



The AIRE Centre
Advice on Individual Rights in Europe



EUROPEAN LAW ON
ASYLUM
THROUGH CASE LAW

A GUIDE FOR JUDGES, DECISION MAKERS AND PRACTITIONERS

EUROPEAN LAW ON

ASYLUM

THROUGH CASE LAW

A GUIDE FOR JUDGES, DECISION MAKERS AND PRACTITIONERS

European Law on Asylum Through Case Law - A guide for judges, decision makers and practitioners

Editorial Board

Biljana Braithwaite, Programme Manager for the Western Balkans, the AIRE Centre
Catharina Harby, Senior Legal Consultant, the AIRE Centre
Judge Ledi Bianku, European Court of Human Rights
Nuala Mole, Senior Lawyer at the AIRE Centre
Marija Jovanovic, MJur (Oxon), DPhil (Oxon)

Main Contributors

Judge Ledi Bianku, European Court of Human Rights
Nuala Mole, Senior Lawyer at the AIRE Centre
Judge Lars Bay Larsen, Court of Justice of the European Union
Judge Hugo Storey, Judge of the Upper Tribunal and President of the
European Chapter of the International Association of Refugee Law Judges

© 2016 AIRE Centre

Print run 250

This original English version has also been translated into Bosnian/Croatian/
Montenegrin/Serbian, Albanian, Macedonian languages

Design by Kliker Dizajn

Printed by Dual Mode

Table of Contents

Introduction.....	8
Overview of the System for International Protection for Those at Risk	17
European Court of Human Rights Case Summaries and Comments	32
<i>Article 3 – Prohibition of Torture.....</i>	<i>32</i>
Cruz Varas and Others v. Sweden, no. 15576/89, 20 March 1991.....	32
Chahal v. the United Kingdom [GC], no. 22414/93, 15 November 1996.....	37
Ahmed v. Austria, no. 25964/94, 17 December 1996	44
Jabari v. Turkey, no. 40035/98, 11 July 2000	48
Bader and Kanbor v. Sweden, no. 13284/04, 8 November 2005.....	52
Salah Sheekh v. the Netherlands, no. 1948/04, 11 January 2007.....	57
Saadi v. Italy [GC], no. 37201/06, 28 February 2008.....	62
N. v. the United Kingdom [GC], no. 26565/05, 27 May 2008	66
NA. v. the United Kingdom, no. 25904/07, 17 July 2008.....	71
Ben Khemais v. Italy, no. 246/07, 24 February 2009	76
Al-Saadoon and Mufdhi v. the United Kingdom, no. 61498/08, 2 March 2010.....	81
Rahimi v. Greece, no. 8687/08, 5 April 2011.....	87
Sufi and Elmi v. the United Kingdom, nos. 8319/07 and 11449/07, 28 June 2011	92
Abdulkhakov v. Russia, no. 14743/11, 2 October 2012	97

<i>Article 3 and Council Regulation No. 604/2013 of 26 June 2013 (Dublin III Regulation) (and previous legislation covering the same matter)</i>	104
T.I. v. the United Kingdom, no. 43844/98, 7 March 2000.....	104
M.S.S. v. Belgium and Greece [GC], no. 30696/09, 21 January 2011	109
Samsam Mohammed Hussein and Others v. the Netherlands and Italy, no. 27725/10, 2 April 2013	116
Tarakhel v. Switzerland [GC], no. 29217/12, 4 November 2014	121
<i>Article 5 – Right to Liberty and Security</i>	126
Tabesh v. Greece, no. 8256/07, 16 November 2009.....	126
Louled Massoud v. Malta, no. 24340/08, 27 July 2010.....	130
<i>Article 6 – Right to a Fair Trial</i>	135
Othman (Abu Qatada) v. the United Kingdom, no. 8139/09, 17 January 2012.....	135
<i>Article 13 – Right to an Effective Remedy</i>	140
I.M. v. France, no. 9152/09, 2 February 2012.....	140
A.C. and Others v. Spain, no. 6528/11, 22 April 2014	145
<i>Article 4 of Protocol No. 4 – Prohibition of Collective Expulsion</i>	150
Hirsi Jamaa and Others v. Italy [GC], no. 27765/09, 23 February 2012.....	150
Sharifi and Others v. Italy and Greece, no. 16643/09, 21 October 2014.....	156
Court of Justice of the European Union Case Summaries and Comments.....	162
<i>Council Regulation No. 343/2003 of 18 February 2003 (Dublin II Regulation)</i>	162

N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform [GC], C-411/10 and C-493/10, 21 December 2011	162
MA, BT and DA v. Secretary of the State for the Home Department, C-648/11, 6 June 2013.....	167
Bundesrepublik Deutschland v. Kaveh Puid [GC], C-4/11, 14 November 2013.....	171
Shamso Abdullahi v. Bundesasylamt [GC], C-394/12, 10 December 2013.....	175
<i>Council Directive No. 2004/83/EC of 29 April 2004 (Qualification Directive)</i>	180
Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie [GC], C-465/07, 17 February 2009	180
Aydin Salahadin Abdulla and Others v. Bundesrepublik Deutschland [GC], C-175/08, C-176/08, C-178/08 and C-179/08, 2 March 2010.....	184
Bundesrepublik Deutschland v. B and D [GC], C-57/09 and C-101/09, 9 November 2010	188
Bundesrepublik Deutschland v. Y and Z [GC], C-71/11 and C-99/11, 5 September 2012.....	193
Minister voor Immigratie en Asiel v. X, and Y and Z v. Minister voor Immigratie en Asiel, C-199/12 to C-201/12, 7 November 2013.....	198
Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides, C-285/12, 30 January 2014	203
A, B and C v. Staatssecretarías van Veiligheid en Justitie [GC], C-148/13 to C-150/13, 2 December 2014	207

Mohamed M’Bodj v. État belge [GC], C-542/13, 18 December 2014.....	211
Andre Lawrence Shepherd v. Bundesrepublik Deutschland, C-472/13, 26 February 2015	216
<i>Council Directive No. 2008/115/EC of 16 December 2008 (Returns Directive)</i>	220
Said Shamilovich Kadzoev (Huchbarov) [GC], C-357/09 PPU, 30 November 2009.....	220
Centre public d’action sociale d’Ottignies-Louvain-la-Neuve v. Moussa Abdida [GC], C-562/13, 18 December 2014	224
Domestic Case Summaries and Comments	229
<i>Encroachment on Religious Freedom as Acts of Persecution – Article 9(1) of the Qualification Directive</i>	229
Germany No. 1 (Federal Administrative Court, 20 February 2013 – BVerwG 10 C 23.12)	229
<i>Persecution from Non-State actors – Article 7 of the Qualification Directive and Article 1A(2) of the 1951 Refugee Convention</i>	235
The United Kingdom No. 1 (Horvath v. Secretary of State for the Home Department [2000] UKHL 37, 6 July 2000)	235
<i>Subsidiary Protection – Article 15(c) of the Qualification Directive</i>	240
France No. 1 (Conseil d’Etat, 3 July 2009, OFPRA v. M.A., n° 320295)	240
France No. 2 (CNDA, 2 February 2015, M.A., n° 14017393).....	243
Germany No. 2 (Federal Administrative Court, 31 January 2013 – BVerwG 10 C 15.12) (also mentions an ‘internal protection alternative’) ...	245
<i>An “Internal Protection” Alternative – Article 8 of the Qualification Directive</i>	248

The United Kingdom No. 2 (Januzi v. Secretary of State for the Home Department & Ors [2006] UKHL 5, 15 February 2006)	248
<i><u>Victims of Trafficking – a Particular Social Group within the Meaning of Article 1A(2) of the 1951 Refugee Convention and Article 10 of the Recast Qualification Directive</u></i>	253
France No. 3 (Cour Nationale du Droit d’Asile, 24 March 2015, n° 10012810) (also mentions an ‘internal protection alternative’).....	253
<i><u>Assessment of Credibility of Evidence in Asylum Applications – Article 4 of the Qualification Directive and Article 46 of the Recast Asylum Procedures Directive</u></i>	257
Sweden (Migration Court of Appeal, UM 122-6, 18 September 2006)	257
<i><u>Domestic Legislation and the Asylum Procedures Directive</u></i>	262
The Netherlands No. 1 (ABRvS, 201103520/1/V3, 25 June 2012) (<i>The right to remain – Article 7 of the Asylum Procedures Directive</i>).....	262
The Netherlands No. 2 (ABRvS, 201112955/1/V4, 29 June 2012) (<i>A second or subsequent asylum procedure – Article 32 of the Asylum Procedures Directive, Article 13 of the ECHR, or Article 47 of the CFREU</i>).....	266

Introduction

Persecution, conflict and poverty forced an unprecedented one million people to flee to Europe in 2015, according to estimates by the UN Refugee Agency and the International Organisation for Migration. The number of people displaced by war and conflict is the highest seen in Western and Central Europe since the 1990s, when several conflicts broke out in the former Yugoslavia. During an initial period, tens of thousands of people moved from Greece through the Western Balkans and northwards, finding themselves blocked at various border points. However, a more coordinated European response is beginning to take shape.

The countries of the Western Balkans are mainly transit countries for migrants and refugees. Nevertheless, the dramatic rise in the numbers of migrants and refugees coming into Europe in 2015 and the decisions by the European Union Member States to impose stricter border controls have also resulted in an increase in the number of asylum applications in Western Balkan countries themselves.

Evidently, such a vast flow of people, including many families with young children as well as unaccompanied minors, pose a challenge to all European countries and their resources have been seriously tested. However, it remains vital that the rights of individuals who are seeking international protection are respected at all times. These rights involve, for example, the right to seek asylum, safeguards in relation to detention and protection from ill-treatment, which are drawn from different legal sources such as the Geneva Convention Relating to the Status of Refugees, the European Convention on Human Rights and European Union law.

This publication forms part of a wider project which aims to address some of the challenges countries in the region have been facing by increasing the knowledge and capacity of the judiciary in the Western Balkans to ensure the proper implementation of international standards at domestic level and the protection of the fundamental rights of asylum seekers. We are hoping that this publication will also benefit government officials, police officials, customs officials and practicing lawyers by providing guidance on how international, European and national asylum and refugee law operates, who has the right to obtain asylum, and what rights this status entails.

The case law book contains four parts:

First, a short narrative sets out an overview of the system for international protection of those at risk. It considers international and regional laws and standards relating to asylum and examines in turn the UN instruments, particularly the 1951 Geneva Convention relating to the Status of Refugees; the ECHR and associated Council of Europe instruments; and the EU asylum *acquis*.

Second, there is a section with case summaries and expert comments on 25 of the most important cases from the European Court of Human Rights in Strasbourg in relation to asylum. A number of provisions in the European Convention on Human Rights are relevant here, in particular Article 3, the prohibition of torture and ill-treatment, which puts an obligation on States not to return individuals to situations where such treatment would occur, but also to ensure that detention conditions are humane. The cases selected in this case law book also consider, *inter alia*, the authority of the Strasbourg Court to put in place interim measures under Rule 39 of the Rules of Court. Rule 39 has been used to request a State not to remove an individual before the European Court of Human Rights has examined the merits of the complaint, the special needs of younger and unaccompanied asylum seekers, periods of detention and a range of other issues. The European Convention on Human Rights is directly applicable in all the countries in the region and hence the case law in this section is of immediate relevance to decision makers.

Third, the case law book contains a section with 15 case summaries and expert comments from the Court of Justice of the European Union in Luxembourg. The CJEU has an important role to ensure the uniform application and interpretation of European Union law, including the asylum *acquis* but also to ensure that these rules are in conformity with respect for fundamental rights. The EU Charter of Fundamental Rights applies to the administration of the asylum *acquis* in its entirety. Moreover, EU Member States remain accountable to the European Court of Human Rights in Strasbourg for their protection of obligations under EU law whenever these obligations involve a right or obligation under the ECHR. There is a clear cross over between the two systems and this is further explored in this case law book. Further, the importance of the EU *acquis* and jurisprudence of the CJEU goes beyond the Member States of the EU. While Western Balkans countries are only bound by the ECHR and Strasbourg jurisprudence, EU legislation and the jurisprudence of the Luxembourg Court on asylum matters is relevant for the region in many ways.

The European regime has already made a significant impact on the law and practice of States around the world¹. The CJEU jurisprudence thus plays a significant role in the development and interpretation of refugee law across the globe, especially since the most important international instrument on refugee law, the 1951 Geneva Convention, did not establish a supranational legal body that provides authoritative interpretations or review of national decisions relating to the application and implementation of the Convention.

Moreover, the Luxemburg and Strasbourg courts frequently refer to each other's decisions to support their respective positions, and the EU Charter, which is directly applicable to the EU *acquis*, directly refers to the ECHR when it comes to interpreting its provisions². Luxemburg and Strasbourg jurisprudence are inextricably linked, which requires familiarity with both bodies of law.

Finally, all the countries in the region aspire to become full members of the EU and, as part of the integration process, they must harmonise their respective legal frameworks in line with Chapter 24 of the *acquis communautaires*. Accordingly, it is of utmost importance for judicial and other institutions in charge of dealing with refugees in Western Balkans to be informed of the developments in the jurisprudence not only of the ECtHR, but also of the CJEU.

Fourth, the publication includes a section with a selection of ten case summaries and expert comments from jurisdictions around Europe, which have experienced a high level of applications for international protection. The domestic courts in these jurisdictions apply a range of international norms, such as the 1951 Geneva Convention on the Status of Refugees, the European Convention on Human Rights and EU law, and showcase good practice in a range of different scenarios.

The main contributors who have lent their vast expertise in the drafting of this case law book are Judge Ledi Bianku, European Court of Human Rights; Nuala Mole, Senior Lawyer at the AIRE Centre; Judge Lars Bay Larsen, Court

1 Helene Lambert, Jane McAdam, Maryellen Fullerton (eds), *The Global Reach of European Refugee Law* (CUP 2013).

2 Art 52(3) of the Charter provides that insofar as the Charter contains rights which 'correspond to rights guaranteed by' the ECHR, the 'meaning and scope of those rights shall be the same' as in the ECHR. Examples of the Courts referring to each others case law can be found in e.g. C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Reform*, [Grand Chamber] judgment of 21 December 2011, and *Tarakhel v. Switzerland*, [Grand Chamber] judgment of 4 November 2014, no. 29217/12, both included in this publication.

of Justice of the European Union; and Judge Hugo Storey, Judge of the Upper Tribunal (United Kingdom) and President of the European Chapter of the International Association of Refugee Law Judges.

The Editorial Board for the publication consists of Biljana Braithwaite, Programme Manager for the Western Balkans, the AIRE Centre; Catharina Harby, Senior Legal Consultant, the AIRE Centre; Judge Ledi Bianku, European Court of Human Rights; Nuala Mole, Senior Lawyer at the AIRE Centre; and Marija Jovanovic, MJur (Oxon), DPhil (Oxon).

In addition, we are particularly grateful to contributors from the International Association of Refugee Law Judges: Justice Harald Dörig, German Federal Administrative Court (Germany); Section President Florence Malvasio, National Court of Asylum Law (France); Liesbeth Steendijk, State Councillor at the Dutch Council of State (Netherlands); as well as Yann Laurans, Court of Justice of the European Union; Alessia Cicatiello, the AIRE Centre; and EDAL - European Database of Asylum Law.

List of Acronyms

APD – Asylum Procedures Directive

CAT – Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

CEAS – Common European Asylum System

CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women 1979

CFREU – Charter of Fundamental Rights of the European Union 2000

CJEU – Court of Justice of the European Union

CRC – Convention on the Rights of the Child 1989

CRPD – Convention on the Rights of Persons with Disabilities 2006

EC – European Community

ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

ECRE – European Council on Refugees and Exiles

ECtHR – European Court of Human Rights

EEA – European Economic Area

ELENA – European Legal Network on Asylum

EU – European Union

GC – Geneva Convention relating to the Status of Refugees 1951

[GC] – Grand Chamber

ICCPR – International Covenant on Civil and Political Rights 1966

ICED – International Covenant for the Protection of All Persons from Enforced Disappearance 2006

ICERD – International Convention on the Elimination of All Forms of Racial Discrimination 1966

ICESCR – International Covenant on Economic, Social and Cultural Rights 1966

ICMW – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990

ICC – International Criminal Court

IDP – Internally displaced persons

IHL – International humanitarian law

MS – Member States

NGO – Non-governmental organisation

QD – Qualification Directive

RCD – Reception Conditions Directive

TFEU – Treaty on the Functioning of the European Union 2007

UDHR – Universal Declaration of Human Rights 1948

UN – United Nations

UNHCR – Office of the United Nations High Commissioner for Refugees

WWII – Second World War

Table of Treaties and Other International and Regional Instruments

1948 Universal Declaration of Human Rights

1950 European Convention on Human Rights

1951 Convention relating to the Status of Refugees

1958 Geneva Convention on the High Seas

1958 Geneva Convention on the Territorial Sea and Contiguous Zone

1961 European Social Charter

1966 International Covenant on the Elimination of All Forms of Racial Discrimination

1966 International Covenant on Civil and Political Rights

1966 International Covenant on Economic, Social and Cultural Rights

1967 Protocol relating to the Status of Refugees

1974 International Convention for the Safety of Life at Sea

1984 Cartagena Declaration on Refugees

1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

1989 Convention on the Rights of the Child

1990 Dublin Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities

1998 Guiding Principles on Internal Displacement

2000 Charter of Fundamental Rights of the European Union

2003 EU Council Directive No. 2003/9 on Minimum Standard for the Reception of Asylum Seekers (RCD)

2003 EU Council Regulation No. 343/2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National (Dublin II Regulation)

2004 EU Council Directive No. 2004/83 on Minimum Standards for the Qualification and Status of Third-Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted (QD)

2005 EU Council Directive No. 2005/85 on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status (APD)

2008 EU Council Directive No. 2008/115 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals (Returns Directive)

2013 EU Council Regulation No. 604/2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National or a Stateless Person (Dublin III Regulation)

Notes on Citations and Footnotes

For European Court of Human Rights cases, references will give the name of the case in italics, the date of the decision or judgment – specifying if it is a Grand Chamber judgment in brackets – and the application number:

Name v. State, [Grand Chamber] judgment/decision of date, no. xxx/xx.

For European Court of Justice cases, references will give the number with which they were registered at the European Court of Justice using the prefix C-, the name of the case in italics, then the date of the judgment, clarifying if it is a Grand Chamber judgment in brackets:

C-number, *case name*, [Grand Chamber] judgment of date.

Overview of the System for International Protection for Those at Risk

The Legal Framework of the System for International Protection in Europe

States have the responsibility to protect their citizens. When governments abuse their citizens, or fail to protect them, those citizens may suffer, or be at risk of suffering, such serious violations of their rights that they are forced to leave their homes, and often even their families, to seek safety in another country. Since the governments of their home countries are no longer able, or willing, to protect their citizens, or are themselves the agents of the impugned abuses, international law requires the States to which those people flee to protect them. Although States are prohibited by international law from excluding their own citizens from their territory, a key attribute of sovereignty is the general right to exclude from a State's territory those who are *not* the State's own citizens. The internationally mandated duty to protect refugees thus significantly interferes with one of the key attributes of State sovereignty.

Those who seek such international protection are said to be seeking "asylum", and are referred to as "refugees". Those who are leaving their own countries for other reasons, but who could return to them, are simply "migrants". Migration flows are often a mixture of asylum seekers and ordinary migrants, and States have obligations – but different obligations – to both groups. The duties to asylum seekers are more exigent, but compliance with those duties requires that those in need of international protection are properly identified, and that the other migrants are treated with dignity and in accordance with the applicable norms of international law.

International and Regional Laws and Standards relating to Asylum

In Europe, three main, and often overlapping, legal regimes apply to those who fall within the scope of this internationally mandated duty to grant asylum to those who need it:

- (I) the United Nations (UN) instruments, particularly the 1951 Geneva Convention relating to the Status of Refugees (GC);

- (II) the European Convention on Human Rights (ECHR) and associated Council of Europe instruments;
- (III) the European Union (EU) asylum *acquis*, applicable in all EU Member States (MS). Some non-EU MS have entered agreements with the EU to participate in some parts of the asylum *acquis*.

(I) THE UN INSTRUMENTS

The UN instruments, which together comprise the UN Bill of Rights, all provide for those in need of international protection: e.g. the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3), the International Covenant on Civil and Political Rights (Article 7); the Fourth Geneva Convention of 1949 (Article 45(4)). In addition there are a number of non-binding UN instruments, such as the Declaration on the Protection of All Persons from Enforced Disappearance (Article 8) and the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 5), which also offer protection³.

THE 1951 GENEVA CONVENTION ON THE STATUS OF REFUGEES

The key international instrument is the 1951 Geneva Convention relating to the Status of Refugees (GC), adopted by the UN after WWII to provide a legal regime regulating the status of all the hundreds of thousands of refugees who were displaced in Europe in 1951.

The GC provides a comprehensive package of rights for a narrowly defined group of people at risk of persecution in their home countries. Article 1A of the Geneva Convention – as now modified by the 1967 Protocol⁴ – defines as a “refugee” a person:

3 Return to face a risk of prohibited ill treatment is also forbidden, explicitly or through interpretation, in a number of regional human rights instruments: e.g. the American Convention on Human Rights (Article 22), the Cartagena Declaration, the OAU Refugee Convention (Article II), the Cairo Declaration on the Protection of Refugees and Displaced Persons in the Arab World (Article 2). The regional instruments specific to Europe will be looked at in more detail below.

4 The 1967 Protocol removes the time and geographic limits originally part of the GC: “For the purpose of the present Protocol, the term “refugee” shall [...] mean any person within the definition of Article 1 of the Convention as if the words “[a]s a result of events occurring before 1 January 1951 [...]” and the words “[...] “a result of such events”, in Article 1A(2) were omitted. The present Protocol shall be applied by the States Parties hereto without any geographic limitation [...]” Article 1(2)(3). Turkey is not a party to the 1967 Protocol.

“[who] owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.

However, Article 1F of the Geneva Convention specifies that a person cannot be recognised as a refugee if:

- a) he has committed a crime against peace, a war crime, or a crime against humanity;
- b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- c) he has been guilty of acts contrary to the purpose and principles of the United Nations.

The GC sets minimum standards for the treatment of persons who qualify for refugee status, as well as the social benefits to which they are entitled.

Together, the GC and the Protocol cover three main subjects:

- (I) Article 1: the basic refugee definition, including the list of qualifying reasons for the feared persecution; the circumstances in which people are ineligible for refugee status, or cease to be regarded as refugees (Article 1C); and a dedicated regime for Palestinians (Article 1D)⁵.
- (II) Articles 2 to 33: the legal status of refugees in their country of asylum, their rights and obligations – including pre-eminently the right in Article 33(1) to be protected from forced return, *“refoulement”*, to a territory where their lives or freedom would be threatened. As noted above, some people at risk of persecution are excluded from refugee status (Article 1F). But even those who are eligible for and have acquired refugee status can lose the protection from *refoulement* under the GC if their conduct is seen as a threat to the host country. In this regard Article 33(2) states: *“The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who,*

5 Article 1D of the GC provides that “[t]his Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention”.

having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country". Although such people lose the Geneva Convention's protection from *refoulement*, they do not cease to be refugees.

- (III) States' obligations to refugees include ensuring the implementation and observation of their entitlement to the many social and civil rights set out in the GC (see above (ii)). Article 34 of the GC also provides for assimilation and naturalisation: "*The Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalisation proceedings, and to reduce as far as possible the charges and costs of such proceedings*". States also have an obligation to cooperate with the United Nations High Commissioner for Refugees (UNHCR) in the exercise of its functions, and facilitating its duty of supervising the implementation of the Convention's provision.

The GC itself does not lay down any rules for the procedures or criteria that are to be applied to the determination of whether a person is, or is not, a refugee, though the UNHCR has published a handbook⁶, and sets out guidance from time to time in the Conclusions of its Executive Committee⁷ or in other Guidelines⁸.

There is however no supranational body providing review, particularly not judicial review, of national decisions relating to the application and implementation of decisions under the GC. This has given rise to an unsatisfactory level of disparity and inconsistency, and a lack of legal certainty between different national decisions implementing the GC. In addition, asylum seekers who are refused refugee status at national level have no recourse to an international review body, much less a court, which can review that decision. Some of the other UN instruments, such as the International Covenant on Civil and Political Rights (ICCPR), Convention Against Torture (CAT), Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), International

6 UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992.

7 UNHCR Conclusions of the Executive Committee on International protection are available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=&comid=49eee4826&cid=49aea93a20&scid=49aea93a12&tid=49ec6f17f> (last visited 30 March 2016).

8 UNHCR Guidelines on International Protection are available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=home&skip=0&cid=49aea93ae2&comid=4a27bad46&keywords=RSDguidelines> (last visited 30 March 2016).

Convention on the Elimination of all Forms of Racial Discrimination (ICERD), Convention on the Rights of the Child (CRC), do have an optional right of individual petition to the Committees which oversee them⁹, but the GC does not.

(II) THE EUROPEAN CONVENTION ON HUMAN RIGHTS

There is no provision of the European Convention on Human Rights which expressly refers to refugees or to asylum. The European Court of Human Rights (ECtHR) has no jurisdiction to rule whether or not a person has rightly or wrongly been refused recognition as a GC refugee, or lost the protection from *refoulement* under the GC (*Ahmed v. Austria*¹⁰). However the case law of the ECtHR makes clear that Article 2 and Article 3 (*Bader and Kanbor v. Sweden*¹¹) of the ECHR prohibit returns to face a real risk of death or torture, or inhuman or degrading treatment or punishment¹².

Article 34 of the ECHR provides for the right of individual petition to the ECtHR¹³. This means that those who consider that this prohibition on return is being, or has been, violated can complain to the ECtHR after they have exhausted all effective domestic remedies. This jurisdiction of the ECtHR has come to play a key role in reviewing the decisions of national administrative bodies and the decisions of national courts reviewing those administrative decisions. The ECtHR also has the power to order interim measures under Rule 39 of its Rules to prevent expulsions or returns that might cause irreparable harm before the Court has considered the admissibility and merits of the complaint. It was previously considered that ‘indications’ made under this rule were not binding, but since the decisions of *Mamatkulov and Askarov v. Turkey*, *Olae-*

9 Anyone can lodge a complaint with a Committee – each of UN treaties has established a “treaty body” (Committee) of experts to monitor implementation of the treaty provisions by its States parties – against a State that is party to the treaty in question (through ratification or accession) providing for the rights which have allegedly been violated, and that accepted Committee’s competence to examine individual complaints, either through ratification or accession to an Optional Protocol (in the case of ICCPR, CEDAW, CRPD, ICESCR and CRC) or by making a declaration to that effect under a specific article of the Convention (in the case of ICERD, CAT, ICED and ICMW).

10 *Ahmed v. Austria*, judgment of 17 December 1996, no. 25964/94, included in this publication in the section on ECtHR case law.

11 *Bader and Kanbor v. Sweden*, judgment of 8 November 2005, no. 13284/04, also included in the section on ECtHR case law.

12 Protocols Nos. 6 and 13 prohibit returns to face the death penalty.

13 Article 33 disciplines Inter-State cases, establishing that “[a]ny High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party”. However, the possibility of Inter-State cases, especially in the context of EU MS, is particularly complex and unlikely.

chea Cahuas v. Spain and *Ben Khemais v. Italy*¹⁴ the Court has held that a failure comply with a Rule 39 indication hinders the exercise of the right of individual petition, and thus violates Article 34.

The ECHR prohibition also applies to returning people to States other than the one from which they originally fled, if this would expose them to serious harm or to a risk of being onward returned to face the feared harm (*M.S.S. v. Belgium and Greece*¹⁵). Special consideration must be given to families with children (*Tarakhel v. Switzerland*¹⁶).

The ECHR prohibition is based on a factual prediction of a risk of serious harm, and not on the *reasons* for which the ill-treatment is feared. Unlike the GC, the ECHR does not require that this risk should be based on individual persecution for one of the reasons set out in Article 1 of the GC (*Salah Sheekh v. the Netherlands, NA. v. the United Kingdom, Sufi and Elmi v. the United Kingdom*¹⁷). Accordingly, whereas sufficiently serious persecution may amount to ill treatment prohibited by Article 3, it is the level of severity of the ill-treatment, or the situation, which is important under the ECHR and not the reasons for it.

States are under a duty to give “the most anxious scrutiny” to the existence of the risks in the country of proposed destination and, if appropriate, do their own diligent research in this respect (*M.S.S. v. Belgium and Greece*¹⁸). In extreme circumstances the prohibition can apply to the risk of severe life-threatening medical situations (*D. v. the United Kingdom*¹⁹, *N. v. the United Kingdom*²⁰).

The prohibition is absolute and, from the outset, no-one is excluded from the

14 *Mamatkulov and Askarov v. Turkey*, [Grand Chamber] judgment of 4 February 2005, no. 46827/99 and 46951/99, *Olaechea Cahuas v. Spain*, judgment of 10 August 2006, no. 24668/03, and *Ben Khemais v. Italy*, judgment of 24 February 2009, no. 246/07, included in the section on ECtHR case law.

15 *M.S.S. v. Belgium and Greece*, [Grand Chamber] judgment of 21 January 2011, no. 30696/09, reported in this publication in the section on ECtHR case law.

16 *Tarakhel v. Switzerland*, [Grand Chamber] judgment of 4 November 2014, no. 29217/12, also reported in the section on ECtHR case law.

17 *Salah Sheekh v. the Netherlands*, judgment of 11 January 2007, no. 1948/04, *NA. v. the United Kingdom*, judgment of 17 July 2008, no. 25904/07, *Sufi and Elmi v. the United Kingdom*, judgment of 28 June 2011, nos. 8319/07 and 11449/07, all included in this publication in the section on ECtHR case law.

18 Also included in this publication in the section on ECtHR case law.

19 *D. v. the United Kingdom*, judgment of 2 May 1997, no. 30240/96.

20 *N. v. the United Kingdom*, [Grand Chamber] judgment of 27 May 2008, no. 26565/05, included in the section on ECtHR case law.

protection of the ECHR (cf. Article 1F of the GC) (*Chahal v. the United Kingdom*²¹). Nor can people lose its protection because of their behaviour, or the perceived threat they pose to the host State (cf. Article 33(2) of the GC) (*Saadi v. Italy, Othman v. the United Kingdom*²²). So Article 1F and Article 33(2) of the GC are inapplicable in substance to any situation governed by the ECHR. The Convention also safeguards the rights of those who are intercepted on the high seas (*Hirsi Jamaa and Others v. Italy*²³) or held in the transit zones of airports (*Amuur v. France*²⁴).

The ECHR also lays down some standards regarding procedural safeguards (*Jabari v. Turkey*²⁵), and Article 13 requires there to be an effective remedy in place for any arguable violation of its guarantees. This remedy must have automatic suspensive effect; people cannot be expelled or pushed back before they have had a chance to have the decision effectively reviewed (*Gebremedhin v. France*²⁶). This remedy is required by Article 13; Article 6 of the ECHR, which establishes the right to a fair trial, does not apply to these challenges, as they do not concern either criminal charges or civil rights.

Those seeking international protection, whose situation brings them within the jurisdiction of any Convention Member State, are entitled to all the guarantees of the ECHR. Article 5 of the ECHR regulates detention, including the detention of migrants and asylum seekers (*Saadi v. the United Kingdom*²⁷). Article 5(1)(f) is the specific provision relating to immigration detention. All the relevant substantive and procedural safeguards of Article 5(1) to 5(5) apply to the detention of asylum seekers or rejected asylum seekers. Of crucial importance is that the detention should not be arbitrary²⁸, that it should not be undu-

21 *Chahal v. the United Kingdom*, [Grand Chamber] judgment of 15 November 1996, no. 22414/93, also included in the section on ECtHR case law.

22 *Saadi v. Italy*, [Grand Chamber] judgment of 28 February 2008, no. 37201/06, and *Othman (Abu Qatada) v. the United Kingdom*, judgment of 17 January 2012, no. 8139/09, both reported in the section on ECtHR case law.

23 *Hirsi Jamaa and Others v. Italy*, [Grand Chamber] judgment of 23 February 2012, no. 27765/09, also reported in the section on ECtHR case law.

24 *Amuur v. France*, judgment of 25 June 1996, no. 19776/92.

25 *Jabari v. Turkey*, judgment of 11 July 2000, no. 40035/98, included in the section on ECtHR case law.

26 *Gebremedhin v. France*, judgment of 26 April 2007, no. 25389/05.

27 *Saadi v. the United Kingdom*, [Grand Chamber] judgment of 29 January 2008, no. 13229/03.

28 Article 5(4) of the ECHR states that “[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”.

ly prolonged, and – most importantly – that it should be authorised by a clear provision of national law with which it fully complies. Article 1 of Protocol No. 4 regulates restrictions on freedom of movement which fall short of a deprivation of liberty.

Of key importance is Article 4 of Protocol No. 4, which prohibits the collective expulsion of aliens. It is important to note that the prohibition under Article 4 of Protocol No. 4 is on the collective nature of the process and the lack of individual assessment. It is thus immaterial whether those affected are ordinary migrants or asylum seekers at risk – everyone is protected under Article 4 of Protocol No. 4²⁹.

Not only does this provision apply to the collective expulsion of those who are on the territory (*Čonka v. Belgium*³⁰), but has also been interpreted as including “push-backs” of groups of people on the high seas (*Hirsi Jamaa and Others v. Italy*³¹) and collective returns from those who have arrived on the territory without consideration of the individual circumstances of each returnee (*Khlaifia and Others v. Italy*³², however, please note that at the time of writing this case has been referred to the Grand Chamber). It also appears to apply to similar indiscriminate push-backs at a land border (*N.D. and N.T. v. Spain* – awaiting judgment).

Unlike the GC, the ECHR generally solely concerns itself with prohibiting returns of those who face a risk of ill-treatment or unacceptable living conditions. It does not require the host country to recognise a particular status or to grant any particular social benefits, except in particular circumstances where these are guaranteed by law and unlawfully denied (*M.S.S. v. Belgium and Greece*³³).

(III) THE EU ASYLUM ACQUIS

The EU has adopted a package of measures known as the Common European Asylum System (CEAS) which together with the jurisprudence of the CJEU

29 The United Kingdom, Greece, Turkey and Switzerland are not parties to Protocol No. 4

30 *Čonka v. Belgium*, judgment of 5 February 2002, no. 51564/99.

31 Also included in this publication in the section on ECtHR case law.

32 *Khlaifia and Others v. Italy*, judgment of 1 September 2015, no. 16483/12, at the time of writing pending before the Grand Chamber.

33 Also reported in this publication in the section on ECtHR case law.

forms the EU asylum *acquis* – applicable in all EU Member States³⁴. It brings the asylum regime in those States into the remit of EU law, including all the general principles of EU law and the EU Charter of Fundamental Rights (CFREU). It is intended to ensure that the lack of harmonised decision making under the GC noted above is remedied within the EU, and that asylum seekers are thus discouraged from forum shopping. It does not include the whole of the GC (*Mohammad Ferooz Qurbani*, C-481/13³⁵) and is narrower in the scope of its protection than the ECHR.

The key instruments are: the Qualification Directive (QD)³⁶, which defines who is entitled to which type of protection and the consequent status and benefits; the Asylum Procedures Directive (APD)³⁷, which prescribes the procedures to be followed in the determination of asylum claims; the Reception Conditions Directive (RCD)³⁸, which lays down minimum standards for the reception, board and lodging and/or subsistence of asylum seekers; and the Dublin Regulation (Dublin)³⁹, which determines which EU State is responsible for determining an asylum claim, and ensures that asylum seekers are sent, or returned, to the State identified as responsible under the Dublin Regulation criteria⁴⁰. The Returns Directive⁴¹ is not part of the asylum *acquis*, but lays down rules relating to the regularisation or return of those migrants who have been given a final decision refusing them the right to stay in a Member State.

The QD provides a definition applicable across the EU of who is entitled to international protection in EU law. It provides for recognition as a “refugee”

34 Denmark does not participate in the CEAS.

35 C-481/13, *Mohammad Ferooz Qurbani*, judgment of 17 July 2014.

36 EU Council Directive No. 2004/83 of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

37 EU Council Directive No. 2005/85 of 1 December 2005 on minimum standards on procedures for granting and withdrawing refugee status.

38 Council Directive No. 2003/9 of 27 January 2003 on minimum standard for the reception of asylum seekers.

39 EU Council Regulation No. 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the MS responsible for examining an asylum application lodged in one of the MSs by a third-country national or a stateless person (recast).

40 The QD, the APD, the RCD and the Dublin Regulation have all been amended. The United Kingdom and Ireland do not participate in the amended versions – except for the Dublin Regulation. Ireland participates in neither the old nor the new RCD.

41 EU Council Directive No. 2008/115 of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

as defined by the GC, or for “subsidiarity protection” for those at risk of serious harm. The definition of “serious harm” overlaps to some extent with the protection offered by the ECHR. However, the QD, like the GC but unlike the ECHR, excludes those considered undesirable or undeserving from its benefits (Article 12). The QD also sets out the benefits bestowed upon those who are recognised as qualifying for protection (Articles 20 to 35).

The APD sets out important and detailed procedural safeguards and procedures which States must observe in respect of those seeking asylum. It only applies on the territory, at the borders and in territorial waters, not on the high seas (Article 3). It also identifies a number of situations where those procedures do not have to be applied (Article 33).

The RCD sets out the minimum material and social conditions which must be provided to asylum seekers whilst they are awaiting the determination of their claims. Asylum seekers subjected to the Dublin return procedures are also entitled to the benefit of this Directive (*CIMADE, GISTI v. Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration*, C-179/11⁴²).

Both the APD and the RCD have provisions relating to freedom of movement and to detention (respectively Article 26 of the APD and Article 8 of the RCD).

The Dublin system is the legal basis within the EU for deciding which EU Member State is responsible for determining an asylum claim. It sets out the criteria to be applied in order to reach these decisions. The first step to be taken when an individual applies for asylum in any EU Member State is to decide which State is responsible for determining the claim. The host State should request another Member State (where the applicant has e.g. appropriate family connections) to “take charge” of the claim, but can also ask another Member State to take back the applicant if relevant criteria apply. The criteria are applied in a strict hierarchy, with family links and the interests of minors taking precedence. People applying for asylum in one MS will normally be transferred to another one, if it appears that that State is responsible under the Dublin criteria. Certain non-EU States are also parties to the Dublin system (Iceland, Norway and Switzerland).

The EU Charter of Fundamental Rights applies to the administration of the

42 *C-179/11, CIMADE and Groupe d’information et de soutien des immigrés (GISTI) v. Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration*, judgment of 27 September 2012.

asylum *acquis* in its entirety. Article 19(1) of the Charter prohibits the collective expulsion of aliens, which is thus prohibited under EU law even in those States which are not party to Protocol No. 4 of the ECHR. Article 47 of the Charter provides that the guarantees of a fair trial found in Article 6 of the ECHR must apply to all proceedings to which the Charter applies. Therefore, Article 6 fair trial guarantees apply to all asylum matters under EU law even though they do not under the ECHR.

There is however no practical access, comparable to the access to the ECtHR, to the CJEU for individual asylum seekers who consider that they have not correctly enjoyed the benefit of the *acquis* or the Charter. Aggrieved individuals can challenge acts or omissions of national bodies relating to EU asylum law in the national courts of EU Member States. Those courts may refer questions of interpretation of the *acquis* or the Charter to the CJEU for preliminary rulings⁴³. All of the CJEU decisions in this handbook have been rendered under this referral procedure. It is also possible for the EU Commission to bring “infringement proceedings” against EU States which are failing to comply with their obligations under the EU asylum *acquis*.

SUMMARY

The three overlapping regimes described above apply simultaneously in all EU Member States and, insofar as other States have opted into to the EU schemes, in some other non-EU States. European States which are *not* members of the EU are not bound by the EU asylum *acquis*; they are only bound by their concurrent obligations under the GC and the ECHR (and other relevant international instruments). Applying these regimes simultaneously is a complex legal exercise. Importantly, Article 53 of the ECHR ensures that no decision can comply with the ECHR if it gives a lower level of human rights protection than is required by any other international instrument to which the State is a party.

The obligations of national authorities – border guards, asylum determining personnel, judges, legislators

People in need of international protection will encounter State authorities in a number of situations in which the State owes them both substantive and procedural duties. State officials and judges will need to be familiar with both the substantive and procedural requirements not only of the applicable national

43 Article 267 of the Treaty on the Functioning of the European Union (TFEU).

law, but also of the relevant European case law.

There is a considerable body of case law concerning the procedural and substantive content of European asylum law. A selection of those cases is appended to this narrative, and listed below.

EUROPEAN COURT OF HUMAN RIGHTS CASES:

The ECtHR has ruled in a number of cases on the asylum seekers' right of access to the territory of the responsible State: Tabesh v. Greece, no. 8256/07; I.M. v. France, no. 9152/09; Hirsi Jamaa and Others v. Italy [GC], no. 27765/09; A.C. and Others v. Spain, no. 6528/11; Sharifi and Others v. Italy and Greece, no. 16643/09; N.D. and N.T. v. Spain, nos. 8675/15 and 8697/15; Khlaifia and Others v. Italy, no. 16483/12 (pending before the Grand Chamber at the time of writing);

It has also ruled on the right of access to the asylum determination procedure: Ahmed v. Austria, no. 25964/94; Jabari v. Turkey, no. 40035/98; Bader and Kanbor v. Sweden, no. 13284/04; N. v. the United Kingdom [GC], no. 26565/05; Louled Massoud v. Malta, no. 24340/08; M.S.S. v. Belgium and Greece [GC], no. 30696/09; Rahimi v. Greece, no. 8687/08; Othman (Abu Qatada) v. the United Kingdom, no. 8139/09; I.M. v. France, no. 9152/09; Hirsi Jamaa and Others v. Italy [GC], no. 27765/09; Samsam Mohammed Hussein and Others v. the Netherlands and Italy, no. 27725/10; A.C. and Others v. Spain, no. 6528/11; Sharifi and Others v. Italy and Greece, no. 16643/09; Tarakhel v. Switzerland [GC], no. 29217/12; Khlaifia and Others v. Italy, no. 16483/12 (pending before the Grand Chamber at the time of writing);

The Court has also ruled on the adequacy of procedural safeguards of the asylum determination procedure: Chahal v. the United Kingdom [GC], no. 22414/93; Ahmed v. Austria, no. 25964/94; T.I. v. the United Kingdom, no. 43844/98; Jabari v. Turkey, no. 40035/98; NA. v. the United Kingdom, no. 25904/07; M.S.S. v. Belgium and Greece [GC], no. 30696/09; Sufi and Elmi v. the United Kingdom, nos. 8319/07 and 11449/07; I.M. v. France, no. 9152/09; Hirsi Jamaa and Others v. Italy [GC], no. 27765/09; Samsam Mohammed Hussein and Others v. the Netherlands and Italy, no. 27725/10; A.C. and Others v. Spain, no. 6528/11;

The substantive decision on international protection: Ahmed v. Austria, no. 25964/94; Jabari v. Turkey, no. 40035/98; Bader and Kanbor v. Sweden, no. 13284/04; Salah Sheekh v. the Netherlands, no. 1948/04; Saadi v. Italy [GC], no. 37201/06; NA. v. the United Kingdom, no. 25904/07; M.S.S. v. Belgium and

Greece [GC], no. 30696/09; Sufi and Elmi v. the United Kingdom, nos. 8319/07 and 11449/07; Othman (Abu Qatada) v. the United Kingdom, no. 8139/09; I.M. v. France, no. 9152/09; Hirsi Jamaa and Others v. Italy [GC], no. 27765/09; Abdulkhakov v. Russia, no. 14743/11; Tarakhel v. Switzerland [GC], no. 29217/12;

The right to an effective remedy against a negative decision: Chahal v. the United Kingdom [GC], no. 22414/93; T.I. v. the United Kingdom, no. 43844/98; Jabari v. Turkey, no. 40035/98; Salah Sheekh v. the Netherlands, no. 1948/04; NA. v. the United Kingdom, no. 25904/07; Ben Khemais v. Italy, no. 246/07; Al-Saadon and Mufdhi v. the United Kingdom, no. 61498/08; M.S.S. v. Belgium and Greece [GC], no. 30696/09; Sufi and Elmi v. the United Kingdom, nos. 8319/07 and 11449/07; I.M. v. France, no. 9152/09; Hirsi Jamaa and Others v. Italy [GC], no. 27765/09; Samsam Mohammed Hussein and Others v. the Netherlands and Italy, no. 27725/10; A.C. and Others v. Spain, no. 6528/11; Sharifi and Others v. Italy and Greece, no. 16643/09; Tarakhel v. Switzerland [GC], no. 29217/12; Khlaifia and Others v. Italy, no. 16483/12 (pending before the Grand Chamber at the time of writing);

The duty to provide dignified reception conditions: N. v. the United Kingdom [GC], no. 26565/05; Tabesh v. Greece, no. 8256/07; Louled Massoud v. Malta, no. 24340/08; M.S.S. v. Belgium and Greece [GC], no. 30696/09; Rahimi v. Greece, no. 8687/08; I.M. v. France, no. 9152/09; Hirsi Jamaa and Others v. Italy [GC], no. 27765/09; Samsam Mohammed Hussein and Others v. the Netherlands and Italy, no. 27725/10; Sharifi and Others v. Italy and Greece, no. 16643/09; Tarakhel v. Switzerland [GC], no. 29217/12; Khlaifia and Others v. Italy, no. 16483/12 (pending before the Grand Chamber at the time of writing);

Detention (or restrictions on freedom of movement) pending determination: Chahal v. the United Kingdom [GC], no. 22414/93; Louled Massoud v. Malta, no. 24340/08; M.S.S. v. Belgium and Greece [GC], no. 30696/09; Abdulkhakov v. Russia, no. 14743/11;

Detention (or restrictions of freedom of movement) pending removal: Chahal v. the United Kingdom [GC], no. 22414/93; Tabesh v. Greece, no. 8256/07; Louled Massoud v. Malta, no. 24340/08; Rahimi v. Greece, no. 8687/08; I.M. v. France, no. 9152/09; Abdulkhakov v. Russia, no. 14743/11; Sharifi and Others v. Italy and Greece, no. 16643/09; Khlaifia and Others v. Italy, no. 16483/12 (pending before the Grand Chamber at the time of writing);

Special duties owed to the vulnerable (children, families, the elderly or those

with disabilities): Cruz Varas and Others v. Sweden, no. 15576/89; Chahal v. the United Kingdom [GC], no. 22414/93; Bader and Kanbor v. Sweden, no. 13284/04; Saadi v. Italy [GC], no. 37201/06; N. v. the United Kingdom [GC], no. 26565/05; Rahimi v. Greece, no. 8687/08; Samsam Mohammed Hussein and Others v. the Netherlands and Italy, no. 27725/10; Tarakhel v. Switzerland [GC], no. 29217/12.

COURT OF JUSTICE OF THE EUROPEAN UNION CASES:

The definition of serious harm and the degree of personal particularisation required: Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie [GC], C-465/07;

Detention under the Returns Directive: Said Shamilovich Kadzoev (Huchbarov) [GC], C-357/09;

Cessation of refugee status when situation has improved, *inter alia*, by presence of effective international actors of protection: Aydin Salahadin Abdulla and Others v. Bundesrepublik Deutschland [GC], C-175/08, C-176/08, C-178/08 and C-179/08;

Returns under the Dublin Regulations to a Member State where there are systemic defects in asylum procedures and reception conditions: NS v. Secretary of State for the Home Department, and ME and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform [GC], C-411/10 and C-493/10;

The application of the best interests of the child principle to all aspects of the Dublin regulation and unaccompanied minors: MA, BT and DA v. Secretary of the State for the Home Department C-648/11;

The Dublin Regulation may require its provisions to be applied to more than one Member State in succession: Bundesrepublik Deutschland v. Kaveh Puid [GC], C-4/11;

An asylum applicant can only challenge a Dublin transfer if the decision to accept a take charge request would entail returning the applicant to systemic deficiencies in the procedure: Shamsu Abdullahi v. Bundesasylamt [GC], C-394/12;

An internal armed conflict is to be assessed on the facts and not on the characterisation of the conflict under international humanitarian law: Aboubacar

Diakité v. Commissaire general aux refugies et aux apatrides C-285/12;

Statements of the applicant for asylum do not lack credibility merely because the applicant did not rely on his declared sexual orientation on the first occasion he was given to set out the ground for persecution: A, B and C v. Staatssecretarías van Veiligheid en Justitie [GC], C-148/13 and C-150/13;

States seeking to remove a seriously ill person under the Returns Directive must endow any appeal with suspensive effect and provide necessary material support pending the appeal: Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida [GC], C-562/13;

No entitlement to social and health care provided for under the QD for persons who have been given humanitarian permits outside the scope of the QD: Mohamed M'Bodj v. Etat belge [GC], C-542/13;

Exclusion from refugee status cannot be based on mere membership of an organisation, but must depend on assessment of degree of personal involvement in proscribed activities: Bundesrepublik Deutschland v. B and D [GC], C-57/09 and C-101/09;

Not all interferences with freedom of religion constitute persecution, but individuals cannot be expected to abstain from practice of religion in order to be safe: Bundesrepublik Deutschland v. Y and Z [GC], C-71/11 and C-99/11; Minister voor Immigratie en Asiel v. X, and Y and Z v. Minister voor Immigratie en Asiel C-199/12 to C-201/12; Andre Lawrence Shepherd v. Bundesrepublik Deutschland C-472/13.

European Court of Human Rights Case Summaries and Comments

Article 3 – Prohibition of Torture and Inhuman or Degrading Treatment or Punishment

*Expulsion order in compliance with Articles 3 and 8, and no violation of the
Convention despite non-compliance with interim measure*

JUDGMENT IN THE CASE OF CRUZ VARAS AND OTHERS v. SWEDEN

(Application No. 15576/89)

20 March 1991

1. Principal facts

The applicants, Mr Hector Cruz Varas, his wife and their son born in 1985, were all Chilean nationals.

Mr Cruz Varas moved to Sweden on 28 January 1987 and applied for asylum the following day. He was joined by his wife and son on 5 June 1987.

On 22 June 1987, in his initial interrogation by the police, Mr Cruz Varas indicated that he had been involved in various political activities in Chile, all of which were in opposition to the Pinochet regime which was then in power. He stated he had been arrested several times. He further declared that he left Chile because he could not keep the house where he lived with his family and because of his poor financial situation.

On 21 April 1988, not having established a sufficient basis on which to be granted refugee status, the National Immigration Board rejected the applicants' claims for asylum, and decided to expel them.

After unsuccessfully appealing to the Government, the applicants alleged to the Police Authorities that there were obstacles to the enforcement of the expulsion order and requested that their case be referred to the Immigration Board. This time, when interrogated by the police in October 1988, Mr Cruz Varas presented new reasons in support of his asylum application. He maintained that, since February 1988 (after his arrival in Sweden), he had worked

for the Frente Patriótico Manuel Rodríguez (FPMR), a radical political organisation that had actively tried to kill General Pinochet. The applicant stated that, if returned to Chile, he would be at risk of political persecution, torture and possibly death.

On 21 October 1988 the Police Authority rejected the applicants' request and decided to enforce the expulsion decision to Chile on 28 October 1988. However, the applicants did not arrive in time for the scheduled departure and the expulsion could not be enforced.

In a letter dated 30 December 1988 to the Police Authority, once again the applicants alleged that there were impediments to the enforcement of the expulsion order. During interrogation by the police authority two weeks later, Mr Cruz Varas gave a lengthy testimony to the effect that he had been tortured by the Chilean authorities on several occasions and that he feared repetition of such torture should he be sent back.

On 13 January 1989 the Police Authority transmitted the issue to the Immigration Board. On 8 March 1989 the Board referred the case to the Government, expressing the opinion that there were no obstacles to the enforcement of the expulsion order.

On 11 August 1989 Mr Cruz Varas submitted further documents to the Government, in particular two medical certificates in support of his allegation that he had been tortured. Other medical reports produced by Swedish doctors concerning Mr Cruz Varas' son, showed that he had personality problems and would very likely suffer serious psychological harm if expelled from Sweden.

On 5 October 1989 the Government again found no impediment to the enforcement of the expulsion order against the applicants. Although the Commission had decided to apply Rule 36 of its Rules of Procedure⁴⁴, indicating that the expulsion should not take place until it had had an opportunity to examine the application, the following day the Board proceeded with the expulsion of Mr Cruz Varas to Chile. His son and wife went into hiding in Sweden.

44 The Commission formed part of the old Convention mechanisms and was abolished by Protocol 11 in 1998. The equivalent of Rule 36 can now be found in Rule 39 in the Rules of Court.

2. Decision of the Court

The applicants complained that the expulsion of Mr Cruz Varas to Chile constituted a breach of Article 3 due to the risk that he would be tortured by the Chilean authorities. They further claimed that the expulsion of his son would give rise to such sufferings as to amount to a violation of Article 3.

They complained that the expulsion of Mr Cruz Varas led to a separation of the family in violation of their right to respect for family life, contrary to Article 8 of the Convention.

Finally, the applicants claimed that the expulsion of Mr Cruz Varas hindered the effective presentation of the application to the Commission.

Article 3

The Court first confirmed that the principle that a decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 applies equally to non-extradition expulsion decisions.

In the present case the Court highlighted that Mr Cruz Varas' complete silence – during the police interrogations that took place in June 1987 and October 1988 – as to his alleged clandestine activities and torture by the Chilean police cast considerable doubt on his credibility. Moreover, the continuous changes in his story following each police interrogation, together with the lack of any material supporting his claims of clandestine political activity with the FPMR, contributed to doubts as to the applicant's credibility.

Considering that the Swedish authorities had extensive experience in dealing with asylum seekers from Chile and had thoroughly examined the applicant's claim for asylum, the Court concluded that substantial grounds had not been shown for believing that Mr Cruz Varas' expulsion would expose him to a real risk of being subjected to ill-treatment on his return to Chile. Therefore, there had not been a violation of Article 3 in respect of the first applicant.

Concerning the trauma involved in expelling the applicant, the Court concluded that even though it appeared that he suffered from post-traumatic stress disorder, no substantial basis was shown for his fears, and hence his expulsion did not exceed the threshold set by Article 3 in this regard.

As for the expulsion of the applicant's son, the Court found that the facts did not reveal a breach in this respect either.

Article 8

The Court noted that the expulsion of all three applicants was ordered by the Swedish Government, but the wife and son went into hiding in order to escape enforcement of the order. Furthermore, there was no evidence of obstacles preventing them from establishing family life in their home country.

Accordingly, Sweden could not be held responsible for the separation of the family, and there had been no violation of the applicants' family life set forth in Article 8.

Article 25(1)⁴⁵

The Commission had found that the failure to comply with the Rule 36 indication amounted to a violation of Article 25, however the Court disagreed. It noted that Article 25(1) is limited to bringing proceedings before the Commission and to individual applications. No provision in the text of the Convention itself empowers the Commission to order interim measures. It would strain the language of Article 25 to infer from the words "*undertake not to hinder in any way the effective exercise of this right*" an obligation to comply with a Commission indication under Rule 36.

The practice of Contracting Parties showed that there had been almost total compliance with Rule 36 indications. However, such a practice did not give rise to a binding obligation. Moreover, no assistance could be derived from general principles of international law since the question whether interim measures indicated by international tribunals are binding was a controversial one and no uniform legal rule existed.

Therefore, the Court found that the power to order binding interim measures could not be inferred from either Article 25(1) or from other sources.

Finally, the Court held that compliance with the Rule 36 indication would certainly have facilitated the presentation of the applicants' case before the Commission. Despite this, there was no evidence that they were hindered in the

45 Now Article 34.

exercise of the right of petition to any significant degree. Their counsel was in fact able to represent them fully before the Commission despite the first applicant's absence during the Commission's hearing.

The Court concluded that there had been no violation of Article 25(1).

3. Comment

The case of *Cruz Varas* is seminal important, less for its substantive findings of no violations of Articles 3 and 8 than for establishing for the first time in a judgment of the Court the principle that a prohibition on sending someone to face torture or inhuman or degrading treatment applies equally to expulsion cases as to extraditions. This principle had previously only been upheld in extradition cases⁴⁶. It thus marked the beginning of a long line of cases in which Article 3, in particular, has been applied to the situation of rejected asylum seekers faced with return to their country of origin. The finding that interim measures indicated by the Commission were not binding was also of great significance and was made as a consequence of the absence of any provision for interim measures in the Convention itself, a strict reading of the language of the rules and the fact that the track record of States of complying with such indications was generally very good. The powerful dissents of the nine eminent Judges who voiced them years later paved the way for the position of the majority to be reversed in the case of *Mamatkulov and Askarov v. Turkey*⁴⁷.

46 See *Soering v. the United Kingdom*, judgment of 7 July 1989, no. 14038/88.

47 *Mamatkulov and Askarov v. Turkey*, [Grand Chamber] judgment of 4 February 2005, nos. 46827/99 and 46951/99.

The execution of a deportation order of an Indian citizen – whose presence in the United Kingdom constituted a threat to national security – would violate Article 3

**GRAND CHAMBER JUDGMENT IN THE CASE OF CHAHAL
v. THE UNITED KINGDOM**
(Application No. 22414/93)
15 November 1996

1. Principal facts

The main applicant in this case, Mr Karamjit Singh Chahal, was an Indian citizen, born in 1948, who entered the United Kingdom in 1971 and was granted indefinite leave to remain in 1974. The other applicants were Mr Chahal's wife, and their two children. They were all Sikhs.

During his travel to India with his family in January 1984, Mr Chahal became involved in organising passive resistance in support of autonomy for Punjab. On that occasion, he was arrested, taken into detention for twenty-one days in what he contended was insanitary conditions and subjected to inhuman treatment. On his return to the United Kingdom in May 1984, Mr Chahal became a leading figure in the Sikh community. In particular, he helped set up branches of the International Sikh Youth Federation (ISYF) in the United Kingdom, an organisation proscribed by the Indian Government until mid-1985.

Between 1985 and 1986, the applicant was arrested three times; on the first two occasions he was released with no charge and on the final occasion he was acquitted of charges of assault and affray.

On 14 August 1990 the Home Secretary decided that Mr Chahal should be deported as his continued presence in the United Kingdom was not conducive to the public good for reasons of national security. The applicant was served with a notice of intention to deport on 16 August 1990 and was then detained for deportation purposes. On the same day, Mr Chahal applied for asylum, claiming that he would be subjected to torture and political persecution if returned to India. On 27 March 1991 the Home Secretary refused to grant the applicant refugee status as it did not consider that there was a reasonable likelihood that he would be persecuted if he was deported to India.

Because of the national security elements of the case, there was no right of

appeal to a court against the deportation order. Nonetheless, on 10 June 1991 the matter was considered by a non-judicial advisory panel of three persons, chaired by a Court of Appeal judge. Mr Chahal was permitted to appear in person before the panel, but was not allowed to be represented by a lawyer. Nor was he allowed to see the documentary sources of the accusations that were levied against him. On 25 July 1991 the Home Secretary signed an order for Mr Chahal's deportation.

On 9 August 1991 the applicant applied for judicial review of the Home Secretaries' decisions to refuse asylum and to make the deportation order. The asylum refusal was quashed and referred back to the Home Secretary. In June 1992 the Home Secretary delivered a fresh decision to refuse asylum and held that, even if Mr Chahal were at risk of persecution in India, he would not be entitled to the protection from *refoulement* under Article 33 of the Geneva Convention because he was deemed to be a threat to national security. Mr Chahal's criminal convictions were later quashed by the Court of Appeal but the decision regarding asylum was maintained.

Once more the applicant applied for judicial review, which was refused in February 1993. He further appealed to the Court of Appeal, which dismissed the case in October 1993.

2. Decision of the Court

Mr Chahal complained that his deportation to India would violate Article 3. He claimed that his detention pending deportation constituted a violation of Article 5(1) of the Convention because of its excessive duration. He further alleged that he was denied the opportunity to have the lawfulness of his detention decided by a national court, in breach of Article 5(4). All four of the applicants complained that the potential deportation of Mr Chahal to India would amount to a breach of Article 8. They also alleged that, contrary to Article 13, they were not provided with an effective remedy before the national courts.

Article 3

The Court noted that the deportation order against Mr Chahal was made because his presence in the United Kingdom was alleged to constitute a threat to national security. It reiterated that Article 3 of the Convention, which also applies in expulsion cases, prohibits torture and inhumane treatment in absolute terms; permitting no derogation even in the event of a public emergency

threatening the life of the nation. It followed that, when an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to protect that individual against such treatment is engaged in the event of expulsion, and the activities of the person in question, however disagreeable or dangerous, cannot be a material consideration. The Court thus rejected the Government's arguments that the threat to national security should be balanced against any risks to which Mr Chahal might be exposed.

Therefore, the Court had to examine whether a real risk existed that Mr Chahal, if returned to India, would be ill-treated in breach of Article 3. Since he had not yet been deported, the material point in time had to be that of the Court's consideration of the case and hence the conditions at the time of the judgment were decisive.

In determining the substance of such a risk, the Court assessed the general situation throughout India, also considering that the applicant was a well-known supporter of Sikh separatism. It noted that, until mid-1994 at least, the police in Punjab, and in India in general, acted without respecting the human rights of suspected Sikh militants. Even considering encouraging events which had taken place in Punjab in more recent years, no concrete evidence was produced of any fundamental reform of the Punjab police, and the Court held that problems still persisted concerning compliance with human rights by the security forces in Punjab.

After considering that, if expelled to India, Mr Chahal would very likely be at risk from the Punjab security forces acting either within or outside State boundaries, the Court further analysed allegations of serious human rights violations by the police recorded elsewhere in India. It found that, despite the effort of the Indian Government in providing assurances intended to guarantee Mr Chahal's safety, such infringements by members of the security forces in India were a lasting problem.

Furthermore, the Court took into consideration the applicant's high profile in supporting the cause of Sikh separatism and held that his well-known position would likely make him a target for the security forces pursuing suspected Sikh militants.

Hence, the Court found it substantiated that there was a real risk of Mr Chahal being subjected to treatment contrary to Article 3 if he were returned to India.

Accordingly, the order of his deportation to India would, if executed, amount to a violation of Article 3.

Article 5(1)

The Court recalled that any deprivation of liberty under Article 5(1) would be justified only for as long as deportation proceedings are in progress. As for Mr Chahal's detention, the Court examined the length of time taken for the various decisions in the domestic proceedings and also considered that the applicant's case involved considerations of extreme gravity requiring due regard to all the relevant issues and evidence. It found that none of the periods complained of by the applicant were excessive, taken either individually or in combination. Accordingly, there had been no violation of Article 5(1) on account of the diligence with which the domestic procedures were conducted.

However, in light of the long period during which Mr Chahal had been detained, it was also necessary to ascertain the existence of sufficient guarantees against arbitrariness. Since the Secretaries of State maintained that national security was involved, the domestic courts were not in a position to effectively control whether the decisions to keep Mr Chahal in detention were justified. Nonetheless, the advisory panel procedure provided an important safeguard against arbitrariness, being able to fully review the evidence relating to the national security threat represented by the applicant.

In conclusion, the Court held that Mr Chahal had undoubtedly been detained for a length of time which gave rise to serious concern. However, in view of the due diligence with which the national authorities had acted throughout the deportation proceedings and the fact that there were sufficient guarantees against the arbitrary deprivation of his liberty, his detention complied with the requirements of Article 5(1). Hence, there had been no violation.

Article 5(4)

The Court had to consider the question whether the available proceedings to challenge the lawfulness of the detention provided an adequate control by the domestic courts.

As national security was involved, the domestic courts were not in a position to review whether the decisions to detain Mr Chahal and to keep him in detention were justified on national security grounds. Furthermore, although

the procedure before the advisory panel undoubtedly provided some degree of control, the applicant was not entitled to legal representation, the panel had no decisive power and its advice to the Home Secretary was not binding. Therefore, the panel could not be considered as a “court” within the meaning of Article 5(4).

The Court recognised that the use of confidential material could be unavoidable where national security was at stake. That did not mean however, that national authorities could be free from effective control by the domestic courts whenever they chose to assert the involvement of national security and terrorism. Hence, neither the proceedings for habeas corpus and for judicial review of the decision to detain Mr Chahal before the domestic courts, nor the advisory panel procedure, satisfied the requirements of Article 5(4). This shortcoming was significant given that Mr Chahal had been deprived of his liberty for a length of time which gave rise to serious concern.

Therefore, there had been a violation of Article 5(4).

Article 8

Having found that the deportation of Mr Chahal to India would amount to a violation of Article 3 of the Convention and having no reason to doubt that the United Kingdom would comply with its judgment, the Court considered it unnecessary to decide the hypothetical question of whether, in the event of expulsion to India, there would also be a breach of the applicants’ rights under Article 8.

Article 13

Given the irreversible nature of the harm that might occur to the applicant if the risk of ill-treatment materialised and the importance the Court attached to Article 3, the Court found that the notion of an effective remedy under Article 13 required independent scrutiny. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State. Such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant in determining whether the remedy before it is effective. In the present case, neither the advisory panel nor the courts could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security consid-

erations. The courts' approach was one of satisfying themselves that the Home Secretary had balanced the risk to Mr Chahal against the danger to national security. Further, in the proceedings before the advisory panel the applicant was not entitled to legal representation, he was only given an outline of the grounds for the notice of intention to deport and the panel had no decisive power as its advice to the Home Secretary was not binding and was not disclosed. In these circumstances, the advisory panel could not be considered to offer sufficient procedural safeguards for the purposes of Article 13. The Court noted that it had held in previous case law that judicial review was an effective remedy in asylum cases. However, in view of the extent of the deficiencies of both the judicial review proceedings and the advisory panel, in national security cases the Court could not consider that, even taken together, the remedies satisfied the requirements of Article 13 in conjunction with Article 3.

Article 50⁴⁸

The Court awarded the applicants £45,000 for the reimbursement of the legal costs of the Strasbourg proceedings.

3. Comment

This landmark decision affirmed two key elements of the ECHR – which have been upheld in many cases since. The first, and most important, is that the prohibition on expulsion to face ill-treatment contrary to Article 3 is absolute and cannot be weighed against the interests of national security⁴⁹. States are understandably reluctant to disclose intelligence sources for fear of compromising them, but the Court makes clear that they must find some other mechanism for dealing with non-nationals suspected of being a threat to national security, normally through criminal law (though it should be noted that in this case all criminal charges against Mr Chahal were either dropped or he was acquitted of them).

Secondly, the system of the “three wise men” panel and the limited judicial review did not meet the requirements of Article 13 and had to be changed. The decision in *Chahal* led to the introduction in the United Kingdom of the Special Immigration Appeals Commission (SIAC) which would remedy some defects

48 Now Article 41.

49 See also *Saadi v. Italy*, [Grand Chamber] judgment of 28 February 2008, no. 37201/06, included in this section, where the United Kingdom Government intervened to try to resuscitate the arguments raised in *Chahal*.

in the *Chahal* system. SIAC hears such cases on the basis of both “open” and “closed” material. The appellant and his/her own lawyers have access to the open materials, but the closed materials are disclosed only to a Special (security cleared) Advocate (SA). The SA presents the appellant’s case to SIAC, but is not allowed communication with the appellant or his/her own lawyers after viewing the closed materials. The SIAC judges are empowered to determine whether or not they consider that it is necessary for the closed material to remain secret. If they decide it is not necessary, the Government must either disclose the material or drop the case (both the decision to deport and the decision to detain). SIAC decisions can be reviewed by the regular courts but they too are subject to the restrictions of open and closed materials (and open and closed parts of the SIAC decision). Similar variations of post-*Chahal* systems now exist in several European countries. The European Court of Human Rights has had occasion to consider these new systems’ compatibility with the ECHR in subsequent cases (see e.g. *Othman (Abu Qatada) v. the United Kingdom*⁵⁰) and to indicate their imperfections.

50 *Othman (Abu Qatada) v. the United Kingdom*, 17 January 2012, no. 8139/09, also included in this section.

The execution of the expulsion order of a Somali national would violate Article 3

JUDGMENT IN THE CASE OF AHMED v. AUSTRIA

(Application No. 25964/94)

17 December 1996

1. Principal facts

Mr Ahmed, a Somali citizen born in 1963, left Somalia and reached Vienna in October 1990 via Syria and the Netherlands.

Mr Ahmed claimed asylum in November 1990. During the interview conducted by the Lower Austria Public Security Authority, he disclosed his uncle's activities as a member of the United Somali Congress ("the USC"), and stated that his father and brother, suspected of belonging to the USC and taking part in acts of rebellion, were executed in May 1990. Fearing being arrested and killed himself, the applicant left Somalia. In May 1992 the Minister of the Interior granted Mr Ahmed refugee status, considering his allegations credible and his fear of persecution if returned to Somalia well-founded.

Following a judgment in which the Graz Regional Court sentenced the applicant to two and a half years' imprisonment for attempted robbery, on 15 July 1994 the Federal Refugee Office in Graz ordered the forfeiture of the applicant's refugee status under the disposition of the Right to Asylum Act, according to which a person can lose refugee status if he commits a "particularly serious crime". The applicant's appeal was dismissed by the Minister of the Interior.

On 14 November 1994, the Graz Federal Police Authority issued an indefinite exclusion order against the applicant and ordered that, after serving his sentence, he was to be detained with a view to his deportation. The Graz Public Security Authority dismissed Mr Ahmed's subsequent appeal, observing that revoking the expulsion order would have much more serious detrimental effects on the community than on Mr Ahmed.

After being released on parole, the applicant was taken into custody at the Graz police headquarters on 14 December 1994 awaiting his expulsion. On 23 January 1995 the Styria Independent Administrative Tribunal upheld an appeal submitted by Mr Ahmed against the above measure and he was released.

On 10 April 1995 the forfeiture of Mr Ahmed's refugee status was again ordered

by the Minister of the Interior. He held that the applicant's offences showed a clear tendency to aggression which would lead the applicant to commit further offences in future and therefore make him a danger to society.

On 26 April 1995, before the Federal Refugee Office, Mr Ahmed asserted that he would risk his life if returned to Somalia. He referred to the deterioration of the situation since he left the country in 1990 and his membership of the Hawive clan, persecuted by the generals in power. Nonetheless, the Federal Refugee Office declared the proposed deportation of the applicant lawful, observing that the offences committed by Mr Ahmed revealed a tendency towards aggressive behaviour and thus it could not be excluded that he might commit other offences in future. He was considered to be a danger to the community and, that being the case, the fact that Mr Ahmed risked persecution if returned to Somalia could not affect the lawfulness of his expulsion.

On 4 May 1995 the Graz Federal Police Authority dismissed another applicant's appeal on the ground that there was nothing to suggest that he might be persecuted or suffer inhuman treatment or punishment on his return. On appeal by the applicant, the Styria Public Security Authority set aside the above decision. Thereupon on 3 October 1995 the Graz Federal Police Authority found that Mr Ahmed would risk persecution in Somalia. Accordingly, on 22 November 1995 it stayed the applicant's expulsion for a renewable period of one year.

2. Decision of the Court

Mr Ahmed alleged that, if he were to be deported to Somalia, he would be exposed to a serious risk of being subjected to treatment prohibited by Article 3 of the Convention.

Article 3

The Court reiterated that Contracting States have the right, as a matter of well-established international law, to control the entry, residence and expulsion of aliens. Although the right to political asylum is not contemplated in either the Convention or its Protocols, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3. Thus it may engage the responsibility of that State under the Convention and the duty not to expel, where substantial grounds have been shown for believing that such expulsion would subject the person in question to treatment contrary to Article 3. Moreover, the Court confirmed the absolute nature of Article 3 prohibition, which applies

with no limitations or possibility of derogation irrespective of the individual's conduct.

On 15 May 1992 the Austrian Minister of the Interior had granted Mr Ahmed refugee status, finding credible his statements that, if he were returned to Somalia, he would be subjected to persecution. The applicant's loss of refugee status was solely due to his criminal conviction and therefore the consequences of his deportation were not taken into consideration.

In order to assess the risks in the case of an expulsion, the Court examined the situation in Somalia at that time. In its report of 5 July 1995 the Commission had noted that the country was still in a state of civil war and fighting was on-going between a number of clans aiming at the control of the country. Furthermore, there was no evidence that the dangers to which the applicant would have been exposed in 1992 had ceased to exist or that any public authority would be able to protect him.

Considering that the Austrian authorities had decided to stay execution of the expulsion in issue because they considered that Mr Ahmed could not return to Somalia without risk of being victim of treatment contrary to Article 3 of the Convention, the Court reached the same conclusion.

Accordingly, the Court held that, as long as the applicant faced a real risk of being subjected in Somalia to treatment contrary to Article 3, Mr Ahmed's deportation to Somalia would breach Article 3 of the Convention.

Article 50⁵¹

The Court found that the present judgment in itself constituted sufficient just satisfaction as regards the non-pecuniary damage suffered by the applicant. In respect of costs and expenses, the Court held that the respondent State was to pay the applicant 150,000 Austrian schillings.

3. Comment

The case is the paradigm example of the significant differences between the protection given to an individual under the 1951 Geneva Convention on the Status of Refugees and the ECHR. The scope of application of the GC is narrow

.....
51 Now Article 41.

and limited to those who are at risk of *persecution* for one of the reasons set out in Article 1A of the GC: race, religion, nationality, membership of a particular social group or political opinion. Those who are recognised according to these criteria as refugees are accorded protection from *refoulement* (return to the country where they risk persecution) by Article 33 of the GC. However, under Article 33(2) a refugee can lose the right to *non-refoulement* if there are “reasonable grounds for regarding as a danger to the security of the country in which he is, or who having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country”. The European Court of Human Rights made clear in this judgment that it did not have jurisdiction to rule on whether the Austrian authorities had correctly applied the term “particularly serious crime” so as to deprive the applicant of his protection from *non-refoulement* compatibly with the terms of the GC. The Court has no jurisdiction to rule on the meaning of the provisions of the GC. Under the ECHR individuals qualify for protection if their expulsion would, objectively assessed, expose them to a real risk of torture or inhuman or degrading treatment (prohibited by Article 3 of the ECHR). They do not have to establish either a subjective fear or a risk of persecution for one of the reasons set out in Article 1 of the GC. No matter what crimes Mr Ahmed had committed, the test for the ECtHR was whether he would be exposed to a risk prohibited by Article 3 if returned to Somalia – once that was established the ECHR prohibited his return. The European Union asylum *acquis* incorporates both the GC criteria, status and protection, and under Article 15 of the Qualification Directive 2004/83/EC (QD) grants status and protection for those at risk of “serious harm”. But this status and protection does not apply to those who are excluded by virtue of their conduct. The EU *acquis*, and in particular the QD, is thus not co-terminous with the ECtHR. Nor it should be noted does the EU *acquis* fully incorporate the safeguards of the GC⁵².

52 See C-481/13, *Mohammad Ferooz Qurbani v. Staatsanwaltschaft Würzburg*, judgment of 17 July 2014.

The proposed deportation of the applicant to Iran would amount to a breach of Article 3

JUDGMENT IN THE CASE OF JABARI v. TURKEY

(Application No. 40035/98)

11 July 2000

1. Principal facts

The applicant, Ms Hoda Jabari, was an Iranian national born in 1973.

In October 1997 Ms Jabari was stopped by policemen while walking along a street with a man in Iran. The policemen arrested the couple and detained them in custody as the man was married. After a few days she was released from detention with the help of her family. In November 1997 the applicant entered Turkey illegally fearing that she would be convicted of having committed adultery, an offence under Islamic law, and sentenced to be stoned to death or flogged.

In February 1998 the applicant used a false passport in an attempt to reach Canada but was arrested by the French police while in transit and returned to Istanbul. Once in Turkey, Ms Jabari was arrested on the ground that she had entered the country with a forged passport and ordered to be deported.

Ms Jabari subsequently submitted an asylum application but it was rejected by the authorities on the basis that the request had been claimed out of time, and should have been registered within five days of her arrival in Turkey in compliance with the 1994 Asylum Regulation.

Eleven days after her arrival in February, the UNHCR branch office in Ankara granted the applicant refugee status on the grounds of a well-founded fear of persecution on return to Iran, since she was at risk of inhuman punishment such as death by stoning, flogging or whipping.

In April 1998 she lodged an application with the Ankara Administrative Court against her deportation. She also asked for a stay of execution of her deportation. Her petitions were dismissed and the suspension of her deportation was found to be unnecessary since it was not tainted with any obvious illegality and its implementation would not cause irreparable harm to the applicant. On 4 November 1998 the Ankara Administrative Court also found that there was

no actual risk of her being expelled considering that she had been granted a temporary residence permit pending the outcome of her application under the European Convention on Human Rights, in compliance with Rule 39. The court found that it was not necessary to suspend the deportation order since no such order had yet been made.

2. Decision of the Court

The applicant claimed that her removal to Iran would put her at real risk of ill-treatment, in breach of Article 3 of the Convention. She further complained that she had no effective remedy under domestic law to challenge the decision by which her asylum claim was rejected as being out of time, in violation of Article 13.

Article 3

Having highlighted that Article 3 of the Convention, embodying one of the most fundamental values of a democratic society, forbids in absolute terms torture or inhuman or degrading treatment or punishment, the Court reiterated the need for rigorous scrutiny to be conducted into any claim that deportation to a third country would expose a person to ill-treatment contrary to Article 3.

The Court found that the authorities of the respondent State had not conducted any significant assessment of the applicant's claim, including its arguability. It observed that the applicant was denied any scrutiny of the factual basis of her fears of being deported to Iran due to the automatic and mechanical application of the five-day time limit for submitting an asylum application, which the Court considered to be at variance with the protection of the fundamental value enshrined in Article 3 of the Convention. Moreover, the Ankara Administrative Court, in hearing Ms Jabari's judicial review challenge, considered solely the formal legality of her deportation rather than the more serious question of the substance of her asylum claim.

The Court placed weight on the fact that the UNHCR branch office in Ankara had recognised the applicant as a refugee, after an interview and examination of the risk she faced. It noted that Turkey had ratified the Geneva Convention and the 1967 Protocol thereto. It had exercised the geographic preference option under the GC in order to limit the grant of refugee status to asylum-seekers from European countries. For humanitarian reasons, Turkey issued tempo-

rary residence permits to asylum-seekers from non-European countries who were recognised by the UNHCR – but not by Turkey – as Geneva Convention refugees spending their resettlement in a third country by that organisation.

As far as the situation in Iran was concerned, the Court was not persuaded that it had evolved significantly to the extent that adulterous behaviour was no longer considered a reprehensible affront to Islamic law.

The Court concluded that Ms Jabari faced a real risk of being subjected to treatment contrary to Article 3 if she were returned to Iran and accordingly her deportation, if executed, would amount to a violation of Article 3 of the Convention.

Article 13

The Court confirmed that the domestic authorities made no assessment of Ms Jabari's claim to be at risk if deported to Iran. The refusal to examine her asylum application for non-respect of procedural requirements could not be appealed. As a matter of fact, the applicant managed to challenge the legality of her deportation in judicial review proceedings. Nevertheless, such a measure entitled her neither to suspend its implementation nor to have an examination of the merits of her claim that she was at risk. Considering that the applicant's removal was in compliance with domestic law requirements, the Ankara Administrative Court decided not to address the substance of her complaint, even though it was arguable on the merits given the UNHCR's recognition of her as a refugee.

In the Court's opinion, given the irreversible nature of the harm that might occur in case of torture or ill-treatment and the great relevance attributed to Article 3, the effective remedy under Article 13 requires independent and rigorous scrutiny of a claim that there might exist substantial grounds for fearing a real risk of treatment contrary to Article 3, as well as the possibility of suspending the implementation of the measure impugned. In the present case, the Court noted that the Ankara Administrative Court failed to provide the applicant with any of those safeguards and that the judicial review proceedings did not satisfy the requirements of Article 13.

Therefore, the Court found that there had been a violation of Article 13.

Article 41

The Court dismissed Ms Jabari's claims for just satisfaction, holding that the finding of a potential breach of Article 3 and an actual breach of Article 13 constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

3. Comment

As is mentioned in the narrative section of this publication, the European Court of Human Rights cannot rule on the compliance of States with the provisions of the Geneva Convention. This case illustrates the particular situation of asylum seekers in Turkey. They fall outside the full legal protection of the GC as a matter of international and Turkish law because of the geographical exclusion, confining GC refugee status to those coming from within Europe. Those non-Europeans recognised as refugees by UNHCR will normally be granted temporary residence until re-settled outside Turkey. In order to obtain *legal* protection, asylum seekers must apply to the Turkish authorities within short time limits. It was the mechanical application of those short time limits, without any consideration of the substance of the claim, much less the "anxious scrutiny" required by the Convention, that led the Court to find a violation of Articles 3 and 13. Turkey still maintains the geographical exclusion to the GC. A new law entered into force in 2014. Syrians are automatically granted temporary protection and do not undergo individual status determination. Non-Syrian, non-Europeans can apply to UNHCR for status determination, but the current huge scale of the influx of asylum seekers into Turkey renders the functioning of this process ineffective for most.

The implementation of a deportation order to Syria where the applicant had been found guilty of a capital offence in absentia would be contrary to Articles 2 and 3

JUDGMENT IN THE CASE OF BADER AND KANBOR v. SWEDEN

(Application No. 13284/04)

8 November 2005

1. Principal facts

The case concerned a complaint by two Syrian nationals, Mr Kamal Bader Muhammad Kurdi, Mrs Abdilhamid Mohammad Kanbor, and their two children.

They arrived in Sweden on 25 August 2002, and made an application for asylum to the Migration Board the following day. Mr Bader, who was of Kurdish origin and a Sunni Muslim, claimed *inter alia* that in December 1999, during his 9 months' imprisonment by the Syrian security police, he had been the victim of torture and ill-treatment. On 27 June 2003, finding that they had not shown a risk of persecution if returned to Syria, the Migration Board rejected the family's application for asylum, and ordered their deportation to Syria. The applicants appealed twice to the Aliens Appeals Board, however both appeals were rejected, and the deportation order was upheld.

In January 2004, the family lodged a new asylum application to the Aliens Appeals Board and requested a stay of execution of the deportation order. They referred to a judgment, delivered on 17 November 2003 by the Regional Court in Aleppo, which stated that Mr Bader had been convicted, *in absentia*, of complicity in a murder and sentenced to death under the Syrian Criminal Code. A few days later the stay of execution of the deportation was granted by the Swedish authorities.

On 26 January 2004 the applicants submitted to the Aliens Appeals Board a certified copy of the judgment, which stated that Mr Bader had been involved in the murder of his brother-in-law and had been sentenced to death. As requested by the Aliens Appeals Board, the Swedish embassy in Syria verified that the judgment was authentic and found that the case would likely be retried in court once the accused was relocated. The embassy had no reliable information about how frequently death sentences were enforced as they were normally carried out without any public scrutiny or accountability. However, it was very rare for the death sentence to be imposed at all by the Syrian

courts at that time.

On 7 April 2004 the Aliens Appeals Board rejected the applicants' request for asylum. On the basis of research carried out by a local lawyer engaged by the Swedish embassy in Syria the majority considered that, should Mr Bader be returned to Syria, the case against him would be re-opened and he would receive a full retrial. If he was convicted, he would not be given the death sentence as the case was "honour related". Therefore the applicants' fears of persecution were not well-founded and they were not in need of protection.

On 19 April 2004, following the European Court of Human Rights' indication under Rule 39 of the Rules of Court, the Migration Board granted a stay of execution of the deportation order until further notice.

2. Decision of the Court

The applicants complained that, if sent back to Syria, Mr Bader would face a real risk of being arrested and executed in violation of Articles 2 and 3 of the Convention.

Articles 2 and 3

As a matter of well-established international law, Contracting States have the right to control the entry, residence and deportation of aliens. Nevertheless, the deportation of an alien may give rise to an issue under Article 3 of the Convention and hence engage the responsibility of that State not to deport, where substantial grounds have been shown for believing that the person in question, if deported, would risk being subjected to treatment contrary to Article 3 in the receiving country. Furthermore, a Contracting State's responsibility may be engaged under Article 2 of the Convention, or Article 1 of Protocol No. 6, the abolition of the death penalty, where an alien is deported to a country where there is a serious risk of being executed as a result of the imposition of the death penalty. Nonetheless, although Sweden had ratified Protocol No. 13 concerning the abolition of the death penalty in all circumstances, the fact that there were still a large number of Council of Europe States who were yet to sign or ratify Protocol No. 13 prevented the Court from finding that it was the established practice of the Contracting States to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Article 3 of the Convention, which allows no derogation. Hence, the Court considered the case only under Articles 2 and 3 of the Convention.

The Court took into consideration the judgment of 17 November 2003 by the Regional Court in Aleppo, which convicted Mr Bader *in absentia* of complicity in a murder and sentenced him to death. The Court did not consider that the efforts of the Swedish authorities to examine law and practice in Syria were sufficient. It first considered the information in the report from the Swedish Embassy in Syria to be vague and imprecise as to whether the case would be re-opened and as to the likelihood, in case of a conviction at a retrial, of the applicant escaping capital punishment. The Court further found it surprising that the Swedish Embassy did not contact Mr Bader's defence lawyer in Syria, even though he had furnished them with his name and address, since he could have provided useful information about the case and the proceedings before the Syrian court. Finally, although the judgment stated that the applicant might apply for a reopening of his case and for a retrial, the Court noted that no guarantee had been provided from the Syrian authorities that the applicant's case would be effectively re-opened and that the public prosecutor would not request the death penalty at any retrial. In those circumstances, the Swedish authorities would be putting Mr Bader at serious risk by returning him to Syria.

The Court observed that Mr Bader had a justified and well-founded fear that the death sentence against him would be carried out if he was forced to return to his home country. Moreover, considering that in Syria executions were carried out without any public scrutiny or accountability, Mr Bader suffered considerable distress and anguish, facing unbearable uncertainty about when, where and how his execution would be carried out.

Furthermore the Court noted that no oral evidence had been taken at the hearing *in absentia*, that all the evidence examined was submitted by the prosecutor, and that neither the accused nor his defence lawyer had been present at the hearing. Because of their summary nature and the total disregard of the rights of the defence, the proceedings had to be considered a flagrant denial of a fair trial. The Court considered that the death penalty imposed on Mr Bader following an unfair trial would inevitably cause the applicants additional fear and anguish as to their future, if they were deported to Syria.

In conclusion, the Court held that there were substantial grounds for believing that, if returned to his country of origin, Mr Bader would be exposed to a real risk of being executed and subjected to treatment contrary to Articles 2 (as the death penalty would be imposed following an unfair trial) and 3 (as a consequence of the fear and anguish suffered). Accordingly, the Court found that the

deportation of Mr Bader and his family to Syria, if implemented, would amount to a violation of Articles 2 and 3 of the Convention.

Article 41

No claims for just satisfaction were submitted and accordingly no award was decided by the Court.

3. Comment

This is a complex judgement. Article 2 does not in itself prohibit the imposition of the death penalty but the Court has long held that it is a violation of Article 3 to impose it following an unfair trial⁵³. The Court had decided in 1989, in the case of *Soering v. the United Kingdom*⁵⁴, that the “death row phenomenon” in the USA constituted a prohibited violation of Article 3. Protocol No. 6 to the Convention abolished the death penalty, except in time of war. Protocol No. 13 abolished the death penalty in all circumstances and, as Judge Cabral Barreto emphasised in his concurring opinion, also prohibits States from putting anyone at risk of incurring it. At the time of this case, Protocol No. 13 had obtained the necessary number of ratifications to be in force and had, specifically, been ratified by Sweden. At the time this publication is going to print, of the 47 Council of Europe Member States only Armenia, Azerbaijan and Russia have still not ratified it (and Russia has not signed). It is quite clear from this judgment that the European Court of Human Rights would not have contemplated the return of this applicant by an ECHR Contracting State to face the death penalty, but may have had difficulty reaching agreement on the route by which they would arrive at this conclusion. Since this case, a number of other complaints have been brought concerning expulsions to face the death penalty. In *Rrapo v. Albania*⁵⁵ the Court found no violation of Article 2 and Protocol No. 13 as credible assurances had been given that the death penalty would not be sought in an extradition case. In *Al-Saadoon and Mufdhi v. the United Kingdom*, as it remained unclear after the handover that the applicants did in fact face capital charges, they preferred to consider the case under the “fear and anguish” elements of Article 3⁵⁶.

53 See *Öcalan v. Turkey*, [GC] judgment of 12 May 2005, no. 46221/99.

54 *Soering v. the United Kingdom*, judgment of 7 July 1989, no. 14038/88.

55 *Rrapo v. Albania*, judgment of 25 September 2012, no. 58555/10.

56 *Al-Saadoon and Mufdhi v. the United Kingdom*, judgment of 2 March 2010, no. 61498/08, included in this section.

Neither the earlier admissibility decision nor the judgment explain the position under the ECHR of the family members of Mr Bader who were not themselves at risk of the death penalty. The two children were aged 5 and 6 at the time. Their complaint was that his expulsion would “*risk destroying the family*”. But as the Court found violations of Articles 2 and 3 in respect of all four applicants, it is to be assumed that the “fear and anguish” elements of the situation were being applied equally to the wife and children.

Lacking internal protection alternatives, the expulsion of a refused asylum seeker to Somalia would violate the prohibition of torture and ill-treatment

JUDGMENT IN THE CASE OF SALAH SHEEKH v. THE NETHERLANDS

(Application No. 1948/04)

11 January 2007

1. Principal facts

The applicant, Abdirizaq Salah Sheekh, was a Somali national from Mogadishu who belonged to the minority Ashraf clan.

In 1991, due to the civil war, his family were forced to leave their belongings in Mogadishu and flee to a village where they lived in primitive conditions. The family had no means of protection since they were members of a minority clan and hence were persecuted by the Abgal clan of the Hawive clan-family, which commanded the village. The applicant claimed that the Abgal militia killed his father and his brother and had raped his sister.

On 12 May 2003 Mr Salah Sheekh left Somalia and arrived in Amsterdam on a false passport. That same day he lodged an asylum application.

On 25 June 2003 his asylum request was refused. The Minister for Immigration and Integration in the Netherlands held that the applicant made unreliable statements concerning his date of birth. Further, the Minister considered that the situation in Somalia for asylum seekers – whether or not they belonged to the minority Ashraf population group – was not such that the fact alone that a person came from that country was sufficient for refugee recognition. The applicant had never been a member or sympathiser of a political party or movement and he had never been arrested or detained. The Minister further held that the problems experienced by the applicant were not the result of systematic acts of discrimination, instead they were rather a consequence of the general unstable situation in which criminal gangs frequently, but arbitrarily, intimidated and threatened people. The Minister concluded that there was no real risk of the applicant being subjected to treatment in breach of Article 3 if returned to Somalia. Given the general situation there, Mr Salah Sheekh could settle in one of Somalia's moderately safe areas.

The applicant appealed against the rejection of his asylum claim on 26 June 2003, arguing *inter alia* that his experiences in Somalia were the result of eth-

nic exploitation and that no internal flight existed there. He also filed an objection against the refusal to grant him a particular residence permit for stateless persons. The appeal was rejected and the Regional Court of The Hague held that Mr Salah Sheekh could move to one of the “relatively safe areas” of Somalia.

Once informed that he was to be issued with a EU expulsion travel document and deported to the “relatively safe areas” of Somalia on 16 January 2004, the applicant lodged an objection with the Minister. He requested the Regional Court of The Hague to issue a provisional measure in order to prevent his deportation pending the appeal.

On 20 January 2004 the judge of the Regional Court rejected the applicant’s request for a provisional measure. It was held that deportation with EU travel documents would only be unlawful if there were indications that entry to a territory would be denied to persons travelling with those documents. No such indications were found.

2. Decision of the Court

On 15 January 2004 the applicant submitted an application to the European Court of Human Rights. The Netherlands’ authorities suspended the applicant’s deportation order, following the application of Rule 39 of the Rules of the Court to issue interim measures indicating that he should not be expelled pending the resolution of the case before the Court.

Taking into account his personal situation of belonging to a minority in the context of the overall human rights situation in Somalia, Mr Salah Sheekh complained that, if returned to Somalia, he would be put at risk of being subjected to torture or ill-treatment. He also complained that he did not have an effective remedy since the Dutch Government refused to suspend his expulsion while a decision on his objection against the manner of his expulsion was pending. He relied on Articles 3 and 13.

Article 3

The establishment of the responsibility of the expelling State under Article 3 involves an assessment of the conditions in the receiving country. Such an assessment must be appropriate and adequately supported by domestic materials as well as by materials originating from other reliable sources – such as

other States, agencies of the UN and respected non-governmental organisations (NGOs).

In the present case the Court had to establish whether an expulsion to “relatively safe” areas in Somalia, as proposed by the Dutch Government, would be in breach of Article 3. The Court noted that even in those territories – situated in the north and generally more peaceful than south and central Somalia – there was a considerable difference between individuals who originated from those areas and individuals who came from elsewhere in Somalia. The Court emphasised the relevance of clan affiliation as an important element and considered that it was unlikely that the applicant – who was a member of the Ashraf minority and who hailed from the south of Somalia – would be able to obtain protection from a clan in those “relatively safe” areas. It also noted that the three most vulnerable groups in Somalia were said to be internally displaced persons, minorities and returnees from exile, and that, if expelled to the “relatively safe” areas, the applicant would surely fall into all three categories.

It is not contrary to the Convention as such for States to rely on internal protection when assessing an individual claim. Nevertheless, the Court held that ‘certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise’. In this respect the position of the Somaliland and Puntland authorities – the relatively safe areas – was clearly against returns respectively of non-Somalilanders and refugees. In addition, both the Somaliland and Puntland authorities indicated that they considered the EU travel document unacceptable.

Despite this, the Dutch Government continued to insist that expulsions were still possible to those areas, pointing out that, in the event of a person returned there being denied entry, he or she would be allowed to return to the Netherlands. The Court held that even if the Government succeeded in removing the applicant to either Somaliland or Puntland, this would by no means guarantee that the applicant, once there, would be allowed or enabled to stay in the territory. Moreover, with no monitoring of deported rejected asylum seekers taking place, the Government would have no way of verifying whether or not the applicant would have succeeded in gaining admittance. In view of the position taken by Puntland and Somaliland, the Court found it rather unlikely that Mr Salah Sheekh would be allowed to settle there upon return.

In determining whether the applicant would be at risk of a violation of Article 3 if forced to go to other areas of Somalia unanimously considered unsafe, the Court observed that, since Mr Salah Sheekh had already been victim of inhuman treatment in Somalia – where the general situation had not undergone a substantial change – there was no indication that the applicant would find himself in a situation different from the one he fled.

In conclusion the Court noted that the applicant and his family were targeted because they belonged to the Ashraf minority and for that reason they had no means of protection. The Court stated that the applicant could not be required to establish the existence of further special distinguishing features concerning him personally in order to show that he was, and continued to be, personally at risk. Departing from the approach it had taken in *Vilvarajah and Others v. the United Kingdom*⁵⁷, the Court held that it might render the protection offered by Article 3 illusory if, in addition to the fact of his belonging to the Ashraf clan, the applicant was required to show the existence of further special distinguishing features.

Bearing in mind the overall situation in the “relatively unsafe” areas of Somalia, the Court considered that, if returned there, it was likely that the applicant would be exposed to treatment in breach of Article 3. Therefore, the Court concluded that the expulsion of Mr Salah Sheekh to Somalia would result in an Article 3 violation.

Article 13

The Court considered that the applicant was provided with an effective remedy as to the manner in which his expulsion was to be carried out.

Accordingly, the Court held that there had been no violation of Article 13.

Article 41

The applicant did not submit a claim for just satisfaction and the Court did not consider appropriate to examine this issue of its own motion.

⁵⁷ *Vilvarajah and Others v. the United Kingdom*, judgment of 30 October 1991, nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87.

3. Comment

This important judgment is one of the key staging posts in the evolution of the Court's jurisprudence. In *Vilvarajah and Others v. the United Kingdom* it had held in 1991 that any young Tamil male being returned to Sri Lanka must show "special distinguishing features" that would make him more likely to be exposed to prohibited ill-treatment than other young Tamil males – although it was recognised that all of them were, generically, at risk. In *Salah Sheekh* the Court accepted that if *all* members of a particular group were at a real risk of prohibited ill-treatment it would deprive the protection of Article 3 of all effectiveness if they had to show, in addition, that they were, personally, more at risk than others in the same group, who were all at risk simply because of their membership of that group. This judgment opened a crack in a door that had been firmly closed since *Vilvarajah* in the face of all those who were genuinely at risk because of their membership of a group and not because of any particular personal activities or peculiarities that might have made them more likely targets for ill-treatment than other members of the group. The judgment in *Salah Sheekh* was a vital jurisprudential stepping stone to the future judgments in *NA. v. the United Kingdom* and *Sufi and Elmi v. the United Kingdom*⁵⁸.

The Dutch Government were very exercised by the issue of exhaustion of domestic remedies. They had argued that the case should have been declared inadmissible due to failure to exhaust by the applicant. However, since the relevant Dutch judicial authorities applied the *Vilvarajah* "personal circumstances" test, the Court considered that the available remedy would have no prospect of success for addressing this complaint which sought to move on from *Vilvarajah*. The Court's finding that the remedy was not one to which the applicant had to have recourse was inextricably tied to the substantive decision on the principle that all members of an at risk group deserve protection.

58 *NA. v. the United Kingdom*, judgment of 17 July 2008, no. 25904/07, and *Sufi and Elmi v. the United Kingdom*, judgment of 28 June 2011, nos. 8319/07 and 11449/07, both included in this section.

Expulsion of aliens to a country where they face real risk of torture

GRAND CHAMBER JUDGMENT IN THE CASE OF SAADI v. ITALY

(Application No. 37201/06)

28 February 2008

1. Principal facts

The applicant, Nassim Saadi, was a Tunisian national who was born in 1974 and lived in Milan, Italy. He was the father of an eight-year-old child whose mother was an Italian national.

In December 2001, the applicant was issued with an Italian residence permit, valid until October 2002, “for family reasons”.

In October 2002, Mr Saadi, who was suspected, among other things, of international terrorism, was arrested and placed in pre-trial detention. In May 2005 Milan Assize Court reclassified the offence of international terrorism, amending it to criminal conspiracy. It found Mr Saadi guilty of that offence and of forgery, sentencing him to four years and six months’ imprisonment. Both the prosecution and the applicant appealed. On the date of the adoption of the Grand Chamber’s judgment the proceedings were still pending in the Italian courts.

On 11 May 2005 a military court in Tunis sentenced the applicant in his absence to 20 years’ imprisonment for membership of a terrorist organisation acting abroad in peacetime and for incitement of terrorism.

Mr Saadi was released on 4 August 2006. On 8 August 2006, however, the Minister of the Interior ordered him to be deported to Tunisia, applying the provisions of the 2005 Law on “urgent measures to combat international terrorism”. The Minister observed that “*it was apparent from the documents in the file*” that the applicant had played an “*active role*” in an organisation responsible for providing logistical and financial support to persons belonging to fundamentalist Islamist cells in Italy and abroad. The applicant was therefore placed in a Milan temporary holding centre pending his deportation.

Mr Saadi made a request for political asylum, which was rejected in September 2006. On the same day he lodged an application with the European Court of Human Rights. Under Rule 39 of the Rules of Court (interim measures), the

Court asked the Italian Government to stay the applicant's expulsion until further notice.

The maximum time allowed for the applicant's detention with a view to expulsion expired on 7 October 2006 and he was released on that date. However, on 6 October 2006 a new deportation order was issued against him to France (the country from which he had arrived in Italy), with the result that he was immediately taken back to the Milan temporary holding centre. The applicant applied for a residence permit and requested refugee status, without success. On 3 November 2006 the applicant was released, as fresh information made it clear that it would not be possible to deport him to France.

In May 2007, the Italian embassy in Tunis asked the Tunisian Government to provide a copy of the alleged judgment convicting the applicant in Tunisia, as well as diplomatic assurances that, if the applicant were to be deported to Tunisia, he would not be subjected to treatment contrary to Article 3 of the ECHR, that he would have the right to have the proceedings reopened and that he would receive a fair trial. In reply, the Tunisian Minister of Foreign Affairs twice sent a note *verbale* to the Italian Embassy in July 2007 stating that he "*accepted the transfer to Tunisia of Tunisians imprisoned abroad once their identity had been confirmed*", that Tunisian legislation guaranteed prisoners' rights and that Tunisia had acceded to "*the relevant international treaties and conventions*".

2. Decision of the Court

The application was lodged with the European Court of Human Rights on 14 September 2006. On 29 March 2007, the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber, under Article 30 of the Convention.

The applicant alleged that enforcement of his deportation to Tunisia would expose him to the risk of being subjected to torture or inhuman and degrading treatment contrary to Article 3 of the Convention. Relying on Article 6, he further complained of a flagrant denial of justice he had allegedly suffered in Tunisia on account of being convicted in his absence and by a military court. Under Article 8, he alleged that his deportation to Tunisia would deprive his partner and his son of his presence and support.

Article 3

The Court observed that it could not underestimate the danger of terrorism and noted that States were facing considerable difficulties in protecting their communities from terrorist violence. However, that should not call into question the absolute nature of Article 3.

Contrary to the argument of the United Kingdom as third-party intervener, supported by the Italian Government, the Court considered that it was not possible to weigh the risk that a person might be subjected to ill-treatment against his dangerousness to the community if not sent back. The prospect that he might pose a serious threat to the community did not diminish in any way the risk that he might suffer harm if deported.

As regards the arguments that such a risk had to be established by solid evidence (meeting a higher standard than otherwise required), where an individual was a threat to national security, the Court observed that such an approach was not compatible with the absolute nature of Article 3. The Court reaffirmed that for a forcible expulsion to be in breach of the Convention it was necessary – and sufficient – for substantial grounds to have been shown for believing that there was a risk that the applicant would be subjected to ill-treatment in the receiving country.

The Court referred to reports by Amnesty International and Human Rights Watch which described a disturbing situation in Tunisia and which were corroborated by a report from the US State Department. These reports mentioned numerous and regular cases of torture inflicted on persons accused under the 2003 Prevention of Terrorism Act. It was reported that allegations of torture and ill-treatment were not investigated by the competent Tunisian authorities and that they regularly used confessions obtained under duress to secure convictions. The applicant therefore belonged to the group at risk of ill-treatment.

The Court further noted that the Tunisian authorities had not provided the diplomatic assurances requested by the Italian Government in May 2007. Furthermore, even if the Tunisian authorities had given the diplomatic assurances that would not have absolved the Court from the obligation to examine whether such assurances provided a sufficient guarantee that the applicant would be protected against the risk of ill treatment.

Consequently, the Court found that the decision to deport Mr Saadi to Tunisia

would breach Article 3 if it were enforced.

Article 6 and Article 8

Recalling its finding concerning Article 3 and having no reason to doubt that the Italian Government would comply with its Grand Chamber judgment, the Court considered that it was not necessary to decide the question whether, in the event of expulsion to Tunisia, there would also be violations of Article 6 and Article 8.

Article 41

The Court held that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant and awarded him €8,000 for costs and expenses.

3. Comment

A key attribute of State sovereignty is the right to admit or expel aliens and it is only if such expulsions would raise issues of human rights norms that the Court will examine the compatibility of proposed expulsions with Convention obligations. The Court has always held that the absolute prohibition on torture or inhuman or degrading treatment or punishment applies equally to prohibit expelling someone when there is a real risk that this would entail exposure to such treatment. In the case of *Chahal v. the United Kingdom*⁵⁹, the United Kingdom Government attempted to argue that where the individual in question presented a threat to national security or public order the prohibition was not absolute. The Court found otherwise. In this case against Italy the United Kingdom intervened, unsuccessfully, to try to persuade the Court to depart from the approach it had taken in *Chahal*. The Grand Chamber held unanimously that if there was a real risk of exposure to absolutely prohibited treatment, the prohibition on expulsion was absolute. It found that a real risk existed in Mr Saadi's case. The fact that Tunisia was a party to international instruments outlawing torture was not sufficient in the face of abundant evidence that torture was routinely practiced. The judgment has been followed in many subsequent cases.

59 *Chahal v. the United Kingdom*, [Grand Chamber] judgment of 15 November 1996, no. 22414/93, also reported in this section.

Proposed deportation of a seriously ill Ugandan national would not amount to degrading treatment

**GRAND CHAMBER JUDGMENT IN THE CASE
OF N. v. THE UNITED KINGDOM**

(Application No. 26565/05)

27 May 2008

1. Principal facts

The applicant, Mrs N., a Ugandan national born in 1974, entered the United Kingdom on 28 March 1998 under an assumed name.

She was seriously ill and was admitted to hospital where she was diagnosed as HIV-positive.

Within a few days, solicitors lodged an asylum application on her behalf, claiming that she had been ill-treated and raped by the National Resistance Movement in Uganda because of her association with the Lord's Resistance Army. They maintained that her life and safety would be at risk if she was returned.

By November 1998, the applicant was diagnosed as having developed a second AIDS-defining illness, Kaposi's sarcoma. Her CD4 count at this stage was down to 10, compared with that of a healthy person which is around 500. It was thanks to the treatment with antiretroviral drugs received in the United Kingdom that Mrs N.'s condition began to stabilise so that by 2005, when the House of Lords examined the case, her CD4 count had risen to 414.

In March 2001, a consultant physician prepared an expert report at the request of the applicant's solicitor. The report made it clear that, without active treatment to improve her CD4 count, the applicant's prognosis was "*appalling*" and put her life expectancy at less than one year should she be forced to return to Uganda, where there was "*no prospect of her getting adequate therapy*".

The United Kingdom Secretary of State refused the applicant's asylum claim on 28 March 2001, finding that her claims were not credible given that no evidence was found that the Ugandan authorities were interested in her. The applicant's claim based on Article 3 of the ECHR was also rejected, the Secretary of State noting that treatment of AIDS in Uganda was comparable to that in any other African country and that all the major anti-viral drugs were availa-

ble in Uganda.

On 10 July 2002, Mrs N.'s appeal of her asylum refusal was dismissed, but it was allowed on Article 3 grounds by reference to the case of *D. v. the United Kingdom*⁶⁰.

The Secretary of State appealed against the Article 3 finding, asserting that all AIDS drugs available under the National Health Service in the United Kingdom could also be acquired in Uganda and most were also available at a reduced price thanks to United Nations' funded projects and from bilateral AIDS donor funded programmes. Therefore, Mrs N.'s return would not amount to a "complete absence of medical treatment" and would not put her at risk of "acute physical and mental suffering". The Immigration Appeal Tribunal allowed the appeal on 29 November 2002 and considered that, even though its level was below the one available in the United Kingdom, the applicant could find available medical treatment for her condition in Uganda.

Mrs N. appealed unsuccessfully to the Court of Appeal and the House of Lords.

2. Decision of the Court

Relying on Articles 3 and 8, Mrs N. complained that, considering her illness and the lack of adequate medical treatment in Uganda, her removal would cause her suffering and lead to her early death, which amounted to inhuman and degrading treatment.

Article 3

The Court reiterated that Article 3 may apply to prevent an expulsion to a country where the risk of ill-treatment derives from acts of the public authorities and/or from non-State bodies, when the authorities are unable to afford the applicant appropriate protection. The Court also outlined its case-law regarding expulsion cases where the applicant claimed to be at risk of suffering a violation of Article 3 on the grounds of ill-health, observing that it had not found such a violation since the 1997 judgment in *D. v. the United Kingdom* where "very exceptional circumstances" and "compelling humanitarian considerations" were involved. In that case the applicant was critically ill, appeared to be close to death and could not be guaranteed any nursing or medical care

60 *D. v. the United Kingdom*, judgment of 21 May 1997, no. 30240/96.

in his country of origin.

The Court noted that aliens subject to expulsion could not, in principle, claim to remain in the territory of one of the Contracting States for the purpose of continuing to benefit from medical, social or other forms of assistance and services provided by the expelling State. The consideration that the applicant's circumstances, including his/her life expectancy, would be significantly worsened if he/she were to be removed from the Contracting State was not sufficient in itself to give rise to a violation of Article 3. Only in a very exceptional case where compelling humanitarian grounds were against the removal, the expulsion of a seriously ill alien to a country where the facilities for the treatment of that illness were inferior to those available in the Contracting State, might give rise to an issue under Article 3. Moreover, even taking into account that the level of treatment available in the Contracting State and the country of origin might vary considerably, Article 3 did not place an obligation on the Contracting State to mitigate such differences through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. Therefore a finding to the contrary would place too great a burden on Contracting States.

In the present case, the Court observed that, although Mrs N. applied for and was refused asylum in the United Kingdom, her claim under Article 3 was based solely on her serious medical condition and the lack of appropriate treatment available in her home country. To that regard, the Court examined information provided by the World Health Organisation, according to which, although antiretroviral medication was available in Uganda, lack of resources meant it was received by only half of those in need.

The Court accepted that the quality of the applicant's health and her life expectancy would be considerably affected if she were returned to Uganda. However, as a result of the medical treatment she had received in the United Kingdom her condition had become more stable and the applicant was not at the present time critically ill. Nevertheless, the United Kingdom had no duty to continue to provide care for her once her claims under Article 3 and 8 of the Convention were determined by the domestic courts and the Strasbourg Court.

The Court held that the rapidity of the deterioration which the applicant would suffer and the extent to which she would be able to obtain access to medical treatment, support and care involved a certain degree of speculation, particularly in the light of the constantly evolving situation concerning the treatment

of HIV and AIDS worldwide. Thus the applicant's case did not disclose "very exceptional circumstances" able to prevent her expulsion.

Accordingly, the Court found that the implementation of the decision to remove her to Uganda would not give rise to a violation of Article 3.

Article 8

The Court held that no separate issues arose under Article 8 and that it was not necessary, therefore, to examine that complaint.

3. Comment

After this judgment was handed down the same question has been brought repeatedly to Strasbourg and it appears to attract particular attention by the Court⁶¹. A similar application was struck out by the Grand Chamber in the case of *S.J. v. Belgium*⁶², where the Belgian authorities offered an indefinite right to stay to the applicant and her three children on "strong humanitarian considerations". Another case where the same issues are raised by the applicants is currently before the Grand Chamber⁶³.

It has to be noted that in these cases the reasoning of the Court is based on the premise that aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his/her life expectancy, would be significantly reduced if he/she were to be removed from the Contracting State was not sufficient in itself to give rise to a breach of Article 3. So the right to remain on health grounds is very exceptional and is subject to a very high threshold, which is the one set by the Court in the case of *D. v. the United Kingdom*. In that case the applicant was critically ill, close to death and could not be guaranteed any medical care in his country of origin, St. Kitts. Further he had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support. It seems that the combination of all these factors and the conditions

61 See e.g. *S.H.H. v. the United Kingdom*, judgment of 29 January 2013, no. 60367/10, *I.K. v. Austria*, judgment of 28 March 2013, no. 2964/12, and *Senchishak v. Finland*, judgment of 18 November 2014, no. 5049/12.

62 *S.J. v. Belgium*, struck out by judgment of the Grand Chamber, 19 March 2015, no. 70055/10.

63 *Paposhvili v. Belgium*, hearing before the Grand Chamber on 16 September 2015, no. 41738/10.

in which the applicant was going to die in that case were of particular importance for analysis of Article 3 by the Court.

It is important to note that the Court, in all medical care cases, underlines the fact that the risk encountered by the applicants upon return does not emanate from intentional acts or omissions of public authorities or non-State bodies, but instead from a naturally occurring illness and the lack of sufficient resources to deal with it in the receiving country. It also proceeds with a some-way balancing test, by saying that finding that Article 3 requires all Member States to provide free and unlimited health care to all aliens without a right to stay within its jurisdiction, would place too great a burden on them.

It will be curious to see whether the *D. v. the United Kingdom* threshold will be maintained by the Grand Chamber in the upcoming case of *Paposhvili v. Belgium* (mentioned above).

Proposed deportation of Tamil asylum seeker to Sri Lanka in violation of Article 3 and application of interim measures in similar cases

JUDGMENT IN THE CASE OF NA. v. THE UNITED KINGDOM

(Application No. 25904/07)

17 July 2008

1. Principal facts

The applicant, Mr NA., was a Sri Lankan national of Tamil ethnicity born in 1975. He arrived in the United Kingdom clandestinely on 17 August 1999 and lodged an asylum application the following day on the grounds that he feared ill-treatment in Sri Lanka by the Sri Lankan army and the Liberation Tigers of Tamil Eelam (the so-called “Tamil Tigers”).

Mr NA. explained that he had been arrested and detained by the army on six occasions between 1990 and 1997 on suspicion of involvement with the Tamil Tigers. On each occasion, he had been released without charge. During one or possibly more of these periods of detention, he was ill-treated and as a result, his legs had scars from being beaten with batons. He had also been photographed and his fingerprints taken. On one occasion, his father had signed a document in order to secure his release. He feared the Tamil Tigers because his brother had done non-combative work for them and they had tried to recruit Mr NA. on two occasions.

His asylum claim was refused by the Secretary of State on 30 October 2002. His appeal against that decision was heard and dismissed by an Adjudicator on 27 July 2003 who found that, although the applicant’s account was credible, his fear of ill-treatment by the army upon his return was unjustified.

Mr NA. was issued with removal directions for 1 April 2006. On 3 April 2006, the Secretary of State refused to consider his further representations as amounting to a new asylum application. Although it was recognised that the general situation in Sri Lanka had deteriorated, this did not mean that all the returns should be stopped. There was no evidence that Mr NA. would be personally affected upon his return or that he was of any interest to the Sri Lankan authorities, given the fact that he had been away for a long period of time.

After the applicant’s successive applications for judicial review of the decision to return him to Sri Lanka failed, new removal directions were issued for 25

June 2007. On that date, after lodging an application to the European Court of Human Rights, the Court decided to apply Rule 39 of the Rules of Court (interim measures) and indicated to the Government that the applicant should not be removed until further notice. Furthermore, the case was prioritised under Rule 41.

In the course of 2007, the Court received an increasing number of requests for interim measures from Tamils who were being returned to Sri Lanka from Contracting States, in particular from the United Kingdom. In October 2007, the Section Registrar sent a letter to the United Kingdom Government expressing the hope that it would assist the Court by refraining for the time being from issuing removal directions in respect of Tamils in the same situation as Mr NA. Since it did not consider that the current situation in Sri Lanka warranted the suspension of removals of all Tamils who claimed that their return would expose them to a risk of ill-treatment, the United Kingdom Government stated that it was not in a position to assist the Court with its request. It was suggested that the difficulties posed by the increasing numbers of requests for interim measures by Tamils could best be addressed by the Court itself; by adopting a lead judgment which could provide guidance in the matter.

2. Decision of the Court

The applicant claimed that, if returned to Sri Lanka, he would be at real risk of being subjected to ill-treatment in breach of Article 3 (prohibition of inhuman or degrading treatment) and/or in violation of Article 2 (right to life) of the Convention.

Article 2

The Court found that the complaint under Article 2 was indissociable from that under Article 3 and therefore should be dealt with in the context of the examination of the latter one.

Article 3

While it was recognised that the general human rights situation in Sri Lanka had deteriorated, the Court had to consider whether it had changed sufficiently to mean that there was a generalised risk applicable to Tamils being returned there and, consequently, whether the applicant's removal would constitute a violation of Article 3.

In its assessment, the Court first considered the general principles applicable to expulsion cases and then set out its approach to the objective information placed before it. On this basis, it assessed the risk to Sri Lankan nationals of Tamil ethnicity returning to Sri Lanka and the individual circumstances of the applicant's case in order to determine whether there would be a violation if he was returned to his country.

In the Court's opinion, the fact that there had been a deterioration in the security situation in Sri Lanka and a corresponding increase in human rights violations did not constitute an overall, general risk to all Tamils returning to the country. The assessment of this risk could only be done on an individual basis. It was therefore, in principle, legitimate to assess the individual risk to returnees on the basis of a list of "risk factors" which the United Kingdom authorities, with the benefit of direct access to objective information and expert evidence, had drawn up. However, the Court underlined that a number of individual factors which did not constitute a real risk when considered separately, might do so when taken cumulatively, in a situation of general violence and heightened security. It followed that both the assessment of the risk to Tamils of "certain profiles" and the assessment of whether individual acts of harassment cumulatively amount to a serious violation of human rights could only be done on an individual basis by demonstrating the existence of further special distinguishing features which would place them at real risk of ill-treatment contrary to Article 3.

The information before the Court showed evidence of systematic torture and ill-treatment by the Sri Lankan authorities of Tamils who would be of interest to them in their efforts to combat the Tamil Tigers. In addition, the Sri Lankan authorities had the technological means and procedures in place to identify at Colombo airport failed asylum seekers and those who were wanted by the authorities.

Regarding the alleged risk from Tamil Tigers, the Court accepted that any risk in Colombo from Tamil Tigers would be only to high profile Tamils - i.e. Tamils who were opposition activists, or those seen as renegades or traitors. Consequently, Mr NA. would not be at real risk of ill-treatment if returned to Colombo.

In assessing his position in relation to the Sri Lankan authorities, the Court examined the strength of the applicant's claim that he was at real risk as a result of an accumulation of the risk factors in light of recent developments. Additional relevant risk factors which had been taken into account in Mr NA.'s

case were: the fact that his father had signed a document to secure his release; the presence of scarring, which greatly increased the cumulative risk of ill-treatment; the applicant's age, gender and origin; his previous record as a suspected or actual Tamil Tiger member; his return from London; and the fact that he had made an asylum claim abroad. All of these factors contributed to the risk of identification, questioning, search and detention at the airport and, to a lesser extent, in Colombo. The fact that it had been over ten years since the applicant had last been arrested and detained by the Sri Lankan authorities was not held as conclusive as it remained likely that the record of this arrest would still exist. Moreover, the Court found that the authorities' interest in particular categories of returnees was likely to change over time in response to domestic developments and could increase as well as decrease.

The Court took note of the current climate of general violence in Sri Lanka and considered cumulatively the factors present in the applicant's case. It underlined that those considered by the Sri Lankan authorities to be of interest in their efforts to combat the Tamil Tigers were systematically exposed to torture and ill-treatment. There was a real risk that the authorities at Colombo airport would be able to access the records on the applicant's detention and, when taken cumulatively with the other risk factors he had relied upon, it was found to be likely that the applicant would be detained and strip-searched. This in turn would lead to the discovery of his scars. On this basis, the Court found that these were substantial grounds for finding that the applicant would be of interest to the Sri Lankan authorities in their efforts to combat the Tamil Tigers.

Consequently, the Court held unanimously that at the present time, the applicant's return to Sri Lanka would violate Article 3, exposing Mr NA. to a real risk of ill-treatment.

Article 41

No claim in respect of pecuniary or non-pecuniary damage was made under Article 41, but the Court awarded the applicant €4,451 for costs and expenses, less €850 already received in legal aid from the Council of Europe.

3. Comment

In this case the Court was faced with the allegation that when the situation in a given country constitutes a generalised risk for whoever is present in that

country, any removal would constitute a violation of Article 3. This allegation was raised at a period when applications for Rule 39 of the Rules of the Court in relation for removals to Sri Lanka were substantially high. This judgment is the Court's answer to the Sri Lankan situation at the time.

In its assessment the Court underlined firstly, the need to have due regard to the deterioration of the security situation in the destination country – Sri Lanka in this case – and the corresponding increase in general violence and heightened security; and secondly, the need to take a cumulative approach to all possible risk factors identified by the applicant as applicable to his case.

It is especially in relation to the first point above that this judgment marks a fundamental step in the case-law of the Court in asylum cases. Indeed, the particular importance of this judgment resides in the fact that the Court accepts for the first time that the general situation in a given country might be sufficient to conclude that the removal of any person to that country would constitute *per se* a violation of Article 3 of the Convention. However the Court makes clear that there is a very high threshold and it will apply this principle only in very grave and exceptional situations. In the circumstances of the specific case, and in view of the objective material it had at its hands, the Court concluded that the situation in Sri Lanka, at the time of the Court's assessment, was not so problematic that it had to be found that the removal of every person to Sri Lanka would constitute a breach of Article 3 just in view of the general situation.

Then the Court turned to the second point, the cumulative approach. It held that the general situation of violence in Sri Lanka combined with the personal characteristics of the applicant, were such that the removal of the applicant to Sri Lanka would constitute a violation of Article 3 of the Convention. The Court took into consideration especially the fact that the applicant was arrested six times between 1990 and 1997, that he was ill-treated in detention and that it appeared a record was made of his detention on at least one occasion, the age, gender and origin of a returnee, data that he was or used to be member of the Tamil opposition, that he was a failed asylum seeker abroad and so on.

It was in view of the cumulative effect of all these factors, including the general situation and the personal characteristics of the applicant that the Court concluded that a removal to Sri Lanka would constitute an Article 3 violation.

*Compliance with interim measures adopted by the Court***JUDGMENT IN THE CASE OF BEN KHEMAIS v. ITALY**

(Application No. 246/07)

24 February 2009**1. Principal facts**

The applicant, Essid Sami Ben Khemais, was a Tunisian national who was born in 1968. He was in prison in Tunisia.

In February 2002, the Italian courts sentenced Mr Ben Khemais to five years' imprisonment for membership of a criminal organisation. He served his sentence in full. In March 2006 the Como District Court sentenced him to another prison sentence for assault and ordered him to be deported from Italy after he had served his sentence. The outcome of an appeal lodged by the applicant with the Court of Cassation is unknown.

In the meantime, by a judgment of 30 January 2002, the Tunis Military Court had sentenced the applicant to ten years' imprisonment in his absence for membership of a terrorist organisation. That conviction was apparently based exclusively on the statements of a co-accused.

Mr Ben Khemais lodged his application with the European Court of Human Rights in January 2007. In March 2007, pursuant to Rule 39 of the Rules of Court, the Court indicated to the Italian Government that it was desirable, in the interests of the parties and of the smooth progress of the proceedings before the Court, to stay the order for the applicant's deportation pending a decision on the merits.

However, on 2 June 2008 the applicant's representative informed the Registry of the Court that his client had been taken to Milan Airport in order to be deported to Tunisia. The Italian Government informed the Court on 11 June 2008 that a deportation order had indeed been issued against the applicant on 31 May 2008 on account of his role in the activities of Islamic extremists. The Milan Criminal Court had observed, *inter alia*, that he represented a threat to national security because he was in a position to renew contacts with a view to resuming terrorist activities, including on an international scale. The applicant had been deported to Tunisia on 3 June 2008.

The Italian Government also submitted documents to the Court containing diplomatic assurances that they had obtained from the Tunisian authorities. According to these documents, the applicant would not be subjected to torture, inhuman or degrading treatment or arbitrary detention. He would be given appropriate medical treatment and would be allowed to receive visits from his lawyer and members of his family.

2. Decision of the Court

Relying on Articles 2, 3 and 6, the applicant alleged in particular that his deportation to Tunisia had exposed him to a risk of death, torture and a flagrant denial of justice. Under Article 34, he alleged that the enforcement of the decision deporting him had infringed his right of individual petition.

Article 3

The Court reiterated that, in its Grand Chamber judgment in the case of *Saadi v. Italy*⁶⁴, it had concluded that international reports mentioned numerous and regular cases of torture and ill-treatment meted out in Tunisia to persons suspected or found guilty of terrorism and that visits by the International Committee of the Red Cross to Tunisian prisons could not exclude the risk of subjection to treatment contrary to Article 3.

In the present case the Court did not see any reason to review its conclusions, which were, moreover, confirmed by Amnesty International's report of 2008 on Tunisia. That report also said that although a lot of detainees had complained of having been tortured while in police custody, "*in virtually all cases the authorities had failed to carry out investigations or bring the alleged perpetrators to justice*". The inability of Mr Ben Khemais' representative before the Court to visit his client confirmed the difficulty experienced by Tunisian prisoners in gaining access to independent foreign lawyers even where they were parties to judicial proceedings before international courts. Thus, once an applicant was deported to Tunisia, the lawyers risked finding themselves unable to verify their circumstances and ascertain any complaints they might raise regarding the treatment inflicted on them. It also appeared impossible for the Italian Government to undertake any such checks since their ambassador could not see the applicant at his place of custody.

64 *Saadi v. Italy*, [Grand Chamber] judgment of 28 February 2008, no. 37201/06, included in this section.

In those circumstances the Court was unable to accept the argument advanced by the Government to the effect that the assurances given by the Tunisian authorities secured effective protection against the serious risk of ill-treatment incurred by the applicant. In that regard, it reiterated the principle affirmed by the Parliamentary Assembly of the Council of Europe (PACE) in its Resolution No. 1433 (2005), according to which diplomatic assurances could not be relied upon unless the absence of a risk of ill-treatment was firmly established.

The Court also pointed out that the Tunisian authorities had indicated that the applicant had received many visits from members of his family and his Tunisian lawyer. The latter had stated that his client had not alleged that he had suffered ill-treatment, which appeared to be confirmed by a medical report annexed to the diplomatic assurances. However, whilst that showed that the applicant had not suffered ill-treatment in the weeks following his deportation it did not in any way predict the applicant's future fate.

Accordingly, the Court held that the enforcement of the order deporting the applicant to Tunisia had violated Article 3.

Articles 2 and 6

The Court held that there was no need to consider whether the enforcement of the order deporting the applicant had also infringed Articles 2 and 6.

Article 34

The Court stressed that the level of protection which the Court was able to afford the applicant in respect of the rights laid down in Articles 2 and 3 had been irreversibly reduced following his deportation. It mattered little that he had been deported after the exchange of observations between the parties; the measure had nonetheless deprived any finding of a violation of all useful effect as the applicant had been deported to a country that was not a party to the Convention, where he risked being subjected to treatment contrary to the Convention.

Moreover, it was implicit in the notion of the effective exercise of the right of application that for the duration of the proceedings in Strasbourg the Court should remain able to examine the application under its normal procedure. The Tunisian authorities had confirmed, however, that Mr Ben Khemais' representative before the Court could not be authorised to visit his client in prison.

Furthermore, the Court noted that the Italian Government, before deporting the applicant, had not requested that the interim measure adopted under Rule 39 of the Rules of Court be lifted and had proceeded to deport him without even obtaining the diplomatic assurances they had referred to in their observations.

Consequently, on account of his deportation to Tunisia, the applicant had not been able to advance all the arguments relevant to his defence and the judgment of the Court was liable to be deprived of all useful effect. The fact that the applicant had been removed from Italy's jurisdiction presented a serious obstacle that could prevent the Italian Government from complying with their obligations to protect the applicant's rights and erase the consequences of the violations found by the Court. Accordingly, the Court held that there had been a violation of Article 34.

Article 41

The Court awarded the applicant €10,000 in respect of non-pecuniary damage and €5,000 for costs and expenses.

3. Comment

Much of the Court's case law is devoted to re-iterating the that the rule of law – which lies at the heart of the Convention – requires that states must comply with the judgments of their own courts⁶⁵. This case demonstrates that the Court equally insists that the rule of law must apply internationally. Rule 39 of the Court's Rules exists so as to permit the Court to ensure that serious irreversible harm does not occur to an applicant pending the Court's substantive consideration of a case. It is not applied automatically and applicants need to make out a strong case in order to be granted a "Rule 39 indication". The normal practice of States party to the Convention has been to comply with such indications but since the Grand Chamber judgment in *Mamatkulov and Askarov v. Turkey*⁶⁶ it has been clear that there is a legal obligation under Article 34 of the Convention for States to comply with Rule 39 indications. In the present case Italy failed to do so. This is all the more unacceptable since the return of Ben Khemais to Tunisia occurred in the context of a very similar situation to

65 See e.g. *Burdov v. Russia*, judgment of 15 January 2009, no. 33509/04.

66 *Mamatkulov and Askarov v. Turkey*, [GC] judgment of 4 February 2005, no. 46827/99 and 46951/99.

that which had existed in *Saadi v. Italy*⁶⁷. In that case, decided by the Grand Chamber just four months before the return of Mr Ben Khemais, the Court emphatically re-affirmed the absolute nature of the prohibition on returning those suspected of terrorist activities to situations where there is a real risk that they will be subjected to torture or inhuman or degrading treatment. The Court paid particular attention to the fact that the State had not requested the Court to lift the Rule 39 indication, which it knew was still in force before carrying out the expulsion. Article 34 – the right to the unimpeded exercise of the right of individual petition – was thus violated.

67 *Saadi v. Italy*, [Grand Chamber] judgment of 28 February 2008, no. 37201/06, included in this section. See also *Rrapo v. Albania*, judgment of 25 September 2012, no. 58555/10, where only a violation of Article 34 was found by the Court.

Transferring two Iraqi nationals from UK detention to the Iraqi authorities breached the Convention

**JUDGMENT IN THE CASE OF AL-SAADON AND MUFDHI
v. THE UNITED KINGDOM**
(Application No. 61498/08)
2 March 2010

1. Principal facts

The applicants, Mr Al-Saadoon and Mr Mufdhi, were Iraqi nationals who were born in 1952 and 1950. They were Sunni Muslims from southern Iraq and former senior officials of the Ba'ath party. At the time of the Court's judgment they were detained in prison near Baghdad.

Following the invasion of Iraq by an international coalition of armed forces on 20 March 2003, the applicants were arrested by British forces and detained in British-run detention facilities as they were suspected, among other things, of having orchestrated violence against the coalition forces. In October 2004, the United Kingdom's Royal Military Police concluded that applicants had been involved in the deaths of two British soldiers, ambushed and murdered in southern Iraq on 23 March 2003.

In December 2005, the British authorities decided to refer the murder case against the applicants to the Iraqi criminal courts. In May 2006, the applicants appeared before the Basra Criminal Court on charges of murder and war crimes. The Basra Criminal Court issued arrest warrants against them and made an order authorising their continued detention by the British Army in Basra. Subsequently, the Basra Criminal Court decided that the allegations against the applicants constituted war crimes and therefore fell within the jurisdiction of the Iraqi High Tribunal ("IHT"). The case was transferred to the IHT which, on 27 December 2007, formally requested the British forces to transfer the applicants into its custody; repeated requests were made to that effect until May 2008.

On 12 June 2008, the applicants brought judicial review proceedings in England challenging, among other things, the legality of their transfer. The case was heard by the English Divisional Court which, on 19 December 2008, declared the proposed transfer lawful. The court found that since the applicants were held in a British military detention facility, they were within the juris-

diction of the United Kingdom as provided by Article 1 (obligation to respect human rights) of the European Convention of Human Rights. Nonetheless, the court held that under public international law the United Kingdom was obliged to surrender the applicants unless there was clear evidence that the receiving State intended to subject them to treatment so harsh as to constitute a crime against humanity. It found no substantial grounds for believing there to be a real risk that, on being transferred, a trial against the applicants would be flagrantly unfair or that they would face torture and/or inhuman and degrading treatment. While, on the other hand there was a real risk that the death penalty would be applied if the applicants were surrendered to the Iraqi authorities, the death penalty in itself was not prohibited by international law.

The applicants' appeal was refused by the Court of Appeal on 30 December 2008. The Court of Appeal found that there was a real risk the applicants would be executed if transferred. It concluded, however, that the United Kingdom was not exercising jurisdiction as it was detaining the applicants on Iraqi territory and on the orders of the Iraqi courts. The Convention did not, therefore, apply and the United Kingdom had to respect Iraqi sovereignty and transfer the applicants.

Immediately after that decision, the applicants applied to the European Court of Human Rights for an interim measure under Rule 39 of its Rules of Court to prevent the British authorities making the transfer. This was granted on 30 December 2008. The following day the UK Government informed the Court that, principally because the UN Mandate - which authorised the role of British forces in arrest, detention and imprisonment tasks in Iraq - was due to expire at midnight on 31 December 2008, exceptionally they could not comply with the measure and that they had transferred the applicants to Iraqi custody earlier that day.

On 16 February 2009, the applicants were refused leave to appeal by the House of Lords.

The applicants' trial before the IHT started in May 2009 and ended in September 2009 with a verdict cancelling the charges against them and ordering their immediate release. Upon an appeal by the prosecutor, the Iraqi Court of Cassation remitted the case for further investigation by the Iraqi authorities and for a retrial. The applicants remained in custody at the time of the European Court's judgment.

2. Decision of the Court

The applicants complained about their transfer to Iraqi custody. They relied on Article 2, Article 3, Article 6 and Article 1 of Protocol No. 13. They also complained about the fact that they were transferred to the Iraqi authorities despite the Court's indication under Rule 39 of its Rules of Court, in breach of Articles 13 and 34.

Jurisdiction

On 30 July 2009, the Court adopted a decision on the admissibility of the applicants' complaints in which it considered that the United Kingdom authorities had had total and exclusive control, first through the exercise of military force and then by law, over the detention facilities in which the applicants were held. The Court found that the applicants had been within the United Kingdom's jurisdiction and had remained so until their physical transfer to the custody of the Iraqi authorities on 31 December 2008.

Article 3

The Court emphasised that 60 years ago, when the Convention was drafted, the death penalty had not been considered to violate international standards. However, there had been a subsequent evolution towards its complete abolition, in law and in practice, within all the Member States of the Council of Europe. Two Protocols to the Convention had thus entered into force, abolishing the death penalty in time of war (Protocol No. 6) and in all circumstances (Protocol No. 13), and the United Kingdom had ratified them both. This demonstrated that Article 2 of the Convention had been amended so as to prohibit the death penalty in all circumstances. The Court concluded therefore that the death penalty, which involved the deliberate and premeditated destruction of a human being by State authorities, causing physical pain and intense psychological suffering as a result of the foreknowledge of death, could be considered inhuman and degrading and, as such, contrary to Article 3 of the Convention.

The Court accepted the findings of the national courts which had concluded, shortly before the physical transfer took place, that there were substantial grounds for believing there to be a real risk of the applicants' being condemned to the death penalty and executed. It further observed that the Iraqi authorities had still not given any binding assurance that they would not execute the applicants. Moreover, while it was impossible to predict the outcome of the

new investigation and trial ordered by the Iraqi courts, there were still substantial grounds for believing that the applicants would run a real risk of being sentenced to death if tried and convicted by an Iraqi court.

The death penalty had been reintroduced in Iraq in August 2004. Nonetheless, without obtaining any assurance from the Iraqi authorities, the UK authorities had decided in December 2005 to refer the applicants' case to the Iraqi courts and in May 2006 proceedings commenced in the Basra Criminal Court. The Court considered that from that date, at least, the applicants had been subjected to a well-founded fear of execution, giving rise to a significant degree of mental suffering, which must have intensified and continued from the date they were physically transferred into Iraqi custody.

The Government had argued that they had no option but to respect Iraqi sovereignty and transfer the applicants, who were Iraqi nationals held on Iraqi territory, to the custody of the Iraqi courts when so requested. However, the Court was not satisfied that the need to secure the applicants' rights under the Convention inevitably required a breach of Iraqi sovereignty. It did not appear that any real attempt was made to negotiate with the Iraqi authorities to prevent the risk of the death penalty.

Consequently, in view of the above, the Court concluded that the applicants had been subjected to inhuman and degrading treatment, in violation of Article 3.

Article 6

The Court accepted the national courts' finding that, at the date of transfer, it had not been established that the applicants risked a flagrantly unfair trial before the IHT. Now that the trial had taken place, there was no evidence before the Court to cast doubt on that assessment. It followed that there had been no violation of Article 6.

Articles 13 and 34

The Government had not satisfied the Court that they had taken all reasonable steps, or indeed any steps, to seek to comply with the Court's Rule 39 indication not to transfer the applicants to Iraqi custody. The failure to comply with the Court's indication and the transfer of the applicants out of the United Kingdom's jurisdiction had exposed them to a serious risk of grave and irrep-

arable harm and had unjustifiably nullified the effectiveness of any appeal to the House of Lords. The Court therefore found violations of Articles 13 and 34 of the Convention.

Article 41

The Court held that the finding of a violation constituted sufficient just satisfaction for the non-pecuniary damage suffered by the applicants and awarded the applicants jointly €40,000 for costs and expenses.

3. Comment

The Court found in *Bankovic and Others v. Belgium and 16 Other Contracting States*⁶⁸ that there was no exercise of jurisdiction when Contracting Parties to the Convention bombed a Belgrade TV station during the NATO operations of 1999. This case however reaffirms the Court's previous case law that jurisdiction for the purposes of Article 1 of the ECHR is exercised when a State holds a person in detention even though the detention occurs on the territory of another State. Once jurisdiction arises the State will be responsible for securing the Convention rights of the affected individuals.

The Court extensively discussed the United Kingdom's obligations under Article 2 (the right to life) and Protocols Nos. 6 and 13 (abolition of the death penalty) noting that they must be strictly construed. Without expressly explaining why, but having noted that it was not clear whether the fresh charges to which the applicants were now subject would in fact attract the death penalty, the Court decided to rule on the complaints under Article 3 and not to rule on the complaints made under Article 2 or the Protocols.

In previous case law, the Court has held that the imposition of the death penalty after an unfair trial constituted a violation of Article 3⁶⁹. In the present case the Court found that the failure by the United Kingdom to take all the steps necessary to ensure that the applicants would not be subjected to the death

68 *Bankovic and Others v. Belgium and 16 Other Contracting States*, [Grand Chamber] decision of 12 December 2001, no. 52207/99.

69 See *Öcalan v. Turkey*, [Grand Chamber] judgment of 5 May 2005, no. 46221/99, concerning a death sentence following an unfair trial by a court whose independence and impartiality were open to doubt. See also *Bader and Kanbor v. Sweden*, judgment of 8 November 2005, no. 13284/04, included in this section, where the applicant had been sentenced to death *in absentia*.

penalty violated their rights under Article 3 because of the fear and anguish to which they had been subjected. The absolute prohibition contained in Article 3 overrode the United Kingdom's internationally concluded arrangements with Iraq. It is important to underline that this judgment could be interpreted as offering an updated reading of Article 2 of the Convention in relation to death penalty. For this purpose is worth quoting paragraph 120 of the Court's judgment. The Court says "*[i]t can be seen, therefore, that the Grand Chamber in Öcalan did not exclude that Article 2 had already been amended so as to remove the exception permitting the death penalty. Moreover, as noted above, the position has evolved since then. All but two of the member States have now signed Protocol No. 13 and all but three of the States which have signed it have ratified it. These figures, together with consistent State practice in observing the moratorium on capital punishment, are strongly indicative that Article 2 has been amended so as to prohibit the death penalty in all circumstances. Against this background, the Court does not consider that the wording of the second sentence of Article 2(1) continues to act as a bar to its interpreting the words "inhuman or degrading treatment or punishment" in Article 3 as including the death penalty (compare Soering, cited above, paras 102-04)*".

The Court also found a violation of Article 34 as a consequence of the failure to comply with the binding Rule 39 indication made by the Court prohibiting the applicants' transfer to the Iraqi authorities. Since the judgment in *Mamatkulov and Askarov v. Turkey*⁷⁰ it has been clear that States are under an obligation to comply with Rule 39 indications. Only the ECtHR can lift a Rule 39 indication once it has been applied. The British Judge concurred with the finding of a violation of Article 3 but dissented in relation to the finding under Article 34.

70 *Mamatkulov and Askarov v. Turkey*, [Grand Chamber] judgment of 4 February 2005, nos. 46827/99 and 46951/99.

*Inadequate care and unlawful detention of an unaccompanied
minor seeking asylum*

JUDGMENT IN THE CASE OF RAHIMI v. GREECE

(Application No. 8687/08)

5 April 2011

1. Principal facts

The applicant, Eivas Rahimi, born in 1992, was 15 years old when he arrived in Greece as an unaccompanied minor. He had fled the armed conflicts in his home country of Afghanistan in 2007 following the death of his parents. According to the applicant, his life was in danger, as he was vulnerable due to his young age, the fact that he was an orphan and that the Afghan State could offer him no protection.

Upon his arrival on the island of Lesbos, he was arrested and sent to a detention camp for refugees where he was held from 19-21 July 2007, pending an order for his deportation. Whilst being detained, he was offered no information on the possibility to seek asylum or on his other legal rights in a language that he could understand. He was placed among adults in unhygienic accommodation.

A deportation order was issued on 20 July, which mentioned that the applicant's cousin, N.M., would be accompanying him back. The applicant was offered no assistance by the authorities upon his release - he was not appointed a legal guardian and was living on the streets in Athens until he received help by local NGOs.

The applicant's request for political asylum was rejected in September 2007 and his appeal was still pending at the time of the European Court of Human Rights judgment.

2. Decision of the Court

Relying on Articles 3 and 13, the applicant complained of a lack of support appropriate to his status as an unaccompanied minor. He also complained about the conditions in the detention centre. Further, under Article 5(1), (2) and (4), he alleged that his situation as an illegally resident minor had been consistently disregarded and that he had not been informed of the reasons for his arrest or

of any remedies in that connection.

Article 3 and 13

Whether the applicant had been accompanied

The question whether Eivas had been accompanied, which the parties disagreed on, was decisive in terms of the State's obligations towards him. Basing its findings on the registration of the applicant's request for political asylum and the report written by a local NGO (Arsis), the Court considered that since 27 July 2007 the applicant had not been accompanied by a close relative.

In the period from 19 to 27 July 2007 the authorities, on the basis of an uncertain procedure, had assigned the applicant a designated adult, N.M. The Court noted the significant impact on the personal circumstances of the applicant arising from the authorities' decision to associate him with another adult who was supposed to assume the functions of a guardian and represent him before the authorities. The official documents contained no information concerning the supposed family ties between the applicant and N.M.

Hence, the Court found it clear that the applicant had been an unaccompanied minor.

Exhaustion of domestic remedies

The information brochure provided by the authorities outlining some of the available remedies, mentioned the possibility of making a complaint to the Chief of Police but included no details of this procedure. The Court noted here that the applicant was a minor without legal representation during his detention. In addition, the information brochure was written in Arabic despite his mother tongue being Farsi. Therefore, the Court could not consider that the information brochure, referring to the remedies available to the applicant was understandable.

The Court further questioned whether the Chief of Police represented an authority satisfying the requirements of impartiality and objectivity necessary to make the remedy effective. As to the legislation, it did not empower the courts to examine living conditions in detention centres for illegal aliens or to order the release of a detainee on those grounds. Accordingly, the Court rejected the Government's objection of non-exhaustion of domestic remedies.

Conditions of detention in the Pagani Centre

The Court noted that reports from a number of well-respected international organisations had reported appalling conditions at the Pagani Centre: seven hundred and twenty migrants were detained in the Centre, which consisted of five large warehouses, when it had a capacity of accommodation for three hundred people. The Centre lacked sufficient places for minors. With regard to the health situation of the Centre, the findings revealed appalling detention conditions. Over one hundred people shared two toilets and inmates had to share mattresses or sleep on the floor. The Court noted in particular flooded toilets, poor ventilation and a general unhealthy environment.

The Court found that the conditions of detention to which the applicant was subjected to in the Pagani Centre, amounted to degrading treatment. Accordingly, there had been a violation of Article 3 of the Convention.

Moreover, given the above considerations in relation to the issue of exhaustion of domestic remedies, the Court concluded that the State had also failed to fulfil its obligations under Article 13 of the Convention.

The period following the applicant's release

The Court considered that the behaviour of the authorities, which showed indifference to the well-being of the applicant, had caused him deep anguish and concern, until he was eventually taken care of by local NGOs. As the applicant came within the class of highly vulnerable members of society, the authorities were required to take adequate measures to protect and care for him, particularly by appointing a guardian. The Court referred to *M.S.S. v. Belgium and Greece*⁷¹, in which it had noted “*the particular state of insecurity and vulnerability in which asylum seekers are known to live in Greece*” and found the authorities responsible “*because of their inaction*”. The threshold of severity required by Article 3 had been attained in the applicant’s case and the Court held that the State had failed to comply with its obligations under Article 3.

In view of its findings concerning the exhaustion of domestic remedies, the Court held that the State had also failed to comply with its obligations under Article 13.

71 *M.S.S. v. Belgium and Greece*, [GC] judgment of 21 January 2011, no. 30696/09, also included in this section.

Article 5(1)

The Court found a violation of the right to liberty and security under Article 5 as the detention of the applicant appeared to be the result of an automatic application of national legislation with no consideration of the particular circumstances of the applicant as an unaccompanied minor. The authorities had given no consideration to the best interests of the applicant as a minor, instead automatically applying the relevant legislation. Nor had they explored the possibility of replacing detention with a less drastic measure.

The Court doubted the authorities had acted in good faith in carrying out the detention measure. The applicant's detention had therefore not been "lawful" within the meaning of Article 5(1)(f).

Article 5(4)

The applicant had been unable in practice to contact a lawyer. Since the information brochure had been incomprehensible to him and he had no guardian who could act as his legal representative, the Court failed to see how the applicant could have exercised the available remedies.

Accordingly, there had been a violation of Article 5(4).

Article 41

The Court awarded the applicant €15,000 in respect of non-pecuniary damage and €1,000 for costs and expenses.

3. Comment

This case raises a number of problems and shows how complex and problematic the situation of asylum seekers in general is when they arrive on the Greek shores. However, the particular importance of this case resides in the fact that the applicant was an unaccompanied child, with no relatives able to assist him. This fact has indeed attracted the Court's particular attention in this judgment⁷². This attention is shown first in the assessment of the applicant's

72 Particular attention has also been dedicated to the position of unaccompanied children in the Dublin Regulation III – see Article 6 of the "Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international

status. The Court was very scrupulous in analysing that the measures taken by the Greek authorities to assign a guardian to the applicant for representing him for eight days in July 2007, had been insufficient and concluded that the applicant was to be considered an unaccompanied child in this case. This way the Court drew attention to the particular importance of the guardianship procedures in cases of unaccompanied minor asylum seekers. The regularity of such procedures might later determine the future obligations of the domestic authorities in relation to the asylum seeker. If the procedure is irregular and has not carefully taken into account the interest of the child, a full set of specific rights apply to the asylum seeker who is an unaccompanied child.

That preliminary finding paved the way for the following analysis of the Court in this case: the conditions of the detention of the applicant in the Pagani detention centre⁷³ were degrading and not appropriate for children. Following *M.S.S. v. Greece and Belgium*, the Court stated that it could be said as *a fortiori* argument in the case of a minor, that the inaction of the authorities to take care of the applicant after his release from detention, constituted degrading treatment.

Also of particular importance are the findings of the Court in relation to Article 5(1) and (4) of the Convention. The Court found that the fact that the applicant was a minor was not taken into account by the authorities in automatically applying the national legislation regarding the detention measure as well as the effective possibility to use remedies against that detention. These conclusions call for particular attention by the national authorities in taking security measures against unaccompanied children who are seeking asylum in Europe.

 protection lodged in one of the Member States by a third-country national or a stateless person (recast)", Official Journal of the European Union L (180/31).

73 For similar findings on the Pagani detention centre conditions see also *Mahmundi and Others v. Greece*, judgment of 31 July 2012, no. 14902/10, and *Ahmade v. Greece*, judgment of 25 September 2012, no. 50520/09.

Deportation of two Somali nationals to Mogadishu would constitute a violation of Article 3

JUDGMENT IN THE CASE OF SUFI AND ELMI v. THE UNITED KINGDOM

(Application Nos. 8319/07 and 11449/07)

28 June 2011

1. Principal facts

The case concerned a complaint by two Somali nationals that, if returned to Mogadishu, they risked being killed or subjected to ill-treatment.

The applicants, Abdisamad Adow Sufi and Abdiaziz Ibrahim Elmi, were Somali nationals born in 1987 and 1969 respectively.

The first applicant, Mr Sufi, entered the United Kingdom clandestinely on 30 September 2003. On 30 October 2003, he claimed asylum on the ground that he belonged to the Reer-Hamar sub-clan of the minority Ahansi clan, which was victim of persecution by Hawiye militia, who had killed his father and sister, and seriously injured him. In April 2005 his asylum application was refused and later in May 2005 his appeal was dismissed, finding *inter alia* that his account was not credible.

The second applicant, Mr Elmi, was born in Hargeisa, capital of the self-declared State of Somaliland; he was a member of the majority Isaaq clan. He joined his father – a high ranking officer in the army during the Barré regime – in the United Kingdom on 18 October 1988. After his father’s death, on 26 April 1989, the applicant made an application for asylum based on his father’s position in the Somali army. On 31 October 1989, he was recognised as a refugee and later granted leave to remain until 1993. On 7 January 1994, he was granted indefinite leave to remain in the United Kingdom.

Following convictions for a number of serious criminal offences – including burglary and threats to kill in Mr Sufi’s case and robbery and supplying class A drugs (cocaine and heroine) in Mr Elmi’s case – both applicants were issued with deportation orders. They appealed unsuccessfully.

2. Decision of the Court

Relying on Articles 2 and 3 of the Convention, the applicants complained that

their removal to Somalia would put their lives at risk and/or expose them to a real risk of ill-treatment. They also complained that their removal would disproportionately interfere with their rights under Article 8 of the Convention.

The applications were lodged with the European Court of Human Rights on 21 February 2007 and 14 March 2007 respectively.

Under Rule 39 of the Rules of Court, the ECtHR granted interim measures to Mr Sufi and Mr Elmi in order to prevent their removal to Mogadishu prior to the Court's consideration of their applications.

Article 3

The Court decided to consider the applicants' complaints under Articles 2 and 8 in the context of its examination of the related complaint under Article 3.

The Court reiterated that the prohibition of torture and of inhuman or degrading treatment or punishment was absolute, irrespective of the victims' conduct. Therefore, however undesirable or perilous the applicants' behaviour was, it could not be taken into account.

In examining an expulsion case, the Court observed that all the circumstances must be analysed in order to determine whether substantial grounds exist for believing that, if deported, the applicant would face a real risk of treatment contrary to Article 3. If the existence of such a risk was recognised, the applicant's removal would necessarily be in breach of Article 3. To this end, the Court specified that not every situation of general violence would give rise to such a risk. As a matter of fact, a general situation of violence would be of sufficient intensity to create such a risk only "*in the most extreme cases*".

According to the findings of the United Kingdom Asylum and Immigration Tribunal, it was not in dispute that toward the end of 2008 Mogadishu was not a safe place to live for the majority of its citizens. Furthermore, according to several country reports, the situation in Mogadishu deteriorated further in 2010 and 2011, resulting in indiscriminate bombardments and military offensives, and unpredictable and widespread violence. It had caused thousands of civilian casualties and the displacement of hundreds of thousands of people from the city.

Consequently the Court held that the level of violence in Mogadishu was of

sufficient intensity to pose a real risk of treatment in breach of Article 3 to anyone in the capital. It did not exclude the possibility that a well-connected individual might be able to obtain protection in Mogadishu, but it also considered that only connections at the highest level would be able to assure such protection, and that anyone who had not been in Somalia for some time was unlikely to have such connections. Therefore the violence was of such a level of intensity that anyone in Mogadishu, except possibly those who were exceptionally well-connected to “powerful actors”, would be at real risk of treatment contrary to Article 3.

Nonetheless, Article 3 did not preclude the Contracting States from relying on the internal flight alternative providing that the returnee could travel to, gain admittance to and settle in an area where he had close family connections without being exposed to a real risk of proscribed treatment. The Court accepted the possibility for a returnee to travel from Mogadishu International Airport to another part of southern and central Somalia safely. However, a returnee with no recent experience of living in Somalia would be at real risk of ill-treatment if his home area was in – or if he was required to travel through – an area controlled by al-Shabaab, one of the warring factions, as he would not be familiar with the strict Islamic codes imposed there, and hence could be subjected to punishments such as beating, flogging, stoning, and corporal punishment.

The Court considered it reasonably likely that a returnee who either had no close family connections, or could not travel safely to an area where he had such connections, would have to seek refuge in an Internal Displaced Persons (IDP) or refugee camp. The Court therefore had to consider the conditions in those camps. The conditions in the main centres – the Afgooye Corridor in Somalia and the Dadaab camps in Kenya – were sufficiently desperate to amount to treatment reaching the Article 3 threshold. Access to food and water was very limited in the Afgooye Corridor and, although humanitarian assistance was available in the Dadaab camps, due to extreme overcrowding, access to shelter, water and sanitation facilities was extremely limited. Therefore, any returnee forced to seek refuge there would be at real risk of being exposed to treatment in violation of Article 3.

With respect to the applicants’ personal circumstances, the Court found that if Mr Sufi was to remain in Mogadishu, there would be a real risk that he would be victim of Article 3 type ill-treatment. Further, if Mr Sufi was able to settle elsewhere, most likely he would travel to Qoryoley – the only area where he

had close family connections and where the general violence was of a lesser intensity but under the control of al-Shabaab. In that case Mr Sufi would be at risk of human rights violations. The Court agreed that Mr Sufi would not, as the Government suggested, be safe if he “*played the game*”. Considering that Mr Sufi arrived in the United Kingdom in 2003, when he was only sixteen years old, the Court highlighted that the risk would be even higher for Somalis who have lived out of the country long enough to make it impossible for them to disguise this fact. Consequently, the Court held it likely that the applicant would end up in an IDP or refugee camp, where conditions were sufficiently dire to reach the Article 3 threshold.

As far as the second applicant was concerned, the Court held that Mr Elmi would be at real risk of ill-treatment if he was to remain in the city of Mogadishu. Although he was a member of the majority Isaaq clan, the Court did not consider this to be evidence of sufficiently powerful connections able to protect him in Mogadishu. Lacking any evidence of close family connections elsewhere in southern or central Somalia, and considering that he had arrived in the United Kingdom in 1998 when he was nineteen years old and had had no experience of living under al-Shabaab’s repressive regime, the Court held that Mr Elmi would very likely seek refuge in an IDP or refugee camp, where there would be a real risk of ill-treatment in violation of Article 3. Moreover, although Mr Elmi was born in Hargeisa, the Court considered that the fact he had been issued with removal orders to Mogadishu appeared to contradict the Government’s assertion that he would be admitted to Somaliland.

Accordingly, the Court concluded that the removal of both applicants to Mogadishu would violate Article 3 of the Convention.

Article 41

The Court held that the United Kingdom was to pay Mr Sufi €14,500 and Mr Elmi €7,500 for costs and expenses. The applicants made no claim in respect of pecuniary or non-pecuniary damage.

3. Comment

This judgment is of particular importance mainly for two reasons. First, whereas in *NA. v. the United Kingdom*⁷⁴ the Court accepted the possibility that

74 *NA. v. the United Kingdom*, judgment of 17 July 2008, no. 25904/07, also included in this section.

an asylum seeker should not be sent to the destination country as the general situation of violence and disorder would put that person in risk of a violation contrary to Article 3, in the *Sufi and Elmi* judgment the Court accepted that such was indeed the situation in Somalia. The *Sufi and Elmi* judgment is indeed considered the leading case in relation to a generalised risk of ill-treatment.

To arrive at this conclusion the Court undertook a careful examination of the situation in Somalia. To this end, the Court conducted an assessment of the credibility of various sources of information to understand the situation in Somalia. The second reason this judgment is of particular importance lays in the establishment of criteria in relation to sources of information on the situation at the destination country. In the assessment of sources of information, the Court stated that consideration must be given especially to their independence, reliability and objectivity. When assessing reports on a country, the Court suggested that the weight to be attached to them depended on the authority and reputation of the author, the seriousness of the investigations by means of which they were compiled, the details and the consistency of their conclusions, and their corroboration by other sources. The Court also recognised that consideration must be given to the presence and reporting capacities of the author of the material in the country. The Court recognised that such considerations apply especially to international organisations, such as United Nations agencies.

On the basis of this methodological approach, the Court concluded that the situation in Somalia, as indicated by the sources of information considered by the Court, was so bad at the time that any removal *per se* would constitute a violation of Article 3 of the Convention. However, it should be clear that such a finding is of an exceptional character, and applied only when the situation in the country of destination is exceptionally bad as to make any other alternative, such as internal relocation, very difficult.

Abduction and illegal transfer of an Uzbek asylum seeker issued with an extradition order from Russia to Tajikistan in violation of the Convention

JUDGMENT IN THE CASE OF ABDULKHAKOV v. RUSSIA

(Application No. 14743/11)

2 October 2012

1. Principal facts

The applicant, Mr Murodzhon Adikhamzhonovich Abdulkhakov, was an Uzbek national born in 1979 and a practising Muslim. In May 2009, after a police station in Khanabad was burnt down, he was summoned to the local police station where he was beaten with the aim of extracting a confession regarding his involvement in extremist activities in the area. After his relatives had bribed the police, the appellant was released; however, he was fined for participating in unlawful religious gatherings and for praying outside the mosque.

On 24 August 2009, Mr Abdulkhakov left for Kazakhstan and on 4 November 2009 for the Russian Federation. His plan was to travel onward to Ukraine and to apply for refugee status there. However, on 9 December 2009, immediately after his arrival in Moscow, the applicant was arrested and detained as a court in Uzbekistan had issued an arrest warrant on the basis of his participation in an extremist organisation of a religious, separatist or fundamentalist nature.

In parallel, on 22 December 2009, Mr Abdulkhakov applied for refugee status in the Russian Federation. He submitted that he had been persecuted in Uzbekistan for his religious beliefs and feared he would be tortured with the aim of obtaining a confession to offences he had not committed. However, his application was rejected on the grounds that the Uzbek authorities had been exercising close legitimate control over the religious life of its population with the sole aim of limiting the influence of radical Islamic organisations.

Between 2009 and 2011, the applicant's detention was extended four times on the grounds that the extradition proceedings were still pending. On 9 June 2011, Mr Abdulkhakov was finally released after it was found that the maximum detention period permitted under Russian law had expired.

On 16 June 2011, the applicant applied for temporary asylum referring to the risks of ill-treatment and persecution for his religious beliefs. His application was initially rejected, but the Russian Migration Service remanded it for a new

examination. The temporary asylum proceedings remained pending at the time of the European Court's judgment.

On 14 March 2011, despite his temporary asylum proceedings still pending, the Russian Supreme Court upheld the authorities' order issued on 14 May 2010 to extradite Mr Abdulkhakov to Uzbekistan. The Supreme Court found that the diplomatic assurances given by the Uzbek authorities were sufficient to ensure adequate protection against eventual ill-treatment of the applicant once returned to his country. However, due to an interim measure issued by the European Court under Rule 39 of the Rules of Court, the Russian extradition order was not enforced and consequently Mr Abdulkhakov could not be extradited to Uzbekistan until further notice.

On 23 August 2011, the applicant, along with two other persons, was abducted in Moscow by a group of men in plain clothes; he was forced in a van, a black plastic bag was put over his head and he was taken to the airport where he was secretly put on a flight to Tajikistan bypassing check-in, border control and security checks. Once there, Mr Abdulkhakov was handed over to the Tajik police and detained in view of his extradition to Uzbekistan. He was detained for three months before being released and going into hiding.

2. Decision of the Court

The application was lodged with the European Court of Human Rights on 6 March 2011.

The applicant claimed that, if returned to Uzbekistan, he would be at serious risk of being subjected to torture, violence or inhuman or degrading treatment; that he would be exposed to religious prosecution; that his detention pending extradition had been unlawful; and that there had been no effective judicial review of the lawfulness of his detention, in breach of Article 3 (prohibition of inhuman or degrading treatment), Article 5 (right to liberty and security), Article 13 (right to an effective remedy), and Article 34 (right of individual petition) of the Convention.

Establishment of the Facts

Given that the parties disagreed about the circumstances of Mr Abdulkhakov's removal to Tajikistan, the Court proceeded to establish the facts of the case. From the information provided, the Court could not but accept the applicant's

allegation that Russian authorities had been implicated in his kidnapping as credible. No plausible explanation was given by the Russian Government regarding the fact that Mr Abdulkhakov went through airport border and customs controls without his passport (which had been retained by Russian authorities) and without any entry being made in the border control register. Consequently, the Court found it established that the applicant was kidnapped and transferred against his will into the custody of the Tajik authorities, with the knowledge and either passive or active involvement of the Russian authorities.

Article 3

The Court examined whether the applicant faced a risk of treatment contrary to Article 3 in Uzbekistan and whether, by removing him to Tajikistan, the Russian Federation had violated its obligations under the same Article.

As to the first issue, the Court referred to its existing case law relating to risks of ill-treatment in the event of extradition or expulsion to Uzbekistan. In all these cases it had found, with reference to international materials from various reliable sources, that the general situation with regard to human rights in Uzbekistan had been alarming, showing persisting serious issues of ill-treatment of detainees (especially if involved with prohibited religious organisations) and a systematic and indiscriminate practice of torture against those in police custody. The Court found there to be no concrete evidence to demonstrate any fundamental improvement. In view of the above considerations, and taking into account the applicant's background, the Court concluded that he would face a serious risk of being subjected to torture or inhuman or degrading treatment if returned to Uzbekistan, recognising that his expulsion to Uzbekistan would give rise to a violation of Article 3.

As to the second issue, the Court found that the applicant had been secretly transferred to Tajikistan, which was not a party to the Convention, where he faced a risk of being repatriated to Uzbekistan. The applicant's transfer to Tajikistan had as a consequence removed him from the protection guaranteed by the Convention. Russian authorities had neither reviewed Tajikistan's legislation nor evaluated its practice regarding ill-treatment of asylum seekers. The Court found particularly striking the fact that the applicant's transfer to Tajikistan had been carried out in secret, outside any legal framework. Consequently, the Court held unanimously that there had been a violation of Article 3 of the Convention.

Article 13

It was not necessary to deal separately with the complaint under Article 13 as it contained essentially the same arguments that had already been examined under Article 3.

Article 5

Regarding the alleged violation of Article 5, the applicant made complaints concerning his unlawful detention from 9 December 2009 to 8 February 2010 without any judicial decision having authorised it; the lack of speediness in examining his appeals against the detention orders of 7 September and 8 December 2010; and the lack of an effective procedure to challenge his detention after 20 January 2011.

The Court observed that Russian law did not contain any specific provisions establishing a procedure for ordering detention pending the receipt of an extradition request. In the present case, the extradition request was not received until 30 December 2009 and the legal basis for the applicant's detention from 9 to 30 December 2009 was unknown. Further, after the receipt of the request, Mr Abdulkhakov's detention had been based on a provision of the Russian Code of Criminal Procedure which, due to a lack of clear procedural rules, was neither precise nor foreseeable in its application. Therefore, the Court found that there has been a violation of Article 5(1)(f).

On the contrary, the Court found the period of detention from 8 February 2010 to 9 June 2011 lawful as it had been extended by a Russian court that set time-limits in compliance with the domestic law provisions. Therefore, the applicant's detention during this period of time was neither unlawful nor arbitrary.

In order to determine whether the appeal decisions had been examined with the requisite speed, the Court had to take into account; the diligence shown by the authorities, the delay attributable to the applicant and any factors causing delays for which the State could not have been held responsible. In light of the circumstances of the present case, the examination of the two appeals had taken place eighty-two days and thirty-five days after lodging them respectively. Therefore, the Court found that these two periods were not compatible with the "speediness" requirement of Article 5(4).

Regarding the lack of an effective procedure to obtain a review of Mr Abdulkhakov's detention measure after 20 January 2011, and as pointed out by the Court in previous judgments, the remedy required by Article 5(4) should have been applied in light of any new relevant factors which had emerged subsequently to the decision on his initial placement in custody, and should have been put in place at reasonable intervals. The new relevant factor was the indication by the Court of an interim measure under Rule 39. The applicant had been entitled to have this assessed by a court without unreasonable delay. However, the lawfulness of the applicant's detention was reviewed and his release ordered only three months later. In such circumstances, the Court found that the reviews of the lawfulness of the applicant's detention had not been held at "reasonable intervals", thus finding a violation of Article 5(4).

Article 34

The applicant had been transferred to Tajikistan five months after the Court had issued an order under Rule 39 that he should not be extradited to Uzbekistan until further notice. Although the prohibition to extradite the appellant to Uzbekistan had been formally respected, his transfer to Tajikistan, which was not a party to the Convention, had removed him from the Convention protection exposing him to the risk of ill-treatment in Uzbekistan. It had also frustrated the purpose of the interim measure – i.e. to maintain the *status quo* pending the Court's examination of the application and to allow its final judgment to be effectively enforced.

Hence the Russian Federation had failed to comply with the interim measure, in breach of its obligation under Article 34 not to hinder the effective exercise of an applicant's right to apply to the Court.

Article 41

The Court held that the Russian Federation had to pay Mr Abdulkhakov €30,000 in respect of non-pecuniary damage and €7,800 for costs and expenses arising from the case.

3. Comment

This case concerns three important aspects the Court has normally dealt with separately in its judicial activity.

The first situation concerns the so-called extraordinary rendition. The Court dealt with this issue for the first time in the case of *El Masri v. the Former Yugoslav Republic of Macedonia*⁷⁵. In a judgment delivered by the Grand Chamber in that case, and in other chamber judgments concerning the same issue⁷⁶, the Court has underlined that extraordinary rendition “by its deliberate circumvention of due process, is anathema to the rule of law and the values protected by the Convention”. These situations are called “black holes”. They are considered to be “in apparent contravention of fundamental principles recognised by both [English and American] jurisdictions and by international law”⁷⁷ and have required special attention by the Court. In the current case, as in the *El-Masri* and *Al Nashiri* and *Husayn* cases, the Court was faced with the difficult task of having to establish the facts of the case⁷⁸. The Court found it established that the only possibility for Mr Abdulkhakov to get out of Russia without a passport, without any kind of entry in the border control register and finding himself at the hands of the Tajik authorities against his will, was an illegal removal with the passive or active involvement of the Russian authorities⁷⁹. The risks accompanying such illegal removals are always higher and the Court found a violation of Article 3 in that regard.

The case is also very important from the perspective of Article 5 of the Convention. First, the Court concluded that the detention of the applicant by the Russian authorities during the period of 9 to 30 December 2009, in absence of an extradition request, was in violation of Article 5(1)(f) of the Convention. This conclusion confirms the constant approach of the Court that the detention of a person under Article 5(1)(f) of the Convention can only be justified in view of his or her extradition or removal from the territory. When this prospect does not have a clear legal basis or seems to be remote, the detention is not justified

75 *El Masri v. the Former Yugoslav Republic of Macedonia*, [GC] judgment of 13 December 2012, no. 39630/09.

76 See also *Babar Ahmad and Others v. the United Kingdom*, judgment of 10 April 2012, nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, *Othman (Abu Qatada) v. the United Kingdom*, judgment of 17 January 2012, no. 8139/09, included in this section, and *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland*, judgments of 24 July 2014, nos. 28761/11 and 7511/13.

77 See the judgment of Court of Appeal of England and Wales (Civil Division), *Abbasi and Another v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department*, [2002] EWCA Civ 1598, 6 November 2002.

78 See also the recent judgment *Nasr and Ghali v. Italy*, judgment of 23 January 2016, no. 44883/09, especially paras 219-235 on the establishment of facts in such cases.

79 See also paras 246-247 of *Nasr and Ghali v. Italy*, although in that case the task of the Court was facilitated by the findings of national jurisdictions.

under this Article of the Convention⁸⁰. Article 5(4) was also breached because 82 days and 35 days for reviewing the detention measures cannot be considered to be speedy under that provision⁸¹, and the applicant could not obtain a review of his detention between 8 December 2010 and 9 June 2011.

Finally, Article 34 of the Convention was of particular importance in this case. The Court had ordered a Rule 39 measure under the Rules of the Court, indicating that the Russian authorities should not to take any measure aiming or leading to the removal of the applicant. However, this order was not respected. The non-compliance with such interim orders by the Court has been a matter of increasing concern over the past years. Such non-compliance is highly problematic because it interferes with the effectiveness of the proceedings before the Court⁸². This is why the Court has consistently found violations of Article 34 of the Convention in all such cases of non-compliance with its interim orders. In *Savridin Dzhurayev v. Russia*, the Court also adopted an Article 46 indication in this regard, underlining that “[i]t is inconceivable that national authorities could be allowed to circumvent an interim measure such as the one indicated in the present case by using another domestic procedure for the applicant’s removal to the country of destination or, even more alarmingly, by allowing him to be arbitrarily removed there in a manifestly unlawful manner”⁸³.

80 See also *Louled Massoud v. Malta*, judgment of 27 July 2010, no. 24340/08, also included in this section, as well as *Quinn v. France*, judgment of 22 March 1995, no. 18580/91, and *Ali v. Switzerland*, judgment of 5 August 1998, no. 24881/94.

81 See *Sanchez-Reisse v. Switzerland*, judgment of 21 October 1986, no. 9862/82, where periods of 31 and 41 days were at stake.

82 It was in the case of *Mamatkulov and Askarov v. Turkey*, [GC] judgment of 4 February 2005, nos. 46827/99 and 46951/99, that for the first time the Court concluded that, by failing to comply with interim measures indicated under Rule 39 of the Rules of Court, a Contracting State had failed to comply with its obligations under Article 34 of the Convention. See also e.g. *Olaechea Cahuas v. Spain*, judgment of 10 August 2006, no. 24668/03; *Ben Khemais v. Italy*, judgment of 24 February 2009, no. 246/07, included in this section; *Grori v. Albania*, judgment of 7 July 2009, no. 25336/04; *Al-Saadoon and Mufdhi v. the United Kingdom*, judgment of 2 March 2010, no. 61498/08, also included in this section; *Labsi v. Slovakia*, judgment of 15 May 2012, no. 33809/08; and *Rrapo v. Albania*, judgment of 25 September 2012, no. 58555/10.

83 *Savridin Dzhurayev v. Russia*, judgment of 25 April 2013, no. 71386/10.

Article 3 and Council Regulation No. 604/2013 of 26 June 2013 (Dublin III Regulation) (and previous legislation covering the same matter)

Transfer order in compliance with the Dublin Convention⁸⁴

DECISION IN THE CASE OF T.I. v. THE UNITED KINGDOM

(Application No. 43844/98)

7 March 2000

1. Principal facts

The applicant, T.I., was a Sri Lankan national, born in 1969.

Until May 1995, the applicant lived in Jaffna, an area controlled by the LTTE, a Tamil organisation engaged in an armed struggle for independence.

From 1993 until June 1994, the applicant claimed he was forced to work for the LTTE, finally being imprisoned for three months in a settlement in Vasavilan. In April 1995, the applicant managed to escape and travel to Colombo, where he was arrested by the Sri Lankan army, as he was suspected of being an LTTE member. He was held in detention until 20 September 1995 and questioned about his links with the LTTE. During that time, he claimed he was tortured and ill-treated by the soldiers. Following his release, he was picked up twice by the ENDLF, a pro-Government Tamil group, and taken to their camp for questioning about his involvement with the LTTE. He alleged that he was beaten on both occasions. After the explosion on an oil tanker near his home, the applicant was arrested on 23 October 1995 and taken to the police station for questioning. He asserted that he was beaten by truncheons and that a heated iron rod was pressed against his arm.

In January 1996, shortly after his release, the applicant left Sri Lanka and arrived in Germany on 10 February 1996 where he claimed asylum. His application was refused on 26 April 1996 by the Federal Office for the Recognition of Foreign Refugees. He appealed to the Bavarian Administrative Court, Regensburg, but the appeal was rejected in April 1997. The Administrative Court noted that the actions of the LTTE could not be attributed to the State, and that the applicant would be sufficiently safe from political persecution if he

⁸⁴ The 1990 Dublin Convention was replaced by the Dublin II Regulation in 2003 and more recently in 2013 by the Dublin III Regulation.

returned to the south of Sri Lanka. In addition it considered that the entire presentation of the applicant was a completely fabricated tissue of lies, and he was not judged credible.

On 16 September 1997, the applicant left Germany, travelled to Italy and eventually arrived in the United Kingdom on 19 September 1997. On 20 September 1997, he claimed asylum there.

On 15 January 1998, the United Kingdom Government requested that Germany accept responsibility for the applicant's asylum request pursuant to the Dublin Convention. The German Government agreed, and on 28 January 1998 the Secretary of State directed the applicant's removal to Germany, refusing to examine the merits of the applicant's asylum claim.

On 10 February 1998, the applicant applied for judicial review but was refused leave. On 10 June 1998, the Court of Appeal rejected his renewed application, and the following month the applicant's application for leave to petition the House of Lords was refused too. On 19 August 1998, the Secretary of State informed the applicant that he was satisfied that Germany was a safe third country. He noted that it was well-established that the German authorities were under a legal obligation to look at any new material placed before them. On 19 August 1998, removal directions to Germany were issued.

2. Decision of the Court

The applicant complained that the United Kingdom's decision to order his removal to Germany, from where he claimed he would be summarily removed to Sri Lanka, violated Articles 2, 3, 8 and 13 of the Convention. He claimed that, if returned to Sri Lanka, there would be a real risk of facing treatment contrary to Article 3. He submitted that the German authorities would not reconsider his asylum application if he was returned to Germany since he had no relevant evidence for their purposes. As regards Article 13, he claimed that judicial review was not an effective remedy since, in the context of a return to an allegedly safe third country under the Dublin Convention, the United Kingdom's courts did not subject asylum applications to "*the most anxious scrutiny*".

Article 3

The Court found that the indirect removal to an intermediary country – also a Contracting State – did not affect the responsibility of the United Kingdom to

guarantee that Mr T.I. was not exposed to treatment contrary to Article 3 of the Convention as a result of the expulsion decision. In the same way, the United Kingdom could not rely automatically on the Dublin Convention arrangements concerning attribution of responsibility between European countries for deciding asylum claims. Therefore, the Court had to examine whether the United Kingdom had abided by its obligations to protect Mr T.I. from violations of Article 3 of the Convention.

In this regard, the Court noted that it had not heard substantial arguments from either the United Kingdom or German Governments concerning the merits of the applicant's asylum claim. However, it held that the materials presented by Mr T.I., especially two medical reports strongly supporting his claims that he was tortured, gave rise to serious concerns as to the risks he would face should he be returned to Sri Lanka – both from the LTTE if returned to his family in Jaffna and from government forces on suspicion of previous involvement with LTTE.

The Court found that, upon arrival in Germany, Mr T.I. could make a fresh claim for asylum, being satisfied by the German Government's assurances that the applicant would not face immediate or summary removal to Sri Lanka. As the previous deportation order was issued more than two years earlier, in order for the applicant to be removed a fresh deportation order had to be made, which would be reviewed by the Administrative Court, and to which Mr T.I. could make an application for interim protection.

The Court acknowledged that the previous court decision heavily questioning the applicant's credibility would weigh against a claim for protection in this context. Nonetheless, the assurances given by the German Government concerning its domestic law and practice, made the Court satisfied that, if accepted by the authorities, Mr T.I.'s claims could fall within the protection granted to persons facing risk to life. Moreover, the Court found no basis on which it could assume that Germany would not provide the applicant with protection against removal to Sri Lanka, should he put forward substantial grounds that he would face a real risk of torture and ill-treatment there.

Therefore, the Court held that it was not established that there was a real risk that Mr T.I. would be expelled by Germany to Sri Lanka in violation of Article 3. Accordingly, the United Kingdom had not failed in its obligations under that provision by deciding to transfer the applicant to Germany.

It followed that this part of the application had to be rejected as manifestly ill-founded.

Article 2 and Article 8

Taking into account its findings under Article 3 of the Convention, the Court found that no separate issues arose requiring examination under these provisions.

Article 13

Having noted that in previous cases it had found judicial review proceedings to be an effective remedy in relation to complaints raised under Article 3 in the contexts of deportation and extradition, the Court found no reason to differ in the present case. The applicant was able to challenge the reasonableness of the Secretary of State's decision to issue a certificate to remove him to Germany pursuant to the arrangements reached under the Dublin Convention.

The Court was satisfied that the substance of Mr T.I.'s complaint under the Convention fell within the scope of examination of the courts, which had the power to afford him the relief that he sought.

Accordingly, Mr T.I.'s complaint in this respect was rejected as manifestly ill-founded.

3. Comment

This admissibility decision is of fundamental importance for clarifying the question of the responsibility of States under the Convention, when they conclude or adhere to other international systems that create for them rights and obligations at international or European level.

The main question was whether the United Kingdom was obliged under the Convention to assess the potential risks encountered by the applicant if removed to Germany, the responsible State for dealing with his asylum application under the 1990 Dublin Convention.

The case deals with the legal regime created in 1990 by the Dublin Convention, a regime which in itself is fully incorporated into EU law by the successive Dublin II and Dublin III Regulations in, respectively, 2003 and 2013. However,

the legal message elaborated in this decision in relation to the Dublin Convention is fully applicable to the Dublin III Regulation.

This decision, despite the fact that the Court declared the application inadmissible as manifestly ill-founded in the given circumstances of the case, establishes the following principles applicable to the Dublin regime:

- (I) removal to an intermediary Contracting State does not affect the responsibility of the sending State to ensure that the applicant is not exposed to treatment contrary to Article 3;
- (II) the sending State cannot rely automatically on the arrangements made in the Dublin Convention or Regulation;
- (III) where States have established international organisations or agreements to pursue cooperation there could be implications for fundamental rights.

Therefore, the Court held that the return of an asylum seeker from one EU Member State to another, in the context of the Dublin system, would engage the sending State's responsibility and might violate the Convention because of the risk of 'chain *refoulement*' – that is, that the receiving country would subsequently expel the person to a place where there were substantial grounds for believing the person faced a real risk of ill treatment. Therefore, for the Dublin system to work, States responsible under the regime must comply with proper risk assessments when contemplating an asylum seekers' removal to their country of origin.

Belgium authorities should not have expelled asylum seeker to Greece in view of the general situation facing asylum seekers in Greece

**GRAND CHAMBER JUDGMENT IN THE CASE
OF M.S.S. v. BELGIUM AND GREECE**

(Application No. 30696/09)

21 January 2011

1. Principal facts

The applicant, M.S.S., an Afghan national, left Kabul early in 2008 and, travelling via Iran and Turkey, entered the European Union through Greece.

On 10 February 2009, he arrived in Belgium where he applied for asylum. By virtue of the “Dublin II” Regulation, the Belgian Aliens Office submitted a request for the Greek authorities to take charge of the asylum application. While the case was pending, the UNHCR sent a letter to the Belgian Minister for Migration and Asylum Policy criticising the deficiencies in the asylum procedure and the conditions of reception of asylum seekers in Greece and recommending the suspension of transfers to Greece. In late May 2009, the Aliens Office nevertheless ordered the applicant to leave the country for Greece, where he would be able to submit an application for asylum. The Aliens Office received no answer from the Greek authorities within the two-month period provided for by the Regulation, which it treated as a tacit acceptance of its request. It argued that Belgium was not the country responsible for examining the asylum application under the Dublin II Regulation and that there was no reason to suspect that the Greek authorities would fail to honour their obligations in asylum matters.

The applicant lodged an appeal with the Aliens Appeals Board, arguing that he ran the risk of detention in Greece in appalling conditions, that there were deficiencies in the asylum system in Greece and that he feared ultimately being sent back to Afghanistan without any examination of the reasons why he had fled that country, where he claimed he had escaped a murder attempt by the Taliban in reprisal for having worked as an interpreter for the air force troops stationed in Kabul.

His application for a stay of execution having been rejected, the applicant was transferred to Greece on 15 June 2009. On arriving at Athens airport, he was immediately placed in detention in an adjacent building where, according to his statements, he was locked up in a small space with 20 other detainees, ac-

cess to the toilets was restricted, detainees were not allowed out into the open air, were given very little to eat and had to sleep on dirty mattresses or on the bare floor. Following his release and issuance of an asylum seeker's card on 18 June 2009, he lived on the street with no means of subsistence.

Having subsequently attempted to leave Greece with a false identity card, the applicant was arrested and again placed in the detention facility next to the airport for one week, where he alleges he was beaten by the police. After his release, he continued to live on the street, occasionally receiving aid from local residents and the church. On renewal of his asylum seeker's card in December 2009, steps were taken to find him accommodation, but according to his submissions no housing was ever offered to him.

2. Decision of the Court

The applicant alleged that the conditions of his detention and his living conditions in Greece amounted to inhuman and degrading treatment in violation of Article 3, and that he had no effective remedy in Greek law in respect of his complaints under Articles 2 (right to life) and 3, in violation of Article 13. He further complained that Belgium had exposed him to the risks arising from the deficiencies in the asylum procedure in Greece, in violation of Articles 2 and 3, and to the poor detention and living conditions to which asylum seekers were subjected there, in violation of Article 3. He further maintained that there was no effective remedy under Belgian law in respect of those complaints, in violation of Article 13.

The application was lodged with the European Court of Human Rights on 11 June 2009. On 2 July 2009 it decided to apply Rule 39 against Greece, to the effect that he would not be deported to Afghanistan pending the outcome of the proceedings before the Court.

On 16 March 2010, the Chamber to which the case had been allocated relinquished jurisdiction in favour of the Grand Chamber.

Article 3 (detention conditions in Greece)

While the Court did not underestimate the burden placed on the States forming the external borders of the EU by the increasing influx of migrants and asylum seekers and the difficulties involved in receiving them at major international airports, that situation could not absolve Greece of its obligations under Article 3, given the absolute character of that provision.

When the applicant arrived in Athens from Belgium, the Greek authorities had been aware of his identity and of the fact that he was a potential asylum seeker. In spite of this, he was immediately placed in detention, without any explanation being given. Various recent reports by international bodies and non-governmental organisations confirmed that the systematic placement of asylum seekers in detention without informing them of the reasons was a widespread practice of Greek authorities. The applicant's allegations that he was subjected to brutality by the police during his second period of detention were equally consistent with numerous accounts collected from witnesses by international organisations, in particular the European Committee for the Prevention of Torture (CPT). Findings by the CPT and the UNHCR also confirmed the applicant's allegations about the unsanitary conditions and the overcrowding in the detention centre next to Athens international airport.

Despite the fact that he was kept in detention for a relatively short period of time, the Court considered that the conditions of detention experienced by the applicant in the holding centre had been unacceptable. It found that, taken together, the feeling of arbitrariness, inferiority and anxiety he must have experienced, as well as the profound effect such detention conditions indubitably had on a person's dignity, constituted degrading treatment. In addition, as an asylum seeker he was particularly vulnerable, because of his migration and the traumatic experiences he was likely to have endured. The Court concluded that there had been a violation of Article 3.

Article 3 (living conditions in Greece)

Article 3 did not generally oblige Member States to give refugees financial assistance to secure for them a certain standard of living. However, the Court considered that the situation in which the applicant had found himself was particularly serious. In spite of the obligations incumbent on the Greek authorities under their own legislation and the EU Reception Directive, he spent months living in extreme poverty, unable to cater for his most basic needs – food, hygiene and a place to live – while in fear of being attacked and robbed. The applicant's account was supported by the reports of a number of international bodies and organisations, in particular the Council of Europe Commissioner for Human Rights and the UNHCR.

The situation of which the applicant complained had lasted since his transfer to Greece in June 2009 and was linked to his status as an asylum seeker. Had the authorities examined his asylum request promptly, they could have sub-

stantially alleviated his suffering. It followed that through their fault he had found himself in a situation incompatible with Article 3. There had accordingly been a violation of that provision.

Article 13 taken together with Articles 2 and 3 (Greece)

It was undisputed between the parties that the situation in Afghanistan had posed and continued to pose a widespread problem of insecurity. As regards the risks to which the applicant would be exposed in that country, it was in the first place for the Greek authorities to examine his request. The Court's primary concern was whether effective guarantees existed to protect him against arbitrary removal.

While Greek legislation contained a number of such guarantees, for a few years the UNHCR, the European Commissioner for Human Rights and other organisations had repeatedly and consistently revealed that the relevant legislation was not being applied in practice and that the asylum procedure was marked by major structural deficiencies. They included: insufficient information about the procedures to be followed; the lack of a reliable system of communication between authorities and asylum seekers; the lack of training of the staff responsible for conducting interviews with them; a shortage of interpreters; and a lack of legal aid effectively depriving asylum seekers of legal counsel. As a result, asylum seekers had very little chance of having their applications seriously examined. Indeed, a 2008 UNHCR report showed a success rate at first instance of less than 0.1%, compared to the average success rate of 36.2% in five of the six EU countries which, along with Greece, received the largest number of applications.

In view of those deficiencies, and having examined the efficiency of appeals that the Greek government argued had been available to the applicant, the Court finally concluded that there had been a violation of Article 13 taken in conjunction with Article 3. In view of that finding there was no need to examine the complaints under Article 13 in conjunction with Article 2.

Article 2 and 3 (the Belgian authorities' decision to expose the applicant to the asylum procedure in Greece)

The Court considered that the deficiencies of the asylum procedure in Greece must have been known to the Belgian authorities when they issued the expulsion order against the applicant and he should therefore not have been ex-

pected to bear the entire burden of proof as regards the risks he faced by being exposed to that procedure. The UNHCR had alerted the Belgian Government to that situation while the applicant's case was pending. While the Court in 2008 had found in another case that removing an asylum seeker to Greece under the Dublin II Regulation did not violate the Convention, numerous reports and materials had been compiled by international bodies and organisations since then which agreed as to the practical difficulties involved in the application of the Dublin system in Greece.

Against that background, it had been up to the Belgian authorities not merely to assume that the applicant would be treated in conformity with the Convention standards but to verify how the Greek authorities applied their legislation on asylum in practice, which they had failed to do. The applicant's transfer by Belgium to Greece had thus given rise to a violation of Article 3. There was no need to in addition examine the complaints under Article 2.

Article 3 (the Belgian authorities' decision to expose the applicant to the detention and living conditions in Greece)

The Court had already found the applicant's conditions of detention and living conditions in Greece to be degrading. These facts had been well known and freely ascertainable from a wide number of sources before the transfer of the applicant. In that view, the Court considered that by transferring the applicant to Greece, the Belgian authorities knowingly exposed him to detention and living conditions that amounted to degrading treatment, in violation of Article 3.

Article 13 taken together with Article 2 and 3 (Belgium)

As regards the complaint that there was no effective remedy under Belgian law by which the applicant could have complained against the expulsion order, the Belgian Government had argued that a request for a stay of execution could be lodged before the Aliens Appeals Board.

However, the Court found that the procedure did not meet the requirements of the Court's case-law that any complaint, where it was argued that expulsion to another country would expose an individual to treatment prohibited by Article 3, be closely and rigorously scrutinised, and that the competent body had to be able to examine the substance of the complaint and afford proper redress. Having regard to the Aliens Appeals Board's examination of cases, which was mostly limited to verifying whether those concerned had produced

concrete proof of the damage that might result from the alleged potential violation of Article 3, the applicant would have had no chance of success. There had accordingly been a violation of Article 13 taken in conjunction with Article 3. There was no need to examine the complaints under Article 13 in conjunction with Article 2.

Article 46

The Court considered it necessary to indicate individual measures required for the execution of the judgment in respect of the applicant, without prejudice to the general measures required to prevent other similar violations in the future. It was incumbent on Greece, without delay, to proceed with an examination of the merits of the applicant's asylum request that met the requirements of the Convention and, pending the outcome of that examination, to refrain from deporting the applicant.

Article 41

The Court held that Greece was to pay the applicant €1,000 in respect of non-pecuniary damage and €4,725 in respect of costs and expenses. It further held that Belgium was to pay the applicant €24,900 in respect of non-pecuniary damage and €7,350 in respect of costs and expenses.

3. Comment

The *M.S.S.* judgment is ground breaking in several respects. It marks only the second time that the European Court of Human Rights has found that expelling someone to another Council of Europe State – which is also a party to the ECHR and therefore expected to secure for everyone in their jurisdiction the rights and freedoms in the Convention – constituted a violation of the Convention⁸⁵. *M.S.S.* was the first time that the Court found that the return of someone to a European Union country violated the Convention – a possibility which had been evoked already in *T.I. v. United Kingdom*⁸⁶. In the *M.S.S.* case the Court found that Belgium violated Article 3 by sending the applicant back to Greece because of the conditions in Greece, both in detention and his general living conditions, in addition to the risk of chain *refoulement* resulting in failings in the Greek asylum system. Another important message of this finding is that

85 See also *Shamayev and Others v. Georgia and Russia*, judgment of 12 April 2005, no. 36378/02.

86 *T.I. v. the United Kingdom*, decision of 7 March 2000, no. 43844/98, also included in this section.

the presumption that the EU system for the protection of fundamental rights is ECHR compliant, as elaborated in the *Bosphorus Airlines* case⁸⁷, is in itself rebuttable. It was indeed a very strong and clear message that the Dublin system was not able to respond to situations of massive influxes of asylum seekers, especially when only a few EU Member States have to absorb this problem.

The violation of the applicant's rights arising out of his living conditions – which resulted in the finding of a violation of Article 3 by Greece – is also significant. It is the first time the Strasbourg Court has found a violation of Article 3 of the Convention arising from inadequate living conditions of a person who was at large. There were two main reasons leading the Court to such a conclusion. First, the Greek authorities left the applicant in a state of poverty because they failed to fulfil their legal obligations, in this case their obligations towards asylum seekers under EU law and particularly Directive No. 2003/9 (the so-called 'Reception Conditions Directive'), while they delayed for months the processing of his asylum request. Second, the Court considered that the applicant, as an asylum seeker, belongs to a vulnerable group. *M.S.S.* may not then signal a general right to housing or welfare, but it does take forward the Court's case law in relation to the social protections for those in a 'particular state of insecurity and vulnerability'.

The third point worth signalling is the Article 13 violation the Court found Belgium responsible for. The Dublin system, like many EU law mechanisms for enhanced cooperation between Member States (e.g. the European Arrest Warrant and other provisions for cross-border criminal cooperation), justifies reducing procedural safeguards by invoking the principle of mutual trust amongst EU Member States and the presumption that all EU MS respect human rights. However, in view of multiple and continues reports, also during the hearing of this case in Strasbourg, that Greece does not provide the necessary procedural and substantial guaranties in relation to asylum seekers, the Court required a 'close and rigorous scrutiny' of complaints that a return to Greece will not result in a violation of Article 3. This may signal a need to re-think the Dublin system, as Judge Rozakis argues in his concurring opinion, especially in situations of massive fluxes of asylum seekers reaching the shores of just a few EU member States.

87 *Bosphorus Hava Yollari Turizmve Ticaret Anonim Şirketi v. Ireland*, [Grand Chamber] judgment of 30 June 2005, no. 45036/98.

*Return to Italy of asylum seeker with two young children
under the Dublin II Regulation*

**DECISION IN THE CASE OF SAMSAM MOHAMMED HUSSEIN AND
OTHERS v. THE NETHERLANDS AND ITALY**

(Application No. 27725/10)

2 April 2013

1. Principal facts

The applicant, Samsam Mohammed Hussein, was a Somali national, member of the Hawiye/Abgal clan, who fled Somalia and entered Italy in August 2008.

Upon her arrival in Italy, her fingerprints were taken and she was registered as an illegal immigrant and transferred to a reception centre. In January 2009, after having applied for international protection, she was granted subsidiary protection in Italy as well as an alien's residence permit, which were both valid for three years.

In May 2009, the applicant lodged an asylum application in the Netherlands. At that time she was seven months pregnant. During interviews with the Netherlands immigration authorities she alleged that, although her fingerprints were taken in Italy, she had not been enabled to apply for asylum there and that she had not been given any help. She also claimed that she had been raped and fallen pregnant whilst sleeping at a railway station in Florence. In August 2009, her son Nahyaan was born, and in March 2010 her asylum request was rejected by the Netherlands authorities, who asked the Italian authorities to take over responsibility for her asylum application under the Dublin II Regulation.

Ms Mohammed Hussein unsuccessfully submitted a second application in the Netherlands on the basis of new developments in her situation, including the birth of her daughter Nowal in February 2011 – who suffered from a skin condition – as well as the contraction of a traditional marriage in the Netherlands in April 2010 with another man and their subsequent separation.

When her transfer to Italy was scheduled for 17 June 2010, she submitted an application to the European Court of Human Rights, on behalf of herself and her two children, Nahyaan and Nowal. In order to ensure the proper conduct of the proceedings before it, a Rule 39 interim measure was granted by the

Court, requesting the Netherlands Government not to return Ms Mohammed Hussein and her children to Italy whilst proceedings were still pending before the Strasbourg Court.

2. Decision of the Court

Ms Mohammed Hussein submitted claims against both the Netherlands and Italy. She alleged that her transfer to Italy would be in breach of Article 3 as well as Article 3 in conjunction with Article 13. She stated that, during her stay in Italy, she had received no support from the Italian authorities and had been forced to live on the streets. She further alleged that, if the Netherlands authorities were to transfer her and her children to Italy, they would end up in a similar situation and suffer from the same lack of support, also risking arbitrary expulsion to Somalia – where she was at risk of becoming the victim of an honour crime. Relying on Article 8, Ms Mohammed Hussein finally claimed that, if transferred to Italy, she would be unable to raise her children in adequate conditions.

Article 3

The Court noted there were discrepancies in the applicant's declarations: she initially complained that she had not been able to apply for asylum in Italy; however, subsequently in her response to the Italian Government's submission to the Court, she confirmed that she had been provided with reception facilities for asylum seekers.

The Court confirmed the absolute nature of Article 3. However, the assessment of risk upon return is relative, depending on the general situation in the country – Italy, if transferred there, and Somalia, considering the foreseeable consequences of the applicant's removal to Italy and her possible *refoulement* – as well as considering the applicant's personal circumstances. The Court held that Article 3 cannot be interpreted as obliging States to provide everyone within their jurisdiction with a home, and that this provision does not entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living. The Court reiterated that, in the absence of exceptionally compelling humanitarian grounds against removal, the fact that the applicant's material and social living conditions would be reduced after the removal from the Contracting State was not sufficient in itself to give rise to a breach of Article 3.

In Ms Mohammed Hussein's case, the Court noted that, three days after her arrival in Italy, she had been provided with facilities for asylum seekers in a reception centre. It further noted that she was provided with a residence permit for a three-year period, which entitled her to benefit from the general schemes for social assistance, health care, social housing and education in the same manner as the general population of Italy.

Furthermore, the Court found that, while at the reception centre – where she had received medical care – there was no indication on the applicant's case file that she ever sought assistance in finding work and/or alternative accommodation in order to avoid the risk of homelessness and destitution. The Court concluded that Ms Mohammed Hussein's treatment in Italy had not met the required minimum level of severity to fall within the scope of Article 3.

In assessing the risk upon return if transferred to Italy, the Court noted that prior notice of the transfer would be given by the Netherlands authorities to the Italians, thus enabling them to prepare for their arrival. Moreover, the Court found that the applicant, as a single mother with two children, was eligible for special consideration as a vulnerable person under Italian domestic law. Lastly, taking into account reports submitted by governmental and non-governmental institutions and organisations on the reception schemes for asylum seekers in Italy, the Court considered that the general situation of asylum seekers in Italy had not been shown to disclose any systemic failure.

The Court acknowledged improvements aimed to remedy some of the failings and the treatment that the applicant received in August 2008 in Italy. Therefore, the Court held that Ms Mohammed Hussein had failed to demonstrate that she and her children would not be able to benefit from the available resources in Italy or that, if she encountered difficulties, the Italian authorities would not respond adequately to any request for further support or assistance. The Court therefore concluded that Ms Mohammed Hussein's complaints under Article 3 against the Netherlands and Italy were manifestly ill-founded.

Article 13

The Court held that Ms Mohammed Hussein had not tried to challenge the actions and/or decision taken by the Italian authorities concerning the asylum request she had lodged there, while in the Netherlands she had challenged the decision taken by the Netherlands administrative and judicial authorities, albeit unsuccessfully. Furthermore, she had failed to prove that she would not

be provided with an effective remedy, if she were to submit another request for international protection in Italy.

Therefore, the Court concluded that the applicant's complaints under Article 13 were manifestly ill-founded.

Article 8

The Court found that Ms Mohammed Hussein's allegations under Article 8 were wholly unsubstantiated and had to be rejected as manifestly ill-founded.

3. Comment

It has to be recalled that this decision was adopted after the *M.S.S. v. Greece and Belgium*⁸⁸ judgment in Strasbourg and also after the ruling of the Grand Chamber of the Court of Justice of European Union in the cases of *NS v. Secretary of State for the Home Department* and *M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*⁸⁹.

As explained in commentary of the *NS v. Secretary of State* ruling, the Luxembourg Court accepted that the presumption that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable. This was in line with the *M.S.S.* judgment in Strasbourg. The Luxembourg Court concluded that Member States, including their courts, cannot send asylum seekers to the first country of entry where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment⁹⁰.

88 *M.S.S. v. Greece and Belgium*, [GC] judgment of 21 January 2011, no. 30696/09, also included in this section.

89 C-411/10 and C-493/10, *NS v. Secretary of State for the Home Department* and *M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, [GC] judgments of 21 December 2011, included in the section on CJEU case law.

90 It might be interesting to add that in the Grand Chamber judgment of 5 April 2016, in Joined Cases C-404/15 and C-659/15, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, concerning the execution of the European arrest warrant where there are doubts as to the conditions of detention in the issuing Member State, the CJEU concluded that "[...] where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine,

Whereas somewhat similar terminology – the notion “systemic” – had been used also in Strasbourg in the judgment of *M.S.S. v. Greece and Belgium*, the Luxembourg Court seems to set the threshold of the “systemic deficiencies” for excluding the application of Dublin transfers from one Member State to another one. The *Mohammed Hussein* judgment in Strasbourg follows the same approach, by concluding that the general situation of asylum seekers in Italy had not been shown to disclose any systemic deficiency. The Court also noted that the applicants, a single mother with two children, would be able to find appropriate accommodation for their needs in Italy. It should be noted that the Italian authorities acceded to the request made by the Dutch authorities to accept responsibility for the applicant’s asylum request under Article 10(1) of the Dublin II Regulation. It is also worth noting the fact that Dutch practice in cases of Dublin removals of vulnerable persons, required particular attention and specific guaranties to be obtained by the country of destination and that removals would take place only upon obtaining such guaranties.

specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State”.

Sending an Afghan family of asylum seekers back to Italy under the “Dublin” Regulation without individual guarantees concerning their care would be in violation of Article 3

**GRAND CHAMBER JUDGMENT IN THE CASE
OF TARAKHEL v. SWITZERLAND**

(Application No. 29217/12)

4 November 2014

1. Principal facts

The applicants, Golajan Tarakhel, born in 1971, his wife Maryam Habibi, born in 1981, and their six minor children, born between 1999 and 2012, were Afghan nationals who lived in Lausanne, Switzerland.

Mr Tarakhel and Mrs Habibi met and married in Pakistan before living in Iran for 15 years. They then left Iran for Turkey, from where they took a boat to Italy. The couple and their five oldest children landed on the Italian coast in July 2011, before being subjected to the EURODAC identification procedure and placed in a reception facility. They were then transferred to the Reception Centre for Asylum Seekers (CARA) in Bari, once their identity had been established.

In late July 2011, the applicants left the CARA without permission and travelled to Austria, where they unsuccessfully claimed asylum. They later travelled to Switzerland, lodging an asylum application there in November 2011. In January 2012, the Federal Migration Office (FMO) in Switzerland decided not to examine the applicants’ asylum application on the basis that, in accordance with the European Union’s Dublin Regulation, Italy was the State responsible for examining the application.

The FMO subsequently issued an order for the applicants to be removed to Italy. The applicants appealed to the Federal Administrative Court, which dismissed the appeal in February 2012. The applicants then requested the FMO to have the proceedings reopened and to grant them asylum in Switzerland but this was dismissed by the Federal Administrative Court in March 2012 on the basis that the applicants had not submitted any new arguments.

2. Decision of the Court

The applicants complained that if they were returned to Italy, “*in the absence*

of individual guarantees concerning their care”, they would be subjected to inhuman and degrading treatment as a result of the “systematic deficiencies” in the reception arrangements for asylum seekers in Italy, in violation of Article 3. They further complained under Article 13 that the Swiss authorities had not given sufficient consideration to their personal circumstances and had not taken into account their situation as a family in the procedure for their return to Italy, which they considered to be unduly formalistic and automatic, as well as arbitrary.

Article 3

The Court reiterated the general principle that expulsion of an asylum seeker by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country. In addition, the Court underlined the fact that an asylum seeker is “*a member of a particularly underprivileged and vulnerable population group in need of special protection*”.

The Court made reference to the UNHCR Recommendations and the Council of Europe Human Rights Commissioner’s Report of 2012, both of which referred to a number of failings in Italy’s reception arrangements for asylum seekers. A lack of spaces in reception centres meant that a large number of asylum seekers were left without accommodation. In 2013, the UNHCR had identified a number of problems relating to the varying quality of the services provided, depending on the size of the facilities, and to a lack of coordination at national level. The Human Rights Commissioner, in his 2012 report, had noted the existence of problems relating to legal aid, care and psychological assistance in emergency reception centres, the time taken to identify vulnerable persons and the preservation of family unity during transfers.

Therefore, the Court concluded that the structure and overall situation of the reception arrangements in Italy raised serious doubts as the capacities of the system. Consequently, the possibility that a significant number of asylum seekers could be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, could not be dismissed as unfounded. Hence, it was necessary to examine the applicants’ individual situation in the light of the overall situation prevailing in Italy at the relevant time concerning reception conditions.

Given the inadequacy of facilities in Italy, Switzerland had a responsibility to obtain assurances from the Italian authorities that the applicants would be received in facilities with conditions adapted to the age of their children, and that the family would remain together on their return to Italy. Though the FMA had been contacted by the Italian authorities regarding where the family would be accommodated, the Swiss authorities had not received sufficiently detailed information that they could be sure the applicants would be treated appropriately.

In the absence of such individual guarantees, the Court found that there had been a violation of Article 3 of the Convention.

Article 13 taken in conjunction with Article 3

Referring to the applicants' interview with the FMO and ability to appeal to the Federal Administrative Court, the Court considered that the applicants had had an effective remedy in respect of their Article 3 complaint available to them. Accordingly, their complaint under Article 13 was rejected as manifestly ill-founded.

Article 41

The Court held that Switzerland was to pay the applicants €7,000 in respect of costs and expenses.

3. Comment

In EU asylum law, the State responsible for processing applications of international protection is determined by the criteria set out in the Dublin Regulation. In the case of *M.S.S. v. Belgium and Greece*⁹¹ the Grand Chamber of the European Court of Human Rights held that to return asylum seekers under the Dublin Regulation criteria from Belgium to the appalling conditions that awaited them in Greece violated Article 3 of the Convention. Following *M.S.S.* the Court of Justice of the European Union (CJEU) adopted its judgment in the case of *NS v. Secretary of State for the Home Department* and *ME and Others v. Refugee Applications Commissioners*⁹². In that judgment, the Luxembourg Court indicated

91 *M.S.S. v. Belgium and Greece*, [GC] judgment of 21 January 2011, no. 30696/09, included in this section.

92 C-411/10 and C-493/10, *NS v. Secretary of State for the Home Department* and *ME and Others v. Refugee Applications Commissioners*, [GC] judgment of 21 December 2011, included in the section on CJEU case law. See also C-394/12, *Shamso Abdullahi*

that Member States of the EU may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of the Dublin Regulation where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.

Following that judgment, the question was whether the systemic deficiencies test was the only one that obliges States not to send asylum seekers back to the Member State of the first entry. It should be mentioned as well that Strasbourg Court itself did apply this test in several decisions it took in 2012 and 2013⁹³.

The *Tarakhel* judgment⁹⁴ was the opportunity to clarify that question. It concerned the return of people from Switzerland to Italy. Switzerland is not, of course, a member of the EU, but it has concluded a treaty with the EU by which it applies the Dublin Regulation. The conditions in Italy are not as systemically or systematically appalling as in Greece, but before the Court there was sufficient information to cast doubt on the fact that Italy would duly implement, in particular, the EU Reception Conditions Directive as far as the accommodation of the applicants was concerned.

This important Grand Chamber judgment makes clear that vulnerable asylum seekers – particularly families with young children – cannot be returned to face a lottery as to the conditions which will await them on return to Italy under the Dublin Regulation. The judgment makes clear that it is not the general systemic deficiencies test that applies but the test of individual assessment of the circumstances. In this judgment, the Court decided a conditional violation, obliging the Swiss authorities to obtain individual guarantees relating to the specific families as to the conditions that will await them on return. It should be noted that specific guaranties are a safeguard provided as a principle by the Dublin Regulation itself⁹⁵. Following this judgment it appears that the Italian authorities have reacted by offering special guaranties for vulnerable asylum

.....
 v. *Bundesasylamt*, [GC] judgment of 10 December 2013, also included in the section on CJEU case law.

93 See for example the decision in the case of *Samsam Mohammed Hussein and Others v. the Netherlands and Italy*, decision of 2 April 2013, no. 27725/10, included in this section.

94 *Tarakhel v. Switzerland*, [GC] judgment of 4 November 2014, no. 29217/12.

95 See especially Article 17 and Chapter VI of the Dublin Regulation.

seekers, including families with young children⁹⁶. It seems that, so far, the Court has accepted that such guaranties do comply with the requirements of the *Tarakhel* judgment⁹⁷.

96 Such a guarantee is provided in two circular letters, of 8 June 2015 and 15 February 2016, by the Dublin Unit of the Italian Ministry of Interior.

97 See the inadmissibility decisions in the cases of *J.A. and Others v. the Netherlands*, decision of 3 November 2015, no. 21459/14, 3 November 2015, *A.T.H. v. the Netherlands*, decision of 17 November 2015, no. 54000/11, and *Rasul v. Finland*, decision of 14 June 2016, no. 13630/16.

Article 5 – Right to Liberty and Security

Afghan national convicted for possession of false travel documents was unlawfully detained pending removal

JUDGMENT IN THE CASE OF TABESH v. GREECE

(Application No. 8256/07)

26 November 2009

1. Principle Facts

The applicant, Mr Rafk Tabesh, was a national of Afghanistan who entered Greece irregularly and was convicted for possession of false travel documents. His expulsion was ordered due to his criminal conviction and he was detained pending removal, on the basis that he was a danger to the public and was at risk of absconding.

He was held for seven days at the Kordelio Border Police facility before being transferred to Thessaloniki Aliens' Police Directorate. The applicant's challenge of his detention in January 2007 was dismissed by the President of the Administrative Court of Thessaloniki. On 28 March 2007, the applicant was released as the three-month maximum period prescribed by the law for his detention had expired, and he could not be deported to Afghanistan as he did not have travel documents.

2. Decision of the Court

The applicant complained that the conditions of his detention in the Kordelio Border Police facility and in the Thessaloniki Aliens' Police Directorate constituted inhuman and degrading treatment contrary to Article 3 of the Convention. He also alleged a violation of Article 5(1) on the basis that the domestic authorities did not give sufficient reasons to justify his detention and that his detention for the three-month statutory maximum period was excessive, as his deportation to Afghanistan was impossible given his lack of travel documents. He also alleged that there was ineffective judicial review of his detention contrary to Article 5(4).

Article 3

When assessing whether or not the conditions of the detention of the appli-

cant could be considered to be inhuman and degrading the Court emphasised the absolute nature of this provision, and the need for the treatment to attain a minimum level of severity in order to be prohibited. The applicant alleged that detainees at the Kordelio Border Police facility were unable to perform physical exercise, there was overcrowding, poor hygiene and lack of access to the outside. In relation to the applicant's allegations concerning conditions at the Thessaloniki Aliens' Police Directorate the Court noted that these were supported by the findings of an Ombudsman's report and reports by the Committee for the Prevention of Torture (CPT).

The Court considered that keeping the applicant in detention for three months on the premises of the executive subcommittee of the Thessaloniki foreign police amounted to degrading treatment within the meaning of Article 3 of the Convention. Given this conclusion, the Court found it unnecessary to rule separately on conditions of detention in the premises of the border police of Kordelio, where the applicant stayed during the first seven days of his detention.

Article 5

In relation to Article 5, the Court found that the Administrative Court had not addressed the applicant's argument that his deportation was not possible as his country of origin had not confirmed to Greece that he was a national. Following its judgment in the earlier case of *Saadi v. the United Kingdom*⁹⁸, the Court found that his detention for three months was arbitrary as he could not be deported without travel documents, and the Greek authorities had not taken the necessary active steps to get these issued. As such, the duration of his detention exceeded the time reasonably required for the purpose pursued, and there was a violation of Article 5(1)(f).

The Court also considered that national legislation (Law No. 3386/2005) did not provide the possibility for a foreign national detained pending deportation to directly challenge the lawfulness of detention as the expulsion decision and detention decision were combined. This meant that a successful challenge in court to a detention measure merely resulted in the grant of 30 days to leave the territory, and that bringing an action in the Administrative Court to annul or stay an expulsion decision would not lead to release from detention.

Considering the above factors, the Court found the deficiencies in domestic

98 *Saadi v. the United Kingdom*, [GC] judgment of 29 January 2008, no. 13229/03.

law to violate Article 5(1) and 5(4).

Article 41

The Court awarded the applicant €8,000 for non-pecuniary damage and €3,500 for costs.

3. Comment

This judgment could be considered as an early warning message of the legal and factual situation concerning asylum seekers in Greece, issues which unfortunately will return frequently to the Court and that by now are common knowledge and of deep concern for the entire continent.

Under Article 3 of the Convention it is worth mentioning that the Court based its findings on the reports of the Greek ombudsman and of the CPT. The fact-finding by independent and specialised institutions constitute an invaluable source of information for the Court in the accomplishment of its judicial function in relation to facts to which it does not and generally could not have direct access. The second important message under Article 3 is that the Court, in finding a violation of that Article, focused its analysis on the detention conditions at the Thessaloniki Aliens' Police Directorate. The Court concluded in fact that the premises of that police station were conceived only for short detention periods and not for long periods of detention like the one the applicant was held in. Detaining people for up to 3 months in such premises constituted a violation of Article 3 of the Convention. This 2009 finding, in relation to a situation taking place in 2007, shows that the Greek asylum detention system was not Convention compliant at that time.

The second point of interest in this judgment is that, as in *Saadi v. the United Kingdom*, the applicant could not be removed to Afghanistan as he did not have any document proving his nationality and the Afghani authorities did not confirm he was their own national. This situation, combined with the lack of quick measures by the Greek authorities to clarify the situation and the detention of the applicant for three months where the prospect of returning to Afghanistan was not realistic, constituted a violation of Article 5(1) of the Convention.

The last point of interest concerns a message that the Court delivered in relation to the Greek legislation under Article 5(4) of the Convention. As explained

in the summary of the judgment above the only possible positive outcome of an appeal against detention under the applicable Greek law was an order to leave the territory within 30 days. Hence, under such conditions, the applicant could either appeal, and in case of success leave the territory within 30 days without a proper assessment as to whether this would constitute a violation of Article 3, or stay in detention in Greece in conditions contrary to Article 3. Consequently, the Court concluded that the Greek legislation was in violation of Article 5(4) of the Convention.

*Unlawful detention of an Algerian national in Malta***JUDGMENT IN THE CASE OF LOULED MASSOUD v. MALTA**

(Application No. 24340/08)

27 July 2010**1. Principal facts**

The applicant, Mr Louled Massoud, was an Algerian national born in 1960.

Mr Louled Massoud arrived in Malta from Libya by boat in June 2006. He did not carry any documents, and was immediately detained at the police headquarters. He was subsequently charged and found guilty by the Court of Magistrates of aiding other persons to enter Malta, and was sentenced to eighteen months' imprisonment.

While in prison, on 17 April 2007, the applicant applied for asylum, and was interviewed on the same day. Once he served his sentence and was released from prison on 27 June 2007, Mr Louled Massoud was placed in a detention centre pending the determination of his asylum claim. His asylum claim was rejected on 24 April 2007. His appeal was also rejected as he did not provide convincing evidence that he would face a real risk or had a well-founded fear of persecution.

Mr Louled Massoud stayed in detention awaiting deportation under the Government's immigration policy until 6 January 2009 when his removal order was rescinded given the lack of prospect of his eventual deportation. The applicant complained that the conditions of detention had not been appropriate; the facilities had been overcrowded with inadequate sanitation, limited medical care, no possibility of constructive activities and limited recreational opportunities.

2. Decision of the Court

Mr Louled Massoud complained that he had been subjected to inhuman and degrading treatment arising from the conditions of his detention, in violation of Article 3 of the Convention. He claimed that the Maltese legal system had not provided him with a speedy and efficient remedy, contrary to Article 5(4). The applicant further complained that his detention following the determination of his asylum claim had been arbitrary and unlawful, in breach of Article

5(1). Finally, Mr Louled Massoud claimed that upon his arrest after a long sea journey he had not been provided with the legal and factual grounds for his detention as prescribed by Article 5(2) of the Convention.

Article 3

Since the applicant had omitted to institute proceedings raising the Article 3 complaint before the competent national courts, this complaint was rejected by the Court for non-exhaustion of domestic remedies.

Article 5(4)

The Court considered the effectiveness of each existing remedy under Maltese domestic law.

In the first place, the Court observed that, under Article 409A of the Criminal Code, the courts entrusted with hearing applications had limited competence. In particular, they were not capable of examining other circumstances which could render detention illegal, such as an incompatibility with the rights set forth in the Convention, the general principles embodied therein, and the aim of the restrictions for the purposes of Article 5(1). Consequently the Court dismissed the Government's argument that the applicant should have pursued this remedy.

The Court then moved on to analyse the remedy before the Immigration Appeals Board (IAB). It noted that the relevant legal provision limited the release from custody to cases where the identity of the detainee had already been verified. Furthermore, considering that such proceedings took at least one month to be decided and that they could last as long as three months or more, the Court highlighted that there had been cases where the decision was not made before the actual release date, rendering such a remedy devoid of any legal practical effect. Thus, the proceedings before the IAB could not be considered to determine requests speedily as required by Article 5(4).

Finally, as for the constitutional remedy, the Court held that such proceedings were rather cumbersome for Article 5(4) purposes, and that lodging a constitutional application could not guarantee a fast review of the lawfulness of an applicant's detention.

In conclusion, the Court held that Mr Louled Massoud did not have at his dis-

positional under domestic law an effective and speedy remedy for challenging the lawfulness of his detention. Hence, there had been a violation of Article 5(4).

Article 5(1)

The period of detention to be considered for the purposes of the complaint was that from 27 June 2007, the date when the applicant was placed in a detention centre pending the determination of his asylum claim, to 6 January 2009, when he was released. His detention therefore lasted eighteen months and nine days. The Court had to determine whether this was excessive, and whether the authorities conducted the deportation proceedings with due diligence.

The delay, despite not being as striking as that in other cases, was not due to the need to wait for the courts to determine a legal challenge, as the applicant's asylum claim had been determined before his detention. Even considering that the applicant was undocumented, the Court found that the Government did not pursue the matter vigorously, and did not enter into negotiations with the Algerian authorities in order to expedite the delivery of an identity document. Moreover, it was unlikely that the authorities could not have had, at their disposal, measures other than the applicant's prolonged detention to secure an eventual removal in the absence of any immediate prospect of his expulsion.

In the light of the above, the Court doubted that the grounds for the applicant's detention – action taken with a view to his deportation under Article 5(1)(f) – remained valid for the whole period of his detention, following the rejection of his asylum claim, due to the likely lack of realistic prospects of his expulsion and the possible failure of the authorities to pursue the proceedings with due diligence.

The Court moved on to determine whether the detention was lawful under national law, “*in accordance with a procedure prescribed by law*”, and whether there were sufficient guarantees against arbitrariness.

The Immigration Act applied no limit to detention, and the applicant was subject to an indeterminate period of detention. Procedural safeguards were hence decisive, however the Court had already determined that Mr Louled Massoud did not have any effective remedy to challenge the lawfulness and length of his detention. It followed that the Maltese legal system did not provide for a procedure capable of avoiding arbitrary detention pending deportation.

The Court concluded that the national system failed to protect the applicant from arbitrary detention, and his detention had not been “lawful” for the purposes of Article 5.

There had accordingly been a violation of Article 5(1) of the Convention.

Article 5(2)

The Court declared this part of the complaint inadmissible for non-compliance with the six-month time limit.

Article 41

The Court awarded the applicant €12,000 in respect of non-pecuniary damage.

3. Comment

This is a very important judgment concerning the legality of the detention of asylum seekers and the review of detention measures at national level.

The Court dealt first with the allegations of the applicant under Article 5(4) of the Convention which provides that “[e]veryone who is deprived of his liberty [...] shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”. It analysed and answered one by one all of the Maltese Government’s objections as to the existence of effective remedies capable of reviewing the legality of the applicant’s detention. The Court held that those remedies were either limited in scope for the purposes of Article 5(1) of the Convention – which was the case of the remedy provided by Article 409A of the Criminal Code – or they took too long and were too cumbersome to be considered speedy under Article 5(4) – as was the case of the appeal before the Immigration Appeals Board and the Constitutional remedy. Referring to its previous findings in relation to Maltese cases⁹⁹, the Court decided there was a violation of Article 5(4) of the Convention.

The Court then moved to the question of the legality of the detention of the applicant, as an asylum seeker, under Article 5(1) of the Convention. The Court

99 See *Sabeur Ben Ali v. Malta*, judgment of 29 June 2000, no. 35892/97, and *Kadem v. Malta*, judgment of 9 January 2003, no. 55263/00.

found that after being released from detention having served his sentence, the applicant was detained again pending the determination of his asylum claim. The Court concluded that keeping an asylum seeker in detention for more than 18 months while his asylum application and the following appeal had both been rejected, and there was no prospect of the applicants removal, could not be justified for the purposes of Article 5(1)(f) of the Convention. Although the Court noted that the period of the applicant's detention had been shorter than in other cases before it¹⁰⁰, it concluded that the Maltese authorities were not diligent in releasing the applicant once they became aware that he could not be deported to Algeria¹⁰¹. Hence, this judgment makes clear that detention "with a view to deportation" can only be justified for as long as there remains a realistic prospect of expulsion. When it becomes clear that expulsion is no longer possible, detention ceases to be Article 5(1)(f) compliant¹⁰².

100 It referred to *Chahal v. the United Kingdom*, [GC] judgment of 15 November 1996, no. 22414/93, also included in this section, and *Raza v. Bulgaria*, judgment of 11 February 2010, no. 31465/08.

101 Compare with *Ali v. Switzerland*, judgment of 5 August 1998, no. 24881/94, where a violation was found, and with *Eid v. Italy*, decision of 22 January 2002, no. 53490/99, where the same period of 18 months was considered not to be in violation of Article 5(1) of the Convention.

102 See also the CJEU judgment of 15 February 2016, C-601/15, *J.N. v. Staatssecretaris van Veiligheid en Justitie*, where the Luxembourg Court reiterated that the Reception Conditions Directive does not disregard the level of protection afforded by Article 5(1)(f) of the ECHR, which permits the detention of a person against whom action "is being taken" with a view to deportation.

Article 6 – Right to a Fair Trial

In absence of diplomatic assurances, returning a refugee to Jordan would amount to a flagrant denial of justice

JUDGMENT IN THE CASE OF OTHMAN (ABU QATADA) v. THE UNITED KINGDOM (Application No. 8139/09) **17 January 2012**

1. Principal facts

The applicant, Omar Othman (Abu Qatada), was a Jordanian national. He arrived in the United Kingdom in September 1993 and lodged an asylum application – in particular on the basis that he had been detained and tortured by the Jordanian authorities in 1988 and 1990-1991. He was granted refugee status in 1994.

In October 2002, he was detained under the Anti-Terrorism, Crime and Security Act. When that Act was rescinded in March 2005, he was released on bail and subjected to a control order under the Prevention of Terrorism Act. While his appeal against the control order was still pending, in August 2005, the Secretary of State notified the applicant of the intention to deport him to Jordan.

Mr Othman appealed against the deportation decision. Because he had been convicted *in absentia* in Jordan of involvement in two terrorist conspiracies in 1999 and 2000. Thus, he claimed that, if deported, he would be retried; putting him at risk of torture, long pre-trial detention and an unfair trial, given that crucial evidence had been obtained by the torture of his co-defendants.

The UK Special Immigration Appeals Commission (SIAC) dismissed his appeal, holding in particular that Mr Othman would be protected against torture and ill-treatment by the agreement negotiated between the United Kingdom and Jordan in 2005. To that regard, the Memorandum of Understanding (MOU) set out a detailed series of assurances of compliance with international human rights standards to be fulfilled when an individual was returned to one State from the other. Moreover, SIAC found that the retrial would not be completely in denial of his right to a fair trial.

The Court of Appeal partially granted Mr Othman's appeal. It found that there

was a risk that torture evidence would be used against him if he were returned to Jordan, and that this would violate the international prohibition on torture, resulting in a flagrant denial of justice in breach of Article 6 of the ECHR.

On 18 February 2009, the House of Lords upheld SIAC's findings. They found that the diplomatic assurances would protect Mr Othman from being tortured. They also found that the risk that evidence obtained by torture would be used in the criminal proceedings in Jordan would not amount to a flagrant denial of justice.

2. Decision of the Court

The applicant claimed that, if deported to Jordan, he would be at real risk of torture and ill-treatment, and of a flagrant denial of justice because, *inter alia*, of the admission of evidence obtained by torture. He relied on Articles 3, 5, 6 and 13.

The application was lodged with the European Court of Human Rights on 11 February 2009. On 19 February 2009, an interim measure under Rule 39 of the Rules of Court was granted to prevent Mr Othman from being returned to Jordan pending the ECtHR's decision.

Article 3

Reiterating its well-established case law, the Court held that Mr Othman could not be deported to Jordan if there was a real risk that he would be tortured or subjected to inhuman or degrading treatment.

The reports of United Nations bodies and human rights organisations showed that torture in Jordan was "widespread and routine" – especially against suspected Islamist terrorists – and that no protection against this was provided by the courts or any other body in Jordan. As a high-profile Islamist, Mr Othman belonged to a category of prisoners at real risk of ill-treatment, and he alleged that he had been tortured when he lived in Jordan.

Therefore, the Court had to decide whether the diplomatic assurances obtained by the UK Government from the Jordanian Government were adequate to protect Mr Othman.

The Court found that the MOU agreement between the two Governments was specific and comprehensive. The diplomatic assurances were provided in good faith by the Jordanian Government, whose bilateral relations with the United

Kingdom had always been strong. The assurances had been approved at the highest levels of the Government; endorsed and supported by the King himself. Considering Mr Othman's high profile, the Jordanian authorities would act carefully to ensure he was properly treated; in addition, any ill-treatment would have serious consequences for Jordan's relationship with the United Kingdom. Finally, in accordance with the MOU, the applicant would be regularly visited by an independent human rights organisation in Jordan – the Adaleh Centre – which would monitor and verify that the diplomatic assurances were respected, and which would have full access to Mr Othman in prison.

Consequently, the applicant's return to Jordan would not violate Article 3, as it would not expose him to a real risk of ill-treatment.

Article 13

The Court considered that SIAC's procedures satisfied the requirements of Article 13, and hence there had been no violation of Article 13.

Article 5

The Court first had to determine whether Article 5 can apply in expulsion cases. It held that if Article 6 can apply in such cases – and therefore be relied on by an applicant to prevent his expulsion to a State where he would face imprisonment after a flagrantly unfair trial – equally Article 5 can be used to prevent extradition to a State where a sentence of imprisonment has already been served after an unfair trial. Therefore, the Court held that Article 5 can apply in expulsion cases, and hence a Contracting State would be in violation if it removed an applicant to a State where he or she was at real risk of a flagrant breach of the right to liberty and security. However, a high threshold must apply.

The Court found that Jordan clearly aimed to bring Mr Othman to trial, and according to domestic law it had to do so within 50 days of his detention. The Court held that 50 days' detention fell far short of the length of detention required for a flagrant breach of Article 5 and, consequently, that there would be no violation of Article 5 if the applicant was deported to Jordan.

Article 6

In the Court's case-law it is established that an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstanc-

es where the person concerned had suffered or risked suffering a flagrant denial of justice in the requesting country. The term “flagrant denial of justice” has become synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein.

The Court observed that a flagrant denial of justice did not involve only mere irregularities or lack of safeguards in trial procedures. Instead, what was required was a breach of the main principles of a fair trial which was so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by Article 6.

In that regard, the Court held that the use of evidence obtained by torture during a criminal trial would amount to a flagrant denial of justice, in violation of Article 6. Torture and the use of torture evidence are prohibited under international law. Thus allowing a criminal court to rely on torture evidence would legitimise the pre-trial torture of witnesses and suspects. Furthermore, torture evidence was to be considered unreliable, as a person being tortured would say anything to make it stop.

The Court found that torture was widespread in Jordan, as was the use of torture evidence by the Jordanian courts. Moreover, the Court found that, in relation to each of the two terrorist conspiracies charged against Mr Othman, the evidence of his involvement had been obtained by torturing one of his co-defendants. When those two co-defendants stood trial, the Jordanian courts had not taken any action in relation to their complaints of torture. The Court held that it was highly likely that the incriminating evidence would be admitted at Mr Othman’s retrial and that it would be of considerable, perhaps decisive, importance.

In the absence of any diplomatic assurance by Jordan that the torture evidence would not be used against Mr Othman, the Court therefore concluded that his deportation to Jordan to be retried would give rise to a flagrant denial of justice in violation of Article 6.

Article 41

The applicant did not submit a claim for just satisfaction.

3. Comment

This was a very high profile case, the applicant being a person accused of several acts of terrorism. The case was widely reported in the media and discussed in detail in the British Parliament.

The judgment in this case is important for two reasons.

Firstly, the Court had to decide whether, while the reports from international organisations suggested that torture was a widespread practice in Jordan, the specific diplomatic guarantees provided by the Jordanian Government to the UK Government were sufficient to avoid the risk of any treatment prohibited by Article 3 in the applicant's case. For this purpose, the Court analysed the terms of the Memorandum of Understanding concluded by the two respective Governments. The Court found that the Memorandum was specific and comprehensive, that guarantees were provided in good faith and that the highest Jordanian authorities had endorsed the commitment. The Court considered it important in this framework that an independent NGO would visit and monitor the respect of the diplomatic guarantees' terms in relation to the applicant. Therefore, the Court concluded that there was no risk of ill-treatment in case of removal.

Secondly, this case constitutes the first time ever where the Strasbourg Court decided that a removal to a country would violate Article 6 of the Convention as the applicant would be victim of a flagrant denial of justice in Jordan. The Court underlined that the term "flagrant denial of justice" is synonymous with a trial which is manifestly contrary to the provisions of Article 6 or the principles embodied therein. Such was, according to the Court, the situation in the applicant's case, where the evidence against Mr Othman's involvement in terrorist conspiracies had been obtained by torturing one of his co-defendants. The fact that the use of torture was widespread in Jordan and evidence extracted by torture was accepted by the Jordanian courts, made the Court arrive at the conclusion that the applicant would face similar risk during his trial upon return, and therefore be a victim of flagrant denial of justice. This is a perfect example of the interpretation of the Convention rights as being effective and practical, and not theoretical. To decide otherwise, would have meant for the Court to indeed concede the practice of torture and its use in criminal trials.

Article 13 – Right to an Effective Remedy

First-time asylum seeker was not given effective remedy under fast-track procedure for examination of his case

JUDGMENT IN THE CASE OF I.M. v. FRANCE

(Application No. 9152/09)

2 February 2012

1. Principal facts

The applicant was a Sudanese national who was born in 1976 and lives in France. In May 2008, he was arrested by the Sudanese police and spent eight days in detention and a further two months under surveillance by the authorities, who interrogated him on a weekly basis using violence. In December 2008, he travelled to Spain with a view to crossing the border into France, carrying a forged French visa.

The applicant was arrested in France for “unlawful entry” and “using forged documents”. He was sentenced to one month’s imprisonment for an offence under aliens’ legislation.

According to the applicant, he claimed asylum both whilst in custody and detention. Neither claim was registered.

On 7 January 2009, the local prefect ordered the removal of the applicant. He tried to challenge this decision but had no assistance from anyone who spoke Arabic and had only a few moments to speak to the duty lawyer before his appeal on 12 January 2009, which was rejected. On 16 January 2009, he was detained at an immigration detention centre awaiting his expulsion.

On 19 January, he made an asylum claim with some assistance for the non-governmental organisation (NGO) CIMADE. On 22 January, his claim for asylum was recorded by the French Office for the Protection of Refugees and Stateless Persons (OFPRA) and registered under the “fast track” procedure because it had been made after the expulsion order. The claim had to be made in French and in five days instead of the normal 20, however, the applicant still had to supply all the same documents as applicants under the normal procedure. On 30 January 2009, his asylum interview, which lasted 30 minutes, was conducted by a caseworker of OFPRA, and his application was rejected on 31 January

2009 but no minutes of the asylum interview were attached.

The applicant appealed. However, in February 2009, before his appeal was heard, he was brought by the French authorities to the Sudanese Consulate to obtain travel documents for his deportation.

On 16 February 2009, the applicant applied to the European Court of Human Rights under Rule 39 of the Rules of Court, seeking to have the order for his deportation suspended. The Court granted his request for the duration of the proceedings before it.

On 19 February 2011, the National Asylum Tribunal granted the applicant refugee status. In the meantime, he had obtained a certificate of residence from his municipality of origin in Darfur and a medical report issued by a psychiatrist stating that he had been subjected to violence.

2. Decision of the Court

The applicant alleged that enforcement of the decision of the French authorities to deport him to Sudan would place him at risk of treatment in breach of Article 3.

Relying on Article 13, taken together with Article 3, he submitted that no effective remedy had been available to him in France owing to the fact that his asylum application had been dealt with under the fast-track procedure.

Article 3

The Court rejected the applicant's complaint under this provision as he no longer faced deportation.

Article 13

The Court reiterated that in asylum and immigration cases it confined itself to verifying that the domestic procedures were effective and that they safeguarded human rights. The way in which States organise domestic remedies fall within their margin of appreciation; the necessary guarantees against arbitrary deportation can be afforded by the aggregate of remedies under domestic law, which can accordingly satisfy the requirements of Article 13 even if no single remedy by itself does so.

Procedure before OFPRA and the National Asylum Tribunal

The Court observed that the applicant had been unable to report in person to the prefecture as required by French law and that the police reports provided some indications that he had attempted to apply for asylum while he was still in police custody.

The authorities had taken the view that the asylum application lodged by the applicant while in administrative detention had been based on “deliberate fraud” or constituted “abuse of the asylum procedure” merely because it had been submitted after the issuance of the removal order. It was on that basis, not the circumstances of his case, that his application had been registered under the fast-track procedure.

The Court acknowledged that fast-track asylum procedures could make it easier to process applications that were clearly unreasonable or manifestly ill-founded. The re-examination of an asylum application under the fast-track procedure did not deprive aliens in administrative detention of a detailed review of their claims, if they had had a first application examined under the normal procedure, but this was not the case with first-time applications like the applicant’s.

Had his request to the ECtHR not been granted in good time, the consideration of the applicant’s asylum application by OFPRA under the fast-track procedure would have been the only examination of the merits of his asylum claim prior to his deportation.

Under the fast-track procedure, the time-limit for lodging the application had been reduced from 21 to 5 days. This short period imposed constraints, as the applicant was expected to submit an application in French, meeting the same requirements as applications in the normal procedure, and to provide supporting documents. The applicant’s inability to provide the necessary information led to the rejection of his application.

Application to the Administrative Court

The application to the Administrative Court challenging the deportation order, which had full suspensive effect, had theoretically made it possible to conduct an effective examination of the risks allegedly faced by the applicant in Sudan. However, he had only 48 hours to prepare his application, as opposed to the

two months allowed under the regular procedure.

He had been able to submit his application only in the form of a letter written in Arabic which an officially appointed lawyer, whom he had met briefly before the hearing, had read out without having the opportunity to add any evidence to it. The lack of conclusive evidence had formed the basis for the application's rejection.

The applicant was also criticised for not having previously lodged an asylum claim, though, being in detention, he had been unable to meet the formalities for doing so including attending the prefecture.

The Court hence observed that while domestic legal remedies had been available in theory, their accessibility had been limited in practice. The applicant's application to the Administrative Court had been adversely affected by the conditions in which he had had to prepare it and the inadequate legal and linguistic assistance provided. Further, the interview with OFPRA had been brief, lasting only 30 minutes, despite the fact that the case was complex and concerned a first-time asylum claim.

The applicant's appeal did not have a suspensive effect once the fast-track procedure had been applied. His deportation had been prevented only by the application of Rule 39 of the Rules of the ECtHR.

The Court could only conclude that, without its intervention, the applicant would have been deported to Sudan without his claims being subjected to the most anxious scrutiny as required by the Convention.

Accordingly, the applicant had not had an effective remedy in practice and there had been a violation of Article 13 taken together with Article 3.

Article 41

The Court awarded the applicant €4,746.25 for costs and expenses.

3. Comment

In its ruling in the case of *I.M. v. France*, the Court underlined that the effectiveness of an appeal “*depends on the requirements of quality, speed and its suspensive effect, considering in particular the importance the Court attaches*

to Article 3 and the irreversible nature of the harm likely to be caused if the risk of torture or ill-treatment should be realised". In finding fault with the fast track procedure, the Court emphasised that the individual did not in practice have the means to appeal, and concluded that there had been a violation of the right to an effective remedy. Amongst the key elements of the procedure which led the Court to its decision were the brevity of the interview, the lack of language and legal assistance but most importantly the absence of suspensive effect. In 2011, one quarter of all asylum applications in France were examined under this truncated accelerated procedure. The absence of a suspensive appeal to the National Court of Asylum for asylum claims processed under this accelerated procedure had thus placed thousands of people at risk. The United Nations Committee Against Torture said it was not convinced that the priority procedure offered adequate safeguards against removal where there is a risk of torture.

Interestingly, the judgment in *I.M.* made no mention of the applicable EU law although the EU Asylum Procedures Directive applied to the applicant's situation.

Removal of international protection seekers from Spain to Morocco, where they alleged they would face a risk of inhuman and degrading treatment

JUDGMENT IN THE CASE OF A.C. AND OTHERS v. SPAIN

(Application No. 6528/11)

22 April 2014

1. Principal facts

The applicants were thirty international protection seekers of Sahrawi origin. On October 10 2010, the applicants set up tents in the Gdeim Izik camp, located in the territory of Western Sahara, in protest against their living conditions, their marginalization and were demanding jobs and adequate housing. According to Moroccan authorities, the camp installation was illegal and unauthorized.

On 8 November 2010, clashes erupted when Moroccan security forces intervened to forcibly remove and dismantle the camp. Eleven members of the security forces and two Sahrawis were killed in the violence and the applicants fled the camp. They arrived on makeshift boats on the coast of the Canary Islands between January 2011 and August 2012. Several days later they lodged applications for international protection (asylum), which were rejected after being considered and reconsidered by the Spanish Minister of the Interior. The Minister also ordered their deportation.

On 21 January 2011, the applicants applied for judicial review of the Minister of Interior's decisions and also sought a stay of execution of the orders for their deportation. On 27 January 2011 the Audiencia Nacional ordered the administrative authorities to provisionally suspend the procedure for the removal of the applicants in question pending the examination of their allegations about the risks they would face in the event of being returned to their country of origin.

Between 28 January 2011 and 1 October 2012 the applicants made thirty requests to the European Court of Human Rights for interim measures under Rule 39 of the Rules of Court. They submitted that in the past, while being arrested or during the dismantling of their camp, they had been subjected to ill-treatment by the Moroccan authorities on account of their Sahrawi origin. The Court decided to indicate to the Spanish Government that the applicants should not be removed for the duration of the proceedings before it. After their

applications for judicial review were dismissed, the applicants appealed on points of law to the Supreme Court. At the time of the judgment, the Court did not have any further information as to the outcome of those appeals.

2. Decision of the Court

Relying on Article 13 (right to an effective remedy) in conjunction with Articles 2 (right to life) and 3 (prohibition of inhuman or degrading treatment), the applicants complained that they had had an insufficient opportunity in the national courts to submit their arguments concerning the risks they would face in the event of their removal to Morocco.

Article 13 in conjunction with Articles 2 and 3

The Court reiterated that the concept of an effective remedy required the possibility of suspending the implementation of a removal order where the person facing deportation was liable to be exposed to a risk of ill-treatment, torture and, a fortiori, a violation of the right to life. In the present case, the Court was not required to determine whether there might be a violation of Articles 2 and 3 in the event of the applicants' removal. It was for the Spanish authorities themselves to examine the applicants' requests and assess the risks they would face in their country of origin. The Court's concern was whether, given that the applicants' appeals on the merits were at the time of the European Court's judgment still pending before the Spanish courts, effective safeguards were in place to protect them against arbitrary removal.

The Court observed that the applicants had made use of the remedies available in the Spanish system in respect of their complaints under Articles 2 and 3 of the Convention; they had lodged applications for international protection, which had been rejected after being considered and reconsidered by the Minister of the Interior. Since the international protection proceedings did not in themselves have suspensive effect, the applicants had subsequently sought a stay of execution of the orders for their deportation. On the face of it, and without prejudice to the Spanish courts' assessment on the merits, the applicants' fears as to the alleged ill-treatment they claimed they were likely to face if they returned to their country of origin did not appear irrational. However, the day after ordering the suspension of the procedure for the first thirteen applicants' removal, the Audiencia Nacional had rejected their requests for a stay of execution.

The requests by the other seventeen applicants had likewise been rejected very shortly after the administrative authorities had been ordered to provisionally suspend the removal procedure. The Audiencia Nacional had noted in particular that the arguments submitted in support of the applicants' requests had not led it to conclude that there was any special emergency that could justify suspending all measures for their removal from Spanish territory. However, because of the expedited nature of the proceedings, the applicants had not had the opportunity to provide any further explanations on these points. This was all the more prejudicial in that, since their applications for international protection did not in themselves have suspensive effect, the proceedings before the Audiencia Nacional had been their only possible means of securing a stay of execution of their removal.

The Court recognised the need for States faced with a large number of asylum seekers to have the necessary means to cope with such litigation, and the risk of these cases clogging the system. However, like Article 6 of the Convention, Article 13 imposes on Contracting States an obligation to organise their judicial systems to enable them to meet the requirements of the Convention. This requirement should not however undermine the effectiveness of the fundamental procedural safeguards in Article 13 for protecting the applicants against arbitrary removal to their country of origin.

Furthermore, since the applicants' applications for judicial review did not have suspensive effect, the application of Rule 39 of the Rules of Court had been the only means of suspending the procedure for their removal. Without the Court's intervention, the applicants would therefore have been returned to their country of origin without their applications for international protection having been examined as thoroughly and rapidly as possible. Accordingly, the Court found that there had been a violation of Article 13 in conjunction with Articles 2 and 3.

Article 46

The Court noted that the violation of Article 13 of the Convention resulted from the non-suspensive effect of judicial proceedings concerning the applicants' applications for international protection. It further emphasised that those applications were still pending at the time of the Court's judgment even though the first group of applicants had applied for asylum on arriving in Spain in January 2011. Consequently, the Court found that the respondent State was to ensure that, from a legal and material perspective, the applicants remained

within Spanish territory while their cases were being examined, pending a final decision by the domestic authorities on their applications for international protection.

3. Comment

The importance of this judgment does not reside in any new and unknown legal standard not used earlier by the Court. It does indeed confirm what the Court has said in many of its previous judgments, like in *Čonka v. Belgium*¹⁰³ or *M.S.S. v. Belgium and Greece*¹⁰⁴, that any appeal by the asylum seekers against a measure ordering their removal to the destination country should have suspensive effect.

The Court has always shown particular attention to this question. The first reason for such attention relies of course on the irreversibility of the situation in case of removal. If an appeal does not have suspensive effect, the appeal itself, and even an eventual application to Strasbourg would be void of any purpose if, in the meantime, the asylum seeker has been removed to the destination country. That person would be outside the reach of the Convention rights and of the national and international courts applying those rights. This is also the logic of the operation of Rule 39 of the Rules of the Court, which in case of removals which represent a potential risk for the applicant, orders the national authorities to stop the removal until the Court would have the possibility of a detailed judicial assessment of that risk.

The second reason relies on the protected rights under consideration. This reason is of course linked with the one of irreversibility, but especially in cases of asylum seekers, where violations of Article 2 or 3 of the Convention are at stake, the Court pays particular attention to the fact that such risks be carefully analysed and reviewed at domestic level. So important is the necessity for the suspension of such removals that the Court has insisted it should take place also in cases of risks emanating in Member States which are members of the Convention and even of the European Union¹⁰⁵.

The case under consideration underlines such importance. Due to the lack of such suspensive effect, the Court not only found a violation of Article 13 of

103 *Čonka v. Belgium*, judgment of 5 February 2002, no. 51564/99.

104 *M.S.S. v. Belgium and Greece*, [GC] judgment of 21 January 2011, no. 30696/09, also included in this section.

105 See *M.S.S. v. Belgium and Greece* and the comment to that case in this section.

the Convention read in conjunction with Articles 2 and 3, but also indicated specific measures to the Spanish authorities under Article 46 of the Convention, in order to guarantee that the applicants remained in Spanish territory until their asylum applications were finally determined by the domestic jurisdictions. This is a strong message for all countries where the appeals against asylum applications do not enjoy a clear and enforceable suspensive effect.

Article 4 of Protocol No. 4 – Prohibition of Collective Expulsion

Returning migrants to Libya without examining their case exposed them to a risk of ill-treatment and amounted to collective expulsion

GRAND CHAMBER JUDGMENT IN THE CASE OF HIRSI JAMAA AND OTHERS v. ITALY

(Application no. 27765/09)

23 February 2012

1. Principal facts

The applicants were 11 Somalian and 13 Eritrean nationals.

They were part of a group of about 200 people who left Libya in 2009 on board three boats bound for Italy. On 6 May 2009, when the boats were 35 miles south of Lampedusa (Agrigento), within the maritime search and rescue region under the responsibility of Malta, they were intercepted by Italian Customs and Coastguard vessels. The passengers were transferred to the Italian military vessels and taken to Tripoli. The applicants claimed that during the journey the Italian authorities did not tell them where they were being taken, or check their identity. Once in Tripoli, after a 10-hour voyage, they were handed over to the Libyan authorities.

At a press conference on 7 May 2009 the Italian Minister of the Interior said that the interception of the vessels on the high seas and the return of the migrants to Libya was in accordance with the bilateral agreements with Libya that had come into force on 4 February 2009, marking an important turning point in the fight against illegal immigration. The policy discouraged criminal gangs involved in people smuggling and trafficking, helped save lives at sea and substantially reduced landings of clandestine migrants along the Italian coast. During the course of 2009, Italy conducted nine operations on the high seas to intercept clandestine migrants, in conformity with the bilateral agreements concluded with Libya. On 26 February 2011, the Italian Defence Minister declared that the bilateral agreements with Libya were suspended following the events in Libya.

According to information submitted to the Court by the applicants' representatives, at the time of the judgment two of the applicants had died in unknown circumstances. Between June and October 2009 fourteen of the applicants had

been granted refugee status by the office of the UN High Commissioner for Refugees (UNHCR) in Tripoli. Following the revolution in Libya in February 2011 the quality of contact between the applicants and their representatives deteriorated. The lawyers were, at that time, in contact with six of the applicants, four of whom live in Benin, Malta or Switzerland and some of whom were awaiting a response to their request for international protection. One of the applicants was in a refugee camp in Tunisia and planning to return to Italy. In June 2011, refugee status was granted to one of the applicants in Italy after he had clandestinely returned there.

2. Decision of the Court

Relying on Article 3, the applicants submitted that the decision of the Italian authorities to send them back to Libya had exposed them to a risk of ill-treatment there, as well as to the risk of ill-treatment if they were sent back to their countries of origin (Somalia and Eritrea). They also complained that they had been subjected to collective expulsion prohibited by Article 4 of Protocol No. 4. Relying, lastly, on Article 13, they complained that they had had no effective remedy in Italy against the alleged violations of Article 3 and of Article 4 of Protocol No. 4.

Article 1

The Court reiterated the principle of international law, enshrined in the Italian Navigation Code, that a vessel sailing on the high seas was subject to the exclusive jurisdiction of the State of the flag it was flying. The Court could not accept the Government's description of the operation as a "rescue operation on the high seas" or that Italy had exercised allegedly minimal control over the applicants. The events had taken place entirely on board ships of the Italian armed forces, the crews of which had been composed exclusively of Italian military personnel. In the period between boarding the ships and being handed over to the Libyan authorities, the applicants had been under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities. Accordingly, the events giving rise to the alleged violations had fallen within Italy's jurisdiction within the meaning of Article 1.

Article 3

Risk of suffering ill-treatment in Libya

The Court was aware of the pressure on States resulting from the increasing influx of migrants, which was a particularly complex phenomenon when occurring by sea, but observed that this could not absolve a State of its obligation not to remove any person who would run the risk of being subjected to treatment prohibited under Article 3 in the receiving country. Noting that the situation in Libya had deteriorated after April 2010, the Court decided to confine its examination of the case to the situation prevailing in Libya at the material time. It noted that the disturbing conclusions of numerous organisations regarding the treatment of clandestine immigrants were corroborated by a 2010 report from the Committee for the Prevention of Torture (CPT). Irregular migrants and asylum seekers, between whom no distinction was made, had been systematically arrested and detained in conditions described as inhuman by observers, who reported cases of torture among others. Clandestine migrants had been at risk of being returned to their countries of origin at any time and, if they managed to regain their freedom, had been subjected to particularly precarious living conditions and exposed to racist acts. Italy could not evade its responsibility under the Convention by referring to its subsequent obligations arising out of bilateral agreements with Libya. The Court noted, further, that the Office of the UNHCR in Tripoli had never been recognised by the Libyan Government. That situation had been well-known and easy to verify at the relevant time. The Court therefore considered that when the applicants had been removed, the Italian authorities had known or should have known that they would be exposed to treatment in breach of the Convention.

Furthermore, the fact that the applicants had not expressly applied for asylum had not exempted Italy from its responsibility. The Court reiterated the obligations on States arising out of international refugee law, including the “*non-refoulement* principle” also enshrined in the Charter of Fundamental Rights of the European Union.

The Court concluded that by transferring the applicants to Libya the Italian authorities had, in full knowledge of the facts, exposed them to treatment proscribed by the Convention. The Court thus concluded that there had been a violation of Article 3.

Risk of suffering ill-treatment in the applicants’ country of origin

The indirect removal of an alien left the State’s responsibility intact, and that State was required to ensure that the intermediary country offered sufficient guarantees against arbitrary *refoulement*, particularly where that State was

not a party to the Convention. The Court would determine whether there had been such guarantees in this case.

All the information in the Court's possession showed *prima facie* that there was widespread insecurity in Somalia and in Eritrea – individuals faced being tortured and detained in inhuman conditions merely for having left the country irregularly. The applicants could therefore arguably claim that their repatriation would breach Article 3 of the Convention. The Court observed that Libya had not ratified the Geneva Convention and noted the absence of any form of asylum and protection procedure for refugees in the country. The Court could not therefore subscribe to the Government's argument that the UNHCR's activities in Tripoli represented a guarantee against arbitrary repatriation. Moreover, Human Rights Watch and the UNHCR had denounced several forced returns of asylum seekers and refugees to high risk countries. Thus, the fact that some of the applicants had obtained refugee status in Libya, far from being reassuring might actually have increased their vulnerability.

The Court concluded that when the applicants were transferred to Libya, the Italian authorities had known or should have known that there were insufficient guarantees protecting them from the risk of being arbitrarily returned to their countries of origin. That transfer accordingly violated Article 3.

Article 4 of Protocol No. 4

The Court observed that at the time of the present judgment, the *Čonka v. Belgium*¹⁰⁶ case was the only one in which it had found a violation of Article 4 of Protocol No. 4. In the present case, the transfer of the applicants to Libya had been carried out without any examination of each individual situation. No identification procedure had been carried out by the Italian authorities, which had merely embarked the applicants and then disembarked them in Libya. The Court concluded that the removal of the applicants had been of a collective nature, in breach of Article 4 of Protocol No. 4.

Article 13 taken in conjunction with Article 3 and Article 4 of Protocol No. 4

The Italian Government acknowledged it had not been possible to assess the applicants' personal circumstances on board the military ships. The applicants alleged that they had been given no information by the Italian military

106 *Čonka v. Belgium*, judgment of 5 February 2002, no. 51564/99.

personnel, who had led them to believe that they were being taken to Italy, and had not informed them as to the procedure to be followed to avoid being returned to Libya. That version of events, though disputed by the Government, was corroborated by a large number of witness statements gathered by the UNHCR, the CPT and Human Rights Watch. The applicants had thus been unable to lodge their complaints under Article 3 of the Convention and Article 4 of Protocol No. 4 with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced. Even if a remedy under criminal law against the military personnel on board the ship was accessible in practice, this did not satisfy the criterion of suspensive effect. The Court reiterated the requirement flowing from Article 13; that the execution of a measure be stayed where the measure was contrary to the Convention and had potentially irreversible effects. The Court concluded that there had been a violation of Article 13 taken in conjunction with Article 3 and Article 4 of Protocol No. 4.

Article 41

The Court held that Italy was to pay each applicant €15,000 in respect of non-pecuniary damage and €1,575.74 to the applicants jointly in respect of costs and expenses.

3. Comment

The Court had already found in the *Medvedyev and Others v. France*¹⁰⁷ case two years earlier that people detained on a boat which was taken over by the French authorities on the high seas during a police operation fell within France's 'jurisdiction'; a similar finding was made in this case of migrants intercepted at sea, placed on Italian boats and returned to Libya. There was ample evidence of the ill-treatment of asylum seekers in pre-revolutionary Libya and of a real risk of onward *refoulement* by Libya to their countries of origin. This led to the finding of an Article 3 violation.

This case was the first time that Article 4 of Protocol No. 4, had been applied to "push-backs" conducted outside the territory of a State. Once the Court found that the applicants were within Italy's jurisdiction, it was able to reach the conclusion that Article 4 of Protocol No. 4 could apply. A violation of this provision depends on the collective nature of the expulsion or rejection and the

107 *Medvedyev and Others v. France*, [GC] judgment 29 March 2010, no. 3394/03.

lack of any individualised consideration of their situation, and not (as with Article 3) on the risks to which those being returned will be exposed. It had been extremely difficult for the lawyers to keep in touch with their clients and the Court was at one stage concerned that they could not claim to be acting on the clients' instructions.

The case is of significant relevance for those States which are on the European Union's southern and south eastern borders. In situations where the risks on return are well known, return to that State is prohibited. Where a State returns someone to an intermediary State, which may subsequently return the person to her/his country of origin, this can also violate Article 3. The Convention now clearly applies to States' immigration control operations wherever they take place – even on the high seas.

Judge Pinto de Albuquerque's concurring opinion attracted significant interest as he asserted that *"if a person is in danger of being tortured in his or her country asks for asylum in an embassy of a State bound by the European Convention on Human Rights, a visa to enter the territory of that State has to be granted, in order to allow the launching of a proper asylum procedure in the receiving State"*.

Collective expulsion of Afghan migrants from Italy to Greece and the deprivation of their right to access asylum procedure in both countries

**JUDGMENT IN THE CASE OF SHARIFI AND OTHERS
v. ITALY AND GREECE**

(Application No. 16643/09)

21 October 2014

1. Principal facts

The case initially concerned 35 applicants of different nationalities, including Afghan, Sudanese and Eritrean. The applicants stated that, on various dates between 2007 and 2008, they entered Greek territory from their countries that had been experiencing armed conflicts involving and affecting civilians. After illegally boarding vessels in the port of Patras, they arrived in Italy between January 2008 and February 2009 in the ports of Bari, Ancona and Venice, where the border police immediately intercepted and deported them back to Greece. The applicants further stated that they had, in both countries, been subjected to violence by the police and the crew on the vessels. They were also prevented from applying for asylum in both Italy and Greece.

With regards to Italy, the applicants were neither given the opportunity to contact lawyers or translators nor provided with information regarding their rights. They also failed to receive any official translated letters concerning their removal to Greece. Instead, upon disembarkation in Italy, they were immediately placed in vessels and sent back to Greece. Once there, the applicants were detained and deportation orders were issued. Subsequently, they were placed in a makeshift camp near Patras where reception conditions were described as inhumane and degrading; with little or no access to toilets, food or medical assistance.

Due to the state of precariousness and utter destitution the applicants found themselves in, a request for an interim measure referred to in Rule 39 was lodged with the Court, especially after the information on the expulsion of several Afghan nationals to Turkey and later back to Afghanistan had been presented to the Court. The request was granted.

Following the police's evacuation and destruction of the makeshift camp in Patras, some of the applicants had been arrested and sent back to Turkey, Albania or detained in Greek prisons. Among them were also several of the appli-

cants with regards to whom interim measures had been indicated by the Court and consequently their removals were suspended.

During their time in Greece, the applicants claimed that they had had no opportunity to contact a lawyer and no translator had been provided. Moreover, they argued that they had had no access to the asylum procedure or to a first instance procedure that, according to Greek law, would have had competence to hear their complaints.

2. Decision of the Court

The application was lodged with the European Court of Human Rights on 25 March 2009. Although 35 applicants were initially involved in the application before the Court, only four of them maintained regular contact with their representative and hence the Court's judgment concerned only these four applicants.

The applicants alleged that they had entered Italian territory illegally and been returned to Greece immediately after. They feared subsequent deportation to their respective countries of origin, where they would face serious risks of death, torture or inhuman or degrading treatment, in breach of Articles 2 and 3 of the Convention.

They also complained about the lack of access to domestic courts in order to assert their grievances in breach of Article 13 of the Convention.

Relying on Article 4 of Protocol No. 4, they argued that they had been subjected to indiscriminate collective expulsion by the Italian authorities which constituted an indirect *refoulement* to Afghanistan.

Lastly, they also contended that they had been denied the right to bring their case in front of the ECtHR due to the impossibility to contact an interpreter and a lawyer during their identification and deportation from Italy, in violation of Article 34 of the Convention.

Articles 13 taken together with Article 3 concerning Greece

The Court decided to examine, under Article 13 taken together with Article 3, the applicants' complaints concerning their possible return to Afghanistan and the lack of access to the asylum procedure.

In terms of opportunities for the applicants to obtain necessary assistance to gain access to the asylum procedure, the Court noted that the shortcomings (deriving from linguistic barriers, shortage of interpreters, absence of legal aid and excessive delays in obtaining a decision) were the result of the inherent difficulties in managing the large flow of migrants that Greece had been facing in past years.

In the present case, it was underlined among other things, that the brochure issued to the “identified” applicants, containing the information that was essential for challenging their deportation decisions, had been given to them in Arabic. The applicants were Afghan nationals and did not necessarily master that language. The Court also pointed out that the asylum seekers had lived in Greece in the overcrowded Patras camp in a state of precariousness and utter destitution - a finding that could not have been ignored when evaluating whether or not the applicants had had concrete prospects of receiving necessary assistance or information.

As to the fear of being returned to Afghanistan, there was a risk that the applicants would, directly or indirectly, be returned to their home country. As a consequence, they had a specific interest in having the possibility to rely on the right to an effective remedy enshrined in Article 13.

Therefore, the Court held that there has been a violation of Article 13 taken together with Article 3, of the Convention.

Articles 3, 13, 34 and Article 4 of Protocol No. 4 concerning Italy

Collective deportation

Third party interventions and various concurring reports from different international sources that underlined the common Italian practice in the ports of the Adriatic Sea of indiscriminate and immediate returns to Greece of migrants, depriving them of any substantive and procedural rights and safeguards, were taken into account during the examination of the present case. The Court considered it established that the same practice had been used in the applicants’ situation.

Further, the Italian government asserted that, under the Dublin system, Greece was the only country that had jurisdiction regarding the applicants’ asylum requests, as it was the country of first entry into the European Union.

However, according to the Court, in order to establish whether Greece had indeed been the only country competent on this point, the Italian authorities should have carefully examined the situation of each single applicant rather than arbitrarily deporting them all. As it had already found in the cases of *Hirsi Jamaa and Others v. Italy*¹⁰⁸ and *M.S.S. v. Belgium and Greece*¹⁰⁹, the Dublin system (which had to be applied in a manner compatible with the Convention) could not be used to justify collective and indiscriminate returns of potential asylum seekers.

The Court concluded that there had been a violation of Article 4 of Protocol No. 4, considering that the measures to which the applicants had been subjected to in the port of Ancona amounted to collective and indiscriminate expulsions.

Risk of arbitrary repatriation to Afghanistan

In examining Italy's responsibility resulting from the applicants' removal to Greece, the Court applied the same findings that it had established in its judgment in the case of *M.S.S. v. Belgium and Greece*. In carrying out the applicants' return to Greece, Italy had failed to examine the applicants' individual situations and to ensure, in the context of the Dublin system, that the destination country offered sufficient guarantees in applying its asylum provisions to prevent their subsequent removal without an assessment of the risks faced. Due to the lack of access to the asylum procedure and the risk of deportation to Afghanistan, where the applicants would have been subjected to ill-treatment, the Court held that there had been a violation of Article 3 of the Convention.

Access to the asylum procedure or to any other remedy in the port of Ancona

Taking into consideration its previous conclusions in the case, the Court considered the applicants' complaints justified, as there was a clear link between their collective expulsions and the fact that they had been prevented from applying for asylum or from having access to any other domestic remedy which could have satisfied the requirements of Article 13. The Court held that there had been a violation of Article 13, taken together with Article 3 and Article 4 of the Protocol No. 4.

108 *Hirsi Jamaa and Others v. Italy*, [Grand Chamber] judgment of 23 February 2012, no. 27765/09, included in this section.

109 *M.S.S. v. Belgium and Greece*, [Grand Chamber] judgment of 21 January 2011, no. 30696/09, also included in this section.

Other Articles

Having regard to its conclusions in respect of Article 13, taken together with Article 3 of the Convention, and of Article 4 of the Protocol No. 4, the Court concluded that there was no reason to examine the applicants' allegations concerning Article 34 of the Convention.

Article 41

The Court held that Greece was to pay jointly to Reza Karimi, Yasir Zaidi, Moza-mil Azimi and Najeeb Heideri €5,000 in respect of costs and expenses arising from the case.

3. Comment

This case is to some extent a combination of the situations the Court was faced with in the Grand Chamber cases *M.S.S. v. Greece and Belgium* and *Hirsi Jamaa and Others v. Italy*. It deals with Dublin removals as in the case of *M.S.S.* from one EU Member State to another, but, as opposed to the actions of the Belgium authorities in that case, the Italian authorities proceeded with a direct removal, not allowing the applicants to have any practical possibility to raise their allegations as to the potential risks they encountered upon return to Greece from Italy.

This is why the Court found that, even in the case of Dublin removals, when the EU Member State of destination – Greece in this case – is not able to offer the required procedural guarantees against arbitrary removals, the second EU Member State – Italy in this case – could be in breach of Article 4 of Protocol No. 4 of the Convention. Therefore, it could be said that this judgment extends the application of the *non-refoulement* principle to Dublin removal situations. Although the Dublin system is based on the presumption that EU Member States respect the *non-refoulement* principle and are considered to be safe countries, the Court reiterated that the Dublin system does not provide a justification for collective and indiscriminate returns and that the Dublin system must be implemented in accordance with the Convention. Therefore, the Court requires an individual assessment of the circumstances of every asylum seeker even in the case of removal on the basis of the Dublin Regulation from one EU Member State to another¹¹⁰. Based on this conclusion the Court found that the way Italy

110 See Article 5 of the "Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 estab-

had removed the applicants from the port of Ancona had breached their rights under Article 4 of Protocol No. 4 of the Convention.

The Court reiterated its conclusions as in the case of *M.S.S. v. Greece and Belgium* concerning access to asylum procedures both in Greece and Italy, under Article 13 taken together with Article 3 of the Convention. In view of this finding the Court also found a violation against Italy of Article 3 of the Convention concerning the risk of arbitrary removal to Greece and then onward to Afghanistan.

lishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)", Official Journal of the European Union L (180/31).

Court of Justice of the European Union Case Summaries and Comments

**Council Regulation No. 343/2003 of 18 February 2003
(Dublin II Regulation)**

An asylum seeker cannot be transferred to the Member State responsible for examining his application if there is a real risk that he will suffer inhuman and degrading treatment there

**GRAND CHAMBER JUDGMENT IN THE CASE OF N.S. v. SECRETARY
OF STATE FOR THE HOME DEPARTMENT and M.E. AND OTHERS v.
REFUGEE APPLICATIONS COMMISSIONER and MINISTER FOR JUSTICE,
EQUALITY AND LAW REFORM**

(Case Nos. C-411/10 and C-493/10)

21 December 2011

1. Principal facts

These two cases were preliminary references emanating, respectively, from the Court of Appeal of England and Wales and the High Court of Ireland on the interpretation of Regulation (EC) No. 343/2003 of the 18 February 2003 (Dublin II Regulation). The Dublin II Regulation establishes the criteria used to determine the Member State responsible for examining an asylum application from a third-country national. Where a third country national has applied for asylum in a Member State which the Regulation does not indicate as the State responsible, the Regulation provides for a procedure for transferring the asylum seeker to the Member State responsible.

The first case concerned an Afghan national who came to the United Kingdom and applied for asylum on 12 January 2009, after travelling via Greece. He claimed that he had been detained upon arrival in Greece and was subsequently expelled to Turkey, where he was detained for a further two months. He stated that he escaped from detention in Turkey and made his way to the United Kingdom.

The second case concerned five persons, all unconnected with each other, from Afghanistan, Iran and Algeria. They had also travelled via Greece and claimed asylum upon arrival in Ireland. They had been arrested in Greece for illegal entry.

The British and Irish authorities considered that, under the Dublin II Regulation, Greece was the Member State responsible for examining the applicants' asylum claims. The applicants were issued with transfer orders to Greece. All applicants opposed their transfer to Greece and claimed that the British or Irish authorities should accept responsibility for examining their asylum claim under Article 3(2) of the Dublin Regulation, which allows a Member State, which is not the responsible Member State under Chapter III, by way of derogation, to examine an asylum application lodged with it by a third-country national. They sought judicial review of the decision to transfer them to Greece. In the first case, the High Court of England and Wales dismissed the request but the applicant appealed to the Court of Appeal. The Court of Appeal of England and the High Court of Ireland requested preliminary rulings from the CJEU concerning the interpretation of Article 3(2).

2. Questions posed by the national court

The Court of Appeal of England and Wales first asked the CJEU if examining an asylum application under Article 3(2) of the Dublin II Regulation fell within the scope of EU law, which would imply that the Charter of Fundamental Rights would be applicable¹¹¹.

Secondly, both national Courts asked in essence whether, in light of the poor asylum conditions in Greece and the treatment of asylum seekers, Member States have an obligation to check whether the responsible Member State under the Dublin II Regulation (in this case Greece) fully observes fundamental rights before transferring asylum applicants. The national courts also asked the CJEU whether they are bound to assume responsibility for examining the application themselves under Article 3(2) of the Dublin II Regulation if they find that the responsible Member State does not observe fundamental rights.

3. Decision of the CJEU

Firstly, the CJEU held that when a Member State decides to exercise its dis-

111 The Charter of Fundamental Rights only applies to Member States when implementing EU law.

cretion by examining an asylum application under Article 3(2) of the Dublin II Regulation, it is implementing EU law. Thus, the Charter of Fundamental Rights applies and Member States must respect the rights and principles in the Charter.

Secondly, the CJEU recalled that the Common European Asylum System (CEAS) is built on the principle of mutual confidence between Member States and that all Member States must observe fundamental rights, including the rights based on the 1951 Geneva Convention and on the ECHR. The aim of the Dublin II Regulation was to speed up the processing of asylum claims by identifying and securing a single responsible Member State and thus also avoid “asylum seekers in orbit”. The CJEU acknowledged that the system may experience major operational problems which can lead to asylum seekers being treated in a manner contrary to their fundamental rights. However, any infringement of an asylum seeker’s fundamental rights by the responsible Member State or the slightest infringement of the secondary asylum law cannot affect the legal situation of other Member States under the Regulation.

Nevertheless, the CJEU stated that “*if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision*”¹¹². Hence, EU law precludes a conclusive presumption that the Member State indicated by the Regulation as responsible observes the fundamental rights of the EU. The Member States should use the instruments at their disposal, including reports of international NGOs, the UNHCR and the Commission, to assess whether an asylum seeker would be at risk of suffering a violation of their fundamental rights if they were to be transferred to the responsible Member State under the Regulation.

With regards to the question of whether the transferring Member State should assume responsibility under Article 3(2) of the Regulation if it finds that the asylum seeker would be at risk, the CJEU held that the transferring Member State must examine the other criteria set out in Chapter III of the Regulation to determine whether another Member State can be identified as the responsible State to examine the asylum claim. However, if an applicant’s fundamental rights have already been violated, the transferring Member State must not use

112 See para 86.

a procedure which would take an unreasonable amount of time to determine the Member State responsible for the asylum claim. If necessary, the Member State which is determining the Member State responsible must itself examine the application in accordance with the procedure laid down in Article 3(2) of the Regulation.

4. Comment

In the *N.S.* and *M.E.* joint cases, the CJEU looked at whether Article 4 of the EU Charter of Fundamental Rights, which corresponds to Article 3 of the ECHR, would be breached if the individuals were transferred to Greece under the Dublin II Regulation. By the time the CJEU considered the cases, the ECtHR had already held that at the time the reception and other conditions for asylum seekers in Greece breached Article 3 of the ECHR¹¹³. The CJEU was, thus, called to take a decision of principle.

The CJEU made clear that the presumption that asylum seekers will be treated in a way which complies with fundamental rights, which forms the basis of the CEAS, must be regarded as rebutted “*if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible*”. Accordingly, Member States should not transfer asylum seekers to the Member State responsible for their application under the Dublin Regulation, where they cannot be unaware that “systemic deficiencies” in the asylum procedure and in the reception conditions of asylum seekers in that Member State create substantial grounds for believing that the asylum seeker would face a real risk of inhuman or degrading treatment within the meaning of the relevant provision of the Charter of Fundamental Rights. In such cases, the referring Member State is under an obligation to continue to examine the criteria set out in the Dublin II Regulation in order to establish whether another Member State is responsible for the examination of the asylum application. If necessary, the Member State in which the asylum seeker is present must itself examine the application to avoid the Dublin procedure taking an unreasonably long time.

This ruling was followed by other cases on the Greek situation¹¹⁴, which are

113 *M.S.S. v. Belgium and Greece*, [GC] judgment of 21 January 2011, no. 30696/09, included in the section on ECtHR case law.

114 C528/11, *Zuheyra Frayeh Halaf v. Darzhavna agentsia za bezhantsite pri Ministerskia savet*, judgment of 30 May 2013; C-4/11, *Bundesrepublik Deutschland v. Kaveh Puid*, [GC] judgment of 14 November 2013, included in this section, and C-394/12, *Shamso Abdullahi v. Bundesasylamt*, [GC] judgment of 10 December 2013, also included in this section.

discussed later in this section, and have arguably inspired the EU legislator in the drafting of the Dublin III Regulation.

Moreover, the ECtHR has, after this judgment, stressed, in the *Tarakhel* judgment¹¹⁵ that the individual assessment of the circumstances in such a situation should be conducted in view of the overall situation with regard to the reception arrangements for asylum seekers and the specific situation of the asylum seeker at stake.

115 *Tarakhel v. Switzerland*, [GC] judgment of 4 November 2014, no. 29217/12, included in the section on ECtHR case law.

The determination of the Member State responsible for examining an asylum application lodged by an unaccompanied minor having no family members in the EU

JUDGMENT IN THE CASE OF MA, BT and DA v. SECRETARY OF THE STATE FOR THE HOME DEPARTMENT

(Case No. C-648/11)

6 June 2013

1. Principal facts

This case was a preliminary reference emanating from the Court of Appeal of England and Wales on the interpretation of the second paragraph of Article 6 of Regulation (EC) No. 343/2003 of 18 February 2003 (Dublin II Regulation). Where the applicant for asylum is an unaccompanied minor, that Regulation provides that the Member State responsible for examining the application is to be that where a member of his family is legally present, provided that this is in the best interest of the minor. In the absence of a family member, the Member State responsible for examining the application is to be that where the minor has lodged his application for asylum.

Two minors of Eritrean nationality (MA and BT) and a minor of Iraqi nationality (DA) applied for asylum in the United Kingdom. No member of their respective families was legally present in another Member State of the EU. The United Kingdom authorities established that they had already lodged applications for asylum in other Member States: in Italy (MA and BT) and in the Netherlands (DA). Therefore, the United Kingdom authorities requested from the Italian and Dutch authorities to take back these applicants for asylum, which these authorities agreed to do.

The applicants brought an action before the High Court of Justice of England and Wales to challenge the legality of their transfers. Before proceeding with the transfer of MA and DA, but after BT had been transferred, the United Kingdom authorities decided to examine the applications for asylum themselves under the 'sovereignty clause' provided for by the Regulation, according to which each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation. Consequently BT, who had already been transferred to Italy, was able to return to the United Kingdom.

The three cases were heard together before the High Court of Justice of England and Wales. On 21 December 2010, this court dismissed the claims and held that, by virtue of the second paragraph of Article 6 of Regulation No. 343/2003, an unaccompanied minor claiming asylum and having no family member legally present in the territory of one of the Member States is liable to be removed to the Member State where he first made an asylum application.

MA, BT and DA appealed to the Court of Appeal of England and Wales (Civil Division) against that judgment.

2. Questions posed by the national court

The Court of Appeal of England and Wales asked the CJEU whether the second paragraph of Article 6 of Regulation No. 343/2003 must be interpreted as meaning that, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has lodged asylum applications in more than one Member State, the Member State responsible is that where that minor lodged his first application, or that in which the minor is present after having lodged his most recent asylum application.

3. Decision of the CJEU

In its judgment, the CJEU declared that, where an unaccompanied minor with no member of his family legally present in the territory of a Member State has applied for asylum in more than one Member State, the Member State responsible for examining the application will be that in which the minor is present after having lodged an application there.

That conclusion followed, *inter alia*, from the context and objective of Article 6 of Regulation No. 343/2003, which is to focus particularly on unaccompanied minors, as well as in the light of the main objective of the Regulation No. 343/2003, which is to guarantee effective access to an assessment of the asylum applicant's refugee status. Thus, since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State. These considerations were supported by the requirement that the fundamental rights of the EU should be observed, including the right whereby in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests are to be

a primary consideration.

Taking into account the child's best interests in circumstances such as those relating to the situation of the appellants in the main proceedings, the Member State in which the minor is present after having lodged an application there shall be designated as responsible for the examination of this application. Accordingly, in the interest of unaccompanied minors, it is important not to prolong unnecessarily the procedure for determining the Member State responsible, and to ensure that unaccompanied minors have prompt access to the procedures for determining refugee status.

The Court added that such an interpretation did not mean that an unaccompanied minor whose application for asylum is substantively rejected in one Member State can subsequently compel another Member State to examine a further asylum claim. Indeed, it is clear from Article 25 of the Council Directive No. 2005/85 that Member States are not required to examine whether the applicant is a refugee where an application is considered inadmissible because the asylum applicant has lodged an identical application after a final decision has been taken against him.

4. Comment

The *MA, BT and DA* judgment is, until now, the only case brought before the CJEU concerning the legal regime of unaccompanied minors under the Dublin II Regulation (Regulation No. 343/2003). This judgment stressed the originality of this regime, which results from the fact that the criterion applicable to unaccompanied minors is the first in the hierarchy of criteria laid down by this Regulation.

Regulation No. 343/2003 contains criteria to determine the Member State responsible for examining an asylum application. This judgment clarifies which State is responsible in case an unaccompanied minor with no family member in a EU State is concerned.

The case concerned particularly vulnerable children who claimed asylum in the United Kingdom after having first claimed asylum elsewhere in the EU. The children had no family members anywhere in Europe. For its interpretation of Article 6(2) of the Regulation, which was ambiguous on this point, the CJEU looked at its wording and context, as well as at the objectives pursued by the Regulation. The Court interpreted, in particular, Article 6(2) in light

of Article 24 of the Charter of Fundamental Rights of the European Union, which provides that “[i]n all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration”, following the existing case law in other fields concerning the child’s best interest¹¹⁶.

According to the CJEU, the best interests of the child are served by not subjecting the child to unnecessary travel, and the Member State in which the minor is currently present is the state that, in principle, ought to determine his or her claim. In other words, that Member State cannot simply send the minor back to the State where he/she first applied for asylum, but is itself responsible for examining the application and must inform the Member State with which the first application has been lodged.

Moreover, in response to an argument submitted by the Netherlands Government, the CJEU noted that an unaccompanied minor whose application for asylum is substantively rejected in one Member State cannot subsequently compel another Member State to examine an application for asylum.

116 C-400/10, *J. McB v. L.E.*, judgment of 5 October 2010.

Determining the Member State responsible for examining an asylum application lodged by a third-country national

**GRAND CHAMBER JUDGMENT IN THE CASE OF BUNDESREPUBLIK
DEUTSCHLAND v. KAVEH PUID**

(Case No. C-4/11)

14 November 2013

1. Principal facts

This case was a preliminary reference emanating from the Higher Administrative Court of Hesse (Germany) on the interpretation of Regulation (EC) No. 343/2003 of the 18 February 2003 (Dublin II Regulation). It concerns, *inter alia*, Article 3(2) of the Regulation, which, by way of derogation, allows a Member State who is not the responsible Member State under Chapter III, to examine an asylum application lodged with it by a third-country national.

Mr Puid was an Iranian national, born in 1979. He travelled to Greece from Tehran on 20 October 2007 and continued to Germany four days later, where he lodged his application for asylum. He was detained and his application for asylum was declared inadmissible because he had transited through Greece, which the German authorities considered to be the responsible Member State to examine his application under the Dublin II Regulation. Mr Puid was therefore transferred to Greece. He brought an action before a German administrative court, which annulled the decision. This Administrative Court found that, due to the poor reception conditions and procedures for asylum seekers in Greece, Germany should examine his application, on the basis of Article 3(2) of the Regulation.

The German authorities appealed before the Higher Administrative Court of Hesse. The High Administrative Court of Hesse decided to refer four questions to the CJEU.

In the meantime, Germany had examined Mr Puid's request and granted him refugee status on 18 May 2011. The Higher Administrative Court considered that a preliminary reference would still be relevant as Mr Puid could claim compensation.

2. Questions posed by the national court

The Higher Administrative Court withdrew three of the four questions, as they

were addressed by the CJEU in another case – *N. S. and Others*¹¹⁷. By the remaining question, the Higher Administrative Court asked the CJEU whether an asylum seeker has an enforceable personal right based on Article 3(2) of the Regulation to force a Member State to examine his asylum application if the situation in the responsible State under the Chapter III criteria (in this case Greece) poses a threat to the applicant’s fundamental rights.

3. Decision of the CJEU

Chapter III of the Regulation contains the hierarchical criteria that determine the Member State responsible for examining an asylum application. The CJEU stated that Article 3(2) of the Regulation permits derogation from the rule that an application for asylum may only be examined by the Member State responsible pursuant to the criteria found in Chapter III, thereby allowing another Member State to examine an application even if it is not its responsibility under Chapter III.

The CJEU held that a Member State cannot transfer an asylum seeker to the Member State responsible under Chapter III “*where they cannot be unaware that systemic deficiencies in the asylum procedure and in the conditions for the reception of asylum seekers in that Member State provide substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union*”¹¹⁸. It was for the national court to decide whether such systemic deficiencies existed in Greece on the date that Mr Puid’s transfer was enforced. The CJEU pointed out that, while the Member State, which is determining the responsible State has the right to apply the Article 3(2) of the Regulation in such a situation, it is not required to do so.

If a Member State finds that such systemic deficiencies exist and is unable to transfer an applicant to the responsible Member State, as determined by Chapter III, the Member State should continue to examine the criteria set out in that Chapter in order to establish whether one of those criteria enables another Member State to be identified as responsible for the examination of the asylum application. Under Article 13 of the Regulation, if no responsible Member State

117 C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, [Grand Chamber] judgment of 21 December 2011, see the separate case commentary provided in this section.

118 Para 30.

can be designated, “*the first Member State with which the application for asylum was lodged shall be responsible for examining it*”. The CJEU added that the procedure for determining the responsible Member State shall not take an unreasonable amount of time and worsen a situation where the applicant’s fundamental rights have been infringed. If necessary, the Member State which is determining the Member State responsible must itself examine the application in accordance with the procedure laid down in Article 3(2) of the Regulation.

4. Comment

In this case, the CJEU further developed some aspects of the *N.S.* judgment.

The CJEU held that a Member State, which is prohibited from returning an asylum seeker under the Dublin II Regulation to a country where the applicant would be at risk of being ill-treated, is not, in principle, obliged to assume responsibility for that application. In these circumstances (when a transfer is impossible due to systemic deficiencies in the responsible Member State), as already stated in the *N.S.* judgment, and reiterated by the CJEU in its current ruling, the ordinary procedure is to apply the hierarchy of criteria found in the Chapter III of the Dublin II Regulation that determine the Member State responsible for examining an asylum application. According to these criteria, the responsibility is attributed to the Member States in the following order of priority: where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor. In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum (Article 6); the Member State in which the applicant has a family member whose application for asylum is being examined or who is recognised as a refugee (Article 7 and 8); the Member State which has provided the applicant with a residence document or a visa (Article 9); the Member State whose border has been crossed illegally by the asylum applicant (Article 10); the Member State where a third-country national entered legally and where the need for a visa is waived (Article 11); the Member State in which an asylum application is made in an international transit area of an airport (Article 12); in situations where none of the previous rules apply, the first Member State where the asylum application was lodged (Article 13).

Accordingly, the Member State intending to send the asylum seeker back to another country must continue to examine these responsibility criteria to

see if another Member State can be made responsible. If no other country can be identified as responsible for examining the application, the Member State where the asylum seeker is located must assume responsibility for examining the application. Such Member State must also assume responsibility if the process of determining responsibility takes “*an unreasonable length of time*”. Accordingly, although a Member State always has the *possibility* to apply Article 3(2) of the Dublin II Regulation, the prohibition to transfer does not entail the obligation to make use of Article 3(2) of the Dublin II Regulation, unless in these very specific circumstances.

In its later judgement in the *Abdullahi* case¹¹⁹, the Court took a position on closely related issues.

119 C-394/12, *Shamso Abdullahi v. Bundesasylamt*, [GC] judgment of 10 December 2013, see the separate commentary provided in this section.

Scope of judicial review in determining responsibility for examining an asylum application

**GRAND CHAMBER JUDGMENT IN THE CASE OF SHAMSO ABDULLAHI
v. BUNDESASYLAMT**
(Case No. C-394/12)
10 December 2013

1. Principal facts

This case was a preliminary reference emanating from the Asylgerichtshof (Austria) on the interpretation of the second paragraph of Article 19 of Regulation (EC) No. 343/2003 of 18 February 2003 (Dublin II Regulation), which provides that a decision not to examine an application and to transfer the asylum seeker to the Member State responsible may be subject to an appeal or a review.

Ms Abdullahi, aged 22, was a Somali national. In 2011, she fled her country and entered Syria by air. She travelled through Turkey and entered Greece illegally. With the help of smugglers she reached Austria via the Former Yugoslav Republic of Macedonia, Serbia and Hungary. She was arrested in Austria, close to the Hungarian border, and lodged an application for international protection with the Bundesasylamt, the competent authority, on 29 August 2011. The Bundesasylamt requested Hungary to take charge of Ms Abdullahi, in accordance with Article 10(1) of Regulation No. 343/2003, and Hungary agreed.

By decision of 30 September 2011, the Bundesasylamt rejected Ms Abdullahi's asylum application as inadmissible, and ordered her removal to Hungary. She appealed against that decision, in particular criticising the asylum situation in Hungary in the light of the European Convention on Human Rights that prohibits torture and inhuman and degrading treatment. Finding that the removal to Hungary would not affect Ms Abdullahi's rights under Article 3 of the ECHR, in January 2012, the Bundesasylamt once again rejected the asylum claim as inadmissible, and pursued the transfer to Hungary.

A further appeal was brought before the Asylgerichtshof, but this time Ms Abdullahi claimed that the Member State responsible for her asylum application was Greece, and not Hungary. She argued, however, that, as Greece did not observe human rights in certain respects, she could not be sent there, and accordingly it was for the Austrian authorities to complete the examination of

her asylum claim. On 14 February 2012, the Asylgerichtshof declared that the appeal was unfounded, holding that, in accordance with Article 10(1) of Regulation No. 343/2003, Hungary was the Member State responsible for processing the asylum application.

Ms Abdullahi brought an appeal before the Verfassungsgerichtshof (Austrian Constitutional Court), which on 27 June 2012 set aside the judgment of the Asylgerichtshof on the ground that the court should have referred to the CJEU for a preliminary ruling.

2. Questions posed by the national court

Having regard to those factors, the Asylgerichtshof decided to stay the proceedings and to ask the CJEU, *inter alia*, whether Article 19(2) of Regulation No. 343/2003 (the Dublin II Regulation) must be interpreted as obliging Member States to provide that an applicant for asylum is to have the right, in an appeal against a transfer decision under Article 19(1) of that Regulation, to request a review of the determination of the Member State responsible, after the latter Member State has agreed to take charge of this applicant, on the grounds that the criteria laid down in Chapter III of that Regulation have been misapplied.

3. Decision of the CJEU

The CJEU held that it was necessary to ascertain to what extent the provisions in Chapter III of Regulation No. 343/2003 actually confer on applicants rights which the national courts have a duty to protect. It noted that the Regulation provides for a single appeal, under Article 19(2), and that it must be read in the light of its general scheme, its objectives and its context, and in particular its evolution in connection with the system of which it forms part. The CJEU referred to the principle of mutual confidence in the Common European Asylum System (CEAS), which is the reason why the Regulation was established in order to rationalise the treatment of asylum applications, and to increase legal certainty and thus avoid forum shopping, it being the principle objective of all those measures to speed up the handling of claims in the interests both of asylum seekers and of the participating Member States.

The CJEU presented as relevant in this context different elements of the CEAS, notably the harmonisation of asylum rules within the EU, the existence of the “sovereignty clause” (Article 3(2) of the Regulation No. 343/2003) or the possibility, for the Member States, to establish, on a bilateral basis, administrative

arrangements between themselves concerning the practical details of the implementation of the Regulation No. 343/2003.

The CJEU stressed the principal objective of Regulation No. 343/2003; a clear and workable method for determining rapidly the Member State responsible for the processing of an asylum application so as to guarantee effective access to procedures for determining refugee status, and not to compromise the objective of the rapid processing of asylum applications.

In the present case, the Member State in which Ms Abdullahi's asylum claim was lodged decided not to examine that claim, and to transfer her to another Member State, which agreed to take charge of Ms Abdullahi under Article 10(1) of Regulation No. 343/2003, as the Member State of Ms Abdullahi's first entry into EU territory. The CJEU held that in such a situation, in which the Member State agrees to take charge of the applicant for asylum, and given the principle of mutual confidence in the CEAS and the objective of measures to speed up the handling of claims, the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that latter Member State. However, the CJEU noted that, from the documents placed before it, there was nothing to suggest that this was the case in Hungary.

Therefore, the CJEU held that Article 19(2) must be interpreted as meaning that, in circumstances where a Member State has agreed to take charge of an applicant for asylum on the basis of the criterion laid down in Article 10(1) of that Regulation – namely, as the Member State of the first entry of the applicant for asylum into the EU – the only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that Member State, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.

4. Comment

The *Abdullahi* judgment is one of the important judgments in which the CJEU pronounced itself on situations concerning a dispute on the identification of the Member State responsible for the processing of an asylum application.

In clarifying the procedure for determining responsibility for examining the asylum claim in light of Article 10(1) of the Dublin II Regulation, the CJEU held that the opportunities for an asylum seeker to challenge a decision to transfer him/her under the Dublin II Regulation are limited once a Member State has agreed to take charge of the examination of his/her application. This decision can only be overturned when there are systemic deficiencies in the asylum procedure and reception conditions of that Member State. The compatibility of the Dublin regime with human rights has been discussed previously in *N. S.*¹²⁰, where the CJEU distinguished between major breaches of fundamental rights, which would constitute a breach of Article 4 of the EU Charter of Fundamental Rights (the equivalent of Article 3 of the ECHR), from minor violations of EU or international rules relating to refugees, which would not require Member States to refrain from applying the Dublin rules. In *Abdullahi*, the CJEU ruled that, when two Member States agreed which of them was the Member State of first authorised entry, an asylum-seeker could only challenge that decision by “*pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum*” in the Member State which was deemed responsible for the asylum application.

This restrictive formulation, read literally, could be interpreted as implying a tension with the *Tarakhel* case¹²¹ of the ECtHR, where the ECtHR stressed that the individual assessment of the circumstances in such a situation should be conducted in view of the overall situation with regards to the reception arrangements for asylum seekers and the specific situation of the asylum seeker at stake. However, this reading needs to be put into perspective, considering the fact that the *Abdullahi* case was not focused on the difference between individual infringements and systematic deficiencies. Moreover, in a neighbouring field, the CJEU has recently taken into account not only systematic deficiencies but also individual infringements¹²².

The CJEU pronounced itself on the dispute of the identification of the Member State responsible for the processing of an asylum application also in the *K*¹²³,

120 C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, [GC] judgment of 21 December 2011, see the separate case commentary provided in this section.

121 *Tarakhel v. Switzerland*, [GC] judgment of 4 November 2014, no. 29217/12, included in the section on ECtHR case law.

122 C-404/15 and C-659/15, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, [GC] judgment of 5 April 2016.

123 C-245/11, *K v. Bundesasylamt*, [GC] judgment of 6 November 2012.

*MA, BT and DA*¹²⁴, *N.S.*¹²⁵, and *Puid*¹²⁶ judgments. It is worth noting that all these judgments have been delivered on the basis of the Dublin II Regulation, which was then replaced by the Regulation No. 604/2013 (Dublin III Regulation). The Dublin III Regulation, which considerably expanded the procedural rights of asylum-seekers in the Dublin context, applies to transfer requests issued from 1 January 2014 onwards. The new right to an effective remedy in Article 27 could be read as providing a broader right for asylum seekers to challenge the legal and factual premises of a transfer decision.

124 C-648/11, *MA, BT and DA v. Secretary of the State for the Home Department*, judgment of 6 June 2013, see the separate case commentary provided in this section.

125 C-411/10 and C-493/10, *N.S v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, [GC] judgment of 21 December 2011, included in this section.

126 C-4/11, *Bundesrepublik Deutschland v. Kaveh Puid*, [GC] judgment of 14 November 2013, see the separate case commentary provided in this section.

Council Directive No. 2004/83/EC of 29 April 2004 (Qualification Directive)

Minimum standards for determining who qualifies for subsidiary protection status

GRAND CHAMBER JUDGMENT IN THE CASE OF MEKI ELGAFAJI and NOOR ELGAFAJI v. STAATSSECRETARIS VAN JUSTITIE

(Case No. C-465/07)

17 February 2009

1. Principal facts

This case was a preliminary reference emanating from the Raad van State (Council of State of the Netherlands) on the interpretation of Article 15(c) of Council Directive 2004/83/EC of 29 April 2004 (Qualification Directive or QD). The Qualification Directive grants “subsidiary protection” to those who do not qualify as refugees but who would face serious harm if returned to their country of origin or country of habitual residence. Article 15 stipulates that “*serious harm consists of (a) [the] death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict*”.

On the 13 December 2006, Mr and Mrs Elgafaji, Iraqi nationals, applied for a temporary residence permit in the Netherlands, stating that they would face serious harm if returned to Iraq. They relied on their personal circumstances, namely that Mr Elgafaji had been working for a British firm providing security and personnel transport between the airport and the “green zone”¹²⁷. His uncle, who was working for the same employer as him in Iraq had been killed by militia. Mr and Mrs Elgafaji had received a death threat pinned to the door of their residence in Iraq. The Minister for Immigration and Integration refused their application on the grounds that they had not established a real risk and serious and individual threat. The Minister claimed that the standard of proof required under Article 15(c) of the Directive was the same as the one for Article 15(b), namely that the circumstances had to be individualised.

Mr and Mrs Elgafaji brought an action for judicial review before the District Court of The Hague, which annulled the Minister’s decision. The District Court

¹²⁷ International zone of Baghdad.

held that Article 15(c) does not require the same degree of individualisation as Article 15(b). “*Thus, the existence of a serious and individual threat to the persons seeking protection can be proved more easily under Article 15(c) of the Directive than under Article 15(b)*”¹²⁸. On appeal, the Raad van State decided to refer the questions on the interpretation of Article 15(c) to the CJEU.

2. Questions posed by national court

1. Does Article 15(c) offer supplementary protection to Article 3 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights?
2. If Article 15(c) is found to offer supplementary protection to Article 3 of the ECHR, what are the criteria for determining whether a person claiming to be eligible for subsidiary protection is at risk of serious and individual harm?

3. Decision of the CJEU

The CJEU held that Article 15(b) of the Directive corresponds to Article 3 of the ECHR and that Article 15(c) has its own field of application and an independent meaning from Article 3 of the ECHR. Unlike Articles 15(a) and (b) in which the applicant for subsidiary protection would be specifically exposed to the risk of a particular type of harm, Article 15(c) covers a more general risk of harm relating to the circumstances of the applicant or the general situation in the country. The CJEU clarified that “*the word ‘individual’ [in Article 15(c)] 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 [...] 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*”¹²⁹. The CJEU notes, pursuant to recital 26 of the preamble of the Qualification Directive, that the finding of a risk linked to the general situation in the country could be enough to meet the conditions set out in Article 15(c) only in exceptional circumstances where there is a high degree of risk.

While collective factors play a significant role in the application of Article 15(c),

128 Para 22 of the District Court’s judgment.

129 Para 35.

the general framework of subsidiary protection and Article 15 itself requires that this Article is interpreted by close reference to the individualisation of the risk. Consequently, the CJEU stated that *“the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection”*¹³⁰.

The CJEU answered the Raad van State’s question by stating that an applicant for subsidiary protection is not required under Article 15(c) to produce evidence that he/she is specifically targeted due to his/her personal circumstances. In exceptional circumstances, the conditions in Article 15(c) can be met if the relevant authorities or courts in the Member State where the application for subsidiary protection has been made, finds that the degree of indiscriminate violence characterising 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”*.

4. Comment

Elgafaji is the first decision concerning the substance of the 2004 Qualification Directive and, more specifically, on the scope of subsidiary protection under Article 15(c). The CJEU stressed the difference between the various types of harm mentioned in Article 15 of the QD, pointing, *inter alia*, to their respective links to Article 3 of the ECHR and to the nuance in the application of the individualisation of the risk requirement.

In particular, the CJEU established that “serious and individual threat” in Article 15(c) did not mean that the applicant is “individually targeted” by reason of factors particular to his circumstances. Instead, the provision requires general violence of sufficient intensity, which results, as such, in individual threat for all persons hailing from the affected area. Such threats may extend to the whole country, but can also be confined to a “region”. These questions are to be decided by the executive and judiciary of the Member States.

Importantly, the CJEU considered that its interpretation of Article 15(c) of the QD is fully compatible with the rights guaranteed under the ECHR, including

130 Para 39.

the case law of the European Court of Human Rights relating to Article 3 of the ECHR. The CJEU drew attention in particular to the judgment of the ECtHR in *NA. v. the United Kingdom*¹³¹.

The *Elgafaji* judgment, however, did not offer an answer to all questions concerning the application of subsidiary protection. The CJEU further elaborated on these in subsequent cases.

The *Diakité* judgment, thus, addressed the interpretation of the concept of “internal armed conflict” in Article 15(c) of the QD¹³².

In two recent judgments, the CJEU has provided clarification on the scope of international protection in cases where claimants are suffering from serious illnesses. The *M’Bodj* and *Abdida* cases, thus, clarified the concept of “serious harm” in Article 15(b) of the QD, which includes torture or inhuman or degrading treatment or punishment of an applicant in the country of origin¹³³. These judgments showed that a protection assessment on medical grounds could not, as such, fall within the scope “serious harm” as defined in Article 15 of the QD, unless intentional actions may be found to explain the lack of access to healthcare.

131 *NA. v. the United Kingdom*, judgment of 17 July 2008, no. 25904/07, 17 July 2008, included in the section on ECtHR case law.

132 C-285/12, *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, judgment of 30 January 2014, see the separate case commentary provided in this section.

133 C-542/13, *Mohamed M’Bodj v. État Belge*, [GC] judgment of 18 December 2014, and C-562/13, *Centre public d’action sociale d’Ottignies-Louvain-la-Neuve v. Moussa Abdida*, [GC] judgment of 18 December 2014, see both separate case commentaries provided in this section.

*Conditions for the cessation of refugee status***GRAND CHAMBER JUDGMENT IN THE CASE OF AYDIN SALAHADIN
ABDULLA AND OTHERS v. BUNDESREPUBLIK DEUTSCHLAND**

(Case Nos. C-175/08, C-176/08, C-178/08 and C-179/08)

2 March 2010**1. Principal facts**

This case was a preliminary reference emanating from the Bundesverwaltungsgericht (Federal Administrative Court of Germany) on the interpretation of Article 11 of Council Directive 2004/83/EC of 29 April 2004 (Qualification Directive or QD). Article 11 of the Qualification Directive allows for the cessation of refugee status, mirroring the cessation clauses under Article 1C of the 1951 Geneva Convention.

Five Iraqi citizens had been granted refugee protection by Germany in 2001 and 2002 as they were opponents of Saddam Hussein's party. In 2005, refugee status was withdrawn due to a change in circumstances in Iraq. The applicants contested the decisions before the relevant administrative courts which found in their favour but the decisions were reversed on appeal. The applicants appealed on points of law to the Federal Administrative Court.

2. Questions posed by the national court

The Federal Administrative Court referred questions to the CJEU on the interpretation of Article 11 of the QD, namely on cessation of refugee status and the change in circumstances. They asked, *inter alia*, whether Article 11(e) is to be interpreted as meaning that refugee status ceases to exist if the circumstances under which the refugee's fear of persecution no longer exist; how the loss of refugee status affects other systems of protection; and the conditions under which the authorities should verify other circumstances which may give rise to well-founded fears of persecution.

3. Decision of the CJEU

Firstly, the CJEU stressed that it is clear from the preamble of the Qualification Directive that the Directive was adopted to guide the competent authorities of the Member States in the application of the 1951 Geneva Convention, which is the foundation of international refugee protection and that the QD must be

interpreted in light of that Convention. It must also be interpreted in a manner which respects the fundamental rights and principles contained in the Charter of Fundamental Rights.

Article 11(1)(e) of the QD provides that a person shall cease to be a refugee if the circumstances under which he was granted refugee status no longer exist. In that case, the person no longer qualifies for a refugee status. The CJEU held that for the purposes of Article 11 of the QD, this means when the circumstances in the third-country concerned have undergone a significant and non-temporary change, the basis of fear no longer exists, and there is no other reason to fear persecution. It is imperative that States consider the refugee's individual situation and verify the existence of an effective legal system in the country concerned, in which acts constituting persecution are detected, prosecuted and punished. This protection must be available to the person concerned. Article 7(1) of the QD does not preclude protection from being guaranteed by international organisations, including a multinational force present in the territory of the concerned country.

The CJEU noted that the cessation of refugee status does not prevent the person from applying for subsidiary protection under the QD if all the factors needed under Article 4 of the Directive are present. Subsidiary protection is granted to those who do not qualify as refugees but who would face a risk of suffering serious harm if returned to their country of origin or habitual residence. Article 15 stipulates that serious harm consists of “*death penalty or execution; torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict*”¹³⁴.

If the circumstances under which refugee status was granted have ceased to exist, and the competent authorities have verified that nothing else could give rise to a fear of persecution or the granting of a new protection status, the standard of probability used for assessing the risk for the person concerned is the same as the one used for assessing the risk when applying for refugee status. However, the CJEU underlined that, while this standard does not vary, a person who, after having resided for a number of years as a refugee outside

134 On the question of subsidiary protection see case commentaries provided in this section on C-465/07, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, [GC] judgment of 17 February 2009, and C-542/13, *Mohamed M’Bodj v. État belge*, [GC] judgment of 18 December 2014.

of his country of origin, relies on other circumstances to found a fear of persecution does not normally have the same opportunities to assess the risk to which he would be exposed in his country of origin as does an applicant who has recently left his country of origin.

Finally, the CJEU stated that, when the competent authorities plan to withdraw refugee status under Article 11(1)(e) of the QD, Article 4(4)¹³⁵ of the Directive may normally only apply at this stage if the reason for fearing persecution is different from that accepted when granting refugee status and only if the new reason is linked to the earlier acts or previous threats of persecution.

4. Comment

Article 11(1)(e) of the QD is commonly known as the “ceased circumstances” clause and is based on Article 1(c)(5) of the 1951 Geneva Convention. In this case, the CJEU explained for the first time the relationship between the 1951 Geneva Convention and the Qualification Directive. Accordingly, even though the CJEU does not have the jurisdiction to directly interpret the Refugee Convention and its Protocol, which do not form part of EU law, the CJEU may nevertheless, in some specific situations, need to interpret those treaties when ruling on the interpretation or the validity of a provision of EU law.

With regards to the question of the relationship between the GC and the QD, the CJEU has developed its position in the subsequent cases, notably in *Abdel Karim El Kott*¹³⁶, *Qurbani*¹³⁷, and *Alo and Osso*¹³⁸.

In the *Qurbani* case, the CJEU held that it lacked jurisdiction to interpret Article 31 of the GC in a situation such as that at issue in that case. Mr Qurbani fled Afghanistan using the services of a people smuggler, eventually reaching Germany by plane from Greece, having passed through Iran and Turkey. When he was arrested on arrival for unauthorised entry and use of a forged Paki-

135 Article 4(4) of the Qualification Directive provides that 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”. It is normally used when assessing the granting of refugee status.

136 C-364/11, *Mostafa Abed El Karem El Kott and Others v. Bevándorlási és Állampolgársági Hivatal*, [GC] judgment of 19 December 2012.

137 C-481/13, *Mohammad Ferooz Qurbani v. Staatsanwaltschaft Würzburg*, judgment of 17 July 2014.

138 C-443/14 and C-444/14, *Kreis Warendorf v. Ibrahim Alo and Amira Osso v. Region Hannover*, [GC] judgment of 1 March 2016.

stani passport, he immediately claimed asylum. The case concerned, *inter alia*, the application of Article 31 of the GC, which exempts asylum seekers “*coming directly from a territory where their life or freedom was threatened*” from being penalised for irregular entry “*provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence*”. The CJEU ruled that it had no jurisdiction to answer the questions referred since its power to provide interpretations by way of preliminary rulings “*extends only to rules which are part of EU law*”. Accordingly, it concluded that, although the CJEU is competent to interpret an international convention between Member States and non-member countries where the EU has assumed powers previously exercised by the Member States in the field covered by this convention, this solution cannot be applied to Article 31 of the GC because Member States “*have retained certain powers [...] relating to the subject-matter of Article 31*”. Moreover, “*Article 31 [...] has not been taken over in a piece of EU legislation*”, which implies that the CJEU cannot find its competence on the necessity to give an uniform interpretation of the provisions of international agreements which have been taken over by national law and by EU law. Finally, although Article 31 of the GC is referred to in Article 14(6) of the QD, the CJEU made clear that the request for a preliminary ruling contains nothing which suggests that this Article is relevant in the case in the main proceedings.

On the other hand, in its recent ruling in *Alo and Osso*, the CJEU strengthened the interpretative interdependence between the GC and the QD by referring to the former in cases involving subsidiary protection beneficiaries, which has been considered as “ground-breaking”. In this case, the CJEU addressed the question of whether it is in accordance with the QD to restrict the freedom of movement within the host country (Germany) of beneficiaries of subsidiary protection in receipt of social security benefits. The CJEU reiterated earlier statements concerning the necessity of ensuring consistency with the GC and a full and inclusive application of that Convention. In addition, the CJEU ruled that since Article 33 of the QD does not specifically allow for difference in treatment between refugees and subsidiary protection beneficiaries, and since Article 26 of the GC on freedom of movement of refugees includes the right for refugees to choose their place of residence, the same must apply as regards Article 33 of the QD.

A person can be excluded from refugee status if he is individually responsible for acts committed by an organisation using terrorist methods

**GRAND CHAMBER JUDGMENT IN THE CASE OF
BUNDESREPUBLIK DEUTSCHLAND v. B AND D**

(Case No. C-57/09 and C-101/09)

9 November 2010

1. Principal facts

This case was a preliminary reference emanating from the Bundesverwaltungsgericht on the interpretation of Articles 12(2)(b) and (c), and 3 of Council Directive 2004/83/EC of 29 April 2004 (Qualification Directive or QD). The Qualification Directive provides, *inter alia*, for the exclusion of a person from refugee status where there are serious reasons for considering that he has committed a ‘serious non-political crime’ or has been guilty of ‘acts contrary to the purposes and principles of the United Nations’. It also permits Member States to introduce or retain more favourable standards for determining who qualifies as a refugee.

B, a Turkish national of Kurdish origin, had supported the armed guerrilla warfare waged by the Revolutionary People’s Liberation Party/Front (DHKP/C). In 2002, he entered Germany, where he applied for asylum. On 14 September 2004, the Bundesamt für Migration und Flüchtlinge rejected B’s claim for asylum as unfounded, and found that the conditions for recognition of refugee status were not met, as he had committed a serious non-political crime. In June 2006, the Verwaltungsgericht Gelsenkirchen annulled the decision of the Bundesamt, and ordered the granting of asylum for B. The Bundesamt appealed against that judgment before the Bundesverwaltungsgericht.

D, a Turkish national of Kurdish origin, had resided in Germany since May 2001, when he was granted refugee status. In support of his application, he stated that he had been a guerrilla fighter and senior official in the Kurdistan Workers’ Party (PKK). In 2004, the Bundesamt revoked the decision granting D refugee status, finding that there were serious reasons for considering that he had committed a serious non-political crime outside Germany and that he had been guilty of acts contrary to the purposes and principles of the United Nations. In 2005, the Verwaltungsgericht Gelsenkirchen annulled the revocation decision. The Bundesamt appealed that judgment.

2. Questions posed by the national court

The Bundesverwaltungsgericht stayed the two proceedings, and asked the CJEU whether a case where the person concerned has been a member of an organisation which, because of its involvement in terrorist acts, is on the EU document listing groups involved in terrorist acts, and that person has actively supported the armed struggle waged by that organisation – and perhaps occupied a prominent position within that organisation – is a case of ‘serious non-political crime’ or ‘acts contrary to the purposes and principles of the United Nations’ within the meaning of Article 12(2)(b) or (c) of the QD. It further questioned whether exclusion from refugee status is conditional upon the person concerned continuing to represent a danger for the host Member State, or upon a proportionality test being undertaken in relation to the particular case. Finally, the Bundesverwaltungsgericht wanted to know whether it was compatible with the QD, for the purposes of Article 3 of that Directive, for a Member State to recognise that a person, excluded from refugee status pursuant to Article 12(2), has a right of asylum under its Constitutional law.

3. Decision of the CJEU

The CJEU held that terrorist acts fall to be regarded as serious non-political crimes within the meaning of Article 12(2)(b) of the QD and that the competent authorities of the Member States can apply Article 12(2)(c) of the QD to a person who, in the course of his membership of an organisation which is on the list forming the Annex to Common Position 2001/931, has been involved in terrorist acts with an international dimension.

The CJEU considered that the exclusion from refugee status of a person who has been a member of an organisation which used terrorist methods is conditional on an individual assessment of the specific facts, requiring the competent authority to determine whether there are serious reasons for considering that, in the context of his activities within that organisation, that person has committed a serious non-political crime or has been guilty of acts contrary to the purposes and principles of the United Nations, within the meaning of the QD.

It followed first that Article 12(2)(b) and (c) of the QD must be interpreted as meaning that the mere fact that a person has been a member of such an organisation cannot automatically entail that that person must be excluded from refugee status. The CJEU held that the inclusion of an organisation on the EU

document listing groups and entities involved in terrorist acts allows to establish the terrorist nature of the group to which the person concerned had belonged. Secondly, according to the CJEU, participation in the activities of a terrorist group is not, in itself, such as to trigger the automatic application of the exclusion clauses laid down in the Directive, which presuppose a full investigation into all the circumstances of each individual case.

Before a finding can be made that the grounds for exclusion apply, the CJEU found that it must be possible for the competent authority to attribute to the person concerned a share of individual responsibility for the acts committed by the organisation in question while that person was a member. To that end, the competent authority must, *inter alia*, assess the true role played by the person concerned in the perpetration of the terrorist acts: his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct. If that assessment shows that the person concerned has - like D - occupied a prominent position within an organisation which uses terrorist methods, it is possible to presume that that person has individual responsibility for acts committed by that organisation during the relevant period. Nevertheless, it is still necessary to examine all the relevant circumstances before a decision excluding that person from refugee status can be adopted.

The CJEU went on to hold that the grounds for exclusion were introduced with the aim of excluding from refugee status persons who are deemed to be undeserving of the protection which that status entails, and of preventing that status from enabling those who have committed certain serious crimes to escape criminal liability. Accordingly, it would not be consistent with that dual objective to make exclusion from refugee status pursuant to Article 12(2)(b) or (c) of the QD conditional upon the existence of a present danger to the host Member State. In the same way, when the competent authority has already assessed the seriousness of the acts committed by the person concerned and that person's individual responsibility, taking into account all the circumstances surrounding those acts and the situation of that person, it cannot be required, if it reaches the conclusion that Article 12(2) applies, to undertake an assessment of proportionality, implying as that does a fresh assessment of the level of seriousness of the acts committed.

Lastly, the CJEU interpreted Article 3 of the QD as meaning that Member States may grant a right of asylum under their national law to a person who is exclud-

ed from refugee status pursuant to one of the exclusion clauses laid down in that Directive, as long as a clear distinction is made between national protection and protection as a refugee under the QD.

4. Comment

The *B and D* judgment was the first case referred to the CJEU concerning clauses on exclusion from refugee status of the QD and remains, until now, the most important case in this field.

Notably, this judgment elucidated important elements concerning the possibility to apply these clauses to members of a terrorist organisation and the method which should be followed to that purpose. In that regard, the CJEU stressed the separation between the Common European Asylum System and some norms of international law. It is worth noting that this type of reasoning was thereafter repeated in the *Diakité* judgment¹³⁹.

The exclusion from refugee status of a person who had been a member of an organisation which used terrorist methods is conditional on an individual assessment of the specific facts. Thus, the fact that a person has been a member of an organisation and has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed ‘a serious non-political crime’ or ‘acts contrary to the purposes and principles of the United Nations’. Hence, individual responsibility had to be assessed in the light of objective and subjective criteria, and an assessment had to be made of the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had or was deemed to have of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct.

Moreover, exclusion from refugee status pursuant to Article 12(2)(b) or (c) of the QD is not conditional on the person concerned representing a present danger to the host Member State and is not conditional on an assessment of proportionality in relation to the particular case.

The *B and D* judgment was also the first case concerning Article 3 of the QD,

 139 C-285/12, *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, judgment of 30 January 2014, see the separate case commentary provided in this section.

which allows Member States to introduce or to retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection. On this question, it was followed by the *M'Bodj* judgment¹⁴⁰.

140 C-542/13, *M'Bodj v. État belge*, [GC] judgment of 18 December 2014, see the separate case commentary provided in this section.

Where persecution is sufficiently serious, refugee status must be granted

**GRAND CHAMBER JUDGMENT IN THE CASE OF BUNDESREPUBLIK
DEUTSCHLAND v Y and Z**

(Case No. C-71/11 and C-99/11)

5 September 2012

1. Principal facts

This case was a preliminary reference emanating from the Bundesverwaltungsgericht (Germany) on the interpretation of Articles 2(c) and 9(1)(a) of Council Directive 2004/83/EC of 29 April 2004 (Qualification Directive or QD). According to the Qualification Directive, Member States must, in principle, grant refugee status to third country nationals who fear persecution in their country of origin for reasons of race, religion, nationality, political opinion, or membership of a particular social group, are outside the country of nationality, and are unable or, owing to such fear, are unwilling to avail themselves of the protection of that country. An act may be considered as persecution, *inter alia*, if it is sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights.

Respectively in January 2004 and August 2003, Y and Z entered Germany, where they applied for asylum. They claimed they were forced to leave Pakistan because of their membership of the Muslim Ahmadiyya community, an Islamic reformist movement. In particular, Y stated that on several occasions he had been beaten in his home village by a group of people, and had stones thrown at him at his community's place of prayer. This group of people threatened to kill him and reported him to the police for insulting the Prophet Mohammed. Z claimed that he was mistreated and imprisoned as a result of his religious beliefs. Indeed, the Pakistani Criminal Code provided that members of the Ahmadiyya religious community might face imprisonment of up to three years or a fine if they claimed to be Muslim, described their faith as Islam, preached or propagated or invited others to accept their faith. The same code provided that any person who defiled the name of the Prophet Mohammed might be punished by death or life imprisonment and a fine.

By decisions of 4 May and 8 July 2004, the Bundesamt rejected Y's and Z's applications for asylum as unfounded. Both applicants challenged the Bundesamt's decision; whilst in Y's case the national court considered him to satisfy the requirements for a prohibition of his deportation to Pakistan, Z's application was dismissed, not meeting the well-founded fear of persecution requirement.

On 13 November 2008, the Sächsisches Oberverwaltungsgericht confirmed the judgment in the case concerning Y, and held that Z actually met the refugee status requirements and therefore was prohibited from deportation. That court considered that, in the event of their return to Pakistan, both applicants, as active Ahmadis, could not continue to practice their religion in public without being exposed to a risk of persecution, a factor which was to be taken into account in any asylum procedure to determine whether they should be granted refugee status.

The Bundesamt and the Bundesbeauftragter lodged an appeal on a point of law against those judgments before the Bundesverwaltungsgericht (Federal Administrative Court), arguing that the appeal court had interpreted the scope of the QD too broadly.

2. Questions posed by the national court

The Bundesverwaltungsgericht stayed the proceedings and questioned the CJEU about whether Article 9(1)(a) of the QD was to be interpreted as meaning that any interference with the right to religious freedom may constitute an ‘act of persecution’ within the meaning of that provision of the QD, and whether a distinction must be made between the ‘core areas’ of religious freedom and its external manifestation. The CJEU was also asked whether Article 2(c) of the QD must be interpreted as meaning that the applicant’s fear of being persecuted is wellfounded where such a person can avoid exposure to persecution in his country of origin by abstaining from certain religious practices.

3. Decision of the CJEU

Firstly, the CJEU found that freedom of religion is one of the foundations of a democratic society and is a basic human right. Nevertheless, it held that not every interference with that right will constitute an act of persecution requiring the competent authorities to grant refugee status. On the contrary, Article 9(1) of the QD requires a ‘severe violation’ of religious freedom having a significant effect on the person concerned in order for it to be possible for the acts in question to be regarded as acts of persecution. Hence, limitations on the exercise of the right to freedom of religion which are covered by Article 52(1) of the Charter of Fundamental Rights of the European Union cannot be considered as persecution.

Secondly, for the purpose of determining, specifically, which acts may be re-

garded as constituting persecution within the meaning of Article 9(1)(a) of the QD, the CJEU pointed out that it is unnecessary to distinguish acts that interfere with the 'core areas' (*forum internum*) of the basic right to freedom of religion, which do not include religious activities in public (*forum externum*), from acts which do not affect those purported 'core areas'. It also noted that acts which may constitute a 'severe violation' within the meaning of Article 9(1)(a) of the QD include serious acts which interfere with the applicant's freedom not only to practice his faith in private circles, but also to live that faith publicly. Therefore, it is not the public or private, or collective or individual, nature of the manifestation and practice of the religion which will determine whether a violation of the right to freedom of religion should be regarded as persecution, but the severity of the measures and sanctions adopted or liable to be adopted against the person concerned.

In that context, the CJEU held that a violation of the right to freedom of religion may constitute persecution where, because of the exercise of that liberty in his country of origin, there is a genuine risk that the asylum applicant will, *inter alia*, be prosecuted or subjected to inhumane or degrading punishment by one of the actors referred to in Article 6 of the QD. The CJEU observed that where the participation in formal worship, either alone or in community with others, may give rise to such a risk, the violation of the right to freedom of religion may be sufficiently serious.

The CJEU further found that, in assessing such a risk, the competent authorities must consider a number of factors, both objective and subjective. The subjective circumstance that the observance of a certain religious practice in public, which is subject to the restrictions at issue, is of particular importance to the person concerned in order to preserve his religious identity is a relevant factor to be taken into account in determining the level of risk to which the applicant will be exposed in his country of origin on account of his religion, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned. Indeed, according to the CJEU the protection afforded on the basis of persecution on religious grounds extends both to forms of personal or communal conduct which the person concerned considers to be necessary to him - namely those 'based on [...] any religious belief' - and to those prescribed by religious doctrine - namely those 'mandated by any religious belief'.

Finally, as far as the interpretation of Article 2(c) of the QD is concerned, the CJEU held that, where it is established that, upon his return to his country

of origin, the person concerned will engage in a religious practice which will expose him to a real risk of persecution, he should be granted refugee status. It found that, in assessing an asylum application on an individual basis, the national authorities cannot reasonably expect the applicant to abstain from the manifestation or practice of certain religious acts.

4. Comment

The *Y and Z* judgment is a key judgment concerning the notion of “persecution acts” within the meaning of Article 9 of the Qualification Directive, in which the CJEU clarified how the link between this notion and violations of human rights should be understood. It also brought important elements on the scope of the protection against persecution on religious grounds¹⁴¹.

The CJEU explained, first, that only certain forms of severe interference with the right to freedom of religion, and not any interference with that right, may constitute an act of persecution requiring the competent authorities to grant refugee status. Hence, limitations on the exercise of that right, which are covered by Article 52(1) of the Charter, cannot be considered as persecution. Moreover, even the violation of the right constitutes an act of persecution only if it is sufficiently serious and has a significant effect on the person concerned.

The CJEU also clarified that acts that may constitute a severe violation include serious acts which interfere with a person’s freedom not only to practice his faith in private circles but also to live that faith publicly. Therefore, it is not the public or private, or collective or individual, nature of the manifestation and practice of the religion which will determine whether a violation of the right to freedom of religion should be regarded as persecution, but the severity of the measures and sanctions adopted or liable to be adopted against the person concerned. In that context, the CJEU held that a violation of the right to freedom of religion may constitute persecution where, because of the exercise of that liberty in his country of origin, there is a genuine risk that the asylum applicant will, *inter alia*, be prosecuted or subject to inhumane or degrading punishment. The CJEU then held that in assessing such a risk, the competent authorities must take account of a number of factors, both objective and subjective. In that respect, the CJEU found, as noted above, that the subjective circumstance that the observance of a certain religious practice in public, which

141 See the commentary on the national judgment of the German Federal Administrative Court, 20 February 2013, *BVerwG*, 10 C 23.12, provided in the section on national case law.

is subject to the restrictions at issue, is of particular importance to the person concerned in order to preserve his religious identity, is a relevant factor to be taken into account in determining the level of risk to which the applicant will be exposed in his country of origin on account of his religion, even if the observance of such a religious practice does not constitute a core element of faith for the religious community concerned.

Lastly, the CJEU held that, where it is established that upon his return to his country of origin, the person concerned will engage in a religious practice, which will expose him to a real risk of persecution, he should be granted refugee status. The CJEU considers that, in assessing an application for refugee status on an individual basis, the national authorities cannot reasonably expect the applicant to abstain from the manifestation or practice of certain religious acts.

Some of the principles set out in this judgment were thereafter applied on a different type of persecution in the *X, Y and Z* judgment¹⁴².

142 C-199/12 to C-201/12, *Minister voor Immigratie en Asiel v. X and Y and Z v. Minister voor Immigratie en Asiel*, judgment of 7 November 2013, see the separate case commentary provided in this section.

Homosexual applicants for asylum constitute a particular social group who may be persecuted on account of their sexual orientation

JUDGMENT IN THE CASE OF MINISTER VOOR IMMIGRATIE EN ASIEL v. X and Y and Z v. MINISTER VOOR IMMIGRATIE EN ASIEL

(Case No. C-199/12 to C-201/12)

7 November 2013

1. Principal facts

This case was a preliminary reference emanating from the Raad van State (the Netherlands) on the interpretation of Article 9(1)(a) of Council Directive 2004/83/EC of 29 April 2004 (Qualification Directive or QD), read in conjunction with Article 9(2)(c) and Article 10(1)(d) thereof. Pursuant to the QD, any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of origin, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, may claim refugee status. Acts may be considered as persecution if they are sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights or if they constitute an accumulation of various measures, including violations of human rights which are sufficiently severe as to effect an individual in a similar manner as a severe violation of basic human rights.

X, Y and Z, nationals of Sierra Leone, Uganda and Senegal, lodged applications for residence permits for a fixed period (asylum) in the Netherlands respectively in 2009, 2011 and 2010, claiming that they had a well-founded fear of being victims of persecution in their countries of nationality by reason of their sexual orientation. Indeed, homosexual acts were a criminal offence in those three countries, and might lead to serious punishment, from heavy fines to life imprisonment in certain cases.

By decrees of 18 March 2010, 10 May 2011 and 12 January 2011, the Minister refused to grant residence permits for a fixed period (asylum) to X, Y and Z. He found that, although the sexual orientation of the applicants was credible, they had not proved to the required legal standard the facts and circumstances relied on and, failed to demonstrate that on return to their respective countries of origin they had a well-founded fear of persecution by reason of their membership of a particular social group.

Following the rejection of their applications, X and Z appealed, and Y lodged an application for interim measure before the Rechtbank's-Gravenhage. The national court upheld X's appeal and Y's application, taking the view, in particular, that the Minister had given insufficient reasons in both of those cases as to whether, having regard in particular to the criminalisation of homosexual acts in the countries of origin concerned, X and Y's fear of being persecuted on account of their homosexuality was well-founded. The Rechtbank's-Gravenhage dismissed Z's appeal, holding that it did not appear from the documentation produced by Z that in Senegal homosexuals were routinely persecuted.

The Minister appealed before the Raad van State against the two judgments annulling his decisions rejecting X's and Y's applications. Z appealed to that same court against the judgment dismissing his appeal against the Minister's decision rejecting his application.

2. Questions posed by the national court

The Raad van State stayed the proceedings, and asked the CJEU whether Article 10(1)(d) of the QD must be interpreted as meaning that, for the assessment of the grounds of persecution which are relied on in support of an application for refugee status, homosexuals may be regarded as being members of a particular social group. In that case, the Raad van State also asked whether foreign nationals with a homosexual orientation could be expected to conceal their orientation from everyone in their country of origin in order to avoid persecution. Furthermore, it wished to know how the national authorities should assess what constitutes an act of persecution against homosexual activities in that context, and whether the criminalisation of those activities in the applicant's country of origin, which may lead to imprisonment, amounts to persecution.

3. Decision of the CJEU

Article 10(1) of the QD gives a definition of a particular social group, membership of which may give rise to a genuine fear of persecution. According to that Article, a group is regarded as a "particular social group" where members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and where that group has a distinct identity in the relevant country because it is perceived as being different by the surrounding society.

The CJEU considered, first of all, that it is common ground that a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it. Accordingly, it recognised that the existence of criminal laws specifically targeting homosexuals supports a finding that those persons form a separate group which is perceived by the surrounding society as being different. Therefore, Article 10(1)(d) of the QD must be interpreted as meaning that the existence of criminal laws, such as those at issue in each of the cases in the main proceedings, which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group.

However, in order for a violation of fundamental rights to constitute persecution, it must be sufficiently serious. Therefore, not all violations of the fundamental rights of a homosexual applicant for asylum will necessarily reach such level of seriousness. In that context, the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in such a significant manner that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the QD. Nevertheless, a term of imprisonment accompanying a legislative provision which punishes homosexual acts may constitute an act of persecution *per se*, provided that it is actually applied.

In those circumstances, where an applicant for asylum relies on the existence in his country of origin of legislation criminalising homosexual acts, national authorities must undertake an examination of all the relevant facts concerning that country of origin; including its laws and regulations and the manner in which they are applied. In carrying out such an examination, the authorities must determine, in particular, whether the term of imprisonment provided for by such legislation is applied in practice.

Finally, the CJEU had to determine whether it is reasonable to expect that, in order to avoid persecution, an asylum seeker should conceal his homosexuality in his country of origin or exercise restraint in expressing it, and whether such reserve should be greater than that of a heterosexual person. In this regard, the CJEU considered that requiring members of a social group sharing the same sexual orientation to conceal it is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it. Therefore, an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution.

As regards the restraint that a person should exercise, in the system provided for by the QD, when assessing whether an applicant has a well-founded fear of persecution, the competent authorities must ascertain whether or not the circumstances established constitute such a threat that the person concerned may reasonably fear, in the light of his individual situation, that he will in fact be subjected to acts of persecution. In assessing the extent of the risk of actual acts of persecution in a particular situation, the CJEU held that the fact that the applicant could avoid that risk by exercising greater restraint than a heterosexual is not to be taken into account in that respect. It followed that the person concerned must be granted refugee status where it is established that on return to his country of origin, his homosexuality would expose him to a genuine risk of persecution within the meaning of Article 9(1).

4. Comment

In the *X, Y and Z* judgment, the CJEU pronounced itself for the first time on a sensitive and emerging subject in the asylum field; the protection of persons facing criminal sanctions because of their sexual orientation. The CJEU was called to address three distinct questions.

As to whether foreign nationals with a homosexual orientation form a “particular social group” for the purposes of the QD, the CJEU found that both conditions listed in the Directive were satisfied in this case – a person’s sexual orientation is a characteristic fundamental to their identity, and the existence of laws criminalising homosexuality supported a finding that the gay community was perceived by surrounding society in the relevant countries as being different.

As for the question of whether criminalisation without enforcement amounts to persecution, the CJEU responded in the negative. This can be compared with the position of the Strasbourg Court, which found the “*mere existence of such laws to be an infringement of Article 8*” in *Dudgeon v. the United Kingdom*, *Norris v. Ireland* and *Modinos v. Cyprus*¹⁴³. The CJEU held that Article 9 of the QD states that relevant acts which constitute persecution must be “sufficiently serious” by their nature or repetition as to constitute a “severe violation of human rights”, which is, according to the CJEU, not satisfied by mere criminalisation. Still, a term of imprisonment that sanctions homosexual acts and which

143 *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, no. 7525/76; *Norris v. Ireland*, judgment of 26 October 1988, no. 10581/83; *Modinos v. Cyprus*, judgment of 22 April 1993, no. 15070/89.

is actually applied in the country of origin that adopted such legislation must be regarded as being punishment that is disproportionate and discriminatory under Art 9(2)(c) and thus constitutes an act of persecution.

Finally, the CJEU found that applicants for asylum cannot be reasonably expected to “conceal their homosexuality in their country of origin, or to exercise reserve in the expression of his sexual orientation”. Considering the issue of concealment, the CJEU reasoned by analogy with *Y and Z*¹⁴⁴, where it ruled that the possibility open to the applicants of avoiding the risk of persecution by abstaining from religious practice is not to be taken into account in determining the risk of persecution. Similarly, the CJEU stated that “the fact that [the applicant] could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account”.

It should also be mentioned that the *X, Y and Z* judgment is focused on the definition of persecution, whereas questions relating to the assessment of fact on sexual orientation were later addressed in the *A, B and C* judgment¹⁴⁵.

144 C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, [GC] judgment of 5 September 2012, included in this section.

145 C-148/13 to C-150/13, *A, B and C v. Staatssecretarías van Veiligheid en Justitie*, [GC] judgment of 2 December 2014, also included in this section.

Interpretation of ‘internal armed conflict’ in the context of international protection

JUDGMENT IN THE CASE OF ABOUBACAR DIAKITÉ v. COMMISSAIRE GÉNÉRAL AUX RÉFUGIÉS ET AUX APATRIDES

(Case No. C-285/12)

30 January 2014

1. Principal facts

This case was a preliminary reference emanating from the Conseil d’État (Belgium) on the interpretation of Article 15(c) of Council Directive 2004/83/EC of 29 April 2004 (Qualification Directive or QD). The Directive protects not only persons who can qualify for recognition as refugees, but also those who qualify for subsidiary protection. A third country national qualifies for subsidiary protection, when substantial grounds have been shown for believing that, if returned to his country of origin or country of former habitual residence, he would face a real risk of suffering a serious harm as defined in Article 15 of the QD. The type of harm specified in Article 15(c) of the QD consists of a ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’.

The case concerned a Guinean national, Mr Diakité, who requested international protection from Belgium on 21 February 2008, arguing that he had been the victim of acts of violence in Guinea following his participation in protest movements against the ruling regime. The competent national authority refused to grant Mr Diakité either refugee status or subsidiary protection. That twofold decision was upheld by the Conseil du contentieux des étrangers (Belgian asylum and immigration board).

On 15 July 2010, Mr Diakité made another application for asylum to the Belgian authorities. The competent national authority once more refused to recognise Mr Diakité as a refugee. He was also denied subsidiary protection, on the basis that there was no situation of indiscriminate violence or ‘internal armed conflict’ in Guinea.

Mr Diakité brought an appeal against that decision before the Conseil du contentieux des étrangers, which, in May 2011, upheld the competent national authority’s twofold refusal. This judgment relied, *inter alia*, on the definition of ‘internal armed conflict’ established by international humanitarian law. In his

appeal in cassation before the Conseil d'État (Council of State, Belgium), Mr Diakité contested the judgment of the Conseil du contentieux des étrangers.

2. Questions posed by the national court

The Conseil d'État decided to stay the proceedings and requested a preliminary ruling from the CJEU in order to ascertain whether the interpretation to be given to the concept of 'internal armed conflict', as referred to in the QD, must be independent of the definition used in international humanitarian law and, if so, which criteria must be met in order to assess whether such a conflict exists for the purposes of determining whether a third country national or a stateless person is eligible for subsidiary protection.

3. Decision of the CJEU

For the CJEU, the concept of 'internal armed conflict', as used in the QD, is unique to that Directive, and is not directly reflected in international humanitarian law, which acknowledges only 'armed conflict not of an international character'. While international humanitarian law aims, *inter alia*, to protect civilian populations in a conflict zone by restricting the effects of war on persons and property, it does not – by contrast with the QD – provide for international protection to be granted to certain civilians who are outside both the conflict zone and the territory of the conflicting parties. Consequently, international humanitarian law definitions of 'armed conflict' do not identify situations in which such international protection would be necessary, and would have to be granted by the competent authorities of the Member States.

Accordingly, the CJEU pointed out that international humanitarian law and the subsidiary protection regime introduced by the QD pursue different aims, and establish quite distinct protection mechanisms.

As a consequence, the CJEU stated that the scope of the phrase 'internal armed conflict' must be determined by considering its usual meaning in everyday language, where it refers to a situation in which a State's armed forces confront one or more armed groups or in which two or more armed groups confront each other. The CJEU further recalled that, in the context of the system provided for under the QD, the existence of an armed conflict can be a cause for granting subsidiary protection only where the degree of indiscriminate violence reaches such a high level that an applicant for subsidiary protection would face a real risk of suffering serious and individual threat to his life or

person solely on account of his presence in the territory concerned. Therefore, it is not necessary, when considering an application for subsidiary protection, to carry out a specific assessment of the intensity of the armed confrontations at issue.

Bearing in mind that subsidiary protection must help to complement and add to the protection of refugees enshrined in the 1951 Geneva Convention through the identification of persons genuinely in need of international protection and through such persons being offered an appropriate status, the finding that there is an armed conflict must not be made conditional upon the armed forces involved having a certain level of organisation or upon the conflict lasting for a specific length of time if the confrontations in which those armed forces are involved give rise to a sufficient level of violence to reach the threshold established by Article 15(c) of the QD.

Consequently, on a proper construction of Article 15(c) of the QD, an internal armed conflict exists if a State's armed forces confront one or more armed groups or if two or more armed groups confront each other. It is not necessary for that conflict to be categorised as 'armed conflict not of an international character' under international humanitarian law; nor is it necessary 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.

4. Comment

The type of harm defined by Article 15(c) of the QD requests a certain level of violence in situations of international or internal armed conflict. Whereas the *Elgafaji* judgment¹⁴⁶ explained important elements concerning this level of violence, the *Diakité* judgment clarified the concept of "international armed conflict" in Article 15(c) of the QD.

Before this judgment, there was an ongoing debate in academic circles, but also before national judges, on whether this concept should be interpreted by reference to international humanitarian law (IHL). The question for the CJEU was whether to equate the concepts of an "internal armed conflict" from the

 146 C-465/07, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, [GC] judgment of 17 February 2009, see the separate case commentary provided in this section.

QD and of a “non-international armed conflict” from IHL for the purpose of interpreting EU law, and consequently for the application of the law of the Member States in conformity with EU law.

The CJEU held that IHL and the QD pursue different aims and establish distinct protection mechanisms. The former provides protection for civilian populations in a conflict zone by restricting the effects of war, whereas the latter protects certain civilians who are outside the conflict zone. The definition of armed conflict in IHL is not designed to identify situations in which international protection is necessary. Therefore, eligibility for subsidiary protection due to “internal armed conflict” cannot be subject to the conditions of IHL.

In the light of that, the CJEU stressed that ‘internal armed conflict’ should be understood autonomously, notably due to the considerable differences between IHL and the Common European Asylum System (CEAS). Thus, the CJEU ruled that the definition of ‘internal armed conflict’ must take the usual meaning in everyday language: armed groups confronting each other or the State armed forces, and not as defined under IHL.

According to the QD, only the internal armed conflicts where there are “substantial grounds” for believing that the applicant if returned would face a “real risk” of being subjected to ‘a serious and individual threat’ to their life. Therefore, given this existing requirement, the CJEU held it unnecessary to impose extra conditions relating to the intensity, level of organisation and duration of the relevant conflict. Such conditions would not help the aim of the QD to aid the identification of persons genuinely in need of international protection.

Consequently, the *Diakité* judgment clarified the scope of subsidiary protection and also contributed to define the relationships between international law and the CEAS.

The evaluation of the credibility of an asylum application based on sexual orientation

**GRAND CHAMBER JUDGMENT IN THE CASE OF A, B and C v.
STAATSSECRETARIS VAN VEILIGHEID EN JUSTITIE**

(Case Nos. C-148/13 to C-150/13)

2 December 2014

1. Principal facts

This case was a preliminary reference emanating from the Raad van State (Council of State, the Netherlands) on the interpretation of Article 4 of Council Directive 2004/83/EC of 29 April 2004 (Qualification Directive or QD), which defines the conditions for the assessment of the facts and circumstances for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection, and Articles 3 and 7 of the Charter of Fundamental Rights of the European Union (CFREU), respectively protecting the right to the integrity of the person, and the right to respect for private and family life.

A, B and C, third country nationals, each applied for asylum in the Netherlands, claiming that they feared persecution in their respective countries of origin on account, in particular, of their homosexuality. In all three cases, the competent authorities rejected the asylum applications, considering that the individuals' statements concerning their homosexuality lacked credibility.

The three applicants appealed against those decisions. Hearing the dispute, the Raad van State held that the verification of the sexual orientation of applicants for asylum is no different from the verification of other grounds for persecution. Nonetheless, the Dutch court was uncertain as to whether EU law imposes any limits as regards the verification of the sexual orientation of applicants for asylum. The Raad van State took the view that the mere fact of putting questions to an applicant for asylum may, to a certain extent, infringe the rights set forth in the Charter.

2. Questions posed by the national court

The Raad van State decided to stay the proceedings, and to ask the CJEU whether Article 4 of the QD, read in the light of the CFREU – in particular Articles 3 and 7 thereof – must be interpreted as meaning that it imposes on

the competent national authorities, acting under the supervision of the courts, certain limits when they assess the facts and circumstances concerning the declared sexual orientation of an applicant for asylum, whose application is based on a fear of persecution on grounds of that sexual orientation.

3. Decision of the CJEU

In the first place, the CJEU stated that the declarations made by an applicant for asylum as to his sexual orientation are merely the starting point in the process of assessment of the application, and may, in certain circumstances, require confirmation. It followed that applications for the granting of refugee status on the basis of a fear of persecution on grounds of that sexual orientation may, in the same way as applications based on other grounds for persecution, be subject to an assessment process, provided for in Article 4 of QD.

However, the methods used by the competent authorities to assess the statements and the evidence submitted in support of asylum applications must be consistent with EU law, and in particular the fundamental rights guaranteed by the CFREU. Consequently, it is for the competent national authorities to modify their methods of assessing statements and documentary or other evidence having regard to the specific features of each category of application for asylum, in observance of the rights guaranteed by the CFREU.

Furthermore, the assessment must be made on an individual basis, considering the individual situation and personal circumstances of the applicant, in order to determine whether the acts to which the applicant has been or could be exposed would amount to persecution or serious harm.

As regards the methods of assessing the statements and the evidence at issue in each of the cases in the main proceedings, the CJEU gave national authorities the following guidance.

Firstly, while questions based on stereotyped notions may be a useful element at the disposal of competent authorities, an assessment of an asylum application on the basis solely of stereotyped notions associated with homosexuals, such as knowledge of organisations for the protection of the rights of homosexuals and the details of those organisations, does not allow those authorities to take account of the individual situation and personal circumstances of the applicant concerned. Therefore, his inability to answer such questions is not, in itself, a sufficient reason for concluding that the applicant lacks credibility.

Secondly, whilst national authorities are entitled to carry out interviews in order to establish the facts as regards the declared sexual orientation of an asylum applicant, questions concerning the details of his sexual practices are contrary to the fundamental rights guaranteed by the CFREU, and, in particular, to the right to respect for private and family life.

Thirdly, as for the option for the national authorities of allowing, as certain applicants for asylum proposed, homosexual acts to be conducted, the submission to possible 'tests' so as to demonstrate their homosexuality or even the production by those applicants of evidence such as films of their intimate acts, the CJEU made clear that, besides the fact that such evidence does not necessarily have probative value, it would by its nature infringe human dignity, the respect of which is guaranteed by the CFREU. Moreover, authorising or allowing such types of evidence would have the effect of inciting other applicants to offer the same, and would lead, *de facto*, to requiring applicants to provide such evidence.

Fourthly, given the sensitive nature of information concerning a person's personal identity and, in particular, his sexuality, the conclusion of a lack of credibility cannot be reached on the sole basis that, due to his reticence in revealing intimate aspects of his life, that person did not declare his homosexuality at the first occasion of setting out his case.

On those grounds, the CJEU ruled that Article 4(3)(c) of the QD must be interpreted as precluding the statements of an applicant for asylum, whose application is based on a fear of persecution on grounds of his sexual orientation, and the documentary and other evidence submitted in support of his application being subject to an assessment by the national authorities founded on questions based only on stereotyped notions concerning homosexuals. Article 4 of the QD, read in the light of Article 7 of the CFREU, must be interpreted as precluding, in the context of that assessment, the competent national authorities from carrying out detailed questioning as to the sexual practices of an applicant for asylum. Article 4 of the QD, read in the light of Article 1 of the CFREU, must be interpreted as preventing, in the context of that assessment, the acceptance by those authorities of evidence which would infringe human dignity, with a view to establishing his homosexuality. Finally, Article 4(3) of QD must be interpreted as impeding, in the context of that assessment, the competent national authorities from finding that the statements of the applicant for asylum lack credibility merely because the applicant did not declare his sexual orientation on the first occasion he was given to set out the ground for persecution.

4. Comment

In its *X, Y and Z* judgment¹⁴⁷, the CJEU had ruled that, in certain circumstances, homosexuals must be regarded as forming a particular social group in the sense of Article 10 of the QD and that some types of criminalisation of homosexual acts can constitute an act of persecution according to Article 9 of the same Directive. While the CJEU gave, in that first judgment, important elements of interpretation concerning the definition of key notions of asylum law in the context of criminalisation of homosexual acts, it did not pronounce itself on the method that should be followed to assess an asylum application based on a fear of persecution on grounds of sexual orientation, and in particular whether the applicant belongs to the persecuted group.

This specific and sensitive question was directly referred to the CJEU in the *A, B and C* cases, in a context where the national court doubted the legality of the method followed by the competent national authorities. In its judgment, the CJEU, for the first time, interpreted in depth the rules provided by Article 4 of the QD, concerning the assessment of facts and circumstances, and stressed the limitations this Article and the CFREU place on the methods which may be used by competent national authorities in such an assessment.

In essence, the CJEU ruled that whilst self-identification of sexual identity is a starting point, Member States are able to subject self-identification to an assessment procedure, pursuant to Article 4 of the QD (currently updated by the 2011 Recast Directive). However, such assessments must not violate rights guaranteed by the CFREU, specifically the right to respect to human dignity (Article 1) and the right to respect for private and family life (Article 7). Accordingly, whereas that “*assessment must take account of the individual situation and personal circumstances of the applicant*”, the CJEU made clear that the assessment cannot be based only on stereotypes – such as knowledge of gay organisations or notions of how gay people behave. Moreover, some practices should be excluded in this assessment: (a) questioning on sexual practices as this would violate the right to respect private and family life (Article 7 of the CFREU); (b) tests to demonstrate sexual identity which have little value and would infringe human dignity (Article 1 of the CFREU); and (c) adverse findings with respect to delay in not declaring sexual identity at the outset (to rely on delay would violate Article 4 of the QD due to the vulnerability of gay applicants).

147 C-199/12 to C-201/12, *Minister voor Immigratie en Asiel v. X and Y and Z v. Minister voor Immigratie en Asiel*, judgment of 7 November 2013, see the separate case commentary provided in this section.

Protection granted to third country nationals suffering from serious illness

**GRAND CHAMBER JUDGMENT IN THE CASE
OF MOHAMED M'BODJ v. ÉTAT BELGE**

(Case No. C-542/13)

18 December 2014

1. Principal facts

This case was a preliminary reference emanating from the Cour constitutionnelle (Belgium) on the interpretation of Articles 28 and 29 of Council Directive 2004/83/EC of 29 April 2004 (Qualification Directive or QD). Regulating social welfare, Article 28 of the QD provides that Member States are to ensure that beneficiaries of refugee or subsidiary protection status receive necessary social assistance, as provided to nationals of that Member State. Article 29 of that Directive regulates health care, allowing those same persons to have access to health care under the same eligibility conditions as the nationals of the Member State which has granted them refugee or subsidiary protection status.

Mr M'Bodj, a Mauritanian national, arrived in Belgium in 2006. He applied for asylum and, subsequently, for leave to reside on medical grounds. Both applications being refused, he made a number of unsuccessful appeals. On 27 May 2008, Mr M'Bodj made a further application for leave to reside on medical grounds, on the basis of the serious after-effects he was suffering as a result of an assault he had been the victim of in Belgium.

In April 2009, Mr M'Bodj unsuccessfully applied for loss of income allowance and income support. He brought an action for annulment of the decision rejecting that application before the Tribunal du Travail de Liège. In the meantime, Mr M'Bodj was granted indefinite leave to remain in Belgium on account of his state of health on 17 May 2010.

By judgment of 8 November 2012, the Tribunal de Travail de Liège decided to refer to the Cour Constitutionnelle a question for a preliminary ruling, in order to ascertain the constitutional legitimacy of Article 4 of Law of 27 February 1987, which precluded the grant of disability allowances to persons residing in Belgium on medical grounds, and thus enjoying international protection status provided for by the QD, whereas it permitted the payment of such allowances to refugees, who, according to that court, enjoy the same international protection.

2. Questions posed by the national court

The Cour Constitutionnelle decided to stay the proceedings, and to ask the CJEU whether Articles 28 and 29 of QD, read in conjunction with Articles 2(e), 3, 15 and 18 thereof, are to be interpreted as requiring a Member State to grant the social welfare and health care benefits provided for in those measures to a third country national who has been granted leave to reside in the territory of that Member State under national legislation – such as that at issue in the main proceedings – which allows a foreign national who suffers from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment to reside in the Member State, where there is no appropriate treatment in that foreign national's country of origin or in the third country in which he resided previously. The referring court also questioned whether, in case of a positive obligation imposed on Member States to take into account the specific situation of vulnerable persons such as the disabled, that duty implies that vulnerable people must be granted the allowances provided for by the Law of 27 February 1987.

3. Decision of the CJEU

In its assessment, the CJEU stressed that Belgium would be required, pursuant to Articles 28 and 29 of QD, to grant the benefits covered by those provisions to third country nationals granted leave to reside in Belgium under the national legislation at issue in the main proceedings only if the leave to remain were to be regarded as also conferring subsidiary protection status.

The CJEU noted that the types of serious harm defined in Article 15 of QD constitute the conditions to be fulfilled if a person is to be eligible for subsidiary protection, where, in accordance with Article 2(e) of that Directive, substantial grounds have been shown for believing that the applicant faces a real risk of such harm if returned to the country of origin concerned. The risks faced by a third country national of a deterioration in his state of health, which is not the result of that person being intentionally deprived of health care, are not covered by Article 15(a) and (c) of the QD. Harm, as defined by those provisions consists of the death penalty or execution 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, respectively. Article 15(b) of the QD would not be applicable either, since it grants subsidiary protection only if a third country national has been subjected to torture or inhuman or degrading treatment or punishment in his own country of origin. Indeed, in light of Ar-

ticle 6 of the QD serious harm has to be inflicted by a third party and cannot therefore simply be the result of general shortcomings in the health system of the country of origin. According to the CJEU, several Recitals indicated that the risk of deterioration in the health of a third country national suffering from a serious illness as a result of the absence of appropriate treatment in his country of origin is not, in principle, sufficient to grant international protection and that the scope of this protection does not extend to persons granted leave to reside in the territories of the Member States on a discretionary basis on compassionate or humanitarian grounds.

Furthermore, the CJEU submitted that whilst the European Court of Human Rights jurisprudence points towards a violation of Article 3 if a person suffering from a serious illness were to be removed to a country where facilities for the illness were inferior to the hosting State in very exceptional cases¹⁴⁸, this does not mean that that person should be granted leave to reside in a Member State by way of subsidiary protection under the QD.

The CJEU further advanced that Article 3 of the QD (allowing Member States to introduce or retain, *inter alia*, more favourable standards for persons who qualify for subsidiary protection) does not apply to national legislation protecting third country nationals on medical grounds. The reservation set out in Article 3 of the QD precludes a Member State from introducing or retaining provisions granting the subsidiary protection status provided for in the Directive to a third country national suffering from a serious illness on the ground that there is a risk that that person's health will deteriorate as a result of the fact that adequate treatment is not available in his country of origin, as such provisions are incompatible with the Directive.

The CJEU based this finding on the fact that it would be contrary to the general scheme and objectives of the QD to grant refugee status and subsidiary protection status to third country nationals in situations which have no connection with the rationale of international protection. It followed that the legislation referred to by the Belgian State could not be regarded, for the purpose of Article 3 of the QD, as introducing a more favourable standard for determining who is eligible for subsidiary protection. Third country nationals granted leave to reside under such legislation were not, therefore, persons with subsidiary protection status to whom Article 28 and 29 of that Directive (social welfare and health care) would apply.

148 *N. v. the United Kingdom*, [GC] judgment of 27 May 2008, no. 26565/05, included in the section on ECtHR case law.

In conclusion, the CJEU ruled that Articles 28 and 29 of the QD, read in conjunction with Articles 2(e), 3, 15, and 18 of that Directive, are to be interpreted as not requiring a Member State to grant the social welfare and health care benefits provided for in those measures to a third country national who has been granted leave to reside in the territory of that Member State under national legislation – such as that at issue in the main proceedings – which allows a foreign national who suffers from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment to reside in that Member State, where there is no appropriate treatment in that foreign national’s country of origin or in the third country in which he resided previously, unless such a foreign national is intentionally deprived of health care in that country.

4. Comment

According to the QD, subsidiary protection must be granted if the applicant is facing any one of the following three situations: (a) the ‘death penalty or execution’; (b) ‘torture or other inhuman or degrading treatment or punishment of an applicant in the country of origin’; or (c) ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’. The CJEU previously interpreted the third of these grounds, in its judgments in *Elgafaji*¹⁴⁹ and *Diakité*¹⁵⁰.

In the *Elgafaji* judgment, the CJEU stressed the link between Article 15(b) of the QD and Article 3 of the ECHR. However, this link does not imply that those articles share entirely the same scope of application. In two recent judgments, *M’Bodj* and *Abdida*¹⁵¹, the CJEU has provided clarification on the scope of international protection in cases where claimants are suffering from serious illnesses.

The present case *M’Bodj* clarified the concept of “serious harm” in Article 15(b) of the QD, which includes torture or inhuman or degrading treatment or punishment of an applicant in the country of origin.

149 C-465/07, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, [GC] judgment of 17 February 2009, included in this section.

150 C-285/12, *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, judgment of 30 January 2014, also included in this section.

151 C-562/13, *Centre public d’action sociale d’Ottignies-Louvain-La-Neuve v. Moussa Abdida*, [GC] judgment of 18 December 2014, see the separate case commentary provided in this section.

Mr M'Bodj argued that the second ground applies, on the basis that the European Court of Human Rights has interpreted Article 3 of the ECHR, which equally bans "torture or other inhuman or degrading treatment or punishment", to mean that, in exceptional cases, people who would die if they were sent back to their country of origin, due to the inadequate medical treatment there, cannot be sent back.

However, the CJEU rejected these arguments. In its view, since the QD listed specific human activities as the source of persecution or serious harm, this form of "serious harm" had to be the result of "*a form of conduct on behalf of a third party*", so "*cannot therefore simply be the result of general shortcomings in the health system of the country of origin*". It did make an exception for cases where the person concerned had been intentionally deprived of health care, which would warrant that person being granted subsidiary protection. Hence, just because the ECtHR interpreted Article 3 of the ECHR to mean that people in Mr M'Bodj's situation could not be removed to their country of origin, that did not mean that they were necessarily entitled to subsidiary protection under the Directive.

However, the exclusion of leave on medical grounds from the field of application of the QD does not imply that the existing ECtHR's case law on Article 3 of the ECHR is not respected in EU law, as it is shown in the ruling on Directive 2008/115 (Returns Directive) in *Abdida* delivered by the CJEU later the same day.

Moreover, the *M'Bodj* judgment completes the *B and D*¹⁵² judgment by confirming that, in accordance with Article 3 of the QD, Member States are allowed to extend the field of the international protection, but only within certain limits.

152 C-57/09 and C-101/09, *Bundesrepublik Deutschland v. B and D*, [GC] judgment of 9 November 2010, see the separate case commentary provided in this section.

The conditions under which a third-country national can be granted refugee status in the EU

**JUDGMENT IN THE CASE OF ANDRE LAWRENCE SHEPHERD v.
BUNDESREPUBLIK DEUTSCHLAND**

(Case No. C-472/13)

26 February 2015

1. Principal facts

This case was a preliminary reference emanating from the Administrative Court of Munich on the interpretation of Council Directive 2004/83/EC of 29 April 2004 (Qualification Directive or QD). According to the QD, a third-country national who has a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group may, under certain conditions, be granted refugee status. The Directive sets out, *inter alia*, the factors which support a finding that acts constitute acts of persecution. According to Article 9(2)(e) of the QD, an act of persecution can take the form of “*prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2)*”. This exclusion clause refers, notably, to crimes against peace, war crimes, crimes against humanity and acts contrary to the purposes and principles of the United Nations.

The applicant, Mr Shepherd, was a national of the United States of America. In 2003, Mr Shepherd enlisted for the army service in the USA. Between 2004 and 2005, he worked as a helicopter technician in Iraq. From February 2005, he was based in Germany.

On 1 April 2007, Mr Shepherd was requested to return to Iraq. Shortly thereafter, Mr Shepherd left the army service based on his conviction that the Iraq war was both unlawful and directly resulted in the commitment of war crimes. He then applied for asylum in Germany claiming that, as a result of his desertion, he would be at risk of criminal prosecution in the USA. This request for asylum was rejected by the German Federal Office for Migration and Refugees.

Mr Shepherd asked the Munich Administrative Court to annul the rejection of his asylum application, and to order that he be granted asylum.

2. Questions posed by the national court

The Administrative Court made a preliminary reference to the CJEU regarding the interpretation of Article 9(2)(e) of the QD. The preliminary questions related to the specific criteria that would trigger the application of Article 9(2)(e), *inter alia*, direct military performance or acts outside of actual combat; the probability of the crime occurring; prosecution before the International Criminal Court (ICC) and lastly it asked whether a prison sentence and social ostracism for desertion may in itself constitute an act of persecution within Article 9(2)(b) or (c) of the Directive.

3. Decision of the CJEU

The CJEU emphasised that the purpose of the QD is to identify individuals who should be granted international protection. Consequently, the CJEU held that the protection granted under Article 9(2)(e) covers all military personnel. This, therefore, includes logistical and support personnel. Nevertheless, Article 9(2)(e) applies merely to those individuals whose activities, such as technical support, would “**sufficiently directly and reasonably plausibly**” lead to participation in war crimes.

Importantly, the protection granted under Article 9(2)(e) would only be triggered in situations where there is a likelihood that the acts under Article 12(2) of the QD, such as crimes against peace, war crimes or crimes against humanity, will be committed. The domestic authorities are responsible for the assessment of previous and current circumstances that would indicate that the army service is or would be involved in committing such acts. It remains the responsibility of the applicant, however, to “*establish with sufficient plausibility*” that his unit would have been involved in carrying out these specific acts.

Significantly, the situation of persecution protected under Article 9(2)(e) only referred to an applicant’s refusal to perform military service. In the case of Mr Shepherd, because the Court stressed that he had not only voluntarily enlisted in the armed forces at a time when they were involved in the conflict in Iraq but also, after carrying out one tour of duty in that country, had re-enlisted in those forces. The CJEU stated that if the applicant did not avail himself of a procedure for obtaining conscientious objector status, any protection under Article 9(2)(e) is excluded, unless he can demonstrate that no such procedure was available to him in his specific situation.

Lastly, the CJEU highlighted that a prison sentence could only be considered an act of persecution under Article 9(2)(b) and (c) when this sentence would be so disproportionate and discriminatory that it would “*go beyond what is necessary for the State concerned in order to exercise its legitimate right to maintain an armed force*”. The national authorities bear the responsibility for this assessment. In the particular case of Mr Shepherd, the CJEU remarked that nothing in the file submitted to the Court suggested that the probable prison sentence would go beyond the State’s legitimate rights to maintain an armed force.

4. Comment

In the *Shepherd* case, several detailed and sensitive questions were referred to the CJEU on a specific aspect of the acts of persecution listed in Article 9 of the QD, namely, the prosecution or punishment for refusal to perform military service where it was argued that performing military service could eventually encompass war crimes.

In its judgment, the CJEU brought important elements necessary to define the scope of this concept, clarifying, notably, the notion of “refusal to perform military service” and the type of link which should be requested between the activity of the applicant and the committal of war crimes.

The CJEU noted that the QD defines as an act of persecution the prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include the commission of war crimes. It explained that the purpose of the Directive is to identify persons who are genuinely in need of international protection. Accordingly, Article 9(2)(e) covers “*all military personnel, including logistical or support staff*”. However, the CJEU noted that for Article 9(2)(e) to apply there must be a conflict situation and whilst indirect participation in alleged war crimes (i.e. where an applicant provides logistical support) does not exclude the applicant from falling under 9(2)(e), the provision only extends to individual’s tasks which could “sufficiently directly and reasonably plausibly” lead to the participation in such acts. The CJEU thus held that members of the military participating indirectly in a conflict can, in certain situations, be granted asylum after desertion. Whilst past commission of war crimes does not have to occur for protection to be applicable, evidence must be provided that there is a high likelihood that war crimes will be committed and that the individual’s tasks are sufficiently linked to the participation in war crimes.

Still, the CJEU underlined that it was unlikely that a soldier would be led to commit war crimes if the intervention was legitimised by a UN Security Council mandate or an international consensus, and if domestic legislation effectively prosecuted war crimes. Therefore, it is up to the applicant to “*establish with sufficient plausibility that his unit carries out operations assigned to it [...] in such conditions that it is highly likely that acts such as those referred to in that provision will be committed*”.

The CJEU further highlighted that the acts of persecution complained of must, and can only, arise from the applicant’s refusal to perform military service, so that refusal must constitute the only means by which the applicant could avoid participating in the alleged war crimes.

Lastly, considering whether a prison sentence, social ostracism or dishonourable discharge for military desertion could constitute acts of persecution under Article 9(2)(b) and (c), when the competent national authorities consider that it is not established that the military service refused would include the commission of war crimes, the CJEU noted that “*it is necessary to consider whether such acts go beyond what is necessary for the State concerned in order to exercise its legitimate right to maintain an armed force*”. Thus, a possible five-year custodial sentence in the United States for military desertion was not considered so disproportionate or discriminatory as to amount to acts of persecution.

Council Directive No. 2008/115/EC of 16 December 2008 (Returns Directive)

The maximum period of detention of 18 months under the Returns Directive cannot be exceeded

GRAND CHAMBER JUDGMENT IN THE CASE OF SAID SHAMILOVICH KADZOEV (HUCHBAROV)

(Case No. C-357/09 PPU)

30 November 2009

1. Principal facts

This case was an urgent request for a preliminary ruling emanating from the Administrativen sad Sofia-grad (Bulgaria) concerning the interpretation of Article 15(4) to (6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 (Returns Directive). Article 15 of the Returns Directive provides the grounds for imposing detention on third-country nationals who are in the process of being returned to their country of origin. Detention can only be imposed if there is a risk of absconding or if the person is hampering return. Article 15 provides that the period of detention cannot exceed 18 months and that the person concerned must be released immediately if a reasonable prospect of removal no longer exists.

Mr Kadzoev was arrested in Bulgaria on 21 October 2006. He was detained, on the basis of national law, and the Bulgarian authorities ordered his return to Chechnya. He claimed that he was a Russian national coming from Chechnya. The Russian authorities declined to recognise his documents as proof of Russian nationality. While still in detention, Mr Kadzoev applied several times for refugee status. His applications were rejected. His actions for judicial review were dismissed.

The Bulgarian authorities tried to find a safe third country¹⁵³ which could

153 The concept of "safe third country" should not be confused with the notion of "safe country of origin". The latter applies to a country whose own citizens are not persecuted, whereas the former refers to a transit country considered safe for providing international protection. The "safe third country" concept is set out in Article 27 of the Asylum Procedures Directive (Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status amended by the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast)). According to the "safe third country" concept, Member States may send applicants to third countries with which the applicant has a connec-

receive Mr Kadzoev, but the countries to which the Bulgarian authority applied refused to receive him. In the meantime, he was kept in detention for 34 months.

2. Questions posed by the national court

The Administrativen sad Sofia-grad made an urgent request for a preliminary ruling essentially asking the CJEU whether the maximum period of 18 months of detention, provided in Article 15, applied to a person in a situation such as that of Mr Kadzoev.

3. Decision of the CJEU

The CJEU held that the overall detention period for the return of a third-country national cannot exceed 18 months, as provided by Article 15 of the Returns Directive, even if the detention period had started before the rules of the Directive became applicable in national law.

The CJEU clarified that a period during which a person has been detained on the basis of a decision taken pursuant to national and EU law concerning asylum seekers is not the same as detention under Article 15 of the Returns Directive. In this case, it was for the national court to establish whether the processing of Mr Kadzoev's asylum application was based on previous national rules for the purpose of return or not. If it was for the purpose of return, the period of detention should be counted towards the maximum period of detention under Article 15 of the Returns Directive.

The period during which the execution of a deportation order is suspended due to a judicial review action brought by the person concerned is also to be counted towards the maximum period of detention. Furthermore, the CJEU made it clear that when no reasonable prospect of removal appears to exist, the person has to be released pursuant to Article 15(4).

Finally, the CJEU held that under Article 15, the maximum period of detention

.....
 tion with, such that it would be reasonable for him/her to go there, and in which the possibility exists to request refugee status and if s/he is found to be a refugee, it must be possible for him/her to receive protection in accordance with the 1951 Geneva Convention. In that third country, the applicant must not be at risk of persecution, *refoulement* or treatment in violation of Article 3 of the ECHR. On the basis of this presumption, Member States may decide to consider the application for asylum as manifestly unfounded or inadmissible in accordance with the Asylum Procedures Directive.

of 18 months may not be exceeded even if the person concerned “*is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose*”. The CJEU noted that the Returns Directive cannot be the legal basis for detention on grounds of public order and public safety.

4. Comment

The *Kadzoev* case was the first case concerning the Returns Directive submitted to the CJEU. The judgment focuses on the interpretation of Article 15 of the Returns Directive – the provision authorising the use of detention by Member States in the context of removal proceedings against third-country nationals who stay illegally on their territory.

With regard to the question of whether, when determining if the maximum period of detention has expired, the Member State must include the period of detention prior to the time when the Returns Directive has been transposed and became applicable, the CJEU established that if the pre-Directive period were not included, persons such as Mr Kadzoev would be detained for longer than the maximum period, which is not consistent with the objectives of the Directive.

The judgement thus clarified how the Returns Directive should be applied during the transitional period where a return procedure has begun under pre-existing national law. On this question, it was notably followed by the *Filev* and *Osmani* judgment¹⁵⁴. In this case, the CJEU ruled that Article 11(2) of the Returns Directive precludes breach of an entry and residence ban from giving rise to a criminal sanction, when such a ban was handed down more than five years before the date either of the re-entry into the territory of a Member State of the third-country national concerned or of the entry into force of the national legislation implementing that Directive, unless that national constitutes a serious threat to public order, public security or national security.

Moreover, the CJEU stressed the difference between detention based on the Returns Directive and detention based on the Reception Conditions Directive (RCD)¹⁵⁵. Namely, detention for the purpose of removal is governed by the Re-

154 C-297/12, *Gjoko Filev and Adnan Osmani*, judgment of 19 September 2013.

155 Council Directive 2003/9/EC of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers (Reception Directive).

turns Directive, whereas detention of asylum seekers is governed by the RCD and the Asylum Procedures Directive¹⁵⁶. Whether or not the period of detention during a pending asylum claim is counted depends upon the Directive under which the asylum seeker is detained. If no decision is taken to switch Mr Kadzoev's detention from "pending removal" to "pending asylum claim", then that period of detention will be counted under the maximum period for detention pending removal under the Returns Directive.

When determining the existence of a "reasonable prospect of removal" in Article 15(4) of the Returns Directive, regard must be had for whether removal can be successful within the maximum periods of detention set out by this Directive. Where the maximum period has been reached, Article 15(4) is inapplicable and the person must be released immediately.

As regards the question of whether a person must be released when the maximum period is exceeded even if he is not in possession of valid documents, his conduct is aggressive, he has no means of supporting himself and no accommodation or means is supplied by the Member State, the CJEU noted that Article 15(6) does not permit the maximum to be exceeded in any circumstances, including public order and public safety.

In the field of detention of asylum seekers, one can also mention the recent *N.* case¹⁵⁷, in which the national court raised a question of the validity of the RCD, under which an asylum seeker may be detained when the protection of national security or public order so requires. The Court ruled in *N.* that there is no basis for calling into question detention measures on grounds of national security or public order, whose scope is strictly circumscribed so as to meet the requirements of proportionality.

156 Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Asylum Procedures Directive).

157 C-601/15, *J.N. v. Staatssecretaris van Veiligheid en Justitie*, [GC] judgment of 15 February 2016.

Necessary suspensive effect of the return decision of a seriously ill Nigerian national

**GRAND CHAMBER JUDGMENT IN THE CASE OF CENTRE PUBLIC
D'ACTION SOCIALE D'OTTIGNIES-LOUVAIN-LA-NEUVE v. MOUSSA
ABDIDA**

(Case No. C-562/13)

18 December 2014

1. Principal facts

This case was a preliminary reference emanating from the Cour du Travail de Bruxelles (Belgium) on the interpretation of Council Directive 2003/9/EC of 27 January 2003 (Reception Conditions Directive or RCD) laying down minimum standards for the reception of asylum seekers, Council Directive 2004/83/EC of 29 April 2004 (Qualification Directive or QD) on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Council Directive 2005/85/EC of 1 December 2005 (Asylum Procedures Directive or APD) on minimum standards on procedures in Member States for granting and withdrawing refugee status, and Articles 1 to 4, 19(2), 20, 21 and 47 of the Charter of Fundamental Rights of the European Union (CFREU).

Mr Abdida, a Nigerien national suffering from a particularly serious illness, applied to the Belgian State for leave to remain due to medical reasons. In June 2011, Mr Abdida's application was rejected on the ground that his country of origin had adequate medical infrastructure for caring for persons suffering from the illness affecting Mr Abdida. Thus, he was ordered to leave Belgium.

On 7 July 2011, Mr Abdida appealed against this decision before the Conseil du Contentieux des Étrangers. During the litigation procedure, Mr Abdida was not provided with a remedy having suspensive effect, and had his basic social security and medical care withdrawn by the Centres Publics d'Action Sociale (CPAS). Mr Abdida then decided to appeal against the decision withdrawing social assistance before the Tribunal du Travail de Nivelles, which upheld his appeal, and ordered the CPAS to pay Mr Abdida social assistance.

On 7 October 2011, the CPAS lodged an appeal against that judgment before the Cour du Travail de Bruxelles. That court stated that, under the relevant

national rules, no judicial remedy was available to Mr Abdida for suspension of the decision refusing him leave to reside, and that, pending the decision of his appeal, he was not entitled to any form of social assistance other than emergency medical assistance.

2. Questions posed by the national court

The Cour du Travail de Bruxelles stayed the proceedings, and asked the CJEU whether the RCD, QD and APD, taken in conjunction with Articles 1 to 4, 19(2), 20, 21 and 47 of the CFREU, are to be interpreted as meaning that a Member State, whose competent authorities have adopted a decision refusing the application of a third country national for leave to remain in that Member State under national legislation, such as that at issue in the main proceedings, which provides that leave is to be granted to a foreign national suffering from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment where there is no appropriate treatment in that foreign national's country of origin or in the third country where he resided previously and ordering that third country national to leave the territory of the Member State, must provide for a remedy with suspensive effect in respect of that decision and must provide for the basic needs of the third country national to be met pending a ruling on his appeal against that decision.

3. Decision of the CJEU

The CJEU reiterated that an application under national legislation granting leave to remain due to a serious illness coupled with a lack of treatment in the country of origin does not constitute a claim for international protection within the meaning of Article 2(g) of the QD. Nevertheless, the present case raised issues under the Returns Directive 2008/115 of 16 December 2008, given that Mr Abdida had been provided with a decision declaring his stay as illegal and stating an obligation to return.

With regards to the suspensive effect of an appeal against a return decision, the CJEU referred to Article 13(1) of the Returns Directive which provides that a third country national must be afforded an effective remedy to appeal against a decision ordering his return. Article 13(2) of that Directive provides that the authority empowered to adjudicate on such an appeal may temporarily suspend enforcement of the return decision that is being challenged, hence implying that the Returns Directive does not require that the remedy provided for in Article 13(1) should necessarily have suspensive effect. However, the

characteristics of such a remedy must be determined in a manner consistent with Article 47 of the CFREU, which constitutes a reaffirmation of the principle of effective judicial protection.

Bearing in mind the case law of the European Court of Human Rights¹⁵⁸, the CJEU held that, in very exceptional cases, the removal of a seriously ill third country national to a country in which appropriate treatment is not available may infringe the principle of *non-refoulement* and subsequently violate Article 5 of the Returns Directive. Those very exceptional cases are characterised by the seriousness and the irreparable nature of the harm that may be caused by the removal of a third country national to a country in which there is a serious risk that he will be subjected to inhuman or degrading treatment.

Given that that removal may lead to serious and irreparable harm, the CJEU submitted that a “*third country national must be able to avail himself, in such circumstances, of a remedy with suspensive effect, in order to ensure that the return decision is not enforced before a competent authority has had the opportunity to examine an objection alleging infringement of*” *non-refoulement* in both the Returns Directive and the CFREU. The CJEU held that this solution is supported by the case law of the ECtHR on the violation of Article 13 of the ECHR, taken in conjunction with Article 3 of the ECHR¹⁵⁹, which is relevant to interpret Article 47 of the Charter.

Accordingly, the CJEU held that Articles 5 and 13 of the Returns Directive must be interpreted as precluding national legislation which does not make provision for a remedy with suspensive effect in respect of a return decision whose enforcement may expose the third country national concerned to a serious risk of grave and irreversible deterioration in his state of health.

As regards provision being made for the basic needs of a third country national to be met in a situation such as that in the main proceedings, Article 14 of the Returns Directive provides for certain safeguards pending return.

In the present case, the Member State concerned was required, pursuant to Article 14(1)(b) of the Returns Directive, to make provision, in so far as possible, for the basic needs of a third country national suffering from a serious illness where such a person lacks the means to make such provision for himself. The

158 Cf. *N. v. the United Kingdom*, [GC] judgment of 27 May 2008, no. 26565/05, included in the section on ECtHR case law.

159 Cf. *Hirsi Jaama and Others v. Italy*, [GC] judgment of 23 February 2012, no. 27765/09, included in the section on ECtHR case law.

requirement to provide emergency health care and essential treatment of illness might, in such a situation, be rendered meaningless if there was not also a concomitant requirement to make provision for the basic needs of the third country national.

Consequently, the CJEU ruled that Article 14(1)(b) of the Returns Directive must be interpreted as precluding national legislation which does not make provision, in so far as possible, for the basic needs of a third country national suffering from a serious illness to be met, in order to ensure that such a person may in fact avail himself of emergency health care and essential treatment of illness during the period in which the Member State concerned is required to postpone removal of the third country national following the lodging of an appeal against a decision ordering that person's return.

4. Comment

The *Abdida* judgment has an indirect link with asylum law. The judgment confirmed the position taken in the *M'Bodj* judgment¹⁶⁰, delivered on the same day, that a protection assessment on medical grounds could not, as such, fall within the scope "serious harm" as defined in Article 15 of the QD, unless intentional actions may be found to explain the lack of access to healthcare.

Thus, the *Abdida* case suggests that in some cases, those who are unable to qualify for subsidiary protection or refugee status cannot, nonetheless, be removed in application of EU's Returns Directive. First, the CJEU ruled that, while the Returns Directive does not require legal challenges to removal to have suspensive effect, it was necessary to consider the impact of Article 19(2) of the CFREU, which bans removals to States where the person concerned would face a serious risk of inhuman or degrading treatment. This had to be interpreted in light of the ECtHR case law on Article 3 of the ECHR, which bans removals on "medical grounds" in exceptional cases¹⁶¹. Accordingly, in such exceptional cases the removal of a third country national suffering from a serious illness to a country in which appropriate treatment is not available "would infringe the principle of non-refoulement" on medical grounds, and subsequently amount to a violation of Article 5 of the Returns Directive. This ban on removal had the consequential effect that the remedy against removal had to be suspen-

160 C-542/13, *Mohamed M'Bodj v. État belge*, [GC] judgment of 18 December 2014, see the separate case commentary provided in this section.

161 *N. v. the United Kingdom*, [GC] judgment of 27 May 2008, no. 26565/05, included in the section on ECtHR case law.

sive, despite the optional wording of the Directive, because otherwise Mr Abidida could suffer irreparable harm if sent back to his country of origin before his appeal was decided. The CJEU thus holds that national legislation, which does not give suspensive effect to an appeal challenging a return decision and which may expose the applicant to a serious risk of grave and irreversible deterioration in his state of health, must be precluded.

Secondly, the CJEU ruled on the applicant's social rights. The CJEU thus held that where an application raises these issues and an appeal has been lodged, the Member State is required to provide under Article 14(1)(b) of the Returns Directive "*for the basic needs of a third country national suffering from a serious illness where such a person lacks the means to make such provision for himself*". However, the CJEU concluded that it is for "*the Member States to determine the form in which such provision for the basic needs of the third country national concerned is to be made*".

The limits of the scope of application of the obligations described in the *Abidida* judgment were later addressed by the Court in the *Tall* judgment¹⁶².

162 C-239/14, *Abdoulaye Amadou Tall v. Centre public d'action sociale de Huy*, judgment of 17 December 2015. See the discussion of this judgment in the commentary of the Dutch judgment in *Administrative Jurisdiction Division of the Council of State (ABRvS)*, 201112955/1/V4, 29 June 2012, in the section on national case law.

Domestic Case Summaries and Comments

Encroachment on Religious Freedom as Acts of Persecution

Council Directive No. 2004/83/EC of 29 April 2004 (Qualification Directive), Article 9(1)

The mere prohibition of practising a religion in certain forms may constitute a significant act of persecution within the meaning of Article 9(1) of the Qualification Directive, irrespective of whether the member of the religion will in fact become religiously active or abstain from a practice because of fear of persecution

Germany: Federal Administrative Court (BVerwG), 20 February 2013, 10 C 23.12

1. Principal facts

The complainant, who was born in 1979, belonged to the Ahmadiyya religious community (Ahmadis) in Pakistan. He travelled to Germany in 2000 and applied for asylum. The application was declined on the grounds that the claims put forward were not credible. Moreover, the Administrative Court held that there was no evidence of mass persecution of Ahmadis in Pakistan.

Following several unsuccessful subsequent applications, the applicant presented a further asylum application in 2008 and stated that the legal situation had changed in his favour thanks to the enforcement of the Qualification Directive (2004/83/EC) (QD)¹⁶³. Namely, he argued that Article 10(1)(b) of the QD now defined religion as a reason for persecution, in such a way as to also protect the practice of beliefs in public. The Administrative Court accepted the

 163 Council Directive No. 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. On 13 December 2011, the European Parliament and the Council adopted a recast Qualification Directive (2011/95/EU). It is a central legislative instrument in the establishment of a Common European Asylum System, which applies to all EU Member States with the exception of Denmark, Ireland and the United Kingdom. Ireland and the United Kingdom continue to be bound by Directive 2004/83/EC. For a broader analysis of the recast Qualification Directive see ECRE, Information Note on the Qualification Directive (recast).

applicant's request and obliged the authorities to grant him refugee status.

The Baden-Württemberg Higher Administrative Court confirmed the decision of the Administrative Court on 13 December 2011 arguing that the QD altered the scope of protection for freedom of religion in refugee law in comparison with the provisions that applied formerly. It determined that, on the basis of the Directive's standards, the complainant was threatened with persecution in Pakistan since Ahmadis were subject to serious restrictions on their practice of religion, particularly by the criminal prohibitions and due to violence committed by religious extremists, without the police agencies providing effective protection against such abuses.

The authorities appealed to the Federal Administrative Court for review. In May 2012, the Federal Administrative Court stayed the proceedings until the Court of Justice of the European Union (CJEU) had decided on the requests for a preliminary ruling on diverse questions concerning the interpretation of Article 9(1)(a) and concerning Article 2(c) of the QD. The CJEU answered the referred questions in a judgment of 5 September 2012 (*Bundesrepublik Deutschland v. Y and Z*, C-71/11 and C-99/11¹⁶⁴).

2. Decision of the Court

In its decision of 5 September 2012 (*Bundesrepublik Deutschland v. Y and Z*, C-71/11 and C-99/11), the CJEU determined under which circumstances encroachment on religious freedom can be considered as acts of persecution according to Article 9(1)(a) of the QD.

The CJEU views the right to freedom of religion enshrined in Article 10(1) of the Charter of Fundamental Rights of the European Union (CFREU) as a fundamental human right that is one of the foundations of a democratic society, and that corresponds to Article 9 of the European Convention of Human Rights (ECHR). According to the CJEU, interference with the right to religious freedom may be so serious as to be treated in the same way as one of the cases referred to in Article 15(2) of the ECHR, to which Article 9(1)(a) of the QD refers, by way of guidance, for the purpose of determining which acts must in particular be regarded as constituting persecution.

164 See C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, [Grand Chamber] judgment of 5 September 2012, included in the section on CJEU case law.

However, not every interference with the right to religious freedom guaranteed by Article 10(1) of the CFREU constitutes an act of persecution within the meaning of Article 9(1) of the QD. First of all, there must be a violation of this freedom that does not fall under the limitations on the right to exercise fundamental rights as provided for by law, within the meaning of Article 52(1) of the CFREU. Furthermore, there must be a severe violation of rights, with a significant effect on the person concerned. According to Article 9(1)(a) of the QD, this presupposes that the infringing acts must be equivalent to an infringement of the basic human rights from which no derogation can be made by virtue of Article 15(2) of the ECHR (which include: the right to life (Article 2 of the ECHR, except in respect of deaths resulting from lawful acts of war), prohibition of torture (Article 3 of the ECHR), prohibition of slavery and forced labour (Article 4(1) of the ECHR) and no punishment without law (Article 7 of the ECHR)).

According to the case law of the CJEU, the acts which may constitute a serious violation of religious freedom in this sense do not only include a serious encroachment on the individual's freedom to practice his faith in private, but also acts to restrict his freedom to express his faith in a public context. Consequently, the CJEU does not deem it compatible with the broad definition of religion given by Article 10(1)(b) of the QD to distinguish between the significance of an infringing act on the basis of whether the act interferes with the core areas of the exercise of religion in private (*forum internum*) or with a broader area of religious activities in public (*forum externum*).

The Federal Administrative Court endorsed this interpretation and held the acts which may be regarded as constituting persecution, must be identified on the basis of the nature of the repression inflicted on the individual concerned and its consequences.

Accordingly, the Federal Administrative Court held that:

“A violation of the right to freedom of religion may constitute persecution within the meaning of Article 9(1)(a) of the Directive where an applicant for asylum, as a result of exercising that freedom in his country of origin, runs a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment by one of the actors referred to in Article 6 of the Directive”.

Furthermore, the Federal Administrative Court noted that:

“A sufficiently severe interference with religious freedom under Article 9(1) of

the Directive does not presuppose that the foreigner does in fact exercise his religion, after returning to his country of origin, in a manner that exposes him to the threat of persecution. Rather, an abstention from practising a religion, when compelled under the pressure of the threat of persecution, may already achieve the quality of a persecution”.

Moreover, the mere prohibition of participation in formal worship in public may constitute a sufficiently serious act within the meaning of Article 9(1)(a) of the QD, and therefore persecution, where a breach of the prohibition gives rise to a genuine risk of the sanctions and consequences mentioned there.

Furthermore, both the CJEU and the Federal Administrative Court confirmed that the observance of a certain religious practice must be particularly important for the preservation of the religious identity of the applicant, even if the pursuit of such a religious practice is not of central importance for the religious community concerned. The deciding factor is how the individual believer lives out his faith, and whether the religious practice that incurs persecution is necessary to him personally according to his understanding of his religion. The deciding factor for the severity of the violation of religious identity is the intensity of the pressure on the concerned individual’s voluntary decision whether he should practise his faith in a manner that he feels is obligatory for him, or should abstain from doing so because of the threatened sanctions. The fact that he considers the suppressed religious practice of his faith to be obligatory for himself in order to maintain his religious identity must be proved by the asylum-seeker to the full satisfaction of the court.

The Federal Administrative Court concluded that the material question is whether, in view of these circumstances, a fear of persecution can be induced in a reasonable, prudent person in the situation of the person concerned:

“In the present case, the material question is whether the Complainant must justifiably fear a considerable probability of being threatened with serious violations of his legal interests, especially the danger of injury to life, limb or liberty, criminal prosecution, or inhuman or degrading treatment or punishment, because of a public religious activity in Pakistan that is of particular importance in order to preserve his religious identity”.

The Federal Administrative Court noted that the Higher Administrative Court rightly established that mere membership of the Ahmadiyya community does not place Pakistani nationals in danger of persecution in their homeland such as would be relevant in asylum law. Such persecution threatens only ‘profess-

ing Ahmadis' who 'also wish to practise their faith in public in their homeland'.

The Federal Administrative Court however held that the standards applicable for group prosecution are not entirely transferable in determining the probability of persecution against 'professing Ahmadis', insofar as a comparable examination of the number of acts of persecution that have taken place relative to the total number of all Ahmadis in Pakistan (about 4 million), or of professing Ahmadis (500,000 to 600,000), might fail to take account of a potentially large number of members of the faith who refrain from practising their religion in public for fear of persecution.

Therefore, since the danger of persecution depends on the voluntary conduct of the individual – the prohibited practice of the faith in public – the prognosis of danger must be based on the group of members of the faith who practise it in public despite the prohibitions. In that case, it must be determined how many Ahmadis practise their faith in a manner prohibited in criminal law and how many acts of persecution affect the members of this group.

If, on the basis of such a prognosis, there is a real risk of persecution for the group of members of the faith who practise their faith in a forbidden manner in public, the conclusion may be drawn on that basis that the entire group of Ahmadis, for whom these public practices of religion constitute a central element of their religious identity and in that sense are necessary, are also affected by the restrictions on their freedom of religion in a manner that is worthy of consideration in refugee law.

For lack of sufficient findings of fact by the Higher Administrative Court concerning the probability of persecution of the complainant in the event of a return to Pakistan, the Federal Administrative Court could not arrive at a final decision in the matter.

The case was referred back to the Higher Administrative Court for further investigation, in order to reach a new decision on the basis of the principles set down by the Federal Administrative Court.

3. Comment

The effect of the CJEU judgment in *Bundesrepublik Deutschland v. Y and Z*, which is included in this publication, and in this subsequent decision of the German Federal Administrative Court is that it will rarely be sufficient for

a person to succeed in a claim based on the threat of being persecuted on grounds of religious orientation to show that their country of origin has laws which discriminate against their religion. It is also necessary to show that those laws impose criminal penalties that are likely to be imposed in practice. Secondly, it is not sufficient for a person to show that they will not be able to exercise their religious freedom in their country due to religious discrimination; it will also be necessary for an applicant to show that exercising such freedom is of fundamental importance to their identity¹⁶⁵.

165 See C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, [GC] judgment of 5 September 2012, included in the section on CJEU case law, para 70.

Persecution from Non-State Actors

Council Directive No. 2004/83/EC of 29 April 2004 (Qualification Directive), Article 7, and the 1951 Geneva Convention, Article 1A(2)

In cases where an applicant fears persecution from non-State actors, the home State can be judged to provide protection if it has in place a system of domestic protection machinery for the detection, prosecution and punishment of such acts, and has an ability and readiness to operate the machinery

The United Kingdom: Horvath v. Secretary of State for the Home Department [2000] UKHL 37 6 July 2000

1. Principal facts

The applicant was a Slovak national and a member of the Roma minority. The Roma, who are widely distributed across the country, constitute about 10 per cent of the population of Slovakia. They are a small minority in the village to which the appellant belongs. He and his family had faced racially motivated ill treatment by skinheads. The same was true of other Roma in his neighbourhood. He travelled to the United Kingdom and claimed asylum. He maintained that he was afraid that if he and his family were returned to Slovakia they would again be attacked by skinheads as they were Roma, and that they would not get protection from the police. The Immigration Appeal Tribunal concluded that, while he had a well-founded fear of violence by skinheads, this did not amount to persecution because he had not shown that he was unable or, through fear of persecution, unwilling to avail himself of the protection of the State.

2. Decision of the Court

The issues in the appeal before the House of Lords¹⁶⁶ relate to the proper construction of Article 1A(2) of the 1951 Geneva Convention relating to the Status of Refugees, as amended by the 1967 Protocol. The appellant's claim for refugee status is based on the alleged insufficiency of State protection against persecution by non-State agents and not upon a well-founded fear of persecution by the State itself or by organs or agents of the State. His claim is based

 166 Pursuant to Part 3 of the Constitutional Reform Act 2005, the Supreme Court was established and it assumed the judicial functions of the House of Lords as of 1 October 2009.

on his fear of violence by skinheads, who are not agents of the State, and on the alleged failure of the State through its police service to provide him with protection against their activities.

All five justices on the panel (Law Lords) dismissed the appeal on the basis that the applicant was able to obtain State protection from the non-State actors who had ill-treated him.

It was held that one of the purposes of the Geneva Convention is to provide surrogate protection to those in fear of harm in their own country. Where the fear is of non-State actors, the ability of the refugee's own State to provide protection is crucial and if such protection is not available then there is an obligation on a receiving State to provide surrogate protection. In endeavouring to define what level of State protection is appropriate when the applicant's fear arises from non-State actors, a number of different formulas were put forward.

Thus, the Law Lords held that:

“The primary duty to provide the protection lies with the home state. It is its duty to establish and to operate a system of protection against the persecution of its own nationals. If that system is lacking the protection of the international community is available as a substitute. But the application of the surrogacy principle rests upon the assumption that, just as the substitute cannot achieve complete protection against isolated and random attacks, so also complete protection against such attacks is not to be expected of the home state. The standard to be applied is therefore not that which would eliminate all risk and would thus amount to a guarantee of protection in the home state. Rather it is a practical standard, which takes proper account of the duty which the state owes to all its own nationals”.

In addition, when it comes to assessing the level of protection available in the home country, the Law Lords held that:

“There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of acting contrary to the purposes which the Convention requires to have protected. More importantly there must be ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case”.

In order to clarify what is intended, the House of Lords relied on the formulation presented in the decision of the Court of Appeal of England and Wales, which stated that:

“There must be in force in the country in question a criminal law which makes the violent attacks by the persecutors punishable by sentences commensurate with the gravity of the crimes. The victims as a class must not be exempt from the protection of the law. There must be a reasonable willingness by the law enforcement agencies, that is to say the police and courts, to detect, prosecute and punish offenders”.

Further, in relation to the question of unwillingness of the home State to provide protection, the Court of Appeal pointed out that:

“Inefficiency and incompetence is not the same as unwillingness, that there may be various sound reasons why criminals may not be brought to justice, and that the corruption, sympathy or weakness of some individuals in the system of justice does not mean that the state is unwilling to afford protection”.

Thus, it concluded that it would require *“cogent evidence that the state which is able to afford protection is unwilling to do so, especially in the case of a democracy”*. Accordingly, the House of Lords concluded that *“the sufficiency of state protection is not measured by the existence of a real risk of an abuse of rights but by the availability of a system for the protection of the citizen and a reasonable willingness by the state to operate it”*.

Accordingly, the sufficiency of State protection should be measured by *“the availability of a system for the protection of the citizen and a reasonable willingness by the state to operate it”*.

The House of Lords concluded that the situation in the Republic of Slovakia was not such as to give rise to the problems which may arise in other jurisdictions where there is no effective State authority or the State authority is unable to provide protection. It was noted that the institutions of government were effective and operating in Slovakia, and that the State provided protection to its nationals by respecting the rule of law and it enforced its authority through the provision of a police force. The judges acknowledged that there was racial violence against the Roma perpetrated by skinheads, that the police did not conduct proper investigation in all cases and there have been cases where their investigation has been very slow. However, the judges also found

“evidence that the police have intervened to provide protection when they have been asked to do so and that stiff sentences are imposed at times for crimes that are racially motivated”. Accordingly, the House of Lords agreed with the Tribunal’s conclusion that the violent attacks on Roma are isolated and random attacks by thugs. The appeal was dismissed.

3. Comment

The *Horvath* decision has had considerable impact on international and European refugee law and on the definition of refugee set out in Article 1A(2) of the Refugee Convention. It clarifies that the issue of whether there exists State protection is an integral part of the inquiry into whether someone can show he or she is “being persecuted”. It also clarifies that there can be no expectation of absolute protection by any State, rather a “practical standard” had to be adopted to assess whether the State is *“unable or unwilling to discharge its duty to establish and operate a system for the protection against persecution of its own nationals”*. To ensure protection, a State must have in place *“a system of domestic protection and machinery for the detection, prosecution and punishment of [acts] contrary to the purposes which the Convention requires to have protected. More importantly there must be ability and a readiness to operate that machinery”*.

The wording of Article 7 of the Qualification Directive (which sets out what entities can constitute actors of protection and under what conditions such actors can be said to provide effective protection) is closely modelled on the reasoning set out in *Horvath*. Recital 27 of the Qualification Directive recast now goes somewhat further in providing that *“[w]here the State or agents of the State are the actors of persecution or serious harm, there should be a presumption that effective protection is not available to the applicant”*.

The *Horvath* case is not to be understood to mean that if an applicant is from a country of origin, which has in place a system of laws that generally provide protection to its citizen, that he or she cannot succeed even if his or her particular circumstances are such that they require additional protection. Rather the judgment should be understood to set out what protection must consist of at a general level. As was stated in the *Banomova* case before the Court of Appeal¹⁶⁷, *Horvath* *“[d]id not attempt to define the precise level or standard of protection which a state must provide against which the facts of a particular case*

167 *Banomova v. SSHD* [2001] EWCA Civ. 807.

can be tested". Moreover, the Court of Appeal case of *Bagdanavicius*¹⁶⁸ identified as one of the post-*Horvath* propositions to be applied by courts and tribunals that "[n]otwithstanding systemic sufficiency of state protection in the receiving state, a claimant may still have a well-founded fear of persecution if he can show that its authorities know or ought to know of circumstances particular to his case giving rise to his fear, but are unlikely to provide the additional protection his particular circumstances reasonably require [...]". Furthermore, relying on this ruling in the subsequent *IM* case¹⁶⁹, the United Kingdom Asylum and Immigration Tribunal concluded that:

"Another way of putting the effect of the above authorities is as follows. A State's protection has to be wide enough to cover the ordinary needs of its citizens for protection. Protection may still be insufficient, to prevent persecution in a particular case or in a particular subcategory of cases, if an individual's (or subcategory of person's) needs for protection is out of the ordinary or exceptional. However, recognition that a person's (or subcategory of person's) individual circumstances may require "additional protection" has an important limit. As emphasised in Horvath, protection is a practical standard – "no-one is entitled to an absolutely guaranteed immunity. That would go beyond any realistic practical expectation".

168 *Bagdanavicius v. Secretary of State for the Home Department* (CA) [2005] EWCA Civ. 1605.

169 *IM (Sufficiency of protection) Malawi v. Secretary of State for the Home Department* [2007] UKAIT 00071.

Subsidiary Protection

Council Directive No. 2004/83/EC of 29 April 2004 (Qualification Directive), Article 15(c)

The requirement of an individualisation of the threat to the life or person for the purpose of subsidiary protection is inversely proportional to the degree of indiscriminate violence, which characterises the armed conflict

France: Conseil d'Etat, 3 July 2009, OFPRA v. M.A., n° 320295

1. Principal facts

The applicant, from Sri Lanka, lodged an asylum application to the French Office for the Protection of Refugees and Stateless Persons (OFPRA), which was rejected. On appeal, the Cour Nationale du Droit d'Asile (CNDA) granted the applicant subsidiary protection in a decision dated the 27 June 2008. The OFPRA claimed that this decision should be quashed by the Council of State.

2. Decision of the Court

Article 15(c) of the Qualification Directive¹⁷⁰ is transposed in French legislation by Article L.712-1 CESEDA. According to Article L.712-1 CESEDA, the Council of State considered that indiscriminate violence giving rise to the threat at the basis of the request for subsidiary protection is inherent to the situation of armed conflict and characterises it. The Council of State considered that according to the interpretation of this provision, as well as, the provisions of the QD, the violence and the situation of armed conflict coexist in all regards on the same geographical zone.

Furthermore, the Council of State stated that the existence of a serious, direct and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that he/she proves that he/she is specifically targeted because of elements which are specific to his/her personal situation, as soon as the degree of indiscriminate violence characterising the armed conflict reaches such a high level that there are serious and established grounds for believing that a civilian, if returned to the country or region concerned, would, by his/her sole presence on the territory, face a real risk of

.....
¹⁷⁰ See (n 163).

suffering these threats.

In the present case, the Council of State considered that the decision of the CNDA was sufficiently reasoned and that it had sovereign power to consider that there was a climate of indiscriminate violence resulting from a situation of international or internal armed conflict in the East of Sri Lanka where the applicant used to live. The Council of State also considered that the CNDA did not make any legal error in deducting from the high level of indiscriminate violence prevailing in this area that the applicant faced a real risk of suffering serious, direct and individual threats. The Council of State therefore rejected OFPRA's appeal.

3. Comment

Article 15(c) of the Qualification Directive is one of three types of “serious harm” capable of qualifying an applicant for subsidiary protection. It is defined as “*serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict*”. This provision represents an attempt to codify State practice among EU Member States by providing some sort of complementary protection for persons fleeing armed conflict, who do not qualify for refugee protection. It must be recalled, however, that when dealing with cases of persons fleeing armed conflict, decision-makers within the EU must first consider whether they qualify for refugee protection under Article 1A(2) of the Geneva Convention. Only if they do not should the decision-maker turn to consider whether they are entitled to subsidiary protection or (in Council of Europe States outside the EU) protection against ill treatment prohibited by Article 3 ECHR.

This decision of the French Conseil d'État illustrates two recurring themes in the case law of national courts and tribunals in EU Member States dealing with Article 15(c). The first is that to qualify under this provision it may not be necessary for an applicant to show that he or she has personally become the target of actual or threatened violence. If the level of violence in the relevant region is exceptionally high, an applicant may be able to succeed simply by virtue of being a civilian coming from that region. Second, the French court considered that the focus should be on the situation of armed conflict in an applicant's home region; to succeed under Article 15(c) it was not necessary for an applicant to show that there was an armed conflict throughout the country concerned (in this case, Sri Lanka in 2009).

By virtue of EU law, all national courts and tribunals are bound by preliminary rulings of the Court of Justice of the European Union (CJEU). On Article 15(c) the CJEU has issued two judgments so far: *Elgafaji* and *Diakité*¹⁷¹. These cases and the correct approach to Article 15(c) have been the subject of a Judicial Analysis produced by a group of European judges as part of the European Asylum Support Office (EASO) Professional Development Series; “Article 15(c) Qualification Directive (2011/95/EU): A Judicial Analysis”, December 2014. Since this analysis draws on corresponding jurisprudence of the European Court of Human Rights, especially Article 3 of the ECHR, it is also of relevance to European countries outside the EU that are parties to the ECHR. This is available free on the Internet.

Since the CJEU’s *Elgafaji* judgment, the ECtHR has developed a very similar set of protection criteria under Article 3 of the ECHR for persons fleeing countries or areas of countries experiencing very high levels of armed conflict. In *L.M. and Others v. Russia*¹⁷², the ECtHR found that in view of the latest country reports on the very dire situation in Syria, forced returns to that country would be incompatible with Article 3.

171 See the CJEU judgments in C-465/07, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, [GC] judgment of 17 February 2009, and C-285/12, *Aboubacar Diakité v. Commissaire general aux refugies et aux apatrides*, judgment of 30 January 2014, both in this publication in the section on CJEU case law.

172 *L.M. and Others v. Russia*, judgment of 15 October 2015, no. 40081/14.

Subsidiary protection under the Qualification Directive goes over and above the protection afforded under Article 1A(2) of the 1951 Geneva Convention and provides for a number of minimum rights and benefits beyond those guaranteed by Article 3 of the ECHR

France: Cour Nationale du Droit d'Asile (CNDA), 2 February 2015, M.A., n° 14017393, Libya Subsidiary protection

1. Principal facts

The applicant, from Libya, lodged an asylum application to the French Office for the Protection of Refugees and Stateless Persons (OFPRA), which was rejected. On appeal, the Cour Nationale du Droit d'Asile (CNDA) granted the applicant subsidiary protection in a decision dated 2 February 2015.

2. Decision of the Court

The applicant is a national of Libya who claimed that he is a member of Ta-wargha tribe and comes from Ajdabiya in Al Wahat district which is a hundred kilometres from Benghazi. He alleged that, because of his tribe membership, he had been targeted by revolutionaries on suspicion of past collaboration with Mouammar Gadhafi's armed forces. He argued he was sent to prison and ill-treated. The CNDA found that his statements lacked sufficient detail and were inconsistent, thus concluding that he was not eligible for refugee status under the 1951 Geneva Convention.

The CNDA went on, however, to appraise his eligibility for subsidiary protection under Article 15(c) applying the framework given by the CJEU in its judgments of *Elgafaji* and *Diakité*¹⁷³. The CNDA's judgment made extensive reference to country of origin information: it referred to Resolutions of the Security Council of the Organisation of United Nations (2014, 2011); a report from the General Secretary of the UN; and a statement by the UNHCR on returns to Libya which concluded that the situation is volatile, has deteriorated in 2014 and is characterised by indiscriminate violence resulting from an internal armed conflict between Libyan armed forces and armed groups, such as Ansar al-Sharia, especially in the east of Libya and in particular in Benghazi. Consequently, the

173 C-465/07, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, [GC] judgment of 17 February 2009, and C-285/12, *Aboubacar Diakité v. Commissaire general aux refugies et aux apatrides*, judgment of 30 January 2014, both included in this publication in the section on CJEU case law.

applicant would run a real threat characterised by a serious and individual threat if returned to his country.

3. Comment

This decision demonstrates the way in which national courts and tribunals in EU Member States have come to view Article 15(c) as having some additional scope over and above that afforded under Article 1A(2) of the 1951 Geneva Convention because it is more specifically geared to situations of armed conflict. The French judgment also illustrates the fact that in countries in which there are a substantial number of areas or regions afflicted by significant levels of armed conflict, it will be more difficult to consider that there is a viable internal protection alternative. A person who is entitled to subsidiary protection qualifies for subsidiary protection status which, under the Qualification Directive, carries with it a number of minimum rights and benefits. That is to be contrasted with Article 3 of the ECHR which really only safeguards against removal and does not endow an applicant with a status.

In order to determine whether an applicant is exposed to a significant, specific risk stemming from an armed conflict, in verifying the requirements for subsidiary protection, reference should be made to the actual target location of the foreign national upon return in the case of a localised armed conflict

Germany: Federal Administrative Court (BVerwG), 31 January 2013, 10 C 15.12

1. Principal facts

The applicant was an Afghani national. He arrived in Germany in February 2009. In March 2010, his asylum application was declined. In response to his claim, the Administrative Court established that the requirements for subsidiary protection had been fulfilled. The authorities appealed against this decision.

In its decision of 27 April 2012, the High Administrative Court agreed with the authorities and stated that the requirements for subsidiary protection did not exist according to Article 15(c) of the Qualification Directive¹⁷⁴. Since there was no country-wide armed conflict in Afghanistan, an individual threat would only apply if the conflict extended to the actual target location of the applicant upon return. This would be the location in which he last lived or to which he would be likely to return. In the applicant's case, this would not be his home region of Helmand, but rather Kabul where he stayed before leaving Afghanistan. There was no longer any internal armed conflict in Kabul. With the exception of a few spectacular attacks, the security situation in Kabul was considered relatively stable as a whole and significantly calmer than it was around ten years ago.

The applicant appealed to the Federal Administrative Court for review.

2. Decision of the Court

The applicant's request for review was considered as valid and well-founded. In verifying the requirements for subsidiary protection, the High Administrative Court did not refer to the applicant's region of origin but rather to the circumstances in Kabul as the only potential target deportation location at present. In general, however, in assessing safety of return, the Government as well as the acting Court have to refer to the applicant's region of origin and not to

174 See (n 163).

the region, which a detached observer might reasonably choose, or the region to which the foreign national concerned would like to go from a subjective point of view. Deviation from this rule cannot be justified by the claim that the foreign national would be exposed to risks in the region of origin which the QD is intended to protect against with subsidiary protection. This can be determined from the systematic context of the deportation bans under EU law in the provisions concerning internal protection (Article 8 of the QD)¹⁷⁵. If the region of origin is not taken into account as the target location because of the risks facing the foreign national, the latter may only be referred to another region in the country subject to the limited requirements of Article 8 of the QD. The concept of the “actual target location of return” is therefore not a purely empirical concept in which the most probable or subjectively desirable region of return is to be applied.

A departure from the region of origin cannot be justified by the fact that the foreign national has lost his personal connection with his region of origin as the result of an armed conflict in which family members have been killed or have also left the region. Insofar as the declining subjective connection with the region of origin has been justified by circumstances which are a direct consequence of armed conflict (e.g. impairment of the social and economic infrastructure, continued worsening of the supply situation) and reluctance to return to the region of origin is understandable due to poor living conditions and a lack of future prospects, these aspects are considered relevant from the point of view of protection. However, the region of origin is not/no longer the point of reference if the foreign national had already been released from this region prior to his departure, irrespective of the circumstances triggering the latter, and had moved to another part of the country with the intention of living there for an unlimited period. The region of origin is not considered to be the point of contact for the examination of subsidiary protection in the case of a voluntary departure of this kind. However, the Federal Administrative Court cannot reach a conclusive decision in this respect and the proceedings have to be referred back to the High Administrative Court.

The applicant’s review was upheld.

3. Comment

This decision by the German Federal Administrative Court highlights the im-

¹⁷⁵ *ibid.*

portance in cases in which applicants base their claim to refugee or subsidiary protection under the Qualification Directive of determining precisely what is an applicant's home area. In countries afflicted by armed conflict, the situation can vary considerably from area to area and there may be a situation of armed conflict in some areas but not in others or it may even be limited to one area. If an applicant is from a relatively safe area, largely unaffected by the armed conflict, he or she may find it more difficult to succeed in his or her claim. For the German Federal Administrative Court, the test of what is a person's home area is essentially a factual one, based on where they were brought up, but if they have settled in another area before departing from their country of origin, without being forced to do so by an armed conflict, their home area must be taken to be that new area. This is a good illustration of the factual approach taken by leading European courts and tribunals to such matters.

Where a government determining authority seeks to argue that an applicant is not at risk because he or she will not face a real risk of serious harm in their home area (because, for example, it is relatively free of armed conflict), it will still be necessary for a court or tribunal (in the event of any legal challenge) to be satisfied that the applicant can access that home area. In the instant case, the area considered safe was Kabul, which was where nationals of Afghanistan are returned to from Germany. But the applicant's home area (Helmand) was not safe. So the applicant could only be returned if he could be reasonably expected to settle in Kabul (see Article 8 of the QD). No facts had so far been stated by the High Administrative Court. Therefore, the case was referred back to that court.

By virtue of EU law, all national courts and tribunals are bound by preliminary rulings of the Court of Justice of the European Union. On Article 15(c) the CJEU has issued two judgments so far: *Elgafaji*, and *Diakité*¹⁷⁶. These cases and the correct approach to Article 15(c) have been the subject of a Judicial Analysis produced by a group of European judges as part of the European Asylum Support Office (EASO) Professional Development Series, "Article 15(c) Qualification Directive (2011/95/EU): A Judicial Analysis", December 2014. Since this analysis draws on corresponding jurisprudence of the European Court of Human Rights, it is also of relevance to European countries outside the EU that are parties to the ECHR. This is available free on the Internet.

176 C-465/07, *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, [GC] judgment of 17 February 2009, and C-285/12, *Aboubacar Diakité v. Commissaire general aux refugies et aux apatrides*, judgment of 30 January 2014, both included in this publication in the section on CJEU case law.

An “Internal Protection” Alternative

Council Directive No. 2004/83/EC of 29 April 2004 (Qualification Directive), Article 8

In assessing whether an applicant could obtain internal protection to avoid persecution, decision makers should consider whether it would be unreasonable or unduly harsh to expect the applicant to relocate to another part of their country

The United Kingdom: Januzi v. Secretary of State for the Home Department & Others [2006] UKHL 5 15 February 2006

1. Principal facts

All four applicants were denied refugee status on the ground that there was considered to be a part of their country where they would have no well-founded fear of persecution and in which it would be neither unreasonable nor unduly harsh for them to relocate. The first applicant, Mr Januzi, was an Albanian Kosovar from Mitrovica in Kosovo who had been displaced by Serbian forces during the conflict. He fled to the United Kingdom and claimed asylum. The Secretary of State in charge of assessing the asylum claim asserted that he could relocate to Pristina, another town in Kosovo. He claimed, largely for medical reasons associated with his experience of persecution, that it would be unduly harsh to expect him to do so. The three other applicants Messrs Hamid, Gaafar and Mohammed, were all black Africans from Darfur in Sudan, who had either suffered or would suffer persecution at the hands of marauding Arab bands which the Khartoum government encouraged, was complicit in or did not restrain. In each case, recognition as a refugee was denied on the ground that the appellant could reasonably (and without undue harshness) be expected to relocate to Khartoum. They all feared that they could be the victims of adverse discriminatory treatment, even persecution, in Khartoum, and they contended that relocation there would be unreasonable and unduly harsh.

2. Decision of the Court

The House of Lords dismissed Januzi’s appeal and allowed the other appeals, remitting them for further consideration by the Asylum and Immigration Tri-

bunal on the basis of inadequate reasoning.

The House of Lords approved the following approach for assessing internal relocation: “[t]he decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so”.

The main point of dispute related to the standards which should be considered when assessing whether applicants could reasonably relocate to a different part of their country. In particular, whether the conditions in the relocation area satisfied the basic norms or civil, political and socio-economic rights; whether there was an international standard below which it would be unreasonable to expect the applicant to live; and whether a comparison would have to be made between the standards in the country of potential refuge and those in the appellant’s country of origin.

The House of Lords found that no standard was set in the 1951 Geneva Convention relating to the Status of Refugees, as amended by the 1967 Protocol, for the circumstances in which relocation would be reasonable and a wide range of sources of international law were therefore considered.

It ruled that the question of whether it would be unduly harsh for a claimant to be expected to live in a place of relocation within the country of his nationality is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic human rights for the following reasons.

Firstly, there was nothing in the GC itself from which such an interpretation could be derived and the GC is not directed to defining the rights in the country of the applicant’s nationality who may have a safe haven free from persecution.

Secondly, whilst the preamble to the GC does invoke the Charter of the United Nations 1945 and the Universal Declaration of Human Rights 1948, the thrust of the Convention relates to the equal treatment of refugees so as to provide effective protection in the country of refuge. Apart from protection from persecution, the Convention is not directed at the level of rights prevailing in the applicant’s country of nationality.

Thirdly, Article 8 of the Qualification Directive¹⁷⁷ made no reference to international standards, containing only a provision that internal protection would be available in a part of the country where the applicant had no risk of being persecuted or of suffering serious harm and the applicant could reasonably be expected to go there. The provision also stated that at the time of the decision regard should be had to “*the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant*”.

Fourthly, there was not, in any event, a uniformity of international practice nor of professional and academic opinion to show that any customary rule of international law had been established on this point.

Finally, it was pointed out that adoption of such a rule would give the GC unintended and anomalous consequences. The example was given of an individual fleeing persecution from a country that is very poor, with huge deprivation and little respect for human rights. If he was to be recognised as a refugee because the circumstances in a potential area of relocation amounted simply to the ‘drawbacks of living in a poor and backward country’ (but not harsh enough to amount to persecution) then he would by chance be using the GC to escape the deprivation to which all in his home country are subject.

The House of Lords suggested that the UNHCR Guidelines on International Protection (July 2003) were an appropriate starting point for deciding what would amount to unreasonable or unduly harsh relocation. The guidelines refer to respect for fundamental human rights, in particular non-derogable rights, to economic survival including issues of access to land, resources protection, family links or a social safety net, trivial or cultural difficulties or conditions of severe hardship and were deemed to be helpful in concentrating attention on the standards prevailing in the country of nationality.

Accordingly, it was held that the “*words ‘unduly harsh’ set the standard that must be met for the internal relocation to be regarded as unreasonable. If the claimant can live a relatively normal life there judged by the standards that prevail in his country of nationality generally, and if he can reach the less hostile part without undue hardship or undue difficulty, it will not be unreasonable to expect him to move there*”.

Based on these principles, the House of Lords concluded that the situation in

177 See (n 163).

Kosovo was sufficiently stable for internal relocation to be regarded as a realistic alternative for an ethnic Albanian who is exposed to persecution in a part of the province where people of his ethnicity are in the minority. The House of Lords dismissed Januzi's appeal.

The Sudanese applicants put forward a second argument alleging that, as the persecution emanated from the State, there could be no possibility of safe or reasonable internal relocation as there would be a presumption that the State is entitled to act throughout the country. However, the idea of such a presumption was rejected as the sources of persecution could emanate from a variety of people with varying degrees of proximity or accountability to the State itself. The House of Lords preferred "*taking account of all relevant circumstances pertaining to the claimant and his country of origin*" in considering any relocation options. It was acknowledged that, the closer the link between the persecution and the State and the greater the level of control exercised by the State over the persecutor, the more likely it was that the claimant would be at risk of harm or particularly vulnerable in another part of the State.

The House of Lords allowed the other three appeals, remitting them for further consideration by the Asylum and Immigration Tribunal on the basis of inadequate reasoning.

3. Comment

The judgment of the House of Lords in *Januzi* reinforces the wide acceptance in international and European refugee law that a person cannot meet the refugee definition in Article 1A(2) simply by establishing a real risk of being persecuted in his or her home area. He must also show that he does not have a viable internal relocation alternative in another part of the country – or what is now termed in the Qualification Directive an “internal protection” alternative. In *Januzi*, the House of Lords identified that, for it to be shown that there is a viable internal relocation alternative, the State must show that (a) the alternative part of the country is safe (meaning there is no real risk of being persecuted there); and (b) it is reasonable to expect a person to settle there (meaning that it would not be unduly harsh to expect the person to settle there).

The reasonableness test has been criticised for being too subjective in nature. The *Januzi* judgment described the test as “*one of great generality, excluding from consideration very little other than the standard of rights protection which an applicant would enjoy in the country where refuge is sought*”, although the

earlier House of Lords judgment in *AH(Sudan)* described it as “a stringent one”.

Article 8 of the Qualification Directive provides that, as part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country. Within the framework of Article 8 of the Qualification Directive (recast) it would appear that the standards to be applied in deciding on reasonableness should be human rights standards, as they are the standards used to define “acts of persecution” in Article 9 of this Directive. In *Januzi*, however, the Law Lords recommended that decision-makers make use of the guidance found in the UNHCR Guidelines on International Protection No. 4 “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Geneva Convention and/or 1967 Protocol relating to the Status of Refugees” which invoke “*basic human rights standards, including in particular non-derogable rights*” as central, but not the only, factors of relevance.

It is important to note that Article 8 of the Qualification Directive recast has increased the number of requirements necessary in order to be satisfied that an applicant has a viable internal protection alternative. By virtue of Article 8(1)(b), not only must the alternative part of the country be (a) safe and (b) reasonable; it is also necessary to show that an applicant: (c) has access to protection; (d) can safely and legally travel to or gain admittance to that part of the country; and (e) can reasonably be expected to resettle there.

Victims of Trafficking as a Particular Social Group

The 1951 Geneva Convention, Article 1A(2), and Council Directive No. 2011/95/EU of 13 December 2011 (recast Qualification Directive), Article 10

Victims of trafficking share a common background and distinct identity, which falls within the definition of a particular social group within the meaning of the 1951 Geneva Convention

France: Cour Nationale du Droit d'Asile, 24 March 2015, n° 10012810

1. Principal facts

The case concerned a Nigerian national from the Edo State who was forced into prostitution after being trafficked to France. She later reported to the police the names of those involved in the prostitution network and applied for asylum. She feared that if returned, she would be suspected of prostitution, which was illegal in Nigeria. The applicant further claimed that she would be ostracised by her social and familial network, that she had breached the social contract in that she had not repaid the debt for her journey to Europe, and that she would be viewed as being cursed by the community in light of a ritual ceremony in Nigeria, which marked her allegiance to the trafficking network.

The French Office for the Protection of Refugees and Stateless People (OFPRA) found that, even though the victims of trafficking would be viewed upon disapprovingly by Nigerian society, given that the majority of female victims were later prostitutes in Europe, this was not enough to constitute a particular social group in accordance with the 1951 Geneva Convention relating to the Status of Refugees, as amended by the 1967 Protocol and the Qualification Directive¹⁷⁸. Moreover, the OFPRA considered that no information had been furnished to suggest that the victims of trafficking were submitted to persecutory acts if returned to Nigeria and, thus, refused the applicant's asylum application.

This argumentation was rejected by the Cour Nationale du Droit d'Asile (CNDA) in an appeal dated the 29 April 2011. The OFPRA appealed against this decision to the Council of State. Quashing CNDA's decision, the Council of State found that the former should have investigated whether, beyond the procuring net-

178 See (n 163).

works from which they were at risk, surrounding society or institutions perceived former victims of human trafficking as having a particular identity that would constitute a social group within the meaning of the GC. The case was then sent back to the CNDA for reconsideration.

2. Decision of the Court

Acting in accordance with the Council of State's decision, the CNDA focused primarily on the community's perception of trafficked victims in its assessment of whether they constitute a particular social group. The CNDA examined Article 10 of the recast Qualification Directive (2011/95/EU) and noted that a social group is comprised of persons who share an innate characteristic or common background, which cannot be modified. As a result, society perceives the group as being different. The CNDA went on to note that females from Nigeria undergo a "juju" ritual, which scars the body, requires an oath to be taken and marks their entry into the trafficking network. Moreover, the years of exploitation in Europe, along with the ensuing threats if they try to leave the network, led the CNDA to find that such women have a common background that could not be changed.

Moreover, the Court noted that credible international reports document that when young female Nigerians return home from Europe without any money, they are immediately suspected of prostitution, which is perceived extremely negatively by local communities. This perception leads to social alienation. The CNDA went on to conclude that female victims of human trafficking from the State of Edo share a distinct identity, which they are unable to rid themselves of and thus such females should be considered as a particular social group in accordance with international and European law. Reference is made to the case law emanating from Australia, Canada, New Zealand and the United Kingdom, which considers that victims of trafficking do constitute a particular social group.

Moreover, the CNDA discussed the debt owed by the applicant to a highly respected cult in the community. The cult had threatened the applicant with severe reprisals for denouncing the prostitution ring, with risks to her physical integrity, as well as discrimination faced if returned. Highlighting that such actors are very powerful and enforce a customary justice in the region, the CNDA also noted the lack of effective administrative and judicial protection, which prevented any real investigation into criminal activities, such as trafficking. Several country reports were cited by the CNDA emphasising the lack

of effective laws against trafficking, slavery and the corrupt judicial system in Nigeria as well as the customary enforcement of “traditional justice” in the State of Edo.

Consequently, on account of the applicant’s membership of a particular social group and her actions against the trafficking network, the CNDA set aside OFPRA’s decision and granted the refugee status to the applicant.

Before the CNDA, in 2015, OFPRA conceded the existence of a particular social group but argued that the threats alleged did not amount to persecution as they did not reach the threshold of gravity required by the GC. The CNDA did not accept this argument. Referring to the provisions of Article 9 of the Qualification Directive, it considered that victims of trafficking face an accumulation of acts (reprisals, threats, insults, ostracism etc.) which amounted to persecution.

3. Comment

In order to qualify as a refugee under Article 1A(2) of the GC a person has to show a well-founded fear of being persecuted for a Convention reason (race, religion, nationality, membership of a particular social group or political opinion). Even if a person can show a well-founded fear of being persecuted, he or she will not be a refugee unless they are able to show that this was by reason of one or more of these five grounds. The “by reason of” test is not a demanding one; it is sufficient if there is a connection between the acts of persecution and one of these reasons; the reason does not have to be the only reason. Ordinarily a decision-maker does not decide whether an applicant has established a Convention ground until after he or she has decided the applicant has shown a well-founded fear of being persecuted.

This decision of the CNDA is in line with other courts and tribunals in Europe, which likewise consider that victims of trafficking (in this case women who have been trafficked for the purposes of prostitution) constitute a “particular social group” for the purposes of showing that there is a reason or ground for their claimed persecution under the GC.

The decision also highlights the importance for the national court or tribunal of considering the likelihood of a trafficked person being “re-trafficked” or otherwise subject to serious harm if they have to return to their home area. On the facts of this case, the French court was satisfied the applicant would face

a real risk of such harm in her home area of Nigeria (Edo State).

It should be observed, however, that at the time this decision was taken, the French court was unique in Europe in not applying an internal protection alternative requirement. In most other European countries, an applicant will not be able to succeed in their refuge claim simply by showing they face a real risk of serious harm in their home area; they must also show that there is no other part of the country to which they could relocate in safety or without undue hardship. For EU Member States, Article 8 of the Qualification Directive sets out relevant criteria. Thus, if there is no evidence that the gangs or agents in the country of origin who trafficked the person in the first place are likely to track her down in another part of the country when she was returned, it may be difficult for her case to succeed. However, other particular circumstances, for example particular vulnerability if a woman in an African country has to resettle away from the social life of her home village, tribe, ethnic group without the support of relatives, may mean that, even if it safe for her to relocate internally, it is not reasonable to expect her to do so.

For those EU Member States who apply an internal protection alternative the relevant legal requirements are set out in Article 8 of the QD. The wording of this provision, particularly in the recast version, is closely modelled on the Article 3 jurisprudence of the European Court of Human Rights, which also applies an internal relocation alternative test. For that reason, Article 8 of the QD and decisions made thereunder may be a useful guide for courts and tribunals of European countries outside the EU. Many states in Europe are also party to the Council of Europe Trafficking Convention on Action against Trafficking of Human Beings, Council of Europe Treaty Series, No. 197, 16 May 2005, which contains a number of protections for victims of trafficking.

Assessment of Credibility of Evidence in Asylum Applications

Council Directive No. 2004/83/EC of 29 April 2004 (Qualification Directive), Article 4, and Directive No. 2013/32/EU of 26 June 2013 (recast Asylum Procedures Directive), Article 46

Whereas an applicant has the responsibility to prove the facts with regard to his asylum application, the obligation to determine and evaluate all relevant facts is shared between the applicant and the acting court

Sweden: Migration Court of Appeal, UM 122-6 18 September 2006

1. Principal facts

The applicant stated that, since 1998, he had been held on numerous occasions for questioning by the Egyptian police's intelligence service in order to provide information on his brother's political activities. The applicant also stated that, in connection with the interrogation, he had been subjected to widespread beatings and torture with electric shocks. In 2001 and 2002, the applicant was arrested each time there was unrest in Egypt. The applicant also referred to a ruling by an Egyptian State Security Court in 2003. The Court sentenced the applicant, together with six other people, to three years' imprisonment for, among other things, founding an illegal party.

The Swedish Migration Board rejected the applicant's asylum application because they felt there were credibility gaps in the applicant's account. This view was based on doubts concerning the applicant's claim that he was called in for questioning because of his brother's political activities. The applicant had stated that he had not engaged in any political activity in Egypt and had given the impression that he did not have any detailed knowledge of his brother's business. The Migration Board also pointed out that the applicant had had no problems getting a passport and identity card issued in 2002, despite the fact that he claimed government interest in him increased in 2001 and 2002. The Board found it remarkable that the applicant claimed to have been able to escape from a hospital where he was admitted after being arrested and imprisoned for producing pamphlets in 2002. There was also conflicting information as to when the applicant found out about the court's decision and sentence. The Migration Board found it strange that the applicant did not try to ascertain the content of the judgment much earlier, before he travelled from Libya

to Sweden, and that in the initial investigation he did not mention that he had sent for the judgment. It was only in counsel's submission that the applicant mentioned the sentence he had received over allegations that he made fliers in 2002. Furthermore, the Migration Board stated that the applicant had not helped to establish his identity by contacting his family in Egypt and asking them to send his current passport and identification card. The Migration Board gave the Swedish Embassy in Cairo the task of verifying the submitted judgment and they replied that the copy appeared to be correct.

The Migration Board's assessment was that the applicant had deliberately tried to withhold information that was essential for the assessment of the case and called into question whether he really was the person named in the judgment. The applicant appealed to the Migration Court, which concurred with the Migration Board's assessment and dismissed the appeal. The applicant then appealed to the Migration Court of Appeal.

2. Decision of the Court

The Migration Court of Appeal concluded in its ruling that the UNHCR Handbook is an important source of law for the process of determining protection needs. The Migration Court of Appeal stated that the applicant had the burden of proof initially to prove the facts are correct, but that the obligation to determine and evaluate all relevant facts is shared between the applicant and the investigator. According to the UNHCR Handbook, an asylum seeker who has presented a credible account should be given "the benefit of the doubt" in cases where the reasons advanced in general are sufficient to grant protection. According to Chapter 8 of the Administrative Procedure Act, the court has a responsibility to ensure that a case will be investigated to the extent that the circumstances of the case require. The Migration Court of Appeal stresses that these principles are particularly important when protection grounds are presented because the decisions are irreversible and mistakes can result in individuals being exposed to serious human rights violations. Although the applicant has the burden of proof for his claims, and despite there being a two-party procedure, the acting court, when appropriate, has a duty to investigate. The acting court may then conduct further investigations or give directions to the parties on what investigation is needed. The Migration Court of Appeal pointed out that in some cases, such as when the issue is to determine the credibility of a complex account, it may be appropriate for the court to summon an oral hearing on its own initiative.

The Migration Court of Appeal found that the applicant's account contained several contradictory and implausible statements, which meant that he could not be granted the benefit of the doubt. On the other hand, the applicant's assertions seemed to be supported by a genuine document. The Migration Board had conducted two oral sessions with the applicant and submitted a detailed justification of its decision as to why they did not consider the applicant to be credible. The Migration Court, however, had not held a hearing nor had it taken any action to further investigate the alleged Egyptian sentence, by trying to clarify the applicant's identity or obtain further information from the Swedish Embassy on the matter of authenticity. Instead, the Migration Court had ruled that they agreed with the Migration Board's assessment without giving any further justification for its decision.

The Migration Court of Appeal noted, given that Egypt was well-known for massive violations of human rights and that the applicant's account has some support through a ruling by the Egyptian security court that could be true, that the Migration Court had not fulfilled its obligation to investigate. The need for a complete decision was additionally emphasised by the applicant's claim that he might be subjected to torture.

The Migration Court of Appeal withdrew the Migration Court decision and referred the case back to the Migration Court for renewed consideration.

3. Comment

When assessing the appeal against the decision of the Swedish Migration Board that rejected the applicant's asylum application on credibility grounds, the Swedish Migration Court did not have specific regard to Article 4 of the Qualification Directive, which sets out various criteria that Member States must apply when assessing evidence and credibility. Nevertheless, this provision is particularly relevant and provides important guidance in reviewing cases like the present one. Article 4(1) places a duty on applicants to submit as soon as possible all the elements needed to substantiate his or her application. It further provides that, in cooperation with the applicant, it is the duty of the Member State to assess the relevant elements of the application. Article 4(5) recognises that sometimes an applicant may not be in a position to support his or her statements with evidence and provides that under certain conditions he or she does not need to provide corroborative evidence. Article 4(5) does not specify any "benefit of the doubt" principle, but has been seen by many commentators to embody such a principle. In the instant case, the Swedish Migra-

tion Court of Appeal highlighted the importance of an oral hearing when the state of the evidence is not such as to enable a court to make its assessment without hearing from the applicant. The “right to be heard” is understood to be one of the components of the protection afforded by Article 47 of the European Charter, although in leading cases the CJEU has not regarded it as an absolute right. Unlike Article 6 of the ECHR, which has been held not to apply to immigration and asylum cases, Article 47 has the potential to afford strong procedural guarantees to asylum-seekers.

In the case *M.M. v. Minster for Justice, Equality and Law Reform*¹⁷⁹, the CJEU confirmed that the assessment of an international protection claim took place in two separate stages: the first stage concerns the establishment of factual circumstances which may constitute evidence that supports the application; the second stage relates to the legal appraisal of the evidence. The CJEU noted that Article 41 of the CFREU provides that 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. Reference was also made to Article 47 of the CFREU.

The recent coming into force of the Asylum Procedures Directive recast has significant consequences for Member States in relation to their procedures. Their domestic systems must now provide for a merits appeal. The right to an effective remedy¹⁸⁰ requires Member States to ensure that an effective remedy provides for “*a full and ex nunc examination of both facts and points of law*”. In this respect the decision of the Swedish Migration Court of Appeal is illustrative of the increasing concern on the part of courts and tribunals to ensure that applicants who lose their case before first-instance determining authorities, have a right to appeal and to appear at a hearing which enables them to give their account in person. In this regard, EU law may be somewhat ahead of Strasbourg jurisprudence.

It is well-established in the case law of many European countries that, in assessing evidence and credibility, particular regard should be had to the 1979 UNHCR Handbook, as the Migration Court of Appeal did in this case. More recently in May 2013, in a publication entitled ‘Beyond Proof: Credibility Assessment in EU Asylum Systems’, the UNHCR stated that “[w]ith regards to the provision of both statements and documentary or other evidence, UNHCR urges

179 C-277/11, *M.M. v. Minster for Justice, Equality and Law Reform*, judgment of 22 November 2012.

180 Now Article 46.

determining authorities to ensure that the procedure allows, and policy guidance instructs, decision-makers to take into account the individual and contextual circumstances of the applicants, including the means at their disposal to obtain documentary or other evidence and translations, where required". The jurisprudence of the European Court of Human Rights also applies a similar approach to assessing evidence and credibility.

Domestic Legislation and Council Directive No. 2005/85/EC of 1 December 2005 (Asylum Procedures Directive)

The protection of public order, through a declaration of undesirability, is not one of the exceptions to the right to remain and the provision of the Dutch Foreigners Act under which a foreigner who has been declared undesirable has no right to remain is in breach of Article 7 of the Asylum Procedures Directive

***The Netherlands: Administrative Jurisdiction Division of the Council of State (ABRvS), 201103520/1/V3
25 June 2012***

1. Principal facts

The foreigner was declared undesirable on 6 January 2008. The appeals against the first and second instance decisions were dismissed. On 25 September 2009, the decision became final. On 17 August 2009, the Minister rejected an asylum application by the foreigner. On 25 September 2009, the court declared that the appeal submitted by the foreigner against this decision was inadmissible. The foreigner was deported to Bosnia-Herzegovina on 24 September 2009. On 15 February 2011, the foreigner indicated at Schiphol airport that he would like to apply for asylum. On that day, admission was refused and he was detained. On 14 March 2011, the court dismissed the appeal. The foreigner is currently appealing this decision.

2. Decision of the Court

The Council of State found that the individual indicated to the Royal Netherlands Marechaussee on 15 February 2011 that he wanted to apply for asylum. This had to be classified as an asylum application within the meaning of Article 2, introductory paragraph and Article 2(b) of the Asylum Procedures Directive (APD)¹⁸¹. The foreigner was therefore an applicant for asylum, as defined

181 Council Directive No. 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. The Asylum Procedures Directive established common standards of safeguards and guarantees to access a fair and efficient asylum procedure. It deals with issues such as access to procedures (including border procedures), detention, the examination of applications, personal interviews, and legal assistance. It also defines concepts such as the first country of asylum, safe countries of origin, safe third countries, and European safe third countries. Importantly, the recast Asylum Procedures Directive was adopted on 26 June 2013 (Directive No. 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protec-

in that provision. Under the Returns Directive¹⁸², according to the Council of State, an individual is allowed to remain if, and for as long as, the conditions for remaining are complied with. The condition for the right to remain set out in Article 7(1) of the Asylum Procedures Directive is that the individual should be an applicant for asylum in respect of whose application no decision has been made at first instance. If, and for as long as, a national of a non-EU Member State is in this position and thus complies with the condition, his stay must be categorized as lawful. The Council of State disagreed with the Minister's view that Article 7(1) of the APD relates only to actual residence of an applicant for asylum in the territory of a Member State.

Right to remain and public order

According to Article 7(2) of the APD, Member States may make a limited number of exceptions to the right to remain referred to in Article 7(1) of the APD. The protection of public order, through a declaration of undesirability, as in this case, is not one of the exceptions referred to in Article 7(2) of the APD. Article 7(1) of the APD, read in conjunction with Article 7(2) of the APD, is unconditional and sufficiently precise to be applicable by domestic judges and thus has direct effect. This provision therefore forces Article 67(3) of the Foreigners Act 2000 to be disregarded in the case of a foreigner previously declared undesirable but awaiting the submission of a formal application for asylum or the decision on an application already submitted. The foreigner may not, therefore, be refused right to remain in order to protect public order.

Right to remain and second or subsequent application

The application for asylum that the foreigner submitted on 15 February 2011 should be viewed as a second or subsequent asylum application, within the meaning of Articles 32 and 34 of the APD. Article 32 of the APD was transposed by Article 4(6) of the General Administrative Law Act. The principle that the same case may not be ruled upon more than once forms the basis for this provision. This legal principle is not in breach of Article 32 of the APD. Under Article 32(3), read in conjunction with Article 34(3), introductory paragraph and Article 34(3)(a) of the APD, a subsequent application for asylum is subject

.....
 tion). The procedural safeguards and guarantees for asylum seekers laid down in the recast Asylum Procedures Directive constitute a considerable improvement compared to the 2005 Asylum Procedures Directive.

182 Directive No. 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 (Returns Directive).

to a preliminary examination of whether there are new elements or findings cited by the applicant for asylum. The applicant for asylum is notified of the outcome of the examination. As soon as the applicant for asylum has been informed that his application for asylum under Articles 32 and 34 of the APD will not be further examined, the exception to the right to remain provided for under Article 7(2) of the APD becomes operative. Within the system established by the Foreigners Act 2000, the notification of the decision that there are no new facts or circumstances is synonymous with the moment referred to in the APD when the applicant for asylum learns that the application for asylum will not be further examined. This means that a foreigner has a right to remain as referred to in Article 7(1) of the APD until this decision is notified. Once the notification has been made, the foreigner, under domestic law, has no further right to remain. When the notification is made, the exception to Article 7(1) of the APD (which provides for right to remain) afforded by Article 7(2) of the APD becomes operative. The exception to the right to remain provided for in Article 7(2) of the APD was operative neither when the individual was detained nor when the contested decision was made.

The Council of State concluded that the foreigner had a right to remain in the Netherlands when he was detained, and when the court issued its decision. The Council of State dismissed the appeal. The contested decision was upheld, with an improvement to the grounds. The claim for damages was dismissed.

3. Comment

The APD states in Article 2 (Article 3(1) of the recast) that “[t]his Directive shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters, or in the transit zones of the Member State [...]”.

Article 7 of the APD (now Article 9 in its recast) provides that applicants for international protection “shall be allowed to remain” in the territory of the Member State whilst awaiting a decision on their application under procedures before a determining authority at first instance. Although this right to remain is stated not to constitute a residence permit, it does amount to a stay which is lawful. The Dutch government had argued that this protection should not apply to this applicant as he had previously been declared undesirable by the Dutch authorities. The Council of State rejected this argument pointing out that undesirability was not one of the exceptions set out in Article 7 (now Article 9) of the APD. The Dutch government had also argued that such a right was

only available to a person who had actual residence in the Member State. This argument too was rejected by the Council of State. If this argument had prevailed, the protection would have been ineffective to assist applicants claiming asylum at the border or at an airport.

The Dutch government also sought to argue that the applicant could be excluded from the protection of Article 7 (now Article 9) because he fell under the exception for those who have made a subsequent application. The Dutch Council of State pointed out that it is not until the notification of the decision on a subsequent application, stating that the application showed no new facts or circumstances, that this exception applies. In the applicant's case, however, he had not yet received such a decision.

If the applicant had been found not to have a right to remain, then he would have fallen under the provisions of the Returns Directive, which provides, *inter alia*, for speedy return of failed asylum seekers.

This decision by the Council of State is also a good example of the EU law doctrine of direct effect. EU law provisions that impose obligations in clear and unconditional terms are binding on all Member States and, consequently, any domestic law provisions that cannot be construed consistently with such provisions must be disapplied. Thus, in this case the Dutch Council of State concluded that Article 67(3) of the Foreigners Act 2000 was to be disregarded in the case of a foreigner previously declared undesirable but awaiting the submission of a formal application for asylum or the decision on an application already submitted.

When a second or subsequent asylum application is not based on any new facts or changed circumstances cited by the alien, the judge is not under an obligation to carry out a new full examination procedure.

***The Netherlands: Administrative Jurisdiction Division of the Council of State (ABRvS), 201112955/1/V4
29 June 2012***

1. Principal facts

This case concerned the second or subsequent asylum procedure. The facts of the case were not reported in the judgment.

2. Decision of the Court

The asylum seeker appealed on the grounds that the assessment framework applied by the Dutch judge in the second and subsequent asylum applications breached the right to an effective remedy as provided for in Article 47(1) of the Charter of Fundamental Rights of the European Union (CFREU) and the application of this right as set out by the Court of Justice of the European Union in the *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*¹⁸³ case. Under the contested assessment framework, if, after a negative decision, a further negative decision is made, an appeal against the latter cannot result in the administrative judge reviewing the judgment as if it were the first negative decision. Only if, and to the extent that, new facts or changed circumstances are cited, or a pertinent change in the law takes place during the administrative phase, can the decision be reviewed by the administrative judge.

Consequently, the judge in the interim injunction proceedings did not examine the grounds for appeal by the asylum seeker. The asylum seeker appealed against this decision. The Council of State found that the grounds for appeal were correctly presented by the asylum seeker but cannot result in the appeal being upheld.

The Council of State found that Article 47(1) of the CFREU does not prevent the adoption of procedural rules under domestic law and on this point it is consistent with Article 13 of the European Convention on Human Rights. As the

183 C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, judgment of 28 July 2011.

appellant demonstrated no particular facts or circumstances, the appeal based on Article 47(1) of the CFREU failed.

The Council of State noted that the judgment by the CJEU in the *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration* case does nothing to alter this finding. This judgment did not relate to a subsequent procedure subject to the special assessment framework. This judgment cannot be used to assert that, when a second or subsequent asylum application is not based on any new facts or changed circumstances cited by the alien, the judge should review the case substantively in order to make his assessment. The Council of State therefore found no grounds for submitting a reference for a preliminary ruling.

The Council of State dismissed the further appeal by the asylum seeker as manifestly unfounded and upheld the judgment by the judge in the interim injunction proceedings.

3. Comment

The Asylum Procedures Directive (Directive No. 2005/85/EC) has done much to harmonise asylum procedures in EU Member States. Under the provisions of this Directive as now recast (Directive No. 2013/32/EU), a Member State may consider inadmissible (and subject to an accelerated procedure) a subsequent application in which no new elements or findings relating to the examination have arisen or been presented (Article 33(2)(d)).

The decision of the Dutch Council of State has since been confirmed by the CJEU ruling in *Tall v. Centre public d'action sociale de Huy*¹⁸⁴. In *Tall* the CJEU said that it was apparent from recital 15 (recital 33 of the recast Directive) that, where an applicant for asylum has made a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. Article 7 of the Directive (now Article 9(2)) empowers Member States by way of exception to provide that an appeal against a decision refusing to take a subsequent application for asylum into consideration is devoid of suspensive effect.

As in the Dutch case, in *Tall* the applicant had sought to invoke Article 47 of the CFREU which affirms the principle of effective judicial protection and pro-

184 C-239/14, *Abdoulaye Amadou Tall v. Centre public d'action sociale de Huy*, judgment of 17 December 2015.

vides that everyone, whose rights and freedoms guaranteed by EU law face violation, has a right to an effective remedy. The CJEU noted that Article 19(2) of the CFREU contains much the same guarantee as Article 3 of the ECHR in prohibiting the removal of any person to a State where there is a serious risk that he or she would be subjected to ill-treatment. Article 13 of the ECHR also requires that a remedy enabling suspension of the enforcement of the removal should *ipso jure* be available to the foreign national. On the given facts of the *Tall* case, however, the dispute concerned only the lawfulness of the decision not to further examine a subsequent asylum application for the purposes of Article 32 (now Article 33) of the APD. The CJEU ruled that the lack of suspensive effect of an appeal brought against such a decision was, in principle, compatible with Articles 19(2) and 47 of the CFREU. The lack of suspensive remedy against a decision such as the one in issue in the main proceedings did not constitute a breach of the right to effective judicial protection provided for in Article 39 (now Article 46 in the recast) of the Directive read in the light of Articles 19(2) and 47 of the CFREU, because its enforcement was not likely to expose the third-country national concerned to a risk of ill treatment contrary to Article 3 of the ECHR.

About the AIRE Centre

The AIRE Centre is a non-governmental organisation based in the United Kingdom whose mission is to promote awareness of European human rights law and assist vulnerable and marginalised individuals in asserting them. Over the past 20 years, the organisation has been involved in over 120 cases before the European Court of Human Rights. The AIRE Centre has represented applicants in numerous expulsion cases before the Court and has been granted permission to intervene in several cases involving the treatment of those seeking international protection from expulsion. The Centre's legal team has prepared and contributed to numerous publications and training programmes on asylum and refugee law, developed in cooperation with the UNHCR, the Council of Europe and the European Union.

The AIRE Centre has conducted and participated in a number of seminars in Central and Eastern Europe for the benefit of lawyers, judges, government officials and non-governmental organisations. In particular, the Centre focuses on Western Balkan states, where, for over fifteen years, it has been conducting a series of long term rule of law programmes in partnership with domestic institutions and courts. The Centre's aim throughout these programmes has been to promote the national implementation of the European Convention on Human Rights, assist with the process of European integration by strengthening the rule of law and full recognition of human rights, and encourage regional cooperation amongst judges and legal professionals.



Foreign &
Commonwealth
Office

The preparation of this publication has been supported by the UK Foreign and Commonwealth Office. Views presented in the publication do not necessarily reflect the official position of the Foreign and Commonwealth Office.
