Speakers' contributions

APPLYING THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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URÍA MENÉNDEZ

Daniel Sarmiento
Uría Menéndez / Universidad Complutense de Madrid

Barcelona, 6 November 2017

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Fundamental Rights in the EU, a brief history

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The pre-charter union and other sources of fundamental rights

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Making the charter

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4 The charter in action

The charter in action

- SCOPE OF APPLICATION (art. 51.1)

  "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union la". They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties".

Making the charter

The addresses:

- Institutions, bodies, offices and agencies
  i. Pringle and Ledra Advertising
  ii. Liivimaa Lihaveis
  iii. Schrems, Digital Rights Irleand
- Member States
  i. Akerberg Fransson
  ii. Delvigne
  iii. Marcos Torralbo

The charter in action

- LEVEL OF PROTECTION

  "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

The charter in action

- Situation determined by EU law
  - Charter trumps national law
- Situation not determined by EU law
  - National court chooses applicable law
  - Except:
    - Charter more protective than EU Law
    - National law does not compromise “the primacy, unity and effectiveness of EU law”

The charter in action

- RIGHTS AND PRINCIPLES

  Art. 51.1:

  “The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties”.

The charter in action

Art. 53.5:

"The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality".

The charter in action

- The distinction and direct effect
  - A relevant precedent: Mangold and Kükücdeveci
  - Directives that "concretize" general principles of law and Directives that "concretize" Charter rights
    - Association de Médiation Sociale
    - Glatzel
    - Grupo Norte (pending)

5 Conclusion

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Family Life and Freedom of Movement and Residence

Focus on the rights of the child and on LGBT Rights

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

FRA and its mandate

- European Union Agency established in Vienna on the basis of Council Regulation (EC) 168/2007 of 15/02/2007
- to provide assistance and expertise on fundamental rights issues to the EU Institutions and Member States (EUMS), when they implement EU law
- to collect, record, analyse and disseminate relevant, objective, reliable and comparable information and data on fundamental rights issues in the EU

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FRA publications

The child as a subject of rights

- All EUMS have ratified the UNCRC – Handbook focus on what European law and jurisprudence adds
- The child specific legal personality entitled to specific rights
- The role of parents and guardians
- The best interests principle in all actions – UNCRC Art. 3
- EU Charter of Fundamental Rights, scope - Art. 24/ECHR
- Derived legislation/indirect: Directive 2004/38/EC Art. 2 autonomous right + family member: ‘direct descendant’

The right of the child to protection and care

- Art. 24 EU Charter - as necessary for their well-being
- Titles I, II, III EU Charter and rights deriving from ECHR - ESC
- Art. 24 EU Charter – Child Best Interests - in all actions relating to children, whether taken by public authorities or private institutions, must be a primary consideration.
- State duties – state control/violence by private actors
- Arts. 2 and 3 ECHR: effective protection against ill-treatment (*ECtHR Kontrova v. Slovakia*) ‘authorities know/ought to know of a real & immediate risk to life of identified individual’

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Right to respect for family life

- Art. 7 of the EU Charter and Art. 8 ECHR
- Article 8.2 ECHR limitations
- EU competence relating to cross-border disputes
- Child's right to be cared for by the child's parents
- Right to maintain contact with both parents
- Right not to be separated from parents except where in the child best interests
- Improper removal across borders
- Right to family unity/reunification
- Best Interests obligation - Art. 24.2 Charter/ECtHR

Right to be cared for by the child's parents

- Right of the child to maintain contact with both parents in all forms of parental separation
- The ECtHR requires a child rights-based approach to improper removals in breach of custody arrangements
- EU law requires the child to be heard in proceedings re. his/her return following wrongful retention/removal (*J. A. Aguirre Zarraga v. S. Pelz CJEU C-491/10 PPU, 2010*)
- For alternative care: relevant and sufficient reasons, procedural safeguards in decision-making (adoption)

Freedom of Movement and Residence

- Directive 2004/38/EC Art. 1 autonomous right + family mbrs.:
- Art. 2 ‘Family Member’ includes ‘direct descendants’:
  - -under the age of 21
  - -dependants
  - -those of the spouse or partner
- No precise definition of ‘descendant’ (biological child, but also child for whom the EU citizen has the legal guardianship or custody, adopted child …)

Entry and residence

- EU citizen entitled to be joined by the child when a legally recognised parental relationship exists
- Possible difficulties where the child only has a legally recognised parental relationship to the citizen's partner – where registered partners are not covered or where the partners are unmarried and unregistered, the partner's children need to seek admission: EUMS 'to undertake an extensive examination of the personal circumstances and justify any denial of entry or residence' **Art. 3.2**
- Duty to facilitate entry to 'any other family members' … who in the country from which they have come, are dependants or members of the EU citizen's household

Right to citizenship/residence

- The CJEU ruled on the effectiveness of the right of residence of children who have EU citizenship but not the nationality of the EUMS of residence
- *Zhu and Chen v. Secretary of State for the Home Department (CJEU C-200/02, 2014)*
- Refusal of residence rights to a parent who is primary caregiver – deprives the child's right of residence of any useful effect – hence parent right to reside with the child in host state

Right to remain/reside

- Directive 2004/38/EC Art.12.1 TCN child semi-autonomous right as family member, following the death/departure of EU citizen parent
- For TCN, in case of parent's death prior residence as family member of at least one year required
- Irrespective of nationality + for custodial parent: while enrolled in educational establishment until completion of studies (Art.12.3)
- TCN prior to permanent residence acquired subject to being a worker/self-employed or sufficient resources + comprehensive insurance cover or study + comprehensive insurance

Right to remain/reside Limitations

- *G. Ruiz Zambrano v. Office National de l'Emploi* (*CJEU C-34/09, 2011)* child status as EU citizen under Art. 20 TFEU to grant the child's TCN parents a permit to work and reside in the EUMS of the child's citizenship – enabling to enjoy the rights attached to EU citizen status in so far as the child would otherwise have to leave the EU to accompany the parents
- *Murat Dereci and Others v. Bundesministerium für Inneres (CJEU C-256/11, 2011) Yoshikazu Iida v. Stadt Ulm (CJEU C-40/11, 2012)* – EU citizen's perception of desirability that TCN family members reside with him to keep the family together in the EU insufficient to support that the EU citizen will be forced to leave if the right of residence not granted

Right to remain/reside while in education Limitations

- Directive 2004/38/EC Art.12.3 departure or death of an EU citizen parent does not entail loss of right of residence of the child and custodial parent irrespective of nationality if the child resides in the host state and is enrolled in an educational establishment for the purpose of studying, until the completion of the studies
- *Baumbast and R v. SoSHD (CJEU C-413/99, 2002)* – children in families with sufficient resources to support themselves
- *Maria Teixeira v. London Borough of Lambeth + SoSHD (CJEU C-310/08, 2010), London Borough of Harrow v. Hassam Ibrahim + SoSHD (CJEU [GC] C-310/08, 2010)* – extends to children dependent on social welfare support

Right to remain/reside parental separation

- Directive 2004/38/EC Art.13.2 TCN child semi-autonomous right as family member following divorce, marriage annulment or termination of registered partnership of EU citizen parent if:
- 3 years,1 in EUMS, prior to initiation of divorce/annulment/ termination or
- TCN has custody of the children of the EU citizen or
- warranted by difficult circumstances-victim domestic violence or
- TCN right of access to minor child, court ruling: in host EUMS
- Prior to permanent residence equivalent to death/departure

Expulsion

- Directive 2004/38/EC Art. 28, 3, b: decision of expulsion of EU citizen child only allowed if based on imperative grounds of public security unless it is necessary for the best interests of the child - as provided by the UNCRC (also Recital 24)
- Return Directive 2008/115/EC Art. 10.1 the Best Interests of the Child to be duly considered and assistance by appropriate bodies other than the authorities enforcing the return granted, before deciding to issue a return decision.
- Art. 10.2 - prior to removal of the child, the EUMS to be satisfied that the child will be returned to a family member, a nominated guardian or adequate reception facilities in the state of return

Dublin Regulation (EU 604/2013) Procedures

- The best interests of the child a primary consideration to determine 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 (Art.6)
- Checklist to assist authorities best interests determination: family reunification possibilities, child's well-being and social development, safety and security (risk of THB victim), child's views in accordance with age and maturity

Dublin Regulation (EU 604/2013) Procedures

- *The Queen, on the application of MA and Others v. SoSHD (CJEU C-648/11).* Case of an unaccompanied child who had submitted asylum applications in different EUMS and who had no family or relatives in other EUMS
- In the absence of a family member legally present in an EUMS: the EUMS where the child is physically present is responsible for examining the asylum claim by reference to Charter Art.24.2
- *Tarakhel v. Switzerland (ECtHR [GC] 29217/12, 2014)*
- FRA Opinion on the impact on children of the proposal for a revised Dublin Regulation

Family Life – Marriages/Partnerships

- Art. 7 EU Charter and Art. 8 ECHR - respect for private and family life
- Art. 9 - right to marry and right to found a family
- Art. 10 - right to freedom of thought, conscience and religion
- Art. 8 - protection of personal data
- Art. 20 - equality before the law
- Art. 21 - prohibition discrimination, including on the ground of sex and sexual orientation
- *ECtHR Hämälainen v. Finland (37359/09, 2014) - Oliari and Others v. Italy (18766/11 + 36030/11, 2016)* preceded by *Vallianatos and Others v. Greece (29381/09 + 32684/09, 2013)*

Spouses

- Spouse = family member under Directive 2004/38/EC Art. 2.2 *(B. B. Metok and others v. Minister for Justice… CJEU C-127/08, 2008)* irrespective when/where marriage took place and how entry EUMS*)*
- Marriage a status granted by national law – in some EUMS this includes same-sex spouses, not in others
- Evolution of the CJEU jurisprudence as to what is the 'definition generally accepted' by EUMS (from eg. *D. and Sweden v. Council, CJEU C-122/99 P and C-125/99 P, 2001*: 'a union between two persons of the opposite sex') - ECtHR jurisprudence
- Some EUMS do not distinguish between same-sex and different-sex spouses for the purpose of entry and residence

Same Sex Spouses

- Some EUMS lack national laws recognising the status of same sex spouses moving in –families compelled to apply to the Courts of the host EUMS to promote non-discriminatory respect for their family life – resulting in different outcomes (IT, CY)
- *ECtHR Schalk and Kopf v. Austria (30141/04, 2010) and X and Others v. Austria (19010/07, 2013) a relationship of a cohabiting same-sex couple in a stable de facto partnership falls within the notion of 'family life' just as such a relationship between a different sex couple would*
- Some EUMS a same-sex marriage entered into abroad = registered partnership

Registered Partners

- Family member under Directive 2004/38/EC Article 2.2.b: the partner with whom the EU citizen has contracted a registered partnership, on the basis of the legislation of an EUMS:
  - -if the legislation of the host EUMS treats registered partnerships as equivalent to marriage
  - -in accordance with the conditions laid down in national legislation
- Required: a) registered partnership formed in an EUMS + b) the EUMS partners move to treats registered partnerships 'as equivalent to marriage' - EUMS different institutions + commonalities with marriage– 'equivalence' difficult to establish – key role of the courts

Registered Same-sex Partners

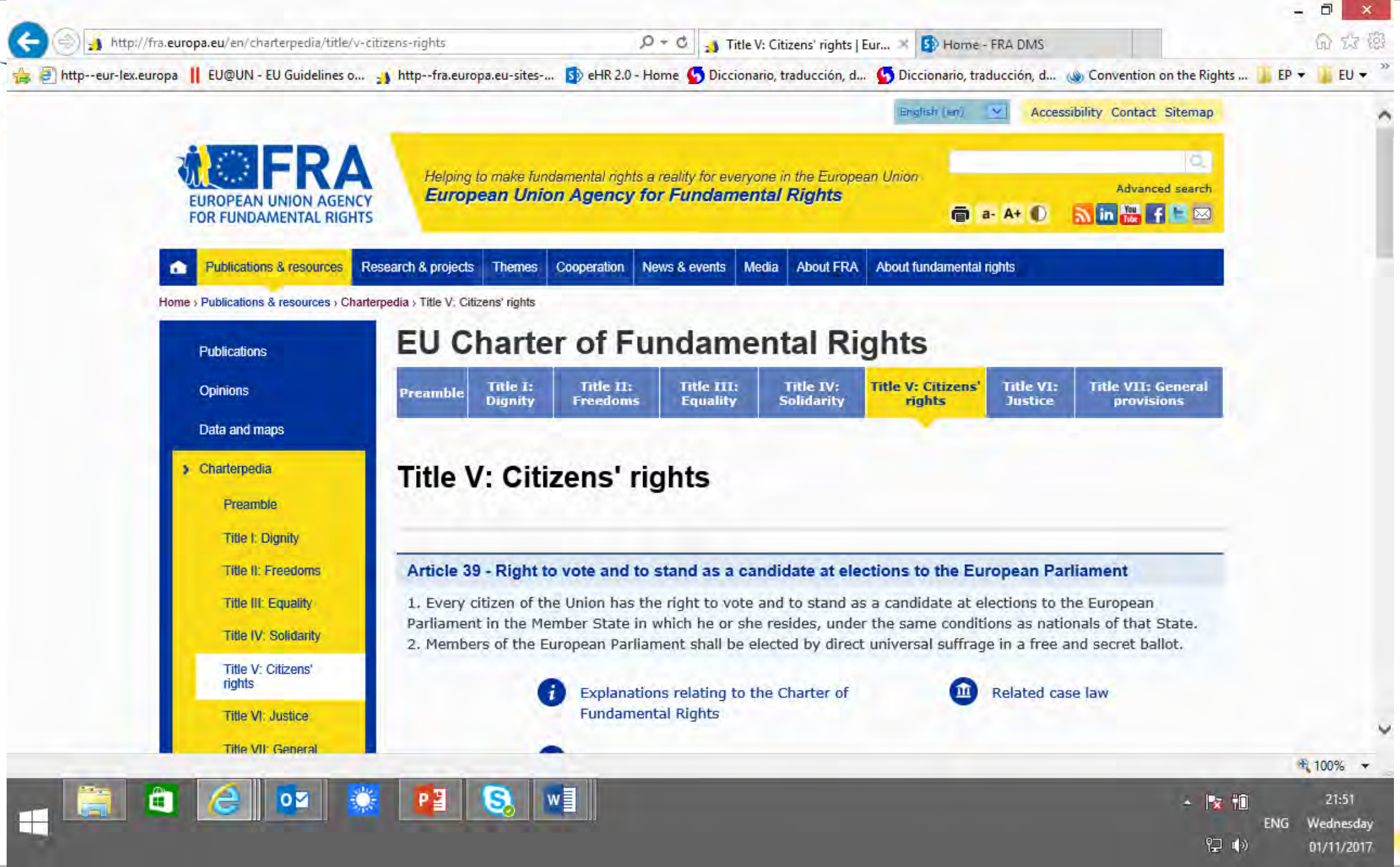
- Requirement of equivalence to marriage presumably applies to host EUMS in which same-sex couples may marry
- As of 2014, 19 EUMS granted entry and residence rights to registered partners - some recognise same sex registered partnerships aboard for the purpose of entry and residence even if they do not recognise same sex registered partnerships domestically: this only applies to same-sex couples if at least one partner is an EU citizen and to their family (not to TCNs)

‘De facto’ Partners

- Eg. in Spain ‘de facto’ unions may register or not – Constitutional Tribunal 155/1998 – marriage and partnership outside marriage are not equivalent situations
- A couple neither married, nor registered, moving to any EUMS
- Registered partners who move to another EUMS which do not have registered partnership provisions
- Legally recognised in the EUMS of origin - does not confer sufficient rights to be considered a ‘registered partnership’ in the host state

‘De facto’ Partners (also same-sex)

- Directive 2004/38/EC Article 3.2 requires EUMS to facilitate the entry and residence of ‘family members who in the country of origin are members of the household’ and ‘the partner with whom the EU citizen has a durable relationship, duly attested’
- No clear guidelines in EUMS on how the existence of a common household or a durable relationship may be proven
- Uncertainty may be explained by the need to refrain from artificially restricting the means of proof – risk that criteria be applied arbitrarily (possibly leading to discrimination of same-sex partners who have been cohabiting or in lasting relationships)
- Similarly vague is the ‘duty to facilitate’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Preamble
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Title VII: General provisions
Title V: Citizens' rights
Article 39 - Right to vote and to stand as a candidate at elections to the European Parliament
1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.
Explanations relating to the Charter of Fundamental Rights
Related case law
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Artículo 6 - Derecho a la libertad y a la seguridad
Toda persona tiene derecho a la libertad y a la seguridad.
Explicaciones sobre la carta de los derechos fundamentales
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Artículo 7 - Respeto de la vida privada y familiar
Toda persona tiene derecho al respeto de su vida privada y familiar, de su domicilio y de sus comunicaciones.
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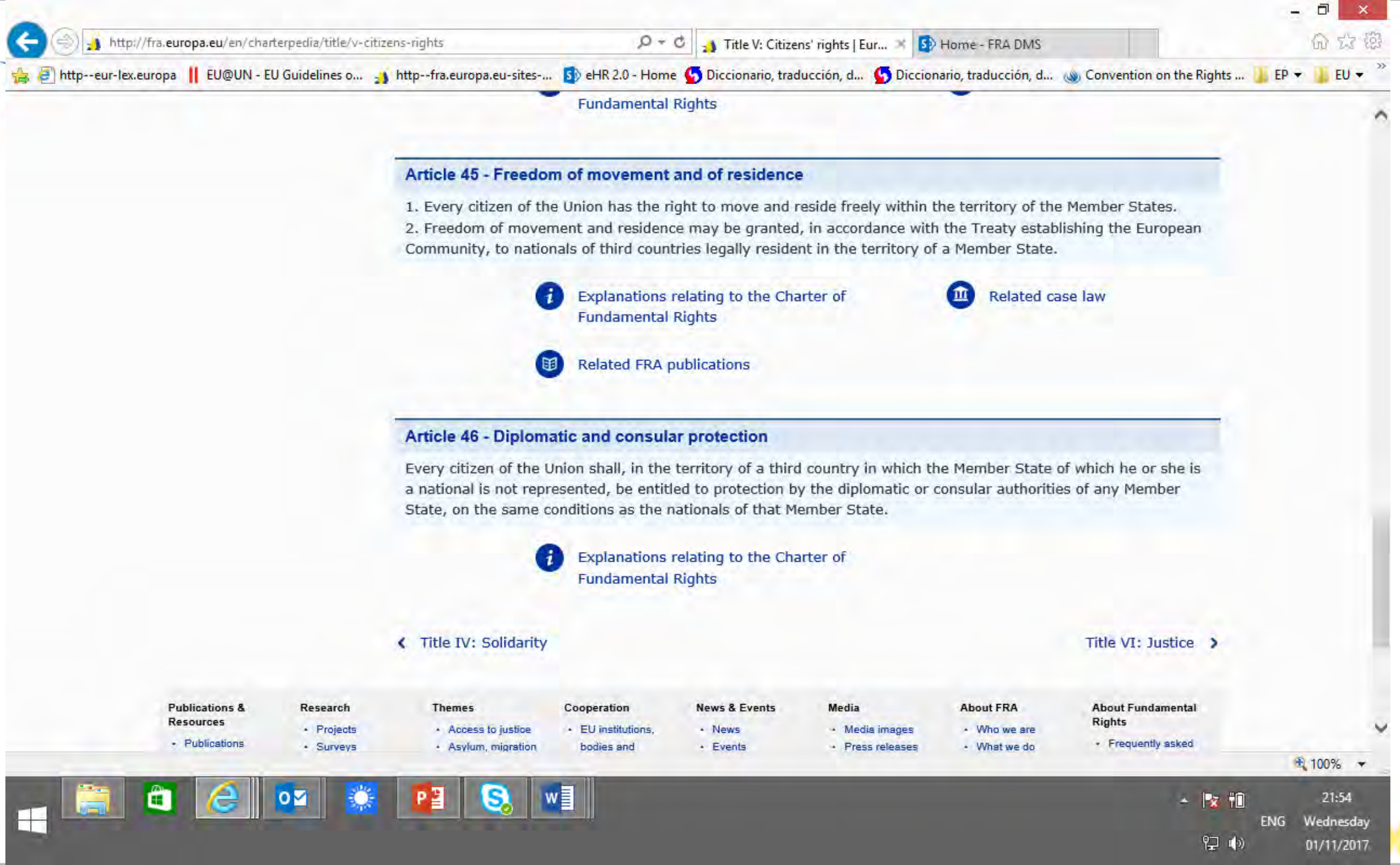
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Article 45 - Freedom of movement and of residence
1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.
Explanations relating to the Charter of Fundamental Rights
Related case law
Related FRA publications
Article 46 - Diplomatic and consular protection
Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.
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The Charter and the ECHR: complementing or competing systems?

Prof. Rick Lawson

ERA – Barcelona, 6 November 2017

Universiteit Leiden
The Netherlands

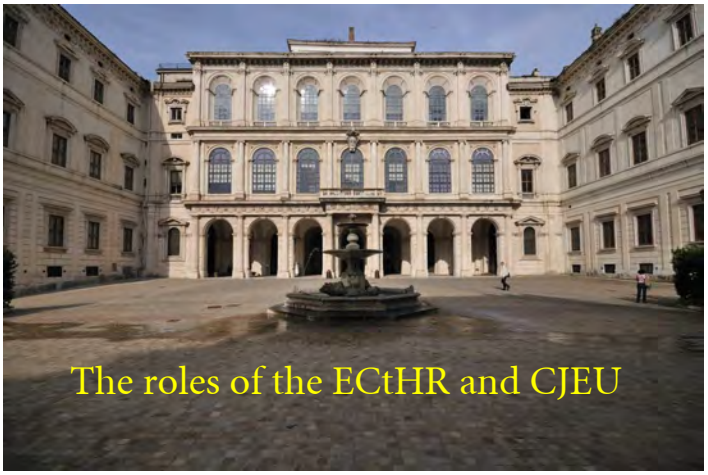
Two European guardians…

Two European guardians…

European Union	Council of Europe
Brussels, Luxembourg Strasbourg	Strasbourg
28 Member States	47 Member States
economic integration (gradually Area FSJ)	human rights, democracy, rule of law
treaties, regulations, directives, decisions…	European Convention on Human Rights
Court of Justice of EU	Eur. Court HR

Topics for discussion

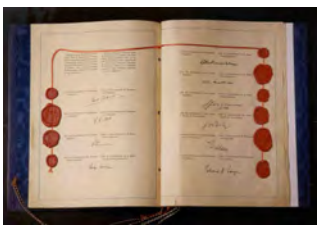
- The roles of the ECtHR and CJEU
- Principle of equivalent protection
- EU accession to the ECHR



ECHR

- Rome, 4 November 1950
- Council of Europe
- 13 → 47 European States

bill of rights
+ supervision



ECHR – bill of rights

Article 2 – Right to life
Article 3 – Prohibition of torture
Article 4 – Prohibition of slavery, forced labour
Article 5 – Right to liberty and security
Article 6 – Right to a fair trial
Article 7 – No punishment without law
Article 8 – Right to respect for private & family life
Article 9 – Freedom of thought, conscience, and religion
Article 10 – Freedom of expression
Article 11 – Freedom of assembly
Article 12 – Right to marry
Article 13 – Right to an effective remedy
Article 14 – Prohibition of discrimination

ECHR

- Rome, 4 November 1950
- Council of Europe
- 13 → 47 European States

bill of rights
+ supervision

the ‘domestic heart’ of the ECHR: Articles 1 and 13

Article 1 – Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Article 13 — Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity

the ‘domestic heart’ of the ECHR: Articles 1 and 13

Article 1 – Obligation to respect human rights

Article 19 — Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights

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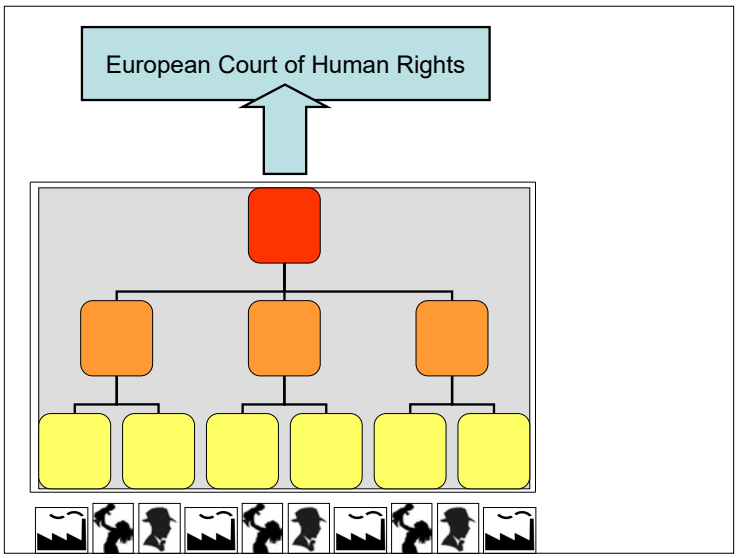
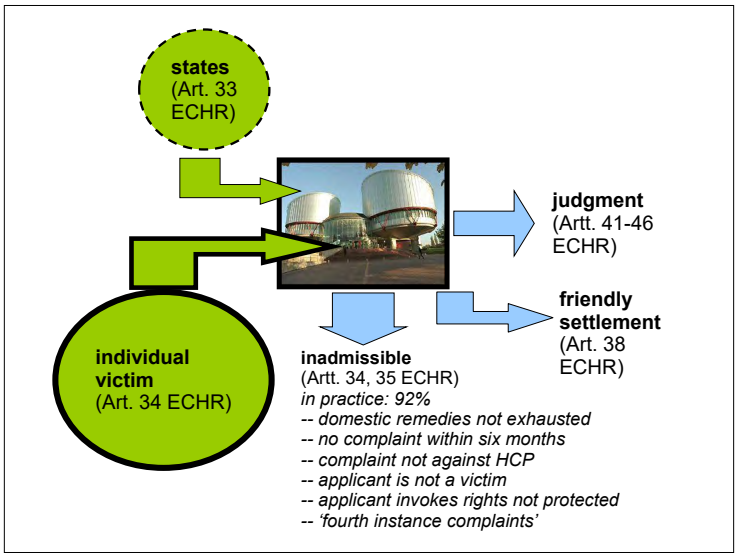




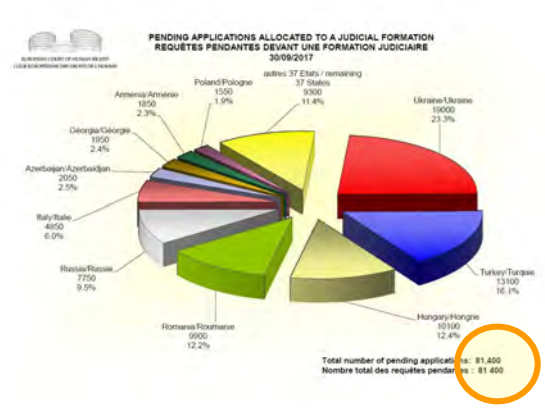
Judgments of the ECtHR

Article 46 — Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

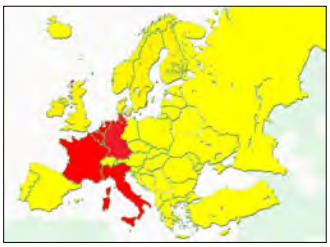
Individual complaints...

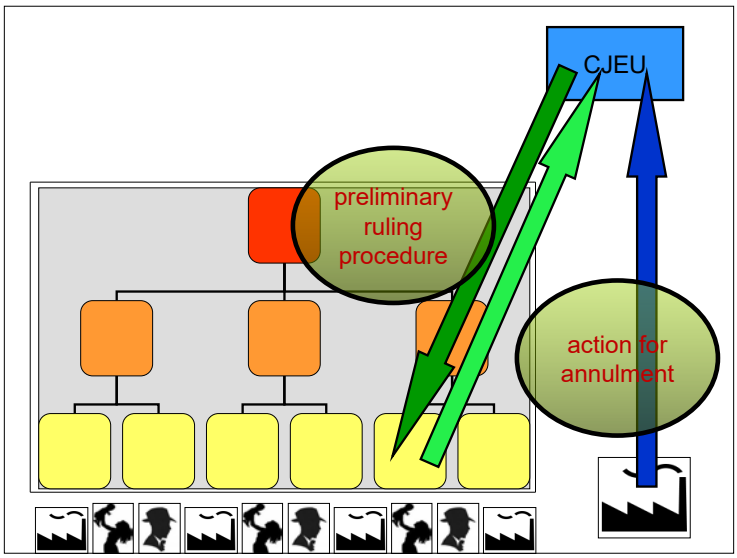


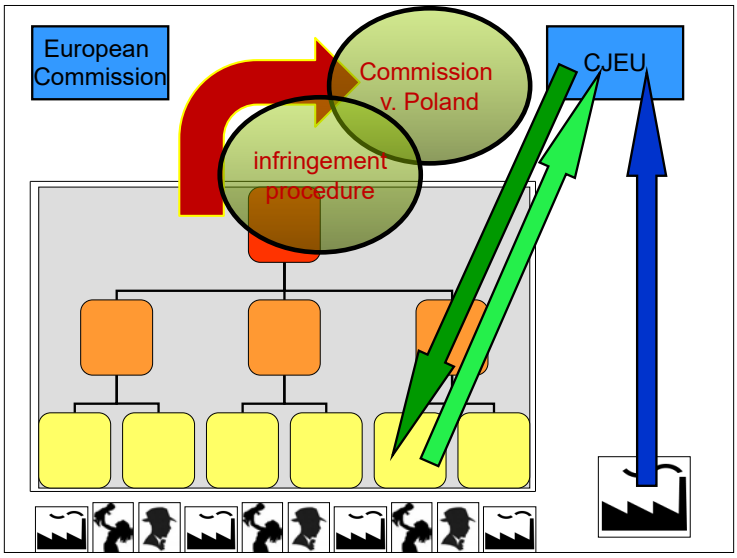
European Communities / Union

- Capitoline Hill, Rome, 25 March 1957
- 6 → 28 European States

market integration
+ transfer of powers
+ supervision
[no human rights]
[general principles]
[EU Charter FR]

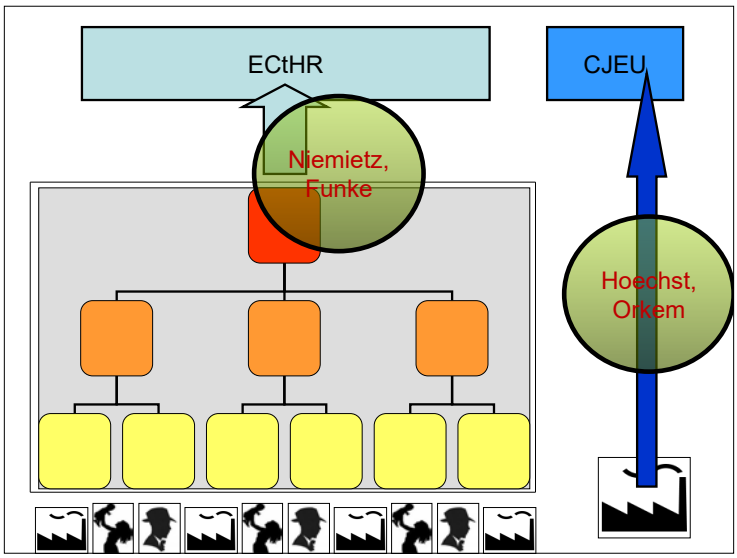


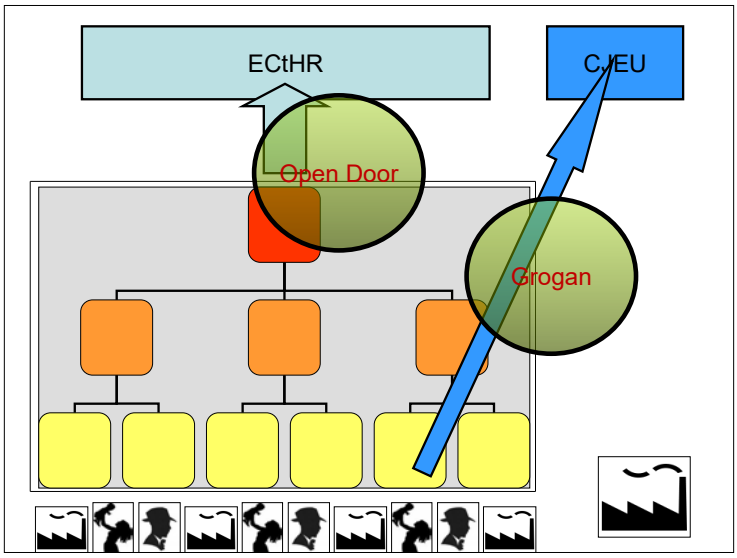




So two European Courts…

- substantive overlap
- so far no formal relationship
- consequences for domestic courts?



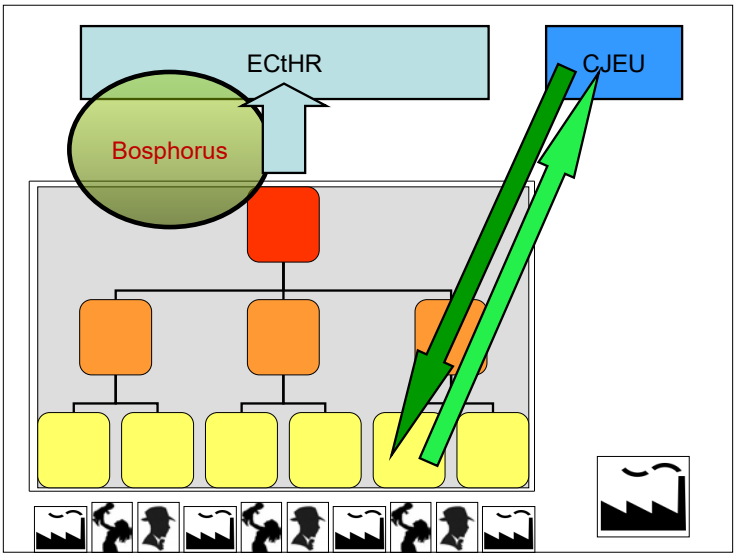


Some examples

1. the right to vote for prisoners
   - → ECtHR: *Hirst v. UK* (2005)
   - → ECJ: case C-650/13 *Delvigne* (2015)

2. Personal data protection
   - → ECtHR: *Rotaru v. Romania* (2000)
   - → ECJ: Case C-362/14 *Schrems* (2015)

3. Statute of limitations
   - → ECtHR: *Stubbings v. UK* (1996)
   - → ECJ: case C-105/14 *Taricco* (2015)



Bosphorus (2005)

facts

- → civil war in Yugoslavia
- → UN sanctions → EC measures → national implement.
- → Irish authorities seize aircraft leased by Bosphorus
- → measure challenged before Irish courts
- → Irish court: preliminary question to ECJ
- → ECJ: compliance with sanctions regime is necessary

claim before ECtHR

- → protection of property rights (Art.1 Prot. 1)
- → complaint addressed against Ireland

Bosphorus – II

Essence of Court ruling:

1. international integration is important
2. ECHR should not be undermined
3. compromise: 'equivalent protection test'
4. if eq. prot. → rebuttable presumption
5. EC legal order offers 'equivalent protection' (substance + procedures)
6. in this case no manifest errors
7. so Ireland could implement EC sanctions

Bosphorus – III

152. The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue co-operation in certain fields of activity (...). Moreover, even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party (...).

Bosphorus – IV

153. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention (...).

Bosphorus – V

155. ... State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least **equivalent** to that for which the Convention provides (...).

Bosphorus – VI

→ By "equivalent" the Court means "comparable": any requirement that the organisation's protection be "identical" could run counter to the interest of international co-operation pursued (...). However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights' protection.

Bosphorus – VII

156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.

Bosphorus – VII

156. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.

However, ar
if, in the circ
considered
rights was n

"no more than": a Member State continues to be fully responsible under the Convention "for all acts falling outside its strict international legal obligations" (para. 157) → discretion, 'gold-plating'

M.S.S. (2011)

ECtHR, *M.S.S. v. Belgium & Greece*, GC judgment of 21 January 2011 (Appl. 30696/09)

- Afghan national enters EU via Greece
- 2009: applies for asylum in Belgium
- returned to Greece ('Dublin system')

- claim: detention conditions *and* living conditions in Greece in breach of Article 3
- responsibility: Greece and Belgium

Arinyosi (2016)

CJEU, *Arinyosi & Caldararu*, GC judgment of 5 April 2016 (C-404/15 PPU and C-659/15 PPU)

- 2014: Hungarian court issues EAW for A.
- 2015: A. arrested in Germany
- A. claims detention conditions in Hungary in breach of Article 3 ECHR

Avotins (2016)

ECtHR, *Avotiņš v. Latvia*, GC judgment of 23 May 2016 (Appl. 17502/07)

- 2004: court in Cyprus orders A, in his absence, to repay debt
- 2006: enforcement in Latvia of Cypriot judgment
- A claims violation of Article 6 ECHR
- Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Brussels I Regulation")

So two European Courts… as Scylla and Charybdis

… or two European opportunities …

… so maybe a single legal order?

Treaty of Lisbon (entry into force 2009)

→ Article 6 para 2 TEU

> The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

→ 2010 negotiations; 2013 draft agreement

No.

CJEU, Opinion 2/13, 18 December 2014

→ draft accession agreement incompatible

→ "autonomy": 15 hits

→ EU accession to ECHR?!

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The right to good administration: legal source, nature, scope, effects and remedies

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The right to good administration: Article 41 Charter (Title V – EU Citizens' rights)

1. Every person 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.

2. The right to good administration includes:
- *the right of every person to be heard*, before any individual measure which would affect him or her adversely is taken;
- *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;
- *the obligation of the administration to give reasons* for its decisions.

3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Personal scope of the right to good administration (Art. 41 CFR)

1. **Applicable to Union institutions and bodies only or also to Member States' authorities?**
2. **Only EU citizens *or* all individuals?**

a. *Explanations to Art. 41 (mandatory interpretational role, Art. 52(7) CFR)* - does not refer to the Member States, but only to the EU administration HOWEVER

- Art. 41 codifies the **general principle of law (GPL) of good administration**, as previously developed in the CJEU jurisprudence.

b. *CJEU* clarifies:

- Art. 41 of the Charter is addressed only to the institutions, bodies, offices and agencies of the European Union (*CJEU in: Cicala C-482/10, para. 28; YS and Others, C-141/12 and C-372/12, para. 67; Mukarubega C-166/13, para. 44; Boudjlida* , C-249/13, paras. 32 and 33; *WebMindLicenses, C-419/14, para. 83; Doux. C-141/15, para. 60*).
- *H.N.* : the right to good administration enshrined in Art. 41 of the Charter "reflects a general principle of EU law" (C-604/12)
  - SCOPE OF APPLICATION OF Art. 41 and GPL is similar: '*where ... a Member State implements EU law, the requirements pertaining to the right to good administration are applicable*'; (see also in the absence of an EU act trigger the scope of EU law, Art. 41 CFR or the GPL do not apply (Cicala)

Right to good administration = Art. 41 CFR (EU) + GPL (MSs, all individuals falling under the scope of EU law (H.N. case))

Is the material scope of the GPL of good administration identical with Art. 41 CFR?

- Art. 41(2) CFR: *right to be heard*; *right to have access to the files*; *right to have the administrative decision motivated (stated reasons);*
- Art. 41(3)+(4) CFR: specific direct guarantees only for the EU administration;

Art. 41(2) guarantees applied at national level on the basis of GPL of rights of defence;

The ***scope of the GPL of good administration*** > Art. 41 CFR - subjective rights (e.g. broader duty to care/diligence);

1. The right to be heard

- **EU secondary legislation guarantees for right to be heard varies:**
  - Asylum: almost mandatory (Art. 14 Recast APD, with only 2 exceptions)
  - Additional guarantees of the duty of good administration can be found in Art. 4 Qualification Directive – assessment of facts and circumstances: *In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application for international protection. (duty to cooperate)*
  - Expulsion procedures (return/removal): no mention of the right to be heard (Art. 12 Return Directive)
- **Varied national practices on the level of protection of the right to be heard**:
  - *Lack of hearing within each administrative proceedings carried out within connected procedures:*
    - Within separate subsidiary protection (Ireland);
    - *Within* combined administrative proceedings (asylum and return; migration + return) with simultaneous administrative decisions; (**Belgium, France**);
  - *Unclear remedies in cases of violations of the right to be heard:* absolute, versus relative nullity (e.g. **Netherlands**); remedy in the form of a judicial hearing by a court within appellate procedures (**Italy**)

Legal source and nature of the right to be heard in international protection and return proceedings - CJEU

Phase	Administrative phase asylum	Return
Source	**1. EU secondary provision (express, mandatory,** Art. 14 APD, only 2 except.) + **2. additional requirements under the GPL of rights of defence** *C-277/11,M.M.(1); C-560/14, M.M(2)*	**1. EU secondary provision (not express,** Art. 12 Return Directive) + **2. GPL of rights of defence** (*Boudjlida+Mukarubega*)
Nature	**Mandatory in all nat. proceedings** (e.g. *competition, EU sanctions, tax, asylum immigration, consular protection*); **Even when the applicable (EU or nat) legislation does not expressly provide for such a procedural requirement**. (M.M. (1), para. 86) RELATIVE: restrictions are possible, except when it is necessary for: 1. taking a decision with full knowledge of the facts 2. vulnerable person (age, health conditions, victim of violence) (*M.M.(1), M.M(2), Moussa Sacko*)	Relative, restrictions are possible for the purpose of securing the objective of the Return Directive (*Mukarubega, Boudjlida)*

The right to be heard - material scope
CJEU jurisprudentially developed guarantees

CROSS-SECTORIAL: the right to be heard requires that *the addressee of an adverse decision must be placed in a position to submit his observations before that decision is adopted, for the purpose of enabling that person to correct an error or submit information relating to his or her personal circumstances capable of influencing the adoption or non-adoption of the decision, or the specific content of the administrative decision.*

Content of the right to be heard in asylum determined also by the specific requirement of the duty of cooperation (C-277/11 (M.M(1)) + C560/14 (M.M(2)):

- statements and documentation regarding the applicant's age, background, identity, nationality, countries of previous residence, previous asylum applications, travel routes and or other information related to the serious harm to which the applicant has been or may be subject. Where necessary, the competent authority must also take account of the explanation provided regarding a lack of relevant elements, and of the applicant's general credibility.
- The asylum seeker should be given sufficient opportunities to substantiate his/her asylum claim, for example by submitting written information.
- The effectiveness of the right to be heard depends on the careful and impartial examination of the observations submitted by the person concerned, by the authorities, and giving a detailed statement of reasons for their decision. (*M.M. (1)*).

The right to be heard - material scope
CJEU jurisprudentially developed guarantees

Content of the right to be heard in IP proceedings as derived from the EU duty of cooperation:

- The interview shall include the opportunity to give an explanation regarding elements which may be missing and/or any inconsistencies or contradictions in the applicant's statements. – Art. 16 Recast APD
- Inconsistencies between the evidence (story) of the applicant and the COI used by the authorities should be put forward to the applicant to be discussed (ECtHR, *J.K. v Sweden, R.F. v Sweden*)

What the right to be heard does not include, so far:

- The right to be heard does 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. (*M.M. (2));*
- It does not impose a mandatory information of the applicant of the administration's intention to reject the subsidiary protection application or the grounds it intends to base its rejection. (*M.M.(1) +(2)*);

The right to be heard material content in return/removal proceedings

CJEU: *Mukarubega* (C-166/13) and *Boudjlida* (C-249/13): The TCN must be able to express his/her point of view on:

- the legality of his stay;
- facts that could justify the authorities to refrain from adopting a particular return related decision (para. 55);
- facts that justify exception(s) to the expulsion (para. 47);
- 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-refoul*ement (para. 48)
- on the detailed arrangements for his return (para. 51) +

- correct an error or submit such information relating to his or her personal circumstances (para. 37)

The right to be heard in return/removal proceedings

CJEU: *Mukarubega and Boudjlida*:

The right to be heard does not give the following rights to the irregular migrants:

- to be warned, prior to the interview, that the administration is contemplating adopting a return decision;
- be disclosed information on the basis of which the administration intends to rely as justification for that decision;
- Be given a period of reflection.

Provided that the third-country national has had the opportunity effectively to present his point of view on the subject of the illegality of his stay and the reasons which might, under national law, justify a refraining of the authority from adopting a return decision.

Right to be heard in taxation *specific requirements?*

- "the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their **views as regards the information on which the authorities intend to base their decision**." (*WebMindLicences*, C-419/14, para. 83)
- Even if the individual concerned is not in a defensive position, but is rather seeking to avail himself of a right or to benefit from an entitlement such as a customs' exemption (exemption from tax for a microscope imported from outside the EU, C-269/90 TUM)

Similar level of protection of the right to be heard under asylum/immigration, or higher under taxation?

What role for national courts in cases of infringements of the right to be heard?

The consequences of violations of the right to be heard in asylum and immigration proceedings are not expressly laid down by EU law:

> *Where the conditions under which observance of the third-country nationals' right to be heard is to be ensured, and the consequences of the infringement of that right are not laid down by EU law, those conditions and consequences are governed by national law, provided that the* ***principles of equivalence and effectiveness are respected*** *(G&R, C-383/13, PPU)*

principle of equivalence = rule adopted to give effect to EU norms are the same as those to which individuals in comparable situations under national law are subject

principle of effectiveness = the national rules do not make it impossible in practice or excessively difficult to exercise the rights of defence conferred by the EU legal order

Possible remedies:

1. Relative nullity (*G&R, C-383/13, PPU, para. 38*): 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*." (analogy with remedies in EU competition law)
2. Oral hearing before the court within the appeal proceedings (see C – 348/16, Moussa Sacko, when national courts have this power under domestic administrative procedure)

Duties of national courts: invocation ex officio of the EU right to be heard in administrative proceedings

Benallal case (**C-161/15)**

Facts: Mr Benallal is a Spanish citizen who asked for a residence permit in Belgium as a salaried worker. He received it, but one year latter the Immigration office withdraw it on the grounds that he provided misleading information. Namely, that there was no social security and no actual activity done by any of the employers of the company where Mr Benallal was working. It was considered that there has been no actual work contract. The withdrawal of the residence permit was thus done on the basis of 'abuse of EU rights' (Art. 35 Citizenship Directive).

1. Complaint: The withdrawal of residence authorisation was vitiated by a deficient statement of reasons; + report of the National Social Security Office was not notified; + he did not receive the letter informing him of an interview with the social worker where he could have clarified the circumstances of his case.

Complaint rejected by the Asylum and Immigration Board on the grounds that it was the duty of the EU citizen to notify the information regarding the general social security system, and work contract; lack of hearing by the social worker did not vitiate the decision;

2. Complaint: before the Conseil d'Etat; this stage he also added a new argument - an infringement of the right to be heard as provided by EU law

Duties of national courts: invocation ex officio of the EU right to be heard in administrative proceedings

Benallal case (**C-161/15)**

Issue: Within the Belgian system a new point of law can be raised in appellate judicial proceedings only if it is part of the public policy; as regards the Belgian right to be heard,

the Conseil d'Etat and Government had different opinions on whether the right to be heard is generally considered as part of the public policy grounds, or as the Belgian Government argued only an infringement of the rights of defence in the disciplinary and criminal field falls within the category of pleas based on public policy.

Preliminary questions: EU based right to be heard is equally considered as part of public policy and also what the effects of the principle of equivalence would entail.

CJEU reasoning: 1) Art. 31 Citizenship Directive does not provide for a right to be heard before the issuing of a withdrawal decision by the national authorities. In these circumstances, the principle of procedural autonomy of the MSs applies, the conditions under which the right to be heard is to be exercised are governed by national law, but subject to observance of the principles of equivalence and effectiveness.

2) Required an equivalent position of the EU right to be heard as the one of the national right to be heard within national procedural law;

3) Right to be heard as part of the rights of defence – FUNDAMENTAL PRINCIPLE

Right to have access to files and duty to state reasons

- *Issue*: limitation on the basis of national security concerns in administrative proceedings involving EU citizens or TCNs. These limitations are commonly extending also during the judicial phase → interconnectivity between GPL of rights of defence and Art. 47 CFR.
- ***Case C-300/11, ZZ***: a French and Algerian citizen, permanently resided in the UK, resident for more than 10 years, with British wife and children;
  - refused re-entry into the UK upon return from a trip to Algeria on the ground that his presence in the country was contrary to public security; he was accused of involvement in an Algerian armed group, but not prosecuted, no distinction between 'serious' and 'imperative' grounds of public security;
  - His right of permanent residence was cancelled and was eventually removed to Algeria (Art. 27 Citizenship Directive);
  - He then lodged appeal against the Secretary of State's decision before the Special Immigration Appeals Commission (SIAC). During the proceedings, the Secretary of State objected to the disclosure of evidence to the appellant and required the application of a closed material procedure. Evidence against ZZ was disclosed only to the special advocates, who were prevented from providing any information to or seeking instruction from the appellant.
  - ZZ lodged an appeal against the SIAC's judgment before the Court of Appeal,
  - UK CA addressed a PR to the CJEU asking if the *principle of effective judicial protection requires a higher level of disclosure of evidence than the one established at the domestic level?*

Right to have access to files and duty to state reasons

CJEU: the importance of the Charter, national authorities cannot escape the responsibility of complying with it, even when allowed to derogate

1. Art. 47 CFR takes precedence over the GPL of effective judicial protection: it re-interpreted the PQs in light of requirements deriving from Art. 47 CFR.

2. Art. 30 Citizenship Directive (guarantees in cases of expulsion decisions) must be interpreted in conformity with Art. 47 CFR.

3. Any limitation to the full and precise disclosure of the grounds for a decision under Art. 30 has to be strictly necessary and proportionate, and taken only in exceptional cases; the state must prove that disclosure would in fact compromise state security and be disproportionate.

4. <u>Essence of those grounds of the decisions restricting the rights of entry or residence always be disclosed;</u> in a manner that respects the confidentiality of the underlying evidence.

Outcome at the national level:

- The UK Court of Appeal found that ZZ had not be given the min. level of disclosure required by EU law (*i.e.*, be informed of the gist of the case). It remitted the case to administrative authority for a new determination in light of the CJEU's decision in *ZZ*.
- The Court also stressed the administrative authority must strike an appropriate balance between national security interests and individual rights, and adopt a more flexible approach to disclosure than it did in the past. Finally, the Court called for the SIAC to take into due account the negative impact that non-disclosure may have on the appellant family life.
- The ZZ PR impacted also on the **Dutch** administrative practice, which provided individual reports where essential grounds were disclosed to the individuals.

Additional guarantees under the right to good administration in asylum

Additional guarantees have developed in international protection proceedings under the EU duty to cooperate (Art. 4 QD) which requires a more active role for the national authorities:

- Duty to cooperate actively with the applicant, to ensure complete, up to date and relevant evidence, including COI (***M.M. (1),*** para. 66);
- Duty to consider *ex officio new grounds for IP: e.g.* both generalised risk of harm and individual threats as grounds for possibly recognising SB under Art. 15(c) Recast QD (*Elgafaji* and *Diakité* ; ***ICC***);

- ***ECtHR, J.K. v Sweden***, para. 92: shared duty of an asylum-seeker and the immigration authorities to ascertain and evaluate all relevant facts of the case in the asylum proceedings.

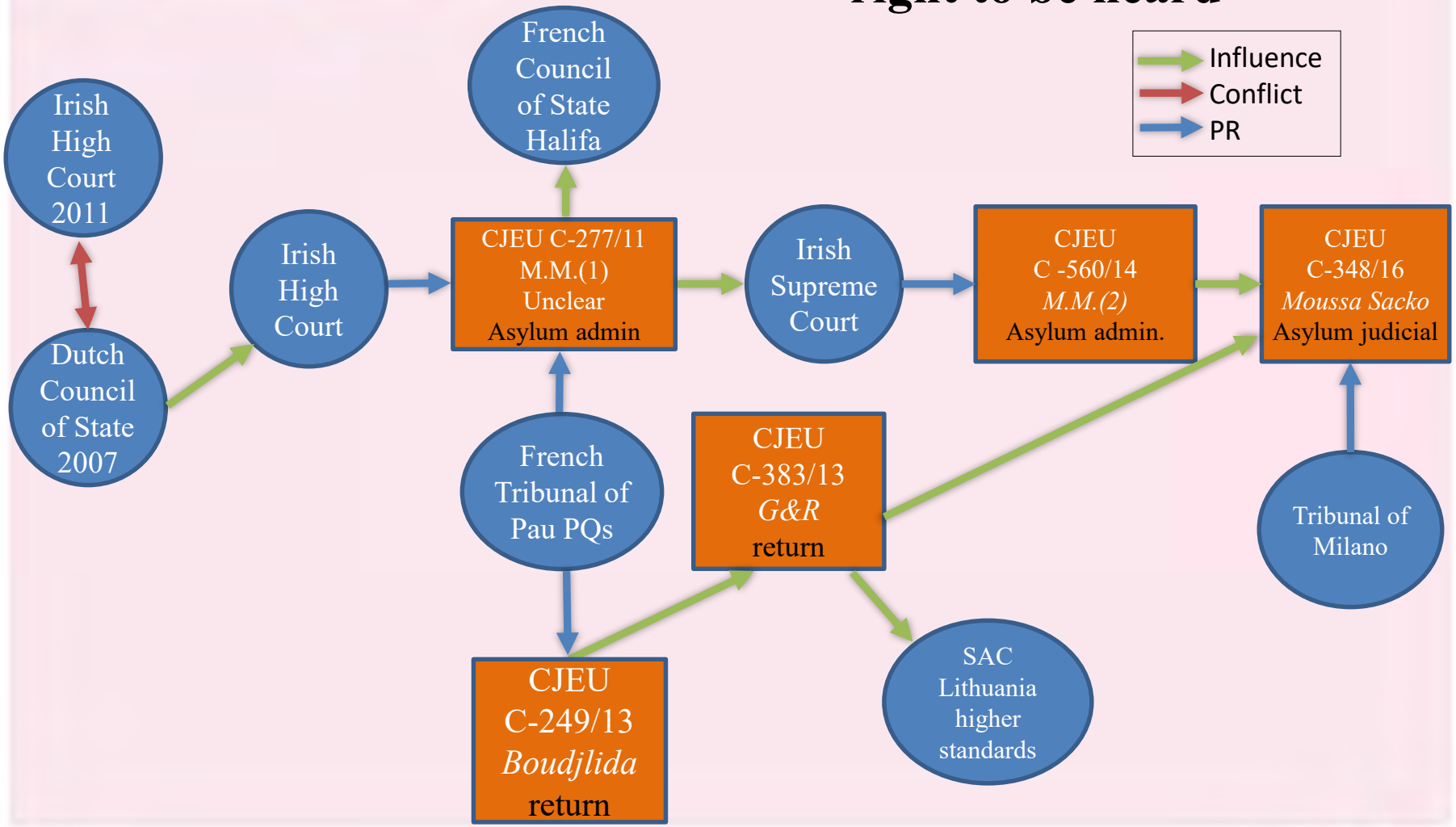
The functions and outcomes of the GPL – right to good administration and rights of defence

- The functions of the GPL are similar to those of the Charter: interpretation of EU and national legislation, disapplication of EU and national legislation

Outcomes at national level:

- Recognising individual rights even in the absence of express EU or national legislation (*return proceedings, see the RD and Belgian prac*tices);
- Amendment of national legislation (*Belgium, following Boudjlida and Mukarubega*);
- Reconfiguration of administrative procedural law under the impact of the EU duty of cooperation required by EU asylum law: more active fact finding role for administrative authorities;
- Extending the judicial review powers of national courts: "*Not to recognise that the national court has such a power of assessment, and to require that every infringement of the right to be heard automatically brings about the annulment of the decision extending the detention and the lifting of that measure, even though such a procedural irregularity might actually have had no impact on that extension decision and the detention fulfils the substantive conditions laid down in Article 15 of Directive 2008/115, would be liable to undermine the effectiveness of the directive.*" (G&R, para. 41)
- Shaping national remedies and judicial powers (together with Art. 47 CFR);
- Limitation of the discretionary powers of the executive in sensitive areas (e.g. national security, ZZ based requirements).

Judicial dialogue clarifying the nature, scope and effects of the right to be heard



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THANK YOU FOR YOUR ATTENTION!

Hypothetical Case 1 – JENNIFER A.

Young Nigerian woman, asking for asylum during her administrative detention

Mrs. Jennifer, a young Nigerian female of 19 years old, is Esan / Ishan and she is speaking and understanding only the Esan language.[1] She was born with a language disability, coming from the Edo State, from a poor family. She had never received support for her language disability; people and her family thought that her disability was connected to the bad influence that her mother received during the pregnancy from a local witch with negative powers. She has left her village when she was around 17 years old. Her mother decided that she needed to undergo female genital mutilation in order to be cleared by the negative influences, and thus become marriageable. She was very afraid to undergo the surgery and because of that, she fled her native village. She moved to a bigger town where a lady offered her accommodation in exchange of domestic help. The lady mentioned the possibility that she could solve her problems by going to Europe where people accept all women also those with negative witch craft.

Jennifer accepted to follow the lady in Libya. She went on trough different places with the old lady, who obliged her and other girls to do prostitution in connection houses, where sexual services involved also violence.
She arrived in Europe from Libya in April 2017. She maintained herself from money earned from prostitution. She thought she needed to prostitute because of the Maman's order and the debt she thinks to have with the Maman.
One night, during a riot in a road in a town of an EU Member State, she was caught by the police and found without documents. She received an expulsion order on the 4th of August 2017 and also a detention order, on the basis of lack of identity documents and the risk of absconding.
In the local administrative detention center, Jennifer was informed in English about her rights and duties. She has later on heard from other Nigerian women that she could ask for international protection. She then lodged an asylum application on the 15th of September.

Her claim was assessed within an accelerated procedure (urgent procedure) because she lodged the asylum application while she was in detention and already subject to return proceedings. She met the asylum authority on the 22th of August 2017. During the asylum interview she spoke with a woman interviewer, through an interpreter, a Nigerian man. She was not able to understand all the questions. She does not want to refer to the contacts she currently has with Maman, and the latter involvement in prostitution, because she feared of the Maman's reaction. She told she is currently working for a Nigerian lady in exchange of accommodation. She explained that in Nigeria the lady's sister has helped her when she fled her native village because their parents wanted her to undergo genital mutilation. The lady proposed her to go to Europe to work for her for sister. She accepted that proposal. She mentioned that she had the money to travel from Nigeria, through Libya until the Member State A from prostitution.
On 7th of October 2016, the asylum authority rejected her asylum claim as unfounded. On the basis of the EASO COI, the administrative authority found that she does not fall within the ethnic group and age of women who are mostly undergoing FGM. The genital mutilation was found not common in the local region where the applicant came from and in any event this is a practice only occasionally applied to females aged more than 15 years old. In addition, the asylum authority found several inconsistencies in her story regarding the travel from Nigeria to Libya and then to

[1] Ishan language: Pidgin and Portuguese language from Niger-Congo area.

Member State A. The asylum authority did not consider other possible risks of *refoulement*, such as those related to trafficking. The negative decision was notified in English and the national language of Member State A. She did not understand that she had the right to lodge an appeal within the specific time period of appeal mentioned in the notification. The translator was always speaking in English or Pidgin even if Jennifer consistently said to him that she knows only the Ishan language.
After the appeal period expired, a lawyer visiting the detention centre on behalf of an NGO asked for the possibility that Jennifer could speak with a Ishan translator. With the help of this translator, she was in the condition of understanding the procedure. The lawyer decided to lodge a complaint before the competent Court even if the time limit had already expired.
In support of his appeal, the lawyer argued that her client's right to a due process had been infringed since she was not in the condition to understand the proceedings due to the lack of a translator speaking her native language, and due to her language disabilities and psychological post traumatic stress as proved by the referrals. The lawyer also argued that in the detention centre legal assistance was provided only occasionally by a limited number of NGO operators who had restricted access to the centre and thus also to meetings with the third country nationals.
In addition the lawyer also asked for the suspensive effect of the initial return decision (the expulsion order of the 4th of August 2017) which had been reactivated after the negative asylum decision that became final due to lack of appeal.
On the merit of the claim, the lawyer insisted in claiming international protection on the ground of risk of persecution due to the refusal of Mrs. Jennifer to undergo genital female mutilation. The lawyer argued that the administrative authorities erred in their credibility assessment, and thus infringed due diligence obligation by not confronting the applicant with the alleged inconsistencies between her statements and COI that were obtained by the administrative authority *proprio motu* or which were submitted by the applicant herself. The administrative authorities did not consider that Jennifer's mother grew up in a Nigerian region where the practice of genital mutilation is common. Moreover, they did not pay attention to the fact that genital mutilation was done in order to remove the negative witchcraft. In order to support the possible connection between the two practices, the lawyer asked for time to support as evidence a report of an anthropologist.

You are the judge hearing the appeal, how would you decide the case? Consider the following questions:

I. Admissibility of the appeal

1) In light of the principle of the right to have an effective access to a court/judge, would you consider admissible such a claim, even if lodged after the expiry of the time limit?
2) Would the lack of language understanding and/or disabilities be considered as a sufficient ground to consider admissible the appeal?
3) Could the lack of legal assistance in the detention facilities be considered as a possible ground for admitting the claim?
4) If yes, would this remedy be provided by national procedural rules? In the absence of specific national procedural rules, is there a provision of EU law that would require the admittance of the appeal?

II. Suspensive effect of appeal

5) When you are considering the issue of admitting the appeal, the return proceedings are ongoing, would you consider ex officio the issue of recognising a suspensive effect of the appeal in relation to the expulsion proceedings? Is there jurisprudence of the CJEU that could be of help?

III. Administrative detention

Jeniffer has been held in administrative detention since 4th of September first under the return proceedings on the basis of the risk of absconding due to lack of identity documents, and then kept in detention also after lodging the detention order on the basis of the submitting the asylum application abusively for interrupting the return proceedings. (Art. 8(3)(d) Directive 2013/33/EU)

The lawyer is challenging the detention order as unlawful since the administrative authorities have not fulfilled their duties under the principle of good administration to provide reasons why no alternative measures where possible, instead they established administrative detention as a first instead of a last resort measure.

6) You are assessing also the legality of the administrative detention adopted by the administration. Do you find the administrative authorities have fulfilled their duties under the principle of good administration?

III. Merits of the asylum application – duty of cooperation

Imagine you admitted the appeal and granted the suspensive effect.

Would you decide to hear the applicant in order to clarify the inconsistencies in administrative procedure? Is there an EU law provision and European jurisprudence establishing standards on this aspect?

7) With regard to the genital mutilation claim for international protection, would you consider to hear an anthropological expert in light of the duty to cooperate in assessing facts? Would you consider feasible to require an international rogatory or to consulting Nigerian embassy consulate in order to verify whether Jennifer's mother place of birth corresponds to a Nigerian region where female genital mutilation are a current practice?

8) Would you order the hearing of the person in order to assess whether she has been effectively subject to trafficking and/or she is still under the control of trafficking criminal networks?

9) Would the right to an effective remedy and the full and *ex nunc* examination of both facts and points of law, according to Article 47 EU Charter and Article 46(3) of the Recast Asylum Procedure Directive play a possible role for extending your inquiry, hearing powers and assessing whether the administration has fulfilled its duties under the principle of good administration and duty to cooperate (Art. 4 Qualification Directive)?

Hypothetical case 2 – renewal of residence permit

The Migration department (MD) of Member State B refused to renew the temporary residence permit to the applicant, since he has not submitted all the necessary documents. The MD claimed that the applicant had not provided detailed information about his plans to develop business in the Member State. The Migration department pointed out that it had contacted the applicant by e-mail and requested to provide additional data, but the applicant failed to do that in the time allocated. The applicant challenged the decision before the regional administrative court, relying on the principle of good administration, pointing out that the respondent failed to provide the applicant adequate opportunities to submit relevant documents and by that failure has violated the applicant's right to be heard.

He argues that according to the national legislation, the respondent had the obligation to process the application of the applicant within one month after its registration, but in reality it informed the

applicant about the lack of relevant documents only after almost two months, and set very short time limit to submit additional documents in person one week, and two days after the email in person. Before the Court he argues that he could not meet the deadlines as he was in another Member States in order to pass the exam.

Consider what are the requirements of the principle of good administration in this case, and whether they were fulfilled by the administration.

Reading list

The right to good administration – an umbrella right

- Legal source(s) of the right to good administration:

  Art. 41 of the EU Charter of Fundamental Rights or general principle of EU law?

  Art. 41 CFR - addressed only to the institutions, bodies, offices and agencies of the European Union (see S and Others (C-141/12 and C-372/12, EU:C:2014:2081, paragraph 67); of 5 November 2014;

  General principle of EU law: "the right to good administration, enshrined in Article 41 of the Charter, reflects a general principle of EU law." (Mukarubega(C-166/13, EU:C:2014:2336, paragraph 44; Case C-604/12, *N.*, EU:C:2014:302, para. 49).

- Scope of the right to good administration - Guarantees:
  1. Right of access to administrative files
     - in national administrative tax proceedings - **Case C-298/16, Opinion of AG Bobek,** ECLI:EU:C:2017:650
     - in return proceedings, see REDIAL Report on the implementation of Chapter III Return Directive – procedural guarantees
  2. Right to a reasoned decision – see in addition for immigration detention, REDIAL Report on the implementation of Chapter IV Return Directive – pre-removal detention
  3. Right to be heard (see Article 41 EU Charter section in the *ACTIONES Module on the Application of the EU Charter in asylum and immigration*)
  4. General due diligence obligations – duty of cooperation in international protection proceedings– Art. 4 Qualification Directive (*Rejus Extract*)
- Effects of the right to good administration – consequences of the violation
  1. G&R, C-383/13– return - see *Rejus Extract*
  2. Moussa Sacko, C-348/16– asylum - see *Rejus Extract*

1. The duty of cooperation and the EU general principle of effectiveness

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

1.2 Burden of proof

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

1.3 Duty of cooperation

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

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

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

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

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

Question 2.a – Can the duty of cooperation require positive obligations from national courts to exercise new investigative enquiries?

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

1.4 Elements of evidence

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

1.5 Standards of proof and benefit of doubt

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

Questions 2 – How are national courts implementing the requirements of Article 7 CFR, the CJEU jurisprudence, and Article 4 QD on standards of proof and benefit of doubt in

cases regarding international protection on the basis of persecution for homosexual orientation?

1.1. National legal contexts on evidentiary procedures in asylum adjudication: variety of types of jurisdiction and judicial review powers

Issues related to evidentiary procedural law, including, in particular, the standards, burden of proof and credibility of the applicant for international protection, are amongst the most complex and difficult tasks in asylum proceedings. Facts assessment in asylum adjudication has been described as a complex but also crucial function of asylum judges.[1] It is a difficult task due to the often scarce documentary evidence,[2] and the fact that the credibility of applicants' oral statements is tilted by suspicions regarding their veracity and correct understanding, given that there are made in a foreign language. This requires from national judges an impressive geographical and historical knowledge on the general situation in around 146 countries from where the asylum seeker could come from in order to verify whether the statements made by the applicant are consistent with the situation in the country of origin. It also requires the determining authorities to assess whether there is a future risk of refoulement, which means that there are no certainties which can be established. At the same time gathering and assessing evidence is crucial since it has a decisive effect for the outcome of asylum proceedings. The inherent complexity of asylum evidentiary procedures stemming from the specific situation of the applicant for international protection is accentuated by the variety of national evidentiary rules and powers of national courts in asylum adjudication.

For instance, while **Italy** allocated asylum adjudication to civil judges, due to the approach of considering these proceedings as involving subjective rights (right to asylum), the majority of the Member States allocate asylum adjudication to administrative courts. However, this does not mean that administrative judges from the EU countries have all identical powers as regards evidentiary procedures. For instance, while in **Germany**, administrative courts have both inquisitorial[3] and adversarial[4] as well as reformatory powers[5], other administrative courts have only inquisitorial and adversarial powers (**Romania, France**), while **UK** courts have only adversarial and legality assessment powers. This means that **German** administrative courts can ask for additional evidence from the administrative authorities, or independent bodies, and can also require the administration to adopt a certain form of international protection.

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[1] See Stephen Sedley, Former Lord Justice of Appeal, England and Wales, "Asylum: Can the Judiciary Maintain its Independence?"

[2] Asylum seekers are usually leaving their countries of origin without documents and other material evidence to support their applications.

[3] In inquisitorial administrative judicial procedure, the judge carries the final responsibility for the sufficiency of evidence. Inquisitorial procedures, hence, gives the judge the possibility of carrying out investigations of his own, to produce and use knowledge from his own sources and also to guide the parties regarding information that needs to be presented.

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

[5] Meaning powers to recognise refugee or subsidiary protection.

In other Member States the division of powers among asylum judges is even starker, since while in certain regions the jurisdiction is allocated to civil judges, in other regions of the same State, the administrative judges are the competent ones (e.g. **Romania**) and this has impacted on the extent of judicial review powers mostly due to the civil formation of the judge compared to that of an administrative one who can usually only quash an administrative decision, and has limited evidentiary powers.

In addition to civil and administrative courts, asylum detention is in certain Member States falling under the competences of criminal courts (e.g. **Hungary**), or general courts (e.g. **Poland**).Under the impact of Article 4 Qualification Directive, principle of effectiveness of EU rights and the jurisprudence of the CJEU and ECtHR administrative courts have exercised as a duty, inquisitorial powers, in the sense of producing new evidence, in particular as regards the use of up to date and accurate country of origin information in international protection proceedings. While some of them also exercise reformatory powers on the basis of the principle of effectiveness of the principle of non-refoulement and the right to asylum when the administrative authorities fail to take on board their judgments (*Hungary, see the case discussed below of the Pecs Administrative Court*).

A number of key principles and standards have been set by *Article 4 of Directive 2011/95/EU* (Recast Qualification Directive), concerning the assessment of facts and laws; Article 10 of the Recast Asylum Procedure Directive 2013/32/EU, introducing a requirement of an appropriate, individual and careful examination of the asylum claim. It will be pointed out below that the EU has imposed specific evidentiary rules in asylum adjudication which take priority over the general principle of civil, administrative, or criminal procedural law.

However, EU secondary asylum law introduced general rules, which leave considerable discretion to the Member States[6], and leave many evidentiary issues untouched, which in conjunction with the variety of national evidentiary procedures and judicial powers has led to inconsistent jurisprudence and practices across the Member States. Some of the discretionary powers and general rules have been interpreted by the CJEU, which established additional requirements to those set by EU secondary asylum law on the basis of the *principle of effectiveness of EU rights, principle of good administration and rights of defence. Additional requirements have been set by the ECtHR, which national courts have to comply under Article 4 Qualification Directive (see F.G. v Sweden and J.K. v Sweden).* For instance, the CJEU has

[6] Article 4 of the Recast Qualification Directive includes both optional and prescriptive rules to be followed by the Member States. One of the optional rules is the duty of the applicant for international protection to submit as soon as possible all elements of evidence in support of his application. Although an option, most of the Member States have chosen to provide for an obligation of the applicant to present all the evidence at his disposal in support of the application. The difference in transposition comes from the deadline of producing the evidence. While some Member States do not provide for a specific time limit, others chose specific time limits for submitting proof. For instance, in certain jurisdictions, elements submitted after the administrative interview do not need to be mandatorily taken into consideration (e.g. Netherlands). In case the Member State took advantage of the option and provided for a national prescriptive rule to submit asylum related evidence, then the requirements of Article 4(5) of the Recast Qualification Directive should be followed. However, not all Member States have strictly transposed this provision. See The Report from the Commission to the European Parliament and the Council on the application of Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection, Brussels, 16.6.2010 COM(2010)314 final, p.5.

provided some standards on interpreting the meaning of the concept of 'as soon as possible' in regard to the timing of submitting evidence in *A.B.C.*:

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

In *Elgafaji* and *Diakité*, the CJEU provided guidelines on the standards of proof and duty of cooperation which should be followed when considering subsidiary protection under Article 15(c) Qualification Directive.

In this section, we will offer examples on how these preliminary rulings have been applied at national level by national courts. These national judgments are not only operating an implementation *ad literam* of the preliminary rulings, but they offer an interpretation of the CJEU preliminary rulings as regards their ex officio duties in terms of standards of proof (*Supreme Court of Cassation of Italy, judgment of 10 April 2015, file No. 7333/2015*). A further example of extension of judicial review powers under the impact of the CJEU preliminary rulings and the principles of effectiveness of EU rights to asylum is to be found in the judgment of the *Sofia City Administrative Court (case 5774/2015 and Hungary, Pécs Court of Public Administration and Labour, 25.01.2017)*

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

- EU and ECHR requirements on burden of proof, duty of cooperation, elements of evidence, standards of proof, and benefit of doubt;
- how national courts apply the duty to conduct an appropriate examination of the asylum claim;
- circumstances when national courts exercise *ex officio* inquisitorial powers for the purpose of fact finding and assessment and securing the principle of effectiveness of EU rights;[7]
- the intensity of judicial review of the administration's duty of cooperation.

The selected cases will also show how national courts have overcome national procedural obstacles, such as, limited judicial powers, procedural deadlines regarding submission of evidence, for the purpose of securing the principle of effectiveness of the right to asylum, the principle of *non-refoulement* and other fundamental rights of the asylum seeker. The cases also reflect the changing powers among the applicant and administration; administration and courts as regards burden of proof and evidence assessment, under the impact of the rights to fair trial, principle of effectiveness and good administration obligations. The caselaw herein discussed shows that although *Article 4 of the Recast Qualification Directive and Article 10 of the Recast Asylum Procedure Directive* have introduced detailed evidentiary rules, there are still a

[7] For an analogy with judicial review powers in consumer protection, please see Re-Jus Casebook on consumer protection, Chapter 1.

significant number of issues that need further clarification or that are not regulated at EU level. Additional relevant rules have been developed by the CJEU and ECtHR which need to be taken into account when implementing EU secondary legislation. Furthermore, the principle of effectiveness imposes additional requirements on the Member States even when they act within the permitted margin of discretion.

Procedural and evidentiary rules in EU secondary legislation are very limited, the CJEU and ECtHR have filled this gap by using general principles of EU law (e.g. rights of defence) and Charter's and Convention's provisions. National courts have referred to this case law to adapt national rules and their powers have increased with different intensity both in legal systems where administrative courts are in charge and legal systems where civil courts are in charge.

1.2. Burden of proof

The allocation of the burden of proof is in fact the starting point for the asylum adjudication. In procedures of refugee or subsidiary protection determination, the placement of the burden of proof refers to the distinction between the obligation for the asylum seeker to prove his or her status as a refugee or beneficiary of subsidiary protection and the burden of the State to counteract this evidence, proving that the person in question is *not* a refugee or a beneficiary of subsidiary protection. According to reports of the European Migration Network comparatively assessing the transposition of the Qualification Directive, domestic proceedings on international protection commonly start with the task of the applicant to prove his or her status.

According to Article 4(1) Recast Qualification Directive:

> *"Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection. In cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application."*

Not all Member States have provided for a duty of the applicant for international protection to submit as soon as possible all the elements needed to substantiate the application for international protection. The proposal for a future Regulation on Qualification will transform this option into a requirement.[8]

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

Therefore, evidentiary structure within asylum adjudication is markedly different from the evidentiary structures of general administrative, civil, or criminal procedures. The presumption of innocence that characterises national criminal procedure; or the rule in civil procedure that it is for the claimant to prove the facts he alleged by presenting documentary or other evidence, and failing this duty, the claim is automatically rejected, are attenuated in asylum adjudication.

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

Specific rules govern asylum procedures, and the aforementioned general procedural rules have to be interpreted in light of these specific duties and principles. Notably, in asylum procedure, the asylum seeker usually has a duty to substantiate his/her claim followed then by the duty of Member State to assess all the relevant elements, in collaboration with the applicant. This 'duty of collaboration' applies to all Member States' authorities – administrative or judicial - involved in the assessment of an asylum application. (Art. 4(1)(2) Recast Qualification Directive)

The meaning of these provisions is that in asylum cases, although the burden of proof rests primarily on the claimant, the competent public authorities of the Member States have also a duty to cooperate in establishing the credibility of the asylum seeker. The nature of the proceedings, involving third country nationals who have escaped persecution, requires a different allocation of the burden of proof compared to civil or administrative proceedings in general. The asylum seeker has to substantiate his claim by providing statements and documentary evidence that (s)he may have, but in cases these are not complete or outdated, the Member States' authorities, before rejecting the application, shall actively cooperate with the asylum seeker in order to reunite all relevant elements.

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

Relevant CJEU jurisprudence

In spite of the requirement of Article 4(1) Qualification Directive, regarding the stages in evidentiary procedure, certain national authorities continue to apply a more cumbersome burden of proof for asylum seekers. In this context, the CJEU clarified the specificity of evidentiary procedure in asylum adjudication, and the division of burden of proof between the applicant and the competent national authorities. The CJEU confirmed in *M.M. (1)* (C-277/11) that "*it is generally for the applicant to submit all elements needed to substantiate the application*" (para. 65).

Relevant ECtHR jurisprudence

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

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

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

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

So far, the **ECtHR** set more detailed standards than the CJEU on the duty to cooperation and the burden of proof.

1.3. Duty of cooperation

Introductory remarks

Equally diverse national transposing legislations have been adopted in regard to Article 4(1), second clause of the Qualification Directive, which requires the Member States to assess relevant elements "in cooperation with" the applicant. This provision establishes a duty of the competent public authorities, including national judges, to be actively involved in the assessment of the relevant facts of the application. This provision, together with the obligation to secure the principles of *non-refoulement (Article 19(2) EU Charter)* and effectiveness of EU rights, might require from the national judge an active role in evidentiary production. This particular duty does not fit perfectly with the characteristics of certain Member States' legal traditions and comprehension of division of state powers, that allocate more powers of decision to the administration, while national courts have less intense powers as regards administration of evidence. However, under the impact of EU law and the CJEU jurisprudence, national courts are challenging the national procedural rules for the purpose of ensuring the effectiveness of EU rights and comply with their EU duty of cooperation. This sub-section will include a short

overview of the relevant CJEU and ECtHR jurisprudence, and then continue to discuss the impact of relevant CJEU preliminary rulings and additional national judgments that have developed innovative approaches under the duty of cooperation and the principle of effectiveness of EU rights.

Clarifications concerning the duty of cooperation, offered by the CJEU jurisprudence

The CJEU clarified when the duty of cooperation is relevant: "*the fact remains that it is the duty of the Member State to cooperate with the applicant at the stage of determining the relevant elements of that application*." (*M.M. (1),* para.65)

The CJEU also clarified when the duty of cooperation is temporarily relevant. In ***M.M.* (1),** the **CJEU** highlighted that the assessment of the facts relevant in cases of international protection is structured in two stages. The first concerns the establishment of factual circumstances which may constitute evidence that support the application, while the second stage deals with the legal evaluation of these evidence. The duty to cooperate actively with the applicant applies at the first stage of the procedure.

The EU duty of cooperation requirement means, in practical terms, that if the elements provided by an applicant are not complete, up to date or relevant, it is necessary for the Member State concerned to cooperate actively with the applicant, so that all the elements needed to substantiate the application may be assembled (***M.M. (1),*** para. 66). The CJEU also draws attention to the fact that a Member State may be better placed than an applicant to gain access to certain types of documents. (***A.B.C.***, para. 68 and ***M.M. (1)***, para. 66)

In the A.B.C. judgment – a case dealing with the assessment of a refugee application based on alleged persecution on the ground of sexual orientation - the **CJEU** observed that Article 4(5) of Directive 2004/93 (now replaced by Article 4(5) of Directive 2011/95) provides for an alleviation of the asylum seeker's *onus probandi*. According to this provision, where aspects of the applicant's statements are not supported by documentary or other evidences, those aspects shall not need confirmation where conditions listed in subsequent letters from a) to e) are cumulatively met.

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

The Member States' 'duty to cooperate' with the asylum claimant in order to assess his application is clearly related to the right to an effective remedy. The duty to cooperate is meant to guarantee the asylum seeker an effective right to defence – which is the expression of the right to an effective remedy (see A.B.C. CJEU judgment, para. 82) - and procedural symmetry with the other party. It is a way to circumvent the inherent difficulties to substantiate international protection claims with documentary evidence and it is in line with the ECtHR finding that the asylum seekers constitute a vulnerable group that deserves special protection (see ECtHR, *M.S.S. and other v Belgium and Greece* case). Furthermore, according to the

settled case law of the CJEU (*Steffensen*[9] and Boiron[10]), evidentiary rules fall under the principle of effectiveness of EU law. Where the national court founds that the evidentiary requirement renders it impossible or excessively difficult to the individual to exercise a right granted by the EU (in this case the right to access international protection), then it must declare the evidentiary related rule incompatible with the principle of effectiveness of EU law.

Clarifications concerning the duty of cooperation, offered by the ECtHR jurisprudence

The **ECtHR** sets a higher standard than CJEU with respect to duties of cooperation clarifying that it requires national authorities to assess all information brought to their attention, even if the applicant does not wish to rely on certain evidence (*in casu*, conversion from Islam to Christianity in Sweden). The ECtHR has recently assessed the legitimacy of national evidentiary procedural limitations which at first sight are adequately transposing provisions from the Asylum Procedure Directive in light of the requirements under Article 3 ECHR. In *F.G. v Sweden* (Appl. No. 43611/11, Grand Chamber Judgment of 23 March 2016)

F.G. concerned an Iranian national who had converted to Christianity after arrival in Sweden. He submitted an asylum application, but did not base it on persecution due to his conversion, although this would put him at a risk of being subject to death penalty for apostasy in Iran. He sought to suspend the deportation order and submit a new application on account of his religious conversion. However, the national authority held that the conversion did not constitute new fact justifying a re-examination of the case. This national procedural requirement (new elements invoked for subsequent applications) is allowed also under the Asylum Procedure Directive (see recital 36, Article 40(2)). As for legitimate reasons for not presenting evidence, Article 40(4) provides that "Member States may provide that the application will only be further examined if the applicant concerned was, through no fault of his or her own, incapable of asserting the situations set forth in paragraphs 2 and 3 of this Article in the previous procedure, in particular by exercising his or her right to an effective remedy pursuant to Article 46." However, Article 42(2)(2) codifies the principle of effectiveness of protection of EU rights, and requires the Member States that evidentiary procedural rules in cases of subsequent applications "*shall not render impossible the access of applicants to a new procedure or result in the effective annulment or severe curtailment of such access*." Additionally, the principle of non-refoulement has to be respected irrespective of procedural limitations, due to its absolute nature (Article 41(1)(2) and Article 19(2) EU Charter, Article 3 ECHR).

The added value of the ECtHR judgment is to clarify the interaction between the domestic limitation of the rights of defence and its impact on the protection of the principle of *non-refoulement*. In this case, the Court recalled that, "*when an asylum request is based on an individual risk, it is not for the State examining this request to look for a risk factor that the asylum seeker did not present. However, in view of the absolute nature of the rights guaranteed by Articles 2 and 3 of the ECHR and the vulnerable situation that asylum seekers frequently*

[9] C-276/01, ECLI:EU:C:2003:228.
[10] C-526/04, ECLI:EU:C:2006:528.

find themselves in, if the State is informed that an individual may be subjected to treatment contrary to said articles upon returning to his country of origin." The national authorities are obliged to assess that risk *ex officio*, where they know that the asylum seeker is likely to belong to a group of persons systematically exposed to such treatment.[11] The ECtHR pointed out, in particular, that the Swedish authorities had not carried out a thorough examination of the actual situation and implications of the applicant's religious conversion. It asserted that, irrespective of the latter's conduct, the national authorities had "*to make an ex nunc assessment of the risk he would face upon returning to Iran as a result of his conversion*." Therefore, in the absence of such an assessment, the ECtHR ruled that the deportation order, if implemented, would constitute a violation of Articles 2 and 3 of the ECHR.

The ECtHR clarifies thus that Article 40(2) and recital 36, although permitting discretionary powers to the Member States to dismiss as inadmissible subsequent asylum application which are not based on new evidence, they cannot establish evidentiary procedural rules which would lead to violation of the principle of non-refoulement which is an absolute fundamental right.

Under EU law, the principle of effectiveness of the guarantees resulting from the principle of non-refoulement would require national authorities to interpret domestic rules in conformity with EU law and to disapply national evidentiary rules when conforming interpretation is not available.

Main questions addressed

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

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

This analysis will assess in chronological order the full cycle of the preliminary rulings in *Elgafaji*[12] and *Diakité*[13] (intended as a cluster) and their impact at national level in other Member States than the referring ones. IT would be useful to give some information about the preliminary references raised in the two cases and which are the referring courts in *Elgafaji* and *Diakité*. It will then show the cross-border effect of the CJEU preliminary rulings and how national courts (Italy and Bulgaria) have understood their duty of cooperation in light of these preliminary rulings. It will show how non-referring national courts have applied these preliminary rulings in concrete cases where applicants did rely on different grounds of persecution, or when national administrative authorities' assessment of COI presented shortcomings.

[11] Similar conclusions were drawn by the CJEU in consumer protection, see Re-Jus Casebook on consumer protection.

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

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

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

Question 1.b – Is it the duty of the national court, in case the administration failed to do so, to make the assessment of the legal qualification for subsidiary protection, in particular taken into consideration whether this can be recognised under the individual or general risk of persecution?

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

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

Second cluster aims to show the extent of duties incumbent on national courts under the duty of cooperation and principle of effectiveness of EU rights. Examples include: the duty to exercise or administrate new investigative elements, such as measures of inquiry on the court own motion and to verify the credibility of the asylum seeker having regard to updated country of origin information, which the adjudicating judge must assess on his own motion; consider new reasons of persecution that can be deduced from the application, even if not expressly invoked by the applicant (that is persecution on the basis of membership of a particular social group: trafficked women, instead of ill treatments)

Question 2.a – Can the duty of cooperation require positive obligations from national courts to exercise new investigative enquiries?

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

The following national cases will then be discussed:

- *Supreme Court of Cassation of Italy, judgment of 10 April 2015, file No. 7333/2015*
- *Sofia City Administrative Court, case 5774/2015*
- *Supreme Court of Cassation, Italy, judgement of 13 December 2016, file No. 25534*
- *Tribunal of Torino, Judgment of 24 February 2017*

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

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

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

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

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

In the *Elgafaji* case, the CJEU provided guidance as regards the type of threat an applicant would need to have experienced in order to qualify for subsidiary protection. For instance, when interpreting Article 15(c) of the Qualification Directive regarding the conditions for receiving subsidiary protection, the CJEU concluded that the existence of a serious and individual threat should not be subordinated to the condition that "*the applicant adduces evidence that he or she is specifically targeted by reason of factors particular to his personal circumstances*." The CJEU established thus a presumption of individual threat when the degree of indiscriminate violence characterising the armed conflict reaches a high level:

> The existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict [...] reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.[14]

[14] Additionally, the CJEU ruled that "the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place […] reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive." (Case 465/07, *Elgafaji 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

The CJEU preliminary ruling did not though provide for a definition of the EU notion of 'internal armed conflict' mentioned by Article 15(c) QD. Therefore, divergent jurisprudence continued, with certain national courts continuing to endorse the more prohibitive definition of the international humanitarian law,[15] while other followed closely the CJEU indications in *Elgafaji*, which seemed not to include among the requirements the involvement of government forces. Lord Justice Sedley, of the **UK Court of Appeal,** held in *QD (Iraq)* that the EU's subsidiary protection regime pursues a different objective to that of international humanitarian law, legitimising "an autonomous meaning [of 'internal armed conflict'] broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed factions or by a state, which reaches the level described by the ECJ in Elgafaji" (para. 35)[16].

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

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

Continuing the line of horizontal judicial dialogue, the **Czech Supreme Administrative Court,** in a case concerning determination of subsidiary protection in a situation of internal armed conflict, referred to CJEU *Elgafaji* and the above-mentioned judgments of the **UK Court of Appeal** and **German Federal Administrative Court**[18].

Few months after the adoption of the *Recast Qualification Directive*, the **Conseil d'État of Belgium** addressed a preliminary reference to the CJEU concerning the interpretation of 'internal armed conflict' (*Diakité* C-285/12). The **CJEU** concluded that the notion of 'internal

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violence, there may be a real risk of ill-treatment (in the sense of Art. 3 ECHR) simply by virtue of exposing an individual to such violence. See *NA v. The United Kingdom,* ECHR (2008), Appl. No. 25904/07, para. 115.

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

[16] 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

[17] 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

[18] Supreme Administrative Court, March 13, 2009, no. 5 Azs 28 : 2008.

armed conflict' is an autonomous notion with a definition distinct than that given by international humanitarian law. The CJEU 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 international humanitarian law.

The Court underlined that:

- *first*, there is no need to qualify the agents in conflict.
- *secondly*, it is necessary only to establish whether the conflict can be characterized by a "degree of indiscriminate violence, so high" as to indicate on a solid level that the presence in the country or region in question, would subject the applicant to a real risk of being subject to threat of.
- *thirdly*, there is no need to carry out, "*in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict*".

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

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

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

Does the national court have an obligation to consider *ex officio* the risk emanating from the generalised situation of violence in the country of origin, even if not expressly invoked by the applicant? What does the duty of cooperation require from national courts in cases where the applicant for international protection did not establish a direct link between the presence of high levels of indiscriminate violence in his country of origin and his own particular situation and the threat he would face if returned there?

Italy, Court of Cassation, judgment of 10 April 2015, file No. 7333/2015[19]

Facts of the case

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

Reasoning of the Italian Court of Cassation

The main questions that had to be answered by the Supreme Court concerned the burden of proof and duty of cooperation of the national courts in regard to the establishment of subsidiary protection. In particular, whether the applicant was obliged to submit information regarding the general security situation in his country of origin or whether this information could or should 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 (see Article 4(1) Recast Qualification Directive), this does not entail an obligation to substantiate the specific grounds which make him eligible for protection; rather *it is the duty of the judicial authorities to make the assessment of the legal qualification for subsidiary protection, in particular taken into consideration whether this can be recognised under the individual or general risk of persecution*. In doing so the judicial authority is obliged to take into account "*all relevant facts as they relate to the country of origin at the time of taking a decision on the application*" (the Court cites Article 4(3)(a) of the Qualification Directive 2004/83. These relevant facts may in turn be used in assessing the credibility of the applicant. In order to establish the precise burden of proof and duty of cooperation of the national court, the Supreme Court cites the **Court of Justice** judgments of *Elgafaji*[20] and *Diakité*[21] for the purpose of establishing the standards of evidence, and the duty of cooperation of the national courts.

As regards the duty of cooperation incumbent upon the national courts, the Italian Supreme Court held that it is the duty of the judicial authorities to make the assessment of qualification

[19] Commentary drafted by Madalina Moraru with the help of Judge Martina Flamini
[20] Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* EU:C:2009:94.
[21] Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* EU:C:2014:39.

for subsidiary protection. In terms of the elements of evidence, the Court held that the judicial authority is obliged to take into account "*all relevant facts as they relate to the country of origin at the time of taking a decision on the application*". As to the standards of proof, the Supreme Court endorsed the sliding scale developed by the CJEU in *Elgafaji*: "*the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection*" and *vice versa*.

In applying these findings 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 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 under Article 15 (c) Recast Qualification Directive.

Instances of judicial dialogue and the added value of the Italian Supreme Court to the understanding of the duty of cooperation of national courts

The **Italian Supreme Court** reversed the judgement of the **Court of Appeal** because it did not take into account the interpretation of the Qualification Directive as provided by the CJEU in the cases *Elgafaji* and *Diakité*[22]. The Court cited the definition of the "general risk of harm" provided by the CJEU in the *Elgafaji* case:

> *the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive. (para. 35)*

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

> *the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection. (para.39)*

The case is a concrete example of how the CJEU development of the evidentiary rules set out by the Qualification Directive directly impacts on the jurisprudence from other Member States than the referring one. The Supreme Court imposed on national courts a duty to consider of their own motion the general situation in the country of origin and assess whether Article 15(c)

[22] The *Diakité* judgment is cited for the purpose of giving effect to the CJEU definition of an 'armed conflict'.

of the Qualification Directive, namely the generalised risk of harm, is applicable, even if not expressly invoked by the individual, on the basis of the Qualification Directive as interpreted by the CJEU in *Elgafaji* and *Diakité*.

The interpretation followed by the **Italian Supreme Court** and the CJEU has been confirmed by the ECtHR in *F.G. v. Sweden* where the Strasbourg Court states that "**in relation to asylum claims based on a well-known general risk, when information about such a risk is freely ascertainable from a wide number of sources, the obligations incumbent on the States under Articles 2 and 3 of the Convention in expulsion cases entail that the authorities carry out an assessment of that risk of their own motion** (see, for example, *Hirsi Jamaa and Others v. Italy* [GC], cited above, §§ 131-133, and *M.S.S. v. Belgium and Greece* [GC], cited above, § 366). By contrast, in relation to **asylum claims based on an individual risk**, it must be for the person seeking asylum to rely on and to substantiate such a risk".[23]

Although the **Italian Court of Cassation** cites only the CJEU judgments in *Elgafaji* and *Diakité* cases, it should be mentioned that the Italian Court judgment is in line also with the conclusions of the CJEU in *M.M. (1).* In this case, the Court of Justice set the obligation of the national authorities "*to ensure that precise and up-to-date information is obtained on the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited."* (para.67) This obligation has been codified in Article 10(3) and recital 39 of the Recast Asylum Procedure Directive. The added value of the judgment of the Italian Court of Cassation is that it does not only confirm an obligation of the national court to investigate the country of origin situation of its own motion, but to consider also *ex officio* a possible new ground for recognising international protection (in this case subsidiary protection), even if the applicant himself has not argued this.

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

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

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

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

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

Bulgaria, Sofia City Administrative Court, Yasinefta v. State Agency for Refugees, case 5774/2015 of SCAC[24]

Facts of the case

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

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

Reasoning of the Sofia City Administrative Court

Before the Court, the allegations of the State Refugee Agency were that the applicant did not substantiate his allegations that if he returns to Ukraine, he will be persecuted on grounds of his race, religion, nationality, belonging to a particular social group, or political opinion or conviction. The Court has considered the evidence gathered by the Agency, but it also gathered new evidence, from public sources of information on the situation in the country of origin of the asylum-seeker in light of Article 8 of Qualification Directive. The Court informed the parties that in taking its decision, it will use publicly available sources and most of all information about the countries of origin published on the website www.ecoi.net managed by the European Asylum Support Office.

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

The Court also looked at the report of Human Rights Watch on Ukraine, published in February 2015 as regards events occured between May and September 2014. Accordingly, hundreds of peaceful inhabitants of Donetsk and Lugansk areas have died as a result of the indiscriminate use of missiles, mortars, and artillery on both sides of the conflict. It was mentioned that these heavy weapons were also targeting densely populated civilian areas, which is contrary to the laws of war. Data on the use of the banned cluster munitions was present in the reports. In areas controlled by the rebels there was a serious breakdown of law and order. Authorities prosecuted and arrested without trial people suspected of being supportive of the power in Kiev. It was reporeted as frequent practice, the abduction of adults and children for ransom. The Ukrainian Special Forces and paramilitary formations in the two troubled areas also used widespread kidnappings, torture, and illegal detentions to achieve political or even commercial ends, as well as suspicion of sympathy for the two separatist areas. The Court took into account the fact that the Report mentioned that there is no guarantee that no person will suffer severe and personal threats unless he is in any way suspected of co-opting or supporting any of the warring parties. Since the beginning of the conflict, more than 450,000 people from troubled

[24] Case submitted by Dobroslav Rukov, Judge at the Sofia City Administrative Court.

regions have been forced to leave their homes and seek refuge in other parts of the country or in other countries, including Russia, Estonia, Latvia, and Lithuania.

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

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

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

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

The Court looked then at the requirements established by the CJEU. It held that the CJEU interpreted the requirements under Article 15(c) of Directive 2004/83 in C-465/07 (*Elgafaji*) and Case C-285/2012 (*Diakité*) as meaning that:

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

Considering the interpretation given by the CJEU of Article 15 (c) of Directive 2004/83, the **Sofia City Administrative Court** found that, in the present case, the situation in the applicant's country of origin even if it does not meet the definition of an 'internal armed conflict' set out in Article 3 of the Geneva Convention and the Second Additional Protocol of 1977, it does reach the level of indiscriminate violence as set by the CJEU:

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

Taking into account the above, the Court annulled the administrative negative decision insofar as it refused to grant subsidiary protection and returned the case for a new ruling on the application with an indication of granting such protection.

Instances of judicial dialogue

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

The national court summarised what are its duties as regards evidence assessment, clearly starting its judgment by underlining that it will not limit to the country of origin information provided by the administration, but that it will gather its own information which needs to reach certain standards: up to date at the point in time current to the assessment. Additionaly, the information extracted from the country of origin information needs to be checked in light of the standards set by the CJEU.

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

Question 2.a – Can the duty of cooperation require positive obligations from national courts to exercise new investigative enquiries?

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

Question 2.a – Can the duty of cooperation require positive obligations from national courts to exercise new investigative enquiries?

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

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

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

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

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

Facts of the case

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

Reasoning of the Court

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

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

The positive obligation to actively cooperate with the asylum claimant in assessing his application is grounded on EU law. Because of that, internal procedural law has to be consistently interpreted with it. The positive obligation on the judge to establish on its own motion measures of inquiry is also considered as a way to compensate the otherwise weak procedural position of the asylum seeker.

This decision is consistent with previous case-law of the **Court of Cassation.**[25]

Conclusion of the Court

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

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

It is relevant to mention that the **Italian Court of Cassation** has clarified that in cases where inconsistencies exist between the evidence provided by the applicant, and the information gathered by public authorities, the national court has to verify the country of origin information of its own motion, by securing relevant and up to date information. The conclusion is similar to the one reached by the **Sofia City Administrative Court in the above case**, which did an independent assessment of the country of origin. Similar also the **German jurisprudence**, and for the purpose of securing respect of the principle of equality of arms, the Court of Cassation requires in such cases, that the national court must indicate the sources of his information and their dating (see decision 3347/2015)[26].

Instances of judicial dialogue

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

[25] See Cassation Court (plenary sess.), decision n. 27310/2008; Cassation Court n. 8282, 4 April 2013.
[26] A similar apporach on the *ex officio* judicial powers exercised for the purpose of rights of defence has developed in the field of consumer protection; see the Re-Jus Casebook on consumer protection.

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

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

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

Facts of the case

A Nigerian woman applied for asylum in Italy. She refers to have been raised in the Delta Niger State, a Region where armed groups and gangs kidnapped oil workers and their relatives and they committed sexual violence on female population.

The applicant refers to be a victim of sexual abuses and that, in order to escape these ongoing violence, she moved to another village, still in the Delta Niger Region. Here, a woman offered to help and persuaded her to move into Libya. In Libya, she was forced to prostitution and "sold" to a Nigerian man. She was informed that her debt amounted to 10.000 US dollars. Finally, the applicant has been further sold to a Libyan national, after having previously been isolated and repeatedly abused, he had then been forced to embark for Italy. Once arrived, she presented a request for international protection.

The administrative body in charge with the assessment of the request rejected the application on the ground of lack of credibility: there were discrepancies with regard the Region the clamant effectively came from and the asserted sexual violence suffered in Nigeria, which were considered as not being credible.

In appeal, the judge reversed and granted subsidiary protection.

Reasoning of the Court

The administrative stage of the procedure focused almost entirely on the asserted violence suffered by the victim in Nigeria and on the discrepancies of the story. While recognising that the claimant story presented indeed some inconsistencies with regard to her stay in Nigeria, the Tribunal relied much more on the alleged trafficked condition of the applicant. By referring to the UNHCR guidelines concerning the risk of persecution for trafficked women, the tribunal did not grant refugee status. Although the repression of trafficking crimes in Nigeria is far from being effective, it cannot be concluded, according to the Tribunal, that it is completely absent. Thus, criminal gangs involved in trafficking in Nigeria were considered as not qualifying as a non-state agent for the purpose of the relevant refugee definition. However, with regard to subsidiary protection, the Tribunal considered that should the applicant be returned to Nigeria, she would probably face the risk of being re-trafficked, in consideration of her vulnerable position due to young age and lack of relatives, the Tribunal recognised subsidiary protection.

In conclusions, the Tribunal seems to have recognised international protection especially relying on the trafficked status of the victim, a ground the administrative authorities did not

assess during the administrative phase, although present in the applicant story. The Tribunal made extensive use of the UNHCR guidelines in order to recognise the subsidiary protection. The Guidelines could be considered as an autonomous use of "COI" by the judge in order to reinforce the 'personal reasons' with the precarious situation in the country of origin. Therefore, the lack of objective elements of proof connected regarding her personal condition (testimony) were overcome by the fact that the essential ground of the application - to live in a Region characterised for the risk of trafficking - are sustained and proved by the UNHCR Guidelines.

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

Relevant legal sources

EU level

Article 4 (2) of Directive 2011/957EU (possible items of evidence), which states that the elements of evidence consist of:

> the applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.

Article 4(3) of Directive 2011/957EU (possible items of evidence), which states that:

> The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:
> a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;
> b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;
> c) the individual position and personal circumstances of the applicant, including factors such as background, gender, and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;
> d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess

whether those activities would expose the applicant to persecution or serious harm if returned to that country;

e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship.

Other sources

According to the **International Association of Refugee Law Judges**[27] the types of evidence that can be taken into account in the risk assessment are the following:

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

Overview of the relevant CJEU case law

CJEU in *Y and Z*: "*in accordance with Article 4(3) of the Directive, the competent authorities carry out an assessment of an application for international protection on an individual basis, they are required to take account of all the acts to which the applicant has been, or risks being, exposed, in order to determine whether, in the light of the applicant's personal circumstances, those acts may be regarded as constituting persecution within the meaning of Article 9(1) of the Directive*." (para. 68)

CJEU in *Y and Z* on the extent of the required risk of persecution: the possibility of avoiding persecution by hiding or avoiding the public practice of religious belief cannot be taken into consideration within the assessment of the risk of persecution.

CJEU: prohibited evidence and methods of collecting evidence (*A, B, C* case[28]):

- Asylum applicants may not be questioned on the details of their sex lives, nor can evidence, including videos, pictures of sex acts be accepted.
- Failure to reveal sexual orientation early in an application for asylum is not necessarily fatal to credibility of an applicant.
- Failure to mention LGBT related organisation cannot constitute the sole ground for rejecting the credibility of an asylum seeker requesting international protection on the basis of persecution n grounds of sexual orientation.
- Administrative authorities must provide details regarding the form of questions posed to ensure that respect for private life and human dignity is maintained.[29]

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[27] See IARLJ Assessment of Credibility in Refugee and Subsidiary Protection Claims under the EU Qualification Directive: Judicial Criteria and Standards, prepared by J. Barnes and A. Mackey, 2013. A forthcoming chapter in the EASO Professional Development Series will deal in detail with Evidence Assessment and Credibility.
[28] C -148/13 to C-150/13, ECLI:EU:C:2014:2406.
[29] Council of States, Netherlands, 201208550/1/V2, 201110141/1/V2, 201210441/1/V2, see more details in the *ACTIONES Module on the Judicial Application of the EU Charter in asylum and immigration*.

Overview of the ECtHR case law

According to an established body of jurisprudence, evidence of past ill treatment can be an indication of a future risk of ill treatment.[30] They can be dispelled only if the situation in the country of origin has changed in the meantime, confirmed by information on country of origin.[31] More details will be provided in the following sub-section on the standard of proof.

Main questions addressed

The case of the **Slovenian Constitutional Court, discussed below**, offers an example of how limitations or restrictions of elements of evidence in cases of renewal of subsidiary protection case are not compatible with the principles of *non-refoulement* and effectiveness. The conclusions and reasoning developed by the Constitutional Court in regard to the constitutionality of the national legislation can be extended by analogy also to evidentiary limitations or restrictions in other fields. The main conclusion reached by the Constitutional Court is that although evidentiary asylum law falls under the procedural autonomy of the Member States, the latter cannot derogate from absolute fundamental rights. Therefore, national legislation that does not allow the applicant to invoke new circumstances which occurred after the decision that granted him or her subsidiary protection, for the purpose of renewing his/her subsidiary protection, is contrary to the principle of effectiveness of the non-refoulement principle enshrined in Article 19 EU Charter and Article 3 ECHR. Although the Slovenian Constitution does not include an express principle of non-refoulement, the provision prohibiting ill treatments, Article 18 of the Slovenian Constitution, was interpreted in light of these European primary legal sources.

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

Are procedural rules limiting the grounds for renewal of subsidiary protection compatible with fundamental rights and the principle of effectiveness of EU rights? In the process of the renewal of subsidiary protection the applicant was unable to state any new relevant circumstances which occurred after the first decision that granted him subsidiary protection.

Slovenia, Constitutional Court, Cases U-I-189/14, Up-663/14[32]

[30] See A.A. v Switzerland; R.C. v Sweden; R.I. v France.
[31] D.N.W. v Sweden.
[32] Case can be found online in the ACTIONES Database.

Facts of the case:

The applicant was granted the status of subsidiary protection in Slovenia on the basis of the second and third indent of Article 28 of the International Protection Act of Slovenia, which includes torture or other inhuman or degrading treatment or punishment in the state of origin and serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict as grounds for granting asylum. 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 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 persistent judicial 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 is a real risk of ill treatments in case of return the person.

Reasoning of the Court:

The **Constitutional Court** assessed whether the Article 106 of the International Protection Act which governs procedural aspects of the request for the renewal of subsidiary protection, 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 EU 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.

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.

Conclusion and outcome of the Court judgment

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. 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.

Instances of 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.

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

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

By ‘standard of proof’ we refer to the level of evidence needed to ‘convince’ that a fact presented by the applicant can be accepted by a Member State. In short, the threshold necessary to be reached by an applicant in order to be found credible. As already anticipated, specific rules govern the standard of proof required in asylum adjudication compared to administrative, civil, or criminal proceedings. The standards are usually more lenient due to irreversible and

negative consequences that a rejection of asylum application would entail on the life of the applicant.

Relevant legal sources

Article 4(5) of the Recast Qualification Directive.

> Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met:(a) the applicant has made a genuine effort to substantiate his application;(b) all relevant elements at the applicant's disposal have been submitted, and a satisfactory explanation has been given regarding any lack of other relevant elements; (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case; (d)the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and(e) the general credibility of the applicant has been established.

This provision provides for an alleviation of the duty to present evidence in favour of the applicant when his procedural conduct makes his claim credible.

Overview of EU law and CJEU jurisprudence

There is no complete EU harmonisation of standards of proof, therefore Member States are, in principle, free to set their own standards. This has lead in practice to a variety of standards applied in the different Member States, depending on the different legal traditions of the countries.

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

Article 4 provides for an alleviation of evidentiary standards in two circumstances. First in cases of past persecution (Article 4(4))[33] and secondly, in cases of lacking evidence (Article 4(5)). According to the first part of Article 4(4) Recast QD, past persecution *or serious harm, or past direct threats of such persecution or such harm, is considered to create a presumption of a serious indication of a future risk of persecution or real risk of suffering serious harm.*

[33] Article 4(4) Recast QD reads as follows: "*The fact that an applicant has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated*."

This presumption of future risk of persecution can be rebutted if "*there are good reasons to consider that such persecution or serious harm will not be repeated*." The CJEU has not yet interpreted the meaning of "good reasons", however relevant guidelines can be found in the jurisprudence of the ECtHR, which is discussed below.

Important guidelines have been developed also in the jurisprudence of the CJEU. For instance, AG Sharpston pointed out that the Member States "*are prohibited from laying down unrealistic standards for the evidence required, as this may undermine the effectiveness of EU rights*", such as the EU right to asylum and the prohibition of *non-refoulement*. (Opinion of AG Sharpston in *Bolbol*, point 95)[34] The Opinion of AG Sharpston has been confirmed by the ECtHR, which in *M.S.S and others v Belgium and Greece* held that the Aliens Appeal Board violated Article 3 ECHR by requiring the applicants to produce "*concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3 ECHR*." Accordingly, the Board increased the burden of proof to such an extent as to hinder the examination of the merits of the alleged risk of a violation. (para. 389) The requirement is that the risk of torture is foreseeable, real, and personal, but the risk does not need to be highly probable.[35] The level of proof required in asylum adjudication is not the normal civil or criminal standard of proof (civil balance of probabilities or the criminal "beyond doubt" level, where the decision-maker needs to be convinced to a very high degree before passing a sentencing judgment), but that of the *reasonable degree of likelihood of the possible future risk*.[36]

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

1. Interpretation of the notion of 'strong indication' provided by Article 4(4) Recast QD: *J.K. v Sweden*
   The case involved Iraqi nationals who were subject of a deportation order after their request for asylum in Sweden was rejected. This request was based on their fear of being persecuted by Al-Qaeda if they returned to Iraq, as a result of previous commercial relations of one of the applicants with the American forces. The Court held that the security situation in Iraq was not such that it would create a general need for international protection of asylum seekers, however their personal situation and the diminished capacity of the Iraqi authorities to protect them should be considered as constituting a genuine risk of ill treatments should they be returned.
   The Court found a strong indication the applicants would continue to be at risk in Iraq based on the past persecution on the basis of their coherent, credible account which was

[34] See also, the CJEU in *Pontin*, "*this means that whilst Member States retain the right to lay down, under national law, the applicable rules of evidence, those rules must not make it impossible or virtually impossible for an applicant to claim rights guaranteed by EU law*" (Case C-63/08 *Pontin*, para. 43)
[35] See also, M. Reneman, *EU Asylum Procedures and the Right to an Effective Remedy*, OUP, 2014, p.189.
[36] UNHCR, Note on Burden and Standard of Proof in Refugee Claims; B. Gorlick, Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status, (2003) 15 *International Journal of Refugee Law* 357, S. Norman, Assessing the Credibility of Refugee Applicant: A Judicial Perspective, (2007) 19 *International Journal of Refugee Law* 279.

compatible with the information taken from reliable and objective sources on the situation of the country (Iraq).
Regarding the protection capacity of the Iraqi authorities, the ECtHR emphasised that although the current level of protection provided was perhaps sufficient for the general population of Iraq, it was not the same for persons belonging to a target group such as those like the applicants, who had collaborated with the American forces. The ECtHR developed its approach that past ill treatment is a strong indication of future risk of ill treatment on the basis of several legal instruments, citing also Article 4(4) Qualification Directive as proof that his position under Article 3 ECHR is correct.
Thus, the ECtHR ruled that the deportation order, if implemented, would lead to a violation of Article 3 of the ECHR.

2. Standards regarding the benefit of the doubt and credibility:
The ECtHR acknowledges in *R.C. v Sweden* that, "*owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof. However, when information is presented which gives strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies*." (para. 50)[37] Many asylum applicants arrive in the EU Member States without documents or evidence that could support their asylum account.[38]
In the Court's view, the Migration Board ought to have directed that an expert opinion be obtained as to the probable cause of the applicant's scars in circumstances where he had made out a *prima facie* case as to their origin. It did not do so and neither did the appellate courts. While the burden of proof, in principle, rests on the applicant, the Court disagrees with the Government's view that it was incumbent upon him to produce such expert opinion. In cases such as the present one, the State has a duty to ascertain all relevant facts, particularly in circumstances where there is a strong indication that an applicant's injuries may have been caused by torture." (para.53)
As regards credibility assessment, the ECtHR requires the claimant's evidence to have 'general credibility' but this does not imply the need for complete accuracy and consistency because: "The Court acknowledges that complete accuracy as to dates and events cannot be expected in all circumstances from a person seeking asylum." (Bello v Sweden, App. No. 32213/04)
In *A.A v Switzerland*[39] the ECtHR had to establish whether the applicant was a genuine case or had constructed it in order to create a post-flight grounds. In this case, the applicant claimed persecution on grounds of political opinion, as a Sudanese regime

[37] This is settled case law of the ECtHR which has been repeated in most asylum and immigration cases involving an issue of credibility assessment. See, among other authorities, A.J. v Sweden, Collins and Akasiebie v. Sweden, 23944/05, 8 March 2007, and Matsiukhina and Matsiukhin v. Sweden (dec.), no. 31260/04, 21 June 2005), N. v. Finland, no. 38885/02, § 167, 26 July 2005).
[38] See the Report of the European Migration Network, Establishing Identity for International Protection: Challenges and Practices.
[39] See also A.A. v France.

opponent active in Switzerland.[40] The ECtHR held that whether the applicant was a political activist prior to fleeing his home country or he played an active role in making his asylum case known to the public in the respondent State so as to create a post flight ground, the Court ruled that "*not only leaders and high-profile people, but also those merely suspected of supporting opposition movements are at risk of treatment contrary to Article 3 of the Convention in Sudan*". The applicant's representation of SLM-Unity at the UN meetings in Geneva meant that he "*might, at least, be suspected of being affiliated with an opposition movement by the Sudanese government*". The Court therefore found substantial grounds for believing that the applicant would be at risk of detention, interrogation and torture contrary to Article 3 ECHR if returned to Sudan. As to the applicant's related complaint that his asylum claims were not afforded sufficiently close and rigorous scrutiny as required by Article 13 ECHR, these were dismissed by the Court, which accepted that the Swiss authorities were right to be critical of the applicant's credibility.

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

The ECtHR has had the opportunity to interpret the meaning of 'good reasons' to consider that such persecution or serious harm will not be repeated. For instance, circumstances such as: conditions in the country of origin which have changed significantly;[41] the abuses were applied by individuals and were not endorsed by the authorities;[42] the applicant has stayed in the country of origin without problems after the ill treatments;[43] the persecution or torture occurred a long time ago.[44]

Main questions addressed

[40] The Applicant is a Sudanese national and had been the human rights officer of the anti-government group Sudan Liberation Movement-Unity (SLM-Unity), based in Switzerland, since 2009.. He claimed to the Swiss refugee authority that he fled his home village in North Darfur, Sudan, when it was attacked by Janjaweed, a government-backed militia that operates in Darfur and is in conflict with Darfur rebel groups. He alleged that his father and other villagers were killed and he was mistreated, prompting him to flee without papers via boat to Calais and then Geneva. He applied twice for international protection in Swtizerland, but both of his asylum applications were rejected due to credibility problems. Regarding the first, the Swiss authorities relied on an expert assessment of his language and cultural knowledge to reject his claim to be from Darfur, alongside inconsistencies in the Applicant's account of his travel itinerary, his region and his relatives' whereabouts.
In his second asylum request, the applicant claimed a new risk based on his political activism with SLM-Unity and fresh evidence of North Darfuri origins obtained from the birth register in Sudan. As regards political activities carried out in Swtizerland - including an interview with a Swiss local TV channel – these were rejected as a non-genuine attempt to create 'post-flight grounds' against removal, and as insufficiently high-profile to attract the attention of the Sudanese government. The Applicant appealed, submitting that his political activities, including an argument with the Sudanese President's brother during an international meeting at the UN building in Geneva, must be known by the Sudanese authorities. His appeal was rejected for the same reasons as before, and his birth certificate was deemed valueless as evidence in part due to the likelihood of forgery.
He claimed before the ECtHR that return to Sudan would violate his rights under Article 3 ECHR, and that the appeal process against his return in Switzerland had violated his right to an effective remedy under Article 13 together with 3 ECHR.

[41] Salah Sheekh.

[42] Hakizimana v Sweden.

[43] DNW v Sweden.

[44] RK v Sweden.

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

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

Question 2 *How are national courts implementing the requirements of Article 7 EU Charter, CJEU jurisprudence, and Article 4 Qualification Directive on standards of proof and benefit of doubt in cases of persecution on grounds of homosexual orientation?*

Since the opinion of the administrative authority regarding danger to the national security was not presented to the applicant and therefore he was not able to comment on it, the Court found that the right to an effective remedy was breached. Annulment of the administrative decision and referral of the case back to the administrative body.

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

The following national cases will then be discussed:

- *Hungary, Pécs Court of Public Administration and Labour, 25.01.2017*
- *Tribunal of Catanzaro, Italy, judgement of 7 December 2015*

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

The standards of proof in cases of persecution on grounds of political opinion:

- What is the level of violation of the right to fair trial necessary to reach the level of persecution?
- What are the applicant's rights to be informed of evidence; and what is the extent of judicial powers as regards evidentiary assessment?

Hungary, Pécs Court of Public Administration and Labour, 25.01.2017[45]

Relevant national legal sources

Fundamental Law of Hungary, Article XIV Section 3, Article XXVIII Section (7): Everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests.; the Act LXXX of 2007 on Asylum (Met.) 6.§ (1), 12.§ (1) , 15.§ point b), 45.§ (1), 58.§ (1)-(2), 61.§.

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

Facts of the case

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

[45] Case submmited by Gruša Matevžič, lawyer at the Hungarian Helsinki Committee, and active lawyer in Slovenia. The summary of the case had been prepared for European Database of Asylum Law (EDAL, www.asylumlawdatabase.org) within the project "Legal exchange and mutual learning between asylum practitioners to promote fundamental rights in the EU" coordinated by the European Council on Refugees and Exiles (ECRE) in partnership with the Helsinki Foundation for Human Rights with financial support from the Fundamental Rights and Citizenship Programme of the European Union.

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

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

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

Reasoning of the Court

This particular judgment is relevant for three main issues regarding limitations and problems in securing effective justice in asylum adjudication:

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

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

The Court further noted that when assessing persecution for political opinion, it is not correct to reject a claim based on the presumption that a sentence issued against the applicant would not be serious enough to be considered persecution. The fact that proceedings were initiated against somebody for his political opinion is, in itself, already persecution.

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

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

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

The Court noted that the above-listed errors were so serious in themselves that the decision should have been quashed. Commenting on the request of the Applicant's legal representative, the Court noted that under the Asylum Act, it had no power to change the decision but only to quash it – even though the procedure started before the Asylum Act was amended this way.

The Court concluded on the merits by noting that it is obvious that the applicant's fear of persecution is well-founded and that this is reinforced by the country of origin information as well. The Court also noted that the applicant cannot be deprived of international protection.

Conclusion and outcome of the Court judgment

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

As to the level of violation of the right to fair trial for the purpose of finding a persecution, the Court found that since proceedings were initiated against the applicant for his political opinion, then this is, in itself, already persecution. The Court looked also at the cases of other Russian opposition politicians (such as the murder of Boris Nemtsov), to assess the likelihood of persecution. In addition, COI were also assessed as regards the situation of political opponents in Russia.

When arguing against the well-foundedness of the fear from persecution, the IAO has to be absolutely certain that no harm will come to the Applicant in case of his return.

Since the opinion of the CPO was not presented to the applicant and therefore he was not able to comment on it, the Court found that the right to an effective remedy was breached. Annulment of the administrative decision and referral of the case back to the administrative body followed.

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

Question 2 – How are national courts implementing the requirements of Article 7 CFR, the CJEU jurisprudence, and Article 4 Qualification Directive on standards of proof and benefit of doubt in cases regarding international protection on the basis of persecution for homosexual orientation?

What is the impact of the EU duty of cooperation? Can new elements of evidence be suggested by the national court to the asylum seeker for the purpose of proving the credibility of his claim of persecution based on homosexual orientation. National judgment directly applying the CJEU judgments on benefit of the doubt and evidentiary rules in homosexual claims (*A. B. C* and *X.Y. Z*) and Article 4(5) QD.

Tribunal of Catanzaro, Italy, judgement of 7 December 2015

Facts of the case

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

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

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

Reasoning of the Tribunal

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

The judge considered genuine the effort of the claimant to substantiate his application: the applicant presented twice before the Court in order to actively collaborate with the judge for substantiating the application.

According to the judge, the applicant's statements were also consistent with available general information from the country of origin. The judge reported that in Ghana having a homosexual relation is a criminal offence. He also made reference to the 2014 *US State Department Country Report on Human Rights Practices*, according to which in Ghana homosexuals are exposed to discrimination and even physical assaults, while the police avoids conducting any effective inquiry into such behaviours.

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

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

Conclusion of the Tribunal

The decision has substantially departed from the dispositive principle according to which the judge is bound to the evidentiary elements offered by the parties since he has indicated the applicant how to produce relevant elements for assessing his credibility concerning homosexuality. He also has admitted the allegation of the relevant documentation (i.e. the statements of the LGBT association) beyond the procedural time limits usually applied in relation to the allegation of probative facts.

Instances of judicial dialogue

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

In relation to the specific situation of individuals claiming a particular sexual orientation, the CJEU 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.

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

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

Guidelines for judges emerging from the analysis

On the burden of proof

- The burden of proof is the starting point of the asylum procedure. As the appellant is the initiator, the Member States have usually placed the formal burden of proof on the applicant, although Article 4(1) of the Recast QD makes it facultative.
- The standards of proof in asylum adjudication are specific and should apply with priority, *lex specialis*, within general procedural rules. These vary depending on whether civil or administrative procedure applies.
- Asylum evidentiary procedures are *lex specialis*.
- It is the fundamental nature of the right to asylum (Article 18 EU Charter), principle of non-refoulement (Article 19 EU Charter) and effectiveness of EU law, together with Article 4 Recast QD that have softened the burden of proof in international protection proceedings. It can be noticed that in Member States where also the constitutional traditions recognise the fundamental nature of the right to asylum, rather than being a mere service, these Member States usually adopt a more softened burden of proof (see, e.g. Germany and Italy).
- According to the settled case law of the CJEU (*Steffensen*[46] and Boiron[47]), evidentiary rules fall under the principle of effectiveness of EU law. Where the national court finds that the evidentiary requirement renders it impossible or excessively difficult to the individual to exercise a right granted by the EU (in this case the right to access international protection), then it must declare the evidentiary related rule incompatible with the principle of effectiveness of EU law.

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

Burden of proof in Civil proceedings	Burden of proof in Criminal proceedings	Burden of proof in Administrative proceedings
Dispositive principle	presumption of innocence	deferential

Impact of EU secondary law: Art. 4

Shared burden of proof between the applicant and the national authorities

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

FIRST STEP: it is generally for the applicant to submit all elements needed to substantiate the application" (para. 65). THEN the burden shifts to the public authorities.

[46] C-276/01, ECLI:EU:C:2003:228.
[47] C-526/04, ECLI:EU:C:2006:528.

Impact of ECtHR and CJEU

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

EFFECTIVENESS: "*the burden of proof should not render ineffective the applicants' rights protected under Article 3 of the Convention. It is also important to take into account all the difficulties which an asylum-seeker may encounter abroad when collecting evidence (see Bahaddar, cited above § 45, and, mutatis mutandis, Said, cited above, para. 49)*" (J.K. v Sweden, para. 97) *SHIFT OF BURDEN*: burden of proof shifted from the applicant to the **Migration Court** to dispel doubts about the cause of injuries after the applicant produced a medical certificate although not prepared by an expert in assessment of torture injuries "the onus rest[ed] with the State to dispel any doubts about the risk of being subjected again to treatment contrary to Article 3 in the event that his expulsion proceeded." (para. 55) The REMEDY for cumbersome national rules on burden of proof which render ineffective the applicant's rights under Article 3 ECHR should be disapplication (*J.K. v Sweden*) leading to the shift of the burden of proof from the applicant to the courts or national authorities (*R.C. v Sweden*)

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

On the duty of cooperation

- The EU principle of effectiveness of the EU right to asylum and the principle of non-refoulement requires national authorities to disapply national procedural limitations of judicial investigative powers, and allow them to consider *ex officio* complete, up to date or relevant evidence, in particular country of origin information. (***M.M. (1),*** para. 66);
- The duty of cooperation requires the national authorities to assess all information brought to their attention, even if the applicant does not wish to rely on certain evidence (*in casu*, conversion from Islam to Christianity in Sweden). The ECtHR clarifies thus that Article 40(2) and recital 36, although permitting discretionary powers to the Member States to dismiss as inadmissible subsequent asylum application which are not based on new evidence, they cannot establish evidentiary procedural rules which would lead to violation of the principle of non-refoulement which is an absolute fundamental right (F.G. v Sweden)
- Irrespective of whether a generalised risk or individual risk of ill treatments is found in the country of origin of the applicant, a national court has to consider ex officio both of the risks even if not expressly invoked by the applicant (*F.G. v Sweden,*[48] *Elgafaji*, and *Diakité)*

[48] ***The ECtHR*** clarified that the duty of cooperation requires the national authorities to assess all information brought to their attention, even if the applicant does not wish to rely on certain evidence (*in casu*, conversion from

- The CJEU underlined in *Diakité* that:
  - *first*, there is no need to qualify the agents in conflict;
  - *secondly*, it is necessary only to establish whether the conflict can be characterized by a "degree of indiscriminate violence, so high" as to indicate on a solid level that the presence 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."
- The *Elgafaji* and *Diakité* preliminary rulings are thus requiring a relaxation (alleviation) of the burden of proof and standards of proof and therefore a neutralisation of excessive obstacles towards ensuring effective justice. They also establish concrete standards on the duty of cooperation of public authorities. Notably, an expansion of the duty of cooperation since more risks need to be assessed by the judge *ex officio*.
- On the basis of the duty of cooperation, CJEU and ECtHR jurisprudence, the **Italian Supreme Court** imposed on national courts a duty to consider of their own motion the general situation in the country of origin and assess whether Article 15(c) of the Qualification Directive, namely the generalised risk of harm, is applicable, even if not expressly invoked by the individual. The duty to cooperate implies for the judge to admit measures of inquiry on his own motion and to verify the credibility of the asylum seeker application having regard to updated country of origin information, which the adjudicating judge must assess on his own.

On the elements of evidence

- **A list of relevant elements of evidence in support of the asylum application can be found in Article 4(2) of the Recast QD.[49] As regards assessment of the evidence, principles are to be found in Article 4(3): individual assessment, and the factors to be taken into account. Article 10(3) Recast APD contains further principles that should guide evidence assessment:** an individual, objective and impartial examination and decision. **Article 10(3)(b)** requires that precise and up-to-date country of origin information should be taken into account for the examination of the application. While **Article 10(3)(d) mentioned** the possibility of seeking expert advice whenever necessary.
- CJEU in *Y and Z*: "*in accordance with Article 4(3) of the Directive, the competent authorities carry out an assessment of an application for international protection on an individual basis, they are required to take account of all the acts to which the applicant has been, or risks being, exposed, in order to determine whether, in the light of the applicant's personal circumstances, those acts may be regarded as constituting persecution within the meaning of Article 9(1) of the Directive*." (para. 68)

Islam to Christianity in Sweden). The ECtHR has recently assessed the legitimacy of national evidentiary procedural limitations which at first sight are adequately transposing provisions from the Asylum Procedure Directive in light of requirements under Article 3 ECHR.

[49] It consists of the applicant's statements and all the documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection

- CJEU in *Y and Z* on the extent of the required risk of persecution: the possibility of avoiding persecution by hiding or avoiding the public practice of religious belief cannot be taken into consideration within the assessment of the risk of persecution.

CJEU: prohibited evidence and methods of collecting evidence (*A, B, C* case[50]):

- Asylum applicants may not be questioned on the details of their sex lives, nor can evidence, including videos, pictures of sex acts be accepted.
- Failure to reveal sexual orientation early in an application for asylum is not necessarily fatal to credibility of an applicant.
- Failure to mention LGBT related organisation cannot constitute the sole ground for rejecting the credibility of an asylum seeker requesting international protection on the basis of persecution on grounds of sexual orientation.
- Administrative authorities must provide details regarding the form of questions posed to ensure that respect for private life and human dignity is maintained.[51]
- The Court held 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 to the extent that limiting procedural norms should be disapplied.

On the standard of proof and the benefit of the doubt

- In principle, Member States are free to set their own standards of proof. However, "they are prohibited from laying down unrealistic standards for the evidence required, as this may undermine the effectiveness of EU rights", such as the EU right to asylum and the prohibition of *non-refoulement*. (Opinion of AG Sharpston in *Bolbol*, point 95)[52] The Opinion of AG Sharpston has been confirmed by the ECtHR, which in *M.S.S and others v Belgium and Greece* held that the Aliens Appeal Board violated Article 3 ECHR by requiring the applicants to produce "*concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3 ECHR*."
- Post-flight activities *in loci* can also lead to the risk of ill-treatment. (A.A. v Switzerland)
- Article 4(5) Recast Qualification Directive, which provides for an alleviation of the asylum seeker's *onus probandi* (A.B.C.) According to this provision, where aspects of the applicant's statements are not supported by documentary or other evidences, those aspects shall not need confirmation where conditions listed in subsequent letters from a) to e) are cumulatively met
- n asylum cases, the standards of proof are specific, *lex specialis* and should apply with priority, as they are set out in Article 4 QD and the jurisprudence of the CJEU and ECtHR. In addition, another specificity is the role of the national judges in evidentiary assessment. In these case, the judge has a positive duty to collaborate in the assessment of the facts, which also implies concrete fact-finding tasks.

[50] C -148/13 to C-150/13, ECLI:EU:C:2014:2406.
[51] Council of States, Netherlands, 201208550/1/V2, 201110141/1/V2, 201210441/1/V2, see more details in the *ACTIONES Module on the Judicial Application of the EU Charter in asylum and immigration*.
[52] See also, the CJEU in *Pontin*, "this means that whilst Member States retain the right to lay down, under national law, the applicable rules of evidence, those rules must not make it impossible or virtually impossible for an applicant to claim rights guaranteed by EU law" (Case C-63/08 *Pontin*, para. 43)

- Tribunal of Catanzaro shows an interesting approach on standards of proof and benefit of doubt in asylum applications based on persecution on sexual orientation. The approach of the Tribunal was to suggest the claimant to actively attend the activities of an LGBT organisation and to postpone its decision on the substance for several weeks after re-hearing the applicant. The positive reaction of the applicant and of the report of the organisation have determined the Court to find Article 4(5)(b) conditions applicable and thus the applicant worthy of the benefit of the doubt. The Tribunal observed that the duty of cooperation in this case was bilateral, acknowledging the willingness of the applicant to answer to questions and proposals. The Court made direct application of the CJEU preliminary ruling in *X, Y, Z* (paras. 58-60) that: "*In undertaking that assessment it is, in particular, for those authorities to determine whether, in the applicant's country of origin, the term of imprisonment provided for by such legislation is applied in practice. It is in the light of that information that the national authorities must decide whether it must be held that in fact the applicant has a well-founded fear of being persecuted on return to his country of origin within the meaning of Article 2(c) of the Directive, read together with Article 9(3) thereof*."

On judicial dialogue: conclusions resulting from the case law herein discussed

Various instances of judicial dialogue are present in the cases herein discussed.

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

   The outcome of the judicial dialogue is disapplication of domestic procedural rules for the benefit of more lenient evidentiary requirements, and extension of the positive obligation of national courts in terms of fact finding and evidence assessment under the impact of the EU duty of cooperation. For instance, the **Italian Court of Cassation** established a judicial duty of probative inquiry, which would require contacting diplomatic channels or event international rogatories for the purpose of clarifying the authenticity of documents and statements. The case law of the **Italian Court of Cassation** and of the **Sofia City Administrative Court** reflect the impact of the CJEU in *Elgafaji and Diakité* on national jurisprudence, which, by changing the jurisprudence of the supreme court, it also spills over the jurisprudence of national courts.
   The **Slovenian 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.

In order to comply with the requirements of *A.B.C.* and Article 4 of the Recast Qualification Directive, the Italian Court considered new elements of evidence to assess the credibility of asylum seekers.

2. *Disapplication*

The Constitutional Court of Slovenia 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.

Judicial Training Project

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

RE-JUS CASEBOOK

EFFECTIVE JUSTICE IN ASYLUM AND IMMIGRATION

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[*note: list to be updated in the final version, please notify us any corrections or integrations*]

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1. The right to be heard

This chapter aims to clarify the codified and jurisprudentially developed standards on the legal nature, content, and remedies of the right to be heard in both international protection and return proceedings. This section will also give examples of how the relevant CJEU preliminary rulings have been applied by national courts from both the referring Member State and other Member States. This analysis of the impact of the CJEU preliminary rulings can help national judges to decide when is necessary to use the technique of the preliminary ruling, and what adaptations are required at the national level in light of the jurisprudentially developed standards on the right to be heard in asylum and return proceedings.

In addition, the relevant jurisprudence of the ECtHR will be provided, since national courts are equally bound to apply both the EU and ECHR standards of fundamental rights.

The chapter is structured in four main sub-sections:

2.1 *The Right to be Heard during the Administrative Phase of International Protection Proceedings* (discussion of the requirements and impact of principle of good administration on national procedures (equivalent of Article 41 CFR))*;*

2.2 *The Right to be Heard in an Oral Hearing before a Court in international protection proceedings* (discussion of requirements and impact of Article 47 CFR – right to a fair trial and effective legal remedy on national procedures)*;*

2.3. *The Right to be Heard in Return Proceedings (discussion of requirements and impact of the right to be heard and right to an effective legal remedy in return proceedings)*;

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

This division was determined by the specificity of EU primary and secondary legislative provisions and relevant CJEU jurisprudence governing these three procedures (administrative phase during international protection proceedings; judicial phase during international protection proceedings; and return proceedings).

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

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

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

Although EU asylum and immigration laws set out several specific standards, problems of interpretation and application of the right to be heard have appeared particularly in national jurisdictions that allow for combined decisions to be taken (e.g. return decision taken at the same time with rejection of a renewal of residence permit or asylum application; or other negative decisions that are combined in one step procedure). In this one step administrative procedures, the individual has been heard only once in the first administrative proceedings, and not also before his return or removal order (e.g. **France, Belgium**). Problems have also occurred in **Ireland** where subsidiary protection was regulated as a separate administrative procedure following the asylum application, and no hearing was possible if the individual was already heard within the asylum proceedings.

Recent problems concern the necessity of hearing the asylum seeker by the national courts. It should be mentioned that while in certain national jurisdictions judicial hearing plays a major role in appellate proceedings (**Italy**, hearing is perceived as the norm), in other jurisdictions, hearing before a court plays a minor role, being perceived as the exception (e.g. **Finland**). Differences exists among the Member States also as regards the powers of hearing by the national courts. While under the national procedural law, certain jurisdictions leave considerable freedom of decision to the national court (e.g**. Italy** and **France**), in other Member States, the hearing powers of the national courts were limited (e.g. **Belgium**). This Chapter will show the impact of the CJEU jurisprudence on the hearing powers of national courts, which in light of the right to be heard as part of the general principle of rights of defence have led to extended judicial hearing powers (e.g. **Belgium**, especially within return proceedings.)

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

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

Main question addressed

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

This cluster addresses the content of the right to be heard during the administrative phase of international protection proceedings, as conceptualised by the CJEU in the two preliminary rulings addressed by Irish Courts: *M.M. (1)* and *M.M. (2)*. In particular, the analysis will discuss whether cross examination of witnesses, full access and comments to the administrative

authorities' arguments are part of the material content of the right to be heard in asylum proceedings.

Short overview of relevant EU secondary norms

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

Here is the list of guarantees of the right to be heard during first instance proceedings under the Recast APD:

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

Short overview of the relevant CJEU jurisprudence

In addition to these detailed EU secondary asylum provisions ensuring respect of the right to be heard during the administrative phase of international protection proceedings, the CJEU has recently had the opportunity to clarify whether the right to be heard which has initially developed in case law concerning competition and state aid, and smart sanctions, applies to asylum proceedings, under which legal basis and its material content.

In *M.M. (1),* the CJEU held that "*the right to be heard of the applicant for asylum must apply fully to the procedure in which the competent national authority examines an application for international protection pursuant to rules adopted*" (para. 89).

The right to be heard has been developed in the jurisprudence of the Court of Justice and General Court already since the 80s as part of the rights of defence.[1] The legal framework of this case law concerned competition law, in particular state aid[2] and administrative sanctions adopted by the then European Community against individuals, such as sanctions in competition law[3], and later on, sanctions adopted by the EU against persons suspected of terrorism.[4] In *OMPI (I)* the General Court defined the right to be heard within the context of financial sanctions adopted by the Council against individuals as including two guarantees[5]:

> *the safeguarding of the right to be heard comprises, in principle, two main parts.*
>
> ***First**, the party concerned must be informed of the evidence adduced against it to justify the proposed sanction ('notification of the evidence adduced').*
>
> ***Second,** he must be afforded the opportunity effectively to make known his view on that evidence ('hearing').*

By the time Article 41 of the EU Charter was elaborated, the right to be heard was already consecrated in EU law as a fundamental standard in administrative procedures, and part of the general principle of EU law of the rights of defence, whose observance is obligatory, even in the absence of express legislation.[6] Article 41(2) of the EU Charter states that "every person has the right to be heard before any individual measure which would affect him or her adversely is taken". Therefore, the application of the Charter provision is detached from a particular procedure, administrative, civil, etc...

It was only in 2012, in *M.M. (1)* (C-277/11[7]), that the Court of Justice had the occasion of addressing the right to be heard within the context of international protection administrative proceedings, and thus to clarify whether the guarantees it developed within the context of competition proceedings will be applied also in the context of asylum law. While in the *M.M. (1)* preliminary ruling of 2012, the CJEU found that Article 41 applied to asylum proceedings, in late 2014 (*Mukarubega and Boudjlida*), the CJEU corrected its approach and since then has consistently held that Article 41(2) which includes the right to be heard applies only to institutions, bodies, offices and agencies of the EU.[8] However, the principle of good

[1] The ***rights of defence*** were defined by the Court of Justice as including: the right to be heard; access to the file; principle of sound administration, objectivity and impartiality, see Cases T-191/98 and T-212 to 214/98, *Atlantic Container Line v. Commission*, ECLI:EU:T:2003:245.
[2] Case 301/87, *France v. Commission*, ECLI:EU:C:1990:67.
[3] Cases 100 – 103/80, *Mussique Diffusión Française*, ECLI:EU:C:1983:158.
[4] See in particular the OMPI case T-228/02, ECLI:EU:T:2006:384.
[5] OMPI, para. 93.
[6] Case 301/87, *France v. Commission*, ECLI:EU:C:1990:67, para. 29.
[7] 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; see also the Opinion of the Advocate General Bot, points 30-45 on a comparison of the scope of the right to be heard in other administrative and criminal proceedings.
[8] 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.

administration with a content equivalent to Article 41 EU Charter has been held to be applicable to the Member States when acting within the scope of EU law.[9]

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

The content of the right to be heard has been the object of a considerable number of preliminary references sent by **Irish** courts (*M.M (1))*; and again in *M.M (2)); D. and A.*[10] *H. N.*[11] 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).

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

The CJEU clarified that the right to be heard "also requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case, and giving a detailed statement of reasons for their decision (see Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14, and *Sopropé*, paragraph 50).

The CJEU clarified that certain questions cannot be addressed by national authorities during the interview with the asylum seekers. For instance, although national authorities are entitled to carry out, where appropriate, interviews in order to determine the facts and circumstances as regards the declared sexual orientation of the asylum seeker, questions concerning the details of the sexual practices of the applicant are not allowed as this would infringe Article 7 EU Charter. Additionally, the CJEU pointed to the sensitive nature of questions related to a person's sexuality and the reticence applicants may have in revealing intimate aspects of their life. (, *A.B.C*[12]*)*

Short overview of the ECtHR jurisprudence

[9] The remaining guarantees enshrined in Article 41 Charter apply to the Member States' actions as part of the principle of good administration, which is broader than the rights of defence (H.N. *para. 49)*
[10] Case C-175/11, *D. and A*., EU:C:2013:45.
[11] Case C-604/12, *N.*, EU:C:2014:302.
[12] C- 148/13 and 150/13, A.B.C, ECLI:EU:C:2014:2406

The European Court of Human Rights has also highlighted the critical importance of the right to be heard in administrative proceedings. In *I.M. v France*, the ECtHR assessed the quality of the French accelerated asylum procedure by taking into account the fact that the personal interview with the applicant only lasted half an hour, in the context that this was the first asylum application.[13] Additionally, the Court recognised that a lack of linguistic aid may affect the asylum applicant's ability to present his asylum claim. Access to interpretation services has been acknowledged by the ECtHR as an essential procedural safeguard in the context of an asylum procedure and absence of such services may lead to a violation of the right to an effective remedy as guaranteed under Article 13 ECHR.[14]

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

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

Relevant CJEU Cases

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

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

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

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

Relevant legal sources

[13] I.M. v France, Appl. No. 9152/09, ECtHR Judgment of 2 May 2012.
[14] ECtHR, *I.M. v France*, para. 145; *Hirsi Jammaa and Others v Italy*, para. 202, Appl. No. 27765/09, ECtHR Judgment 23 February 2012; *M.S.S. v Belgium and Greece*, Appl. No. 30696/09, ECtHR Judgment 21 February 2011, para. 301.

EU level

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

Art. 41(2), CFREU: This right includes:

- the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

Article 4(1) of Directive 2004/83

National legal sources (Ireland)

The Irish '1996 Act' governed at that point in time the procedure processing the asylum application. Ireland distinguished then between two types of application, namely:

- in the first place, an application for asylum and, if there is a negative decision on that application,
- in the second place, an application for subsidiary protection.

In Ireland, each of those applications is dealt with in a distinct procedure with one procedure following the other. While a personal interview was expressly required by the 1996 Act during the proceedings for application for asylum, the 2006 Regulation, which governed the application for subsidiary protection did not provide for the obligation to hold a personal interview. For the purpose of the second procedure the applicant only filled out a questionnaire.

This legislation has then been amended following the CJEU preliminary ruling in M.M.(1) and subsequently in M.M.(2).

Facts of the case[15]

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.

[15] See ***ACTIONES Module on on the Techniques of Judicial Interactions in the Application of the EU Charter in ASYLUM AND MIGRATION***, written by Madalina Moraru and Stephen Coutts and Geraldine Renaudiere (commentary of the judicial application of Article 41 EU Charter).

Mr M. argued that he was not heard in the course of examination of his application of subsidiary protection; furthermore, that he was not informed of the matters which "*the Minister regarded as relevant to the decision to refuse him subsidiary protection or of the date on which that decision would be taken. Moreover, in giving grounds for his decision, the Minister to a very great extent referred merely to reasons previously relied on in rejecting Mr M.'s asylum applicatio*n." As regards the rejection of his asylum application in appeal, which preceded the application for subsidiary protection, Mr M. submitted that "he was denied an oral hearing on the ground that he had not made that application as soon as reasonably practicable after his arrival in Ireland and that he had not been able to provide any convincing reason for his failure to do so."

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

It should be noted that the Asylum Procedures Directive applies to asylum applications. It also applies to applications for subsidiary protection where a single procedure is used to assess applications for asylum and subsidiary protection (a 'one-stop shop' system). Ireland 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 order for a preliminary reference, the **High Court** was inclined to find against the applicant, relying specifically on a prior case of the High Court, *Ahmed v Minister for Justice, Equality and Law Reform* (High Court, 24 March 2011), in which it was noted that an application for subsidiary protection took place following a failed asylum application and that during the course of such an application, which frequently deals with the same material claims as any subsequent subsidiary protection claim, there is extensive correspondence and interaction with the applicant. Viewed as a continuation of the asylum application, the subsidiary protection proceedings were considered as including sufficient procedural rights to ensure that all the obligations under Article 4(1) of the Qualification Directive are 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 was also against recognising an automatic right to be heard within a multiplicity of procedural steps.

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

Following the CJEU preliminary ruling in the M.M.(1) 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 follow-up judgment (*MM v Minister for Justice (No 3)* [2013] IEHC 9 – *Follow-up judgment of the High Court*), the **High Court** was unclear 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, which the Irish legislation at that moment in time did not permit.

The High Court noted that this would necessitate far reaching changes to the current procedure for subsidiary protection applications and invited the Oireachtas 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 addressed a new reference to the Court of Justice.

Preliminary questions referred to the Court of Justice:

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

> *In a case where an applicant seeks subsidiary protection status following a refusal to grant refugee status and it is proposed that such an application should be refused, does the requirement to cooperate with an applicant imposed on a Member State in Article 4(1) of … Directive 2004/83 … require the administrative authorities of the Member State in question to supply such applicant with the results of such an assessment before a decision is finally*

> *made so as to enable him or her to address those aspects of the proposed decision which suggest a negative result?*

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

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

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

Reasoning of the Court of Justice

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

In its reply, the 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 Asylum Procedures Directive did not apply to a system such as the Irish, in which the asylum and subsidiary protection applications were separate.

However, the 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 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. (N.B. that since the 2014 Boudjlida preliminary ruling, the CJEU applies the right to be heard on the basis of the principle of the rights of defence, and no longer Article 41 EU Charter; however, the guarantees developed by the CJEU in M.M. 1 are transferable under the rights of defence principle)

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

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

However, the Court of Justice 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.

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

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

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

- Given the fundamental nature of the applicant's right to be heard, it should be fully respected in both asylum and subsidiary protection proceedings, when these are

separated. In *M.M. (1)*, the Court of Justice left it to the national court to decide whether the EU right to be heard is respected in the procedure which the application for subsidiary protection was assessed.

- The asylum seeker should be given sufficient opportunities to substantiate his/her asylum claim, for example by submitting written information.
- This right also requires the authorities to pay due attention to the observations submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case, and giving a detailed statement of reasons for their decision (*M.M. (1)*).
- In the specific circumstances that a decision on subsidiary protection takes place immediately after the asylum proceedings, an interview must be arranged if the competent authority is not in a position to reach a conclusion with full knowledge of the facts based on the available evidence 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)*).

Instances of judicial dialogue and their outcomes[16]*:*

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

In *M.M.(No 2)* extensive reference is made to *Debisi v Minister for Justice and Law Reform* [2012] IEHC 44, contrasting it with the judgment of the 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 *M.M.(1)* is referred to by the High Court of England and Wales in *R (AZ) v Secretary of State for the Home Department* [2015] EWHC 3695. (see separate case summary).

The High Court in *M.M (No 2)* makes reference to the response of the 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.M. (1)* but as a consequence of judicial comity and the duty

[16] Extract from the ***ACTIONES Module on on the Techniques of Judicial Interactions in the Application of the EU Charter in ASYLUM AND MIGRATION.***

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.

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

Impact on the Irish jurisprudence and legislation

The essential result of the preliminary ruling is that of legislative amendment (operation from 24th of November 2013), providing for a right to be heard in the context of subsidiary protection procedures, including a right to be informed of any recommendations to grant or refuse subsidiary protection, to be sent any supporting documentation and to request an oral hearing and to call witnesses upon appeal. The legislative amendment thus included a right to be heard which is substantially wider than the CJEU's conceptualisation which did not require for calling of 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.

Impact on the UK jurisprudence

While the Irish legislator seems to have taken upon the interpretation of the right to be heard argued by the claimant, the UK legislator and courts adopted a more restrictive interpretation of the right to be heard. Individuals have unsuccessfully invoked Article 41(2) Charter equivalent rights, in particular the right to be informed of reasons on the basis of which the administration will take a negative decision against the individual, in both Dublin procedures,[17] and within proceedings refusing a travel permit to a refugee on grounds of national security (*R (AZ) v Secretary of State for the Home Department* [2015] EWHC 3695). The UK courts have closely followed the strict interpretation of the right to be heard developed by the CJEU in M.M. which refuses to recognise a right to cross examine witnesses or a mandatory right to inform of the arguments on the basis of which the administration aims to base its negative decision. It has to be recalled that the CJEU has an established case law since OMPI(I)

[17] United Kingdom, Court of Appeal, R (AR) v Secretary of State for the Home Department, [2013] EWCA Civ 778, Appellate, 28 June 2013, [2013] 3 CMLR 40.

whereby, "*the party concerned must be informed of the evidence adduced against it to justify the proposed sanction ('notification of the evidence adduced')." (para. 93)*

1.2. The Right to an Oral Hearing before a Court

Short overview of relevant EU norms

In the previous section we saw that the right to be heard applies to the administrative phase of international proceedings on the basis of the specific provisions of the Recast ADP and on the basis of the general principle of EU law of rights of defence. As for the judicial phase of international proceedings, there is no express general right to be heard before a court under the Recast APD. In *Sacko Moussa*, the CJEU clarified that Article 46 of Directive 2013/32, the right to an effective remedy before a court or tribunal, does not include an absolute obligation to a hearing before a court or tribunal when challenging an administrative decision (para. 28). The CJEU held that Article 47 CFR does not require a national court or tribunal hearing an appeal against a decision rejecting a manifestly unfounded application for international protection to have a mandatory oral hearing before dismissing the appeal

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

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

As for the hearing of children, in *Aguirre Zarraga*[18], the CJEU required that a child be able to express his views in legal proceedings:

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

[18] C-491/10 PPU, ECLI:EU:C:2010:828.

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

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

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

The cases have been selected as they reflect two different judicial interaction techniques (*consistent interpretation* v *preliminary reference*) chosen by national courts to address essentially similar constitutional issues: nature and limits of the right to an oral hearing before national courts. The added value of the lines of case law of the **Austrian Constitutional Court** is that it also offers a concrete example of when the right to be heard before a national court, which is not an absolute right, can be discovered as having been violated by a national court (N.B. in *Sacko Moussa*, although the CJEU leaves the final decision to the referring court, the suggestion is that in that particular case, there seems to be no violation of the right to be heard by the fact that the individual is not heard in person by the referring court).

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

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

Relevant legal sources

Article 3 ECHR;

Article 47(2) EU Charter;

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

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

Facts of the case[19]

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

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

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

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

Reasoning of the Austrian Constitutional Court

The Austrian Constitutional Court came to the conclusion that the decision by the Asylum Court had violated the right of the applicant to equal treatment of foreigners and his right granted under the Constitution to an oral hearing in accordance with Article 47(2) EU Charter. It has to be mentioned that the Austrian Constitutional Court has recognised Article 47 EU Charter as part of the constitutional standard of review. In *U466/11 and others*, the Constitutional Court noted the close connection between the Charter and the ECHR which is, incidentally, directly applicable as a source of constitutional rights in the Austrian legal order.[20] From these two points, the Court concludes, in effect, that the Charter can supply the appropriate standard of review for breaches of constitutional rights. The centralisation of such decisions in the hands of the Constitutional Court is turned into an argument in favour of that reading. At least insofar as 'rights' from the Charter are concerned, the overlap of their content with the ECHR means that they should be translated into national constitutional standards; this

[19] Facts based on summary from EDAL database (http://www.asylumlawdatabase.eu/en).
[20] While the ECHR was recognised equivalent constitutional status in the Austrian legal order, since 1964, thus enjoying directly applicable federal constitutional law, the EU Charter has been recognised similar status since 2012.

may not, however, hold for the "principles" laid down by the EU Charter, requiring thus a case-by-case assessment (para 5.5). As for the application of Article 47 of the Charter, the Austrian Constitutional Court noted that it has a broader scope of application than its correspondent right in the ECHR – Article 6 ECHR. While under Article 6 ECHR, the right to a hearing only applies in civil and criminal law cases, Article 47 EU Charter extends to all judicial proceedings, including asylum proceedings, and thus the applicants can benefit from the particular fair trial safeguards in asylum related proceedings.

The Court emphasised that Article 47 (2) EU Charter does not prescribe absolute fundamental right, but one which accepts limitations, which must pass the test of the principle of **proportionality** in order to be found legitimate. Citing the case law of the ECtHR, the Constitutional Court finds that this right can be limited in exceptional circumstances and that the legitimacy of the limitation(s) has to be established on a case-by case basis. In *U466/11 and others*, the Austrian Constitutional Court defined the circumstance where the right to an oral hearing can be limited. Namely, in circumstances where it has nothing to contribute to the written record, an oral hearing can thus be dispensed with. On this basis of this argument, the Constitutional Court found no violation of the Charter in that case. The situation was completely different in *U1175/12.*

The Austrian Constitutional Court found that the statements by the Asylum Court on the lack of credibility are general and do not refer to the personal circumstances of the applicant. The general statements on local knowledge, the clothing and punctuality of chauffeurs did not have any weight in this particular case and can also not have an adverse effect on the credibility of the applicant, in particular because there are no definite statements relating to Uzbekistan. The contradictions identified by the Asylum Court are mere nuances of an otherwise coherent submission.

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

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

Use of judicial interaction technique

Through the use of consistent interpretation technique, the Austrian Constitutional Court recognised that Article 47 of the EU Charter enjoys domestic constitutional status. The Court links the EU Charter with the jurisprudence of the ECtHR and by doing so indirectly strengthens also the horizontal dialogue between the CJEU and the ECtHR. The Austrian Constitutional Court considers Article 6 ECHR as not directly applicable to this case, but refers to the jurisprudence of the ECtHR on Article 6 ECHR in order to derive standards for exceptional derogations from the right to fair trial. The Court refers to Article 13 ECHR in order to clarify that Art. 47 EU Charter has a broader scope, since it applies also to international protection proceedings. This interpretation of Article 47 EU Charter provided in *U466/11, was*

used also in U1175/12. While in the former case, the Court did not find a violation of Article 47, in the latter, the Constitutional Court did find a violation of Article 47(2) EU Charter, using as an express ground for striking down the judgment of the Asylum Court.

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

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

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

The Tribunal of Milan sought to ascertain, in essence, whether Directive 2013/32, in particular Articles 12, 14, 31 and 46 thereof, is to be interpreted as precluding a national court hearing an appeal against a decision rejecting a manifestly unfounded application for international protection from dismissing the appeal without hearing the applicant, in particular where the applicant has already been interviewed by the administrative authorities and where the factual circumstances leave no doubt as to whether the decision rejecting the application was well founded.

Facts of the case

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

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

Under the Italian law applicable at that time (art. 19, legislative decree n. 150/2011), the judge may alternatively follow two procedural patterns: it may hold a hearing with the parties or it can opt for deciding without hearing the applicant when it considers that the solution that could be reached on the basis of the evidence existing in the case file would be no different even if a further interview would be conducted with the applicant.

The referring court has no doubt concerning the manifestly unfounded nature of the action brought by Mr Sacko and its intention would be that of dismissing the case without hearing.

However, it has doubts as to the compatibility with EU law, in particular with Articles 12, 14, 31 and 46 of Directive 2013/32, of the national legislation which allows it to dismiss the action or find it inadmissible without a prior hearing.

Reasoning of the CJEU

The point of departure of both the CJEU decision and the A.G. opinion is that while the personal interview of an applicant for international protection is mandatory at the administrative stage, in pursuance of art. 14 of dir. 2013/32, such a requirement is not explicitly foreseen with regard to the appeal procedures as set in Chapter V of 2013/32 directive. However, the CJEU had to assess whether such an obligation of an oral hearing before the court in asylum proceedings is imposed by Article 47 EU Charter and/or by a systematic reading of articles 12,14, 31 and 46 of the 2013/32 Directive.

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

Indeed, the close **relation between the administrative and the judicial phases** is such that the latter is considered by the advocate general as having the primary purpose of reviewing the legitimacy of the administrative decision refusing the application for international protection. However, this is not the current understanding of the purpose of the judicial stage in international protection cases under Italian law. The judicial stage is seen as having the goal to ascertain whether the conditions for the granting of international protection are fulfilled, and not to review the administrative decision. This is so, particularly since asylum adjudication falls under the jurisdiction of civil courts[21] rather than administrative ones (where the latter are normally conceived as in charge of judicial review of administrative acts under Italian law). This different conception of the role of the judicial phase in asylum proceeding cases and the idea that the judicial phase evaluates facts and point of law of the asylum application autonomously with regard to the preceding administrative phase, although relying on the factual elements assessed in the administrative phase, may explain why the majoritarian Italian jurisprudence considered always necessary to have a personal hearing of the applicant in the judicial phase.[22]

[21] Under the Italian jurisdictions, international protection proceedings have been allocated to the civil courts, as they are considered as involving constitutional rights.
[22] Under the Italian jurisdictions, international protection proceedings have been allocated to the civil courts, as they are considered as involving constitutional rights.

On the contrary, other national jurisdictions[23] placed critical importance on the personal interview at the administrative stage, while hearing before the court should rather assess how the administration fulfilled its duties to state reasons in fact and law; whether any errors of laws were committed (see for instance **Belgium**). Therefore, an evaluation of the transcript of the personal hearing carried out during the administrative stage by the appeal judges should be sufficient, rather than replicate the oral hearing automatically.

The Court takes a somehow opposite view and it considers that the "failure to give the applicant the opportunity to be heard in an appeal procedure constitutes a restriction of the right of the defence, which form part of the principle of effective judicial protection enshrined in Article 47 of the Charter" (para. 37)

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

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

In that regard, the Court relies on its previous judgements to the extent of holding that according to the ECtHR case-law (explicit reference to ECTHR, 23 November 2006, *Jussila v. Finland* CE:ECHR:2006:1123JUDO07305301) Article 6(1) of the ECHR does not impose an absolute obligation to hold a public hearing and does not necessarily require that a hearing be held in all proceedings. (para. 40).

Establishing whether the right to an effective remedy and fair trial requires or not a personal hearing of the applicant in the judicial phase of an asylum procedure is a question to be assessed in the light of the judge's obligation to carry out the full and *ex nunc* examination of both facts and points of laws as required by Article 46 of Directive 2013/32. (para. 44)

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

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

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

AG Campos Sànchez Bordona focuses more specifically on one dimension of the right to be heard. According to him, the question is not whether the right to be heard in general must be

[23] See the position expressed by the Belgian government as summarised in the preliminary ruling. Additionally, AG Opinion, point 28: "This was a position expressed ultimately by the Belgian government according to which given the safeguards provided by the directive itself to ensure the transcription of the interviews conducted at the administrative stages, the European legislator has considered (logically) that it was unnecessary to require a further hearing at the judicial stage, irrespective of whether or not the application or the appeal are manifestly unfounded"

guaranteed in the judicial phase of the asylum procedure but rather whether a specific type of it, namely the right to be interviewed, must be guaranteed (para. 37-38)

The AG highlights that a right to be personally heard applies only at the administrative stage of the asylum procedure, while, as to the judicial phase, it is the right to an effective remedy according to Article 47 of the Charter that comes into play. However, the right to be heard by a judicial authority shall be interpreted as the right to explain – not necessarily orally, but also in written form - the reasons which the applicant considers necessary in defence of his claims (point 52). The right to be heard in the judicial phase does not imply that the applicant should be interviewed personally provided that that applicant has been heard personally in the administrative phase and that he can present written documentations in the judicial phase, according to the adversarial principle. In this, AG follows the findings expressed in M.M. (2) judgment (points 45-46).

However, according to the AG, the fact that a person that lodges an international protection application has not a right to be heard personally in the judicial phase does not mean that the judge cannot decide to admit the personal hearing whenever he deems it necessary for the better administration of the justice (para 54-55). In sum, the personal hearing of an asylum applicant should apply in the judicial phase not because it is a component of the fundamental right of the asylum applicant to have an effective remedy, but because and to the extent that the judge considers it necessary for carrying out his duty of fully review factual and legal circumstances of the applicant's situation.

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

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

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

It is not clear, though, which are the objectives of general interests whose pursuance justifies a restriction of the right to be heard personally and that allows the judge to dismiss the appeal without hearing the applicant whenever it deems the probative elements sufficient for deciding the appeal

In its preliminary reference, the referring court has mentioned two different grounds that can justify such a decision not to hear the clamant in case, namely the reasons of speed and economic savings.

The Court of Justice does not refer to any of them.

Conclusions and outcome of the CJEU preliminary ruling

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

Instances of judicial dialogue

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

Instances of internal judicial dialogue: In its reference for a preliminary ruling, the Tribunal of Milano highlights that the majoritarian Italian jurisprudence is in favour of having a mandatory hearing of the applicant on the grounds that only this option would permit the respect of the right to effective remedy and the full and *ex nunc* examination of both facts and points of law, as required under Article 46(3), 2013/32/EU directive. See, however, the opposite view of the Cassation court (Cass. Civ., sez. VI-1, ord. 8.6.2016, n. 11754), though not motivating this finding.

Impact on national law

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

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

In the judicial phase, the judge must in principle base its decision on the written observations presented by the parties and on the probative elements collected during the administrative stage, which include the video-tape of the applicant's personal hearing.

However, the new law introduced some derogations, allowing the judge to order the personal hearing of the recurrent in case he considers necessary to do so after the vision of the video-tape or in case the judge deems indispensable to require the parties to provide clarifications.

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

The new Italian provisions seem to comply with the requirements set by the CJEU in the Sacko case. This decision can be useful invoked to avoid restrictive interpretations of the wording of the new law and to guarantee the judge discretion in the matter against further restrictive legislative changes.

1.3. The Right to be Heard in Return Proceedings[24]

It can be noticed that the right to be heard before issuing a return (expulsion) decision is perhaps furthermore important due to the irrevocable consequences of the return decision – end of stay and removal of the migrant. Thus, it is important to check that the expulsion does not lead to violation of his fundamental rights. In order to avoid such violations, it is important that the competent national authorities offer another possibility to be heard to the individual. This is furthermore necessary when the TCN was not previously heard, or even if heard, a long time passed since she was heard, or check if new elements, circumstances have not intervened which are opposing to the return.

Short overview of EU norms

Article 41 of the EU Charter guarantees the right of every person to be heard before being subject to any individual measure that would affect him/her adversely. The Return Directive provides a detailed list of procedural safeguards granted to the third-country nationals (TCNs) subject to return-related decisions (*i.e.* return decisions, entry-ban decisions, decisions on removal, decisions on detention, etc.).[25] However, the Return Directive does not expressly refer to the right to be heard of those third-country nationals before the adoption of any such decision, nor does it specify the consequences of an infringement of this fundamental right. *Article 12 RD* expressly refers to the duty to state reasons in fact and in law, which, in practice, cannot be effectively fulfilled if the competent authority did not previously hear the TCN.

On the occasion of several preliminary rulings,[26] the CJEU deduced a right to be heard for the TCNs subject to return-related decision, and established also the legal consequences of its violation within the framework of the return procedures.[27]

It should be noted that the CJEU held that *Article 41 EU Charter applies only to the EU institutions, bodies, offices, and agencies of the European Union. However, the Member States are obliged to respect the right to be heard when acting within the scope of EU law, on the basis of the general principles of the rights of defence*.[28] It has to be emphasised that the Court held that Member States are bound to respect the right to be heard even in the absence of an express EU or national legislation providing for it.[29] 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.[30]). Therefore, the general

[24] This section is developed on the basis of material gathered in the REDIAL Project.
[25] See, in particular Articles 12-16 RD.
[26] C-166/13, *Mukarubega*, EU:C:2014:2336; C-249/13, *Boudjlida*, ECLI:EU:C:2014:2431, 11 December 2014; G&R C- 383/13 PPU, EU:C:2013:533.
[27] G&R C- 383/13 PPU, EU:C:2013:533.
[28] See C-141/12 and C-372/12, *YS and Others*, EU:C:2014:2081, para. 61; C-166/13, *Mukarubega*, EU:C:2014:2336, para. 44; Case C-249/13, *Khaled Boudjlida v Préfet des Pyrénées-Atlantiques*, ECLI:EU:C:2014:2431, para. 32-33.
[29] Case 301/87, *France v. Commission*, ECLI:EU:C:1990:67, para. 29; Boudjlida, para. 39.
[30] 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).

principles of EU law remain of importance, even after the entry into force of the EU Charter.[31] Similarly to the international protection proceedings, Article 47 EU Charter is applicable and relevant for the judicial phase of return proceedings. However, unlike the asylum proceedings, the CJEU did not have the opportunity so far to clarify on the nature (automatic or not) of the right to an oral hearing before the national court.

As a counterpart to the right to be heard, the TCN is required to co-operate with the competent authorities and to provide them with all relevant information, in particular all information that could be brought against a return decision being issued.[32] The CJEU, then, admitted that Member States can place restrictions on the rights of the defence. It did so since these restrictions do not constitute unfettered prerogatives. But the restrictions must correspond to the objectives of general interest pursued by the measure in question. They, likewise, must not involve, with regard to the objectives pursued, a disproportionate and intolerable interference infringing upon the very substance of guaranteed rights.

In situations of combined decisions (*e.g.* ending legal stay and return decision), the CJEU clarified that Member States are not obliged to hear the third-country national before the adoption of the return decision, as long as the individual has been effectively heard during the previous administrative procedure (*e.g.* asylum proceedings[33]). Mindful of the objective of the Return Directive, the Court held that the right to be heard should not be used for unduly prolonging return procedures.[34]

Finally, even if the right to be heard has been breached, it would render a return-related decision invalid, *"only insofar as the outcome of the procedure would have been different if the right was respected."*[35] In another case, the Court emphasised the impact a violation of the right to be heard would have on other administrative duties. National courts have to be aware that *"where the person concerned is not afforded the opportunity to be heard before the adoption of an initial decision [...] compliance with the obligation to state reasons is all the more important because it constitutes the sole safeguard enabling the person concerned, at least after the adoption of that decision, to make effective use of the legal remedies available to him in order to challenge the lawfulness of that decision."*[36]

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

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[31] 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*.
[32] C-166/13, *Mukarubega*, EU:C:2014:2336; C-249/13, *Boudjlida*, ECLI:EU:C:2014:2431, 11 December 2014 etc.
[33] In *Mukarubega* the TCN was heard during the asylum proceedings and while in public custody; the adoption of the first return decision was taken at the same time as the refusal of the residence permit; while the second return decision was adopted at the same time as the rejection of the asylum application, without informing the applicant that following the rejection of the asylum application, the return decision could be taken at the same time.
[34] *Mukarubega*, para. 71.
[35] G&R C-383/13 PPU, EU:C:2013:533. National jurisprudence on the legal remedies against violation(s) of the right to be heard will be discussed in more detail under the section dedicated to Article 13 of the Return Directive.
[36] Case C-417/11 P, *Council v Bamba*, ECLI:EU:C:2012:718, para. 51.

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

In the absence of an express right to be heard provided in the Return Directive, are national authorities required to secure it during the administrative and judicial phases of return proceedings? If yes, under which legal basis? What is the material content of the right to be heard? What are the possible remedies in cases of violation of the right to be heard? Is the cautious approach of the CJEU regarding remedies in *G&R* followed by national courts? If some national courts depart from the caustious CJEU approach, can this be interpreted as a signal for the CJEU to revisit its approach or is it up to the national courts to ensure implementation of the preliminary rulings in light of the specific national legal systems?

Relevant Cases

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

Facts (Mukarubega case and Boudjlida case)[37]

In March and April 2013, two French administrative courts submitted a request to the CJEU for a preliminary ruling.[38] 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.[39] 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.[40] 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,

[37] Extract from the ***ACTIONES Module on on the Techniques of Judicial Interactions in the Application of the EU Charter in ASYLUM AND MIGRATION***, written by Madalina Moraru with Stephen Coutts and Geraldine Renaudiere.
[38] 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.
[39] CJEU, *Mukarubega*, C-166/13, 5 November 2014, EU:C:2014:2336
[40] CJEU, *Boudjlida*, C-249/13, 11 December 2014EU:C:2014:2431

the Prefect of the 'Pyrénées-Atlantiques' issued a decision ordering Mr. Boudjlida to leave French territory, granting him a period of 30 days for his voluntary return to Algeria. The applicant challenged that decision before the French courts. He claimed that he did not have the right to be heard effectively before the adoption of the return decision. He claimed that he was not in a position to analyse all the information relied on against him, since the French authorities did not disclose that information to him beforehand and did not allow him an adequate period for reflection before the hearing. Further, the length of his interview by the police (30 minutes) was much too short, the more so when he did not have the benefit of legal assistance.

In the Mukarubega case, the ***administrative tribunal of Melun*** first decided to stay proceedings and to refer the following questions to the CJEU: it asked in substance whether the right to be heard, which is an integral part of the fundamental principle of respect for the rights of defence (enshrined, according to the court, in Article 41 Charter) shall 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. In the *Boudjlida* case 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.

First outcome at national level in distinct pending cases

The above-mentioned CJEU cases C-166/13 and C-249/13 were pending at the time the French Council of State was hearing the case. While both preliminary questions were addressed by first instance national administrative courts, the ***French Council of State*** did not wait for the outcome at the EU level and decided on the present case, assuming that enough indications were given in previous case-law of CJEU.[41] 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*[42]. 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*

[41] France, Council of State, *Halifa*, no. 370515, 4 June 2014.
[42] CJEU, *G. and R.,* C-383/13, 10 September 2013, EU:C:2013:533, explicitly referred to by the Public "Rapporteur" in his opinion.

annulment only if, had it not been for such an irregularity, the outcome of the procedure might have been different".[43] The **Council of State** considered that by applying for a residence permit, the applicant should have known that a potential consequence in case of refusal would be that the authorities might take a return decision. Hearing the person a second time, before issuing the return decision, was therefore not required. According to the M.M.(1), public authorities are not obliged before to inform the applicant, before adopting its decision, that it proposes to reject his application and notify him of the arguments on which it intends to base its rejection. However, this is not the same thing to the decision of the Council of State. Being heard should be aimed to provide the public authority with more elements which are useful for the final decision, not (at least primarily) to inform the applicant of the consequence of the decisions.

Reasoning of the CJEU

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

1. EU law does not specify whether, and under what conditions, observance of the right to be heard (which is inherent to the **general principle** of respect for the rights of defence) is to be ensured, nor does it specify the consequences of an infringement of that right.

2. Once the competent national authorities have determined that a third-country national is staying illegally in the national territory, they have to rely on provisions in national law 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

[43] 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.

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.

Instances of judicial dialogue

Before the judgments of the *Conseil d'Etat* and of the CJEU, the French Courts of Appeal had different views on the nature, circumstances when a violation of the right to be heard should be found. Some of them they even quashed the administrative decisions on the grounds of the right to be heard.[44] It has to be pointed out that the CJEU refused to fully endorse the interpretation of the referring court, and did not limit the procedural autonomy of the Member States.

By first anticipating the CJEU case-law, the ***French Council of State*** seems to have first assumed 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".*[45] 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.

[44] Administrative Court of Appeal from Nancy no. 12NC01705 *M. Ouda.*
[45] CJEU, *Mukarubega*, *op.cit*., para. 44.

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

BELGIUM

The **Belgian Council of Alien Law Litigation** (CALL) consistently applies the right to be heard as a general principle of EU law. Relying on cases C-349/07, *and* C-277/11, *M.M.,* it underlines "*the importance of the right to be heard and its very wide working sphere in the EU legal order"*[46](e.g. CALL, 126.219 of 25 June 2014). It has also consistently held that irregular migrants have to be heard in relation to each of the return-related decisions, which the administration adopts. For instance, the third country national must be heard not only as regards the withdrawal of the right to stay (CALL, 230.293/24.02.2015), but also as regards the order to leave the territory (CALL, 232.758/29.10.2015) and he or she must have the chance to express their view on the entry ban, adopted together with the removal order (CALL, 233.257/15.12.2015).[47] See the Belgian synthesis report on the second package of the Return Directive.

LITHUANIA

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

BULGARIA

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

GERMANY

As for the applicable legal source, some national courts prefer to rely on the national constitutional principles that guarantee the right to be heard, instead of referring to the EU Charter of Fundamental Rights, since the guarantees ensured by the domestic constitutional principles are found sufficient. The **German Federal Administrative Court** invoked the

[46] This jurisprudence also led to substantial modifications in the Aliens Office's practices. The Belgian Aliens Office now sends a formal letter that invites foreign nationals to express their views before the withdrawal of their right to stay

[47] The CALL statements go, therefore, further in terms of guarantees than the minimum safeguards established by the CJEU in its case law.

CJEU preliminary ruling in *Boudjlida* to justify its conclusion that the right to good administration enshrined in Article 41 of the Charter of Fundamental Rights is addressed to EU institutions and bodies alone, and cannot be invoked, therefore, against domestic authorities (Federal Administrative Court, Decision of 27.10.2015, 1 C 33.14). This was also the conclusion of the **French Council of State** (see above), though it considered there was no practical difference between the invocation of Article 41 CFR and the right to be heard as a general principle of EU law.

THE NETHERLANDS

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

Additional relevant cases

In addition to the above, it is worth mentioning the case CJEU, *Nianga*, C-199/16, pending at the time of compilation of the Casebook.

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

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

G. and R., C-383/13, Judgment of 10 September 2013, ECLI:EU:C:2013:533[48]

[48] Preliminary reference addressed by the Council of State, 5 July 2013, 201304861/1/T1/V3 and 201305033/1/T1/V3.

Facts of the case

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

Preliminary question

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

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

Reasoning of the CJEU

According to the CJEU, even if the referring court has established that the decision on prolongation of detention infringed the right to be heard, this breach does not systematically render the decision unlawful. Accordingly, it does not automatically require the release of the third-country national concerned. Before concluding on the 'unlawfulness' of the decision concerned, the referring court must assess whether, in the light of the actual and legal circumstances of the case, the outcome of the administrative procedure at issue "could have been different if the third-country nationals in question had been able to put forward information which might show that their detention should be brought to an end"[49]. In that respect, the Court recalls that the directive is intended to establish an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity. Likewise, the use of coercive measures should be expressly subject not only to the principle of proportionality, but also to the principle of effectiveness, with regard to the means used and the objectives pursued.

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

Impact of the CJEU preliminary ruling[50]

THE NETHERLANDS

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

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

GREECE

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

BELGIUM

In **Belgium**, explicit reference is made by the CALL to G. and R. to argue that if the right to be heard has been breached when issuing the return decision, national courts may annul the decision only if the TCN can "show grounds that might have led the administration to adopt a

[50] The empirical evidence is provided by the REDIAL Project.

different decision if the hearing had taken place" (*CALL, 128.272, 27 August 2014*, see Belgian report).

LITHUANIA

As regards *the timing of the interview*, this should be set so as to ensure that the right to be heard can be effectively exercised. The **Lithuanian Supreme Administrative Court** held that the administration does not only have an obligation to hear the third country national before adopting a particular administrative decision, but, in order to ensure an effective application of the right to be heard, the deadline given to the TCN cannot be very short, as it would render the right ineffective. For instance, a deadline of 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).

1.4. The Right to be Heard in Collective Expulsion Cases[51]

Short overview of the ECtHR jurisprudence

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

In reaching this conclusion, the ECtHR took into account the lack of training of the official involved on carrying out individual interviews and lack of legal and linguistic assistance to the applicants. It is clear how here the right to a good administration and the right to defence were directly concerned by the conduct of national authorities.

[51] Sub-section written by Simone Penasa and Madalina Moraru.

The case Khlaifia v Italy (Grand Chamber, 15 December 2016) went to rationalize the principles and guarantees in this context, which are derived not only from Article 4 Protocol 4, but also from Articles 5 and 13, in conjunction with Article 3 of the ECHR.

The standard of "individualized examination" was re-confirmed. It was intended as the "opportunity to put arguments against expulsion on an individual basis to competent authority" (para. 239). Notwithstanding, the Court clarified also that Article 4 Protocol 4 does not guarantee an absolute right to an individual interview, thus limiting the scope of the right to be heard in a way similar to that followed by the CJEU. In order to satisfy the standard provided by Protocol 4, it is sufficient that the applicant has:

a) a genuine and effective possibility of submitting arguments against the expulsion; and

b) that the arguments are examined in an appropriate manner by competent authorities (para. 248).

In the concrete case at stake, the right to a hearing and individualised assessment have been guaranteed, as the applicants have been repeatedly identified, their nationality being assessed, and have been given the opportunity "genuinely and effectively" to submit arguments against the expulsion.

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

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

National jurisprudence -Supreme Court of Cyprus

The EU Charter and the ECHR and its case law have recently been used by the lawyers of detained third-country nationals in order to claim for immediate release following the administration practice of collective expulsions. In the case of *Falak Shad*,[52] the applicant argued that there was a violation of Article 19(1) of the EU Charter and of Article 4(1) of the Fourth Protocol to the ECHR, both of which prohibit mass deportations, as the authorities deported all persons involved in the incident in which the applicant was also involved and which formed the basis for his detention and deportation. The applicant claimed that the authorities ordered the deportation of all persons involved, without examining each case

[52] Cyprus, Supreme Court, Falak Shad v. the Republic, Case No. 763 /2011, 26 July 2013, available in original language at http://cylaw.org/cgi-bin/open.pl?file=apofaseis/aad/meros_4/2013/4-201307-763-11.htm&qstring=Falak%20and%20Shad

separately. To this end, the applicant's lawyer also cited the definition of collective expulsions given by the ECHR in *Becker v Denmark* (Appl.7011/75). Unfortunately, **the Supreme Court of Cyprus** rejected the argument of collective expulsions, concluding that simultaneous deportation of several persons does not necessarily mean a collective expulsion; nor, continued the court, was there any evidence that each case was not examined separately. The court did not, however, carefully assess whether the administration carried out a proper individual and case-by-case assessment providing, in writing, the necessary facts for its decisions.

Points to consider from the Cyprus case

In this case the Supreme Court attributed to the competent administration a wide margin of discretion in assessing the opportunity of deportation or refusal against third country nationals. Notwithstanding, it must be underlined that in this case the fact that the reason of the administration's decision related to national security and public order concerns played a decisive role in the way in which the Court gave effective enforcement to the principles derived (and recalled within the judgment) from the ECtHR case-law. The Court expressly stated that when reasons based on public order exist, no scrutiny on the merit of such reasons can be performed by the Court, as the administration does not have the duty to give reasons for the deportation or refusal of entry.

The nature of the case, therefore, and especially of the reasons on which the administrative decision is grounded, gives the Court the opportunity to deny the relevance of the principles enshrined in the ECtHR case-law (see the reference made by the applicant to the Becker case), which have been brought by the applicant. It is not denied the existence of a right to be heard intended as the right to have personal and individualized case separately examined by competent authorities, according to Article 4 Protocol 4 of the Convention; but when the particular circumstances of the case so require (public order reasons for removal), a strong presumption of legitimacy of the administration behaviour is recognised by courts: the review made by the Court is accordingly weak.

In the balancing between the right to an individualized and concrete assessment of personal circumstances of the case and the duty of public administration to effectively and promptly react to public order threats, the latter generally prevails, conferring to competent authorities a wide margin of appreciation in conjunction with a strong presumption of fairness of its behaviour (in terms of principle of good administration).

Guidelines for judges emerging from the analysis

Right to be heard	ADMININISTRATIVE STAGE ASYLUM	JUDICIAL STAGE ASYLUM	RETURN
STATUS	**Automatic and mandatory** with two exceptions when the **interview on the substance** may be omitted (see Art. 14(2) Recast ADP)	**Not automatic**, provided that the applicant has been heard personally in the administrative phase and that he can present written documentations in the	**Generally mandatory**, with few exceptions (see below)

		judicial phase, according to the adversarial principle	
LEGAL BASIS	Article 14 Recast ADP and general principle of EU law of rights of defence	Article 47(2) CFR and Article 46 Recast APD	Not expressly provided for the administrative phase but must be ensured as component of the general principle of rights of defence, or Art. 47 CFR within judicial phase (so far, no case law before the CJEU on right to be heard before the court)
CONTENT	The applicant must be able to make known his views before the adoption of any decision that does not grant the protection requested. Detailed guarantees during and after the personal interview are set out in Articles 14, 15 and 16 Recast APD	In certain circumstances, such as where an applicant is particularly vulnerable, the right to a defence could necessitate a personal interview, this would be applicable where a personal interview would be necessary in order to ensure that the decision maker had a full understanding of the facts relevant to the application and to the assessment of whether a serious threat existed that would qualify the applicant for the status of subsidiary protection	Right to be heard must be ensured in all the stages of the return proceedings, obliging the administration to enable the person concerned to express his point of view *on the legality of his stay* and *the detailed arrangements for his return,* while *taking due account* of the personal and family situation of the foreigner before deciding on the authorization to stay and/or a return decision.
REMEDY	Relative nullity; meaning nullity of the administrative decision if the outcome of the administrative procedure at issue "could have been different if the third-country national in question had been able to put forward	Relative nullity unless the result would have been different	Relative nullity unless the result would have been different (different approaches at the national level)

	information showing that a different decision would have been reached		

- *Article 41 CFR applies only to the EU institutions, bodies, offices, and agencies of the European Union. However, the Member States are obliged to respect the right to be heard when acting within the scope of EU law, on the basis of the general principles of the rights of defence*.[53]
- Member States are bound to respect the right to be heard even in the absence of an express EU or national legislation providing for it, as component of the general principle of the rights of defence (Case 301/87, *France v. Commission*, ECLI:EU:C:1990:67, para. 29; *Boudjlida*, para. 39; as well as *M.M. (2)*, para. 86)
- The remaining guarantees enshrined in Article 41 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.[54]).

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

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

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

- The purpose of the right to be heard before the adoption of an administrative decision entailing negative consequences on the individual is to enable the person concerned to express his point of view regarding the merits of the decision (e.g. the legality of his stay and on whether any of the exceptions to the general rule (issuance of a return

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

[54] 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).

decision) are applicable). Additionally, the purpose of the right to be heard is, inter alia, to enable that person to correct an error or submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content.

- National authorities must take due account of the best interests of the child, family life and the state of health of the third-country national concerned and respect the principle of non-refoulement.
- 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).
- 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;
- A competent national authority is **not required to warn a third-country national** that it is contemplating adopting a return decision with respect to him, or to disclose to him the information which it intends to rely on to justify that decision, or to allow him a period of reflection before seeking his observations. EU law does not establish any such detailed arrangements for an adversarial procedure.
- It is therefore sufficient if the person concerned has the opportunity effectively to submit his point of view on the subject of the illegality of his stay and reasons that might justify the non-adoption of a return decision.
- **An exception must however be admitted where a third-country national could not reasonably suspect what evidence might be relied on against him or would objectively only be able to respond to it after certain checks or steps were taken with a view, in particular, to obtaining supporting documents.** Further, the Court states that return decisions may always be challenged by legal action, so that the protection and defence of the person concerned against a decision that adversely affects him, is ensured.

- The right to be heard is not an absolute right and may be limited, provided that this restriction satisfies the examination of proportionality;
- The infringement of the right to be heard does not automatically entail the annulment of the decision; the court must assess whether, in the light of the actual and legal circumstances of the case, the outcome of the administrative procedure at issue “could have been different if the third-country nationals in question had been able to put forward information which might show” that the negative administrative decision would had been different;

- Following the CJEU judgment, the **Dutch Council of State** has ruled that the principles formulated in G. and R. also apply in the procedure that regulates the taking of a return decision by the administration. If the right to be heard has not been observed by the administration, the court should determine whether this has deprived the third-country national of the possibility to bring forward circumstances which could have led to a different decision. If this is not the case, the judge hearing the appeal against the return decision will not quash the decision (Council of State, 24 June 2014, 201309226/1/V3).
- In the specific circumstances that a decision on subsidiary protection takes place immediately after the asylum proceedings, an interview must be arranged if the competent authority is not in a position to reach a conclusion with full knowledge of the facts based on the available evidence The interview must also be arranged if the personal circumstances of the applicant (in particular, any vulnerability due to age, health conditions or 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)*)
- According to the CJEU preliminary ruling in *Sacko Moussa*, national legislation should leave the freedom to national courts to decide an oral hearing if it considers it necessary for the purpose of fulfilling its obligations under Article 46(3) even in cases of manifestly unfounded applications. For instance:

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

- **The judge shall evaluate whether the information in the case-file – including where applicable the report of or the transcript of the personal interviews – are sufficiently informative as to exclude the need of a personal hearing in the judicial phase.**

- Other corollaries of the principle of the rights of defence: national authorities should pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision, the obligation to state reasons for a decision which are sufficiently specific and concrete to allow the person to understand why his application is being rejected is thus a corollary of the principle of respect for the rights of the defence (*M.M. (2)*).

Guidelines emerging from the ECtHR and CJEU on collective expulsion:

- Article 4 of Protocol 4 guarantees the right to an individualized and genuine examination, which is respected when prior to the removal the individual is given the

opportunity to put arguments against his/her expulsion to the competent authority on an individual basis; the right to an individual interview in all circumstances is not covered by the Convention (no absolute right to be heard individually);

- The removal does not amount in a collective expulsion when the absence of an individualized examination is the consequence of the culpable conduct of the individual concerned;
- The right to an effective remedy against expulsion is guaranteed when the individual concerned has given adequate information and opportunity to appeal against the refusal-of-entry order;
- The right to be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him is violated when: a) the refusal-to-entry order does not provide any reference to individual's detention or to legal or factual reasons for such measure; and b) the order is not communicated promptly to the individual.

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Freedom of Movement and Residence of Persons within the EU

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Paper outline

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INTRODUCTION: unpacking the law for migrants

EU CITIZENS

1. Who can benefit from the freedom of movement and residence?
2. Non-discrimination on grounds of nationality
3. Possible restrictions
4. CJEU case law on EU citizenship/residence

THIRD COUNTRIES' NATIONALS

1. Legally resident
2. Illegal immigrants

CONCLUSIONS

Unpacking the law for migrants

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- Citizenship, Migration and Human Rights are key items of European and domestic agendas – who has the right to enter and settle in Europe and under what conditions, is a widely debated topic.
- Tensions between restrictive migration policies as opposed to commitment to strengthen protection of fundamental rights
- Citizenship and Migration: at the intersection of 3 areas of law:
  - Free movement provisions for EU citizens
  - Area of freedom, security and justice
  - Fundamental rights

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Unpacking the law for migrants

- Mapping exercise of migrants within the EU – Variables triggering different levels of protection:
  - EU qualified citizens
  - Intra-mobility clause for EU citizens
  - Length of residence
  - TCNs: depending on their entry and length of residence
- Nested entitlements to achieve social cohesion – citizenship versus denizenship - Matrioska doll

Who can benefit from free movement and residence?

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EU citizens:

- Enjoy a quasi-equality of rights based on non-discrimination on the ground of nationality & Union citizenship status - free movement rights (with restrictions)
- However HIERARCHY of entitlements: depending on qualified status (workers, self-employed people, students, persons with independent means) or/and length of residence (up to 3 months , between 3 months and 5 years, 5 years and over)

TCNs:

- if part of EU citizen's family subject to Union citizenship provisions
- Otherwise area of freedom, security and justice (Title V TFEU)

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EU citizens: free movement and residence

PRIMARY LEGISLATION:

- Article 45 TFEU – Free movement of workers
- Articles 20 & 21 TFEU – EU Citizenship
- EU Charter of Fundamental Rights (Arts 39 – 46), Art 45 Charter refers to free movement
- Art 21 Charter non-discrimination

SECONDARY LEGISLATION:

- Directive 2004/38 (Citizenship Rights Directive - CRD): formalities of entry and residence
- Other pieces of secondary legislation regulates equal access and conditions of work (Reg 492/11) and the right to remain after being employed (Reg 635/2006/EC)

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EU citizens: free movement and residence

Article 20(2) TFEU Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the MSs

Article 21(1) TFEU Every citizen of the Union shall have the right to move and reside freely within the territory of the MSs, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

- Article 45 Charter - Freedom of movement and of residence

- 1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
- 2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

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EU citizens: free movement and residence

CJEU: emphasised the importance of intra-Union mobility: core legal component of right to freely move and reside

Not an unlimited right to residence in the host state under Directive 2004/38 (known as CR Directive)

CJEU's approach more flexible to cover grey areas combining art 20 TFEU and art 18 TFEU = the non-discriminatory model – equal treatment for legally residing citizens (*Maria Martinez Sala, Grzelczyk, Trojani, Bidar*) = if lawful residence then entitlements to EU citizens.

Grzelczyk case (C-184/99) status of EU citizenship as: "destined to be the fundamental status of nationals of the MSs, …… to enjoy the same treatment in law within the area of application ratione materiae of the EC Treaty irrespective of their nationality, subject to such exceptions as are expressly provided for…".

Directive (CRD) 2004/38

- Consolidates, updates and replaces most of the legislation governing the rights of movement & residence of all categories of persons under part 2 TFEU (non-discrimination and citizenship)

Aim

it facilitates exercise of rights by reducing administrative formalities, gives a better definition of the status of family members, limits the scope for refusing entry or terminating the right of residence

(citizenship and social rights –different degrees of solidarity to which Union citizenship gives rise)

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Who is covered by Directive 2004/38/EC?

- Citizens of an EU member state who visit, live, study or work in a different member state
- The EU citizen's direct family members, including their non-EU spouse/partner and the spouse/partner's direct family members (such as children)
- Other family members who are "beneficiaries"
- Different entitlements depending on the length of residence.

Directive (CRD) 2004/38

- Right to move & reside up to 3 months = Short-term residence
- Right to residence for more than 3 months up to 5 yrs = Mid-term residence
- Permanent residence for more than 5 yrs = Long-term residence

Workers

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Article 45 TFEU

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

No definition of "workers" in primary or secondary legislation

The CJEU: concept of "worker" is a Union Law concept (Levin Case 53/61)

Family Members

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Article 2 Directive 2004/38:

'family' entails citizen's:

(a) spouse;

(b) partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a MS, if the legislation of the host MS treats registered partnership as equivalent to marriage […]

(c) direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b).

(d) dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b).

Automatic right of entry and residence in the host MS

Family Members: other beneficiaries

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Article 3 Directive 2004/38:

[…] host MS shall facilitate the entry of two other groups of people :

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested [….] any denial of entry or residence to these people [needs to be justified]

Students

Free movement BUT:

Students must demonstrate
(i) sufficient resources to avoid becoming a burden on the social assistance system of the host MS and
(ii) full sickness insurance.

Same fees but for grant provisions see Article 24(2) Directive 2004/38 (see CJEU case law)

Interface between migrant students and migrant workers who become migrant students - Access to 'Vocational education" for workers

Full equality of children of migrant workers

Retired people

Right of entry and residence to employees and self-employed persons that have ceased their occupational activity

AND

- are they are the recipients of an invalidity or early retirement pension or old-age benefits, or a pension in respect of an industrial accident or disease

- and provided that they are covered by sickness insurance or have sufficient resources to avoid becoming a burden on the social security system of the host Member State during their period of residence.

People with independent means

Right of entry and residence to any EU national, their spouse and dependents

on the CONDITION that they have:

- sufficient means to avoid being a burden on the social assistance scheme of the host MS
- and that they have sickness insurance.

The spouse and the dependent children of a national of a MS entitled to the right of residence within the territory of the MS may take up any employed activity anywhere within the territory of that MS, even if they are not nationals of a MS.

Who is not covered by Directive 2004/38/EC?

- A static citizen who has never moved in which all movement of non-EU family members into the home state is governed by national law.
- Special "transitional" arrangements for new MS (Croatia) maintained until June 2018. Citizens of new EU member states can however travel without visas throughout Europe, and their non-EU family members can travel freely with them.
- Citizens of non-EU countries who are not travelling with or joining family members who are EU citizen.

2. Non-discrimination on grounds of nationality

A. Free movement of workers: Article 45 and Directive 2004/38 and Regulation 492/11 gives a general right of non-discrimination on grounds of nationality in matters relating to employment, remuneration and other conditions of work and employment.

B. Access to social citizenship entitlements under the free movement provisions is based on the principle of non-discrimination and citizenship of the Union which supplements art 45 TFEU and its associated secondary legislation (extensive use by the CJEU of art 20-21 TFEU combined with art 18 TFEU)

C. Non-discrimination - Article 21 (2) Charter (Equality Title III) – […], any discrimination on grounds of nationality shall be prohibited.

3. Possible Restrictions

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Art 45 (3) TFEU. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health

Article 27(1) Dir. 2004/38.

[…] MSs may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends."

Article 28 Dir. 2004/38 - Protection against expulsion

1. Before taking an expulsion decision […], the host MS shall take account of […] how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host MS and the extent of his/her links with the country of origin.
2. The host MS may not take an expulsion decision against Union citizens or their family members […] who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.

4. Selected case-law

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Beyond Classic Free Movement Case Law

- *Case C-34/09 Gerardo Ruiz Zambrano*
- *Case C-434/09 R (McCarthy)*
- *Case C-256/11 Dereci*
- *Case C-40/11 Yoshikazu Iida v Stadt Ulm*
- *Case C-86/12 Alokpa v Ministre du Travail, de l'Emploi et de l'Immigration*
- *Case C-165/14 Alfredo Rendón Marín v Administración del Estado*

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To what extent does EU citizenship legislation impact on TCNs residence rights?

Before the entry into force of the Lisbon Treaty/Charter and the CR Directive – *Case of Zu and Chen* (C-200/02)

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To what extent does EU citizenship legislation impact on TCNs residence rights?

Facts: Chinese family who gave birth to second child, Catherine, in Belfast and then moved to Cardiff. Catherine acquired Irish nationality, as she was born in the island in accordance with section 6(3) of the Irish Nationality and Citizenship Act. Her dad was working in China but part of his business was carried out in the UK. She had independent means of support and sickness insurance.

CJEU: Article 20 TFEU and the then Council Directive 90/364/EEC, confer on a young minor who is a national of a MS, covered by appropriate sickness insurance and sufficient resources: right to reside for an indefinite period in that State and a parent who is that minor's primary carer to reside with the child in the host MS.

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To what extent does EU citizenship legislation impact on TCNs residence rights?

After the entry into force of the Lisbon Treaty /Charter and the CR Directive – *Case of Zambrano* (C-34/09)

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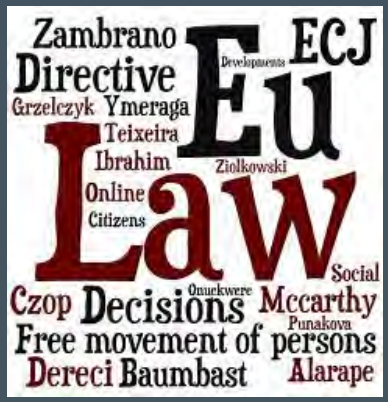
To what extent does EU citizenship legislation impact on TCNs residence rights?



Facts: Mr Zambrano, his wife and child arrived in Belgium on a visa and immediately applied for asylum, on the basis that they had faced persecution in Colombia. The application was denied but the appeal lasted 12 years. In the meantime Mr Zambrano found employment and had two more children who by virtue of Belgian law became Belgian citizens, which is the corollary of EU citizenship.

AG Sharpston: EU citizenship's philosophy reversing the relationship between the refugee (TCN) and citizen. EU Citizenship not used to exclude the refugee, but to bring the refugee in.

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To what extent does EU citizenship legislation impact on TCNs residence rights?

Case of Zambrano (C-34/09) - Test of 'genuine enjoyment of the substance of citizenship rights'.

CJEU: Article 20 TFEU precludes a MS from refusing a TCN upon whom his minor children, who are EU citizens, are dependent, a right of residence and from refusing to grant a work permit to him, in so far as such decisions deprive those children of the genuine enjoyment of the substance of EU citizen rights.

Innovative element: extension of the principle to a child who never exercised intra-Union mobility (no application of CR Directive) and with no independent means of support – art 20 TFEU independent source of residence rights. Rights protected in the Charter mentioned by the referring Court in one of the three questions which have been simplified by the CJEU in one question.

"It's been not so bad … I have fallen asleep only after the Zambrano case."

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To what extent does EU citizenship legislation impact on TCNs residence rights?

McCarthy

McCarty v SSHD (C-434/09). McCarthy case limited potentially wide-ramification of Zambrano.

Facts: a British national (Mrs McCarthy) who was born in the UK and always lived there, following her marriage to a TCN applied for an Irish passport for the first time. Once obtained, as an Irish national, she asked for a residence permit to base her residence in the UK on rights associated with European citizenship. Consequently, her husband applied for a residence document as the spouse of a Union citizen.

Both applications refused: she had never exercised her right to move and reside in Member States other than the United Kingdom. The Charter was just briefly mentioned to state the rights to free movement for Union citizens (art 45 Charter)

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To what extent does EU citizenship legislation impact on TCNs residence rights?

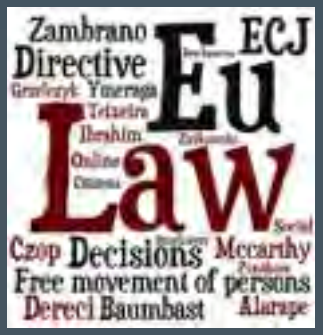
McCarthy

McCarty : the right of free movement and residence in the CR Directive is a unitary right, not two different rights, as it seemed to suggest in Zambrano in relation to Article 20 TFEU.

CJEU: Test of 'genuine enjoyment of the substance' of citizenship rights to the fact = negative reply of the Court in relation to Art 3(1) Dir 2004/38 and also art 21 TFEU. In McCarty CJEU focused the analysis on Article 21 TFEU.

Whether "the national measure at issue […] has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the MSs, in accordance with Art 21 TFEU." (para 49)

To what extent does EU citizenship legislation impact on TCNs residence rights?



Dereci and others (C-256/11)

Facts: a 5 joint applications: 1. A Turkish national (Mr Dereci) who entered Austria illegally, married an Austrian citizen, 3 Austrian minor children; 2. A Nigerian national (Mr Maduike) who entered Austria illegally and married an Austrian national; 3. A Sri Lankan national (Mrs Heiml) who entered Austria as a regular migrant and married an Austrian national; 4. A Yugoslav national (Mr Kokollari) entered Austria legally at age of 2 with his Yugoslav parents. Now 29 yrs old resident in Austria and dependant on his mother, now Austrian; 5. A Serbian national (Mrs Stevic) resident in Serbia with her husband and 3 adult children, seeking family reunification with her father, a naturalised Austrian resident in Austria, from whom she receives monthly financial support.

All applications for residence permits rejected + 4 of them expulsion orders and individual removal orders.

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To what extent does EU citizenship legislation impact on TCNs residence rights?

CJEU: *Test of 'genuine enjoyment of the substance of citizenship rights': very cautious application of the test.*

Risk expulsion: Re-assertion of the 'genuine enjoyment' test (Zambrano test) and its limitations: the Union citizen must be forced to leave not only home MS but also Union as a whole. (para 66).

Decision left to the national court. […] if the referring court considers [….] that the situation of the applicants in the main proceedings is covered by EU law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life (Article 7 Charter). On the other hand, if it takes the view that that situation is not covered by EU law, it must undertake that examination in the light of Article 8(1) of the ECHR (para 72)

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To what extent does EU citizenship legislation impact on TCNs residence rights?

Yoshikazu Iida v Stadt Ulm (Case C-40/11)

Facts: Case involved a Japanese national (Mr Iida), married in 1998 to a German national and separated but not divorced since 2008. Since 2005, Mr Iida lives and works (with a permanent job) in Germany. The wife moved to Vienna (Austria) with her daughter. The spouses jointly exercise parental responsibility for their daughter. Their daughter was born in 2004 in the US, and she has German, Japanese and American nationality.

German authorities refused to grant residence card as a family member of an EU citizen on the basis of Directive 2004/381 on European citizenship. Mr Iida obtained a right of residence in Germany in connection with family reunion, extending his residence permit was a matter of discretion

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To what extent does EU citizenship legislation impact on TCNs residence rights?

CJEU: application of the 'genuine enjoyment' test (Zambrano test): the refusal to grant him a right of residence derived from their status of EU citizen is not liable to deny his daughter or his spouse genuine enjoyment of the substance of rights.

Mr Iida cannot base a right of residence directly on the TFEU by referring to the EU citizenship of his daughter or his spouse. He has always lived in Germany in accordance with national law and can be granted a right of residence in Germany on another legal basis.

Finally, he cannot rely on the Charter, which lays down a right to respect for private life and certain rights of the child. Since Mr Iida does not satisfy the conditions of Directive 2004/38 and has not applied for a right of residence as a long-term resident (Directive 2003/109), his situation shows no connection with EU law.

To what extent does EU citizenship legislation impact on TCNs residence rights?

Alokpa v Ministre du Travail, de l'Emploi et de l'Immigration (C-86/12)

Facts: a Togolese national (Mrs Alopka) was rejected asylum seeker application in Luxembourg but discretionary leave to remain granted until 31 December 2008, as she had given birth to twins requiring care. Her French children acquired Union citizenship. Then, residence permit was rejected and she appealed, questions referred to the CJEU.

CJEU: Articles 20 TFEU and 21 TFEU do not preclude a MS from refusing to allow a TCN with sole responsibility of two EU minor children to reside in its territory … in so far as those Union citizens do not satisfy the conditions set out in CR Directive or such a refusal does not deprive those citizens of effective enjoyment of the substance of the rights … to be determined by the referring court (reference to the Charter by the referring Court) ..as a consequence of such a refusal, those children would find themselves obliged to leave the EU.

To what extent does EU citizenship legislation impact on TCNs residence rights?

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Alfredo Rendón Marín (C-165/14)

Facts: a Colombian national (Mr Rendón Marín) is the father of 2 minor children born in Malaga (Spain): a boy of Spanish nationality and a girl of Polish nationality. The children have always resided in Spain. The father was granted sole care and custody of his children. The 2 children are receiving appropriate care and schooling. He has a criminal record. (9 months imprisonment) but granted a provisional 2 year suspension of that sentence. He was awaiting a decision for his criminal record to be removed from the register

CJEU: Article 21 TFEU and Directive 2004/38 must be interpreted as precluding national legislation which requires a TCN to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record where he is the parent of a minor child who is a Union citizen […]. Decision left to the national court on the use art 20 TFEU to be interpreted in the same manner as above if conditions for the Directive 2004/38. Mention to art 7 and 24 Charter!

Legally Resident TCNs: free movement and residence

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PRIMARY LEGISLATION:

- Article 67-80 TFEU
- EU Charter of Fundamental Rights Art 45 Charter free movement
- Art 21 Charter non-discrimination

SECONDARY LEGISLATION:

- Long-Term Residence Directive 2003/109/EC
- EU Blue Card Directive 2009/50/EC
- Students and Researcher Directive 2016/801
- Intra-Corporate Transfer Directive 2014/66/EU
- Single Permit Directive 2011/98/EU
- Qualification Directive 2004/83/EC and (Recast) Qualification Directive 2011/95/EC.
- Family Reunification Directive
- Return Directive 2008/115/EC

Legally Resident TCNs: free movement and residence

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Entry and Residence of TCNs: fragmented status depending on whether they are economically or non-economically active, highly or low skilled or meet the integration requirements (i.e. language test) or hold the permanent residence status.

Thus, depending on whether they are asylum seekers and beneficiaries of international protection, economic migrants, long-term residents and family members have diversified entitlements.

Some approximation of norms for asylum seekers + EU Asylum Package Denmark, UK and Ireland Special Protocols. The UK and Ireland began taking part in some aspects of the Schengen agreement, such as the Schengen Information System (SIS), from 2000 and 2002 respectively.

Free movement rights for TCNs

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Category of migrants	Free movement rights
EU citizens	This is a fundamental right, which is now not only guaranteed in the TFEU and the Citizenship Directive but also in the Charter of Fundamental Rights.
Legally residing TCNs	Article 45 (2) of the Charter states that freedom to move and reside in the Member States can also be granted to them. However, the facultative nature of this provision makes it difficult to consider this as a fundamental right.
Long-term residents, students, researchers and highly qualified workers	Subject to restrictions: Long Term Residents (after 5 years of legal continuous residence) but free movement in another MS for more than 3 months subject to conditions See art 14(2) (3), 15 (1) and (2) (a) and (b) Family members of LTR can move too (see art 16 (1) Blue Card holders/Students/Researcher limited facilitation for intra-EU mobility. Intra-Corporate Transferees conditional intra-EU mobility (art 20) Family members can move (art 19)
Refugees, beneficiaries of subsidiary protection and non-EU family members of TCNs	Not entitled to free movement. Differential treatment compared to EU citizens. Refugees, beneficiaries of subsidiary protection acquisition of free movement when they acquire the status of long term residents.

Security of residence for TCNs

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Category of migrants	Security of residence
Long-Term Residents Directive (LRD)	Most legally residing TCNs become eligible for permanent resident status when they have stayed in a Member State for five years.
Legally residing TCNs	Students are excluded from the scope of the LRD, not entitled to permanent residence. ICT no right to permanent residency – max stay in the host country, 3 years. Refugees and beneficiaries of subsidiary protection only recently included within the personal scope of application of the amended Long-Term Residents Directive (see also Recast Qualification Directive 2011/95/EU).
Citizenship Directive (2004/38)	Family members of EU citizens are, however, entitled to permanent residence after five years without any further conditions being imposed
Blue Card Directive	For highly qualified workers, the directive contains more favourable criteria by which the period of five years residence is calculated.

Illegally Resident TCNs

Return Directive 2008/115/EC: key legal instrument for returning TCNs staying illegally on the MS's territory. UK and Ireland have decided not to opt into this area.

A MS can issue a return decision including a period from 7 to 30 days to return voluntary. If the TCN does not return within the voluntary period, then the MS can take the necessary measures to enforce return of the TCN.

MS may refrain from making the decision:

- if the MS decides to grant the TCN a residence permit based on humanitarian reasons.
- if the TCN is waiting for a renewal of their residence permit. With the exception of cases where there is cause for concern for national security or similar situations.

Conclusion

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EU citizens: Free movement and residence for EU citizens and their families subject to conditions applied restrictively.
However status of EU citizenship as: "destined to be the fundamental status of nationals of the MSs, …… to enjoy the same treatment in law within the area of application ratione materiae of the EC Treaty irrespective of their nationality, subject to such exceptions as are expressly provided for…" (Grzelczyk case (C-184/99).

TCNs: fragmented status linked to entry and length of residence in the host state. Intra-mobility possible for those who have acquired the permanent residence status.

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Freedom of Movement and Residence of Persons within the EU

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Key legal sources

EU CITIZENS

Primary legislation:

Article 45 TFEU – Free movement of workers

Articles 20 & 21 TFEU – EU Citizenship

EU Charter of Fundamental Rights (Arts 39 – 46), Art 45 Charter refers to free movement

Art 21 Charter non-discrimination

Secondary legislation:

Directive 2004/38 (Citizenship Rights Directive - CRD): formalities of entry and residence

Regulation 492/11 and Directive 2004/38:

A) Equal access to and conditions to employment

B) Equal treatment in matters of employment, remuneration and conditions of work for EU workers and members of their families

Commission Regulation 635/2006/EC repealing Council Regulation 1251/70/EEC : right to remain in the host Member State after being employed there with the status of permanent residence

THIRD COUNTRY NATIONALS

Primary legislation:

Article 67-80 TFEU

See in particular: Article 78 TFEU and Article 79 TFEU

Secondary legislation:
Long-Term Residence Directive 2003/109/EC
EU Blue Card Directive 2009/50/EC
Students and Researcher Directive 2016/801
Intra-Corporate Transfer Directive 2014/66/EU
Single Permit Directive 2011/98/EU
Qualification Directive 2004/83/EC and (Recast) Qualification Directive 2011/95/EC.
Family Reunification Directive 2003/86/EC.
Return Directive 2008/115/EC.

Selected case law on freedom of movement and residence

Case 34/09, Zambrano, 8 March 2011 (reference to Chen and Zhu case) (leading case)

Case C-434/09, Shirley McCarthy v Secretary of State for the Home Department, 5 May 2011 (covered)

Case C-256/11, Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduike, Dragica Stevic v Bundesministerium f r Inneres, 15 November 2011 (covered)

Opinion of Advocate General, Case C-254/11, Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége v Oskar Shomodi, 6 December 2012 (covered)

Case C-145/09, Land Baden-W rttemberg v Panagiotis Tsakouridis, 23 November 2010 (mentioned)

Case 162/09, Secretary of State for Work and Pensions v Child Poverty Action Group, 7 October 2010 (just mentioned)

Case-86/12, Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration, 10 October 2013 (covered)

Case C‑165/14 Alfredo Rendón Marín ase C‑165/14 v Administración del Estado, 13 September 2016 (covered).

EU CITIZENS

1. WHO CAN BENEFIT FROM THE FREEDOM OF MOVEMENT AND RESIDENCE?

Free movement of workers - Article 45 TFEU –

Article 45 TFEU

1. Freedom of movement for workers shall be secured within the Union.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
(a) to accept offers of employment actually made;
(b) to move freely within the territory of Member States for this purpose;
(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Who is a worker? The concept of “worker” is a Union Law concept (Levin Case 53/61).

The CJEU has been generously construed by the Court of Justice (see CJEU case-law)

EU Citizens - Articles 20 & 21 TFEU -

Article 20 TFEU

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
(a) the right to move and reside freely within the territory of the Member States;
(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Article 21 TFEU

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

2. If action by the Union should prove necessary to attain this objective and the Treaties have not provided the necessary powers, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

3. For the same purposes as those referred to in paragraph 1 and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament.

EU Charter of Fundamental Rights (Free movement rights)

Article 45 Freedom of movement and of residence

1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.

2. Freedom of movement and residence may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

Who is covered by Directive 2004/38/EC?

- Citizens of an EU or EEA member state who visit, live, study or work in a different member state
- The EU citizen's direct family members, including their non-EU spouse/partner and the spouse/partner's direct family members (such as children)
- Other family members who are "beneficiaries", including common law partners, same sex partners, and dependent family members, members of the household, and sick family members

Family Members

Direct family members Article 2(2) Directive 2004/38/EC:

"Family member"	***Examples, notes and interpretation***
(a) the spouse;	*A partner in a legal same-sex marriage should also be considered a "spouse". See discussion on same-sex marriage.*
(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a [EU/EEA] Member	*This applies when the member state treats registered partnership "as equivalent to marriage". Where that is not true, the partner is not considered a "family member" in this definition, but still has a right of entry*

State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;	*as a beneficiary (see beneficiary below). This only covers registered partnerships done by an EU member state.*
(c) the direct descendants who are under the age of 21 or are dependents and those of the spouse or partner as defined in point (b);	*Children (or grandchildren!) under 21 or those who are older than 21 but still dependent (e.g. students supported by their parents). The child can be of the EU citizen or of the non-EU citizen. This would include a child from a previous relationship or from before the EU-citizen obtained their citizenship.*
(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);	*Dependent parents and dependent grandparents of either the EU citizen or of the non-EU spouse or partner. Dependent usually means financially dependent, though there may be other legally reasonable interpretations. For non-dependent parents, see beneficiary below.*

These are the people who have the easy-evidence route through the Directive. They can usually prove their relationship with a simple document, like a birth certificate or a marriage certificate, that legally documents the family link. These "*family members*" (as the Directive states) "*enjoy an automatic right of entry and residence in the host Member State*" when they are with their EU citizen relative.

There are other people who are also direct beneficiaries of Directive 2004/38/EC. These are people who do not fall into this explicit definition of "*family member*", but who are none the less "part of the family".

Other family members who are "beneficiaries", including common law partners, same sex partners (if not in a registered partnership), and dependent family members, members of the household, and sick family members.

Other beneficiaries

There are other people who are also direct beneficiaries of Directive 2004/38/EC. These are people who do not fall into the explicit definition of "*family member*", but who are none the less "part of the family".

For these beneficiaries, Directive 2004/38/EC says in the preamble:

In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.

Later, in the text of the Directive, it becomes a little more explicit about who these other beneficiaries are:

Article 3 Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

Who can be a beneficiary of Directive 2004/38/EC is worth breaking up and looking at in more detail, category by category:

"Other beneficiaries"	***Notes and interpretation***
2 (a) any other family members […] who, in the country from which they have come, are [either] dependants or members of the household of the Union citizen	This covers two separate groups, either: 1. other family members who are dependent on the EU citizen, or 2. other family members who live (or have lived recently) in the same household (even if they are not dependent). Another key phrase is "in the country <u>from which they have come</u> ". The phrase is quite open and covers a number of situations. For a Japanese person, it can include their original home country (e.g. Japan), a country they have recently lived in (e.g. USA) or where they currently live (e.g. France).
[2 (a) continued] or where serious health grounds strictly require the personal care of the family member by the Union citizen;	e.g. a non-EU parent who has been quite independent but who now needs intensive assistance because of a medical condition such as a stroke or Alzheimer's
2 (b) the partner with whom the Union citizen has a durable relationship, duly attested	This category covers all other long term "durable" partnerships, including both opposite-sex and same-sex relationships. There is no official definition of how long the relationship must have existed. Some countries expect to see two years of living together, but if you have a child with somebody and live with them it would clearly be incompatible with the Directive to require two years of relationship history. When a member-state does not recognize civil partnerships as equivalent to marriage, this is the category which is used for entry.

Family members (as outlined above) are also covered in situation where the EU citizen has worked in another member state and now wishes to return to his/her "home" country to work (Case C-370/90 *Surinder Singh*).

See Case C-83/11 - Rahman and Others – State's obligation to facilitate, in accordance with national legislation, entry and residence for 'any other family members' who are dependants of a Union citizen

Who is NOT covered by Directive 2004/38/EC?

- If a citizen is living in their home EU member state and has not worked in other EU member state, then this Directive does not apply. All movement of non-EU family members into the home state is governed by national law.
- Some old-EU member states have special "transitional" arrangements that curb the ability of citizens of new EU states (Bulgaria and Romania) to move freely for work. The curbs were maintained until 2017. Citizens of new EU member states can however travel without visas throughout Europe, and their non-EU family members can travel freely with them.
- Citizens of non-EEA countries who are not travelling with or joining family members who are EU/EEA citizen.

2. NON-DISCRIMINATION ON GROUNDS OF NATIONALITY

A. Free movement of workers: Article 45 and Directive 2004/38 and Regulation 492/11 gives a general right of non-discrimination on grounds of nationality in matters relating to employment, remuneration and other conditions of work and employment.

Art 45 (2) TFEU - Such freedom of movement shall entail the abolition of *any discrimination based on nationality* between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

Recital 20, Preamble to Directive 2004/38 "In accordance with the *prohibition of discrimination on grounds of nationality*, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law".

Regulation 492/11, Section 2 Employment and equality of treatment

Article 7

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.
2. He shall enjoy the same social and tax advantages as national workers.
3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.
4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.

Article 8

A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote and to be eligible for the administration or management posts of a trade union. He may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by

public law. Furthermore, he shall have the right of eligibility for workers' representative bodies in the undertaking.
The first paragraph of this Article shall not affect laws or regulations in certain Member States which grant more extensive rights to workers coming from the other Member States.

Article 9
1. A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs.
2. A worker referred to in paragraph 1 may, with the same right as nationals, put his name down on the housing lists in the region in which he is employed, where such lists exist, and shall enjoy the resultant benefits and priorities.
If his family has remained in the country whence he came, they shall be considered for this purpose as residing in the said region, where national workers benefit from a similar presumption.

B. Access to social citizenship entitlements under the free movement provisions is based on the principle of non-discrimination and citizenship of the Union (art 18 TFEU) which supplements art 45 TFEU and its associated secondary legislation.

Article 18 (1) TFEU
1. Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.

Article 21 Charter (Equality Title III) - Non-discrimination -
1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

3. POSSIBLE RESTRICTIONS

Art 45 (3) TFEU. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health […]

Article 27(1) Directive 2004/38).
[…] Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends."

Restrictions on the right of entry and the right of residence: Union citizens or members of their family may be expelled from the host Member State on grounds of *public policy, public security or public health*. Under no circumstances may an expulsion decision be taken on economic grounds. Measures affecting freedom of movement and residence must comply with the proportionality principle and be based exclusively on the personal conduct of the individual concerned. Such conduct must represent a sufficiently serious and present threat affecting the fundamental interests of the state. Previous criminal convictions do not automatically justify expulsion. The mere fact that the entry documents used by the individual concerned have expired does not constitute grounds for such a measure. Only in exceptional circumstances, for overriding considerations of public security, can expulsion orders be served on a Union

citizen if he/she has resided in the host country for ten years or if he/she is a minor. Lifelong exclusion orders may not be issued under any circumstances and persons concerned by exclusion orders may apply for a review after three years. They also have access to judicial review and, where relevant, administrative review in the host Member State.

Article 28 Directive 2004/38 - Protection against expulsion
1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
(a) have resided in the host Member State for the previous 10 years; or
(b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989.

Finally, the directive enables Member States to adopt the necessary measures to refuse, terminate or withdraw any right conferred in the event of abuse of rights or fraud, such as marriages of convenience (**Article 35 Directive 2004/38**).

Moreover, the CJEU in the Case C-430/10 *Hristo Gaydarov v Director na Glavna direktsia 'Ohranitelna politsia' pri Ministerstvo na vatreshnite raboti* has stated that "Article 21 TFEU and Article 27 of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States do not preclude national legislation that permits the restriction of the right of a national of a Member State to travel to another Member State in particular on the ground that he has been convicted of a criminal offence of narcotic drug trafficking in another State, provided that (i) the personal conduct of that national constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, (ii) the restrictive measure envisaged is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it and (iii) that measure is subject to effective judicial review permitting a determination of its legality as regards matters of fact and law in the light of the requirements of European Union law".

In the Case C-145/09 *Land Baden-Württemberg v Panagiotis Tsakouridis*, the CJEU has stated that Article 28(3) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is capable of being covered by the concept of 'imperative grounds of public security' which may justify a measure expelling a Union citizen who has resided in the host Member State for the preceding 10 years. Article 28(2) of Directive 2004/38 must be interpreted as meaning that the fight against crime in connection with dealing in narcotics as part of an organised group is covered by the concept of 'serious grounds of public policy or public security'.

4. CASE-LAW on EU CITIZENSHIP PROVISIONS AND THE CHARTER

Is still intra-mobility the trigger for citizenship rights?

Case C-34/09 Zambrano [2011] ECR

- Case involved a family (Mr Zambrano, his wife and child) who arrived in Belgium on a visa and immediately applied for asylum, on the basis that they had faced persecution in Colombia. Application denied but appeal lasting 12 years. In the meantime, Mr Zambrano found stable employment and had two more children.
- Two children by virtue of Belgian law became Belgian citizens, corollary of EU citizenship.
- The Employment Tribunal in Brussels decided to refer three questions to the CJEU. Firstly, it asked whether Articles 18, 20 and 21TFEU taken together or separately could 'confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national, irrespective of whether he has previously exercised his right to move within the territory of the Member States?' Secondly, it asked whether these three articles of the TFEU, when put together with Articles 21, 24 and 34 of the EU Charter of Fundamental Rights meant that these rights must be protected on behalf of an infant-citizen, even where the infant citizen has not exercised free movement rights and is dependent for their enjoyment upon a third country national (TCN) parent.
  Finally it asked the CJEU whether, given this constellation of rights in EU law and the circumstances of a non-migratory infant-citizen, where the TCN parent 'fulfils the condition of sufficient resources and the possession of sickness insurance by virtue of paid employment making him subject to the social security system of that State', national law must grant the TCN parent an exemption from the requirement to hold a work permit.

- The Grand Chamber simplified the three questions into one: 'whether the provisions of the TFEU on European Union citizenship are to be interpreted as meaning that they confer on a relative in the ascending line who is a third country national, upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of which they are nationals and in which they reside, and also exempt him from having to obtain a work permit in that Member State.'

- Could Mr Zambrano could rely on the citizenship rights of his children to enjoy a derived right of residence, as had been the case in Chen? The difference here was that the children had remained in the member state of which they were nationals: would the absence of a cross-border element make this a 'wholly internal' situation?

- CJ: Test of 'genuine enjoyment of the substance' of citizenship rights in favour of Mr Zambrano: "Article 20 TFEU precludes a MS from refusing a TCN upon whom his minor children, who are EU citizens, are dependent, a right of residence and from refusing to grant a work permit to him, in so far as such decisions deprive those children of the genuine enjoyment of the substance of EU citizen rights".

- No application Citizenship Directive - Zambrano family not 'beneficiaries' Article 3(1) - they were not 'Union citizens who move to or reside in a Member State other than that of which they are a national.

Case C-434/09 McCarthy [2011] ECR

• Case involved a British/Irish national (Mrs McCarthy) who was born in the UK and always lived there. Following her marriage to a TCN applied for an Irish passport for the first time. Once obtained, as an Irish national, she asked for a residence permit to base her residence in the United Kingdom on rights associated with European citizenship.

Consequently, her husband applied for a residence document as the spouse of a Union citizen.

- Both applications refused: she had never exercised her right to move and reside in Member States other than the United Kingdom.

The Charter was briefly mentioned in McCarthy:

Para 27 As a preliminary point, it should be observed that citizenship of the Union confers on each Union citizen a primary and individual right to move and reside freely within the territory of the Member States, subject to the limitations and restrictions laid down by the Treaties and the measures adopted for their implementation, freedom of movement for persons being, moreover, one of the fundamental freedoms of the internal market, which was also reaffirmed in Article 45 of the Charter of Fundamental Rights of the European Union (Case C‑162/09 Lassal [2010] ECR I‑0000, paragraph 29).

- Test of 'genuine enjoyment of the substance' of citizenship rights (Zambrano test) to the fact = art 21 do not apply in this case. Mrs McCarthy was not deprived of the genuine enjoyment of Union citizen rights, or exercise of her right to move and reside freely within the territory of the Member States (para 49).

Case C-256/11 Dereci [2011] ECR

- 5 joint applications: TCNs married to Austrian citizens: residence permits rejected by the Austrian Authority.

- 4 of them subject to expulsion orders and individual removal orders. Austrian Authority refused to apply Directive 2004/38 family members of EU citizens: Union citizens concerned not exercised right of free movement.

- Re-assertion of the 'genuine enjoyment' test (Zambrano test) and its limitations: the Union citizen must be forced to leave not only home MS but also Union as a whole. (para 66). Decision left to the national court.

In Dereci, the Charter was mentioned when the Court looked at the issue of 'The right to respect for private and family life'.

Para 70 As a preliminary point, it must be observed that in so far as Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), concerning respect for private and family life, contains rights which correspond to rights guaranteed by Article 8(1) of the ECHR, the meaning and scope of Article 7 of the Charter are to be the same as those laid down by Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights (Case C‑400/10 PPU McB. [2010] ECR I-0000, paragraph 53).

Para 71 However, it must be borne in mind that the provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (McB., paragraph 51, see also Joined Cases C-483/09 and C-1/10 Gueye and Salmerón Sánchez [2011] ECR I‑0000, paragraph 69).

Para 72 Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR.

Case C-40/11 Yoshikazu Iida v Stadt Ulm (case decided on 8 November 2012)

- Case involved a Japanese national (Mr Iida), married in 1998 to a German national and separated but not divorced since 2008. Since 2005, Mr Iida lives and works (with a permanent job) in Germany. The wife moved to Vienna (Austria) with her daughter. The spouses jointly exercise parental responsibility for their daughter. Their daughter was born in 2004 in the US, and she has German, Japanese and American nationality.

- German authorities refused to grant residence card as a family member of an EU citizen on the basis of Directive 2004/381 on European citizenship. Mr Iida obtained a right of residence in Germany in connection with family reunion, extending his residence permit was a matter of discretion.

- CJ: application of the 'genuine enjoyment' test (Zambrano test): the refusal to grant him a right of residence derived from their status of EU citizen is not liable to deny his daughter or his spouse genuine enjoyment of the substance of rights.

- Mr Iida cannot base a right of residence directly on the TFEU by referring to the EU citizenship of his daughter or his spouse. He has always lived in Germany in accordance with national law and can be granted a right of residence in Germany on another legal basis.

- Finally, he cannot rely on the Charter of Fundamental Rights of the European Union, which lays down a right to respect for private life and certain rights of the child. Since Mr Iida does not satisfy the conditions of Directive 2004/38 and has not applied for a right of residence as a long-term resident within the meaning of Directive 2003/109, his situation shows no connection with EU law, so that the Charter of Fundamental Rights of the European Union does not apply.

The Charter was referred to extensively in Case C-40/11 Yoshikazu Iida:

Para 32 In that context, the Verwaltungsgerichtshof Baden-Württemberg decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. On Articles 2, 3 and 7 of [Directive 2004/38]:

(a) Does "family member" include, in particular in the light of Articles 7 and 24 of the [Charter of Fundamental Rights ("the Charter")] and Article 8 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, "the ECHR")], on an extended interpretation of Article 2(2)(d) of Directive 2004/38, a parent who is a third-country national, has parental responsibility for a child who is a Union citizen entitled to freedom of movement, and is not maintained by that child?

(b) If so, does Directive 2004/38 apply to that parent, in particular in the light of Articles 7 and 24 of the Charter and Article 8 of the ECHR, on an extended interpretation of Article 3(1) of the directive, even where there is no "accompanying" or "joining" with respect to the Member State of origin of the child who is a Union citizen and has moved away?

(c) If so, does it follow that that parent, in particular in the light of Articles 7 and 24 of the Charter and Article 8 of the ECHR, has a right of residence for more than three months in the Member State of origin of the child who is a Union citizen, on an extended interpretation of Article 7(2) of Directive 2004/38, at least as long as parental responsibility subsists and is actually exercised?

2. On Article 6(1) TEU in conjunction with the Charter:

(a) (i) Is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter simply where the subject-matter of the dispute depends on a national law (or part of a law) which inter alia – but not only – transposed directives?

(ii) If not, is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter simply because the claimant is possibly entitled to a right of residence under Union law and could accordingly, under the first sentence of Paragraph 5(2) of the FreizügG/EU, claim a residence card for a family member of a Union citizen which has its legal basis in the first sentence of Article 10(1) of [Directive 2004/38]?

(iii) If not, is the Charter applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter, in accordance with the case-law deriving from Case C-260/89 ERT [1991] ECR I-2925, paragraphs 41 to 45, where a Member State restricts the right of residence of the father who is a third-country national with parental responsibility for a Union citizen who is a minor and resides predominantly with her mother in another Member State of the Union because of the mother's employment?

(b) (i) If the Charter is applicable, can a right of residence under European Union law for the father who is a third-country national be derived directly from Article 24(3) of the Charter, at least as long as he has and actually exercises parental responsibility for his child who is a Union citizen, even if the child resides predominantly in another Member State of the Union?

(ii) If not, does it follow from the freedom of movement of the child who is a Union citizen under Article 45(1) of the Charter, possibly in conjunction with Article 24(3) of the Charter, that the father who is a third-country national has a right of residence under European Union law, at least as long as he has and actually exercises parental responsibility for his child who is a Union citizen, so that in particular the freedom of movement of the child who is a Union citizen is not deprived of all practical effect?

3. On Article 6(3) TEU in conjunction with the general principles of European Union law:

(a) Can the "unwritten" fundamental rights of the European Union developed in the Court's case-law from Case 29/69 Stauder [1969] ECR 419, paragraph 7, up to, for example, Case C-144/04 Mangold [2005] ECR I-9981, paragraph 75, be applied in full even if the Charter is not applicable in the specific case; in other words, do the fundamental rights which continue to apply as general principles of Union law under Article 6(3) TEU stand autonomously and independently alongside the new fundamental rights laid down in the Charter in accordance with Article 6(1) TEU?

Para 78 As to the fundamental rights mentioned by the referring court, in particular the right to respect for private and family life and the rights of the child, laid down in Articles 7 and 24 of the Charter respectively, it must be borne in mind that, in accordance with Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing European Union law. Under Article 51(2) of the Charter, it does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the

Treaties. Accordingly, the Court is called on to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (see Dereci and Others, paragraph 71).

Para 79 To determine whether the German authorities' refusal to grant Mr Iida a 'residence card of a family member of a Union citizen' falls within the implementation of European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it (see Case C‑309/96 Annibaldi [1997] ECR I‑7493, paragraphs 21 to 23).

Para 80 While Paragraph 5 of the FreizügG/EU, which provides for the issue of a 'residence card of a family member of a Union citizen', is indeed intended to implement European Union law, it is none the less the case that the situation of the claimant in the main proceedings is not governed by European Union law, since he does not satisfy the conditions for the grant of that card in accordance with Article 10 of Directive 2004/38. Moreover, in the absence of an application by him for the status of long-term resident in accordance with Directive 2003/109, his situation shows no connection with European Union law.

Para 81 In those circumstances, the German authorities' refusal to grant Mr Iida a 'residence card of a family member of a Union citizen' does not fall within the implementation of European Union law within the meaning of Article 51 of the Charter, so that its conformity with fundamental rights cannot be examined by reference to the rights established by the Charter.

Para 82 In the light of the foregoing, the answer to the referring court's question is that, outside the situations governed by Directive 2004/38 and where there is no other connection with the provisions on citizenship of European Union law, a third‑country national cannot claim a right of residence derived from a Union citizen.

Case C‑86/12 Adzo Domenyo Alokpa

- The case involves a Togolese national (Mrs Alopka) who was rejected asylum seeker application in Luxembourg but discretionary leave to remain was granted until 31 December 2008, as she had given birth to twins requiring care. Her French children acquired Union citizenship. Then, residence permit was rejected and she appealed, questions referred to the CJEU.

- Questions referred by the Administrative Court to the CJEU: 'Is Article 20 TFEU – if necessary, read in conjunction with Charter 'Is Article 20 TFEU – if necessary, read in conjunction with Articles 20, 21, 24, 33 and 34 of the Charter of Fundamental Rights [of the European Union], or with one or more of those provisions read separately or in conjunction – to be interpreted as precluding a Member State from refusing a third-country national, with sole responsibility for his or her minor children who are citizens of the European Union, residence in the Member State of residence of the children, where they have been living with that person since birth, without having that nationality, while refusing the third-country national a residence permit, or even a work permit?

In Case C‑86/12 Adzo Domenyo Alokpa, the Charter was only mentioned by the referring national court:

Para 19 In those circumstances, the Cour administrative decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 20 TFEU – if necessary, read in conjunction with Articles 20, 21, 24, 33 and 34 of the Charter of Fundamental Rights [of the European Union], or with one or more of those provisions read separately or in conjunction – to be interpreted as precluding a Member State from refusing a third-country national, with sole responsibility for his or her minor children who are citizens of the European Union, residence in the Member State of residence of the children, where they have been living with that person since birth, without having that nationality, while refusing the third-country national a residence permit, or even a work permit?

Are such decisions to be regarded as being in the nature of decisions depriving those children, in their country of residence, in which they have lived since birth, of effective enjoyment of the substance of the rights attaching to the status of citizen of the European Union also in the situation where their other direct ascendant, with whom they have never shared family life, is resident in another Member State of the European Union, of which that person is a national?'

- CJEU: Articles 20 TFEU and 21 TFEU do not preclude a MS from refusing to allow a TCN with sole responsibility of two EU minor children to reside in its territory… in so far as those Union citizens do not satisfy the conditions set out in CR Directive or such a refusal does not deprive those citizens of effective enjoyment of the substance of the rights … to be determined by the referring court.

- Therefore, if the referring court holds that Article 21 TFEU does not preclude Mrs Alokpa from being refused a right of residence in Luxembourg, that court must still determine whether such a right of residence may nevertheless be granted to her, exceptionally – if the effectiveness of the Union citizenship that her children enjoy is not to be undermined – in light of the fact that, as a consequence of such a refusal, those children would find themselves obliged in practice to leave the territory of the European Union altogether, thus denying them the genuine enjoyment of the substance of the rights conferred by virtue of that status.

- In that regard, as the Advocate-General stated in his Opinion, Mrs Alokpa, as the mother of Jarel and Eja Moudoulou and as sole carer of those children since their birth, could have the benefit of a derived right to reside in France. (points 55 and 56)

- It follows that, in principle, the refusal by the Luxembourg authorities to grant Mrs Alokpa a right of residence cannot result in her children being obliged to leave the territory of the European Union altogether. It is, however, for the referring court to determine whether, in the light of all of the facts of the main proceedings, that is in fact the case.

- Nearly 10 years ago, the CJEU in the case of Chen C‑200/02 ruled that self-sufficient Union national children have the right to be accompanied by their TCN parents, but Alokpa case relates to the interpretation of Article 20 TFEU.

- It was not undertaken in the light of fundamental rights, as it was primarily concerned with the satisfaction of the conditions laid down by CR Directive.

• Thus, the lack of human rights dimension in the judgement and the mere application of the test leaving the national court to decide is unsatisfactory as the referring Court in Alokpa asked to interpret art 20 TFEU in light of the Charter.

Case C‑165/14 Alfredo Rendón Marín

• Mr Rendón Marín, a Colombian national, is the father of two minor children born in Malaga (Spain), namely a boy of Spanish nationality and a girl of Polish nationality. The children have always resided in Spain. Mr Rendón Marín was granted sole care and custody of his children. The whereabouts of the children's mother, a Polish national, are unknown. The two children are receiving appropriate care and schooling.

• Mr Rendón Marín has a criminal record. In particular, he was sentenced in Spain to a term of nine months' imprisonment. However, he was granted a provisional two-year suspension of that sentence with effect from 13 February 2009. On the date of the order for reference, namely 20 March 2014, he was awaiting a decision on an application for mention of his criminal record to be removed from the register (cancelación).

On 18 February 2010, Mr Rendón Marín lodged an application with the Director-General of Immigration of the Ministry of Labour and Immigration for a temporary residence permit on the basis of exceptional circumstances, pursuant to paragraph 4 of the First Additional Provision of Royal Decree 2393/2004.

By decision of 13 July 2010, Mr Rendón Marín's application was rejected pursuant to Article 31(5) of Law 4/2000 because he had a criminal record.

Mr Rendón Marín's appeal against that decision was dismissed by judgment of the Audiencia Nacional (National High Court (Spain)) of 21 March 2012, whereupon he brought an appeal against that judgment before the Tribunal Supremo (Supreme Court, Spain).

Mr Rendón Marín based his appeal against the judgment on a single plea in law, alleging (i) misinterpretation of the judgments of 19 October 2004, Zhu and Chen (C‑200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C‑34/09, EU:C:2011:124), since the case-law resulting from those judgments should, in his submission, have led to him being granted the residence permit sought, and (ii) infringement of Article 31(3) and (7) of Law 4/2000.

The referring court states that, leaving aside the specific circumstances of the main proceedings, in this case, as in the cases which gave rise to the judgments of 19 October 2004, Zhu and Chen (C‑200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C‑34/09, EU:C:2011:124), the refusal in Spain to grant Mr Rendón Marín a residence permit would result in his removal from Spanish territory and, therefore, from the territory of the European Union, which the two minor children, his dependants, would leave as a consequence. That court observes, however, that, in contrast to the situations examined in the judgments of 19 October 2004, Zhu and Chen (C‑200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C‑34/09, EU:C:2011:124), the applicable national legislation lays down a prohibition on the grant of a residence permit when the applicant has a criminal record in Spain.

Consequently, the referring court is uncertain whether national law, which prohibits, without any possibility of derogation, the grant of a residence permit when the applicant has a criminal record in the country where the permit is applied for, even though that has the unavoidable consequence of depriving a minor, a Union citizen who is a dependant of the applicant for a

residence permit, of his right to reside in the European Union, is consistent with the Court's case-law, relied on in the case, relating to Article 20 TFEU.

It was in those circumstances that the Tribunal Supremo (Supreme Court) decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is national legislation which excludes the possibility of granting a residence permit to the parent of a Union citizen who is a minor and a dependant of that parent on the ground that the parent has a criminal record in the country in which the application is made consistent with Article 20 TFEU, interpreted in the light of the judgments of 19 October 2004, Zhu and Chen (C‑200/02, EU:C:2004:639), and of 8 March 2011, Ruiz Zambrano (C‑34/09, EU:C:2011:124), even if this results in the removal of the child from the territory of the European Union, inasmuch as the child will have to leave with its parent?'

In Case C‑165/14 Alfredo Rendón Marín, the Charter was referred to in the following two paragraphs:

Para 66 As regards, moreover, the possible expulsion of Mr Rendón Marín, it is necessary, first, to take account of the fundamental rights whose observance the Court ensures, in particular the right to respect for private and family life, as laid down in Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') (see, to this effect, judgment of 23 November 2010, Tsakouridis, C‑145/09, EU:C:2010:708, paragraph 52) and, secondly, to observe the principle of proportionality. Article 7 of the Charter must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) thereof (see, to this effect, judgment of 23 December 2009, Detiček, C‑403/09 PPU, EU:C:2009:810, paragraphs 53 and 54).

The possibility of limiting a derived right of residence flowing from Article 20 TFEU

Para 81 Article 20 TFEU does not affect the possibility of Member States relying on an exception linked, in particular, to upholding the requirements of public policy and safeguarding public security. However, in so far as Mr Rendón Marin's situation falls within the scope of EU law, assessment of his situation must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter, an article which, as has been pointed out in paragraph 66 above, must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter.

CJEU: Article 21 TFEU and Directive 2004/38 must be interpreted as precluding national legislation which requires a third-country national to be automatically refused the grant of a residence permit on the sole ground that he has a criminal record where he is the parent of a minor child who is a Union citizen and a national of a Member State other than the host Member State and who is his dependant and resides with him in the host Member State;

Left the decision to the national court – however told the national court to use art 20 TFEU
"In the event that the referring court, when reviewing the conditions laid down in Article 7(1) of Directive 2004/38, comes to the conclusion that those conditions are not fulfilled and, in any event, so far as concerns Mr Rendón Marín's son, a minor, who has always resided in the Member State of which he is a national, it should be examined whether a derived right of residence for Mr Rendón Marín may, where appropriate, be founded on Article 20 TFEU".

Article 20 TFEU must be interpreted as precluding the same national legislation which requires a third-country national who is a parent of minor children who are Union citizens in his sole care to be automatically refused the grant of a residence permit on the sole ground that he

has a criminal record, where that refusal has the consequence of requiring those children to leave the territory of the European Union.

THIRD COUNTRY NATIONALS

5. LEGALLY RESIDENT TCNs

The entry and residence status of TCNs in the host country determine the set of rights that each category enjoys. Some groups of third-country nationals enjoy free movement rights to varying extents as it is shown by a number of directives (see below).

Primary law

Article 78 TFEU
1.The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising:
(a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
(b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
(c) a common system of temporary protection for displaced persons in the event of a massive inflow;
(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.
3. In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the ember State(s) concerned. It shall act after consulting the European Parliament.

Article 79 TFEU
1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:
(a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;
(b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;

(c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
(d) combating trafficking in persons, in particular women and children.
3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.
4. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.

5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

Long-Term Residence Directive 2003/109/EC

This directive covers long-term resident TCNs – those who resided in one EU MS for at least 5 years. Allows rights of residence and movement to other EU Member States after obtaining permanent residence in the first Member State (which is after 5 years of legal continuous residence there). But subject to conditions, if residence over 3 months (Article 14).

Article 14(2):
"A long-term resident may reside in a second Member State on the following grounds:
(a) exercise of an economic activity in an employed or self-employed capacity (2nd MS can apply labour market test, give preference to EU citizens (art 14(3))
(b) pursuit of studies or vocational training;
(c) other purposes."

In the 2nd MS, a TCN must apply for residence permit (art 15(1))

2nd MS may require stable and regular resources (art 15 (2)(a), comprehensive sickness insurance (art 15 (2)(b)).

Family member can move too if constituted as a family in the 1st MS (art 16(1)).

EU Blue Card Directive 2009/50/EC

This directive covers TCNs, who are in highly qualified employees. A highly-qualified employee is defined as a person who

"in the Member State concerned, - is protected as an employee under national employment law and/or in accordance with national practice, irrespective of the legal relationship, for the purpose of exercising genuine and effective work for, or under the direction of, someone else,

- is paid, and,

- has the required adequate and specific competence, as proven by higher professional qualifications" (art 2(b)).

EU Blue Card Holders enjoy more favourable rules on obtaining permanent residence status and free movement compared to long-term residents:

- accumulation of 5 years of legal and continuous residence, even within several Member States (art 15(2))

- application for PR as an EU Blue Car holder maybe submitted already after 2 years of continuous legal residence (art 15(2)(b))
- opportunity to change employer after in highly skilled employment after 2 years (art 12)
- movement to 2nd MS possible after 18 months of continuous legal residence in 1st MS, for the purpose of high-skilled employment (art 18(1))
- within 1 month after entry TCN/employer must submit application for Blue Card in the 2nd MS
- family members can move too, if family constituted in the 1st MS (art 19)

The current EU Blue Card Directive has demonstrated intrinsic weaknesses such as restrictive admission conditions and very limited facilitation for intra-EU mobility. This, combined with many different sets of parallel rules, conditions and procedures for admitting the same category of highly skilled workers which apply across EU Member States, has limited the EU Blue Card's attractiveness and usage. This is neither efficient, as such fragmentation entails a burden for employers and individual applicants, nor effective, as shown by the very limited overall number of highly skilled permits issued.

Note: Proposal EU Blue Card Directive (Recast) because the original Directive considered ineffective (see http://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160607/directive_conditions_entry_residence_third-country_nationals_highly_skilled_employment_en.pdf)

Students and Researchers Directive 2016/801/EU (recast)

This Directive is not in force as yet. It will enter into force on 23rd May 2018.

It simplifies the rules on intra-EU mobility and transfer of skills and knowledge. More flexible rules will increase the possibility for researchers, students and remunerated trainees to move within the EU, which is particularly important for students and researchers enrolled in joint programmes. Family members of researchers will also be granted certain mobility rights.

The text of the Directive is available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2016_132_R_0002

Intra-Corporate Transfer Directive 2014/66/EU

It covers TCNs subject to intra-corporate transfer, which is defined as “the temporary secondment for occupational or training purposes of a third-country national who, at the time of application for an intra-corporate transferee permit, resides outside the territory of the Member States, from an undertaking established outside the territory of a Member State, and to which the third-country national is bound by a work contract prior to and during the transfer, to an entity belonging to the undertaking or to the same group of undertakings which is established in that Member State, and, where applicable, the mobility between host entities established in one or several second Member States” (art 3(a)).

Very limited chance to obtain permanent residence, max residence 3 years for managers and specialist and 1 year for trainee employees, then they need to leave the territory of the Member States unless they obtain a residence permit on another basis in accordance with Union or national law. (art 12(1))

MS may apply 6 months cooling of period (art 12(2))

No opportunity to change employer.

But have conditional intra-EU mobility rights (art 20)

Short-term mobility a period of up to 90 days in any 180-day period per Member State, based on the permit granted in the 1st MS, but 2nd MS may require notification of movement (art 21)

Long-term mobility a period of more than 90 days, 2nd MS may require notification or even application for permit (art 22).

Family member can move as well (art 19(1))

Seasonal Workers Directive 2014/36/EU

It covers a TCN "who retains his or her principal place of residence in a third country and stays legally and temporarily in the territory of a Member State to carry out an activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between that third-country national and the employer established in that Member State;" (art 3(b))

There is a total maximum limit of between five and nine months per calendar year of residence for a seasonal worker; they must then return to a third country (art 14).

Within the maximum time limit, seasonal workers will be able, on one occasion, to change employers or to obtain an extension of their stay with their employer, if they still meet the criteria for admission, although the grounds for refusal will still apply. The preamble makes clear that this possibility is intended to avoid abuse, since the worker will not be tied to a single employer. Member States will have an option to allow further extensions or changes of employer.

The directive facilitates the re-entry of seasonal workers who were admitted at least once within the previous five years, if they complied with immigration law during their stay (art 16). This could include a simplified application process, an accelerated procedure, priority for previous seasonal workers, or the issue of several seasonal worker permits at the same time.

There are no intra-EU mobility rights.

Single Permit Directive 2011/98/EU

It covers TCNs admitted to the EU for the purpose of employment, who have not yet achieved long-term residence status (art 3(1)).

There are no intra-EU mobility rights.

The following table summarises the free movement rights:

Category of migrants	***Free movement rights***
EU citizens	This is a fundamental right, which is now not only guaranteed in the TFEU and the Citizenship Directive but also in the Charter of Fundamental Rights.
Legally residing TCNs	Article 45 (2) of the Charter states that freedom to move and reside in the Member States can also be granted to them. However, the facultative nature of this provision makes it difficult to consider this as a fundamental right.
Long-term residents, students, researchers and highly qualified workers	Subject to restrictions

Refugees, beneficiaries of subsidiary protection and non-EU family members of TCNs	Not entitled to free movement. Differential treatment compared to EU citizens. Refugees, beneficiaries of subsidiary protection acquisition of free movement when they acquire the status of long term residents.

Category of migrants	***Security of residence***
Long-Term Residents Directive (LRD)	Most legally residing TCNs become eligible for permanent resident status when they have stayed in a Member State for five years.
Legally residing TCNs	• Students are excluded from the scope of the LRD, not entitled to permanent residence. • ICT no right to permanent residency – max stay in the host country, 3 years. • Refugees and beneficiaries of subsidiary protection only recently included within the personal scope of application of the amended Long-Term Residents Directive (see also Recast Qualification Directive 2011/95/EU).
Citizenship Directive (2004/38)	Family members of EU citizens are, however, entitled to permanent residence after five years without any further conditions being imposed
Blue Card Directive	For highly qualified workers, the directive contains more favourable criteria by which the period of five years residence is calculated

European Parliament and Council Regulation No 1931/2006

This Regulation establishes a local border traffic regime at the external land borders of the Member States and introduces for that purpose a local border traffic permit. This Regulation authorises Member States to conclude or maintain bilateral Agreements with neighbouring third countries for the purpose of implementing the local border traffic regime established by this Regulation. The local border traffic regime constitutes a derogation from the general rules governing the border control of persons crossing the external borders of the Member States of the European Union which are set out in Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

6. ILLEGALLY RESIDENT TCNS

The **Return Directive 2008/115/EC** is the key legal instrument for returning TCNs. It provides guidelines for EU Member States and Schengen Countries to follow return and removal procedures.[1] The common standards and procedures cover areas such as the use of coercive force, return, removal, detention, and re-entry. The Directive also provides provisions on postponement of removal (art 9), specifying criteria for when a Member State shall and may postpone a removal, and on safeguards pending return (concerning rights to family unity, health care, access to education for minors and specific needs of vulnerable persons).

[1] Except Ireland and the UK who have decided not to opt into this area of Community law.

The Return Directive also takes into consideration the 'Twenty guidelines on forced return', adopted in May 2005 by the Committee of Ministers of the Council of Europe.[2] These twenty guidelines form a non-binding code of good conduct for expulsion procedures that Member States can bear in mind when developing national legislation and regulations on returning illegal TCNs. They are based on detailed research by bodies such as the European Court of Human Rights, as well as a questionnaire on forced return sent to the Member States. For the most part, the issues discussed under the twenty guidelines are included in the Return Directive.

According to the Return Directive, a Member State can issue a return decision to TCNs if they are staying illegally on the Member State's territory, although they may refrain from making the decision, for example if the Member State decides to grant the TCN a residence permit based on humanitarian reasons. Also, a Member State should not issue a return decision if the TCN is waiting for a renewal of their residence permit. With the exception of cases where there is cause for concern for national security or similar situations, the return decision should include a period ranging from seven to 30 days, depending on each individual case[3], for the TCN to return voluntarily. If the TCN does not return within the voluntary period, then the Member State can take the necessary measures to enforce return of the TCN.

The Return Directive provides that the return decision itself should be issued in writing, and if the TCN requests it, then also with a written or oral translation of the main elements, in a language that the TCN is believed to understand. The TCN should also be able to appeal against or seek review of the decision. In the case of detention, TCNs should be kept in detention for the shortest period possible, and for the most part only when there is a risk of absconding or the TCN avoids or hampers the preparation of return. If the use of coercive measures is required, as a last resort, then they shall not exceed reasonable force.

Special attention should be paid to vulnerable persons throughout the entire return process, particularly in relation to forced return. According to the Return Directive, vulnerable persons are defined as 'minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical, or sexual violence'. For example, in the case of minors, the best interests of the child must be considered, and minors should only be detained as a measure of last resort. This is also one of the goals of the Return Fund, which specifically states that it will provide assistance for the proper treatment of these vulnerable persons. For example, it will support the exchange of information of best practices for the return of vulnerable persons.[4]

This directive was interpreted in the *Case M.G., N.R. v Staatssecretaris van Veiligheid en Justitie.* The CJEU (Second Chamber) hereby ruled that: "Article 15(2) and (6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, must be interpreted as meaning that, 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".

[2] Council of Europe 'Twenty Guidelines on Forced Return', September 2005.

[3] According to Art. 7(4) of the Return Directive, Member States may in some cases refrain from granting a period for voluntary departure or may grant a period shorter than seven days, if there is a risk absconding, if an application for legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person poses a risk to public policy, public or national security.

[4] Decision No 575/2007/EC.

7. CASE-LAW ON FREE MOVEMENT OF TCNS

Case C‑254/11 Szabolcs-Szatmár-Bereg Megyei Rendőrkapitányság Záhony Határrendészeti Kirendeltsége v Oskar Shomodi

• Case concerned a Ukrainian national (Mr Shomodi) who is in possession of a valid local border traffic permit, issued pursuant to Regulation No 1931/2006, which authorises him to enter the border area of Hungary. On 2 February 2010 he requested entry into Hungary at the Záhony border crossing. The Hungarian border police established that he had stayed in Hungarian territory for 105 days during the period from 3 September 2009 to 2 February 2010, entering that territory almost daily for several hours. Since Mr Shomodi had thus stayed for more than three months in the Schengen area during a six-month period, the Hungarian border police refused him entry into Hungarian territory on the basis of Hungarian national law, interpreted in the light of the Convention implementing the Schengen Agreement.

• Mr Shomodi brought an action against the decision of the border police before the Hungarian courts. In the appeal proceedings on a point of law before it, the Hungarian Supreme Court, referred to the Court of Justice the question of whether the agreement at issue as interpreted by the Hungarian authorities, limits the total length of a stay of a cross-border worker in the border area of Hungary to three months over a six-month period is compatible with the local border traffic regulation.

The CJEU found:

1. First that the general rule in the Schengen acquis, which limits the stay of foreign nationals to three months over a six-month period, does not apply to local border traffic. The three-month limit laid down in the local border traffic regulation relates only to 'uninterrupted stays', whereas the limitation resulting from the Schengen acquis does not relate to such stays. In the Court's view, the fact that that limitation is, as in the Schengen acquis, limited to three months cannot cast doubt on its special nature in relation to the ordinary rules in place for third-country nationals who are not subject to visa requirements. It is not apparent from any provision of the regulation that those three months must fall within the same six-month period.
2. Second by adopting the regulation on local border traffic, the EU legislature intended to put rules in place for local border traffic which are independent of, and distinct from, those of the Schengen acquis. The purpose of those rules is to enable the residents of the border areas concerned to cross the external land borders of the EU for legitimate economic, social, cultural or family reasons, and to do so easily – that is to say, without excessive administrative constraints – and frequently, even regularly.
3. Third, in relation to the concerns expressed by certain Member States in relation to the alleged negative consequences of such an autonomous interpretation of the regulation, the Court responds that the easing of border crossing is intended for *bona fide* border residents with legitimate and duly substantiated reasons for frequently crossing an external land border. In addition, the Member States remain free to impose penalties on those who abuse or fraudulently use their local border traffic permit.

- Accordingly, the Court considered that the holder of a local border traffic permit must be able to move freely within the border area for a period of three months if his stay is uninterrupted and to have a new right to a three-month stay each time that his stay is interrupted.
- Finally, the Court stated that the stay of the holder of a local border traffic permit must be regarded as interrupted as soon as the person concerned crosses the border back into his State of residence in accordance with the conditions laid down in his permit, irrespective of the frequency of such crossings, even if they occur several times daily.

The Charter was not referred to in the judgment of Case C‑254/11 Oskar Shomodi.

However, it was mentioned rather extensively in the **Opinion of Advocate General CRUZ VILLALÓN.** The case is decided in the light of the scheme of the border crossing regime laid down by Regulation No 1931/2006 read in conjunction with Article 20 of the Convention implementing the Schengen Agreement, signed in Schengen on 19 June 1990. The suggestion of the Advocate General Villalon is to read Article 5 of Regulation No 1931/2006 in conjunction with the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

Compliance with the Charter and the ECHR

Para 65. In the light of the foregoing, the main question which is therefore submitted for the assessment of the Court is whether the regime established by the bilateral agreement concluded by Hungary, as interpreted and/or implemented by the competent Hungarian authorities, is compatible, in the first place, with the spirit of the local border traffic regime which I have just examined in detail, as interpreted in accordance with primary EU law, and, more specifically, with the relevant provisions of the Charter, or, if appropriate, of the ECHR and, in the second place and more widely, with all EU law, in accordance with Article 4(3) TEU.

Para 66. It should be noted, in that regard, that recital 13 in the preamble to Regulation No 1931/2006 states that the regulation respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter.

Para 67. Moreover, the conclusion of bilateral agreements such as the one at issue in the main proceedings falls within the scope of the implementation of the local border traffic regime, so that those agreements, which must be in accordance with the rules of Regulation No 1931/2006, must, more generally, be concluded in compliance with primary law and in particular with the provisions of the Charter, in accordance with Article 51(1) thereof or, failing that and as appropriate, the provisions of the ECHR, in accordance with Article 6(3) TEU.

Para 68. One may, very intuitively, be prompted to approach the question initially from the point of view of freedom of movement.

Para 69. However, it should be pointed out, putting aside the situation of 'persons enjoying the Community right of free movement' or equivalent rights, within the meaning of Article 3(4) of Regulation No 1931/2006, that Article 45(1) of the Charter, which establishes the right of every citizen of the European Union to move and reside freely within the territory of the Member States, does not apply ratione personae to the main proceedings, any more than Article 45(2) of the Charter, which provides that those same rights may be granted to third-country nationals legally resident in the territory of a Member State.

Para 70. However, and without the need to question whether the main proceedings fall, in any way at all, within the scope of Article 2 of Protocol No 4 to the ECHR, which enshrines the right to freedom of movement, it is clear that it is covered, in any event, owing to the scheme of the local border traffic regime, by Article 7 of the Charter, which guarantees respect for private and family life, a provision which, in accordance with Article 52(3) of the Charter, must be interpreted in the light of Article 8 ECHR.

Para 71. Third-country nationals who are not included within the definition of family members of a European Union citizen, within the meaning of the aforementioned Directive 2004/38 and who therefore do not enjoy an automatic right of entry and residence in the host Member State, but who fall within the scope of Regulation No 1931/2006, must, in my view, be able to have, in the implementation of the regulation, guarantees of the right to a private

and family life in the broad sense, as do, reciprocally, the border residents in the Member States.

Application of Article 7 of the Charter and Article 8 ECHR

Para 72. In the end, therefore, it is definitely in the light of the relevant provisions of the Charter and the ECHR and also the general principles of EU law, and in particular the principle of proportionality, that Regulation No 1931/2006 must be interpreted and that the application of the relevant provision of the bilateral agreement concluded by Hungary must be assessed.

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ERA – Applying the Charter of Fundamental Rights of the European Union
Workshop on Combatting Discrimination of Workers
Barcelona 6-7 November 2017

Dr Sonia Morano-Foadi

Instructions for participants

This workshop is based on a Court of Justice's case, *Case C-54/07 Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV [2008] ECR I-5187*. The case was decided before the Charter of Fundamental Rights became legally binding.

The following pages provide some reading materials, including a summary of the case and extracts from Directive 2000/43, which will enable you to answer the questions for discussion at pages 9-10.

The summary of the case is taken from *'Summaries of important judgments' (European Commission Legal Service, October 2008) <http://ec.europa.eu/dgs/legal_service/arrets/07c054_en.pdf> accessed 29 October 2017.*

Participants will be divided into groups and be asked to spend 20 minutes reading through the case and answering the questions.

We will then have a general discussion about the issues raised by the *Feryn* case.

Content

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Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* [2008] ECR I-5187

Case Summary

Directive 2004/43/EC establishes the legal framework for combating discrimination on the grounds of racial or ethnic origin. The Belgian legislation transposing that directive allows the Centrum voor gelijkheid van kansen en voor racismebestrijding [Centre for equal opportunities and combating racism] ("the Centre") to bring legal proceedings in cases of actual or potential discrimination, even if there is no identifiable complainant.

Following **a number of public statements made by the director of the company Feryn** to the effect that his undertaking was looking to recruit fitters but that it could not employ "immigrants" because its customers were reluctant to give them access to their private residences, the Centre applied to the Belgian labour courts for a finding that the company Feryn applied a discriminatory recruitment policy. Following the initial dismissal of the application by the Voorzitter van de arbeidsrechtbank te Brussel [President of the Labour Court, Brussels], the Centre appealed to the l'Arbeidshof te Brussel [Labour Court, Brussels], which decided to refer to the Court of Justice questions for a preliminary ruling concerning the **terms 'discrimination', 'presumption of discrimination' and 'sanctions' within the meaning of Directive 2000/43/EC.**

The Court observed first of all that discrimination for the purposes of the Directive does not necessarily require that there is an identifiable complainant/victim. The Directive does allow Member States to lay down the right for associations with a legitimate interest in ensuring compliance with the obligations under that directive to bring legal or administrative proceedings without acting in the name of a specific complainant or in the absence of an identifiable complainant. In addition, **the Court pointed out that the fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin constitutes of itself direct discrimination in respect of recruitment**, since such statements are likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.

The Court went on to state that **a presumption of discrimination** may be found to exist if it is based on facts such as statements giving rise to a presumption of a discriminatory recruitment policy. In such a situation, it is for the employer to adduce evidence that it has not breached the principle of equal treatment, which it can do, inter alia, by showing that the actual recruitment practice does not correspond to those statements.

Finally, the Court pointed out that the sanctions for such a breach of the principle of discrimination – which must be **effective, proportionate and dissuasive** – may take the form of a finding of discrimination by the court with an adequate level of publicity, or an injunction ordering the employer to cease the discriminatory practice and a fine, or even the award of damages to the body bringing the proceedings.

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Relevant legislation

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin Official Journal L 180 , 19/07/2000 P. 0022 - 0026

Chapter I "General Provisions"
Article 2 Concept of discrimination
1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
2. For the purposes of paragraph 1:
(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;
(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.
4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

Chapter II "Remedies and Enforcement"
Article 8 Burden of proof
"1. Member States shall take **such measures as are necessary**, in accordance with their national judicial systems, **to ensure that, when persons who consider themselves wronged because the principle of equal treatment** has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be **for the respondent to prove that there has been no breach of the principle of equal treatment**."

Chapter III "Bodies for the Promotion of Equal Treatment"
Article 13:
"1. Member States shall designate a **body or bodies for the promotion of equal treatment** of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.
2. Member States shall ensure that the **competences of these bodies** include:
- without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
- conducting independent surveys concerning discrimination,
- publishing independent reports and making recommendations on any issue relating to such discrimination".

Chapter IV "Final Provisions"
Article 15 Sanctions
"Member States shall lay down the rules on **sanctions applicable to infringements of the national provisions** adopted pursuant to this Directive and shall take all measures necessary to ensure that they are applied. The sanctions, which may comprise the **payment of compensation to the victim**, must be **effective, proportionate and dissuasive**. The Member States shall notify those provisions to the Commission by 19 July 2003 at the latest and shall notify it without delay of any subsequent amendment affecting them".

Charter of Fundamental Rights of The European Union (2000/C 364/01)

Chapter III Equality
Article 21
Non-discrimination
1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

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2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

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Analysis of the case

1. The dispute: Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV* [2008] ECR I-5187

Centrum voor gelijkheid van kansen en voor racismebestrijding, [Centre for equal opportunities and combating racism] ("the Centre") is a Belgian body designated, pursuant to **Article 13 of Directive 2000/43**, to promote equal treatment. The Centre applied to the Belgian labour courts for a finding that Feryn, a company which specialises in the sale and installation of up-and-over and sectional doors, applied a discriminatory recruitment policy.

The Centre is acting on the basis of the **public statements of the director of Feryn** to the effect that his undertaking was looking to recruit fitters, but that it **could not employ 'immigrants'** because its customers were reluctant to give them **access to their private residences for the period of the works**.

The President of the Labour Court of Brussels by order of 26 June 2006 dismissed the Centre's application, stating, in particular, that **there was no proof nor was there a presumption that a person had applied for a job and had not been employed as a result of his ethnic origin.**

The Centre appealed to the Labour Court of Brussels. The Labour Court decided to stay the proceedings and to refer the **questions to the Court of Justice of the EU (CJEU) for a preliminary ruling.**

2. Preliminary Ruling Questions from the Brussels Labour Court to the CJEU

Assessing the scope of the concept of direct discrimination in the light of the public statements

- **Question no (1)**

Is there direct discrimination within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC where an employer, after putting up a conspicuous job vacancy notice, publicly states:

'I must comply with my customers' requirements. If you say "I want that particular product or I want it like this and like that", and I say "I'm not doing it, I'll send those people", then you say "I don't need that door". Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!'[?]

- **Question no (2)**

Is it sufficient for a finding of direct discrimination in the conditions for access to paid employment to establish that the employer applies **directly discriminatory selection criteria**?

Conditions in which the rule of the reversal of the burden of proof laid down in the directive

- **Question no (3)**

For the purpose of establishing that there is direct discrimination within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC, **may account be taken of the recruitment of exclusively indigenous fitters** by an affiliated company of the employer in assessing whether that employer's recruitment policy is discriminatory?

- **Question no (4)**

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What is to be understood by 'facts from which it may be presumed that there has been **direct or indirect discrimination'** within the terms of Article 8(1) of Directive 2004/43 [burden of proof]?

How strict must a national court be in assessing facts which give rise to a presumption of discrimination?

(a) **To what extent do earlier acts of discrimination (public announcement of directly discriminatory selection criteria in April 2005) constitute 'facts** from which it may be presumed that there has been direct or indirect discrimination' within the terms of Article 8(1) of [Directive 2000/43 see text above]?

(b) Does an **established act of discrimination in April 2005** (public announcement in April 2005) subsequently give rise to a **presumption of the continuation of a directly discriminatory recruitment policy**?

Having regard to the facts in the main proceedings, is it sufficient, in order to raise the presumption (that an employer operates and continues to pursue a discriminatory recruitment policy) that, in April 2005, in answer to the question whether, as an employer, he did not treat people from foreign and indigenous backgrounds in the same manner and was thus actually a bit racist, he publicly stated: '*I must comply with my customers' requirements. If you say "I want that particular product or I want it like this and like that", and I say "I'm not doing it, I'll send those people", then you say "I don't need that door". Then I'm putting myself out of business. We must meet the customers' requirements. This isn't my problem. I didn't create this problem in Belgium. I want the firm to do well and I want us to achieve our turnover at the end of the year, and how do I do that? – I must do it the way the customer wants it done!'[?]*

(c) Having regard to the facts in the main proceedings, can **a joint press release issued by an employer and the national body for combating discrimination,** in which acts of discrimination are at least implicitly confirmed by the employer, give rise to such a presumption?

(d) **Does the fact that an employer does not employ any fitters from ethnic minorities give rise to a presumption of indirect discrimination** when that same employer some time previously had experienced great difficulty in recruiting fitters and, moreover, had also stated publicly that his customers did not like working with fitters who were immigrants?

(e) Is **one fact sufficient in order to raise a presumption of discrimination**?

(f) Having regard to the facts in the main proceedings, **can a presumption of discrimination on the part of the employer be inferred from the recruitment of exclusively indigenous fitters by an affiliated company of that employer**?

- **Question no (5)**

How strict must the national court be in assessing the evidence in rebuttal which must be produced when a presumption of discrimination within the meaning of Article 8(1) of Directive 2000/43 has been raised?

Can a presumption of discrimination within the meaning of Article 8(1) of Directive 2000/43 … be rebutted by a simple and unilateral statement by the employer in the press?

Press Statement that *he does not or does not any longer discriminate and that fitters from ethnic minorities are welcome; and/or by a simple declaration by the employer that his company, excluding the sister company, has filled all vacancies for fitters and/or by the statement that a Tunisian cleaning lady has been taken on and/or, having regard to the facts in the main proceedings, can the presumption be rebutted only by actual recruitment of fitters from ethnic minorities and/or by fulfilling commitments given in the joint press release?*

What penalties may be considered appropriate in a case such as that in the main proceedings

- **Question no (6)**

What is to be understood by an 'effective, proportionate and dissuasive' sanction, as provided for in Article 15 of Directive 2000/43 [sanctions]?

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Having regard to the facts in the main proceedings, does the abovementioned requirement of Article 15 of Directive 2000/43 permit the **national court merely to declare that there has been direct discrimination**?

Or does it, on the contrary, also require the **national court to grant a prohibitory injunction**, as provided for in national law?

Having regard to the facts in the main proceedings, **to what extent is the national court further required to order the publication of the forthcoming judgment as an effective, proportionate and dissuasive sanction**?

3. Court of Justice's interpretation of the provisions of Directive 2000/43

The **national court** has requested the Court to interpret the provisions of Directive 2000/43 for the purpose, essentially, of assessing:

- the **scope of the concept of direct discrimination** in the light of the public statements made by an employer in the course of a recruitment procedure (first and second questions);
- the **conditions in which the rule of the reversal of the burden of proof** laid down in the directive can be applie**d** (third to fifth questions);
- and **what penalties** may be considered appropriate for employment discrimination established on the basis of the employer's public statements (sixth question).

First and second questions: scope of the concept of direct discrimination

- **Two intervening Member States (Ireland and the United Kingdom)** contend that Article 2(2) of Directive 2000/43 defines direct discrimination as a situation in which *"a person 'is treated' less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin*". Thus, the directive is inapplicable where the alleged discrimination results from public statements made by an employer concerning its recruitment policy but there is no identifiable complainant contending that he has been the victim of that discrimination.
- **CJEU's** answer to the first and second questions is ***"the fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination*** *in respect of recruitment within the meaning of Article 2(2)(a) of Directive 2000/43. Such statements being* ***likely strongly to dissuade certain candidates from submitting their candidature*** *and, accordingly, to* ***hinder their access to the labour market****."*

Court's legal reasoning:

- It **acknowledges** the definition in Article 2(2) of Directive 2000/43
- it **adds that likewise**, Article 7 of that directive requires Member States to ensure that judicial procedures are available to '*all persons who consider themselves wronged by failure to apply the principle of equal treatment to them*' and to public interest bodies bringing judicial proceedings '*on behalf or in support of the complainant*'.
- It **suggests that Article 7** provides the legal procedures for a finding of failure to comply with the principle of equal treatment and the imposition of sanctions in that regard. Those legal procedures must, in accordance with the provisions of that article, be available to persons who consider that they have suffered discrimination. However, the requirements of Article 7 of Directive 2000/43 are, as stated in Article 6 thereof, only minimum requirements and the Directive does not preclude Member States from introducing or maintaining provisions which are more favourable to the protection of the principle of equal treatment.

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- It **argues** that Article 7 does not preclude Member States from laying down, in their national legislation, the right for associations with a legitimate interest in ensuring compliance with that directive, or for the body or bodies designated pursuant to Article 13 thereof, to bring legal or administrative proceedings to enforce the obligations resulting therefrom without acting in the **name of a specific complainant or in the absence of an identifiable complainant**. It is, however, solely for the national court to assess whether national legislation allows such a possibility.

- It **states** that **it cannot be inferred from this that the lack of an identifiable complainant leads to the conclusion that there is no direct discrimination** within the meaning of Directive 2000/43.

- It states that the aim of that directive in recital 8 of its preamble, is '**to foster conditions for a socially inclusive labour market'**. For that purpose, Article 3(1)(a) states that the directive covers, inter alia, **selection criteria and recruitment conditions.**

- It **affirms** that the **objective** of fostering conditions for a socially inclusive labour market would be hard to achieve if the scope of Directive 2000/43 were to be limited to only those cases in which an **unsuccessful candidate for a post, considering himself to be the victim of direct discrimination, brought legal proceedings against the employer**.

- It **concludes** that the fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43. The existence of such direct discrimination is not dependant on the identification of a complainant who claims to have been the victim.

Third to fifth questions: the application of the rule of the reversal of the burden of proof laid down in in Article 8(1) of Directive 2000/43

- **CJEU's answer** to the third to fifth questions is "***public statements*** *by which an employer … under its recruitment policy …will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is* ***directly discriminatory within the meaning of Article 8(1) of Directive 2000/43***". Then it continues "*it is for that employer to prove that there was no breach of the principle of equal treatment. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements".* Then, in relation to the role of the national court, the Court states *"it is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's contentions that it has not breached the principle of equal treatment*.

Court's legal reasoning:

- It **acknowledges** the definition in Article 8 of Directive 2000/43. The article states that, where there are facts from which it may be presumed that there has been **direct or indirect discrimination, it is for the defendant to prove that there has been no breach of the principle of equal treatment**. The precondition of the obligation to adduce **evidence in rebuttal** which thus arises for the alleged perpetrator of the discrimination is a simple finding that **a presumption of discrimination has arisen** on the basis of established facts.

- It **affirms** that "**statements** by which an employer publicly lets it be known that, under its recruitment policy, **it will not recruit any employees of a certain ethnic or racial origin** may constitute facts of such a nature as to give rise to a presumption of a discriminatory recruitment policy".

- It **concludes** that it is the employer who has to adduce **evidence** that it has not breached **the principle of equal treatment,** which **it can do, inter alia, by showing that the actual recruitment practice of the undertaking does not correspond to those statements**.

- It **considers** the role of the national court **to verify that the facts alleged against that employer are established and to assess the sufficiency of the evidence** which the employer adduces in support of its contentions that it has not breached the principle of equal treatment.

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The sixth question: what penalties may be considered appropriate for employment discrimination established on the basis of the employer's public statements

- **CJEU's answer** to the sixth question must therefore be that Article 15 of Directive 2000/43 **requires that rules on sanctions** applicable to breaches of national provisions adopted in order to transpose the directive must be **effective, proportionate and dissuasive**, **even where there is no identifiable victim**.

Court's legal reasoning:

- It **acknowledges** the content of Article 15 of Directive 2000/43. The article confers on **Member States responsibility for determining the rules on sanctions for breaches of national provisions** adopted pursuant to the directive. Article 15 specifies that those sanctions must be **effective, proportionate and dissuasive** and that they may comprise the **payment of compensation to the victim**.

- It **explains** that Article 15 of Directive 2000/43 imposes on Member States the obligation to introduce into their national legal systems measures which are **sufficiently effective to achieve the aim of the directive** and to ensure that they may be **effectively relied upon before the national courts** in order that judicial protection will be real and effective. Directive 2000/43 **does not, however, prescribe a specific sanction,** but leaves Member States free to choose between the different solutions suitable for achieving its objective.

- It **concludes** that even if there is **no direct victim of discrimination** but a body empowered to do so by law seeks a finding of discrimination and the imposition of a penalty, the **sanctions which Article 15** of Directive 2000/43 requires to be laid down in national law must also be **effective, proportionate and dissuasive.**

- It **continues, affirming** that those sanctions may, where necessary, include **a finding of discrimination by the court or the competent administrative authority** in conjunction with an adequate level of publicity, the cost of which is to be borne by the defendant. They may also take the form of **a prohibitory injunction**, in accordance with the rules of national law, **ordering the employer to cease the discriminatory practice**, and, **where appropriate, a fine**. They may, moreover, take the form of the **award of damages to the body bringing the proceedings**.

4. Court's judgment

The **Court (Second Chamber)** rules:

1. The fact that an employer states publicly that it will not recruit employees of a certain ethnic or racial origin constitutes **direct discrimination in respect of recruitment** within the meaning of Article 2(2)(a) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, such statements being likely strongly to dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market.

2. **Public statements by which an employer lets it be known that under its recruitment policy** it will not recruit any employees of a certain ethnic or racial origin are sufficient for a presumption of the existence of a recruitment policy which is directly discriminatory within the meaning of Article 8(1) of Directive 2000/43. **It is then for that employer to prove that there was no breach of the principle of equal treatment**. It can do so by showing that the undertaking's actual recruitment practice does not correspond to those statements. It is for the national court to verify that the facts alleged are established and to assess the sufficiency of the evidence submitted in support of the employer's contentions that it has not breached the principle of equal treatment.

3. Article 15 of Directive 2000/43 requires that **rules on sanctions applicable to breaches of national provisions** adopted in order to transpose that directive must be **effective, proportionate and dissuasive, even where there is no identifiable victim.**

This publication has been produced with the financial support of the European Union's Justice Programme 2014-2020. The contents of this publication are the sole responsibility of the author and can in no way be taken to reflect the views of the European Commission.

Questions for discussion

The case involves a Belgian employer who had publicly stated that he would not hire **immigrants** (TCNs) while engaged in a recruitment campaign. The CJEU was asked to determine *inter alia* whether the employer's statement constituted **direct discrimination** even in the absence of **an identifiable complainant** who had personally been subject to discrimination.

Before going over the questions, you may wish to note that:

- **EU nationals** residing in another Member State cannot be **directly discriminated against on the basis of their nationality in employment, remuneration and any other areas, such as health and education**. Any direct discrimination is unlawful. The **principle of non-discrimination on grounds of nationality** has been present since the 1957 Treaty of Rome. It was considered as a means of facilitating the establishment and functioning of the common market. Traditionally, the material scope of **non-discrimination based on nationality** was restricted to the **right of free movement and its personal scope was limited to EU nationals**. **The CJEU** has confirmed this interpretation, stating that the article '*is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries*.'[1] However, it is interesting to note that **art 21(2) of the Charter of fundamental rights** includes nationality discrimination under the title of 'Equality' rather than 'Citizens' rights'.

- **TCNs are not protected by EU law, unless they can prove racial or ethnic origin discrimination.** They might be covered by national legislation, but there are likely to be disparities between **the levels of protection provided in different countries. Non-discrimination on racial grounds** was introduced in 1997 by the Treaty of Amsterdam in article 13 TEC (now art 19 TFEU). The article empowered the Council to take 'appropriate action to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. Based on this article, the Council adopted **Directive 2000/43. Article 3(2)** states that the Directive '*does not cover differences of treatment based on nationality'* and '*is without prejudice to provisions and conditions relating to* ***the entry into and residence of third-country nationals and stateless persons*** *on the territory of Member States, and to* ***any treatment which arises from the legal status of the third-country nationals and stateless persons*** *concerned*'.
- It follows that the Directive protects **TCNs from discrimination on grounds of race and ethnic origin** but does not cover **differences of treatment based on nationality**, in particular those concerning **entry and residence and arising from their legal status as TCNs**. The adoption of such an exclusion clause is commonly explained in the light of many Member States' concern that the Directive would interfere with national regulations on border control and immigration policies.

Main questions raised by this case:

1. Does an employer who declares publicly that he/she will not recruit employees of a certain ethnic or racial origin, a comment which is clearly likely to dissuade strongly certain candidates from submitting their candidature, thereby hindering their access to the labour market, **constitutes direct discrimination** in respect of recruitment within the meaning of Directive 2000/43?
   Explain why it does / does not.

2. Is the existence of such **direct discrimination** dependant on the identification of **a complainant** who claims to have been the victim?
   How does the Court justify this?

3. What is the meaning of **effective, proportionate and dissuasive sanctions**?
   Are you convinced by the Court's interpretation of Article 15 of the Directive?

[1] Joint Cases C-22/08 and C-23/08 Vatsouras and Koupatantze v Arbeitsgemeinschaft (ARGE) [2009] ECR I-04585.

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Questions to think about:

4. Do you think the *Feryn* decision was a celebration of the CJEU's commitment to protecting migrants from workplace discrimination as a result of their race/ethnicity?

5. Can **discrimination based on nationality** be justified under the same directive?

6. Do you think **businesses who are reluctant to employ immigrants** could still get away by not making unlawfully discriminatory public statements?

7. Do you have **experience** of defending or dealing with victims of workplace discrimination (or less favourable treatment at work) as a result of their nationality / religion / ethnicity?

8. Do you consider that the **Charter of Fundamental Rights** has enhanced the protection of victims of nationality/racial discrimination in the workplace?

Family Life and Freedom of Movement and Residence

Focus on the rights of the child and on LGBT Rights

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FRA and its mandate

- European Union Agency established in Vienna on the basis of Council Regulation (EC) 168/2007 of 15/02/2007
- to provide assistance and expertise on fundamental rights issues to the EU Institutions and Member States (EUMS), when they implement EU law
- to collect, record, analyse and disseminate relevant, objective, reliable and comparable information and data on fundamental rights issues in the EU

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FRA publications

The child as a subject of rights

- All EUMS have ratified the UNCRC – Handbook focus on what European law and jurisprudence adds
- The child as a legal person entitled to specific rights
- The role of parents and guardians
- The best interests principle in all actions – UNCRC Art. 3
- EU Charter of Fundamental Rights, scope - Art. 24/ECHR
- Derived legislation/indirect: Directive 2004/38/EC Art. 2 autonomous right + family member: ‘direct descendant’

The right of the child to protection and care

- Art. 24 EU Charter - as necessary for their well-being
- Titles I, II, III EU Charter and rights deriving from ECHR - ESC
- Art. 24 EU Charter – Child Best Interests - in all actions relating to children, whether taken by public authorities or private institutions, must be a primary consideration.
- State duties – state control/violence by private actors
- Arts. 2 and 3 ECHR: effective protection against ill-treatment (*ECtHR Kontrova v. Slovakia*) ‘authorities know/ought to know of a real & immediate risk to life of identified individual’

Right to respect for family life

- Art. 7 of the EU Charter and Art. 8 ECHR
- Article 8.2 ECHR limitations
- EU competence relating to cross-border disputes
- Child's right to be cared for by the child's parents
- Right to maintain contact with both parents
- Right not to be separated from parents except where in the child best interests
- Improper removal across borders
- Right to family unity/reunification
- Best Interests obligation - Art. 24.2 Charter/ECtHR

Right to be cared for by the child's parents

- Right of the child to maintain contact with both parents in all forms of parental separation
- The ECtHR requires a child rights-based approach to improper removals in breach of custody arrangements
- EU law requires the child to be heard in proceedings re. his/her return following wrongful retention/removal (*J. A. Aguirre Zarraga v. S. Pelz CJEU C-491/10 PPU, 2010*)
- For alternative care: relevant and sufficient reasons, procedural safeguards in decision-making (adoption)

Freedom of Movement and Residence

- Directive 2004/38/EC Art. 1 autonomous right + family mbrs.:
- Art. 2 ‘Family Member’ includes ‘direct descendants’:
  - -under the age of 21
  - -dependants
  - -those of the spouse or partner
- No precise definition of ‘descendant’ (biological child, but also child for whom the EU citizen has the legal guardianship or custody, adopted child …)

Entry and residence

- EU citizen entitled to be joined by the child when a legally recognised parental relationship exists
- Possible difficulties where the child only has a legally recognised parental relationship to the citizen's partner – where registered partners are not covered or where the partners are unmarried and unregistered, the partner's children need to seek admission: EUMS 'to undertake an extensive examination of the personal circumstances and justify any denial of entry or residence' **Art. 3.2**
- Duty to facilitate entry to 'any other family members' … who in the country from which they have come, are dependants or members of the EU citizen's household

Right to citizenship/residence

- The CJEU ruled on the effectiveness of the right of residence of children who have EU citizenship but not the nationality of the EUMS of residence
- *Zhu and Chen v. Secretary of State for the Home Department (CJEU C-200/02, 2014)*
- Refusal of residence rights to a parent who is primary caregiver – deprives the child's right of residence of any useful effect – hence parent right to reside with the child in host state

Right to remain/reside

- Directive 2004/38/EC Art.12.1 TCN child semi-autonomous right as family member, following the death/departure of EU citizen parent
- For TCN, in case of parent's death prior residence as family member of at least one year required
- Irrespective of nationality + for custodial parent: while enrolled in educational establishment until completion of studies (Art.12.3)
- TCN prior to permanent residence acquired subject to being a worker/self-employed or sufficient resources + comprehensive insurance cover or study + comprehensive insurance

Right to remain/reside Limitations

- *G. Ruiz Zambrano v. Office National de l'Emploi* (*CJEU C-34/09, 2011)* child status as EU citizen under Art. 20 TFEU to grant the child's TCN parents a permit to work and reside in the EUMS of the child's citizenship – enabling to enjoy the rights attached to EU citizen status in so far as the child would otherwise have to leave the EU to accompany the parents
- *Murat Dereci and Others v. Bundesministerium für Inneres (CJEU C-256/11, 2011) Yoshikazu Iida v. Stadt Ulm (CJEU C-40/11, 2012)* – EU citizen's perception of desirability that TCN family members reside with him to keep the family together in the EU insufficient to support that the EU citizen will be forced to leave if the right of residence not granted

Right to remain/reside while in education Limitations

- Directive 2004/38/EC Art.12.3 departure or death of an EU citizen parent does not entail loss of right of residence of the child and custodial parent irrespective of nationality if the child resides in the host state and is enrolled in an educational establishment for the purpose of studying, until the completion of the studies
- *Baumbast and R v. SoSHD (CJEU C-413/99, 2002)* – children in families with sufficient resources to support themselves
- *Maria Teixeira v. London Borough of Lambeth* + *SoSHD (CJEU C-310/08, 2010), London Borough of Harrow v. Hassam Ibrahim* + *SoSHD (CJEU [GC] C-310/08, 2010)* – extends to children dependent on social welfare support

Right to remain/reside parental separation

- Directive 2004/38/EC Art.13.2 TCN child semi-autonomous right as family member following divorce, marriage annulment or termination of registered partnership of EU citizen parent if:
- 3 years,1 in EUMS, prior to initiation of divorce/annulment/ termination or
- TCN has custody of the children of the EU citizen or
- warranted by difficult circumstances-victim domestic violence or
- TCN right of access to minor child, court ruling: in host EUMS
- Prior to permanent residence equivalent to death/departure

Expulsion

- Directive 2004/38/EC Art. 28, 3, b: decision of expulsion of EU citizen child only allowed if based on imperative grounds of public security unless it is necessary for the best interests of the child - as provided by the UNCRC (also Recital 24)
- Return Directive 2008/115/EC Art. 10.1 the Best Interests of the Child to be duly considered and assistance by appropriate bodies other than the authorities enforcing the return granted, before deciding to issue a return decision.
- Art. 10.2 - prior to removal of the child, the EUMS to be satisfied that the child will be returned to a family member, a nominated guardian or adequate reception facilities in the state of return

Dublin Regulation (EU 604/2013) Procedures

- The best interests of the child a primary consideration to determine 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 (Art.6)
- Checklist to assist authorities best interests determination: family reunification possibilities, child's well-being and social development, safety and security (risk of THB victim), child's views in accordance with age and maturity

Dublin Regulation (EU 604/2013) Procedures

- *The Queen, on the application of MA and Others v. SoSHD (CJEU C-648/11).* Case of an unaccompanied child who had submitted asylum applications in different EUMS and who had no family or relatives in other EUMS
- In the absence of a family member legally present in an EUMS: the EUMS where the child is physically present is responsible for examining the asylum claim by reference to Charter Art.24.2
- *Tarakhel v. Switzerland (ECtHR [GC] 29217/12, 2014)*
- FRA Opinion on the impact on children of the proposal for a revised Dublin Regulation

Family Life – Marriages/Partnerships

- Art. 7 EU Charter and Art. 8 ECHR - respect for private and family life
- Art. 9 - right to marry and right to found a family
- Art. 10 - right to freedom of thought, conscience and religion
- Art. 8 - protection of personal data
- Art. 20 - equality before the law
- Art. 21 - prohibition discrimination, including on the ground of sex and sexual orientation
- *ECtHR Hämälainen v. Finland (37359/09, 2014) - Oliari and Others v. Italy (18766/11 + 36030/11, 2016)* preceded by *Vallianatos and Others v. Greece (29381/09 + 32684/09, 2013)*

Spouses

- Spouse = family member under Directive 2004/38/EC Art. 2.2 *(B. B. Metok and others v. Minister for Justice… CJEU C-127/08, 2008)* irrespective when/where marriage took place and how entry EUMS*)*
- Marriage a status granted by national law – in some EUMS this includes same-sex spouses, not in others
- Evolution of the CJEU jurisprudence as to what is the 'definition generally accepted' by EUMS (from eg. *D. and Sweden v. Council, CJEU C-122/99 P and C-125/99 P, 2001*: 'a union between two persons of the opposite sex') - ECtHR jurisprudence
- Some EUMS do not distinguish between same-sex and different-sex spouses for the purpose of entry and residence

Same Sex Spouses

- Some EUMS lack national laws recognising the status of same sex spouses moving in –families compelled to apply to the Courts of the host EUMS to promote non-discriminatory respect for their family life – resulting in different outcomes (IT, CY)
- *ECtHR Schalk and Kopf v. Austria (30141/04, 2010) and X and Others v. Austria (19010/07, 2013) a relationship of a cohabiting same-sex couple in a stable de facto partnership falls within the notion of 'family life' just as such a relationship between a different sex couple would*
- Some EUMS a same-sex marriage entered into abroad = registered partnership

Registered Partners

- Family member under Directive 2004/38/EC Article 2.2.b: the partner with whom the EU citizen has contracted a registered partnership, on the basis of the legislation of an EUMS:
  - -if the legislation of the host EUMS treats registered partnerships as equivalent to marriage
  - -in accordance with the conditions laid down in national legislation
- Required: a) registered partnership formed in an EUMS + b) the EUMS partners move to treats registered partnerships 'as equivalent to marriage' - EUMS different institutions + commonalities with marriage– 'equivalence' difficult to establish – key role of the courts

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Registered Same-sex Partners

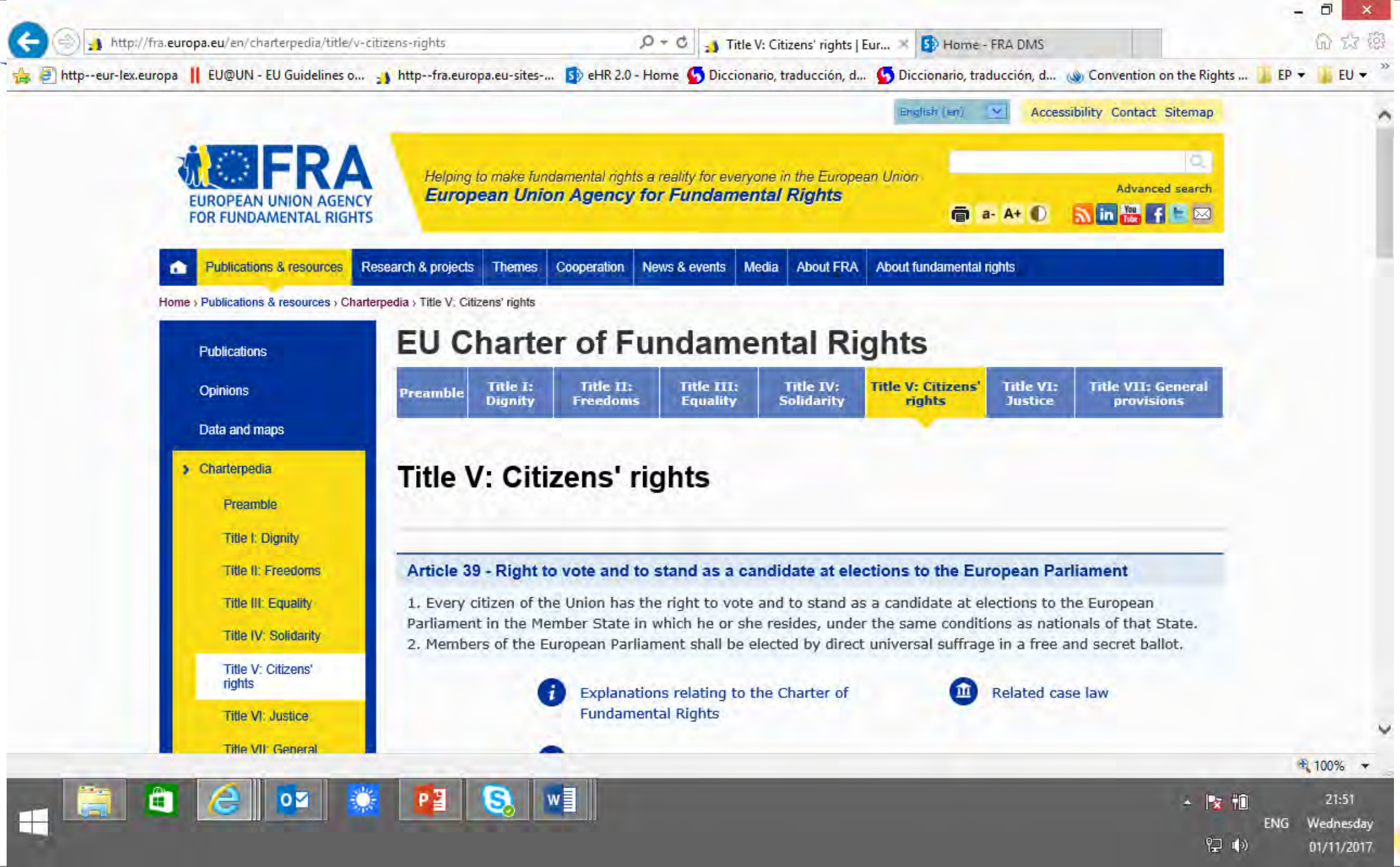
- Requirement of equivalence to marriage presumably applies to host EUMS in which same-sex couples may marry
- As of 2014, 19 EUMS granted entry and residence rights to registered partners - some recognise same sex registered partnerships aboard for the purpose of entry and residence even if they do not recognise same sex registered partnerships domestically: this only applies to same-sex couples if at least one partner is an EU citizen and to their family (not to TCNs)

‘De facto’ Partners

- Eg. in Spain ‘de facto’ unions may register or not – Constitutional Tribunal 155/1998 – marriage and partnership outside marriage are not equivalent situations
- A couple neither married, nor registered, moving to any EUMS
- Registered partners who move to another EUMS which do not have registered partnership provisions
- Legally recognised in the EUMS of origin - does not confer sufficient rights to be considered a ‘registered partnership’ in the host state

‘De facto’ Partners (also same-sex)

- Directive 2004/38/EC Article 3.2 requires EUMS to facilitate the entry and residence of ‘family members who in the country of origin are members of the household’ and ‘the partner with whom the EU citizen has a durable relationship, duly attested’
- No clear guidelines in EUMS on how the existence of a common household or a durable relationship may be proven
- Uncertainty may be explained by the need to refrain from artificially restricting the means of proof – risk that criteria be applied arbitrarily (possibly leading to discrimination of same-sex partners who have been cohabiting or in lasting relationships)
- Similarly vague is the ‘duty to facilitate’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Title II: Freedoms
Title III: Equality
Title IV: Solidarity
Title V: Citizens' rights
Title VI: Justice
Title VII: General provisions
Title V: Citizens' rights
Article 39 - Right to vote and to stand as a candidate at elections to the European Parliament
1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.
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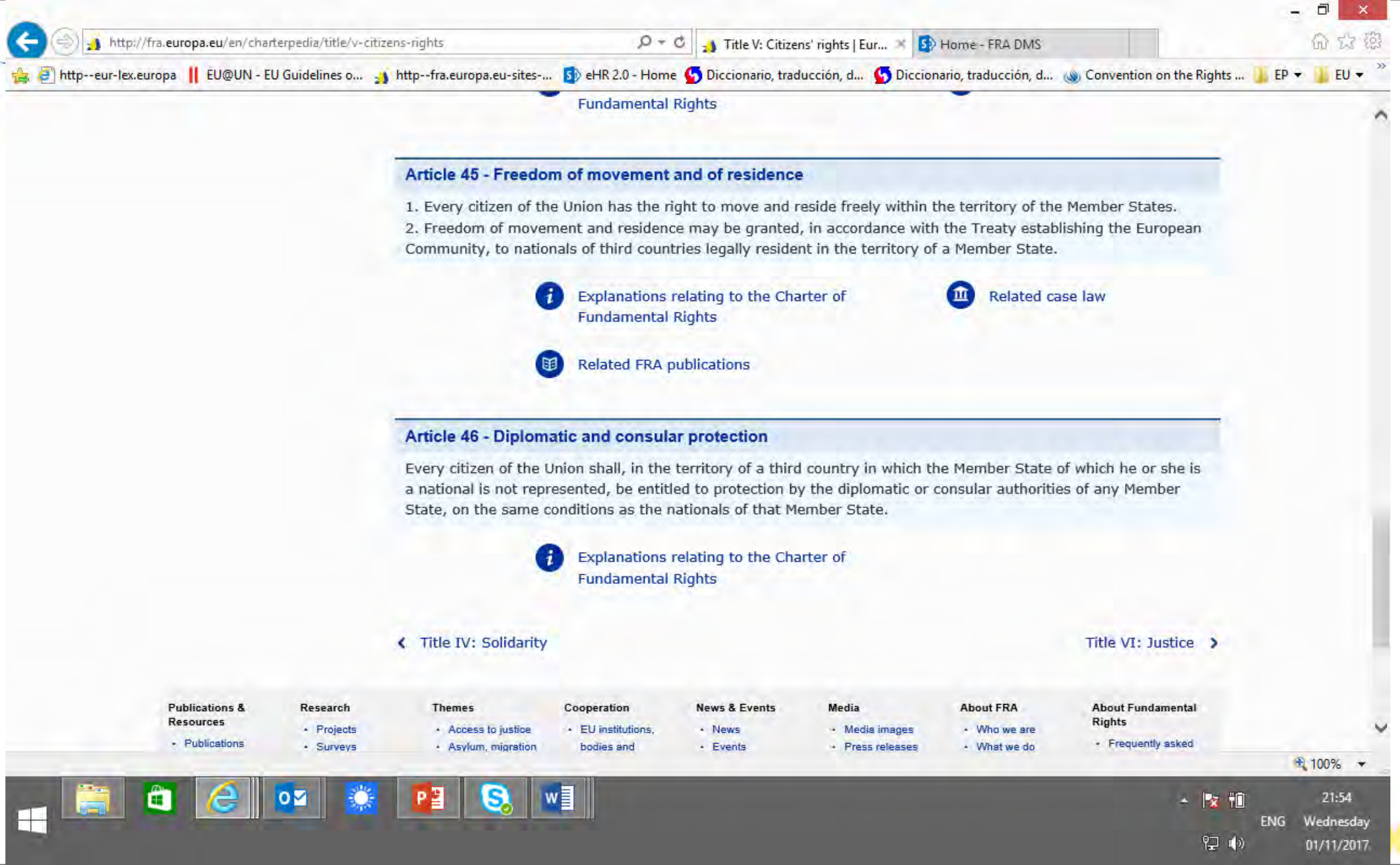
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Article 45 - Freedom of movement and of residence
1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.
Explanations relating to the Charter of Fundamental Rights
Related case law
Related FRA publications
Article 46 - Diplomatic and consular protection
Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.
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Subject-matter concerned	☐ 1) non-discrimination on grounds of nationality ☐ 2) freedom of movement and residence - linked to which article of the Directive 2004/38: art. 6 ☐ 3) voting rights ☐ 4) diplomatic protection ☐ 5) the right to petition
Decision date	13 February 2012
Deciding body (in original language)	*Tribunale di Reggio Emilia*
Deciding body (in English)	Ordinary Court of Reggio Emilia
Case number (also European Case Law Identifier (ECLI) where applicable)	Proceeding No. 1401/2011
Parties	*A third-country citizen v. the Police Headquarters of Reggio Emilia (Questura di Reggio Emilia)*
Web link to the decision (if available)	www.meltingpot.org/IMG/pdf/trib-re-coniuge-omosex.pdf
Legal basis in national law of the rights under dispute	Article 2 of Legislative Decree No. 30 of 6 February 2007 on the implementation of the Directive 2004/38/EC concerning the right of EU citizens and their families to move and live in the territory of EU member States (*DecretoLegislativo 6 febbraio 2007, n. 30 "Attuazionedelladirettiva 2004/38/CE relativa al dirittodeicittadinidell'Unione e deilorofamiliari di circolare e di soggiornareliberamentenelterritoriodegliStatimembri"*)
Key facts of the case	This case concerns the regulation of same-sex marriages celebrated abroad. The complainant is the spouse of an Italian citizen: they got married in Spain in 2010 and decided to move their residence to Italy. The Police Headquarters of Reggio Emilia denied the issuing of the EU long-term residence permit. The complainant decided to challenge the decision, claiming to be the spouse of an EU citizen.
Main reasoning / argumentation	According to the Ordinary Court of Reggio Emilia, the complainant was to be recognised as the legitimate spouse of the Italian citizen willing to move his residence back to Italy together with his spouse. This right – which is recognised by Directive 2004/38/EC and Legislative Decree No. 30/2007 – has to be guaranteed even though the Italian legislation at the time did not allow for same-sex marriages. For this reason, the challenged decision to deny the long-term residence permit to the EU citizen's spouse was to be considered invalid and in breach of EU and national legislation.
Key issues (concepts, interpretations) clarified by the case	The decision of the Ordinary Court of Reggio Emilia is relevant because it provided an interpretation of the categories of relatives entitled to family reunification with EU citizens living in another EU Member State: in particular, the category of 'spouse' cannot be interpreted according to national legislation, but each Member State shall respect the legislation on marriage adopted by other EU Member States. In this case, the interpretation at hand was crucial because, at the time, the Italian legislation – unlike the Spanish one – did not allow for same-sex marriages.

	Moreover, this court decision is relevant because it stressed that, if they are more favourable, the provisions contained in Legislative Decree No. 30/2007 are to be applied to non-Italian relatives of Italian citizens.
Results (e.g. sanctions) and key consequences or implications of the case (max. 500 chars)	The challenged decision adopted by the Police Headquarters of Reggio Emilia was considered invalid, and the complainant was entitled to receive compensation for legal costs.
Key quotations in original language and translated into English with reference details (max. 500 chars)	*"Occorre rilevare, infine, come il D.Ivo. n. 30 del 2007, al fine di favorire la libera circolazione, riconosca il diritto a soggiornare tutelando la conservazione dell'unione familiare così come si è formata nel Paese di provenienza (nella specie, la Spagna); non emerge dalla normativa alcuna disposizione che consenta di limitare tale diritto tenendo conto della legge nazionale dei coniugi (nel caso di specie, né l'Uruguay né l'Itali riconoscono l'accesso delle coppie dello stesso sesso al matrimonio);"* *"Finally, it is necessary to stress that Legislative Decree No. 30/2007, in order to guarantee free movement, recognises the right of residence, protecting the preservation of the family union as in the country where it was formed (in this case, Spain); considering the national legislation of the countries of origin of the spouses – in this case, neither the Uruguayan nor the Italian legislation recognises the possibility for same-sex couples to access marriage –, there is no legislative provision limiting the right referred to above;"*
Has the deciding body refer to the Charter of Fundamental Rights. If yes, to which specific Article.	Yes, it has. The court referred to Articles 9 and 21 of the EU Charter of Fundamental Rights.

1. Subject-matter concerned	☒ 1) non-discrimination on grounds of nationality ☒ 2) freedom of movement and residence - linked to which article of the Directive 2004/38 ☐ 3) voting rights ☐ 4) diplomatic protection ☐ 5) the right to petition
Decision date	24 November 2016 (entered into force 24 December 2016)
Deciding body (in original language)	Tallinna Ringkonnakohus
Deciding body (in English)	Tallinn Circuit Court
Case No. /European Case Law Identifier (ECLI)	3-15-2355/24, ECLI:EE:TLRK:2016:3.15.2355.6513
Parties	XX vs. Harju Maavalitsus (County Government)
Web link to the decision	https://www.riigiteataja.ee/kohtulahendid/detailid.html?id=195899991
Legal basis in national law of the rights under dispute	• Private International Law Act (PILA, *Rahvusvahelise eraõiguse seadus*)[1] Articles 7, 55 sec 2, Art 58 sec 1 and Art 60 sec 1 • Family Law Act (FLA, *Perekonnaseadus*)[2] Art 1 sec 1 and Art 10 • Registered Partnership Act (RPA, *Kooseluseadus*)[3] Art 7 sec 2 • Directive 2004/38 article Art 2 sec 2 (a) • Vital Statistics Registration Act (VSRA, *Perekonnaseisutoimingute seadus*)[4] Art 50 sec 1 • Population Register Act (PRA, *Rahvastikuregistri seadus*)[5] Art 21 sec 1 (10) and (6), Art 25^1
Key facts of the case (max. 500 chars)	The Estonian legal system (FLA Art 10) recognises marriage only between a man and a woman; it does not recognise same-sex marriage. However, Estonia has adopted the RPA that among other types of partnerships accepts registered partnerships between same-sex couples. As of June 2017, Estonia has not adopted specific national implementation acts that would allow official registration of such partnerships in the population register. Ms. XX registered her marriage with a woman in Sweden. She wanted Harju Maavalitsus (County Government) to recognise her marriage and register it in the population register so that her partner can enjoy the benefits granted through marriage. The Harju County Government refused the application stating that there is no legal ground for such registration. This decision was upheld by the Tallinn Administrative Court, that questioned the application of EU law in the current

	situation as the applicant was not an Estonian citizen since 1994 and since the main place of residence of the couple seemed to be Sweden, there was no need to register them in the Estonian registry. Ms. XX appealed this decision claiming among other things that such refusal violates free movement of persons of the EU. The Tallinn Circuit Court applied the PILA and found that same-sex marriage is not contrary to the values of the Estonian legal order and, therefore, such marriage has to be recognised as legal under the private international law and should be entered into the Estonian population register as a registered partnership.
Main reasoning / argumentation	
Key issues (concepts, interpretations) clarified by the case	
Results (e.g. sanctions) and key consequences or implications of the case	
Which references to the EU Charter of Fundamental Rights/EU legislation could have been included?	

[1] Estonia, Private International Law Act (*Rahvusvahelise eraõiguse seadus*) 14.03.2016, www.riigiteataja.ee/en/eli/514032016002/consolide
[2] Estonia, Family Law Act (*Perekonnaseadus*) 27.12.2016, www.riigiteataja.ee/en/eli/527122016004/consolide
[3] Estonia, Registered Partnership Act (*Kooseluseadus*), 27.11.2014, www.riigiteataja.ee/en/eli/527112014001/consolide
[4] Estonia, Vital Statistics Registration Act (*Perekonnaseisutoimingute seadus*) 13.06.2016, www.riigiteataja.ee/en/eli/513062016006/consolide
[5] Estonia, Population Register Act (*Rahvastikuregistri seadus*) 23.03.2017, www.riigiteataja.ee/en/eli/523032017001/consolide

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ERA SEMINAR (BARCELONA)

Tuesday 7th November 2017

"How to Litigate the Right to Family Life before the European Courts"

Lecturer: Dr. Sarah Fennell BL

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ERA Seminar

- Taking a Case to the Court of Justice of the European Union (CJEU) with particular reference to Article 267 TFEU
- Jurisdiction of the General Court

2

Most Common Types of Cases before the CJEU

1. Enforcing the Law (Infringement Proceedings): Arts. 258-260 TFEU

2. Annulling EU Legal acts (Actions for Annulment): Article 263 TFEU

3. Interpreting the Law (Preliminary Rulings): Article 267 TFEU

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Jurisdiction of General Court

- Jurisdiction to hear and determine at first instance actions of proceedings referred to in Articles 263, 265, 268, 270 and 272 with the exception of those assigned to a specialised court and those reserved in the Statute for CJEU
- Jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267 in specific areas laid down by the Statute
- Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the CJEU for a ruling
- Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the CJEU under the conditions and within the limits laid down by the Statute if there is a serious risk of the unity or consistency of Union law being affected.

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Articles 258-260 TFEU

- **Article 258 TFEU:**
- Commission fulfills its watchdog role as guardian of the Treaties
- Types of Breach by Member States of Community law e.g. failure to implement a Directive or inadequate implementation of EU law
- Procedure
- State Defences
- **Article 259 TFEU:**
- Mechanism for one Member State to initiate action against another Member State
- **Article 260 TFEU:**
- Lump sum or penalty payment

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Article 263 TFEU

- Central article for challenging acts of Community institutions
- Institutions/Bodies that may have their acts or legislation reviewed
- Acts/legislation that may be challenged - see Case *C-540/03 European Parliament v. Council* [2006] ECR I-5769 on challenge brought to the Family Reunification Directive
- Grounds that form the basis for a challenge - see in particular in the context of family life, the general principles of EU law to include proportionality, legal certainty, legitimate expectations and non-discrimination
- Time limits
- Categories of applicant that may challenge acts
- Related actions: Art. 279 TFEU (Interim measures), Art. 265 TFEU (Failure to act) and Art. 277 TFEU (Plea of Illegality)

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- Article 267 TFEU reads:

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretations of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court of tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

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The Provisions which can be Referred under Article 267 TFEU

(i) References can be made concerning the interpretation of the Treaties.

(ii) References can be made concerning the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Community.

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The Courts or Tribunals to Which Article 267 TFEU Applies

- Question one of Community and not national law
- What is more significant than the label attached is whether the body performs judicial functions
- Case by case determination
- The ECJ in *Dorsch Consult*, Case C-54/96 [1997] ECR I-4961 provided a list of what constitutes a 'judicial function' for the purposes of Article 267 TFEU to include:

(i) Whether the body is established by law;
(ii) Whether it is permanent;
(iii) Whether its jurisdiction is compulsory;
(iv) Whether its procedure is *inter partes*;
(v) Whether it applies rules of law;
(vi) Whether it is independent.

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Obligation or Discretion to Make a Preliminary Reference

- Article 267 TFEU draws a distinction between the courts against whose decision there is no judicial remedy in national law and are therefore obliged to refer where this is necessary for the interpretation or validity of EU law (Article 267(3)) and the courts which enjoy a discretion as to whether to make a preliminary reference (Article 267(2)).

- The ECJ established in *Köbler v. Austria*, Case C-224/01, [2003] CMLR 1003, that Member States can be held liable for breaches of EU law committed by their Supreme Courts, with one of the circumstances being non-compliance by the court in question with its obligation to make a preliminary reference under Article 267(3) TFEU.

- 'Concrete theory' and 'Abstract theory' - see *Costa*, Case 6/64, [1964] ECR 585 and *Lyckeskog*, Case C-99/00, [2002] ECR I-4839.

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The Circumstances in Which a Preliminary Reference May be Made by National Courts

Broadly speaking, there are three situations which may result in a preliminary reference:

- Where a piece of secondary Community law may be invalid;
- Where national law might be in conflict with EU law;
- Where there is doubt as to how Community law is to be applied.

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Exceptions to the Obligation to Refer

1. Facts virtually identical to earlier case law – see *Da Costa*, Cases 28-30/62 [1963] ECR 31.
2. There exists previous case law – see *CILFIT* Case 238/81, [1982] ECR 3415.
3. The answer is obvious – see *CILFIT* Case 238/81, [1982] ECR 3415.

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The Circumstances under Which the ECJ may Declare a Reference Inadmissible

1. If it concerns a purely hypothetical question – see *Borker v. Paris Bar* Case 138/80 [1980] ECR 1975.
2. If the ECJ considers that the parties to the dispute had contrived together in the absence of a genuine dispute – see *Foglia v. Novello (No .2)* Case 244/80 [1981] ECR 3045.
3. If the questions raised are not relevant to the resolution of the substantive action in the national court – see *Meilicke* Case C-83/91 [1992] ECR I-4871.
4. If the questions are not articulated clearly enough for the ECJ to be able to give any meaningful legal response.
5. If the facts are insufficiently clear to enable it to apply the relevant legal rules.

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Statute of the CJEU

- Title III – Procedure before the CJEU
- Article 20 – the procedure before the CJEU shall consist of two parts: written and oral
- Article 23 – Cases governed by Article 267 TFEU
- Article 23a – Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice an urgent procedure.

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Rules of Procedure of the CJEU

- Consolidated version of the Rules of Procedure of the Court of Justice of 25th September 2012 (as amended on 18 June 2013 and 19 July 2016)
- Title III – References for a Preliminary Ruling
- Article 94 – Content of the request (i) summary of the subject matter and accounts of facts on which the questions are based (ii) tenor of any national provisions and where, appropriate, the relevant national case-law (iii) statement of reasons which prompted the reference
- Article 96 – Participation in preliminary ruling proceedings
- Article 99 – Reply by reasoned order

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Rules of Procedure of the CJEU

- **Chapter 2 – Expedited Preliminary Ruling Procedure**

- Article 105 – Expedited Procedure derogating from the provisions of the Rules
- Ordinary or Standard Procedure - delays of up to 16.8 months and this necessitated introduction of speedier reference mechanisms for limited categories of cases.
- Article 105(1) – statements or written observations may be lodged within a time-limit prescribed by the President which shall not be less than 15 days
- Article 106 – transmission of procedural documents

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Rules of Procedure of the CJEU

- **Chapter 3 – Urgent Preliminary Ruling Procedure**

- Scope: areas covered by Title V of Part Three of TFEU
- Decision as to urgency: this is taken by the designated Chamber, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General
- Article 109 – the decision to deal with the reference under the urgent procedure shall prescribe the time-limit within which those parties or entities may lodge statement of case or written observations
- The designated Chamber may, in cases of extreme urgency, decide to omit the written part of the procedure referred to in Article 109(2).

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Recommendations to National Courts and Tribunals in relation to the Initiation of Preliminary Ruling Proceedings

- The Recommendations (2016/C439/01) replace the Information Note on references from national courts for a preliminary ruling (OJ C 160, 28.5.2011).

- The following are some of the Recommendations:

- a reference for a preliminary ruling may prove particularly useful when there is a new question of interpretation of general interest for the uniform application of EU law, or where the existing case-law does not appear to be applicable to a new set of facts
- the referring court or tribunal must set out the reasons which prompted it to inquire about the interpretation or validity of provisions of EU law and the relationship between those provisions and the national legislation applicable to the main proceedings
- the request for a preliminary ruling should be drafted simply, clearly and precisely, avoiding superfluous detail.
- Since the CJEU has no jurisdiction to give a preliminary ruling where a legal situation does not come within the scope of EU law, any provisions of the Charter that may be relied upon by the referring court or tribunal cannot, of themselves, form the basis for such jurisdiction.

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Recommendations (Ctd).

- About 10 pages is often sufficient to set out in a proper manner the context of a request for a preliminary ruling.

- The request must contain, in addition to the text of the questions:

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

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

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

The Recommendations also contain an Annex which address the essential elements of a request for a preliminary ruling and include: the referring court or tribunal, the parties and their representatives, the subject matter of the dispute, the grounds for reference, and the questions referred .

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Recommendations (Ctd).

- **Conditions for the application of the expedited and urgent procedures**

- Application for expedited procedure must only be sought in particular circumstances that warrant the Court giving its ruling quickly
- Application for urgent procedure must be requested only where it is absolute necessary e.g. proceedings concerning parental authority or custody of young children.
- Request must set out precisely the matters of fact and law which establish the urgency and, in particular, the risks involved in following the ordinary procedure.

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Recommendations (Ctd).

- In so far as is possible, the referring court or tribunal must also briefly state its view on the answer to be given to the questions referred

- The request for the application of the expedited or urgent procedure must be submitted in an unambiguous form that enables the Registry to establish immediately that the file has to be dealt with in a particular way

- The order for reference must be concise where the matter is urgent, to help ensure the rapidity of the procedure.

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Practice Directions to Parties Concerning Cases brought before the Court (31.1.2014)

- By means of a "working tool" for legal practitioners, the ECJ had published *Notes for the Guidance of Counsel (2009)* which addressed the steps in preliminary reference proceedings before the ECJ. These have now been included in Practice Directions to Parties concerning cases brought before the Court.

- The procedure before the CJEU is to consist as a general rule, of a written and an oral part.

- The purpose of the written part in preliminary reference proceedings is to put before the Court the observations which the interested persons referred to in Article 23 of the Statute intend to submit concerning the questions.

- The oral part is intended to allow the Court to complete its knowledge of the case by the possible hearing of submissions from those parties or interested persons at a hearing, and if appropriate, by hearing the Opinion of the Advocate General.

- In preliminary rulings, it is for the referring court or tribunal to rule on the costs of the proceedings.

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Practice Directions to Parties Concerning Cases brought before the Court (31.1.2014)

- Where a party considers it necessary that its identity or certain information concerning it should not be disclosed in a case brought before the Court, it may request that the Court "anonymise" the relevant case, in whole or in part.

- The written part of the procedure in preliminary references is characterised by the absence of adversarial proceedings, the interested persons referred to in Article 23 of the Statute being merely requested to submit any observations they may make on the questions referred by a national court or tribunal, without as a general rule knowing the position adopted by the other interested persons on those questions.

- The written observations must be lodged within a time limit of two months from service of the request for a preliminary ruling (extended on account of distance by a single period of 10 days), that cannot otherwise be extended.

- The written pleadings or observations lodged are presented in a form in which they can be processed electronically by the court and that, in particular, documents can be scanned and character recognition used.

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Practice Directions to Parties Concerning Cases brought before the Court (31.1.2014)

- The written pleadings or observations must be drafted in clear, concise language.

- Only the documents expressly provided for by the procedural rules may be lodged at the Registry and must be lodged within the prescribed time-limits and observing the requirements set out in Article 57 of the Rules of Procedure.

- An oral hearing is arranged by the Court whenever it is likely to contribute to a better understanding of the case and the issues raised by it, whether or not a request to that effect has been made by the parties or the interested persons referred to in Article 23 of the Statute.

- Where those parties or interested persons consider that a hearing must be arranged in a case, the onus is on them as soon as they have received notification of the end of the written part of the procedure to inform the Court by letter why they wish to be heard.

- Before the hearing begins, the members of the formation of the Court usually hold a short meeting with the representatives of the parties of interested persons about the organisation of the hearing.

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Practice Directions to Parties Concerning Cases brought before the Court (31.1.2014)

- The normal procedure at the hearing:

(i) The oral submissions

- Only the decisive points for the purposes of the Court's decision must be brought to its attention

- As a general rule, the speaking time is fixed at 15 minutes. However, that duration may be made longer or shorter depending on the nature or the specific complexity of the case, the number and procedural status of the participants in the hearing and any measures of organisation of procedure.

- If the parties have a text available, however short, of notes for the oral submissions or an outline of their argument, it should be sent in advance to the interpretation directorate.

(ii) Questions from the members of the Court

- The persons presenting oral argument may be requested, at the end of the oral submissions, to answer additional questions from the members of the court.

(iii) Replies

- After that exchange, the representatives of the parties or the interested persons finally have the opportunity, if they consider it necessary, of replying briefly. Those replies, of a maximum duration of five minutes each, do not constitute a second round of oral submissions.

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Selection of Irish Preliminary References in Family and Child Law

- Case C-428/15, *Child and Family Agency v J.D.*, 27th October 2016 – Scope and conditions applicable to Article 15 of BrusselsII*bis*

- Case C-173/16 *M.H. V. M.H.* - Order of the CJEU of 22nd June 2016 – Determination of the time when a court is seised under BrusselsII*bis*

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Selection of Irish Preliminary References in Family and Child Law

- Case C-92/12 PPU, *HSE v S.C. And A.C.,* 26th April 2012 – Material scope of Article 56 of BrusselsII*bis*

- Case C-400/10 PPU, *McB v E*, 5th October 2010 Rights of Custody in context of child abduction.

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