claim on the basis of conversion to Christianity; determination of violations of freedom of religion that can be a ground of persecution for the purpose of recognising the refugee status</p>			<p>interpretation and application of the CILFIT doctrine in deciding whether to address a preliminary ruling.</p> <p>Outcome: Dutch Council of State confirmed the validity of credibility assessment methods, including detailed questions on reasons of conversion to Christianity and his religious practices in the country of origin.</p>
	<p>2. Definition of conscientious objector, - application of the <i>Sheperd</i> preliminary ruling to cases of desertion by Ukrainians during</p>	<p>2. Judgment of 11 August 2015 giving effect to the <i>Sheperd</i> preliminary ruling (C-472/13) <u><i>casesheet 10</i></u></p>	<p>2. Netherlands, Court of first instance of the Hague, Middelburg branch</p>	<p>Role of the Charter: clarification of scope of application of Article 9(2)(e) and 12 Qualification Directive</p> <p>Role of Judicial Dialogue: consistent interpretation of the <i>Sheperd</i> preliminary ruling</p> <p>Outcome: amendment of test applied by Dutch authorities: the requirement that the armed conflict be condemned by the</p>

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	and the war			international community was excluded; recognition of both absolute and partial objectors within the scope of Art. 10(2) and Art. 9(2)(e) QD Additional relevant cases: <i>Sheperd</i> C-472/13
Article 18- right to asylum	Exclusion/Revocation/Refusal to issue a residence permit to refugee The link between an asylum seeker or refugee activities and specific acts of terrorism that is necessary to trigger the exclusion from international protection, revocation of refugee or subsidiary protection; refusal of residence permit of a refugee	B and D , <i>H.T. and Lounani</i> cases; <i>casesheet 11</i>	Germany (<i>German Federal Administrative Court</i> in B. and D.; <i>Administrative Court of Baden-Württemberg</i> in <i>H.T</i>)	Role of the Charter: The relation between the constitutional right to asylum and the grounds for exclusion and revocation of refugee protection set out by the Qualification Directive. Article 18 CFR is not used by the CJEU. The CJEU clarified that Article 3 of the Qualification Directive must be interpreted as meaning that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status, provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive. Role of Judicial Dialogue: The German courts sent in 2009 and 2010 two sets of questions regarding the clarification of first the application of the exclusion and revocation of refugee protection clauses, and then the interpretation of compelling reasons of national security and public order for the

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				<p>refusal of residence permit. Clarification of personal scope of application of the exclusion and revocation from refugee protection and consequences on the refugees' rights.</p> <p>Outcome: B and D. – Obligation to carry out an individual assessment, excluding the automatic application of the exclusion clause due to a criminal conviction or revocation clause due to person concerned was a member of an organisation listed by Common Position 2001/931 as involved in terrorist activities.</p> <p>The individual assessment should include the following elements (paras 97-98):</p> <ul style="list-style-type: none"> • true role played by the person concerned in the perpetration of the acts in question; • his position within the organisation; • the extent of the knowledge he had, or was deemed to have, of its activities; • any pressure to which he was exposed; or • other factors likely to have influenced his conduct. <p><i>H.T.</i> – support for a terrorist organisation included on the list annexed to Council Common Position 2001/931/CFSP of 27</p>
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				<p>December 2001 on the application of specific measures to combat terrorism, in the version in force at the material date, may constitute one of the ‘compelling reasons of national security or public order’ within the meaning of Article 24(1) of Directive 2004/83, even if the conditions set out in Article 21(2) of that directive are not met. Mandatory application of the individual assessment as laid down in B and D</p> <p><i>Lounani</i> - The Court held, firstly, that it is not a prerequisite for the ground for exclusion of refugee status that the applicant has been convicted of one of the terrorist offences referred to in Article 1(1) of Framework Decision 2002/475 due to the lack of reference made by the Qualification Directive. Secondly, participation in the activities of a terrorist group does not require that the person concerned committed, attempted to commit or threatened to commit a terrorist act. The CJEU held that despite the fact that there is no direct link between Mr. Lounani’s activities and specific acts of terrorism, he could fall under the scope of exclusion clause (he provided logistical support to a terrorist group</p>
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				by the provision of, inter alia, material resources or information; forgery of passports and fraudulent transfer of passports; active participation in the organisation of a network for sending volunteers to Iraq)
Article 19(2) – principle of non-refoulement (Article 19(1) collective expulsion which, so far, has been an issue assessed only the ECtHR: Hirsi, Sharifi, Khlaifia versus Italy, as well as Conka v Belgium)	1. Process of renewal of subsidiary protection was incompatible with the prohibition of torture as provided for in Article 18 of the Constitution of the Republic of Slovenia, and Art 19(2) - principle of non-refoulement	1. Constitutional Court of Slovenia, 2015, 82/2015 US30770, <i>casesheet 12</i>	Slovenia	<p>Role of the Charter: the constitutional right of prohibition of ill treatments was interpreted in light of Article 19(2) CFR. The principle of non-refoulement enshrined in Article 19 CFR is also applicable to situations of cessation of subsidiary protection, since the situation is governed by the Revised Qualification Directive and Article 45 of the Asylum Procedure Directive, which requires the competent authority to obtain information as to the general situation prevailing in the countries of origin of the persons concerned.</p> <p>Role of Judicial Dialogue: consistent interpretation and disapplication for the purpose of ensuring that the national procedural rules are in line with the Charter and EU secondary provisions regarding renewal of subsidiary protection, and protection against expulsion risking subjecting the applicant to ill treatments.</p>

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	2. Prohibition of expulsion of a third country national on the basis of Art. 19(2), suffering from serious illness, not qualifying for subsidiary protection or refugee status	2. Abdida (C-562/13) <i>casesheet 13</i>	Belgium (Labour Tribunal of Brussels)	<p>Outcome: the national provisions limiting the evidence and reasons that a person can bring in support of his claim for renewal of subsidiary protection were declared unconstitutional.</p> <p>Additional relevant cases: ECtHR decisions: <i>Chahal v. The United Kingdom</i>, 15 November 1996; <i>HLR v France</i>, 29. April 1997; <i>Mamatkulov and Askarov v. Turkey</i>, 4 February 2005; <i>Salah Sheekh v The Netherlands</i>, 11. January 2007; <i>Saadi v. Italy</i> 28. February 2008; <i>Sufi and Elmi v. The United Kingdom</i> 28. June 2011.</p> <p>Role of the Charter: Art. 19(2) EU Charter has an absolute nature, and there can be no limitation. Therefore even if an individual does not qualify for subsidiary protection, he cannot be expelled if there is a risk that he will be subject to the torture or other ill treatments. Article 47 EU Charter requires in conjunction with Article 19(2) that an automatic suspensive effect of the appeal against a return decision is recognised if there is a risk of violation of Art. 19(2) EU Charter.</p> <p>Role of Judicial Dialogue: After rejection of</p>
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	<p>3. Principle of non-refoulement is absolute and it cannot be limited, not even in cases of expulsion on the basis of crimes committed within a Member State or risks against the</p>	<p>3. Court of Cassation of Italy (Corte di Cassazione) 49242/2017, casesheet, No.14</p>	<p>Italy</p>	<p>the Council of Aliens to recognise such a suspensive effect of the appeal, the Labour Tribunal decided to address a preliminary reference to the CJEU to clarify the access to social benefits and the impact of Article 19(2) and 47 EU charter in the case of an individual whose application for subsidiary protection was rejected and he was subject to a return decision.</p> <p>Outcome: Mr Abdida was not removed on the basis of Article 19(2) EU Charter, and a suspensive effect of the appeal was recognised pending the assessment of main claim.</p> <p>Additional case law: see the subsequent preliminary ruling in Tall.</p> <p>Role of the Charter: Article 19(2) EU Charter confers rights which are absolute, and cannot be limited, even if the third country national was considered as posing a risk to national security, or has committed a crime in Italy (in casu, drug related crime, sanctioned with prison sentence). Article 19(2) Eu Charter is hierarchically superior to national legal provisions. Therefore the later have to be interpreted in conformity with Article 19(2)</p>
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	national security			<p>EU charter</p> <p>Role of the Judicial Dialogue: Use the conform interpretation and disapplication technique is mandatory for the criminal law judge on the basis of the principle of supremacy of Article 19(2) EU Charter vis-à-vis the national legal provisions.</p> <p>Outcome: In this particular case, the Court of Cassation concluded that Article 19(2) Eu Charter requires an obligation on the part of the national judges to disapply Art. 20 of the Legislative decree 251/2007 in favour of the direct application of the principle of non-refoulement. The Court of Cassation establishes the duty of the criminal law judge to examine both the application for revocation of expulsion and for the recognition of subsidiary protection and the necessity of interpreting the national legislation on expulsion of the subsidiary protection seeker in compliance with Article 3 ECHR and Article 19(2) Charter</p> <p>Additional case law: <i>Saadi vs. Italy</i>; <i>Tuomi vs. Italy</i>.</p>
Article 24 – best interests of	1. Legal nature and effects of Art.	1. ZAT and other (making use of	UK (Upper Tribunal)	Role of the Charter: the best interests of the children are seen as part of the right to family

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children	<p>24(2) in Dublin transfers; Whether an individual has an immediate right for leave to enter the United Kingdom based on Article 8 ECHR or whether a prior application for transfer would have to be made in the Member State in which he/she was present in accordance with the Dublin Regulation</p>	<p>the MA preliminary ruling (C-648/11) <u>casesheet 15</u></p>		<p>life; the MA and others preliminary ruling is also cited, where the CJEU add new requirements – to not transfer unaccompanied children in a Member State where there is no family – on account of Article 24(2) CFR</p> <p>Role of Judicial Dialogue: clarification of the principle of proportionality under Article 8 ECHR and use of consistent interpretation to establish how Dublin rules should be interpreted in order to ensure the best interests of children</p> <p>Outcome: best interests of children and their right to family life to override the formal Dublin procedure for the purpose of family reunification; the unaccompanied minors were not transfer in the Member State of first entry</p> <p>Additional relevant cases: <u>MA and others</u> (C-648/11).</p>
	<p>2. Refusal to detain family with newly born children</p>	<p>2. Tallinn Circuit Court, 2015 (<u>in the database</u>)</p>	Estonia	<p>Role of the Charter: Article 24 of the Charter was used as a standard for assessing the legality of detention of under-aged and newly born children whose parents have applied for asylum in Estonia</p> <p>Role of Judicial Dialogue: Consistent interpretation</p>

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				Outcome: the measure to be a disproportionate interference with their human rights – right to liberty, rights of the child.
Article 41- right to good administration	1. The right to be heard in asylum and subsidiary protection proceedings; the duty of	1. M.M. (the two preliminary references: C-277/11 and C-560/14) <i>casesheet 16</i>	Ireland (first preliminary reference sent by the High Court); second preliminary reference sent by the Supreme Court	<p>Role of the Charter: the right to be heard as part of the EU law principle of rights of defence.</p> <p>The Court of Justice found that the right to be heard did not imply a right to call and cross-examine witnesses, such a right does not normally constitutes part of the right of the defence in the context of administrative procedures.</p> <p>Role of Judicial Dialogue: the first preliminary reference was sent following the High Court doubt regarding the compatibility of Irish law with EU secondary legislation, in light of a Dutch Council of State Decision that appeared to contradict the Irish High Court previous jurisprudence; the reference for a preliminary ruling was based on the need to ensure coherent application of the CEAS</p> <p>Outcome: <u>As part of the CEAS, the granting of subsidiary protection must comply with general principles and the CFR.</u> In the case of a dual system then the right to be heard must</p>

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				<p>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.</p> <p>The High Court applied the findings of the Court of Justice and quashed the decision of the Minister to refuse subsidiary protection.</p> <p>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.</p> <p>The case was appealed to the Irish Supreme Court by the government and cross-appealed by <i>M. M</i> in particular argued that the right to be heard as recognised by the Court of Justice implied a right to an oral hearing and a right to call and cross-examine witnesses.</p> <p>the Court of Justice, noted 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</p>
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				<p>protection.</p> <p>However, the <u>Court 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.</u></p> <p>Ireland unified the dual procedure at the end of December 2016.</p> <p>Role of the Charter: right to be heard as part of the general principles of right of defence: “guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely.”</p> <p>Role of Judicial Dialogue: preliminary references sent by first instance courts with the purpose of clarifying the legal status and</p>
	<p>2. The right to be heard in return proceedings</p>	<p>2. <i>Boudjlida (C-249/13)</i> and Halifa, <i>casesheet 17</i></p>	<p>France (Administrative Court of Pau and Council of State)</p>	

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				<p>content of the right to be heard in cases of combined procedures (return decision adopted together with the refusal of residence permit or rejection of asylum application)</p> <p>Outcome: 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. 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.</p> <p>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</p>
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	3. Effects of violations of the right to be heard in return proceedings (detention)	3. G. and R. in REDIAL database	Netherlands (Council of State)	<p>that the protection and defence of the person concerned against a decision that adversely affects him, is ensured.</p> <p>Outcome: “Where the extension of a detention measure has been decided in an administrative procedure in breach of the right to be heard, the national court responsible for assessing the lawfulness of that extension decision may order the lifting of the detention measure only if it considers, in the light of all of the factual and legal circumstances of each case, that the infringement at issue actually deprived the party relying thereon of the possibility of arguing his defence better, to the extent that the outcome of that administrative procedure could have been different.”</p>
Article 47 – right to effective legal remedy	1. Suspensive effects of appeal in asylum and return proceedings	1. Tall (C-562/13) casesheet 19	Belgium (Labour courts)	<p>Role of the Charter: Article 47 CFR is recognised a reinforced status when Article 19(2) CFR circumstances are applicable, requiring a suspensive effect of appeal. The ECtHR clarified in similar cases against Belgium, that the suspensive effect should be automatic when risk of Articles 3 ECHR are at issue.</p>

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				<p>Role of Judicial Dialogue: The jurisprudence discussed under the issue of suspensive effect of appeals in asylum and return proceedings (<i>Abdida, Tall</i>) has revealed a fruitful judicial dialogue between the Belgian Labour courts and the CJEU which ultimately impacted not only on the jurisprudence of these courts, but also on the (quite more reluctant) Council of Aliens Law Litigation. Following a uniform interpretation of Article 47 CFR requirements, even the Belgian Constitutional Court saw itself forced to recognise this amended judicial practice and required the legislator to intervene and codify it in legislative provisions. Finally, the repeated preliminary references sent by the Belgian Labour courts constrained the CJEU to consider adapting its previous <i>Diouf</i> practice: Although the <i>Tall</i> judgment reinstates the standards set in <i>Diouf</i> for the right to an effective remedy in accelerated asylum procedure, it represents a step forward for fundamental rights of migrants as Article 47 CFR is recognised a reinforced status when Article 19(2) CFR circumstances are applicable.</p> <p>Outcome: Regardless of the type and number</p>
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				<p>of asylum applications submitted, the follow-up return proceedings need to offer an appeal with <u>suspensory effect</u>, “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</p> <p>Following the CJEU ruling in <i>Abdida</i>, the Belgian CALL recognised that an automatic suspensive effect should be available to appeals against orders 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.</p> <p>Whilst the Constitutional Court 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 automatic suspensive effect is recognised to the request for suspension,</p>
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	2. Use of secret information and urgent procedure when national security is at stake in asylum and return cases - Limitation of the right to a fair trial and effective remedy in asylum and removal proceedings	2. Court of first instance of The Hague, branch Zwolle (application of ZZ) <i>case note 18</i>	Netherlands	<p>which need to be introduced within the 10 days of the notification of the order to leave the territory</p> <p>Additional relevant case law: ECtHR, <i>Sow v. Belgium</i>, App. 27081/13, 19 January 2016, para. 47. See also <i>Jabary v. Turkey</i>, App. 40035/98, 11 July 2000, para. 50. ECtHR, <i>M.D. and M.A. v. Belgium</i>, App. 58689/12, 19 January 2016</p> <p>Role of the Charter: The requirements of Article 47 CFR in cases of administrative decisions impacting on third country nationals' rights where national security is at issue, require disclosure of the essence of evidence to the defendant (the CJEU in the ZZ case). These requirements were taken as standard for the validity check of the administrative practice from a Member State other than the referring one.</p> <p>Role of Judicial Dialogue: Consistent interpretation and application of the ZZ preliminary ruling of the CJEU.</p> <p>Outcome: The court ruled that the national procedure, consisting of two judgments – one</p>
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	3. The recognition of a suspensive effect of appeal against an expulsion order within the framework of interim proceedings in order to ensure the complainant efficiently takes part in court	3. Supreme Court of Estonia, <i>casesheet 20</i>	Estonia	<p>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 by concrete facts, so that it was clear to him why the Dutch authorities considered him to be a danger to national security</p> <p>Additional relevant cases: CJEU, ZZ, C-300/11, 4 June 2013, EU:C:2013:363.</p> <p>Role of the Charter : Not cited directly, but indirectly through Articles 8 and 13 ECHR. Equivalent protection under Articles 7 and 47 CFR (Article 52(3) CFR)</p> <p>Role of Judicial Dialogue : Direct application of the ECtHR and of the standards developed under Art. 8 ECHR</p> <p>Outcome : 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</p>
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	proceedings, and protection of family life.			ECHR). Additional relevant cases : 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
Article 51 – scope of application	1. Application of the Charter to measures adopted by the EU countries when acting within the margin of discretion permitted by the CEAS	2. N.S. and other UK Court of Appeal	UK	Outcome: the EU Charter is applicable when the EU countries are acting within the margin of discretionary power recognised to them by CEAS.
Article 52(2) – principle of proportionality	Dublin II Regulation – modality to enforce a Dublin transfer – voluntary departure or forced deportation Art. 7 Dublin II provided for three alternative means of transfer. The applicant argued that preference should be given to voluntary departure on account of Article 52 and 6	Supreme Administrative Court	Germany	Role of the Charter: The Supreme Administrative Court regards the principle of proportionality under Art. 52 (1)(2) EU Charter as guiding the interpretation of the German provision on Dublin transfers. Role of Judicial Dialogue: consistent interpretation and horizontal reasoning were used in order to decide whether the three alternative measure to enforce a Dublin transfer should be interpreted as being applied starting first from the least restrictive and going to the most restrictive to liberty. In

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	CFR			<p>order to understand whether Article 7 establishes a gradation of measure similar to the Return Directive, the Supreme Court looked at the jurisprudence of the supreme courts of France and Switzerland, in addition it addressed a question on the interpretation of this article to the supreme courts of the various EU countries.</p> <p>Outcome: The Supreme Court decided to follow the interpretation which seems to be that shared by the majority of national courts: officially organised transfer are preferred over those without administrative compulsion, with exceptions possibly when the applicant is transferred based on family members present in the Member State of transfer.</p>
Protocols	See Annex I			