RAPPORT

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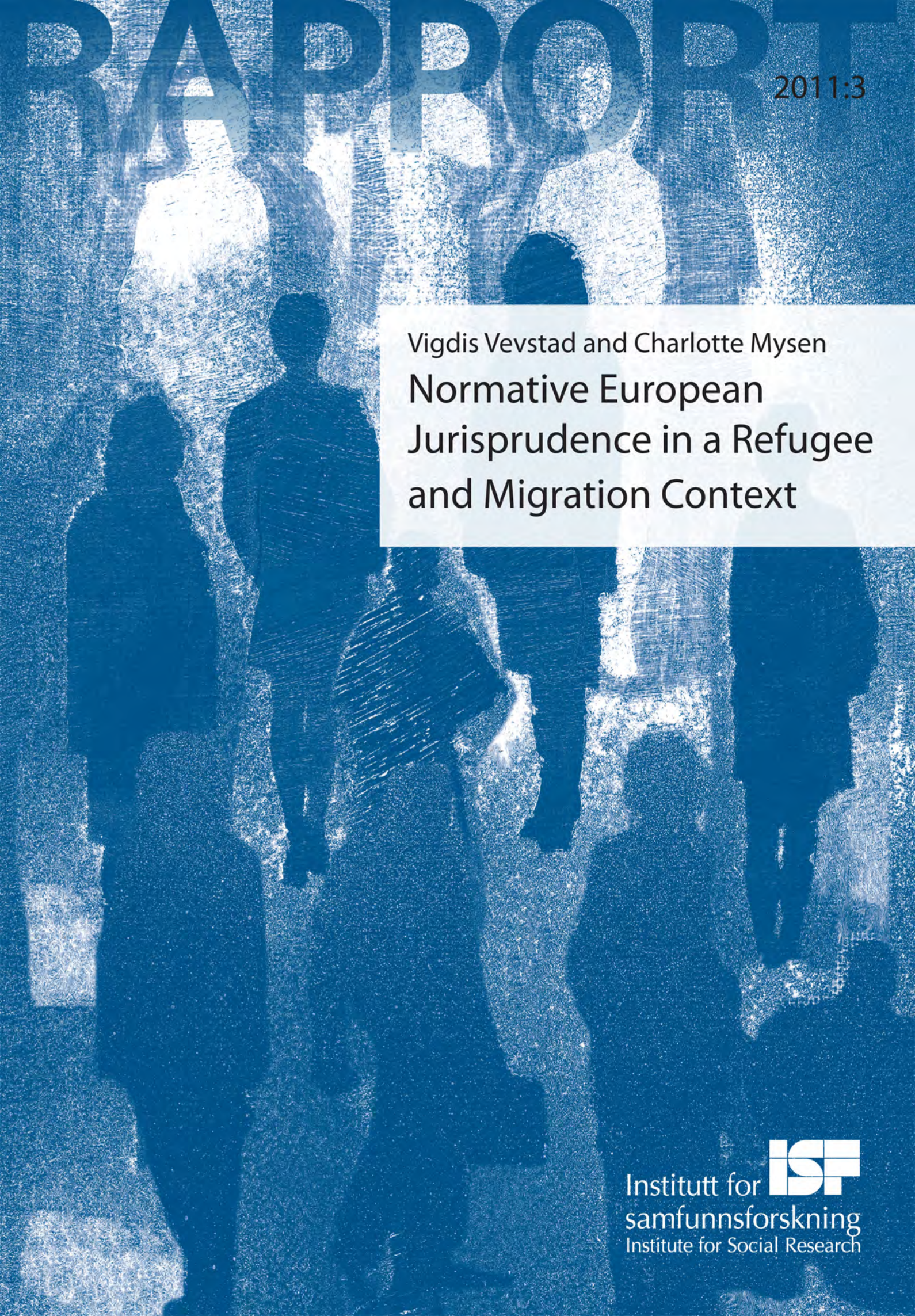

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Normative European Jurisprudence in a Refugee and Migration Context

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Oslo 2011

Report 2011:3

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ISBN: 978-82-7763-357-2
ISSN: 0333-3671

Content

Foreword

The present study has been requested by the Ministry of Justice at a point in time where the EU is discussing its ”second generation” instruments of the Common European Asylum System (CEAS) while focus is also given to other related legislative areas such as implementation of the Citizens' Rights Directive, the Family Reunification Directive and the Returns Directive. The study attempts to answer the request of presenting an overview of the case law of the European Court of Justice (ECJ) as well as of national courts in regard to these instruments.

According to the Stockholm programme, the EU has a clear ambition of further strengthening its practical cooperation and legislative harmonization in the refugee and migration area. Establishment of the EU Asylum Support Office (EASO) is in the making and the intent is for EASO to further strengthen cooperation and harmonization in the Member States. With the entry into force of the Lisbon Treaty (TFEU), the former limitation when only courts of last instance could request preliminary rulings has been abolished, meaning all national court can now make requests in relation to asylum, immigration and visa issues to the ECJ. This has the potential to extend the range and subject matter of questions put to the the Court, yet another path of ensuring that Member States eventueally acquire a similar understanding of the many interpretative issues. With the TFEU in place, a conferral of legally binding effect on the EU Charter of Fundamental Rights is also in place meaning, that the Charter may be invoked not only before the CJEU, but equally before national courts. We are at the beginning of a new era in regard to a common European understanding of migration law and policies. The content of this study illustrates this view. Some questions are answered. Many remain. Retaining a complete overview of European judicial developments in the area of asylum and migration demands a constant focus and updating.

We have chosen to refer to some judgments from the European Court of Human Rights (ECtHR) and interventions by commentators such as the UNHCR which is regularly invited to intervene both in cases before the CJEU and before the ECtHR. These statements are intended as important elements in the interpretative analysis of the study. The sources used are, however, by no means exhaustive, as this would go beyond the limitations of the study.The choice of cases and the quotes drawn from these, are thus intended as contri-

butions to the analysis and interpretation of the EU instruments. The ECtHR deals with fundamental issues in regard to the European Convention on Human Rights (ECHR) whereas the CJEU has the competence to interpret a different set of legal instruments. The overlaps in some of the subject matters discussed should therefore not confuse the reader in regard to differences in competences. Interpretation of article 15 of the Qualification Directive and the relationship with article 3 ECHR, provides one such example. As regards the CJEU cases in particular, statements by the Advocate Generals are of essential interpretative importance and thus extensively cited.

The CJEU has already dealt with a number of important issues in relation to the directives on which the study gives focus whereas many questions still remain unanswered.. The upcoming results from the Council in regard to the recast proposals of CEAS may induce answers to some of these questions, but on the other hand, also provoke new issues in need of judicial interpretation in the future.

We have attempted to focus our work within a framework of what would be interesting from a Norwegian perspective given the fact that Norway is cooperating closely with the EU through the European Economic Area (EEA) and the Schengen- and Dublin coopration agreements and has expressed a keen interest in further cooperation, such as participation in EASO and the European Migration Network (EMN). Therefore, descriptions of how the Norwegian Immigration Act meets the EU related questions raised have been added. And the same perspective explains why the CJEU cases we have chosen are those which deal with interpretation of substance matters of the various instruments and not the cases which deal with certain Member States' lack of transposition of the instruments. We have, however, included cases pending before the CJEU. Referral to sources such as cases tried before national courts is not exhaustive.

Part 1 of the study introduces the legal background of EU jurisprudence; the basic instruments, procedural matters, the competency of the CJEU, UNHCRs role and the background for Norwegian interest. The introduction of the instruments and the case law in relation to each of these, follow in parts 2-8. Part 9 contains a summing up of major findings and recommendations. In annex, a summarized overview of the CJEU caseload is added with the inclusion of an overview of these cases in relation to Norwegian law and practice.

We would like to thank Cand. jur. Vegard Vevstad who has rendered research assistance.

Oslo, October 2010

Charlotte Mysen Vigdis Vevstad

1

Legal background

The Treaty of Amsterdam

The Amsterdam Treaty entered into force in 1999[1]. The agreement consolidates both the Treaty on European Union (TEU) (hereafter referred to as the Maastricht Treaty)[2] and the Treaty establishing the European Economic Community, the EC Treaty (hereafter referred to as TEC)[3] and moved parts of the justice and home affairs cooperation from the third pillar to the first pillar and within the legal framework and decision-making mechanisms which apply to the EC Treaty. The Amsterdam Treaty has long been the principal legal basis for a common European asylum and refugee policy. Treaty Articles 61-63 specify the rules to be established within a period of five years (1999-2004). The legal basis for the development of a Common European asylum system (hereafter referred to as CEAS) is contained in these articles.

Article 61 states that the Council within five years after implementation of the Amsterdam Treaty, shall adopt measures in the areas of border control, immigration and asylum in accordance with Articles 62 and 63. Article 62 regulates border control, visas and free movement of third persons within the EU. Article 63 regulates asylum and immigration and further specifies the measures to be implemented within this five years period.[4]

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1. JO C 340/1, 1997.
2. JO C 325, 2002.
3. JO C 325, 2002.
4. Article 63
   The Council, acting in accordance with the procedure referred to in Ar ticle 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:
   1. measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:
   (a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States; (Dublin forordningen)

The measures referred to in Article 63(1) cover the entire process from an applicant comes to a border and seeks asylum until he or she receives a decision. This provision provides the legal basis for action in relation to which Member State is responsible for processing asylum applications (the Dublin II Regulation, EC 343/2003, herafter referred to as the DR), how to conduct the processing of the application (the Procedures Directive, 2005/85/EC, herafter referred to as the PD), the reception conditions during the asylum processing period (the Reception Conditions Directive, 2003/9/EC (herafter referred to as the RCD), guidelines for assessing whether the applicant falls under the Refugee Convention or whether the person is entitled to subsidiary protection, the Qualification Directive, 2004/83/EC (herafter referred to as the QD). Article 63(1) further provides the legal basis for Regulation No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention. Because of the more technical character of this regulation, this has not been included in the study.

Article 63(2) (a) states that it[5] shall adopt measures for temporary protection of refugees and a mechanism for burden-sharing.[6] Article 63(2)(b) allows for measures to promote balance in the Member States' capacity in relation to taking in asylum seekers. This led to the creation of a Refugee Fund in 2000.[7]

(b) minimum standards on the reception of asylum seekers in Member States; (mottaksdirektivet)
(c) minimum standards with respect to the qualification of nationals of third countries as refugees; (qualificationdirective - statusdirektivet)
(d) minimum standards on procedures in Member States for granting or withdrawing refugee status; (prosedyredirektivet)
2. measures on refugees and displaced persons within the following areas:
(a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who other wise need international protection;
(b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons;
(3)-measures on immigration policy within the following areas:
(a)-conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the
purpose of family reunion,
(b) illegal immigration and illegal residence, including repatriation of illegal residents;
(4)- measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.

5. The Council.
6. In June 2001, the EU adopted a Directive on temporary protection in mass influx situations. The provisions of this directive have never been used. It is noteable that this Directive provides for a third status of protection within the EU, in addition to refugee status and subsidiary protection.
7. Council Decision of 28 September 2000 establishing a European Refugee Fund (2000/596/EC) for the period 2000-2004. The current Refugee Fund III (2008-2013) is one

Article 63(3)(a) provides the legal basis for measures in the broader immigration area when it comes to family reunification, (Family Reunification Directive, 2003/86/EC, hereafter referred to as FRD) and article 63(3)(b) provides a basis for action with regard to illegal migration, illegal migrants and repatriation of these (the Returns Directive, 2008/115/EC), hereafter referred to as RD).

Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents has been developed on the basis of article 63(3) and article 63(4). This directive was not part of the research assignment given by the Ministry of Justice and Police, and is therefor not part of this report.

The Residence Directive, also referred to as the "Citizens Rights Directive"(in this report, hereafter referred to as CRD), is the only directive in this study which does not have TEC Articles 61-63 as its legal basis. This directive is designed with a legal basis in the provisions of TEC covering Union citizenship, cf. Articles 12 and 18, and the provisions concerning free movement of workers, cf. Articles 40, 44 and 52.

Treaty of Lisbon

The Treaty of Lisbon entered into force on 1 December 2009, and amends the two fundamental treaties - TEU and TEC. The Lisbon Treaty is also referred to as Treaty on the Functioning of the European Union or the TFEU.[8]

The TFEU has contributed to some fundamental changes to the texture of the EU in the migration context. One being that the EU now has a "legal personality". Another is that the pillar structure has disappeared. Furthermore, with the TFEU, The Charter of Fundamental Rights has been given legally binding effect, equal to the Treaties.

The Charter of Fundamental Rights consists of rights previously found in a variety of legislative instruments at EU and national level, as well as in international conventions emanating form the Council of Europe, the United Nations (UN), and the International Labour Organisation (ILO). The charter applies to the European institutions and to EU Member States when implementing EU law.

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of four financial distribution regulations within the EU to assist EU countries in their task to receive asylum seekers and refugees and to contribute to a common solidarity policy among the Member States, but also to activate effective border control and combat illegal migration as well to promulgate the return of illegal migrants.

8 . The Treaty of Lisbon and the European Court of Justice, EUROPA Press Release No 104/09

If any of the rights correspond to rights guaranteed by the European Convention on Human Rights (hereafter referred to as ECHR), the meaning and scope are to be interpreted as being the same as those contained in the ECHR, though EU law may provide for more extensive protection. Any of the rights derived from the common constitutional traditions of the EU Member States must be interpreted in accordance with these traditions.[9]

Directives, Regulations, Decisions, Guidelines

Three types of EU legislation are binding on Member States: Directives, Regulations and Decisions. In regard to Directives and Regulations, TEC article 249 states:

> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. [10]

A Regulation has immediate application in the Member States, whereas it is up to Member States to choose how to implement Directives nationally. These different ways of implementing directives indicates that Member States in practice still have national legislation with different wording.

Some States adapt national legislation by using the same wording as in the directive and some States change their law to make it correspond to a directive, but without using the same wording. Still other countries consider current national legislation as alredy being in compliance with the minimum standards set out in a directive. Translation of the wording of a directive into the language of a Member State is, in itself, a challenge in order to avoid differences in content between the different national transpositions.

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9. http://europa.eu/legislation_summaries/justice_freedom_security/combating_discrimination/l33501_en.htm
   Protocol (No) 30 to the Treaties on the application of the charter to Poland and the United Kingdom, restricts the interpretation of the Charter by the Court of Justice and the national courts of these two countries, in particular regarding rights relating to solidarity (chapter IV).
10. Changed by the Treaty of Nice, Consolidated Version of the Treaty Establishing the European Community, Blackstone´s EU Treaties & Legislation 2008-2009, Nigel Foster, Oxford University Press 19th Edition

Decisions are EU laws relating to specific cases. They emanate from the EU Council (sometimes jointly with the European Parliament) or from the Commission, and can require authorities and individuals in Member States either to do something or stop doing something, and can also confer rights on them. EU decisions are addressed to specific parties (unlike Regulations), and are legally binding. [11]

In addition, both the Council and the Commission can draw up Guidelines in order to contribute to better implementation and use of EU law, but Guidelines are not binding on the Member States.

Development of new rules - decision-making procedures

With the Treaty of Nice, the procedure of co-decision was extended to new important areas where Parliament had previously only a right of consultation, among these on the asylum provisions in Article 63. The procedure was laid down in article 251 in the treaty. With the TFEU, the decision procedure is extended to even more key areas, and is now the normal procedure for passing legislation at Community level. The procedure is therefore now called the "ordinary legislative procedure" and laid down in TFEU article 294.

The ordinary legislative procedure is based on the principle of parity between the directly elected European Parliament, representing the people of the Union, and the Council of Ministers, representing the governments of Member States. The two co-legislators adopt legislation jointly, having equal rights and obligations. Neither can adopt legislation without the agreement of the other. The procedure "consists of up to three readings with the possibility of the two co-legislators to conclude at any reading, if they reach an overall agreement in the form of a joint text." [1]
This procedure and the role of the different EU institutions is thoroughly described in the "Guide to Codecision and Conciliation under the Treaty of Lisbon", published by the EP in November 2009. [12]

Competence of the Court

The Court of Justice of the European Union (CJEU) is the ultimate interpretative authority of EU law, cf. Treaty of Lisbon (TFEU) articles 251-155 and the Statute of the Court of Justice of the European Union.

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11. http://ec.europa.eu/community_law/introduction/what_decision_en.htm
12. European Parliament, Guide to Co-decision and Conciliation under the Treaty of Lisbon", published by the EP in November 2009, p. 6.

With the TFEU in place, the whole court system of the European Union is known as "Court of Justice of the European Union" and consists of three courts, the European Court of Justice (which is relevant in this report and referred to as ECJ), the General Court and the Civil Service Tribunal.

The ECJ has acquired general jurisdiction to give preliminary rulings in the area of freedom, security and justice, as a result of the disappearance of the pillars and the repeal of articles 35 EU and 68 TEC which imposed restrictions on the jurisdiction of the Court of Justice.

Article 234 of the TEC stated that the ECJ has jurisdiction to give advance statements (preliminary rulings) and pronounce verdicts. A national court may apply to the ECJ either when such an advance ruling is deemed necessary for the national court to make a decision, or when there is no national appeal.

Article 68 of the TEC made it clear that Article 234 was applicable to Section IV[13] of the Treaty, with two limitations. For inquiries from national courts, it was required that a preliminary ruling was considered necessary and that there was no national court of appeal, article 68(1). Article 68(2) further restricted the jurisdiction of the Court in cases falling under Article 62(1) in relation to the maintenance of law and order and internal security.[14]Whereas with the TFEU in place, any national court or tribunal - no longer just the higher courts – may request preliminary rulings.

The Court of Justice

The Court of Justice consists of 27 Judges and eight Advocate Generals. The Advocate Generals assist the Court and are "responsible for presenting, with complete impartiality and independence, an 'opinion' in the cases assigned to them." The Court may sit as a full court, in a Grand Chamber of 13 Judges or in Chambers of three or five Judges.

If a national court is unsure of how to intepret or apply European Union legislation, the national court can refer to the Court of Justice and ask for clarification. A reference for a preliminary ruling may also seek the review of the validity of an act of EU law.

A case brought before the ECJ is argued at a public hearing, before the bench and the Advocate General. The Judges and the Advocate General may put to the parties any questions they consider appropriate. Some weeks later,

13. Title IV Visas, asylum, immigration and other policies related to free movement of persons.
14. Jean-Yves Carlier The Role of the European Court of Justice, in Karin Zwaan ed. "The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States".

the Advocate General delivers his or her Opinion before the Court of Justice, again in open court. He or she analyses in detail the legal aspects of the case and suggests completely independently to the Court of Justice, the response which he or she considers should be given to the problem raised. This marks the end of the oral stage of the proceedings. If it is decided that the case raises no further question of law, the Court may decide, after hearing the Advocate General, to give judgment.

Decisions of the Court of Justice are taken by majority voting and no record is made public of any dissenting opinions. Judgments are signed by all the judges who took part in the deliberation and their operative part is pronounced in open court. Judgments and the Opinions of the Advocate Generals are available on the CURIA Internet site on the day they are delivered. They are, in most cases, subsequently published in the European Court Reports.

Sanctions

If the Commission considers that Member States have not fulfilled their obligations under TEC, it can send a reminder to the State in question (reasoned opinion), cf. TEC article 226. If the State still do not follow-up, the Commission may bring cases before the ECJ where Member States are at risk of having a judgment pronounced against them and to be held liable for court costs pursuant to article 69.2 of the procedural rules of the court.

Four countries, including Sweden and Britain, had not completed implementation of the QD and during the spring and summer of 2009, received judgments against them by the ECJ for lack of implementation and reporting.

Interpretation; wording and purpose

Article 249 TEC specifies that the purpose of a directive is important in relation to its implementation by the States. ECJ has also stated that a directive shall be interpreted in accordance with its wording and objective.

> It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 [new article 249] of the Treaty.[15]

15. CJEU Case C-106/89, para 8.

The Court has also ruled that provisions of a directive shall be construed in accordance with the principles set forth in the preamble.[16]

The ECJ has also confirmed in a number of cases from 1964 to 1978, that Community law has precedence over national law.[17] This principle applies even if a national law was passed subsequent to Community law.

The principle of direct effect

Certain provisions in EU legislation apply with "direct effect" even if a Member State has not transposed the legislation into national legislation. This principle was already enshrined in EU law in 1964, in the case Van Gent en Loos,[18] which pertained to customs tariffs. The principle has since become a fundamental principle of Community law.

If a provision has direct effect, it means that an individual may invoke the right of this provision in the national legal system, even if the provision is not implemented in national law.[19]

For a provision to have direct effect, it must, according to the practice of the ECJ, be unconditional and sufficiently precise.

> Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the state.[20]

UNHCR

In all cases where the ECJ has been asked to interpret a provision in one of the directives of TEC article 63, UNHCR has been invited to intervene. UNHCR may also appear in court. From the cases examined in this study, it is evident

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16. CJEU Case C-184/99, para 44.
17. Paul Craig, The CJEU, National Courts and the Supremacy of Community Law in: Ingolf Pernice/Roberto Miccù (eds.): The European Constitution in the Making (Nomos 2003).
18. CJEU Case 26/62 1963
19. Hemme Battjes, European Asylum Law and International Law, Martinus Nijhoff Publishers, 2006, p. 536.
20. CJEU Case 8/81.

that UNHCR perceives its role and reasons for intervening in the following manner:

> UNHCR has a direct interest in this matter, as the agency entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees, and for seeking permanent solutions for the problem of refugees. According to its Statute, UNHCR fulfils its mandate *inter alia* by "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto". This supervisory responsibility is confirmed by Article 35 of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees1 and extends to all EU Member States, as they are all States Parties to both instruments.[21]

UNHCR has been entrusted with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees. Article 8 of UNHCR's Statute (1950), confers responsibility on UNHCR for supervising international conventions for the protection of refugees, whereas the 1951 Convention relating to the Status of Refugees (hereafter referred to the GC) and its 1967 Protocol relating to the Status of Refugees3 (hereafter referred to as"the 1967 Protocol") oblige States to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR's duty of supervising the application of the provisions of the GC and the 1967 Protocol (cf. article 35 of the GC and Article II of the 1967 Protocol). UNHCRs supervisory responsibility extends to all EU Member States, as they are all State Parties to both instruments. The GC does not explicitly regulate asylum procedures, but such procedures are essential, and therefore implicitly required, for States' compliance with their obligations under GC. As such UNHCR has the responsibility to express itself on the choice of the procedure and the safeguards it contains.

UNHCR's supervisory responsibility is reflected in European Union law. Article 78(1) of the TFEU stipulates that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Convention. Further, Declaration 17 to the Treaty of Amsterdam provides that *"consultations shall be established with the United Nations High Commissioner for Refugees (...) on matters relating to asylum policy"*. In addition, Article 18 of the Charter of Fundamental Rights of the European Union states that the right to asylum shall be guaranteed with due respect for the rules of the 1951 Convention and the 1967 Protocol. Other EU legislation also emphasizes the role of UNHCR. For instance, QD Recital 15. It states that consultations with the UNHCR *"may provide valuable guidance for Member States when determining refugee status according to Article 1 of the*

21. UNHCR Revised Statement (2009) on Article 1D of the 1951 Convention.

Geneva Convention." The supervisory responsibility of UNHCR is also specifically articulated in Article 21 of the PD. It is also reflected in the Regulation establishing a European Asylum Support Office (EASO), which recognizes UNHCRs expertise in the field of asylum and foresees a non-voting seat for UNHCR on EASO's Management Board.[22]

ECHR and the EU

The ECHR is the most important European human rights instrument. It has 47 contracting parties (including all 27 EU Member States and Norway). Accession to the ECHR has long been on the EU agenda, and with the entry into force of the Lisbon Treaty, Article 6(2) of the TFEU makes it an obligation for the EU to accede to the ECHR. The Commision presented in March 2010 a recommendation for a negotiation mandate, but the accession process is detailed and it is expected that it will take several years. [23]

With the EU as a party, the ECJ will be able to scrutinize all acts of the EU institutions and bodies for their compatibility with the ECHR. This means that persons who assess that their rights have been infringed by EU institutions, can take their case to the ECtHR once they have exhausted all national judicial remedies. The Strasbourg court is the final and highest instance for ensuring protection of fundamental rights.

With the entry into force of the TFEU in December 2009, the EU Charter of Fundamental Rights, as already indicated above, became legally binding on Member States and EU institutions when they act within the scope of EU law. The Charter entrenches all the rights found in the ECHR as well as other rights, e.g. the right to asylum (art 18 of the Charter). It also entrences all the rights and principles resulting from the common constitutional traditions of the EU Member States, the case law of the ECtHR and other international instruments. Article 53 of the Charter makes it clear that the level of protection provided by the Charter must at least be as high as that of the ECHR.

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22. UNHCR Statement (2010) on the right to an effective remedy in relation to accelerated asylum procedures.
23. "Accession requires, under Article 218(2), (3) and (8) of the Treaty on the Functioning of the European Union, a recommendation from the Commission for a negotiation mandate; a unanimous Council decision to open accession negotiations with the Council of Europe; unanimous agreement by the Council to the outcome of these negotiations; the consent of the European Parliament to the Accession Agreement; and ratification of the Accession Agreement in all 27 EU Member States and in the remaining 20 countries that are signatories to the Convention (including Russia and Turkey)."
http://ec.europa.eu/commission_2010-2014/reding/pdf/echr_background.pdf

The EU and Norwegian law

Through its Schengen- and Dublin-cooperation[24] Norway is closely linked to EU law and development. But Norway is not bound by interpretations or judgments rendered by the ECJ. Nevertheless, it is fair to believe that it would generally be in Norwegian interest to respect the interpretation by the ECJ.

The Norwegian Immigration Act (2010) is also influenced by other elements of CEAS such as a number of provisions in the QD on the interpretation of the concept of "refugee" according to the GC and on who is otherwise in need of international protection. Norway's adaptations to EU developments in the asylum field, are largely due to the Dublin cooperation. It would be impossible to cooperate formally in regard to the DR without having an eye to other areas pertaining to asylum, such as other Member States' implementation of the QD, the RCD and the PD.[25] It should also be noted that in the "Somalia II" case which was heard before the Grand Jury of the Immigration Appeals Board (Stornemnd) and which sets administrative precedence in Norway (see below, Case 1), the Appeals Board made reference to EU instruments and the judgment of the Elgafaji case as relevant for interpretative purposes in spite of Norway not being bound by EU legislation and ECJ rulings. This understanding has also been recognized politically by the government and is manifested in a number of public documents, ultimately in the "white paper" prepared by the government to Parliament on Norwegian refugee and migration policies of 2010.[26]

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24. JO L176/36, 1999; JO L176/36, 1999.
25. Vevstad, Utvikling av et felles europeisk asylsystem. Jus og Politikk, Universitetsforlaget, 2006, p. 186-189; vevstad. Kommentarutgaven, 2010, p. 269.
26. Meld.St.9 (2009-2010) Melding til Stortinget. Norsk flyktning- og migrasjonspolitikk i et europeisk perspektiv.

2

The Qualification Directive

Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (hereafter referred to as QD) was adopted by the Council on 29 April 2004. The directive applies to all Member States except Denmark. The transposition was set to be completed by 10 October 2006.

The legal basis for the QD is Article 63(1)(c) of the Treaty establishing the European Community (TEC).

2.1. Objective, important provisions and legal issues

This sub-section deals with the most significant provisions and interpretative issues in regard to international protection as well as issues in regard to cessation and exclusion.

The main objective of the QD is, on the one hand, to ensure that all Member States apply common criteria for the identification of persons genuinely in need of international protection in accordance with the GC and subsidiary protection, and, on the other hand, to ensure that a minimum level of benefits is given for these persons in all Member States.

Until the adoption of the QD, the granting of complementary protection was totally at the discretion of the Member States. The Directive is thus the first supranational instrument seeking to harmonize domestic complementary protection, referred to as "subsidiary protection".

International protection

International protection is defined in article 2 and consists of two elements; refugee status and subsidiary protection.

> Person eligible for subsidiary protection" in article 2 (e) is defined as "… a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, …, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

According to article 15, serious harm consists of:

(a) 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.

Cessation

The QD contains provisions concerning Cessation and Exclusion principally based on the provisions in GC. Article 11 in the Qualification Directive "Cessation" is based on article 1 C (5) in the 1951 Convention, and states that a

> third country national … shall cease to be a refugee if he or she"… "can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality (article 11 (1)(e).
>
> In considering [point] (e) … of paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well founded (article 11 (2)).

The wording of QD article 11(1)(e) is, to a large extent identical to article 1(C)(5) first paragraph of the GC and article 11(2) confirms the three basic conditions of article 1(C)(5) as has been advised by UNHCR[27]. According to UNHCR, changes in a home country must be (1) fundamental, (2) durable,

27. Guidelines on International protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses) HCR/GIP/03/03 10 February 2003

and (3) effective protection must be available in the country of origin.[28]

GC article 1(C)(5) second paragraph contains an exception to the cessation provision for refugees which invokes "compelling reasons arising out of previous persecution" for refusing to reavail themselves of the protection of the country of origin. A similar provision has not been incorporated in QD article 11.This does not preclude application of the GC in this regard as a regional instrument cannot exclude binding obligations contained in previously adopted instruments of international law. Furthermore, article 4(4) QD specifically invokes that the fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or harm, "is a serious indication" of the applicant's well-founded fear of persecution.

Exclusion

The QD exclusion clauses are divided into two parts. Article 12 is based on article 1 F and 1 C of the GC, whereas art 14(4) and (5) may have exclusion as a result without a similar basis in the GC, a phenomenon challenged by legal commentators as being in violation of international, public law.[29]Article 17 deals with persons excluded from being eligible for subsidiary protection.

The first paragraph of Article 12 Exclusion in the Qualification Directive reads as follows:

> 1. A third country national or a stateless person is excluded from being a refugee, if:
>
> (a) he or she falls within the scope of Article 1 D of the GC, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Directive;

This provision is a transformation of Article 1D of the GC which reads:

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28. A comment in Borgarting Court of Appeal (Borgarting lagmannsrett), suggests that the Directive does not fulfil UNHCRs criteria without giving further explanation to this statement (see page 8 of the judgment).
29. Einarsen, Skaar, Vevstad, "Flyktningkonvensjonen Artikkel 1 C-F Folkerettslig og komparativ studie av eksklusjons- og opphørsgrunnene, 2006.

> This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.
> When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

Article 12(2) states that a "third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

> (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; *which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;*
>
> (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations *as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations*.

As seen above, Article 1 F in the GC has been transposed into article 12(2) of the QD. In addition, EU Member States have added additional wording indicated above in Italic.

Thus, art 12(2)(b) of the QD goes beyond the wording of Article 1F, in providing that "particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes". However, "particularly cruel actions" remains undefined in the QD, in other instruments of the *acquis,* or in international law. Research done by the UNHCR, shows that a significant number of Member States have not transposed this provision on "particularly cruel actions" into national law.[30] The few national laws providing a definition of "particularly cruel actions" have taken a cautious approach to the concept, omitting it from the legislative criteria for exclusion, or confining its scope to exceptional and particularly egregious crimes[31].

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30. Including, for instance, Austria, Belgium, Czech Republic, France, Hungary, Ireland, Luxembourg, Netherlands, Poland, Romania, Slovenia, Sweden and United Kingdom.
31. UNHCR, Statement on Article 1F 2009 page 23

Other provisions

The Directive lays down common standards on the assessment of applications for international protection, dealing with issues such as assessment of facts and circumstances (article 4), International protection arising sur place (article 5), Actors of persecution or serious harm (article 6), Actors of protection (article 7), internal protection (article 8), acts of persecution (article 9) and reasons for persecution (article 10). The Directive further regulates revocation of status (articles 14 and 19), and the content of international protection (articles 20-34). No case in relation to these provisions have, to our knowledge, so far been brought before the ECJ (mid-October 2010), whereas, as will be shown, questions concerning subsidiary protection (article 15(c)) as well as questions in regard to the exclusion and cessation clauses have been assessed by the ECJ.

Evaluation and the QD Recast

In its report of 16 June 2010, the European Commission reports on the application of the QD to the European Parliament and the Council. This report meets the Commission`s obligation under article 37 of the Directive. In line with studies provided by ECRE and UNHCR,[32] the Commission concludes that several issues of incomplete and /or inncorrect transposition of provisions have been identified. Some provisions are also considered so vague as to allow "widely divergent interpretations".

A recent study carried out by the Odysseus Academic Network on Immigration and Asylum (hereafter referred to as the Odysseus Network), commissioned by the European Parliament, further confirms the problems identified in relation to the interpretation and implementation of the QD[33]. Contrary to the purpose of the establishment of a Common European Asylum System (CEAS) of which the QD is an important element, all the abovementioned studies conclude that there are important discrepancies and differences in the implementation of the Directive in the national practice of Member States.

Due to divergent approaches to transposition, mistranslation into national law or differing interpretation of the provisions, differences persist and have been defined as major problem areas which the Commission seeks to adjust. On 21 October 2009, the Commission therefore proposed a recast Directive

32. UNHCR, Study of the Qualification Directive, November 2007 ECRE "The Impact of the EU Qualification Directive on International Protection" October 2008
33. "Setting up a Common European Asylum System", Executive Summary, EP, Directorate-General for Internal Policies, PE 425.622, 2010

which would replace the existing Directive (2004/83/EC).[34] The recast Directive suggests, in particular, to widen the definition of 'family member' of the persons concerned; clarify the concepts of 'actor of protection' and 'internal protection'; extend the possibility of considering gender-related aspects of persecution; require consideration of additional factors as regards cessation of status; and equalize the beneficiaries of subsidiary protection status to that of refugee status[35]. A finalisation of the negotiations in Council on the Recast QD was one of the priorities of the Belgian Presidency, but there are no signs that this will happen by the end of 2010.[36]

2.2. ECJ CASE 1; International protection

C-465/07 Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie, 17 February 2009

This case concerns the interpretation of QD Article 15 (c) and whether or not two persons seeking asylum in the Netherlands qualified for subsidiary protection according to this provision.

On the 9 September 2008 General Advocate Maduro delivered his opinion to the Dutch authorities. A judgement (Preliminary ruling) from the ECJ was delivered on the 17 February 2009.

Background

In December 2006, an Iraqi couple submitted an application for a temporary residence permit in the Netherlands. Their application was rejected. Dutch authorities argued that the applicants had not established the existence of a real risk of serious and individual threat to which they claimed to be exposed in their country of origin.

The applicants brought action before the District Court which annulled the orders to refuse residence permits. The case was then appealed to the Dutch Council of State (Raad van State)[37].

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34. COM (2009) 551.
35. http://infoportal.fra.europa.eu/InfoPortal/infobaseShowContent.do?btnCat_249& btnCountryBread_169
36. Council of the European Union 13703/10 ASILE 64
37. The highest administrative court with general jurisdiction in the Netherlands.

In the proceedings, the applicants argued that they qualified for subsidiary protection, in accordance with Article 15(c) in conjunction with Article 2(e) of the QD.

According to the Minister voor Vreemdelingenzaken en Intergratie,[38] the burden of proof remains identical whether considering protection under Article 15 b) or c). The Minister further argued that there should be a requirement of, a strong individual link between indiscriminate violence and the threat to a civilian's life or person. This presupposes that the applicant shows that he is covered by reason of features particular to him/her.

The Dutch Council of State referred the following questions to the ECJ for a preliminary ruling:

> (1) Is Article 15(c) of [the Directive] to be interpreted as offering protection only in a situation in which Article 3 of the [ECHR], as interpreted in the case-law of the European Court of Human Rights, also has a bearing, or does Article 15(c), in comparison with Article 3 of the [ECHR], offer supplementary or other protection?
>
> (2) If Article 15(c) of the Directive, in comparison with Article 3 of the [ECHR], offers supplementary or other protection, what are the criteria in that case for determining whether a person who claims to be eligible for subsidiary protection status runs a real risk of serious and individual threat by reason of indiscriminate violence within the terms of Article 15(c) of the Directive, read in conjunction with Article 2(e) thereof?

Interpretation by the ECJ

The Elgafaji case represents the first example of interpretation from the European Court of Justice regarding a provision in the QD and article 15(c) is one of the core provisions which Member States have interpreted differently.

An Opinion given by the Advocate General as reference for a preliminary ruling, is not binding on the European Court of Justice, but it carries important weight and is, in many cases, adhered to by the Court.[39]

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38. The competent authority unntil February 2007 when the Staatsecretaris van Justitie became responsible for immigration matters.
39. AM & AM (Armed Conflict: Risk Categories) Somalia v. Secretary of State for the Home Department, CG [2008] UKAIT 00091, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 27 January 2009, page 30.

General Advocate Maduros Opinion, contains a clarification of the substance of article 15(c), as well as on the relationship between Article 15 in the QD and relevant provisions in the ECHR.

According to the Advocate General, the relevant question is not if subsidiary protection provided for by the Directive is more or less identical to protection granted on the basis of the ECHR, but rather to define the content of subsidiary protection in Community law. He argues that the case-law of the Strasbourg Court is an important source of interpretation, but that Community law must be interpreted independently. The Strasbourg Court will have a dynamic interpretation of the ECHR, meaning that its interpretation of certain provisions and legal terms might change over time[40].

On these grounds, the Advocate General concludes as follows;

> 1) Article 15(c) of […] [the directive] must be interpreted as conferring subsidiary protection where the person concerned demonstrates that he runs a real risk of threats to his life or person in situations of international or internal armed conflict by reason of indiscriminate violence which is so serious that it cannot fail to represent a likely and serious threat to that person. It is for the national courts to ensure that such conditions are fulfilled.
>
> (2) Furthermore, that implies from the point of view of the standard of proof, that the individual nature of the threat does not have to be established to such a high standard under Article 15(c) of the Directive as under Article 15(a) and (b) thereof. However, the seriousness of the violence will have to be clearly established so that no doubt remains as to both the indiscriminate and the serious nature of the violence of which the applicant for subsidiary protection is the target.

The Advocate General argues that Article 15(c) of the Qualification Directive should be interpreted to offer supplementary protection to Article 15(a) and (b)[41]. And that there should be a lower standard of proof considering the individual nature of the threat applying Article 15(c) in comparison with Article 15(a) and (b). According to the GA, the distinction between a high degree of individual risk and a risk which is based on individual features is of defining importance.[42]

In other words, the more serious and indiscriminate the violence is, the less proof is needed to show that there is a real risk of a person suffering serious

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40. Opinion of Advocate General 2008 Para 18-24
41. Ibid Para 32
42. Ibid Para 35

harm if returned to his or her country of origin. In a situation where the general violence is not so serious, the standard of proof applied should be at a higher level, in order to establish if a real risk of suffering serious harm exists.

The ECJ made its decision in the Elgafaji-case on 17 February 2009. The court takes a different angle than the General Advocate and discusses first of all, the different types of ”serious harm” defined in Article 15 of the QD. The Court argues that while Article 15 (a) and (b) cover situations where the applicant would face a specific type of harm, Article 15 (c) covers situations where a more general risk of harm exists. This would be a general threat caused by a general situation; ”international or internal armed conflict”.[43]

The Court further argues that Article 15 (c) in conjuction with Article 2 (e) must be interpreted as follows (para 43):

> - the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;
> – the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.

This interpretation should ensure that Article 15(c) of the Directive has its own field of application, not invalidated by the wording of recital 26 in the preamble[44].

> While that recital implies that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions set out in Article 15(c) of the Directive have been met in respect of a specific person, its wording nevertheless allows -- by the use of the word ‘normally' -- for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.[45]

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43. Elgafaji v. Staatssecretaris van Justitie, C-465/07, 2009 paras 32-34
44. Ibid para 36
45. Ibid para 37

In that regard, 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.[46]

The assessment of whether there is an exceptional situation or not prevailing in a country, should, as stated in the quote above, be left to the Member States to decide.

The ECJ did not define the term "internal armed conflict" or discuss relevant criteria for determining when a situation can be defined as an internal armed conflict. As will be seen below, State practice shows that Member States have interpreted the term "armed conflict"very differently, thus a clarification by the ECJ on this point could have been an important contribution to the interpretation of article 15(c).

On 25 May 2009, the Dutch Raad van State (Council of State, the Netherlands highest administrative court), gave their judgment applying the recent European Court of Justice's interpretation of the QD in the Elgafaji case.

In their ruling, the Raad van State assessed that the situation in Iraq could not be classified as an exceptional situation where civil citizens would face a real risk of suffering serious harm. On these grounds the Raad van State denied the request of the Elgafaji couple to remain in the Netherlands.

In summing up, one of the concluding remarks in the Elgafaji judgement[47] is that the ECJ interpretation of QD Article 15(c) is fully compatible with the interpretation of ECHR Article 3 by the European Court of Human Rights (ECtHR). In this regard, it should be noted that according to the General Advocate, the relevant question is not if subsidiary protection provided for by the Directive is more or less identical to protection granted on the basis of the ECHR, but rather to define the content of subsidiary protection in Community law. He argues that the case-law of the Strasbourg Court is an important source of interpretation, but that Community law must be interpreted independently. The Strasbourg Court will have a dynamic interpretation of the ECHR, meaning that its interpretation of certain provisions and legal terms might change over time.[48]

The ECJ also underlines that

> …it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR. By contrast, Article 15 (c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently,

46. Ibid para 39
47. Ibid para 44
48. Opinion of Advocat General 2008 Para 18-24

> although with due regard for fundamental rights, as they are guaranteed under the ECHR.[49]

The ECJ interprets QD art 15 (a) and (b) as dealing with specific individual threats and art 15(c) as covering threats of a more general nature, but weighted depending on the impact on the individual. In essence, that general threats due to strife can rise to such a level that protection is needed, depending on the situation of the individual concerned. In the second part of the ruling with respect to art 15(c), the ECJ indicates that states have considerable discretion with respect to determining if the level of threat is sufficient to warrant protection, and interpretations by the ECtHR of ECHR art 3 may be used as an argument, but not as precedence.

The QD and the ECHR are two different sets of rules of law although their interrelationship is clearly illustrated by the present case which calls for interesting interpretative challenges by two separate judiciaries at the European level. This is also of interest in the Norwegian context. Norway is bound by the ECHR, not by the QD. However, Norway has, to a large extent copied the QD wording in its Immigration Act, with the exception of QD art 15c. See further on this below, under 2.3.

ECHR Article 3

According to the case law from ECtHR, expulsion by a Contracting State may give rise to an issue under ECHR Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to ill-treatment which would amount to refoulement.

ECtHR operates with a distinct burden of proof and standard of proof. First of all there has to be substantial ground for believing a person´s claims. Second, a specific standard of proof has been developed, namely that there is a real risk that the person to be deported risks being subjected to a treatment or punishment[50] in violation of Article 3.

Examining whether there is a real risk, the ECtHR applies a rigorous approach;

> The Court's examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the

49. Elgafaji, 2009, para 28.
50. http://www.coehelp.org/mod/glossary/showentry.php?courseid=75&concept=Punishment

> fundamental values of the democratic societies making up the Council of Europe.[51]

The ECtHR therefore requires that the treatment or punishment in question must contain a minimum of severity in order to fall within article 3 of the ECHR.

The ECtHR has also, until 2007, requested that the person must show "a distinguished feature" compared to other persons facing the same situation at a return, since a general situation of violence normally will not in itself entail a violation of Article 3.[52]

Thus, until 2007, the ECtHR was of the opinion that a general situation of violence would not normally in itself entail a violation of Article 3 in the event of an expulsion. However, in the Salah Sheek case (Salah Sheek v. the Netherlands, no. 1948/04), the Court assessed that

> …in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned[53].

The court added that "…it cannot be required of the applicant that he establishes that further special distinguishing features, concerning him personally, exist in order to show that he was, and continues to be, personally at risk".[54]

Further, in the NA v. UK case of 2008, the ECtHR states that it has never excluded the possibility that the general situation of violence in a country of destination may be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. But, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return (see *NA v. the United Kingdom*, no. 25904/07, para 115, 2008)". These interpretative elements have also been confirmed in the F.H. case of 2009 (F.H. v. Sweden, no. 32621/06, 2009).

Considering the question of burden of proof, the ECJ states in the Elgafaji judgment, that there is no requirement as to the person having to prove that he or she will be individually targeted.

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51. Saadi v Italy ECtHR 2008, Appl. No 37201/06 para 128
52. H.L.R. v. France, 29 April 1997, § 41, Reports of Judgments and Decisions 1997-III).
53. Saadi v Italy ECtHR 2008, Appl. No 37201/06 para 132 (mutatis mutandis Salah Sheekh paras 138-149).
54. Salah Sheek v. the Netherlands ECtHR 2007, Appl. No. 1948/04 para 148

It can therefore be argued that, in accordance with QD Article 15(c), a lower standard of severity of harm is required than what is required in accordance with art 3 ECHR. Article 15(c) in the QD refers to a ”threat” whereas Article 3 ECHR refers to a concrete harm inflicted through , torture, inhuman or degrading treatment (cf the requirements of QD art 15(b). (This has been further elaborated under 2.3 and the interpretative significance of these instruments and court decisions in relation to Norwegian interpretation of the Immigration Act Section 28, para one, litra b).

Until judgment was delivered in the Elgafaji case, article 15(c) QD was considered a very problematic and unclear provision. There are reasons to believe that the ECJ interpretation has resolved some of the interpretative uncertainty and provided the provision with an objective content. The fact that the Commission did not propose any changes to article 15 (c) in its QD recast, supports this view. Another argument in support of this assumption is that Member States, over the last year, have actively been applying article 15(c). On the other hand, certain interpretative problems do remain. For example, a clarification on the term “internal armed conflict” is lacking causing Member States to have divergent interpretationons. The discussion in regard to recast QD could have provided a good opportunity for further clarification.

Application of article 15(c) in EU Member States

The travaux préparatoires of the QD shed some light on how different Member States understood the different provisions during the time of negotiations of the QD even if the travaux préparatoires are not regarded as important sources of interpretation in EU law.[55] More important, however, is how Member States actually have applied the provisions. Sweden, UK and the Netherlands will be used as examples hereunder.

Applying Article 15(c), Member States first assess if the situation in a given country or part of it can be defined as a situation of international or internal armed conflict.

Countries like Sweden and the UK have concluded differently on this. Both derive their interpretation from International Humanitarian Law and conclude that internal armed conflict arises when there is armed violence between governmental authorities and organised armed groups. Sweden has added a requirement, that the armed groups must have a certain type of con-

55. Presidency Note to the Strategic Committee on Immigration, Frontiers and Asylum 12148/02 ASILE 43 (20 September 2002) http://parlis.nl/pdf/bijlagen/BLG14658.pdf Zwaan, Karin (ed.) 2007

trol over parts of its territory which enables them to carry out military operations. Further, Swedish authorities have argued that a decisive factor is how the civil society is affected. [56]

The definition of internal armed conflict which UK holds includes that they in 2008 considered the situation in Somalia and Iraq as being an internal armed conflict[57] whereas Sweden concluded the opposite, namely that the situation in these countries not could be defines as such. The Netherlands concluded in the Elgafaji case that the situation in Iraq could not be defined as an internal armed conflict, but operated with a categorical protection for Somalis from Southern and Sentral Somalia until April 2009[58].

Still, the outcome of the individual cases was not only dependent on the definition of internal armed conflict, but also on how Member States assess an individual threat of serious harm.

According to Swedish case law, if a situation is to be defined as an internal armed conflict, there would be no further individual assessment. A person from an area where there is an internal armed conflict would automaticly be granted a protection permit.[59]

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56. Dom fra Migrationsöverdomstolen MIG2007:09, vedtaksdato 26.2.2007, Saksnummer 23-06Kommentar från rättschefen med anledning av Migrationsöverdomstolens domar om väpnad konflikt, meddelade den 6 oktober 2009 [UM 133-09, UM 334-09, UM 8628-08]

    Kommentar till Länsrättens i Stockholm, Migrationsdomstolen, dom den 29 januari 2010 (UM 11374-09) i vilken domstolen slår fast att det råder ett tillstånd av inre väpnad konflikt i hela södra och centrala Somalia, dvs. i de delar av Somalia som inte utgörs av Somaliland och Puntland

57. "The UK Asylum and Immigration Tribunal concluded in October 2008 in the case of AM & AM that indeed there is an internal armed conflict within the meaning of international humanitarian law and Art 15 (c) of the Qualification Directive throughout central and southern Somalia.26 According to the Tribunal "an armed conflict can exist even when the warring parties do not include government forces."27 The Tribunal noted that "the armed conflict taking place in Mogadishu currently amounts to indiscriminate violence at such a level of severity as to place the great majority of the population at risk of a consistent pattern of indiscriminate violence."28 It was furthermore asserted that the nature of the violence in Mogadishu "has become increasingly indiscriminate in the sense that the different armed groups involved in the fighting routinely fail to distinguish between civilians and military targets and use disproportionate methods."29 "(ibid)

58. http://english.justitie.nl/currenttopics/pressreleases/archives-2009/assessment-of-asylum-applications-from-somalia-on-individual-grounds.aspx?cp=35&cs=1578
59. Vägledande beslu rörande kvinna från Nord-Kivu i den demokratiska republiken Kongo 2008-11-21, Dokumentnr: 19783

The United Kingdom, on the other hand, makes an individual assessment, whereby an assessment is made on whether a person faces a serious and individual threat to his or her person.[60].

In 2009, the question of territorial control as a prerequisite for the existence of an armed conflict was brought before the Swedish Courts. UNHCR gave its opinion, arguing the following;

> The question currently pending before this Court, i.e whether territorial control is a prerequisite for the existence of an internal armed conflict, arises as a result of the assumption that an internal armed conflict only takes place between state and non-state actors. However, as indicated above, International Humanitarian Law does not require that the State is part of a non-international armed conflict.[61]

In three judgments from October 2009 the Migrationsöverdomstol changed its previous interpretation of "internal armed conflict" and presented a new definition of the term. This definition is in line with the opinion of UNHCR. The court then concluded in all three cases that the situation in Mogadishu is to be considered as an "internal armed conflict."[62]

In a judgment from the Court of Appeal (England and Wales), [63] this Court stated that the Asylum and Immigration Tribunal did apply International Humanitarian law correctly when interpreting international and internal armed conflict.

After the Dutch authorities ended their categorical protection of persons from Southern and Sentral Somalia in April 2009, they did not find the situation in this area to fall in under the term "internal armed conflict". In January 2010 the Administrative Jurisdiction Division of the Dutch Council of State,

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60. HH & Others (Mogadishu: Armed Conflict: Risk) Somalia v. Secretary of State for the Home Department, CG [2008] UKAIT 00022, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 28 January 2008, forordet (5)
KH (Article 15(c) Qualification Directive) Iraq v. Secretary of State for the Home Department, CG [2008] UKAIT 00023, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 25 March 2008 (page 58)
AM & AM (Armed Conflict: Risk Categories) Somalia v. Secretary of State for the Home Department, CG [2008] UKAIT 00091, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 27 January 2009
61. UNHCR, Statement in cases UM 8628-08, UM 334-09, UM 133-09
On the application of non-international armed conflict in Mogadish, UNHCR Stockholm, April 2009
62. Kommentar från rättschefen med anledning Migrationsöverdomstolens domar om väpnad konflikt, meddelade den 6 oktober 2009 [UM 133-09, UM 334-09], UM 8628-08].
63. QD (Iraq) v. Secretary of State for the Home Department; AH (Iraq) v. Secretary of State for the Home Department, [2009] EWCA Civ 620, United Kingdom: Court of Appeal (England and Wales), 24 June 2009,

refuted the position of the Secretary of Justice that refugees from Mogadishu and its surroundings can safely return to their region[64]. The Division did not hold that there was a situation as referred to in Article 15 C of the Qualification Directive in Mogadishu at the time of the decision, but that it had not been sufficiently substantiated why that was not the case.

Commenting this decision in a letter to the "Lower House of the States General" in March 2010, the Dutch Minister of Justice, Mr.Ballin said, that he believes that the assessment of Article 15(c) "should not in general be made against the background of one city or one restricted area. …I believe that one should look, for the purpose of the assessment, in principle at the situation of the entire area affected by the relevant armed conflict. … For Somalia this concerns South and Central Somalia. …The nature and intensity of the violence in these areas are, however, according to the Minister, "not so serious that the conclusion must be drawn that every civilian there would be at risk." [65]

2.3. Relation to Norwegian law and practice

The expert law committee responsible for the draft of the new Norwegian Immigration Act (NOU 2004:20) was mandated to build on, and be inspired by, international developments in the asylum and immigration area. The draft proposal therefore, to a large extent, copied the relevant provisions of the QD, but with some very specific differences. Broadly speaking, the principle ideas of the law committee were followed-up upon in the government proposal of 2006 (ot.prp.nr 75 (2006-2007), hereafter referred to as ot.prp.). Equally so when the law was adopted by Parliament in 2008 (entry into force on 1 January 2010).

A main feature of section 28 of the Immigration Act is that it widens the scope of refugee status to include, not only refugee status in accordance with the GC (section 28, paragraph one, litra a), but equally as regards other persons in need of international protection who are at real risk of death penalty, torture or other inhuman or degrading treatment or punishment upon return to a home country (section 28, paragraph one, litra b). The content of QD article 15 (a) and (b) cf. art 2(e) are easily detectable, but with three major differences: 1. the present QD differentiates between a GC status and a subsidiary protectionon status; 2. the content of QD article 15(c) has not been transposed into Norwegian legislation; and 3. Norway is not obliged to do so as it

64. Raad van State 200905017/1 A/2. Datum uitspraak: 26 januari 2010;
65. Tweede Kamer der Staten General, Terugkeerbeleid nr 72, Brief van de Minister van Justitie, 29 maart 2010, http://www.overheid.nl

is not part of any CEAS instrument except the Dublin Regulation (see further below).

The reasons for Norway not having transposed the content of QD art 15(c), can be identified through the background documents cited above. According to the law committee, situations described in QD art 15(c) were regarded as covered by ECHR art 3 and therefore by the proposed new Immigration Act Section 28, paragraph one, litra b. The hypothesis of QD art 15(c) being covered by ECHR art 3 and not having any independent content, was concluded by the Norwegian committee in 2004 before any normative, judicial developments had taken place in the EU context. The government adhered to the same conclusion in 2006. The compatibility between QD art 15(c) and ECHR art 3 was later confirmed, as has been seen above, in the Elgafaji case in 2009, para. 44. It states:

> It should…, be added that the interpretation of Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, arising from the foregoing paragraphs is fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR (see, inter alia N.A. v. the United Kingdom. § 115 to 117 and the case-law cited).

However, the Elgafaji case can be interpreted as indicating that the scope of QD art 15(c) is somewhat wider than that of ECHR art 3 (paras 32-34) as art 15(c) covers a more general risk, dangers which occur at random.[66]

The Norwegian Immigration Act, Section 28, paragraph one, litra b is, in accordance with the explanatory background documents, applicable in regard to refugees of war (ot.prp, p. 414). This would include persons fleeing a war situation for reasons other than those mentioned in the GC.

The concept of "war refugee" in the Norwegian context, is of particular interest in regard to Section 28, paragraph one, litra b. According to Einarsen, two different scenarious can be envisaged although there are grey areas and overlappings.[67]

The first scenario concerns refugees being returned to a situation of indiscriminate violence. The second scenario concerns situations of war crimes which would fall within the meaning of Section 28, paragraph one, litra b.

In regard to situations of indiscriminate violence, the risk of becoming a victim could vary according to the intensity of the fighting, and the weapons used. The situation is similar to a situation in a country consisting of serious general violence and crime. However, what characterizes a situation of "armed conflict" or "armed conflict not of an international character" is that the level of violence amounts to a degree and intensity which distinguishes it

66. Einarsen, T., in Vevstad (ed.) Kommentarugave, 2010, p. 195-1200.
67. Ibid, p. 194.

from a situation of sporadic armed confrontations (cf. the ICC Statutes art 8(2), litra d cf. litra c). The question at hand therefore concerns situations whereby an individual's life or person is seriously threatened and that the situation is exceptional. Under these circumstances, the mere fact that a person is present in the country could expose him or her to being targeted and further individualization is not called for. Such is the conclusion of the Elgafaji judgment and such is the judicial practice of the European Court of Human Rights (see N.A. v. UK, paras 115-117).[68]

In a case before the Grand Jury of the Immigration Appeal's Board (Stornemnd) of March 2010, a decision (with the vote 6-1) was made in regard to application of Section 28, paragraph one, litra b in favour of return of an asylum applicant to Mogadishu. The majority concluded that the applicant did not have a right to protection under the said provision as the level of violence in Mogadishu, according to the arguments, did not amount to a level whereby the obligation to offer protection came into function. The majority further pointed to the fact that the applicant would be in a similar situation to other civilians. The minority, however, found the situation in Mogadishu to be a situation of conflict and that the violent character and consequences for civilians was covered by Section 28, paragraph one, litra b. The minority also referred to the fact that many other European countries regarded the situation in Mogadishu as amounting to armed conflict and that they granted residence permits to applicants from Somalia.

The decision was heavily criticized by commentators and viewed as not being in line with neither the intent of the law maker as explained in the background documents nor in line with interpretation of the Immigration Act itself which, in Section 3, states that the Act shall be applied in accordance with international obligations undertaken by Norway in order to strengthen the position of an applicant. Legal doctrine has also questioned the legality of the decision by referring to arts 2 and 3 of the ECHR.[69]

In July 2010, the Ministry of Justice, in accordance with Section 76, paragraph two of the Immigration Act, instructed the Immigration Appeal's Board, to identify another Somalia case in order to clarify the interpretation of Section 28, paragraph one, litra b. The Ministry asks for a clarification in regard to the meaning of ECHR art 3 and decisions by the European Court of Human Rights in this regard. Further, the Ministry asks for a clarification in regard to the weight given or not given to European practice in regard to the QD art 15(c) and a clarification of the standard of risk to be applied under the Norwegian Immigration Act Section 28, paragraph one, litra b.

The following elements were drawn upon in the second Somalia case:

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68. Ibid, p. 197.
69. Ibid, p. 199.

As regards the burden of proof and the standard of proof required, an assessment of risk must be made. A mere risk assessment is future oriented, e.g. what would happen if an applicant is returned, whereas the concept of proof relates to all factual evidence at hand, past, present and future. Once all facts have been established, the question is whether the risk at hand is covered by the requirements of the GC, QD and/or the Immigration Act.

In accordance with judicial practice by the ECtHR, proof beyond a reasonable doubt, regarding the facts of the case, is sufficient as seen in the case N.A. v. UK where the Court addresses the situation on a general basis in regard to the standard of proof.

In the *travaux préparatoires* to the Norwegian Immigration Act (ot.prp. p. 95), the Ministry refers to the condition of "real risk", as indicating a purely objective assessment. The term "real risk" of Section 28 paragraph one, litra b, would presumably, according to the Norwegian Ministry, require a somewhat stricter interpretation than what is required by the term "well-founded fear" in the GC art 1A and Section 28, paragraph one, litra a of the Immigration Act. However, the Ministry also says that it is of relevance to consider the amount of seriousness prevailing in a concrete situation. If the risk at hand could be loss of life, for example, or that a person risks being subjected to torture, the conditions for fulfilling the requirements of "real risk" should be less than if the consequences of a return are less serious. The question may be more theoretical than practical as the nuances are marginal in practice as all situations pertaining to Section 28, paragraph one, litra b are indeed serious. Decisions by the ECtHR in application of art 3 of ECHR are, according to the Ministry, of relevance for the interpretation of the provision of the Immigration Act.

The ECtHR has, on a number of occasions, established that the term "substantial grounds" indicates that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to art 3 (N.A. v. UK), whereas "(A) mere possibility of ill-treatment" is not sufficient (Vilvarajah v. UK). It has also been established that in a calculation of probability predominance is not required Saadi v. Italy).

A mere presence on the territory can give rise to a need for protection as illustrated by judgment N.A. v. UK. paras 114-115 which are referred to in the Somaila II case and which read:

> 114. However, a general situation of violence will not normally in itself entail a violation of Article 3 in the event of an expulsion (see H.L.R. cited above § 41). Indeed, the Court has rarely found a violation of Article 3 on that ground alone. For example, in Müslim v. Turkey, no. 53566/99, 26 April 2005, where the Court considered the expulsion of an Iraqi national of Turkmen origin to Iraq, it found the mere possibility of ill-treatment because of the unstable situation in that country at the material time would not in itself amount to a breach of Article 3 (paragraph 70 of judgement). Equally, in Sultani, cited

> above, § 67, the Court took notice of the general situation of violence at that time in Afghanistan but found that this without more, was not sufficient to find a violation of Article 3. Moreoever, in the Thampibillai and Venkadajalasarma judgements relied on by the parties in their observations in the present case, the Court considered the considerable improvement in the security situation in Sri Lanka and the "very real progress" in the peace process at the material time as relevant factors in its finding that there were no substantial grounds for believing that the applicants would be exposed to a real risk of ill-treatment contrary to Article 3 (Thampillai at paragraphs 64 and 65; Venkadajalasarma at paragraphs 66 and 67). In the earlier case of Vilvarajah and others, cited above, the Court recognized the possibility of detention and ill-treatment in respect of youg Tamil males returning to Sri lanka. However, it insisted that the applicants show that special distinguishing features existed in their cases that could or ought to have enabled the United Kingdom authorities to foresee that they would be treated in a manner incompatible with Article 3 (paragraphs 111-112 of the judgement). Finally, while in Ahmed v. Austria, judgement of 17 December 1996, Reports 1996-VI, the Court did find a violation of Article 3 partly on account of conditions in Somalia in early 1990s, it also noted that the Austrian Government had not contested the applicant's submission that there was no observable improvement in the general situation and had also accepted that the material time the applicant could not be returned there without being exposed to the risk of treatment contrary to Article 3 (see paragraph 5 of the judgement).
>
> 115. From the foregoing survey of its case-law, it follows that the Court has never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.

This understanding is further confirmed in the Elgafaji judgment of the ECJ where the Court states (para 43):

> Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 15(c) of the Directive, in conjunction with Article 2(e) thereof, must be interpreted as meaning that:
> - the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;
>
> - the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterizing the armed conflict taking place – assessed by the competent national authorities before

> which an application for subsidiary protection is made, or by the courts of member States to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country; or, as the case may be, to the relevant region, would solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.

In conclusion, in extreme situations of violence or instability, a return to a country or region would be in violation of ECHR Article 3, QD Article 15(c) and Section 28, paragraph one, litra b of the Norwegian Immigration Act. This risk, without being individualised, indicates that any person present on the territory would run a real risk by his or her mere presence.

In conclusion, the Grand Jury of the Immigration Appeal's Board (Decision of 14 October 2010) decided against return to Mogadishu based on the interpretative findings related above and in reference to ECtHR case law, N.A. v. UK in particular. What is particularly worth noticing in relation to the topic of this study, is that reference was made to ECJ case law and the QD art 15(c). Furthermore, the Appeal's Board refers to the travaux préparatoires (ot.prp.(2006-2007)) where it is stated that:

> In spite of the EU Qualification Directive not being binding on Norway, the Ministry agrees with the expert law committee that the Directive appears to be an appropriate basis for drawing up new provisions. The provisions of the Directive indicate suitable clarifications without taking away the possibility of a dynamic and flexible application of the refugee definition contained in the 1951 Convention. Further, in view of the Dublin- cooperation, it would be fortunate to signal to the outside world that Norway is conducting, to large extent, a similar policy to that of most other European countries, which are expected to transform, in a relatively detailed manner, the standards of the Directive into their national legislation[70]

In addition, the Grand Jury refers to the more recent document, Meld.St.9 (2009-2010).[71]

70. Ot.prp. p. 73.
71. See for example, para 3.2, p. 22 where Norwegian interest in aligning itself with EU developments although it is not a Member State is confirmed.

2.4. ECJ Case 2; Cessation

ECJ C-175/08 Aydin Salahadin Abdulla v Bundesrepublik Deutschland, C-176/08 Kamil Hasan v Bundesrepublik Deutschland, C-178/08 Ahmed Adem Hamrin Mosa Rashi v Bundesrepublik Deutschland, C-179/08 Dler Jamal v Bundesrepublik Deutschland, 2 March 2010

Four cases were joined in a main proceeding before the ECJ in regard to cessation of refugee status, regulated in QD article 11. Judgment from the ECJ was delivered on 2 March 2010.

The appellants, all Iraqi citizens, travelled to Germany between 1999-2002 and applied for asylum. All four were recognised as refugees and granted refugee status in 2001 and 2002, due to fear of percecution by Saddam Hussein´s regime, the Baath Party.

German law requires that authorities revoke a decision of granting refugee status as soon as the ”ceased circumstances” clause can be applied. The latest reform of

Germany’s Aliens and Refugee Act in 2004 introduced an obligation for the authorities to review refugee status in each individual case with a view of cessation, three years after the recognition decision had become final. [72]

Between November 2003 and May 2007, German authorities revoked refugee status of about 14,000 Iraqi refugees in Germany, due to the changed circumstances in Iraq. This practice changed in 2007 when German authorities began aknowledging that some groups would have a new well-founded fear of persecution if returned to Iraq.

Refugee status of the appellants of the here cited cases was revoked in Germany in 2005. However, in decisions delivered between July and October 2005, the competent administrative courts set aside the revocation decisions. Then the higher administrative courts having jurisdiction in the matter, by rulings delivered in March and August 2006, overturned the first-instance decisions and dismissed the actions for annulment. The appellants in the main proceedings lodged appeals on a point of law (‘Revision’) against the appellate rulings before the Bundesverwaltungsgericht (Federal Administrative Court), seeking confirmation of the decisions delivered at first instance. This Court decided to refer some questions to the ECJ for a preliminary ruling.

The questions posed by the German Federal Administrative Court to the ECJ, concern the criteria for cessation of refugee status under QD Article

72. UNHCR Statement on the Ceased Circumstances Clause page 9.

11(1)(e) as well as the applicable standard and burden of proof in this context.

The questions raised by the German court were as follows:

1. Is Article 11(1)(e) … to be interpreted as meaning that … refugee status ceases to exist if the refugee's well-founded fear of persecution within the terms of Article 2(c) …, on the basis of which refugee status was granted, no longer exists and he also has no other reason to fear persecution within the terms of Article 2(c) of Directive 2004/83?

2. If Question 1 is to be answered in the negative: does the cessation of refugee status under Article 11(1)(e) of Directive 2004/83 also require that, in the country of the refugee's nationality,

> (a) an actor of protection within the meaning of Article 7(1) of Directive 2004/83 be present, and is it sufficient in that regard if protection can be assured only with the help of multinational troops,
>
> (b) the refugee should not be threatened with serious harm, within the meaning of Article 15 of Directive 2004/83, which leads to the granting of subsidiary protection under Article 18 of that directive, and/or
>
> (c) the security situation be stable and the general living conditions ensure a minimum standard of living?

3. In a situation in which the previous circumstances, on the basis of which the person concerned was granted refugee status, have ceased to exist, are new, different circumstances founding persecution to be

> (a) measured against the standard of probability applied for recognising refugee status, or is another standard to be applied in favour of the person concerned, and/or
>
> (b) assessed having regard to the relaxation of the burden of proof under Article 4(4) of Directive 2004/83?'

Judgment by the ECJ

In order to answer the first two questions, the Court argues that a refugee has been granted refugee status because a country of origin has not been willing or able to protect him or her. Assessing whether the circumstances on which his/her fear of persecution was founded have ceased to exist, it is therefore of crucial importance to assess the country`s ability to ensure protection.

The Member State must therefore verify "that the actor or actors of protec-

tion of the third country in question have taken reasonable steps to prevent the persecution"[73] cf Article 7(2). The actors of protection referred to in Article 7(1)(b) of the Directive may comprise international organisations including protection ensured through the presence of a multinational force in the territory.

The Court then emphasized that the change of cirumstances must be of 'a significant and non-temporary'nature within the terms of Article 11(2) of the QD.

In regard to interpretation of the term "protection in the country" (QD art 11(1)(a), the Court states that the cessation of refugee status cannot be made conditional on a finding that a person does not qualify for subsidiary protection.

On the question of the standard of probability the court holds that "the standard of probability used to assess the risk is the same as that applied when refugee status was granted."[74]

Further, the Court states that QD article 4(4), relating to the evidential value, can be applied. Normally this would be the case only when the reason for persecution is different from that accepted at the time when refugee status was granted and only when there are earlier acts or threats of persecution which are connected with the reason for persecution being examined at that stage.[75]On those grounds, the Court (Grand Chamber) ruled that:

> 1. Article 11(1)(e) … must be interpreted as meaning that:
> – refugee status ceases to exist when, having regard to a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which justified the person's fear of persecution for one of the reasons referred to in Article 2(c) …, on the basis of which refugee status was granted, no longer exist and that person has no other reason to fear being 'persecuted' within the meaning of Article 2(c) …;
>
> – for the purposes of assessing a change of circumstances, the competent authorities of the Member State must verify, having regard to the refugee's individual situation, that the actor or actors of protection referred to in Article 7(1) of Directive 2004/83 have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status;
> – the actors of protection referred to in Article 7(1)(b) of Directive 2004/83 may comprise international organisations controlling the State or a substantial

73. CJEU C-175/08, C-176/08, C-178/08, C-179/08, 2 March 2010, paragraph 70
74. Ibid para. 84
75. Ibid para. 100

part of the territory of the State, including by means of the presence of a multinational force in that territory.

2. When the circumstances which resulted in the granting of refugee status have ceased to exist and the competent authorities of the Member State verify that there are no other circumstances which could justify a fear of persecution on the part of the person concerned either for the same reason as that initially at issue or for one of the other reasons set out in Article 2(c) of Directive 2004/83, the standard of probability used to assess the risk stemming from those other circumstances is the same as that applied when refugee status was granted.

3. In so far as it provides indications as to the scope of the evidential value to be attached to previous acts or threats of persecution, Article 4(4) of Directive 2004/83 may apply when the competent authorities plan to withdraw refugee status under Article 11(1)(e) of that directive and the person concerned, in order to demonstrate that there is still a well-founded fear of persecution, relies on circumstances other than those as a result of which he was recognised as being a refugee. However, that may normally be the case only when the reason for persecution is different from that accepted at the time when refugee status was granted and only when there are earlier acts or threats of persecution which are connected with the reason for persecution being examined at that stage.

In referring to QD art 4(4), of this particular ECJ judgment, the ECJ amplifies that as regards application of the cessation clause, previous inflicted persecution or serious harm should indeed count as facts and circumstances of the case. However, according to the ECJ, certain conditions prevail: firstly, in order to demonstrate that there is still a well-founded fear of persecution for the person concerned, these facts must rely on circumstances other than those as a result of which he was previously recognised as a refugee. Secondly, the facts now presented must be different from those which were presented at the time when refugee status was granted. And thirdly, the Court indicates that such facts may be invoked only "when there are earlier acts or threats of persecution which are connected with the reason for persecution being examined at that stage."

We consider that an example of such conditions as inciated by the Court could be, for example, an Iraqi refugee who had previously been persecuted by the Baath party and therefore granted refugee status in an asylum country. With changed circumstances in Iraq, a given country could consider making use of the cessation clauses of the GC/QD in his regard. However, the person may bring forward evidence of other reasons of potential persecution linked to gounds such as already having been subject to persecution or serious harm for being Christian, previous to the political persecution by the Baath party. The risk of persecution or serious harm would thus be new grounds which could

prevent application of the cessation clause provided they fall within the criteria of the GC/QD.

UNHCR and state practice

Stating their opinion on question 1, UNHCR underlines that the absence of a present risk of persecution is necessary, but not sufficient. According to UNHCR, the change in question must be significant and of a non-temporary character. UNHCR further underlines that effective protection must be available.

Contrary to the ECJ which is silent on this point, UNHCR argues that protection, in the sense of Article 11(1)(e), not only encompasses protection against persecution, but also respect for human rights, including the right to basic livelihood.[76]

UNHCR had previously[77] expressed serious concern about the inclusion of non-State actors and organizations as actors of protection under Article 7(1) of the QD, and it does not consider cessation appropriate in a situation where protection can only be provided by other actors, including multinational forces.

Acccording to UNHCR the burden of proof in cessation cases rests with the authorities of the Member State, cf QD article 14(2).

Elaborating on Article 1(c)(5) in the GC, UNHCR has stated that [w]hile the cessation clauses in paragraphs 1 to 4 of Article 1(C) are linked to a change in an individual's personal circumstances brought about by that person, Article 1(C)(5) relates to a fundamental change in the objective circumstances in connection with which the refugee has been recognized."[78]

Information about how other countries apply the cessation clauses was collected by Norwegian immigration authorities in April 2010.[79] The Netherlands, Belgium and Sweden state that the cessation clause is very rarely used in their countries.

Other countries like Germany, the UK and Switzerland use the clause more actively. Belgium, Germany, New Zealand, Switzerland, USA and the UK, all consider that Article 1(C)(5) can be applied also in cases where the cause for the individual´s fear **has been removed by his/hers voluntary action.**

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76. UNHCR 2008 Statement on the Ceased Circumstances Clause page page 14
77. Ibid page 16
78. Ibid page 6
79. HR-2010-01130-A(sak nr. 2010-259) avsagt 29. Juni 2010

2.5. Relation to Norwegian law and practice

Norwegian Immigration authorities do not apply the cessation clause in Article 5(1) of the GC on a regular basis. However, cessation is assessed in some cases which are being reviewed, often because the person concerned has committed a crime which could lead to expulsion.

One of the cases where the Immigration authorities have applied article 5(1)(C), has recently been assesed by the Supreme Court.[80] The case concerns a woman from Iran, who was granted refugee status in 2005 due to her sexual orientation as a Lesbian and her fear of persecution if returned to Iran.

The woman later married a man in Norway. Based on this information, the Norwegian Directorate of Immigration decided to revoke her refugee status in 2007. The former Norwegian Act on Immigration of 1988, (section 18 second paragraph) stated that a refugee status could be revoked when the refugee definition no longer applied. The former law, as indeed also the present law of 2010, referred to GC art.1(C-F).

The question assessed by the courts, in accordance with the law of 1988, has been whether Article 1(C)(5) could be applied in this case, and whether GC art 1(C)(5) could be applied when there were changes in individual circumstances, rather than substantial and durable changes in the refugee´s home country.

The Norwegian Court of Appeals (Lagmannsretten) argues, in its judgement, that even if the wording of article 1(C)(5) in isolation can be interpreted as had been done by the administrative authorities (the Immigration Appeals Board), namely that a change in personal circumstances could provoke an application of GC art 1(C)(5), the Court of Appeals states that this interpretation does not have support in any *travaux préparatoires* or practice from courts or the immigration authorities. On the contrary, these sources of interpretation refer to changes in the refugee's home country.

The Court of Appeals concludes that Article 1(C)(5) presupposes a change in the refugee's home country and decides that the decision from the Appeals Board should be annulled.

The case was later presented before the Supreme Court which gave its judgment on 29 June 2010.[81] Interpreting article 1C(5) of the GC, the Court applies common priciples of interpretation as stated in article 32 of the Vienna Convention on the Law of Treaties 1969. The Court argues that both the text and the purpose of the GC ssuggest that Article 1(C)5 should be interpreted to include not only changes in the home country, but also changes in personal circumstances. The Supreme Court claims that other sources of law do not

80. Dom fra Borgarting lagmannsrett 09-051140ASD-BOR/01 avsagt 01.12.2009
81. HR-2010-01130

oppose this interpretation. The interpretation to the case given by the Appeals Court was not upheld and its decision was annulled by the Supreme Court.

This case is rather unusual and legal doctrine suggests that reluctance be shown in the application of GC art 1(c)(5) if conditions in the home country have not radically changed.[82] What "radically changed" indicates is, according to UNHCRs, that changes are fundamental and durable and that effective protection must be available in the country of origin.[83] These conditions are not met in the referred case. Even if the personal circumstances have been fundamentally changed, there have been no changes in the person´s home country whereby effective protection in Iran is guaranteed.

2.6. ECJ Case 3; Exclusion

ECJ C –31/09 Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal, 17 June 2010

This case concerns the interpretation of QD article 12(1)(a). The provision applies to persons who fall within the scope of Article 1(D) of the GC, relating to protection or assistance from organs or agencies of the United Nations other than UNHCR.

An opinion from Advocate General Sharpston was delivered on 3 March 2010, and a judgment from the ECJ was delivered on 17 June 2010.

n 10 January 2007 Ms Bolbol, a stateless Palestinian, arrived from Gaza to Hungary on a visa together with her spouse. Upon arrival, she applied for and received a residence permit from the authority responsible for foreign nationals. On 21 June 2007 she applied to the Immigration and Citizenship Office (the BAH) for refugee status because, she did not want to return to the Gaza Strip, which she stated was unsafe on account of the conflict between Fatah and Hamas.

Ms Bolbol's application was made under the second paragraph of Article 1(D) of the GC, on the basis that she is a Palestinian residing outside the UNRWA zone.

While in Gaza, Ms Bolbol had not actually availed herself of UNRWA's protection or assistance. Her claim in Hungary for refugee status was, however, based on her entitlement to UNWRA protection. UNRWA had not expressly confirmed whether she would be entitled to be registered.

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82. Einarsen, Skaar, Vevstad, s. 106.
83. See, UNHCR Guidelines on International protection, 2003.

The application for refugee status was refused by BAH in its decision of 14 September 2007, but the applicant was placed under the protection of a non-*refoulement* order on the grounds that the readmission of Palestinians is at the discretion of the Israeli authorities, and that Ms Bolbol would be exposed to the risk of torture or inhuman and degrading treatment in the Gaza Strip on account of the conditions there.

The applicant challenged the decision rejecting her claim for refugee status before the Fővárosi Bíróság (Budapest Metropolitan Court), which stayed the proceedings and referred questions to the ECJ for a preliminary ruling. The posed were the following:

> 1. Must someone be regarded as a person receiving the protection and assistance of a United Nations agency merely by virtue of the fact he is entitled to assistance or protection or is it also necessary for him actually to avail himself of that protection or assistance?
>
> 2. Does cessation of the agency's protection or assistance mean residence outside the agency's area of operations, cessation of the agency and cessation of the possibility of receiving the agency's protection or assistance or, possibly, an objective obstacle such that the person entitled thereto is unable to avail himself of that protection or assistance?
>
> 3. Do the benefits of this directive mean recognition as a refugee, or either of the two forms of protection covered by the directive (recognition as a refugee and the grant of subsidiary protection), according to the choice made by the Member State, or, possibly, neither automatically but merely inclusion in the scope *ratione personae* of the directive?

Judgment by the ECJ

In the judgement delivered on 17 June 2010 the Court concludes that

> for the purpose of the first sentence of Article 12(1) (a) …, a person receives protection or assistance from an agency of the United Nations other than UNHCR, when that person has actually availed himself of that protection or assistance.[84]

The Court further notes that persons that have not actually availed themselves of protection or assistance, may, in any event have their application examined pursuant to QD article 2(c).

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84. CJEU C 31/09 date 17 June 2010, para. 53

The Court does not find it necessary to answer the other questions referred, since the appellant had not availed herself of UNRWAs protection or assistance. Concerning sufficient proof of when a person actually has been receiving assistance, the court states that while registration with UNRWA is sufficient proof, assistance can be provided even in the absence of such registration.

In her opinion from March 2010, the Advocate General on the other hand, elaborates more on the different questions raised by the Hungarian court. This is interesting in the context of the case brought before the Oslo Tingrett, (see below under 2.9.). It is also of interest to note as the Advocate General refers to practice in different states.

The Advocate General first analyses GC article 1(D) before giving an interpretation of QD article 12(1)(a). She assesses which limitation of place and time that should be interpreted in the wording of the article. Furthermore, she assesses whether the person must have been an actual or merely a potential beneficiary of assistance or protection, and, the meaning of "ceased" assistance or protection and the meaning of the term "benefits".

The Advocate General first states that the two sentences of 1(D) must be read in conjunction. The Advocate General agrees with UNHCR that a person only comes within the first sentence of Article 1(D) when residing in the UNRWA zone, but does not agree with an assumption of geografical limitation for the whole of article 1(D) as was indicated by the Belgian Government in its intervention in the case.

The Advocate General is of the opinion that it is necessary to operate with some limitation in time, and interpret the wording "at present receiving" in the first sentence of Article 1(D) as meaning, "…at any particular point in time, ´persons who are currently receiving protection or assistance from UN organs or agencies other than the UNHCR.´"[85] The United Kingdom, on the other hand, argues in itsr intervention, that the use of the words ´at present´ refers to 1951, an approach which the Advocate General refers to as "more rigid than the text will allow".[86]

In the Advocate General´s view, the first sentence of Article 1(D) covers only persons who have actually availed themselves of the protection or assistance of an organ or agency other than UNHCR. And this interpretation was confirmed by the ECJ in their judgment.

UNHCR, on the other hand, is of a different opinion. According to UNHCR, it is not a requirement of GC art 1(D) that the person has actually availed himself of this assistance or protection.[87]

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85. CJEU C-31/09 Opinion par. 70
86. Ibid para 65
87. UNHCR Revised Note on the Applicability of Article 1 D

The phrase ´when such protection or assistance har ceased for any reason´ has, according to the Advocate General, been interpreted in many different ways by Member States. The Advocate General argues for an individual assessment, and distinguishes between persons who have left the area of assistance voluntarily and persons who have left the area involuntarily.[88]

Finally, the Advocate General argues that an ipso facto entitlement in accordance with GC art 1(D)(2).must mean the automatic grant of refugee status, without further individual assessment. The result of this interpretation of Article 1(D) is as follows:

> (a) a displaced Palestinian who is not receiving UNRWA protection or assistance is not excluded *ratione personae* from the scope of the Convention: he is therefore to be treated like any other applicant for refugee status and to be assessed under Article 1A (avoidance of overlap between UNRWA and the UNHCR; application of the principle of universal protection);
>
> (b) a displaced Palestinian who is receiving protection or assistance from UNRWA is excluded *ratione personae* from the scope of the Convention whilst he is in receipt of that protection or assistance (avoidance of overlap between UNRWA and the UNHCR);
>
> (c) a displaced Palestinian who was receiving protection or assistance from UNRWA but who, for whatever reason, can no longer obtain protection or assistance from UNRWA ceases to be excluded *ratione personae* from the scope of the Convention (application of the principle of universal protection); however, whether he is then *ipso facto* entitled to the benefits of the Convention or not depends on why he can no longer obtain such protection or assistance;
>
> (d) if such a displaced Palestinian can no longer benefit from UNRWA protection or assistance as a result of external circumstances over which he had no control, he has an automatic right to refugee status (application of the principle of special treatment and consideration);
> (e) if such a displaced Palestinian can no longer benefit from UNRWA protection or assistance as a result of his own actions, he cannot claim automatic refugee status; however, he is (naturally) entitled to have an application for refugee status assessed on its merits under Article 1A (application of the principle of universal protection and fair treatment for all genuine refugees; proportionate interpretation of the extent of special treatment and consideration to be afforded to displaced Palestinians).

The Advocate General comments on the evidentiary issues; concerning receiving assistance and protection, and whether a person left the UNRWA zone voluntarily or involuntarily.

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88. CJEU C-31/09 Opinion 83, 84

Summing up, the ECJ rejects the argument that the mere fact that a person could receive protection or assistance from an agency of the United Nations other than UNHCR entitles him to refugee status under QD Article 12(1). It adds that formal registration with such an agency is not a requirement, but actual receipt of protection or assistance is. Other issues raised are not considered by the ECJ. The Advocate General had added that persons who may at some point have received such protection or assistance may not be entitled to automatic refugee status if they voluntarily gave up such protection or assistance. This assessment is based on her interpretation of the GC art 1(D).

UNHCR and State practice

In the context of the above mentioned case, UNHCR issued a revised statement on GC article 1(D) in October 2009.[89] At the same time it issued a "Revised Note" on the applicability of GC article 1(D)[90], replacing the note from 2002.

UNHCR defines the groups of Palestinian refugees falling within the scope of GC article 1(D), according to relevant UN General Assembly resolutions defining these groups. Included in these groups are not only persons displaced at the time of the 1948 and 1967 hostilities, but also the descendants of such persons.[91]

UNHCR considers that the persons falling within the scope of article 1(D) who are inside the area of operation of UNRWA are "at present receiving from organs or agencies of the UN other than UNHCR protection and assistance". The UNHCR does not require that the persons actually has availed themselves of this protection or assistance.

UNHCR therefore holds that a person within the UNRWA area will be excluded according to article 1(D) paragraph 1, while persons who have left the UNRWA area should ipso facto be entitled to the benefits of the GC, meaning recognized as a refugee.

Sweden

Information from the Swedish Country of Origin Service, Lifos, shows that Swedish authorities have practiced a more liberal interpretation of GC article

89. UNHCR Revised Statement on Article 1D of the 1951 Convention, October 2009
90. Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees, October 2009
91. UNHCR Revised Note on the Applicability of Article 1 D, para 4.

1 (D) than the interpretation indicatd by the ECJ. In a decision from the Swedish Appeals Board in 2004[92] the Board assesses a case where the applicant was born and grew up in Saudi Arabia. His father and grandfather were registered by the UNRWA.

The Swedish Appeals Board conclude that even if the applicant had never stayed in the UNRWA areas, he was a Palestinian refugee according to GA resolution 194 (III) and therefore entitled to registration by the UNRWA. His entitlement to registration, protection and assistance ceased when the applicant came to Sweden. The Appeals board therefore granted the person refugee status according to GC article 1(D) and in accordance with UNHCR guidelines.

This practice is confirmed in a legal note from the Head of the Legal Division in the Swedish Migration Board dated 1 April 2010.[93]

2.7. Relation to Norwegian law and practice

In connexion with work on the Immigration Act 2010, the law committe had originally suggested not to include provisions reflecting GC article 1(D) in the new Act as the provision would seldom be applied. The Ministry, on the other hand, was of a different opinion and included the reference to this provision of the GC in its proposal, an approach which was later adopted by Parliament. Section 31 of the Norwegian Immigration Act contains the exclusion clauses of the GC.

Existing Norwegian practice is described in the *travaux préparatoires* to the Immigration Act (ot.prp. nr 75 para 5.8). Since 2003 the Directorate of Immigration has been using article 1(D) second paragraph to grant refugee status to stateless Palestinians from the West Bank and Gaza Strip registrered by the UNRWA. According to the Directorate of Immigartion, protection by UNRWA has ceased to exist in these areas.

However, in 2009 the Directorate of Immigration changed its practice. Currently the Directorate assesses applications from persons from the West Bank and Gaza according to GC article 1(A) without applying the ipsu facto clause contained in GC art 1(D).

In a case decided in the Oslo Tingrett (lowest court) of 1 February 2010, the court assessed GC article 1(D). In the foregoing administrative preceeding (administrative appeal to the Appelas Board), the applicant had claimed that

92. Beslut Utlänningsnämnden, 2004-06-17, Doc. No. 11604
93. Rättschefens rättsliga ställningstagande angående situationen på Gazaremsan och frågan om uppehållstillstånd enligt 5 kap. 6 § utlänningslagen, Instruktion 2010-04-01

the Immigartion Appeals Board was wrong in not applying GC article 1 (D), and that he was entitled to refugee protection according to this provision.

The applicant was born in Gaza in 1977 but moved with his parents to the Emirates in 1979. He lived there until 1995 when he moved to Lithuania to study medicine. He returned to the Emirates in 2001, and in 2004 he arrived in Norway and applied for asylum. His claim was based on the facts that his residence permit in the Emirates had expired, and that he was not able to return to the Palestinian territories nor Egypt. He also referred to general problems he was facing as a stateless Palestinian in the Emirates. In the proceedings before the Oslo Tingrett, the applicant claimed that since he as Palestinian had been entitled to assistance from the UNRWA, and that this protection or assistance now had ceased, he was entitled to refugee status according to the GC article 1(D), second paragraph. Neither the Directorate of Immigration nor the Appeals Board made a clearcut assessment of article 1(D) in this case.

According to the explanation given in the court decision, the applicant is registered by UNRWA. The court refers to legal doctrine, Einarsen, a German court decision from 1991 and the revised note from UNHCR on cessation clauses from 2009.

The Court argues that protection must be regarded as ceased if the person is unable to return to the areas where he is entitled to protection or assistance. At the same time the court argues that a person does not fall under the exclusion clause in art 1(D), paragraph one if he has left the area voluntarily.

The court then assesses the wording ”entitled to the benefits of this convention,”[94] but bases its interpretation on the official Norwegian translation of the GC, not on the official texts of the Convention. The Norwegian translation is ”krav på å nyte godt av denne konvensjonens bestemmelser.” It is not clear why the Court chooses this way of interpretation, since the Immigration Act 2010 incorporates article 1(D) into Norwegian law, cf. Article 31, paragraph one.

According to the Court, the Norwegian wording means an assessment of the criteria in GC article 1(A). The Court has noted the interpretation given by UNHCR, that these persons should be given refugee status without a further individual assessment of their case, but the Court concludes that the UNHCRs statement is not binding for the UN Member States and that this interpretation is only followed by a few countries.

The court concludes that protection and assistance have ceased if a person is unable to return to the area where he is entiled to these services. But, a person leaving the areas of protection and assistance voluntarily does not fall within GC art 1(D), first paragraph.

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94. In Norwegian: ”krav på å nyte godt av denne konvensjonens bestemmelser”, p. 9.

The court therefore states that a Palestinian who has lost protection from UNRWA by leaving the area, is only entitled to refugee protection in other countries if they fall under the general provisions in the GC article 1(A).[95]

These arguments are so far well in line with the opinion of the General Advocate.

But if the GC article 1(D) second paragraph is to be considered, as the court does, the Advocate General of the ECJ concludes, like UNHCR, that the words ”entitled to benefits of this convention” means the automatic grant of refugee protection. On this point the Oslo Court differs from the ECJ and the UNHCR.

2.8. ECJ Case 4; Exclusion

ECJ C 57/09 B. t. Duitsland (hereafter referred to “case B”) and C 101/09 D. t. Duitsland (hereafter referred to as “case D”), Opinion from the General Advocate, 1 June 2010.

This case concerns the interpretation of QD articles 12(2)(b) and (c) on which grounds Member States can exclude a person from being recognised as a refugee.

General Advocate Paolo Mengozzi gave his opinion concerning these questions on both cases in conjunction on 1 June 2010 which will be referred to in the following. The ECJ has not yet given judgment (mid-October 2010).

In the case, two Turkish citizens applied for asylum in Germany in 2001 and 2002. Both of them had participated in armed battle in Turkey, one in Dev Sol (DHKP/C), case B. and the other in PKK, case D.

Both of these organisations are on the list of individuals, groups and entities involved in terrorism, according to Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism.

In case B, the applicant applied for asylum in Germany in 2002. As a Kurdish student in Turkey he had sympathies with the organisation Dev Sol (now DHKP/C). From 1993-1995 he participated in armed battle. He was imprisoned in Turkey and when he was temporarily released in 2002, he left the country to seek asylum in Germany.

The application was refused in 2004 because the applicant was excluded from refugee status. German authorities considered at the same time that he could be expelled to Turkey. Both the Verwaltungsgericht in Gelsenkirchen (in 2004) and the Oberverwaltungsgericht für das Land Nordrhein-Westfalen

95. Oslo Tingrett, 09-030719TVI-OTIR/08, Side 10

(2007), however, were of the opinion that the applicant should be recognised as a refugee. The Bundesamt then made an appeal to the Bundesverwaltungsgericht.

In the second case, case D, the applicant applied for asylum in Germany in 2001 claiming that he, at the end of the 1980s, had been tortured because of his sympathies with the Kurdish right to self-determination. In 1990 he joined the PKK, participated in guerilla activities and was a high ranking officer in the party. He left the PKK in 2000 because of political differences of opinion.

According to the law at that time, the applicant was recognised as a refugee. The new law on terrorism in Germany entered into force in 2002 and the Federal Police instigated an investigation procedure in order to assess whether the refugee status should be revoked. In May 2002 the refugee status was indeed revoked.

UNHCR gave its opinion on the interpretation of the exclusion clauses in a statement dated July 2009. In this statement they also explained some parts of the German system, which is of relevance in order to understand the questions referred to the ECJ in these cases.

UNHCR states:

> Germany introduced provisions on exclusion from refugee status with the Law on Fighting Terrorism in 2002. Since then, these provisions have been applied in practice not only in refugee status determination procedures, but also as a reason for revocation of decisions granting refugee status. …
>
> Three aspects, in particular, need to be explained in order to understand German practice on exclusion and the line of reasoning used by authorities and courts. One concerns the merging of grounds for exclusion from refugee protection with exceptions to the *non- refoulement* principle. The second aspect pertains to a practice in some cases of excluding aliens from refugee status for reasons of minor crimes, if committed by members of terrorist organizations. Finally, there are divergent opinions on whether a continuing danger emanating from the applicant is a condition for exclusion; the positive answer by most of the courts, inter alia, is based on the equation of exclusion with the exceptions to the *non-refoulement* principle in German law.
>
> This suggests that in the view of the administrative authorities, the German equivalent of the exclusion clauses of Article 12 (2)(c) of the QD and Article 1(F)(c) of the 1951 Convention may be triggered by any form of membership in or support of a terrorist organization. In such cases, it would appear that the seriousness of the alleged act, as well as the degree of individual responsibil-

> ity, have not been considered by the administrative authorities to the extent that UNHCR considers necessary to apply Article 1 F(c).[96]

The UNHCR refer to that the practices of the administrative courts have not been uniform concerning this question.

The questions refered to the ECJ from the Bundesverwaltungsgericht (Federal Administrative Court), were as follows:

1. Does it constitute a serious non-political crime or an act contrary to the purposes and principles of the United Nations within the meaning of Article 12(2)(b) and (c) … if the appellant was a member of an organisation which is included in the list of persons, groups and entities (1) annexed to the Council Common Position on the application of specific measures to combat terrorism and employs terrorist methods, and the appellant has actively supported that organisation's armed struggle?
2. If Question 1 is to be answered in the affirmative: does exclusion from recognition as a refugee under Article 12(2)(b) and (c) … require that the appellant continue to constitute a danger?

3. If Question 2 is to be answered in the negative: does exclusion from recognition as a refugee under Article 12(2)(b) and (c) … require that a proportionality test be undertaken in relation to the individual case?
4. If Question 3 is to be answered in the affirmative:
a) Is it to be taken into account in considering proportionality that the appellant enjoys protection against deportation under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 or under national rules
b) Is exclusion disproportionate only in exceptional cases having particular characteristics?

5. Is it compatible with the directive, for the purposes of Article 3 of Directive 2004/83/EC, if the appellant has a right to asylum under national constitutional law even if one of the exclusion criteria laid down in Article 12(2) of the directive is satisfied?

Opinion from the General Advocate

Concerning question 1, the General Advocate agrees with UNHCR that it is not sufficient to be on the list in annex to the Council Common Position on

96. UNHCR Statement on Article 1F of the 1951 Convention chapter 3.

the application of specific measures to combat terrorism. There should be a three step approach in order to conclude whether or not a person should be excluded. Member States should first assess the organisation or the group in question and which activities this organisation or group had during the period the applicant was assosiated. Secondly, the Member States have to assess the personal responsibility according to QD article 12(2). Thirdly, when a personal responsibility has been established, Member States should decide if the acts commited actually do fall under the QD articles 12(2) (b) and 12 (2)(c).

Since the provisions in the QD provide minimum standards, and since it is the Member States which have knowledge of the actual cases, it should up to the national Member States to apply the criteria and carry out assessments in the individual case, and not the ECJ.

The second question is whether the existence of a continued danger is required. According to both applicants, case B and case D, such a requirement exists, whereas the German Bundesverwaltungsgericht (Federal Administrative Court, the Commission and all intervening parties hold the opposite opinion, that there is no such requirement.

The General Advocate states in his opinion that he agrees with the latter, meaning that there is no requirement that the person still poses a danger.

Question four concerns a proportionality test. The General Advocate argues that there should be a proportionality test where the consequenses of excluding a person must be weighed against the seriousness of acts committed. He emphasizes that the proportionality test is central for the protection of human rights and that it is important in order to have a certain degree of flexibility applying international law. In this respect, it is important for states to assess whether the applicant will have an effective protection against refoulement. If the applicant will be granted protection according to international or national law in a Member State, the person shall not necessarily be granted refugee status. If refugee status is the only type of protection that will ensure protection againt refoulment, the General Advocate is of the opinion that the Member States should not be prohibited to grant such status. The General Advocate further argues that the Member States should secure an application of QD articles 12(2)(b) and (c) in proportionality with the purpose of the provisions and the humanitarian character of refugee law. The General Advocate suggests that the ECJ answer questions 3 and 4 with these recommendations in mind.

UNHCR on the other hand, consents to a proportionality test regarding GC art 1(F)(b), but not regarding art 1(F)(c), because of the serious character of the actions referred to in this provision.[97]

97. Ibid para 91

Finally the General Advocate states that the Member States can grant a person, who is excluded, protection, as long as this form of protection cannot be confused with refugee protection in accordance with the QD.

UNHCR and State practice:

UNHCR produced a statement on the application of GC art 1(F) in the context of the above mentioned reference for a preliminary ruling in July 2009. In this statement it gave its interpretation of the relevant provisions in the GC together with an opinion on the spesific questions raised by the German court.

First of all, UNHCR underlines that Member States must examine each case on its own merit and take into consideration all relevant facts. Exclusion is only justified if the person concerned can be held individually responsible. ”A high standard of proof applies to the establishment of individual responsibility, requiring ”serious reasons for considering” that the person ”has committed” or ”has been guilty” of the relevant excluding acts under article 12(2)QD.[98] UNHCR refers to a number of member States, including Poland, the Netherlands and Sweden, where the standard of proof required for exclusion, corresponds to those laid down for prosecution under international criminal law instruments. Further, UNHCR refers to that in assessing individual responsibility based on due process standards, decision makers must also examine any valid defences (e.g. that he or she was forced to participate in the commission of a crime under duress or self-defence).[99]

Furthermore, UNHCR argues that membership of ”terrorist” organizations or groups should not automatically lead to making use of the exclusion clauses. However, it is recognized that it could trigger consideration of such application.[100]

When assessing a person’s involvement in armed combat of a terrorist organization, (cf. GC article 1(F)(c)), UNHCR argues that the individual acts in question must be assessed for their impact on and relevance to international peace. UNHCR states:

> Regarding membership in a terrorist organization, it is necessary to determine whether the activities of the organization reach the threshold required for the application of Article 1(F)(c), namely whether their gravity and impact on the international plane are such that they impinge on the maintenance of international peace and security; or peaceful relations between States; or constitute

98. UNHCR Statement 1 F page 25
99. Ibid, page 25-26
100. Ibid, page 24

> serious and sustained violations of human rights which would come within the scope of Article 1(F)(c) of the 1951 Convention.[101]

If the organization's acts are found to meet the threshold required for the application of Article 1(F)(c), UNHCR emphasizes that an individual assessment in each case nevertheless should be undertaken to determine whether the person is individually responsible for those acts.

The question of whether or not article 1(F)(c) may extend beyond States and those acting in a State capacity, is interpreted differently in different Member States. Some Member States have limited the application of GC article 1(F)(c) to persons exercising a leadership role or holding a position of authority within a State.[102] In the UK, by contrast, the asylum authorities and courts have concluded in a number of cases that a person who is not acting on behalf of a State can commit an act contrary to the purposes and principles of the United Nations, and that Article 1(F)(c) can apply.[103] According to UNHCR, prevalent Member State practice accords particular weight to the "individual responsibility" requirement, holding that mere membership in a terrorist organization is not enough to bring the person concerned within the exclusion clauses.[104]

Concerning question no. 2, UNHCR states that it is not a requirement that the person continues to pose a danger.

To question no. 3, UNHCR confirms that a proportionality test should be applied because it is an important safeguard. The proportionality test must involve, inter alia, determining the degree and likelihood of persecution feared, and measuring this against the seriousness of the acts committed.

In UNHCR's view, the proportionality test should be used even if other guarantees, under human rights instruments or other regional or national mechanisms exist and can be applied.

To question no. 4, the General Advocate, and to a certain extent UNHCR, agree that a proportionality test should include considerations of protection under Article 3 ECHR or national provisions against return. There are differences in how Member States make this assessment in practice.[105]

And, finally, as regards question no. 5, whether it is compatible with the Directive to grant a person asylum even if one of the exclusion criteria laid down in article 12(2) is satisfied, UNHCR deems that it would be in breach of international law. It should be noted, that according to the Opinion stated by

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101. Ibid, page 27
102. Belgium, Czech Republic,Slovak Republic, Spain and Sweden, ibid, page 29
103. Ibid, page 29-30
104. Ibid, page 29
105. Ibid, page 34

the General Advocate other forms of protection may be granted, in accordance with the QD, provided this is not confused with refugee protection.

Sweden

In a Legal Note dated 7 April 2010 the Head of the legal division (Rättschefen) in the Swedish Migration Board gives guidelines on exclusion and the assessment of individual responsibility.[106] The legal guideline is based on two decisions from the Migrationsöverdomstol.

First of all, the Head of the Legal Division concludes that the standard of proof should be equal to the standard applied in Swedish criminal law. This means that there should be "skälig misstanke" "reasonable suspicion" to believe that the person has committed actions referred to in the GC article 1F.

Based on UNHCR guidelines and how international tribunals have defined the standard of proof, the Swedish authorities conclude that the standard of proof should not be higher than the standard of proof applied according to Swedish criminal law which means "reasonable grounds to believe".

A detailed credibility assessment will therefore be of basic importance in order to assess exclusion cases.

Second, Membership in an organisation which is on the list contained in the annex to Council Common Position 2006/380/CFSP (of 29 May 2006 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2006/231/CFSP) will in itself be a reason to exclude. Other cases must be assessed individually.

This is not in line with UNHCRs Statement on GC art1(F) application issued in the context of the above mentioned preliminary ruling in the ECJ dated July 2009. An interesting part is that Sweden intervened in the ECJ case and seemed to have a different opinion on this issue there. According to the home page of the Swedish goverment, the official statement from Sweden in the above mentioned case is that a person's membership in an organisation on the list and his or her active involvement, would not automaticly lead to exclusion.[107]

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106. Rättschefens rättsliga ställningstagande angående beviskravet för exklusion och individuellt ansvar, Instruktion 2010-04-07, RCI 06/2010

107. http://www.sweden.gov.se/sb/d/11521/a/130703

2.9. Relation to Norwegian law and practice

According to Norwegian law, Section 31 of the Immigration Act covers the issue. According to Section 31, first paragraph, persons falling within the scope of the GC art 1(D) or (F), are not to be regarded as refugees. This includes more persons from refugee status in Norway than those covered by the GC art 1(A) as the Norwegian law accords refugee status to other persons in need of international protection as well (cf. Art 28, first paragraph, litra a and b).

Thus, the possibility to exclude is widened towards those who are covered by Section 28, first paragraph, litra b; persons for whom expulsion grounds may exist for reasons of fundamental national interests or because the person has received a sentence for having commited a particularly serious crime and for this reason poses a threat to the Norwegian society. The same applies (according to Section 28, third paragraph) if the person has left his or her home country in order to escape a penal reaction which could have given ground for imprisonment also in Norway.

By application of Section 31, a person who would otherwise qualify as a refugee in accordance with Section 28, will nevertheless not be granted refugee status. But, although protection against refoulement in accordance with the GC art 33 may not be applicable, the Immigration Act demands that the non-refouleent provision (Section 73) be assessed and if he or she is in need of protection, such may be granted in accordance with Section 74 of the Act.

As regards GC art 1(D) in particular, Norwegian practice is to normally accord refugee status in accordance with the Immigration Act Section 28 if asylum is sought in Norway. It is unclear whether one considers UNRWA's protection as having ceased altogether or if it ceases because the person is now on Norwegian territory.[108]

As far as exclusion in accordance with GC art 1(F) is concerned, it follows from the wording of Section 28 first paragraph that the exclusion clause of GC art 1(F) applies in the Norwegian context as well. The wording from the GC has been incorporated in its entirety into Section 28. Previously, Norway did not make much use of the exclusion clauses. This has changed over the last decade due to the fight against terrorism and the development of international penal law.[109] Still, there is unclarity on the matter. An internal administrative guide to the handling of such cases is in the making within the Directorate of Immigration.

However, according to the Immigration Act (Section 31) and practice, a basic condition for making use of exclusion is that the person concerned

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108. Einarsen, in Vevstad (ed.) Kommentarutgave, p. 250.
109. Ibid, p. 251.

"guilty",[110] in contrast to future possible actions. What the law refers to must have already happened.[111]

As regards burden of proof, the law (Section 31) contains the wording "serious reason to believe."[112] According to legal doctrine, Einarsen, this seems to be in direct translation to the wording of the GC art 1(F) which uses the term "serious reason for considering".[113] Much indication is not given in the *travaux préparatoires*, but there is no condition of a sentence having been passed and there is no condition of the authorities having to prove anything beyond [114] "reasonable doubt" as in a penal case. This point is referred to in the *travaux préparatoires* as [115] being the same as in civil procedural law, that the standard of proof is that of "preponderance of evidence."[116]

The burden of proof rests with the authorities which contemplate exclusion. But the alien in question is under the same obligation as otherwise, to furnish sufficient information on his or her case.

One condition for exclusion is identification of guilt. Einarsen refers to the International Criminal Court and that doings which may cause exclusion must have been committed purposely and with the ability of guilt.[117] In Norway, the minimum age for responsibility for criminal acts is 15. UNHCR advices that the age 18 may be an appropriate standard for the assessment of excluding child soldiers from refugee status.

A person is responsible if he or she has committed a criminal act or contributed to such an act. One could also be held responsible for attempting to commit a crime referred to in the exclusion clauses cf. the Immigration Act Section 31 first paragraph. Collecting financial contributions may also be seen as a "contribution". A military leader is held responsible for the subordinates even if he or she has not been directly involved. A leader could have prevented someone from commiting the crimes in question.[118] And furthermore, membership in a socalled "joint criminal enterprise" may also cause responsibility, for example when such an organization is on a, for example UN or EU terrorist list. Einarsen indicates that it is sometimes very difficult to define what "membership" is. Sometimes entire villages are involved and family structures are linked to various groupings. There seems to be a standard requirement that the person involved, however, must have knowledge of the

110. Norwegian: "har gjort seg skyldig I".
111. Einarsen in Vevstad (ed) Kommentarutgave, p. 253.
112. Norwegian: "alvorlig grunn til å anta".
113. Eiarsen in Vevstad (ed), Kommentarutgave, p. 254.
114. Ibid.
115. Ot.prp. p. 112.
116. The equivalent from penal law notably being "beyond resonsable doubt".
117. Einarsen, in Vevstad (ed), Kommentarutgave, pp. 256-257. According to the Statute of the ICC, the condition is that a doing has been commited with "intent and knowledge."
118. Ibid.

criminal actions carried out by the group in order to be held individually responsible. [119] Knowledge of the organisation's criminal objective and actions is a requirement. Mere knowledge of some singled out events may not be sufficient for incrimination or exclusion.[120] This is in line with UNHCRs advice referred to above, but seemingly in contradiction to Swedish understanding of where to draw the responsibility line.

119. Einarsen, Skaar, Vevstad, p. 79.
120. Einarsen in Vevstad (ed), Kommentarutgave, p. 257-

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The Procedures Directive

Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereafter referred to as PD), was adopted by the Council on 1 December 2005. The Directive applies to all Member States except Denmark. The transposition was set to be completed by 1 December 2007.[121]

The legal basis for the PD is Article 63(1)(d) in the Treaty establishing the European Community (TEC). Norway is not part of the PD.

3.1. Objective, important provisions and legal issues

The PD aims at harmonizing asylum procedures of first instance. Subject to a number of significant exceptions, the Directive guarantees i.a. the opportunity of a personal interview for asylum applicants, the right to receive information and to communicate with UNHCR, the right to a lawyer, and the right to appeal. The Directive contains provisions concerning Member States' duty to meet special needs of unaccompanied children and to have a gender sensitive approach. The Directive also provides for the notion of the safe third country, safe country of origin and European safe third country.

Many provisions of the Directive open for a wide margin of discretion for Member states and extensive exceptions. At the time of the adoption of the Directive, UNHCR expressed concern that some of the provisions in the Directive may lead to breaches of international refugee law if implemented at the level permitted by the Directive´s minimum standards. UNHCR published in 2010 a comparative analysis of asylum procedure law and practice undertaken in 12 EU Member States. In the report, UNHCR concludes that the Directive

121. Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (PD) Article 15 by 1 December 2008.

> has not achieved the harmonization of legal standards or practice across the EU. This is partially due to the wide scope of many provisions, which explicitly permit divergent practice, exceptions and derogations. It is also due, however, to differing interpretations of many articles and different approaches to their application[122].

During the negotiations on the Directive in 2005, European Parliament was only consulted as adoption was not subject to co-decision. In the end the Council adopted standards which were lower than those proposed by the Commission and supported by the European Parliament.

When the Directive was adopted on 1 December 2005, it contained provisions allowing the Council to adopt and amend lists of 'safe third countries' and 'European safe countries' after a mere consultation of the Parliament.

In the first case regarding the PD in 2006, the European Parliament asked the ECJ to annull the provisions in the PD allowing the Council to adopt and amend lists of 'safe third countries' and 'European safe countries', cf PD article 29(1) and (2) and article 36(3), after mere consultation of the Parliament. The main argument was that TEC does not provide the Council with this type of legislative powers.

The second case, recently brought before the ECJ, deals with the interpretation of Article 39 on the right to effective remedy and is the first preliminary ruling referral regarding the interpretation of the PD.

3.2. ECJ Case 5; Institutional competence

ECJ C-133/06 European Parliament v. Council of the European Union, 6 May 2008

When the PD was adopted on 1 December 2005, the Directive contained provisions allowing the Council to adopt and amend lists of 'safe third countries' and 'European safe countries' after consultation of the Parliament.

The question raised in this case was whether or not the Council could adopt and amend these lists merely by consulting the EP, or whether the list should have been adopted according to a co-decision procedure.

The European Parliament which brought this case before the ECJ, wanted primarily, the annulment of Articles 29(1) and (2) and 36(3) of the PD, alternatively, the annulment of the Directive in its entirety.[123]

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122. UNHCR: Implementation of the Asylum Procedures Directive March 2009
123. CJEU C-133/06 para 1

With the Treaty of Nice (2003), the procedure of co-decision was extended to new important areas where Parliament previously only had a right of consultation, among these, in regard to the asylum provisions in article 63. The procedure was laid down in article 251 in the treaty.

The transition period between the two types of decision procedures used in asylum matters is regulated in Article 67, which states that the procedure of co-decision would only enter into force after the Council has adopted Community legislation defining the common rules and basic principles governing these issues, measures provided for in Article 63(1) and 63(2)(a).

The question raised in this case is whether the adoption of a third country list was part of the ”legislation defining the common rules and basic principles” referred to in Article 67(5), or should be regarded as new measures which should have been adopted in accordance with the co-decision procedure.[124]

Article 67

1. During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.

2. After this period of five years:

- the Council shall act on proposals from the Commission; the Commission shall examine any request made by a Member State that it submit a proposal to the Council,

- the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas cov-

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124. The first indent of Article 67(5) EC provides that the Council is to adopt the measures provided for in Article 63(1) and (2)(a) EC in accordance with the co-decision procedure referred to in Article 251 EC provided that it has adopted ‘Community legislation defining the common rules and basic principles governing these issues’, that is to say governing the asylum policy provided for by Article 63(1) EC and some of the measures on refugees and displaced persons, those referred to in Article 63 2(a) (EC). The question raised in this case is whether the definition of the common rules and basic principles was completed by the adoption of the contested directive, with the result that the co-decision procedure henceforth applies in respect of the adoption of any subsequent measure on those matters, in particular in respect of the establishment of the lists of safe countries.

ered by this title to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the powers of the Court of Justice.

…

5. By derogation from paragraph 1, the Council shall adopt, in accordance with the procedure referred to in Article 251:

- the measures provided for in Article 63(1) and (2)(a) provided that the Council has previously adopted, in accordance with paragraph 1 of this article, Community legislation defining the common rules and basic principles governing these issues,
- the measures provided for in Article 65 with the exception of aspects relating to family law.

The EP argued that the PD constituted the final stage of the necessary legislation required by Article 67(5) TEC for the transition to co-decision; and that the basic legal framework in respect of Article 63(1) and 2(a) TEC was completed, given the legislative measures already adopted. The list of "safe third countries" was considered by the EP as a new measure which should be adopted according to co-decision procedure.

The contested provisions of the PD would therefore, according to the EP have to be annulled, since they authorised the Council, acting by a qualified majority on a proposal from the Commission and after consultation of the EP, to adopt and to amend lists of safe third countries.[125]

By this action, the EP essentially alleges that the Council, by means of the contested provisions in the PD, created a secondary legal base which enables it to adopt and amend the lists of safe countries according to a procedure which derogates from that of the first indent of Article 67(5) TEC, which, subject to conditions, provides for co-decision.

In the Opinion rendered by the Advocate General, he concluded that recourse to secondary legal bases is precluded by the principle, laid down by article 7 TEC, that the institutions must act within the limits of their powers; '[e]ach institution shall act within the limits of the powers conferred upon it by this Treaty'.[126] It is the basic Treaties that lay down the procedures culminating in the adoption of legislative measures. An institution cannot therefore

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125. A minimum common list of third countries which are to be regarded by Member States as safe countries of origin, which is the object of PD article 29(1) and (2) and a common list of European safe third countries, which is the object of PD article 36(3) ('the lists of safe countries').
Those lists of safe countries are to be adopted by applying the criteria for the designation of safe third countries set out in Annex II to that Directive and the criteria for the designation of European safe countries set out in Article 36(2) of the Directive.

126. CJEU C-133/06 Opinion para 38

itself freely decide upon the way in which it exercises its powers and amend, with a view to the adoption of an act, the procedure laid down for that purpose by the Treaty.

Only the Treaty may, if necessary, empower the Council to amend the decision-making process, as illustrated by bridging clauses such as the second indent of Article 67(2) TEC or the second subparagraph of Article 175(2) TEC. In other words, it follows from the principle that the institutions must act within the limits of their powers and that certain powers are not available to them.

The ECJ consequently concluded that

> by that legislative act, the Council adopted 'Community legislation defining the common rules and basic principles' within the meaning of the first indent of Article 67(5) EC, and therefore the co-decision procedure is applicable.

The ECJ therefore annulled articles 29 (1), 29 (2) (minimum common list of third countries regarded as safe countries of origin) and 36 (3)(the European safe third country concept) of the PD in its judgment of 6 May 2008 and confirmed that the EP should be granted co-legislative powers.

A co-decision procedure, giving more power to the Parliament, allows for a better political contro. On the other hand, the co-decision procedure has shown that is it difficult to get Member States to agree which countries should be on the list. The result so far is, that no common list of 'safe countries of origin' has been adopted. Instead, different lists still exist at national level, generating differences in the treatment of asylum applications.[127]

In the context of asylum application procedures, the use of 'safe countries' lists determines the way in which national authorities will deal with an application and the extent of the procedural guarantees provided to the applicant under the Directive. In a large majority of cases, asylum applications from countries defined as "safe third countries", are considered inadmissible in accordance with the PD and no examination is carried out.

Making use of 'safe third country' concepts is of great political significance having as a consequence, that persons in need of international protection are impeded from having their asylum applications examined. This may be in violation of refugee law and human rights obligations by which all EU Member states are bound.

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127. UNHCR March 2010, pages 65-72

3.3. Relation to Norwegian law and practice

Norway is not bound by the PD and the term "safe third country" is neither used directly in the legal framework nor in practice, although it could be interpreted as a prerequisite for application of the Immigration Act Secion 32 paragraph one, litra a. Applications for asylum from nationals of countries from where asylum claims are assumed to be manifestly unfounded are placed under a 48-hour procedure. This means that applications are processed by the Norwegian Directorate of Immigration within 48-hours from registration. Unaccompanied minors are not subject to this procedure.

The Norwegian Directorate of Immigration has a list of countries where this procedure applies. The Directorate point out, however, that these are not lists of “safe” and “less safe” countries. The 48-hour procedure list consists of countries where the Directorate has sufficient information about the general security and human rights situation to assume that citizens from these countries, on a general basis, are not in need of international protection, neither under the GC nor under other international or national obligations prohibiting refoulement. All applications from these countries are examined individually on the merit of the claims. Applications not assumed to be manifestly unfounded will be assessed and removed from the 48-hour procedure. The fact that a country of origin appears on the list does not preclude any application for asylum from that country from being granted. Furthermore, the list of countries is not fixed. The Directorate is constantly monitoring the situation in the relevant countries, and a country may be removed from the list if relevant information calls for it.

3.4. ECJ Case 6; Effective remedy (pending)

ECJ C – 69/10 Brahim Samba Diouf v Ministre du Travail, de l´Emploi et de l´Immigration. Reference for a preliminary ruling from the Tribunal administratif du Grande-Duché de Luxembourg 3 chambre lodged on 5. February 2010

This case concerns interpretation of PD article 39 and the right to effective remedy. This is the first time after the Treaty of Lisbon entered into force, that a lower court has used its right to request a preliminary ruling by the ECJ.

A citizen from Mauretania applied for asylum in Luxembourg in August 2009. In an interview with government officials he stated that he had been working for a friend of his father since 1991, but that his situation was more like a slave. In order to get a better life, to be free and to build a family, he

stole money from his employer and left for Europe. The applicant had presented a false passport.

The government in Luxembourg decided to assess the case under an accelerated procedure under Article 20 of the amended law of 5 May 2006. According to Article 20, the Minister may decide the merits of the application for international protection under an accelerated procedure if, among other reasons, it is clear that the applicant does not meet the requirements to qualify for international protection and if the applicant has misled the authorities by presenting false information or false documents. The asylum application was rejected.

The applicant appealed the case, arguing that the fact that he could not appeal a decision to process the case under an accelerated procedure was contrary to article 6 and 13 of the ECHR and art 39 PD.

On these grounds the Luxembourg Administrative Tribunal referred the following questions for preliminary ruling to the ECJ.

1. Is Article 39 of Directive 2005/85/EC (1) to be interpreted as precluding national rules such as those established in the Grand Duchy of Luxembourg by Article 20(5) of the Amended Law of 5 May 2006 on the right of asylum and complementary forms of protection, pursuant to which an applicant for asylum does not have a right to appeal to a court against the administrative authority's decision to rule on the merits of the application for inter national protection under the accelerated procedure?

2. If the answer is in the negative, is the general principle of an effective remedy under Community law, prompted by Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, to be interpreted as precluding national rules such as those established in the Grand Duchy of Luxembourg by Article 20(5) of the Amended Law of 5 May 2006 on the right of asylum and complementary forms of protection, pursuant to which an applicant for asylum does not have a right to appeal to a court against the administrative authority's decision to rule on the merits of the application for international protection under the accelerated procedure?

In sum, the referring court asks whether the right to effective remedy in accordance with art 39 PD precludes denial of the right to appeal when an application for international protection is channeled into an accelerated procedure.

Judgment by the ECJ:

The court has not yet (by mid-October 2010), issued an opinion or delivered a decision in this case.

UNHCR and state practice

On 21 May 2010, UNHCR issued a statement concerning the above mentioned case referred to the ECJ. UNHCR concludes that national legislation, providing no remedy against a decision to channel asylum claims into accelerated procedures, may be consistent with PD article 39 and ECHR articles 6 and 13.

However, this understanding is dependent on the existence of a remedy (possibility of appealing) against the final decision, and provided that the accelerated procedures afford the applicant with access to all procedural safeguards essential for the enjoyment of the right to an effective remedy.[128] UNHCR emphasised that the "need to process asylum applications in a rapid and efficient manner cannot prevail over the effective exercise of the prohibition of refoulement."[129]

UNHCR further states that an effective remedy under the PD should have the same features as those required under the ECHR, since the ECtHR jurisprudence will be binding on all EU Member States. An effective remedy should, according to UNHCR, include a full review of both facts and law based on updated information by a court or tribunal, and the possibility to request suspensive effect during appeal. If not, the remedy against the final decision will not be effective.

In addition, an accelerated procedure should always entail respect for certain minimum safeguards, both in law and in practice. It is possible that failure to respect minimum safeguards as those foreseen in chapter II of the PD may effectively prevent applicants from exercising a substantive right such as the right to asylum under Article 18 of the Charter of Fundamental Rights of the European Union and the right to international protection under the GC and other relevant treaties.[130]

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128. These rights include the right to information, legal assistance, translation, reasonable time limits and the possibility to request suspensive effect during appeal

129. ECRE Newsletter 28 May

130. UN High Commissioner for Refugees, UNHCR Statement on the right to an effective remedy in relation to accelerated asylum procedures, 21 May 2010, para 52

3.5. Relation to Norwegian law and practice

In 2010, UNHCR published a study on the implementation of the PD, where it concludes that law and practice on the prioritization and acceleration of examinations in the 12 Member States it studied were disparate and difficult to compare. Since there is no definition in the PD of what constitutes an "accelerated examination," the term "accelerated procedure" is used as a label on procedures conducted within a shorter time than other asylum procedure(s). According to UNHCRs research, "accelerated procedures" applied are so diverse in form and duration that "the term becomes ambiguous and unhelpful". [131] Norwegian practice was not part of the study. According to established practice, a decision to examine an asylum request under accelerated procedure in Norway is not regarded as an administrative decision against which an applicant may appeal. However, the right to appeal prevails when a decision has been taken on the merits of the case (Act on Immigration Section 76).

131. Ibid, para 36.

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The Reception Conditions Directive

Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers (hereafter referred to as the RCD), was adopted by the Council on 27 January 2003. The directive applies to all Member States except Denmark. The transposition was set to be completed by 6 February 2005. The RCD is not binding on Norway.

The legal basis for the RCD is TEC article 63(1)(b). The RCD has not been made subject to referral to the ECJ except in relation to Member States' failure to abide by the transposition requirements.[132]

4.1 Objective, important provisions and legal issues

The RCD contains provisions relating to the reception of asylum seekers during the entirety of the asylum procedure. The Directive thus encompasses provisions in relation to: information to the asylum seeker (art 5), residence and freedom of movement, hereunder the possibility of confinement (art 7), the principle of family unity (art 8), medical screening (art 9), health care (art. 15) and employment (art 11), to mention some of the features. Chapter IV of the Directive contains provisions for persons with special needs. This is an area pertaining to the reception conditions where, as practice has shown, only a few Member States live up to the expectations of the Directive.[133] New fo-

132. As notified in the introductory part of this study, these cases are not deemed interesting for the purpose of this study and are therefore not examined here.

133. Odysseus Academic Network (2010). «Identification of Vulnerable Asylum Seekers with Special Needs: Comparative Study and recommendations for Law and Practice». (Study financed by the European Refugee Fund (ERF), to be published 2011). Odysseus Academic Network (2007). Comparative overview of the implementation of the Directive 2003/9 of 27 January, 2003 laying down minimum standards for the reception of asylum seekers in the EU Member States. Reception Conditions Synthesis Report, Study done for the DG JLS of the European Commission during the year 2007, contract JLS/B4/2006/03. European

cus has been given to these questions in the Commission recast proposal which is under discussion in the Council.[134]

The general principle of article 17 implies a non-exhaustive listing of potentially vulnerable persons. It also creates a link between *vulnerability* (in para 1) and *special needs* (in para 2) and implementation of a screening mechanism is presupposed through para 2 in order to identify persons with special needs.

Article 17 states:

> 1. Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, in the national legislation implementing the provisions of Chapter II relating to material reception conditions and health care.
>
> 2. Paragraph 1 shall apply only to persons found to have special needs after an individual evaluation of their situation.

Another characteristic of the present RCD regards, articles 3 and 2(c) which, refer to the RCD as applying to all asylum seekers, upon lodging an application for international protection under the GC for as long as they are allowed to remain in the territory. This indicates that there is at present no obligation on Member States for extending the application of the Directive to persons applying for subsidiary protection, a situation the Commission, recast proposal aims at changing. Nevertheless, in practice the majority of Member states already apply the Directive's conditions in regard to all applicants for international protection, subsidiary protection included.[135]

For interpretative purposes, it is furthermore worth noting that art 1 of the RCD indicates the purpose of the directive and reads:

> The purpose of this Directive is to lay down minimum standards for the reception of asylum seekers in Member States.

The message is clear. The standards indicated in the Directive (as in all the other CEAS directives) are "minimum standards" which means they indicate

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Commission, Report from the Commission to the Council and to the European Parliament on the application of directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers COM (2007) 745 of 26 November 2007.

134. European Commission, COM (2008) 815 final of 3 December 2008, Proposal for a Directive of the European Parliament and of the Council laying down minimum standards on the reception of asylum seekers.

135. Commission, Discussion Paper, Experts Meeting, 11 February 2008, p. 1

the absolute minimal basis according to which Member States are bound to adhere through national legislation and practice. Member States are allowed, however, to introduce or retain more favourable provisions than those indicated in the Directive.[136]

Furthermore, the ECJ has decided that a Directive shall be interpreted in accordance with the recitals of its Preamble.[137] Some of the basic recitals of the RCD have also been referred to in court proceedings, e.g. containing the following policy statements:[138]

> Recital (4) The establishment of minimum standards for the reception of asylum seekers is a further step towards a European asylum policy.
>
> Recital (5) This Directive respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Article 1 and 18 of the said Charter (inviolability of human dignity and the guarantee of the right to asylum with due respect to the Geneva Convention 28 July 1951 and the Protocol of 31 January 1967 to the status of refugees).
>
> Recital (7) Minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down.

RCD provisions which have been interpreted by national courts and the ECtHR has also referred to the RCD in regard to certain issues, in particular, the question of access to the labour market during the asylum procedure period and questions relating to reception conditions and vulnerable asylum seekers.

Article 11 on "Employment" has caused controversy. The provision leaves ample space for national discretion and potential difficulties will be illustrated through one national case law, here below, from UK practice in the case R (MM (Burma) and another) *v* Secretary of State for the Home Department R (DT (Eritrea)) *v* Same [2009].

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136. RCD art 4.
137. CJEU, Case C-184/99, para 44.
138. UK, Judgement of 28 July 2010 R (on the application of ZO (Somalia) and others) (respondents) v. Secretary of State for the Home Department (Appellant).

Article 11 reads:

> 1. MemberStates shall determine a period of time, starting from the date which an application for asylum was lodged, during which an applicant shall not have access to the labour market.
>
> 2. If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant.
>
> 3. Access to the labour market shall not be withdrawn during the appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision is notified
>
> 4. For reasons of labour market policies, Member States may give priority to EU citizens and nationals of States parties to the Agreement on the European Economic Area and also to legally resident third-.country nationals.

Yet another controversial issue regards application of the RCD and detained asylum seekers. According to the findings from the Commission evaluation process in 2008, a number of Member States do not apply the RCD in cases of detention (cf. art 7(3)). Material reception conditions of the RCD are defined in article 2(j) as being *"the full set of measures that Member States grant to asylum seekers in accordance with this Directive"*, meaning that housing, food, clothing and a daily allowance must be provided to asylum seekers and should, as nothing to the contrary is stated, include asylum seekers in detention. In virtue of art 13 which contains general rules on material reception conditions and health care, *"Member States shall ensure that material reception conditions are available to applicants when they make their application for asylum"* and art 13(2) says that *"Member States shall make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence"*. Further, article 13(2), second indent, explicitly states that *"Member States shall ensure that that standard of living is met in the specific situation of persons who have special needs, in accordance with article 17, as well as in relation to the situation of persons who are in detention"*. But, this is contradicted by a reading a contrario in several other provisions which allow Member States to set exceptional modalities, e.g. article 14(8) which allows for reception conditions different from those provided for in article 14 otherwise to, for example, asylum seekers in detention or confined to border posts. Another example is contained in Article 6(2) which allows for exceptions in regard to issuance of documentation. In other words, reception conditions are in principle applica-

ble to places where asylum seekers are detained, unless the Directive foresees exceptions or derogations. Divergent views of Member States pose a problem in regard to the scope of the Directive on this point.[139]

The RCD is the only Directive, first generation CEAS instruments which specifically calls upon Member States to provide particular attention to asylum seekers who are vulnerable and who have special needs. Several provisions are in place for this purpose, notably RCD articles 17-20. Several reports have, however, revealed that two thirds of the Member States fail to provide the specific assistance which the said provisions are meant to cover.[140]

Article 17 in Chapter IV of the RCD provides the general principles which apply. This provision reads:

> 1. "Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, in the national legislation implementing the provisions of Chapter II relating to material reception conditions and health care.
>
> 2. Paragraph 1 shall apply only to persons found to have special needs after an individual evaluation of their situation."

In order to emphasize what this provision should imply, but which the evaluations have shown is not satisfactorily interpreted to date,[141] the Commission, in its recast proposal attempts to clarify the obligations on States, notably that there is a need to put in place an identification procedure and that vulnerable persons who do have special needs shall be given special care. In a more recent study carried out by Odysseus,[142] the necessity of maintaining a causal link between the concept of vulnerability and special needs is underlined. Further, the Odysseus studies mentioned also reveal that the RCD has not been applied in relation to Dublin cases.[143] This is another flaw in the application of the Directive, which the Commission has sought to alleviate in the recast proposal presently discussed by the Council.

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139. Commission, Discussion Paper, Experts Meeting, 11 February 2008, p. 2.
140. Odysseus, Study on the conformity checking of the transposition by member states of 10 EC directives in the sector of asylum and immigration, for DG JIS of the European Commission, 2007.
141. Commission Report on the Application of Directive 2003/9/EC of 27 January 2003 Laying down Minimum Standards for the Reception of Asylum Seekers, COM(2007) 745.
142. Report (2009-2010) not yet made public at the time of writing this report.
143. Commission Report on the Application of Directive 2003/9/EC of 27 January 2003 Laying down Minimum Standards for the Reception of Asylum Seekers, COM(2007) 745.

ECHR and State practice

Although no case in substance has been brought before the ECJ, the ECtHR has concluded, in a number of cases that a stay in reception centres and in detention may be contrary to ECHR art 3 and 5(1).

In the case of Muskhadzhiyeva and others v. Belgium (Application No. 41442/07), 19 January 2010, the applicants, Aina Muskhadzhiyeva and her four children (all of very young age; seven months, three and a half, five and seven), Russian citizens of Chechen origin, live in a refugee camp in Poland. After having fled from Grozny in Chechnya, they arrived in Belgium where they sought asylum. As they had spent time in Poland, Polish authorities agreed to take on the responsibility under the DR. Belgian authorities, on 21 December 2006, issued a decision refusing them permission to stay in Belgium and ordered them to leave the country. They were summoned by the Aliens Office and placed on 22 December 2006 in a closed transit centre known as "Transit Centre 127bis" where aliens were held pending removal. Several independent reports from recent years had highlighted the unsuitability of the centre for housing children.

A psychological examination of the applicants found that the children in particular, were showing serious psychological and psycho traumatic symptoms. However, on 24 January 2007, they were returned to Poland. A report drawn up in Poland revealed that one of the children was in a very critical psychological state and confirmed that the deterioration might have been caused by the detention in Belgium.

On 10 January 2010, the ECtHR released its judgment. Belgium had already previously been convicted for the detention of unaccompanied minor asylum seekers in the same detention centre in the Case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium (Application no. 13178/03) in judgment of 12 October 2006 where the ECtHR pronounced the unlawfulness of detaining minors.

In the case of Muskhadzhiyeva and others, the children had been together with their mother and not alone. The circumstances of the cases therefore differed somewhat. However, in the Muskhadzhiyeva case, the ECtHR did note that the children had been in a centre unfit for children for over a month. The Court also attached importance to the worrying state of health of the children who exhibited serious physical and psychosomatic symptoms as a consequence of trauma. Thus, taking into account the young age of the children, their state of health and the duration of their detention, the ECtHR concluded that their detention was in violation of ECHR art 3. The Court further found that detention of the children in a closed centre for adults under the same conditions as an adult person was in violation of ECHR art 5 para 1.In its conclusion, the ECtHR clarified "that the detention of minor asylum seekers, whether accompanied by their parents or not, in closed centres that do not

offer conditions compatible with the needs of children is strictly prohibited, even for the shortest duration of time". It remains unclair, however, whether detention of families of asylum seekers with children in closed centres is compatible with the ECHR if it takes place in centres specifically designed for and/or adapted to reception of children. The Court does refer to CRC art 3 (principle of best interest of the child) and 22 (protection of minor asylum seekers) in its reasoning.

Thus, although the ECtHR is not referring to the RCD as such, articles 7 and/or 17, the message seems clear: inadequate reception conditions in a Member State can be contrary to ECHR and should prevent application of the Dublin system (see further on Dublin under 5). Yet another message can be drawn from this case, notably that vulnerability as described through the RCD art 17, should be taken into consideration in line with the objective of the Directive while considering whether adequate reception conditions are provided for in a Member State. Reception conditions of a receiving State, in connexion with application of the Dublin system,thus also need to be assessed. If adequate conditions cannot be afforded in a receiving State, return should not take place.

As far as State practice is concerned, there seems notably to be a development towards a requirement of compliance with EU standards before transfers are permitted, e.g. in accordance with the Dublin system. Examples can be found, for example, in German practice where it has been decided that "when the responsible State does not comply with EU standards as such, Dublin transfers are impermissible. Various argumentations have been deployed to sustain this position.[144]In legal doctrine Maiani refers to an argumentation, which according to him, is "increasingly finding resonance in German-speaking literature." In a judgment VG Frankfurt of 8 July 2009, [145]the argumentation is on a systematic interpretation of the EU asylum acquis and that the Dublin system "presupposes the existence of a CEAS as it has found expression in the directives." The implication is clear: if the practice of the responsible State discloses (serious) breaches of the Directives, then the sending State has no choice but to apply the sovereignty clause".[146] The line of development is interesting from a "Dublin perspective". It is equally interesting from a "reception conditions" perspective as part of the EU asylum acquis.

144. Maiani, F., "The systematic relations between the Dublin system and EU standards: recent evolutions and the position of Dublin "associates", Abhandlungen, Asyl 2/10, p. 14.
145. VG Frankfurt, 7 K 4376/07.F.A.(3), InfAusIR 10/2009, 406.
146. Maiani, 2010, p. 14.

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At national level, the RCD has been interpreted in regard to whether the provisions of the Directive apply in cases of subsequent applications.

Judgment R (on the application of ZO (Somalia) and others) (Respondents) *v* Secretary of State for the Home Department (Appellant) of 28 July 2010, concerns a Somali national (ZO) who arrived in the UK in 2003 and applied for asylum. The application was rejected in 2004. On 27 February 2007 she was granted permission to apply for judicial review to challenge the delay in dealing with various submissions on her part. She asked for permission to work, a request which was rejected on the grounds that her asylum application had been rejected on 17 February 2004.

Equally, MM, a Burmese national, had made an asylum request which was rejected and all attempts to challenge the refusal had failed by March 2005. On 9 May 2005 he made further submissions for a fresh claim based on new evidence. And on 27 July he asked for permission to work, an application which was refused on 26 September. He then applied for judicial review of the case.

The Court esteems that 'an application for asylum' in the context of the RCD must be interpreted to include a subsequent application made after an original application has been determined and that the term 'asylum seeker' should be construed accordingly to include a person who makes such a subsequent application. This conclusion was seen as being in line with the spirit of the recitals to the Directive, particularly recital 7. It was further noted that the Directive seeks to set minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living. It would therefore be "anomalous and untoward that an applicant who makes a subsequent application after his first application has been finally disposed of should be denied access to standards that are no more than the minimum to permit him to live with some measure of dignity. Moreover, if the Directive was found not to apply to subsequent applications for asylum this would give rise to a surprising incongruity.

First time applications for asylum made long after an asylum seeker arrived in this country would be governed by the Directive but a perfectly genuine applicant who makes a subsequent application, perhaps within a relatively short time of arrival, would be denied the benefits that it affords. Article 3 applies the Directive to all third country nationals and stateless persons who make an application for asylum at the border *or in the territory of a Member State*. It is clear, therefore, that a person who has been in the United Kingdom for some time can apply for asylum and, on the interpretation that the appellant espouses, such a person would be entitled to the benefits of the Reception Directive whereas an applicant who has made an application immediately on

arrival would lose those benefits forever after the first application has been determined.[147]

The Court further argued that if the reception conditions were held *not* to apply, some decidedly curious consequences would follow. For instance, the duties under Article 8 of the Directive (to maintain, as far as possible, family unity) and under Article 13 (2) (to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence) and 15 (1) (the provision of necessary health care), would not apply to those who make subsequent applications for asylum. When one considers that many of these will be genuine applicants, it is impossible to believe that it was intended that they should not have access to these basic amenities and facilities.[148]

The Court also made an assessment on whether it should refer the case to the ECJ under Article 267 of the TFEU and concluded that this should not be done in this case. The standard to which the court referred in order to make this decision, the Court relied on Case 283/81 CILFIT Srl v Ministero della Sanita (1982) ECR 3415. According to para 16 of its judgment in that case, the ECJ stated that

> the correct application of Community Law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.[149]

Another case concerned interpretation of RCD art 11(2) on the right to employment. A person whose asylum claim had been finally determined made a subsequent claim and was therefore able to enjoy the benefits of art 11(2) within the ambit of the RCD and to be afforded conditional access to the labour market. Reference was made to the case referred above. [150]

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147. Judgment R (on the application of ZO (Somalia) and others) (Respondents) v Secretary of State for the Home Department (Appellant), 28 July 2010, para 31.
148. Ibid, para 42.
149. Ibid para. 50.
150. R (MM (Burma) and another) v Secretary of State for the Home Department R (DT (Eritrea)) v Same [2009] EWCA Civ 442; [2009] WLR (D) 166
CA: Laws, Keene, Hooper LJJ: 20 May 2009.
p://www.lawreports.co.uk/WLRD/2009/CACiv/R(MM(Burma))_v_SSHD.htmlhtt

4.2. Relation to Norwegian law and practice

Norway is not bound by the RCD. However, as indicated below in regard to the relationship between Norwegian law and practice and the Dublin Regulation, it would be impossible to cooperate formally in regard to the DR without having an eye to other areas of CEAS, such as, the RCD.[151] This view is in line with Norwegian official policy.[152] In other words, in cases where Norway contemplates return to another Member State in virtue of the Dublin cooperation mechanism, an assessment of reception conditions in the receiving country must be part of the assessment. In this regard, decisions emanating from the ECJ are of interest to Norway as these will be guiding further EU developments. And, the "Somalia II case" referred to above (see 2.2), shows that Norwegian authorities (Grand Jury of the Immigration Appeal's Board) already refer to EU sources of law (the QD art 15 and judgment by the ECJ, the Elgafaji case). The White Paper on Norwegian refugee and migration policy in a European perspective confirms that when applying the DR to the processing of asylum cases, it is important to Norway that reception conditions, asylum practice and asylum procedures in the countries with which we cooperate are in compliance with international standards.[153] Norway, as well as EU Member States, is bound by ECHR as well as other human rights instruments, e.g. the Convention on the Rights of the Child. The question in relation to vulnerable asylum applicants in judgments by the ECtHR against Belgium in the cases referred to above (Mubilanzila Mayeka and Kaniki Mitunga and Muskhadzhiyeva and others) therefore illustrate necessary deliberations when applying the Dublin mechanism. The ECtHR cases further illustrate that Norway and the EU Member States can and must rely on the same basic international human rights obligations as sources of interpretation when applying the asylum instruments. ECHR is a common denominator for EU States and Norway.

Another aspect worth noting in regard to the RCD has been further elaborated in two comparative studies on the situation of reception conditions in Norway and the EU.[154] One of the principle findings of these studies is that the Norwegian law system in this area is fragmented and therefore difficult to

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151. Vevstad, Utvikling av et felles europeisk asylsystem. Jus og Politikk, Universitetsforlaget, 2006, p. 186-189; vevstad. Kommentarutgaven, 2010, p. 269.

152. Norwegian Ministry of Justice and the Police, Fact Sheet in connexion with Meld. St.9 (2009-2010), p. 2.

153. Norwegian Ministry of Justice and the Police, Fact Sheet in connexion with Meld. St.9 (2009-2010), p. 2-3.

154. Brekke, Vevstad (2007), *Reception conditions for asylum seekers in Norway and the EU*, ISF Report 2007:4 to which the Meld.St.9 (2009-2010) makes reference, p. 29; Brekke, Sveaass, Vevstad, "Sårbare asylsøkere I Norge og EU (Vulnerable asylum seekers in Norway and the EU"), to be published December 2010.

access (not only for those who need to interpret the applicable rules in Norway, but also for European cooperating partners). At present, in Norway, some very few basic requirements on e.g. housing and information are contained in the Immigration Act such as Sections 95 and 81. Most regulations in regard to reception conditions are contained in secondary legislation such as instructions, recommendations and guidelines. Therefore, with a few exceptions, Norwegian legislation is not sufficiently transparent as regards reception conditions.

Another finding, which should be noted, concerns vulnerable asylum seekers (cf. RCD art 17) and the lack of an identification procedure which ensures that their special needs are catered to. This finding has also been noted by the government in its report to Parliament of this year. The yet unpublished study where a comparative analysis is given between Norway and six selected EU Member States confirms that these difficulties persist.[155] It is e.g. necessary to establish clear legislation which provides a definition on vulnerability. Further, an identification mechanism must be put in place which contains guidelines on when, how and who is to be responsible for the procedure and its follow-up. The rights emanating from identification of vulnerability must be clarified. For example, as regards, the Dublin cooperation. If a vulnerable asylum applicant is not fit to travel, a condition possibly identified during an identification mechanism procedure, the asylum application could be examined in Norway in virtue of the sovereignty clause of the DR. Furthermore, communication between the different systems working with asylum applicants should be ensured. This would require communication and guidelines on how to interact between the reception system, the asylum procedure authorities and the health authorities.[156]

In regard to reception conditions in genereal and for vulnerable persons in particular, much could be learned from the RCD and, in particular, learned

155. Brekke, Sveaass, Vevstad, report to be published in January 2011.

156. Ibid for further recommendations and explanations to the various proposals, findings and recommendations.

from the evaluations and discussions which have taken place since 2007[157] and now taking place (mid-October) in the Council on the recast proposal. The recast casts light on changes which could be made in order to clarify the RCD and ensure improvements. The ambition of the Belgian presidency is to terminate discussions on the RCD during its presidency.

157. Odysseus, Study on the conformity checking of the transposition by member states of 10 EC directives in the sector of asylum and immigration, for DG JIS of the European Commission, 2007. Commission Report on the Application of Directive 2003/9/EC of 27 January 2003 Laying down Minimum Standards for the Reception of Asylum Seekers, COM(2007) 745.

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The Dublin Regulation

Regulation 343/2003/EC establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (often referred to as Dublin II, and in this report hereafter referred to as the DR), was adopted by the Council on 18 February 2003. The Regulation applies to 26 Member States which fully participate in CEAS and to associated States: Denmark, Iceland, Norway and Switzerland. The latter four countries are not bound by the asylum directives of CEAS.

The legal basis for the Dublin Regulation is Article 63(1) (a) in the Treaty establishing the European Community (TEC). In accordance with DR art 24, the Regulation replaces the Dublin Convention (Dublin I) of 15 June 1990.

In order to facilitate the functionality of the Dublin system, Member States adopted the Eurodac Regulation (Council Regulation 2725/2000/EC concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (hereafter referred to as Eurodac) on 11 December 2000. Eurodac entails the establishment of a database for the comparison of fingerprints of asylum applicants and persons apprehended illegally on the territory of a Dublin Member State. The fact that applicants for asylum are fingerprinted, enables identification of whether the applicant has moved from one Member State to another in which case he could be transferred there in accordance with the criteria set out in the DR.

5.1. Objective, important provisions and legal issues

The main objectives of the distribution of asylum applicants in accordance with the DR entail the following: to determine rapidly the Member State responsible for examining an asylum application so as to guarantee effective access to the asylum procedure (thus ensuring that each asylum application presented within the European area be examined by one State, but one State

only);[158] and to prevent abuse in the form of multiple asylum applications ("asylum shopping"). A political intent of the Dublin mechanism was also to prevent refugee "in orbit" situations whereby applicants for protection are sent from country to country without examination of their claim. Ensuring fair responsibility sharing among European States through the Dublin system has not been expressly stated in the DR although its preamble recital 4 refers to the method to be used under the Regulation as being "based on objective, fair criteria both for the Member States and for the persons concerned". This ambition has largely failed, however, as has been shown in the various studies on the Dublin system, e.g. by the Commission, the European Parliament, UNHCR and other actors.[159]

In order to make the Dublin system function, fair and equal treatment of all asylum applicants, independently of where they have ended up having their case examined, must be ensured. This thinking presupposes respect for international public law, moreover, it presupposes adherence to the principles laid down in the asylum directives of CEAS. It is therefore of importance, while applying the Dublin system, to assess other Member States'application of the other asylum instruments, as has also been illustrated by the ECtHR in a number of cases which will be discussed below, e.g. K.R.S. v. UK (application no. 32733/08 of 2 December 2008), Muskhadzhiyeva and others v. Belgium, (application no. 41442/07 of 19 January 2010). The relationship between the DR and the RCD and implicantions for Norway thereof have been further examined above under chapter 4.

Issues appearing before international and national courts in regard to the Dublin system are largely questions in regard to the non-refoulement principle, indirect refoulement in particular. Further, the question of application of the sovereignty clause contained in DR art 3(2) and the principle of family unity.[160] As will be apparent from the cases referred below, much focus has been given to the use of the Dublin system in regard to transfers to Greece. This includes questions in relation to access to procedures, the limited number of applicants granted refugee status, direct and indirect refoulement and reception conditions.

The recast to the DR raises other important issues, for example, questions related to the issue of distributive fairness in the application of the system.

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158. Recital 4 of the Preamble and art 3(1).

159. European Parliament, Directorate-General for Internal Policies, Policy Department Citizens' Rights and Constitutional Affairs, "What system of Burden-Sharing between Member States for the reception of asylum seekers", Study, 2010; Commission Staff Working Document, SEC(2008)2962, accompanying the Proposal for a Regulation of the European Parliament and the Council , Impact Assessment (COM(2008)820final, SEC(2008)2963;UNHCR, The Dublin Regulation a UNHCR Discussion paper, 2006.

160. See DR preamble recitals (2), (6), (12), (15)

The recast proposal thus suggests an inclusion of a mechanism for temporarily stopping transfers to States which are overburdened.[161] While finalization of the new Dublin Regulation (Dublin III) is still pending one can, at this stage, only note that this proposal is seen as controversial by Member States. The recast proposal also suggests improvements in regard to vulnerable persons in the Dublin system, including children.[162] Lack of effectiveness of the system is yet another area of concern of the Dublin system.

So far only one Dublin related case has been finalized before the ECJ (Case 7 Petrosian and Others in regard to the question of the interpretation of the deadlines laid down in DR art 20(1)(d) and art 20(2)).

Two cases have more recently been brought before the ECJ by the UK and Ireland in regard to the Dublin system and return of asylum applicants to Greece. The specific questions brought before the ECJ by the UK will be referred below, whereas the specific questions raised by Ireland have not yet been made public (mid-October 2010). Case law before the ECtHR in regard to Dublin, as well as national court deliberations of relevance, and UNHCR commentaries will also be referred below.

A crucial question relates to application of DR art 3(2) (the DR sovereignty clause) which says:

> By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation.

As has already been noted, the TFEU abolishes former Art. 68 TEC, which limited the right to request preliminary rulings to courts of last instance – meaning that now, all national courts, and not merely the highest judicial bodies, are able to make requests in relation to asylum, immigration and visa issues. This has the potential greatly to increase the number of rulings that will be requested and, notably, to extend the range and subject matter of questions put to the ECJ. Questions and provisions that may previously not have reached the highest courts can now be sent by the lower judicial tribunals and courts, which are dealing with the bulk of appeals or reviews of negative first-instance asylum decisions. The DR cases at hand illustrate this. Until now they have not been heard in the ECJ because of the short timeframes and nar-

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161. Recast DR.This is also in line with the Lisbon Treaty (TFEU) art 80 which lays down that the common policy on asylum should be "governed by the principle of solidarity and fair sharing of responsibklity, including financial implications between the Member States (art 80 TFEU).

162. Recast DR.

row appeal rights under most states' Dublin II procedures, which may have prevented them reaching the highest level of domestic judicial structures. [163]

A second major change provided by the TFEU, is the conferral of legally binding effect on the EUs Charter of Fundamental Rights in which art 18 provides the right of asylum in that it "shall be guaranteed with due respect for the rules of the Geneva Convention" and now can be invoked directly, not only before the ECJ, but also at national level. As Garlick explains,

> it is not clear how the ECJ will interpret 'right to asylum'or the nature of this 'guarantee', nor the interplay between this article and other provisions in the asylum acquis.

But, she continues, "(G)iven that the Charter carries the same legal force as the Treaties, it should in principle prevail over any inconsistent provisions in an EU directive or implementing national law".[164] The outcome of the cases brought before the ECJ in regard to Dublin transfers to Greece chould thus provide some helpful answers to these queries.

5.2. ECJ Case 7; Transfer deadlines

ECJ C-19/08 Migrationsverket (Swedish Immigration Board) v. Petrosian and Others, 29 January 2009

This case concerns the interpretation of DR art 20(1)(d) and art 20(2) and the question of whether responsibility for the examination of an application for asylum passes to the Member State where the application was lodged if the transfer is not carried out within six months.

On 29 January, the ECJ delivered a judgment in a preliminary ruling procedure concerning the interpretation. The reference for a preliminary ruling had been submitted by the High Court of Sweden on whether 'Article 20(1)(d) and article 20(2) of the DR are to be interpreted as meaning that responsibility for the examination of an application for asylum passes to the Member State where the application was lodged if the transfer is not carried out within six months after a temporary decision has been made to suspend

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163. Madeline v. Garlick, "The Common European Asylum System and the European Court of Justice New Jurisdiction and New Challenges", CEPS, The Area of Freedom, Security and Justice Ten Years On, Successes and Future Challenges Under the Stockholm Programme, 2010, 59-60.

164. Ibid, p. 60-61.

the transfer and irrespective of when the final decision is made on whether the transfer is to be carried out?

Although the questions posed in regard to the Migrationsverket v. Petrosian and others do not concern the most controversial and sensitive issues in relation to the DR; this was the first (and so far only) decision by the ECJ concerning the Regulation.

Background

The case concerned the Petrosian family who are all, but one, of Armenian nationality. The family had applied for asylum in Sweden on 22 March 2006. On examination of the family's application, it became apparent that the family had previously applied for asylum in different countries, France included. On the basis of DR art 16(1)(e), the Swedish Immigration Board requested French authorities to take the family back. French authorities did not reply within the time period indicated in DR art 20(1)(c), whereupon Swedish authorities informed them that France was seen as having consented to take back the family in accordance with DR art 20(1)(c). France did consent and Sweden decided the family should be transferred to France on the basis of DR art 20(1)(d) and (e). However, due to appeals against the decision by the family and extended dealings with the case before various courts in Sweden, finally, the question arose as to from which point in time the six month period for carrying out a transfer in accordance with DR art 20(1)(d) would run.

Interpretation by the ECJ

In its judgment, the ECJ held that 'Article 20(1)(d) and Article 20(2) of the Regulation are to be interpreted as meaning that, where the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation.' This decision was in line with the interpretative view expressed both by the Commission and the eight governments which had submitted written observations in the case.[165]

The ECJ refers, in its explanations, to settled case-law that in interpreting a provision of Community law, it is necessary to consider not only its wording,

165. Judgment of the Court (Fourth Chamber), 29 January 2009, Case C-19/08, Para. 29.

but also the context in which it occurs and the objectives pursued by the rules of which it is part.[166]

The Court distinguishes between two situations. The first situation concerns cases where there is no provision for an appeal to have suspensive effect and where it follows from the wording of art 20(1)(d), that the period for implementation of the transfer starts to run as from the time of the decision, explicit or presumed, by which the requested MS agrees to take back the person concerned.[167] In that case, only the practical details of the implementation of the transfer remain to be determined. In this conext, DR art 20(1)(d), allows the requesting Member State six months in which to carry out the transfer, in view of the practical complexities and organizational difficulties associated with implementing a transfer and allows for the two Member states to collaborate.[168] This understanding is further based on the fact that this was precisely the reason for changing the deadline for transfers from one month ("Dublin I") to six months ("Dublin II")[169]

In the second situation, where the requesting State provides for an appeal which may have suspensive effect and the court of that Member State gives its decision such effect, art 20(1)(d) provides that the period of transfer starts to run as from the time of "the decision on an appeal or review".[170] However, although the period for transfer starts to run at a different time than that described under the first situation referred to above, the ECJ states that

> …the fact remains that each of the two Member States concerned is confronted with the same practical difficulties in organizing the transfer and should thus have the same six-month period in which to carry out that transfer.

The Court continues:

> There is in fact nothing in the wording of Article 2020(1)(d) of Regulation No 343/2003 to suggest that the Community legislature intended to treat those two situations differently. It follows that, in the second situation, in the light of the objective pursued by setting a period for the Member States, the start of that period should be determined in such a manner as to allow the Member States, as in the first situation, a six-month period which they are deemed to require in full in order to determine the practical details for carrying out the transfer.

Furthermore, the Court continues:

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166. Ibid para. 34.
167. Ibid, para 38.
168. Ibid, para. 40.
169. Commission Proposal, 26 July 2001 (COM(2001) 447 final , p. 5 and pp. 19-20.
170. Judgment, Case C-19/08, para 42.

> Accordingly, the period for carrying out the transfer may begin to run only as from the time the future implementation of the transfer is, in principle, agreed upon and only the practical details remain to be determined. Such implementation cannot be regarded as certain, however, if a court of the requesting Member State which is hearing an appeal has not yet ruled on the merits of the appeal but has merely ruled on an application for suspension of the operation of the contested decision. [171]

It follows, according to ECJ, that in the second situation, that in order to ensure the effectiveness of DR art 20(1)(d) laying down the period for implementation of the transfer,

> that period must begin to run not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation.[172]

Summing up, the ECJ concludes that Article 20(1)(d) and Article 20(2) of the DR are to be interpreted as meaning that,:

> where the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation.[173]

5.3. Relation to Norwegian law and practice

The Norwegian cooperation in the Dublin system is incorporated into the Immigration Act Section 32 and secondary legislation Sections 7-3 and 7-4. Neither of these provide any reference to the question of transfer deadlines. The assumption is that these questions are regulated in the DR itself to which Norway is bound.[174]

Although Norway is bound by the DR, Norway is, as has already been noted, not bound by interpretations or judgments rendered by the ECJ. Nevertheless, it is fair to believe that it would be in Norwegian interest to respect

171. Ibid, para. 43-45.
172. Ibid, para. 46.
173. Ibid, para. 53.
174. For further examination of Section 32 and secondary legislation, see Vevstad, Kommentarutgave, pp. 264-285.

the interpretation by the ECJ and there is no argument to the contrary in regard to a common understanding of the Petrosian judgment. Norway's adaptation to EU developments in the asylum field are, largely due to its alignment with the Dublin cooperation. It would be impossible to cooperate formally in regard to the DR without having an eye to other areas pertaining to asylum, such as other Member States' implementation of the QD, the RCD and the PD.[175] It should be noted that in the "Somalia II" case which was heard before the Grand Jury of the Immigration Appeals Board (Stornemnd) and which sets administrative precedence in Norway (see above in reference to Case 1), the Appeals Board made reference to EU instruments and the judgment of the Elgafaji case as relevant for interpretative purposes in spite of Norway not being bound by EU legislation and ECJ rulings. This understanding has, as already noted above, also been recognized politically by the government and is manifested in a number of public documents, ultimately in the "white paper" prepared by the government to Parliament on Norwegian refugee and migration policies of 2010.[176]

5.4. ECJ Case 8; Relation between the Dublin II Regulation and the EU Human Rights acquis – Greece (pending)

ECJ C-411/10 Court of Appeal (England & Wales) (Civil Division) (UK) 18 August 2010 – NS v Secretary of State for the Home Department

This case concerns interpretation of DR art 3 and whether for Member States to apply art 3(2), the "sovereignty clause" in order for Member States to respect their Human Rights obligations and not return asylum applicants to Greece in light of the Charter of Fundamental Rights of the EU, and various other instruments.

Two "test cases" have been brought before the ECJ, one from the Court of Appeal (England and Wales) UK and one from the Irish High Court. At the time of finalization of this report (mid-October 2010), only the questions raised by the UK have so far been made public. At present no statement by the General Advocate is available (mid-October 2010).

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175. Vevstad, Utvikling av et felles europeisk asylsystem. Jus og Politikk, Universitetsforlaget, 2006, p. 186-189; vevstad. Kommentarutgaven, 2010, p. 269.
176. Meld. St. 9 (2009-2010), Norsk flyktning- og migrasjonspolitikk I et europeisk perspektiv.

Background

The case has been made in proceedings between N.S., an Afghan national who has applied for asylum in the UK and the Secretary of State for the Home Department, responsible for asylum and immigration matters in the UK. The referring court wishes to ascertain, i.a. whether a Member State is required under European law to exercise the power provided for in the sovereignty clause where the State responsible for examining the case (in this case Greece), would expose that applicant to a risk of violation of his fundamental rights. If so, the court raises the question of the circumstances in which that power must be exercised.

The critical legal point, which is expected to be at the centre of the ECJ deliberations, relates to the discretion that each EU Member State has to determine whether to send an asylum seeker back under the DR. UNHCR argues that EU states must consider if a person's rights would be breached if they are sent back to a state that does not have a functioning asylum system.[177]

These rulings (both the UK and Ireland cases) may indeed have far-reaching consequences for application of the Dublin system as a whole which, as it is seen today by most Member States, presupposes that all participating States are bound by and respect treaty obligations under international law which should afford the protection required (e.g. the GC, ECHR, etc.). And further, that the EU Member States fully respect and implement the EU Charter on Fundamental Rights and the minimum standards laid down in the asylum directives under the CEAS. If an interpretation by the ECJ goes in the direction of excluding transfer to certain States under certain circumstances, the Dublin system would have to applied in a non-automatic manner in the future. As has been seen over the past few years, through numerous reports furnished by different actors,[178] a number of problems in regard to adequate refugee protection have been identified in EU States in spite of official adherence to treaty obligations on protection of refugees and human rights and in spite of official adherence to the CEAS directives and the European Charter of Fundamental Rights. Greece is a special case in this context. The referred cases to the ECJ may thus set a legal precedent, which would affect potentially thousands of transfers to Greece across the EU and potentially the EFTA countries participating in the Dublin cooperation (Norway, Iceland and Switzerland) which today are not bound by ECJ judgments, but which would most likely comply with the same policy as the EU Member States.

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177. UNHCR and other agencies were granted leave to intervene in the proceedings before the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court).

178. EU Commission, UNHCR, Council of Europe, High Commissioner for Human Rights, Amnesty International, ECRE, etc.

Questions referred to ECJ by the UK

The questions referred to the ECJ from the British Court of Appeal are:

Does a decision made by a Member State under Article 3(2) of Council Regulation 343/2003 (1) ('the Regulation') whether to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the Regulation fall within the scope of EU law for the purposes of Article 6 of the Treaty of European Union and/or Article 51 of the Charter of Fundamental Rights of the European Union ('the Charter')?

If the answer to Question 1 is 'yes':

2. Is the duty of a Member State to observe EU fundamental rights (including the rights set out in Articles 1,4, 18, 19(2) and 47 of the Charter) discharged where that State sends the asylum seeker to the Member State which Article 3(1) designates as the responsible State in accordance with the criteria set out in Chapter III of the Regulation ('the Responsible State'), regardless of the situation in the Responsible State?

3. In particular, does the obligation to observe EU fundamental rights preclude the operation of a conclusive presumption that the Responsible State will observe (i) the claimant's fundamental rights under EU law; and/or (ii) the minimum standards imposed by Directives 2003/9/EC (2) ('the Reception Directive'); 2004/83/EC (3) ('the Qualification Directive') and/or 2005/85/EC (4) ('the Procedures Directive') (together referred to as 'the Directives')?

4. Alternatively, is a Member State obliged by EU law, and if so, in what circumstances, to exercise the power under Article 3(2) of the Regulation to examine and take responsibility for a claim, where transfer to the Responsible State would expose the claimant to a risk of violation of his fundamental rights, in particular the rights set out in Articles 1,4, 18, 19(2), and/or 47 of the Charter, and/or to a risk that the minimum standards set out in the Directives will not be applied to him?

5. Is the scope of the protection conferred upon a person to whom the Regulation applies by the general principles of EU law, and, in particular, the rights set out in Articles 1,18, and 47 of the Charter wider than the protection conferred by Article 3 of the European Convention on Human Rights and Fundamental Freedoms ('the Convention')?

6. Is it compatible with the rights set out in Article 47 of the Charter for a provision of national law to require a Court, for the purpose of determining whether a person may lawfully be removed to another Member State pursuant to the Regulation, to treat that Member State as a State from which the person will not be sent to another State in contravention of his rights pursuant to the Convention or his rights pursuant to the 1951 Convention and 1967 Protocol Relating to the Status of Refugees?

7. Insofar as the preceding questions arise in respect of the obligations of the United Kingdom, are the answers to Questions 2-4 qualified in any respect so as to take account of the Protocol (No. 30) on the application of the Charter to Poland and to the United Kingdom?
(1) Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 50, p. 1
(2) Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers OJ L 31, p. 18
(3) Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L 304, p. 12
(4) Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ L 326, p. 13EN C 274/22 Official Journal of the European Union 9.10.2010

ECtHR in regard to application of the Dublin Regulation and Greece

Difficulties in regard to application of the DR and transfers to Greece have been well known for many years, but have become even more evident over the last few years. A substantial number of cases have been brought before national courts and before the ECtHR.

The ECtHR has made use of its powers and applied Rule 39 as an interim measure, asking Member States not to return asylum applicants to Greece until the case in question has been heard before the ECtHR. The request under Rule 39 is binding on Member States. Such is the also the case as regards the case M.S.S. v. Belgium and Greece (case no. 30696/09) which is seen as a "test case" before te ECtHR. Hearing was held on 1 September and a decision is expected in December 2010.

The case concerns M.S.S., an Afghan national who left Kabul early in 2008 and, travelling via Iran and Turkey, entered the EU through Greece. On

10 February 2009, after passing through France, he arrived in Belgium, where he applied for asylum. By virtue of the DR, Belgium requested Greek authorities to take charge of the asylum application. M.S.S. objected, arguing that he ran the risk of detention in Greece in appalling conditions. He also argues that there are deficiencies in the asylum system in Greece and that he fears ultimately being sent back to Afghanisatan without any examination of the reasons why he had led that country. And his reasons for leaving Afghanistan were that 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.

M.S.S. was nonetheless transferred back to Greece on 15 June 2009. Upon arriving in Athens airport, he was immediately placed in detention. Following his release, he lived on the street with no means of subsistence.

In May, the ECtHR invited the Council of Europe Commissioner for Human Rights to intervene as a third party in the Court's proceedings. Hammerberg discusses at length and in great detail all different aspects relating to the situation of refugee protection in Greece, including the conditions under which Greece is operating, for example with a total of pending asylum claims of 44.560, fact the Commissioner characterizes as "worrying".[179] The Commissioner otherwise reiterates and updates much of his findings described in his March report as intervention to Ahmed and others v. the Netherlands and Greece (see below).

In his conclusions of May 2010, the Commissioner states:

> 47. In conclusion, the Commissioner considers that current asylum law and practice in Greece are not in compliance with international and European human rights standards. In particular:
> - access to refugee protection remains highly problematic, notably due to the non-functioning of the first instance Advisory Refugee Committees, lack of proper information on asylum procedures and legal aid that should be available to potential or actual asylum seekers, widely reported instances of *refoulement* or non-registration of asylum claims;
> - the quality of asylum decisions at first instance is inadequate, notably because of structural deficiencies and lack of procedural safeguards, in particular concerning the provision of legal aid and interpretation;
> - existing domestic remedy against negative asylum applications is not effective;
> - asylum seekers, including persons transferred under the Dublin Regulation, face extremely harsh living conditions in Greece.
>
> 48. Since the beginning of his mandate, the Commissioner has been following developments relating to migration, and especially asylum, in Greece. The

179. Council of Europe Commissioner for Human Rights, Third party intervention under Article 36, paragraph 2 of the European Convention on Human Rights, 31 May 2010, p. 2.

> Commissioner is pleased to note the new Greek government's decision and willingness, shown to him during his visit in February 2010, to overhaul the refugee protection system and overcome its current serious, chronic and structural deficiencies.
>
> 49. The Commissioner fully supports these efforts and has urged the Greek authorities to proceed and engage with determination and commitment in the necessary legislative and administrative changes that would bring the Greek asylum system in line with international and European human rights standards.

During the oral hearing on 1 September, UNHCR also intervened in the M.S.S. v. Belgium and Greece case. Although UNHCR acknowledges Greek current reform efforts, UNHCR upholds its conclusion that transfers to Greece under the DR should not take place until the deficiencies in the Greek asylum system have been addressed. UNHCR therefore advices Dublin States to make use of the sovereignty clause in DR art 3(2). The organization expresses grave concern

> about the failure of Greece to provide an asylum system which affords an acceptable level of respect for basic rights of asylum-seekers and refugees. The Dublin participating states have created a system based on so-called inter-State trust. In this particular situation it operates at the expense of particularly vulnerable individuals and is at variance with not only their legal rights but also their human dignity. This cannot be sustained in the legal framework that the European Convention on Human Rights and the 1951 Convention relating to the status of refugees have established.[180]

While commenting on the presumption that all participating States to the Dublin system will respect the rights of asylum-seekers, examine their claims in a fair and effective procedure, and grant protection in line with international and European law (the inter-state trust), UNHCR refers the Court to the case T.I. v. UK (application no. 43844/98) of 7 March 2000., In T.I. v. UK, the ECtHR emphasized that "each contracting State remains responsible under the ECHR". One can therefore not "rely in each and every case on international responsibility sharing arrangements for deciding asylum claims". Therefore, according to UNHCR, in light of the T.I. case,

> the Contracting State – in this case Belgium – would need to ensure that the individual concerned is not, as a result of its decision to transfer, exposed to a risk of ill-treatment. In this regard, UNHCR shares the Court's view that effec-

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180. UNHCR's oral intervention at the European Court of Human Rights Hearing of the case M.S.S. v. Belgium and Greece, Strasbourg, September 1, 2010, p. 4.

> tive procedural safeguards against such risks must exist in the Dublin receiving State – in this case Greece – to protect the applicant from such risks.[181]

Further, UNHCR considers that even if asylum applicants are admitted to Greek asylum procedures, they are not afforded a fair and effective examination of their claims, and they are not, as a result, identified as being in need of international protection and would risk removal to danger (in breach of the non refoulement principle). "Lack of protection is related to, and compounded by, inadequate reception and detention conditions for asylum-seekers that do not guarantee the standard of treatment foreseen under the 1951 Convention and European law".[182]

In another similar case before the ECtHR, Ahmed and others v. the Netherlands and Greece, a date for public hearing had not yet been set while this report was being drafted.

In his intervention, in this case, in March 2010, the Council of Europe Commissioner for Human Rights expressed grave concern:

> 47. The Commissioner considers that current asylum law and practice in Greece are not in compliance with international and European human rights standards. In particular:- access to refugee protection remains highly problematic, notably due to the nonfunctioningof the first instance Advisory Refugee Committees, lack of proper informationon asylum procedures and legal aid that should be available to potential or actual asylumseekers, widely reported instances of *refoulement* or non-registration of asylum claims;- the quality of asylum decisions at first instance is inadequate, notably because ofstructural deficiencies and lack of procedural safeguards, in particular concerning the provision of legal aid and interpretation;- existing domestic remedy against negative asylum applications is not effective;- asylum seekers, including persons transferred under the Dublin Regulation, face extremely harsh living conditions in Greece.
>
> 48. Since the beginning of his mandate, the Commissioner has been following developments relating to migration, and especially asylum, in Greece. The Commissioner is pleased to note the new Greek government's decision and willingness, shown to him during his visit in February 2010, to overhaul the refugee protection system and overcome its current serious, chronic and structural deficiencies.
>
> 49. The Commissioner fully supports these efforts and has urged the Greek authorities to proceed and engage with determination and commitment in the necessary legislative and administrative changes that would bring the Greek

181. Ibid, p. 1.
182. Ibid, p. 2.

> asylum system in line with international and European human rights standards.[183]

In its written intervention to the ECtHR, UNHCR on its side, addresses four elements of importance to the Ahmed and Others v. the Netherlands and Greece case. First, UNHCR examines transfer procedures under the DR and remedies available against such transfers. Second, it examines the legal status and concrete situation of asylum-seekers in Greece, including under the DR. Thirdly, UNHCR examines the procedure for transfer from the Netherlands under the DR and remedies available against a transfer decision.[184] And, finally, UNHCR examines the interrelationship between obligations under the DR and those under international law.

In conclusion, UNHCR underlines that, since the K.R.S. v. UK judgment of 2008, UNHCR draws the ECtHRs attention to the fact that UNHCR and other objective sources have provided independent background material that adequate safeguards and effective access to procedures and international protection are not generally available in Greece. In addition, UNHCR states that "inadequate reception conditions can give rise to a risk of refoulement". UNHCR equally underlines that more recent court decisions against Greece have highlighted the serious shortcomings in the Greek asylum system, including violations of articles 3 and 5 during detention (S.D. v. Greece (application no. 5354/07, 26 November 2009) and Tabesh v. Greece (application no. 8256/07, 26 November 2009). "Until reform of the Greek asylum system put in place, UNHCR thus continues to recommend against transfers to Greece" and requests states to make use of DR art 3(2) as long as Greece fails to meet the minimum standards set by the CEAS directives, in particular in regard to reception and detention of asylum-seekers and while the real risk of indirect refoulement continues.[185]

The Case Sharifi and others v Italy and Greece (Application No. 16643/09), October 2009, concerns thirty-two Afghan nationals, two Sudanese and one Eritrean, all in Greece. Among these, ten are minors. They have all tried to move clandestinely from Greece to Italy (Bari, Ancona and Venice) where the police intercepted and returned them immediately back to Greece. The applicants claim to have been maltreated by the Italian police and

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183. Council of Europe Commissioner for Human Rights, Third party intervention under Article 36, paragraph 2 of the European Convention on Human Rights, 10 March 2010, paras. 47-49.

184. For the purposes of this report, Dutch case law as presented in the intervention, will be referred below under State practice.

185. UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the case of Ahmed Ali and Others v. the Netherlands and Greece, February 2010, p. 10.

then, upon return to Greece, by the Greek police. According to the claimants, neither Italy nor Greece would allow them to put forward a claim for international protection. In Italy they were not given access to a lawyer or interpretation nor any kind of information about their rights, whereas in Greece, they were staying in appalling living conditions.

By letter of 3 September 2009, the ECtHR invited UNHCR to submit a written intervention as a third party in the in the Case of Sharifi and others v Italy and Greece where UNHCR addresses the issue of violation of the principle of non-refoulement (direct and indirect) and the situation in Greece and Italy and the issue of non-access to asylum procedures.[186] UNHCRs statement further speaks of the situation of asylum seekers in both Italy and Greece. In an annex to the report, UNHCR attaches a description of cases of returns from Italy to Greece, from Greece to Turkey and cases of refoulement from Turkey.

In its intervention to the case, UNHCR underlines, that the duty not to refoule is recognized as applying to refugees irrespective of their formal recognition, thus including asylum-seekers whose status has not yet been determined.

State practice in regard to the Dublin Regulation and Greece

There is divergent practice across the EU in relation to the transfer of asylum seekers to Greece. It is illustrative that five Dublin-States have recently and preliminarily (autumn 2010), suspended all Dublin transfers to Greece: Denmark, the UK, the Netherlands, Belgium and Norway, while Germany continues to apply the Dublin rule and return applicants to Greece.[187]

UK

On 20 September, the UK Border Agency announced the suspension of the return of all asylum seekers to Greece and that the backlog of approximately 1300 cases and all new cases would be examined in the UK. This decision came as a result of the Court of Appeal's decision to refer the case of NS (formerly known as Saeedi) to the ECJ.[188] It appears that the ECJ process

186. UNHCR, Written submission by the Office of the United Nations High Commissioner for Refugees in the Case of Sharifi and others v. Italy and Greece (application No. 16643/09).

187. For more extensive information on the practice by Member States in regard to Dublin transfers to Greece, see UNHCR Information Note on International Practice in the Application of Article 3(2) of the Dublin II Regulation in particular in the context of intended transfers to Greece.

188. ECRE, Weekly Bulleting, 8 October.

could take up to two years. According to Order by the President of the ECJ, a UK request for the use of accelerated procedure in the case was rejected as it was not regarded as "exceptional", indeed indicating that the process may well take a long time.[189] The UK government has meanwhile decided to use its powers to assess asylum claims in the UK during this period, rather than have the applicants wait for the outcome. Nevertheless, the UK Border Agency has stressed that the decision to examine the presently pending "Dublin cases" in the UK, is purely pragmatic, and is in no way related to the multiple human rights abuses and the near impossibility of claiming asylum in Greece. UNHCR and other commentators have, however, to date, highlighted human rights violations and difficulties in connexion with asylum procedures and examinations on a number of occasions.[190]

The UK inclination seems to be that the discretion not to issue transfer orders should be severely limited. Nevertheless, the decision may have positive repercussions on thousands of asylum seekers as the immediate backlog in the UK is reported as being approximately 1300 cases.

The NS case brought before the ECJ, has its background in the case Saeedi, R (on the application of) v Secretary of State for the Home Department & Ors [2010] EWHC 705 (Admin) (31 March 2010).

The England and Wales High Court held that the proposed transfer of the asylum applicant to Greece was not incompatible with art 3 of the European Convention on Human Rights or similar rights guaranteed under European Union law. On 1 April 2009, the UK Secretary of State sought to transfer the claimant from the UK to Greece for determination of his application for asylum, pursuant to the Dublin Regulation.

Under art 10(1) of the DR, the responsibility lies on a Member State to examine an asylum application where it is established that the applicant first entered that Member State's border irregularly, having come from a third country. Accordingly, in this case, Greece was held responsible for processing the claimant's asylum application.

The claimant argued that transfer under the DR would place him at risk of treatment in violation of art 3 of the ECHR, which prohibits inhuman and degrading treatment. He also argued that the removal would be contrary to similar fundamental human rights recognised as general principles of European Union law. These claims were based on the conditions and procedures for asylum applicants in Greece, as well as the possibility of onward refoule-

189. Order of the president of the CJEU in Case C-411/10, 1 October 2010.

190. A most recent commentary being: UNHCR, Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation in particular in the context of intended transfers to Greece, June 2010, UNHCR, "Observations on Greece as a country of asylum", December 2009, UNHCR, "Unhcr Position on the return of asylum- seekers to Greece under the "Dublin Regulation", April 2008.

ment. The claimant advanced three key arguments in support of his claim which are discussed below.

Argument 1 – incompatibility of the 'deeming provision' with the European Convention

The Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (UK) c 19 contains a so-called 'deeming provision'. Countries listed in Schedule 3 of the Act are deemed to be 'safe countries' as regards Refugee Convention-prohibited persecution, as well as onward refoulement in breach of the European Convention **or** the Refugee Convention. The Act restricts the ability of a claimant to appeal to the Asylum and Immigration Tribunal against the decision to remove him or her to a safe country.

The deeming provision does not apply to claims relating to treatment in contravention of the European Convention within the receiving country. However, para 5(4) of Schedule 3 requires the UK Secretary of State to certify these claims as being clearly unfounded unless satisfied that they are not clearly unfounded.

The claimant's first argument was that this deeming provision is incompatible with the European Convention.

In the 2009 case of Nasseri, the House of Lords held that the deeming provision (as it related to Greece) was not incompatible with the ECHR on the evidence before the Court. Hence, the deeming provision's incompatibility with the ECHR in this matter depended on the provision of fresh evidence indicating that the situation in Greece had deteriorated sufficiently.

Justice Cranston found that the evidence concerning the conditions and procedures for asylum applicants in Greece, as well as the risk of refoulement, was not materially different from the evidence in Nasseri. Thus, the deeming provision was held not incompatible with art 3 of the ECHR. It was held that there was no real risk that removal to Greece under the DR would result in the claimant suffering treatment prohibited under art 3. Citing Lord Hoffman's acknowledgment in Nasseri that the procedures for asylum applicants in Greece 'may leave something to be desired', the principle established by the Strasbourg Court in KRS (affirmed in Nasseri) was that these matters ought to be taken up with the Greek domestic authorities or the ECtHR, if necessary.

Argument 2 – the Secretary of State's 'clearly unfounded claim' certificate ought to be quashed

The second key question for Cranston J was whether the Secretary of State's Schedule 3 para 5(4) certificate ought to be quashed. As mentioned above, this provision of the Act required the Secretary of State to certify an applicant's ECHR claims as clearly unfounded unless satisfied that they were not clearly unfounded.

On the evidence before the Court in this case, it was held that the Secretary of State's certification was valid. There was no basis for a conclusion that the ECHR claims were not clearly unfounded.

Argument 3 – the scope of the Secretary of State's obligations under Art 3(2) of the Dublin Regulation

Finally, Cranston J had to determine the scope of the Secretary of State's obligations under art 3(2) of the DR. This section gives a Member State discretion to process an asylum application within its own country, notwithstanding that responsibility for examining the claim lies with another Member State under the Regulation.

His Honour held that, in exercising the art 3(2) discretion, the Secretary of State was bound to consider the rights embodied in art 1 (human dignity), art 18 (guarantee of the right of asylum) and art 19(2) (prohibition on inhuman or degrading treatment) of the EU Charter of Fundamental Rights. This was because these human rights form part of the general principles of European Union law, and the Secretary of State was applying a European Union law instrument. As there was found to be only an ad hoc policy regarding the application of art 3(2), there was no evidence that the Secretary of State had considered these fundamental rights.

However, despite this failure, Cranston J did not consider that the claimant's fundamental rights would be jeopardised by removal to Greece.

It followed from these three findings that the Secretary of State could validly return the applicant to Greece under the Dublin Regulation.

Ireland

On 30 July 2010, the High Court of Ireland also referred an asylum appeals case to the ECJ to test the legality of transferring asylum seekers between EU Member States which have different standards of protection for refugees. This

case concerns five asylum seekers from Afghanistan, Iran and Algeria who contest a transfer order to Greece made by the Minister for Justice.The asylum seekers do not dispute that they entered the EU through Greece. However, they allege their human rights would be infringed if they were returned to Greece as it does not operate a fair or humane asylum system.

In Ireland, up to forty appeal cases are pending in the High Court against transfer orders to Greece made under the Dublin II regulation and while these are pending no action will be

Denmark

The ECtHR has intervened in accordance with Rule 39 and temporarily suspended the return of more than 200 asylum applicants from Denmark to Greece. Another 400 applicants are at risk of deportation. Most applicants come from Syria and Afghanistan. Unlike the UK, Denmark has expressed that the interim measures imposed by the ECtHR do not mean that it will examine all the pending cases in Denmark.

Belgium

Belgium has declared that it will not transfer asylum seekers to Greece and will give priority to the examination of these claims. This decision follows the request by the ECtHR, pending the adoption of its judgment in the M.S.S. v. Belgium and Greece – which assesses whether sending asylum seekers back to Greece violates the ECHR -, to suspend all transfers to Greece, in any case where an asylum seeker challenges his or her return to Greece.[191]

Germany

A number of decisions have been taken on the question of return to Greece by various administrative courts in Germany and Dublin transfers to Greece have been suspended because of the lack of legal protection for the applicants.

In a decision by the Verwaltungsgericht Frankfurt on 8 July 2009 (K 4376/07.F.A.(3)), the court reached a similar conclusion:[192]

The main argument of the court is that the applicant did not get a fair asylum procedure according to the rules of the QD and the RCD. This fact – in

191. ECRE, Weekly Bulletin, 22 October 2010.
192. Written by Professor Dr. Juris Holger Hoffman.

the opinion of the court – reduces the discretion of the German office of asylum insofar as the question of art 3, second paragraph of the DR is concerned. The VG Frankfurt holds that the discretion is reduced to zero because of the disastrous practice concerning asylum cases to Greece. To give substance to this, the Court quotes several new statements by UNHCR concerning the situation of asylum seekers in Greece. The most recent UNHCR position paper dated, at that time, from 15.04.2008. Concerning the Greek asylum procedure in theory and practice the court quotes the intergovernmental consultations on migration, asylum and refugees: report on policies and practices in EGC participating States, Geneva 2009, chapter "Greece". The court had, in its oral hearing, heard a representative of UNHCR concerning the question whether the situation in Greek law and practice is still the same as described by UNHCR in 2007 and 2008. The employee of UNHCR said that UNHCR will no longer take part in the Greek asylum procedure because of its unfairness (a UNHCR press release from 17.07.2009 is available as is the report by Thomas Hammerberg, Council of Europe Commissioner for Human Rights, 04/02.2009). The legal representative of the applicant had mentioned in Court that in July 2009 by a decree of the Greek government the Court of second instance and a second oral hearing were omitted.

The shortcomings of the asylum procedure, which are not going to be improved in the near future, the non-existing social benefits and housing for applicants, the impossibility to find work on a legal basis during the very long running asylum procedure and the lack of information and legal guidance during the whole procedure led the Frankfurt Court to the opinion that the criteria of a fair asylum procedure are not fulfilled. This is why the Court held the German government responsible for applying art 3 para 2 of the DR and for leading the asylum case in Germany and for that purpose for bringing the applicant back from Greece to Germany.

The long awaited hearing before the German Constitutional Court, the Bundesverfassungsgericht, is scheduled for 28 October 2010. The Court will decide if the case can be heard by it and if German authorities, in their application of the Dublin rules, can assess the security situation of Greece. The case concerns an asylum applicant from Iraq who had previously applied for asylum in Greece and whom German authorities wants to transfer back to Greece.

France

The Tribunal Administratif de Paris of 31.7.2009 (case no. 0912502/9-1) halted a transfer of a family to Greece in June 2009.[193] On the basis of evidence from the Hammersberg report, a French decision highlights the threat of a violation of basic human rights in connexion with retun to Greece in accordance with the Dublin rules. The reasoning of the French decision is similar to the German decision referred above and based on the failure of an effective right to seek asylum in Greece. The French court included evidence from a Hammersberg report and a report by the European Committee for the Prevention of Torture (CPT). The reception and detention conditions for asylum seekers in Greece were also criticized as was the inadequate use of the sovereignty clause DR art 3(2).

The Netherlands

According to UNHCRs intervention in the case Ahmed and Others v. the Netherlands and Greece, "it is not possible to know whether, and if so on what grounds, asylum seekers in Dublin cases have been successful in rebutting the presumption of safety of Greece and other Member states".[194] Among the example cited, is the regional court, Zwolle which for a long time was the only court dealing with Dublin cases, and which has granted interim measures and upheld appeals citing deficits in the Greek asylum system. Reasons include low recognition rates, unavailability of legal aid or interpreters, length of procedures, lack of reception facilities, etc. The Court has seen such shortcomings as tangible or specific indications of Greece not respecting its international obligations.

By contrast, the Council of State (the highest court of appeal in the Netherlands), has consistently annulled such regional court decisions since 2001. Case law in 2008 and 2009 suggest that conditions in Greece are not seen as being in violation of the non-refoulement principle (Council of State, 29 December 2008). And, the Council of State has also found that condemnation of Greece by the ECtHR for a violation of articles 3 and 5 "is not in itself an indication that every asylum-seeker who is to be transferred under the Dublin II Regulation to Greece will suffer a human rights violation" (Council of State, November 2009). The Council of State has also found that incomplete

193. Tribunal administratif de Paris, Décision no. 0912502/9-1, 31 July 2009.
194. UNHCR, Submission, February 2010, pp. 8-9

transposition and implementation by Greece of the relevant EU Directives, is not in itself a ground for not relying on the inter-state trust".[195]

However, following a letter from the ECtHR, the Netherlands announced, on 6 October 2010, that it would no longer send asylum seekers back to Greece. This suspension affects 240 asylum seekers who were to be returned under the DR. Dutch authorities referred to the huge differences between the Netherlands and Greece in the recognition rate for Somalis, as one example. In the Netherlands, Somali asylum seekers have a recognition rate of 65% whereas in Greece, 0.[196]

After having had deliberations with the Dutch Council of State, the government considered, in principle, that it was safe to return asylum seekers back to Greece. Out of a total of more than one thousand persons to be returned, only approximately 70-80 persons were actually returned in 2009. There are different reasons for the low implementation. Some applicants abscond.[197] Other reasons are appeal possibilities and interventions by the ECtHR which preliminarily prevent return until the case has been heard by the Court. The Netherlands intervened in the M.S.S. v. Belgium and Greece case which was heard before the ECtHR on 1 September (see below). Here, the Netherlands stressed the same argument as did the UK in its intervention, namely that an asylum applicant should open procedures against Greece, not the Netherlands or the UK. In other words, according to this view, it would be the receiving, and not the sending State that should be challenged.

This line of arguing is in line with the approach the ECtHR took in the case K.R.S. v. UK (Application no. 32733/08) in 2008. In this case which concerned return of an Iranian asylum seeker from the UK to Greece, the Court, while referring to obligations under CEAS, states that "the presumption must be that Greece will abide by its obligations under those Directives". Thus, the Court admits the principle of inter-state trust as a strong safety presumption. Further, the ECtHR states that

> there is nothing to suggest that those returned to Greece under the Dublin Regulation run the risk of onward removal to a third country where they will face ill-treatment contrary to art 3 without being afforded a real opportunity, on the territory of Greece, of applying to the Court for a Rule 39 measure to prevent such"…as "asylum applicants in Greece have a right to appeal against any expulsion decision and to seek interim measures from the Court under Rule 39…

195. Ibid, p. 9.
196. ECRE, Weekly Bulletin, 8 October 2010.
197. One of the main reasons why the Dublin system cannot be regarded as overly efficient, Maiani, Vevstad, 2009.

And, of crucial importance, the Court concludes by stating that

> the objective information before it on conditions of detention in Greece is of some concern, not least given Greece's obligations under Council Directive 2003/9/EC[198] and Article 3 of the Convention. However, for substantially the same reasons, the Court finds that were any claim under the Convention to arise from those conditions, it should also be pursued first with the Greek domestic authorities and thereafter in an application to this Court.

The Court thereby seemingly blocked the assumption of direct refoulement while Member States apply the Dublin rules and return applicants to Greece.

5.5. Relation to Norwegian law and practice

Section 32, paragraph two of the Norwegian Immigration Act, allows for Norwegian examination of an asylum application in spite of the criteria otherwise pointing to the responsibility of another Dublin State. This would be in parallel to the DR art 3(2).[199] The objective is for all participating States to be able to make other considerations than those laid down in the DR arts. 4-14. In accordance with the secondary legislation to the Immigration Act (Utlendingsforskriften) Section 7-4, an asylum application in relation to Section 28 of the Act, may be examined in Norway in two situations: firstly, if the applicant has a close link to Norway (for example that the applicant has previously held a residence permit in Norway exceeding one year or more or for family reasons) and secondly, if there are other special reasons ("særlige grunner") indicating that examination of the case should be carried out in Norway.

Special reasons allowing for examination in Norway may relate to the situation in the receiving country. [200] The questions raised before the ECJ in relation to Greece are therefore indeed of interpretative interest in the Norwegian context although Norway is not formally bound by ECJ judgments. First, because of the need also for Norway to relate to European developments in the asylum field and the expressed interest in so doing, as has been referred to above.[201] Secondly, although Norway is not bound by the EU Charter for Fundamental Rights, Norway is bound by the same refugee law principles and human rights principles as EU Member States contained in other instruments of international public law, the principle of non refoulement included. Section 32, paragraph three of the Immigration Act explicitly exempts making

198. The RCD.
199. Vevstad, Kommentarutgaven, p. 281.
200. Ibid, p. 282-285.
201. See under comments on case 7. See also Chapter 1 Legal Background of this report.

use of the Dublin system in case a return would be in violation of the non refoulement principle as contained in. Section 73 of the same Act.

As in other European States, the question of return or non-return to Greece has been tried administratively and before Norwegian courts. Norway has transposed the ECHR into national law (The Human Rights Act). In accordance with this Act, Norway is bound not only by the ECHR as such, but equally by its decisions. The present situation of not making use of the DR, has come as a direct consequence of a ECtHR request in accordance with Rule 39. At the time of the finalizing this report (mid-October 2010), the ECtHR has so far applied Rule 39 in two cases regarding return to Greece in the Norwegian context. Failure of a Member State of the Council of Europe to comply with a measure indicated under Rule 39 may entail a breach of Article 34 of the ECHR.[202]

Thus, the outcome of the M.S.S. v. Belgium and Greece (see below), scheduled for December, will be of fundamental interest to Norwegian interpretation and practice in this area. A Norwegian case which concerns the return of an Iraqi applicant to Greece whose claim was rejected by the Immigration Appeals Board, Grand Chamber (Stornemnd) in January 2010, has been brought before the Norwegian Court of first instance (on case, see further below). The case should have been heard in October 2010, but has been rescheduled for December, possibly in order to await the results of the Strasbourg case against Belgium.

Immigration Appeals Board, Grand Chamber (Stornemnd)

In January 2010, the Immigration Appeals Board took a decision regarding return to Greece of an Iraqi asylum applicant in accordance with the Immigration Act Section 32 and Section 73. The conclusion in this case was that return to Greece according to the Dublin rules would be permissible.

The Grand Jury did pronounce itself on a number of issues of interest which have the effect of precedence in regard to later cases:

> The principle of non-refoulement is a fundamental principle in regard to the Dublin cooperation and implies protection against return to a country which does not respect this principle.
>
> As regards administrative considerations, differing procedures in the various countries cooperating under the Dublin rules must, to a large effect, be accepted.

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202. Case of Mamatkulov and Askarov v. Turkey (applications nos. 46827/99 and 46951/99) paragraphs 128 and 129 as well as point 5 of the operative part.

The Grand Jury of the Appeals Board states that not granting refugee status to an alien who, according to the Refugee Convention is entitled to it, is in violation of the conditions laid down for the Dublin cooperation. For the individual asylum applicant such non compliance implies that the person concerned does not acquire the rights pertaining to refugees. The Grand Jury of the Appeals Board is of the opinion that this is a relevant and far reaching risk, independently of whether a risk of refoulement exists.

The Grand Chamber of the Appeals Board is of the opinion that Section 32 second paragraph of the Immigration Act and its secondary legislation, Section 7-4, paragraph two, must be interpreted so that the concept of "special reasons includes legislation and practice in another Dublin State. This may be the case if the deficiencies of a receiving state imply a danger that the the asylum applicants will not being granted adequate protection. In a concrete assessment of another State's national asylum system, the vulnerability of the applicant or weak potential for the applicant's ability to fend for his or her rights as an asylum applicant should be taken into consideration.[203]

The last word has not yet been spoken in regard to the Dublin rules and Greece. Hopefully a number of clarifications may be expected in the near future from various instances involved, both at national and the international levels. In the Norwegian context this implies waiting with interest for the upcoming decisions in the ECJ and the ECtHR. And indeed, the upcoming case to be heard before the First Instance National Court scheduled for December 2010 (see above). It should equally be noted, that although Greece, at present, represents a case in point, the fundamental principles of refugee protection and human rights referred to in the discussion on return to Greece are of relevance to situations pertaining to other countries as well, both within the cooperation area in Europe and outside. This includes the question of whether European States a priori may continue to consider each other safe and appropriate for Dublin returns.

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203. Unofficial translation from Immigration Appeals Board Grand Chamber, January 2010.

6

The Family Reunification Directive

Directive 2003/86/EC on the right to family reunification (hereafter referred to as FRD), was adopted by the Council in September 2003. This Directive applies to all Member States except Ireland, Denmark and the United Kingdom. The transposition was set to be completed by October 2005.

The legal basis for the FRD is TEC article 63(3)(a).

6.1. Objectives, important provisions and legal issues

The purpose of the Directive is to determine the right to family reunification of third-country nationals, who reside lawfully in the territory of a European Union Member State and to determine the conditions under which family members can enter into and reside in a Member State in order to preserve family unity. The Directive also determines the rights of the family members once the application for family reunification has been accepted.[204]

The Directive lays down common rules, e.g. on the right to family reunification (Article 1), on who can be a sponsor (Article 3), eligible family members (Article 4), on how to apply the concept of best interest of the child (Article 5(5)). The Directive also regulates requirements concerning accomodation, sickness insurance, financial resources and integration measures (Article 7).

Already in December 2003, the first case in regard to FRD was brought before the ECJ by the EP. The question concerned annulment of the final subparagraph of Article 4(1), Article 4(6) and Article 8 of the Directive, arguing that these provisions were not compatible with fundamental human rights. In this case, the Court has a broad analysis on the legal relationship between the provisions in the Directive and the provisions in the ECHR regulating the right to family life and non-discrimination.

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204. ECRE Information Note on the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, November 2003

The second case brought before the Court concerns the interpretion of Article 7(1)(c) and the requirement that the sponsor should have stable and sufficient resources.

Several studies on the implementation of the FRD were conducted in 2007.[205] In a report from the Commission to the European Parliament and the Council, dated 8 October 2008, the Commission reports on the application of Directive 2003/86/EC,[206] concluding that the report revealed a few cross-cutting issues of incorrect transposition or misapplication which needed to be highlighted.

The report from the Commission also shows that the impact of the Directive on harmonisation in the field of family reunification remains limited. ”The low-level binding character of the Directive leaves the Member States much discretion and in some Member States the results have shown a lowering of standards when applying ”may” provisions”.

The Directive must be seen in connection with rights enscrined in the ECHR and the Directive on the rights of citizens of the European Union and their family members to move and reside freely within the territory of the EU (the Citizens´ Rights Directive, CRD).

The terms ”Belgian route”, ”European route” or “Surinder Singh route” are now used to describe situations where EU citizens establish themselves as workers in another EU/EEA Member State and invoke their community right to family reunification in this country. For Dutch citizens for example, moving to Belgium has been a way to avoid strict requirements for family reunification. According to the case Surinder Singh,[207] the EU citizen and the family members will have the right to return to his or her home country, and have the same rights as they already have been granted according to EC law.

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205. Odysseus network 2007, the European Migration Network and Centre for Migration Law Nijmegen 2007

206. Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification COM(2008) 610 final

207. CJEU C-370/90

6.2. ECJ Case 9; Conflict of rights

ECJ C-540/03 Parliament v Council 27 June 2006

This case concerns whether some of the provisions in the FRD are contrary to the rights enshcrined in the ECHR.

In December 2003, three months after the FRD was adopted, the EP brought action against the Council arguing that Article 4 (4), 4 (6) and Article 8 in the Directive, were not compliant with the right to respect for family life and the right to non-discrimination.

The provisions in question allow Member States to introduce certain derogations to the right to family reunification and enable the Member States to:
– require that a child aged over 12 years, who arrives independently from the rest of his/her family, meets a condition for integration;
– authorise applications in respect of children only if they are submitted before they reach the age of 15;
– impose a waiting period of up to three years, between submission of the application for family reunification and the issue of a residence permit, to the family members.

A judgment was delivered on 27 June 2006 following an opinion of Advocate General Kokott of 8 September 2005.

Judgment by the ECJ

The action for annulment was dismissed by the Court.

The Court first of all confirms that fundamental rights form an integral part of the general principle of law which the Court ensures the observance of.

> For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has a special significance in that respect.[208]

According to Article 4 (1) final subparagraph,

208. CJEU C-540/03 Judgment Para 35

> where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.

The EP argues that this provision is not compatible with Article 8 in the ECHR. One of the arguments put forward by the Parliament was, that "a condition for integration does not fall within one of the legitimate objectives capable of justifying inteference, as referred to in Article 8 (2) of the EHCR" The EP also refers to this being interferece which must be justified and proportionate, conditions which have not been incoporporated into the Directive.

Further, the Parliament argues that the Directive establishes discrimination based on a child´s age, and that this is contrary to Article 14 of the ECHR.

The Court emphasizes that the ECHR does not guarantee the right to family reunification and that each case must be assessed individually with respect to the interests of the applicant and the State, leaving the State a margin of appreciation.

The Court further states that

> the final subparagraph of Article 4(1) of the Directive cannot be regarded as running counter to the right to respect for family life. In the context of a directive imposing precise positive obligations on the Member States, it preserves a limited margin of appreciation for those States which is no different from that accorded to them by the ECtHR, in its case-law relating to that right, for weighing, in each factual situation, the competing interests.[209]

The Court does not find conditions for integration to be contrary to the right set out in Article 8 of the ECHR. This condition will merely be a condition assessed within the States' margin of appreciation. According to the Court, the choice of the age of 12 years does not appear to amount to a criterion that would infringe the principle of non-discrimination on the grounds of age.[210]

While assessing article 4(6), the Court concludes in the same way, arguing that the provision

> cannot be regarded as running counter to the fundamental right to respect for family life, to the obligation to have regard to the best interests of children or to the principle of non-discrimination on grounds of age, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way.[211]

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209. CJEU C-540/03 Judgment para 62
210. Ibid para 74
211. Ibid para 90

Article 8 of the Directive allows Member States to impose a waiting period of up to three years, between submission of the application for family reunification and the issue of a residence permit to the family members.

In line with its previous arguments, the ECJ does not find that the provision has the effect of precluding family reunification. The provision merely preserves a limited margin of appreciation for Member States.

The Court emphasizes that Member States, in their analysis, must take due regard to fundamental rights and other provisions of the Directive, especially on the best interest of minor children, pusuant to Article 5 (5).

While the Directive leaves Member States a margin of appreciation, it is sufficiently broad to enable them to apply the rules of the Directive in a manner consistent with the requirements flowing from the protection of fundamental rights. The Court concludes that none of the three derogation provisions could be regarded as running counter to the rights at stake.

6.3. Relation to Norwegian law and practice

Norway is bound by the same principles of the ECHR as EU Member States. Section 3 of the Immigration Act states that international obligations by which Norway is bound are applicable in so far as they would be in favour for the applicant. The international instrument in relation to the questions raised in case 9 pertain principally to art 8 ECHR. Norwegian practice has so far been seen as being within the requirements of the ECHR art 8.[212]

6.4. ECJ Case 10; Income requirement, Family reunification/formation

ECJ C-578/08 Rhimou Chakroun v Minister van Buitenlandse Zaken 4 March 2010

This case concerns the interpretation of Articles 2 (d) and 7 (1) (c) of the Family Reunification Directive.

The judgment was delivered on 4 March 2010 and an opinion from Advocate General Sharpstone was issued on 10 December 2009.

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212. Tolonen, Paula, in Vevstad (red,), Kommentarutgaven, p. 326.

The main proceedings concern an application by a Moroccan national to join her husband, also of Moroccan nationality, in the Netherlands. The husband had been lawfully resident in the Netherlands since 1970, and the couple married in 1972.

Dutch law differentiates between family reunification and family formation, and the Netherlands operates with different income requirements/criteria related to these two permits. The application from the Moroccan woman to join her husband in the Netherlands was regarded as an application for family formation, since they married after the husband had migrated to the Netherlands.

At the time of the application the husband did not meet the income requirements for family formation, but he met the income requirements for family reunification. The applicable income standard for family formation was 120 % of the minimum wage.

Mr Chakroun received unemployment benefits, which is not considered 'social assistance' according to Dutch law. These benefits amounted to EURO 1,322.73 net per month, whereas the applicable income standard was EURO 1,441.44 net per month.

The case was appealed all the way to the Council of State. The Council of State decided to refer questions to the Court asking whether the Directive allows a distinction to be drawn according to whether a family relationship arose before or after the resident's entry into the Member State.

The Council of State further asked for guidance on the criterion 'without recourse to the social assistance system' which is found in article 7(1) c in the Directive. The reason for this question was that the husband had stable and regular resources sufficient to meet general subsistence costs but not to render him ineligible for certain types of special assistance.

The questions raised were as follows:

1. Should the phrase 'recourse to the social assistance system' in Article 7(1)(c) of Council Directive 2003/86/EC (1) of 22 September 2003 on the right to family reunification be interpreted as permitting a Member State to make an arrangement in respect of family reunification which results in family reunification not being granted to a sponsor who has provided evidence of having stable and regular resources to meet general subsistence costs, but who, given the level of such resources, shall never the less be entitled to claim special assistance to meet exceptional, individually determined, essential living costs, income-related remission of charges by municipal authorities, or income-support measures in the context of municipal minimum income policies?

2. Should Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, in particular Article 2(d), be interpreted as precluding

national legislation which, in applying the resource requirement pursuant to Article 7(1)(c), makes a distinction according to whether a family relationship arose before or after the entry of the resident of the Member State?

In Article 2 (d)... the Directive sets out the following definitions:

For the purposes of this Directive:

> (d) 'family reunification' means the entry into and residence in a Member State by family members of a third-country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry.

Article 7(1) (c) of the Directive provides:

> When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has:
>
> (a) accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned;
> (b) sickness insurance in respect of all risks normally covered for its own nationals in the Member State concerned for himself/herself and the members of his/her family;
>
> (c) stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned. Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members.

One issue in those proceedings concerns the way in which the applicable income criterion is defined, another issue concerns the distinction drawn in the Netherlands between family reunification and family formation.

Judgment by the ECJ

In the hearing on 21 October 2009 the Commision submitted its observations to the case, supporting the views of the appellant. According to the Commission and the appellant, the discretion left to Member States in implementing the Directive must not adversely affect its objectives or effectiveness. The Commission stated further that the determining factor, according to the Direc-

tive, is whether the person concerned himself has sufficient resources to meet his basic needs without recourse to social assistance. [213]

The Court emphasizes in its judgment that the objective of the Directive is to promote family reunification. Article 4(1) imposes precise positive obligations, with corresponding clearly defined individual rights on the Member States. Contrary to the provisions assessed in Case C 540/03 (see above under case 8), the Court states that Member States do not have a margin of appreciation in assesseing this provision.[214] However, FRD article 7(1) allows Member States to require that certain conditions are fulfilled, but that "that faculty must be exercised in a manner which avoids undermining the objective of the Directive".[215]

The Court and the General Advocate agree on the first question, concluding that Article 7(1)(c) of the Directive must be interpreted as precluding a Member State from adopting rules which result in family reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance.

Considering the second question, whether the Directive allows a distinction to be drawn according to whether a family relationship was established before or after the sponsor's entry into the Member State, the Court and the General Advocate also agree on this question.

On the grounds that the Directive does not differentiate between family reunification and family formation, the need to interpret the provisions effectively according to the objective, the Court states that "…Member States did not have discretion to reintroduce that distinction in their national legislation transposing the Directive[216]"

Both the Court and the Advocate General therefore conclude that the FRD must be interpreted as precluding national legislation which, in applying the income requirement set out in Article 7(1)(c), draws a distinction according to whether the family relationship was established before or after the sponsor entered the territory of the host Member State.

The Advocate General states that

> I do not see that any objective distinction can be drawn systematically between the two third country nationals wishing to live in a Member State in order to

213. CJEU C-578/08 Judgment para 33-38
214. Ibid para 41
215. Ibid para 47
216. Ibid para. 64

> work and start a family there, one of whom marries before emigrating while the other saves up to marry on a visit to his or her country of origin.[217]

She further concludes that the Directive

> precludes the drawing of a distinction such as that in issue, to the extent that such a distinction is not based on any objective factor related to the level of resources required to maintain the sponsor and his or her family and applies without regard to the circumstances of each case.[218]

Changes in Dutch law

In a press release from the Dutch Ministry of Justice dated 12.03.2010, Dutch authorities state that the conditions for family reunification shall be brought in line with the conditions for family establishement. This means that the general requirement of a stable and regular income, minimum wage will constitute the benchmark, and apply to all migrants wishing to bring their partners to the Netherlands. Another change introduced by the Dutch authorities is to increase the age requirement for family reunification from 18 years to 21 years. This requirement will be in line with the age requirement for family formation. Dutch adaptation illustrates how Member States regulate the material content of the instruments into their national legislation and adapt to ECJ decisions.

6.5. Relation to Norwegian law and practice

Together with the Convention on the Rights of the Child (hereafter referred to as CRC), the ECHR represents the most fundamental European instrument of international public law in regard to the principle of family unity. Norway is not bound by the FRD although the content of the Directive is of importance for the development of Norwegian legislation in this field as the EU directives are obligatory to most European States and regulate family immigration matters into Europe in countries Norway cooperates with and seeks comparative guidance from.

Not many decisions have emanated form the ECtHR in regard to family immigration cases. However, a general principle which has evolved, is that ECHR art 8 does not imply a right to family immigration if, with a certain

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217. Opinion para. 51
218. Opinion para. 55

degree of reasonableness, family life may be excercised in another country.[219] A general feature of Norwegian practice, is to distinguish between family establishment and family reunification. New establishment of family life or potential family establishment, is given less favourable treatment than family cases already established.[220] Originally, the law Committee advicing the government on a proposed new Immigration Act had proposed to make a clearcut distinction between family establishment and family reunification in the new legislation, but this proposal was not followed-up upon.[221] Both cases are called "family immigration".

As a main rule[222], the sponsor in Norway has to have a certain level of income in order to be granted family reunification. The income standard in Norway per June 2010 corresponds to a salary grade 8 in the pay scale for Norwegian state employers. This implies a net monthly income of NKR 17.754 (approximately EURO 2,200).[223]

Since 1 January 2010, Norwegian law requires that in order to be granted a family immigration permit based on family establishment, a sponsor must have had "four years of work or education in Norway". There are certain ex-

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219. Paula Tolonen in Vevstad (red.), Kommentarutgave, p. 326.

220. This feature is also described in the travaux prépratoires to the Immigration Act (2010), see ot. prp. P. 182.

221. Vevstad (red.), Kommentarutgaven, p. 327.

222. Immigration Act 2010, Section 58, Immigration Regulation 2010 Sections 10-7

223. The income can be:

- income from employment
- sickness benefit, pregnancy benefit, parental benefit, disability pension or retirement pension from the National Insurance Scheme
- other permanent pensions or periodical benefits (insurance payments or similar)
- introduction benefit for newly arrived immigrants
- loans or grants received in connection with studies (from UDI.no)

ceptions to this rule. Norwegian law differenciates between family reunification and family formation. The question arising from the case brought before the ECJ, is whether or not this distinction is based on objective factors.

Although Norway is not bound by the decision of the ECJ, the new Norwegian provision highlights a difference in approach between Norway and the EU. Norwegian authorities esteem nevertheless, that Norwegian practice is within the required right to family life as contained in ECHR.

7

The Returns Directive

Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (hereafter referred to as the RD), was adopted on 16 December 2008. The Directive applies to all Member States except Denmark, Great Britain and Irland. The transposition is set to be completed by 24 December 2010.[224]

The legal basis for the Returns Directive is Article 63(3) b in the Treaty establishing the European Community (TEC). Recital 28 of the Returns Directive refers to the Directive being a development of the Schengen acquis and thus regarded as Schengen relevant in accordance with Council Decision 1999/437/EC article 1, litra c.[225] This is why, according to the 1997 Schengen cooperation agreement, Norway needed to transpose the Directive into national Norwegian legislation (transformation). The proposal for recognition by the Ministry of Justice was accepted by the government on the same day of the proposal, 1 October 2010.

7.1. Objective, important provisions and legal issues

The purpose of the Directive is to lay down EU-wide (and beyond) rules and procedures that apply to third-country nationals staying illegally on the territory of a Member State (article 2).

The Directive lays down common rules on a number of issues relevant to return proceedings, and encourages the voluntary return of persons who are not given a regularised stay. It regulates the issuing of return decisions (article 6) and entry bans (Article 11), and stipulates that irregularly staying third country nationals should be granted a period ranging between seven and thirty days to independently organise their departure before measures to carry out

224. In relation to Article 13(4), Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 December 2011.

225. Prop. 3 L (2010-2011) Endringer i utlendingsloven (gjennomføring av returdirektivet)

forced return are taken (article 7).

A number of procedural safeguards are granted to persons subject to return procedures, for example the right to appeal or seek review of decisions related to return (article 13) and to receive essential health care and, in the case of children, to access education while removal is pending (article 14).

Further, the RD regulates the detention of third country nationals subject to return procedures, including the maximum length of time during which a person can be detained (Article 15) and the conditions of detention (Article 16).

The first, and so far only, case refered to the ECJ concerns article 15. While article 15(5) establishes that third country nationals subject to return procedures should in principle not be detained for more than six months, under article 15(6) Member States may be able to prolong detention up to eighteen months in the event of uncooperative behavior on the part of the individual or when there are delays in obtaining the necessary documentation from third countries. According to article 15(4), detention ceases to be justified and the person shall be released immediately, when it appears that a reasonable prospect of removal no longer exists.

The RD establishes particular rules for the detention of children and families (article 17). It also provides a right for Member States to derogate from some of their obligations towards detained third country nationals in the event of emergency situations (Article 18).[226]

7.2. ECJ Case 11; Period of detention

Case C-357/09 Saïd Shamilovich Kadzoev v. Direktsia 'Migratsia' pri Ministerstvo na vatreshnite raboti, 30 November 2009

The reference for a preliminary ruling concerns the interpretation of article 15(4) to (6) of the RD. A judgment from the Court was delivered on 30 November 2009.

In this case, a person was arrested on the 21 October 2006 in Bulgaria, close to the border with Turkey. He had no identity papers, but claimed to be born in Chechnya. A deportation measure was imposed. He was placed in detention centre on 3 November 2006, pending the execution of the decision. In order to do this, Bulgarian authorities had to obtain documents and have a guarantee for funds sufficient to buy ticket to Chechnya.

The person presented two different names to the Bulgarian authorities. He was able to produce some identity documents, but the Russian authorities

226. ECRE Information Note on the Directive 2008/115/EC

claimed that the person was unknown to them and did not accept his return.

During a period from May 2007 until March 2009 the person applied for refugee status three times. The applications were all rejected. By the time of the ECJ judgment of 30 November 2009, the claimant had been held in detention for 3 years and was still in detention.

The Sofia City Administrative Court referred the case to the ECJ in order to find out whether a prolonged detention would be a breach of Article 15 of the RD.

The questions referred by the Sofia City Administrative Court can be summarized as follows:[227]

> The Court first of all asked what should be included in the period of maximun duration of detention regulated in Article 15(5) and (6) of the Directive.
>
> 1 (a) Should the maximum period of detention for the purpose of removal include the period of detention completed before the rules in the directive become applicable?
>
> 1 (b) Should the maximum period of detention include the period in which the removal decision was suspended pending the examination of the asylum claim?
>
> 2. Should the maximum period of detention include the period during which the removal decision was suspended because of a judicial review procedure, during which the person remained detained?
>
> 3.
> How should the the concept of a "reasonable prospect of removal" be interpreted?
>
> 4.
> Does the Directive allow continued detention of the person after the maximum period has expired, on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose.

227. Based on the Court`s version of the questions raised.

Judgment by the ECJ

In its judgment, the Court emphasizes the obligation for Member States not to exceed the maximum period of 18 months of detention.

In order to calculate which periods should count within this maximum period, the Court states that all detention according to the RD, for the purpose of removal, should be taken into account. This includes detention completed prior to implementation of the Directive.

Detention completed pursuant to provisions in other directives (such as the PD) or national legislation, does not have to be taken into assount.

Article 15(4) in the Directive states that detention is to be ended where there is no reasonable prospect of removal. The Court underlines that this provision does not apply when the maximum period of detention has expired. The Court further specifies that Member States can not invoke grounds of public order or public safety in order to continue the detention of a person according to the Return Directive.

The Court (Grand Chamber) therefore rules:

> 1. Article 15(5) and (6) of Directive ... must be interpreted as meaning that the maximum duration of detention laid down in those provisions must include a period of detention completed in connection with a removal procedure commenced before the rules in that directive become applicable.
>
> 2. A period during which a person has been held in a detention centre on the basis of a decision taken pursuant to the provisions of national and Community law concerning asylum seekers may not be regarded as detention for the purpose of removal within the meaning of Article 15 of Directive 2008/115.
>
> 3. Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the period during which execution of the decree of deportation was suspended because of a judicial review procedure brought against that decree by the person concerned is to be taken into account in calculating the period of detention for the purpose of removal, where the person concerned continued to be held in a detention facility during that procedure.
>
> 4. Article 15(4) of Directive 2008/115 must be interpreted as not being applicable where the possibilities of extending the periods of detention provided for in Article 15(6) of Directive 2008/115 have been exhausted at the time when a judicial review of the detention of the person concerned is conducted.
>
> 5. Article 15(4) of Directive 2008/115 must be interpreted as meaning that only a real prospect that removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6), corresponds to a reasonable prospect of removal, and that that reasonable prospect does not exist

where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.

6. Article 15(4) and (6) of Directive 2008/115 must be interpreted as not allowing, where the maximum period of detention laid down by that directive has expired, the person concerned not to be released immediately on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose.

7.3. Relation to Norwegian law and practice

The Returns Directive is due to become part of the Norwegian Immigration Act as of 24 December 2010. From a Norwegian perspective, ECJ judgments on the Directive will not have legally binding effect, but rulings by the ECJ will be of interpretative value.[228]

228. Proposal 3L on implementation of the Returns Directive

8

The Citizens' Rights Directive

The Citizen's Rights Directive[229] (EC 2004/38) on the right of citizens of the European Union and their family members to move and reside freely within the territory of the EU, was adopted by the European Parliament and the Council on 29 April 2004. The deadline for transposition was 30 April 2006.

The legal basis for the Directive is the provisions in the Treaty concerning union citizenship article 18 and the provisions concerning free movement of workers, Title III, article 40, 44 and 52.

This Directive was incorporated into the EEA Agreement of 7 December 2007 with a reservation of approval by the Norwegian Parliament. A proposition was brought before the Norwegian Parliament (Proposal to Parliament No. 42 on consent to recognition of the decision by the EEA Committee no. 158/2007 of 7 December 2007 on incorporation into the EEA agreement of Directive 2004/38/EC on union citizens and their family members right to move freely and reside on the territory of the Member States. The Ministry of Foreign Affairs presented its recommendation to the governemnt on 29 February 2008 and it was accepted by the government on that same day.

Transposition into Norwegian legislation was done via the Parliamentary report (ot.prp.) no. 72 (2007-2008)) on changes to the Immigration Act (provisions in regard to citizens of the EEA and EFTA and others). The Ministry of Labour and Social Inclusion presented its recommendation on 27 June 2008 and it was accepted by the government on that same day.

8.1. Objective, important provisions and legal issues

Until the Directive was adopted in 2004, several Community instruments dealt separately with workers, self-employed persons, students and other economically inactive persons.

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229. Cathrine Bernard p. 286, Also called "Free Movement of Persons Directive"

The Citizens` Rights Directive codifies and reviews existing Community instruments dealing with these groups ”in order to simplify and strenghten the right of free movement and residence of all Union Citizens”. [230] To fully understand the provisions in the Directive and the ECJ case law after the transposistion, it is important to understand that the Directive builds on existing legal instruments and practice concerning free movement of workers and union citizenship. To fully understand the provisions in the Directive and the ECJ case law after the transposistion, it is therefore important to understand that the Directive builds on existing legal instruments and practice concerning free movement of workers and union citizenship.

Another important feature is that the Directive unifies two areas of Community law; free movement of workers and union citizenship. According to the Directive “Union citizenship should be the fundamental status of the Member States when they exercise their right of free movement and residence”.[231]

In this chapter we will only deal with recent judgments and judgments that have direct interest for Norwegian practice following clarification of some important features and concepts hereunder.

Worker

Free movement of persons is considered one of the most fundamental freedoms guaranteed by Community law. Such freedom was initially directed towards the workers and has existed since the founding of the EC in 1957. The right to free movement for workers is enshrined in Article 39 of the EC Treaty and has been developed by secondary legislation, particularly Regulation 1612/68 on freedom of movement for workers within the Community and the Citizens` Rights Directive. [232] Today the right of free movement of persons comprises students, retired persons and EU citizens in general.

The term “worker” is not defined in the EC Treaty, but the ECJ has throught a wide range of cases interpreted the term. According to case law from the ECJ, ”worker” has been interpreted to cover ”any person who 1) undertakes genuine and effective work; 2) is under the direction of someone else; 3) for which he or her is paid”[233].

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230. Citizens’ Rights Directive, Preamble, recital 3.
231. Ibid
232. http://ec.europa.eu/social/main.jsp?catId=458&langId=en
233. COM/2002/0694 final

ECJ has also in a wide range of cases dealt with questions concerning the rights and benefits of workers, often related to equal treatment with national workers. On these grounds, one can argue that a worker is no longer seen as a "factor of production", but as an EU citizen with enforceable rights against the host state." [234]

Union Citizenship

By introducing the concept of citizenship[235] in the Maastricht Treaty in 1992, the EU generalised, for the benefit of all citizens and not just those pursuing an economic activity, the rights to enter, to reside and to stay in the territory of another Member State.[236] From a starting point where "Union citizenship began as a terminology pooling of the few rights which the individual enjoyed in other Member States",[237] one can argue that there has been a development, both legislative and judicial, where the status of citizenship has increasingly been enriched. The principle of solidarity has been particularly influential in that regard.

The Citizens' Rights Directive gives rights, not only to "Union citizens", as defined in article 2(1), but also to "family member", as defined in article 2(2). There is therefore an interesting relationship between the Citizens Rights Directive and the Family Reunification Directive, since both directives contain provisions regulating the right to family reunification. (see above on the Family Reunification Directive).

Article 3, first paragraph, of the directive, "Beneficiaries", provides:

> This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

According to Article 2(2)(a) of Directive 2004/38, for the purpose of the Directive, 'family member' means inter alia, the spouse.

As a family member of a Union Citizen, non EU/EEA nationals may benefit from the provisions of this Directive. The only condition is that the Union citizen has exercised his/her right of free movement.

Of great importance in this regard is the Metock case from 2008 concerning whether or not a non EU/EEA national must have legal residence in a

234. Bernard, p. 410
235. http://ec.europa.eu/justice/policies/citizenship/policies_citizenship_intro_en.htm
236. http://europa.eu/legislation_summaries/justice_freedom_security/citizenship_of_the_union/l23032_en.htm
237. Bernard, p. 410

country before he/she can benefit from the right of residence as a family member according to Article 3 in the Directive. This case is assessed below.

In two other recent cases the ECJ assesses the relationship between Regulation 1612/68 on freedom of movement for workers within the Community and the Citizens` Rights Directive, article 7(1) and 7(2). These provisions, cited below, list some conditions that have to be fulfilled, in order to stay for a longer period in another Member State.

> 1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
> (a) are workers or self-employed persons in the host Member State; or
> (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or
>
> (c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and
> – have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or
>
> (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).
>
> 2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

Another disputed provision is article 27 and article 28 in the Directive which , concern the possibility for Member States to restrict the right to entry and residence of a Union Citizen, and protection against expulsion. According to these provisions,

> restrictive measures may be taken only on a case-by-case basis where the personal conduct of an individual represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the host Member State. Restrictive measures cannot be based solely on considerations pertaining to the protection of public policy or public security advanced by another Member State.

The question has been raised in relation to persistent petty criminality and new forms of organised crimes performed by some Union Citizens.

Both Sweden and Denmark have recently had cases before their Supreme Courts assessing whether expulsion of a Union Citizen would be a breach of article 28[238].

In a Communication dated 11 December 2002 from the Commission,[239] the Commission gives an overview of the legal developments in the EC concerning free movement of workers. At the same time the Commission describes some of the most important issues in this area.

In December 2008 the Commission adopted a report on the application of the Citizen´s Rights Directive. The report concluded that "the overall transposition was rather disappointing". The Commission issued therefore in July 2009 a guidance note for better transposition and application of the Directive, aiming to provide guidance to Member States on how to apply the Directive.[240]

8.2. ECJ Case 12; Family Reunification

ECJ C 127/08 Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform, 25 July 2008

Four cases concerning the interpretation of article 3(1) of the Citizen´s Rights Directive were heard together before the national court, and joined in the main proceedings. The cases concerns whether a Member State can have requirements that non-EU national spouses of Union citizens must have been lawfully resident in another Member State prior to coming to the host Member State.

Four non-EU/EEA nationals, ('third-country nationals') had applied (unsuccessfully) for asylum in Ireland, and then married a citizen of another EU/EEA state who was exercising free movement rights in Ireland (the 'host' Member State). They each applied for a residence card under the Irish regulations that implement the Free Movement Directive.

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238. Högsta Domstolens Judgement, Stockholm, 29 September 2009 B 3439-07, on expulsion of Union Citizen
Explanation to the Danish "Riksadvokat",
http://www.djoef.dk/Udgivelser/Juristen/Juristen2009/Juristennr32009/UdvisningafEUborgere.aspx

239. COM/2002/0694 final

240. COM (2009) 313 final, Brussels 2.7.2009

Their applications were turned down on the grounds that the applicants did not satisfy the condition of prior lawful residence in another Member State required by Irish law, Regulation 3 (2) of the 2006 Regulations. Provision 3 (2) states that the regulations shall not apply to a family member unless the family member is lawfully resident in another Member State.[241]

The appellants argued that the Directive did not have a provision for a condition of prior lawful residence in another Member State. The Irish Minister of Justice on the other hand, argued that the Directive did not preclude such a condition. He argued that the Directive leaves the Member States the discretion to impose such condition and that such a condition would be consistent with Community law as followed from ECJ Case C-109/01 Akrich and ECJ Case C-1/05 Jia.

A condition requiring prior lawful residence would according to the Court not be compatible with the objective set out in article 3 (1)(c) EC of an internal market characterised by the abolition of obstacles to the free movement of persons.[242]

Further, the Court argues that if Union citizens were not allowed to lead a normal family life in the host state, the exercise of the freedoms would be seriously obstructed. [243]

Since it considered that an interpretation of Directive 2004/38 was necessary for it to give judgment in the main proceedings, the High Court decided to stay the proceedings and refer the following questions to the ECJ for a preliminary ruling:

> (1) Does Directive 2004/38/EC permit a Member State to have a general requirement that a non-EU national spouse of a Union citizen must have been lawfully resident in another Member State prior to coming to the host Member State in order that he or she be entitled to benefit from the provisions of Directive 2004/38/EC?
>
> (2) Does Article 3(1) of Directive 2004/38/EC include within its scope of application a non-EU national who is:
> - a spouse of a Union citizen who resides in the host Member State and satisfies a condition in Article 7(1)(a), (b) or (c) and
> - is then residing in the host Member State with the Union citizen as his/her spouse irrespective of when or where their marriage took place or when or how the non-EU national entered the host Member State?

241. CJEU C-127/08 Judgment Para 16
242. Ibid para 68
243. Ibid para 63

(3) If the answer to the preceding question is in the negative does Article 3(1) of Directive 2004/38/EC include within its scope of application a non-EU national spouse of a Union citizen who is:
- a spouse of a Union citizen who resides in the host Member State and satisfies a condition in Article 7(1)(a), (b) or (c) and
- resides in the host Member State with the Union citizen as his/her spouse
- has entered the host Member State independently of the Union citizen and
- subsequently married the Union citizen in the host Member State?

Judgment by the ECJ

In the judgment, the Court finds, first of all, that there are no provisions in the Directive which contain a condition for lawful stay. The Court therefore concludes that the Directive precludes national legislation which requires a national of a non-member country, who is the spouse of a Union citizen residing in that Member State, to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive.

The Court confirms that the Court came to a different conclusion in the Akrich case in 2001, when the issue was still regulated by Article 10 in Regulation No 1612/68. In this case the Court concluded that "in order to benefit from the rights provided for in Article 10 ...the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State. In the Metock case, the Court states that this conclusion must be reconsidered[244].

Question 2 concerns whether there should be other restrictions on when or where the marriage took place and how the national of a non-member country entered the host Member State.

That interpretation is consistent with the purpose of Directive 2004/38, which aims to facilitate the exercise of the fundamental right of residence of Union citizens in a Member State other than that of which they are a national. Where a Union citizen founds a family after becoming established in the host Member State, the refusal of that Member State to authorise his family members who are nationals of non-member countries to join him there, would be such as to discourage him from continuing to reside there and encourage him to leave in order to be able to lead a family life in another Member State or in a non-member country.

The Court argues that such requirements cannot be found in the Directive. On the contrary, the purpose of the Directive, held together with "the necessity of not interpreting the provisions of Directive 2004/38 restrictively and

244 . Ibid para 58

not depriving them of their effectiveness, the words 'family members [of Union citizens] who accompany … them' in Article 3(1) of that directive must be interpreted as referring both to the family members of a Union citizen who entered the host Member State with him and to those who reside with him in that Member State, without it being necessary, in the latter case, to distinguish according to whether the nationals of non-member countries entered that Member State before or after the Union citizen or before or after becoming his family members.

2. Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State … and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.

The Metock ruling had the effect that several Member States had to change their existing laws and practices. Some Member States (Denmark, Ireland, Italy and the UK) argued that the interpretation would lead to abuse and misuse and stated proposals before the Council in order to restrict the scope of the rights enshrined in Directive 2004/38[245]. Several discussions on the Metock ruling took place within the Council and different proposals for Council Conclusions was put forward. The Conclusions that were adopted by the Council on the 27 and 28 November has a modified approach and simply states that the Commission will present a report providing guidelines on the application of the Directive.

Both Denmark and the Netherlands have reported a high increase in the number of applications and permits given to third country nationals applying for family reunification under Community law.[246]

8.3. Relation to Norwegian law and practice

Directive 2004/38 was transposed into Norwegian law on the 1 January 2010.[247] The new provisions have been described in the newly published Commentary to the Immigration Act.[248] As the ECJ has ruled that the wording of the Directive cannot be interpreted restrictively and not be stripped of its

245. Implementation of Directive 2004/38 in the context of EU Enlargement CEPS Special report/April 2009.

246. Gemeenschapsrecht en gezinmigratie (english summary) Regioplan, 2009 Ministerie van Justitie http://jp.dk/indland/indland_politik/article2074449.ece " Omstridt dom sendes til Bruxelles"

247. Chapter 13 in the Immigration Act

248. Bull, Henrik, in Vevstad (ed.), Kommentarutgave, pp. 626-632.

effectiveness, it was obvious that the Court placed importance on the objective of the Directive and the larger context of which it is part. In the Norwegian context, Bull makes reference to the interpretative instruction of Article 3 of the Immigration Act, which states that the Act shall be interpreted in conjunction with international obligations by which Norway is bound, if these have as objective, to strengthen the position of the individual concerned. This allows for taking decisions in line with the EEA law as it is now interpreted and understood by the EFTA Court and by the ECJ even if these happen to be contrary to the wording of the Immigration Act.[249]

While elaborating chapter 13 of the Immigration Act, the Norwegian Parliament expressed concern about possible consequences of the Metock case and possible guidelines emanating form the Commission in regard to the case. The majority in the Norwegian Parliament seems to have accepted the understanding offered by the Metock case as the interpretative means of interpreting Chapter 13. A possibility was retained, however, in regard to Norwegian secondary legislation (utlendingsforskriften), to allow for certain restrictions/adaptations as a consequence of the reported Commission instruction which had been announced[250]. But the secondary legislation does not contain any provisions which seeks to clarify a Norwegian understanding of the Metock case.[251]

8.4. ECJ Case 13; Child in education

ECJ C-480/08 Maria Teixeira v London Borough of Lambeth, Secretary of State for the Home Department, and ECJ C-310/08, London Borough of Harrow v Nimco Hassan Ibrahim, Secretary of State for the Home Department, 23 February 2010

This case concerns the interpretation of Article 12 in Regulation (EEC) No 1612/68 in relation to the Citizen´s Rights Directive.

Article 10 and 11 of Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community (amended by Council Regulation (EEC) No 2434/92 of 27. July 1992) provided that also family members of a worker should have the right to install themselves with a worker who had exercised his right to free movement and have the right to take up any activity as

249. Ibid, p. 632.
250. COM(2009)313 final.
251. Ibid, p. 641 in reference to Parliamentary report (Innstilling) O. no. 33 (2008-2009).

an employed person. These provisions were repealed by Article 38(1) of the Citizen`s Rights Directive.

Article 12, however was not repealed in the Directive. This Article provides that

> The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Article 12 paragraph 3 further states;

> The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.

At the same time, Article 7 (1) and (2) in the Directive require certain conditions if a person is staying longer that three months in the territory of another Member State. If the person is not working or self-employed, or financed by the host Member State there is a condition that the person has

> sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State;[252]

The question essentially asked in these two joined cases was if the right defined in article 12 of the Regulation is conditional to the requirements given in article 7 (1) and (2) in the Directive, concerning sufficient resources.

In the first case, a Somali woman, Nimco Hassan Ibrahim, arrived with her children in the UK in 2003 to join her husband. He was a Danish citizen working legally in the UK. Ms Ibrahim's husband left the UK in 2004 and the couple separated. Ms Ibrahim and the children, who also had Danish citizenship, stayed in the UK. Ms Ibrahim had never been self-sufficient, and relied on benefits and housing support for herself and her children.

In the second case, a Portuguese woman, Maria Teixeira, joined her husband in the UK in 1989 and their daughter was born in the country two years later. The couple divorced, but both continued to live in United Kingdom. Ms

252. Under Article 7(1) and (2) of Directive 2004/38

Texeira worked for some periods during her stay. In 2007 Ms Teixeira applied for housing assistance for homeless persons. The application was rejected on the grounds that Ms. Texeira could not claim a right of recidence. The assessment officer stated that Article 12 of Regulation No 1612/68 had been modified by Directive 2004/38.

Before the County Court,

> Ms Teixeira accepted that she had no right of residence under Article 7(1) of Directive 2004/38, that she did not satisfy the conditions set out in Article 7(3) of that directive for her to be regarded as having retained the status of worker, and that she did not have a right of permanent residence under Article 16 of that directive.
>
> She submitted that the sole basis on which she sought to claim a right of residence in the United Kingdom was the fact that her daughter was in education there and had an independent right of residence under Article 12 of Regulation No 1612/68, as interpreted by the Court in Baumbast and R , and that she had been her daughter's primary carer from March 2007.[253]

The question refered to the ECJ were as follows:

> In circumstances where
> – an EU citizen came to the United Kingdom
> – the EU citizen was for certain periods a worker in the United Kingdom
> – the EU citizen ceased to be a worker but did not depart from the United Kingdom
> – the EU citizen has not retained her status as a worker and has no right to reside under Article 7 and has no right of permanent residence under Article 16 of Directive 2004/38 …
> – the EU citizen's child entered education at a time when the EU citizen was not a worker but the child remained in education in the United Kingdom during periods when the EU citizen was in work in the United Kingdom
> – the EU citizen is the primary carer of her child and
> – the EU citizen and her child are not self-sufficient:
> (1) does the EU citizen only enjoy a right of residence in the United Kingdom if she satisfies the conditions set out in Directive 2004/38 …
> or
> (2) (a) does the EU citizen enjoy a right to reside derived from Article 12 of Regulation … No 1612/68 … as interpreted by the Court of Justice, without being required to satisfy the conditions set out in Directive 2004/38 …
> and
> (b) if so, must she have access to sufficient resources so as not to become a burden on the social assistance system of the host Member State during their

253. CJEU Case C-480-08 para. 27 and 28

> proposed period of residence and have comprehensive sickness insurance cover in the host Member State;
> (c) if so, must the child have first entered education at a time when the EU citizen was a worker in order to enjoy a right to reside derived from Article 12 of Regulation … No 1612/68 … as interpreted by the Court of Justice, or is it sufficient that the EU citizen has been a worker at some time after the child commenced education;
> (d) does any right that the EU citizen has to reside, as the primary carer of a child in education, cease when her child attains the age of 18?
> (3) If the answer to Question 1 is yes, is the position different in circumstances such as the present case where the child commenced education prior to the date by which Directive 2004/38 … was to be implemented by the Member States but the mother did not become the primary carer and did not claim the right to reside on the basis that she was the primary carer of the child until March 2007, i.e. after the date by which the directive was to be implemented?

Judgment by the ECJ

In its judgment, the Court refers to the case Baumbast and R[254] were the Court held that a child of a migrant worker or former migrant worker has a right to reside there in order to attend general education courses, pursuant to Article 12 of Regulation 1612/68. The Court argued that the provisions in the Regulation had to be interpreted in the light of the requirement of respect for family life laid down in Article 8 of the ECHR and concluded that

> that the right conferred by Article 12 of that Regulation on the child of a migrant worker to pursue, under the best possible conditions, his education in the host Member State necessarily implies that that child has the right to be accompanied by the person who is his primary carer and, accordingly, that that person is able to reside with him in that Member State during his studies.[255]

The Court refers to the case Gaal[256] and states that Article 12 of the Regulation should be interpreted independent of previous Article 10 in the Regulations, now article 7 (1) (b).

In Gaal, the Court argues that once the right to access of education is established pusuant to Article 12, there can be no requirement that the conditions in Article 10 should be satisfied. Second, a child`s right to education does not depend on the current status of the parents, but applies to children of migrant workers as well as former migrant workers.

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254. CJEU C-413/99 Baumbast and R v Secretary of State for the Home Department,
255. CJEU C- 480/08 para 39
256. CJEU C-7/94

On those grounds, the Court ruled:
1. A national of a Member State who was employed in another Member State in which his or her child is in education can, in circumstances such as those of the main proceedings, claim, in the capacity of primary carer for that child, a right of residence in the host Member State on the sole basis of Article 12 of Regulation (EEC) No 1612/68.

2. The right of residence in the host Member State of the parent who is the primary carer of a child exercising the right to pursue his or her education in accordance with Article 12 of Regulation No 1612/68 is not conditional on that parent having sufficient resources not to become a burden on the social assistance system of that Member State during the period of residence and having comprehensive sickness insurance cover there.

3. The right of residence in the host Member State of the parent who is the primary carer for a child of a migrant worker, where that child is in education in that State, is not conditional on one of the child's parents having worked as a migrant worker in that Member State on the date on which the child started in education.

4. The right of residence in the host Member State of the parent who is the primary carer for a child of a migrant worker, where that child is in education in that State, ends when the child reaches the age of majority, unless the child continues to need the presence and care of that parent in order to be able to pursue and complete his or her education.

8.5. Relation to Norwegian law and practice

Provisions of relevance in the Norwegian Immigration Act are containd in Section 114 cf. secondary legislation (Utlendingsforskriften) Section 19-15. These provisions relate to family members who are not EEA citizens. The rights pertaining to these family members derive in principle from the residence permit of the "main person" and therefore terminates at the same time as that of the "main person". Under certain circumstances, the family members from third countries may, however, have certain rights attached to themselves specifically. This may be the case, for example children and one parent (not the EEA citizen), for as long as the child is under education in an educational institution.[257] The provisions discussed in the case above, are imple-

257. For further reading, see extensive commentary in Bull in Vevstad (ed.), *Kommentarutgave*, pp. 661-666.

mented in secondary legislation in Norway, but the implementation in the secondary legislation does not clarify the relationship between the two provisions. It is thus unclear whether the right of a child to education in practice will be conditional on the parent´s access to sufficient resources.

9

Findings and Recommendations

Findings

1.TFEU extends the right of the lower level courts of EU Member States (previously reserved supreme courts) to refer to the ECJ for preliminary rulings in relation to asylum, immigration and visa issues. This carries potential for extention of range and subject matter of questions put before the court and can enhance common interpretation of the instruments. At the same time, there is a certain degree of anxiety that the case load before the ECJ will increase dramatically.

2. UNHCR is invited to intervene in cases before the ECJ and its advisory role is further enhanced through the observatory role it is meant to have in the EASO.

3. Increased use of ECtHR in regard to interpretation of EU law.

4. National courts increasingly give focus to the CEAS instruments in their rulings with reference to "European standards".

5. The results of pending cases before the ECJ in regard to interpretation of the Dublin Regulation and the EU Human Rights acquis, are of vital importance in regard to future application of the Dublin system, e.g. "the standard of mutual trust" and a possible new content of a Dublin III Regulation.

6. Norwegian law and practice mirrored in the study shows by and large that major differences in the areas covered are rare although some differences have been detected.

Recommendations:

1. To continue monitoring EU legislative as well as judicial developments before the ECJ, national courts and the ECtHR in the area of asylum and migration.

2. To analyse the EU influence (legislative and judicial) in the Norwegian context further – e.g. EU law and jurisprudence in Norwegian court cases, in the Appeal's Board and in the Directorate of Immigration (1st instance cases).

3. To facilitate cooperation between Norwegian courts and courts in Member States.

4. To establish learning facilities (seminars, conferences) for advanced knowledge of legislation and jurisprudence at all levels of the Norwegian administration and courts.

5. To consider developing Norwegian legislation further in line with the EU legislation

Concluding remarks

The next few years will lay the premises for European legislation and policy further. Judicial review forms an important part of these expected developments of which the ECJ has a dominant role. The case law presented in this study shows that the ECJ addresses the whole spectrum of sources of law such as the GC and the ECHR in addition to EU law and that its deliberations and interpretations are thorough.

Therefore, although Norway is not formally bound by the ECJ interpretations, they are important to Norway in order to gain knowledge of European jurisprudence both at institutional level and national level, but also in order to assess how and when to further align itself with European cooperation as our ambitions have been expressed in the White Paper to Parliament in April 2010 (Meld.St.9).

A close and continued follw-up of European jurisprudence will also allow Norway to identify policy issues which we wish to address in a format deemed appropriate and for internal use, for issues which can inspire improvements in our own national law and practice.

For the purposes of European cooperation and information exchange, it would be of interest to our European partners to gain further knowledge of Norwegian law and practice.Comments in this study on the relationship between jurisprudence in the EU and Member States can bee seen as an initial stage and inspiration for Norway's future cooperation in the EASO and EMN context.

Summary of ECJ cases

ECJ CASE 1; International protection

C-465/07 Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie, 17 February 2009

This case concerns the interpretation of QD Article 15 (c) and whether or not two persons seeking asylum in the Netherlands qualified for subsidiary protection according to this provision.

On the 9 September 2008 General Advocate Maduro delivered his opinion to the Dutch authorities. A judgement (Preliminary ruling) from the ECJ was delivered on the 17 February 2009.

The General Advocate argues that Article 15(c) of the Qualification Directive should be interpreted to offer supplementary protection to Article 15(a) and (b)[258]. And that there should be a lower standard of proof considering the individual nature of the threat applying Article 15(c) in comparison with Article 15(a) and (b). According to the GA, the distinction between a high degree of individual risk and a risk which is based on individual features is of defining importance.[259] In other words, the more serious and indiscriminate the violence is, the less proof is needed.

The court takes a different angle than the General Advocate and discusses first of all, the different types of ”serious harm” defined in Article 15 of the QD. The Court argues that while Article 15 (a) and (b) cover situations where the applicant would face a specific type of harm, Article 15 (c) covers situations where a more general risk of harm exists. This would be a general threat caused by a general situation; ”international or internal armed conflict”.[260]

The Court further argues that Article 15 (c) in conjuction with Article 2 (e) must be interpreted as follows (para 43):

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258. Ibid Para 32
259. Ibid Para 35
260. Elgafaji v. Staatssecretaris van Justitie, C-465/07, 2009 paras 32-34

> - the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;
> - the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.

This interpretation should ensure that Article 15(c) of the Directive has its own field of application, not invalidated by the wording of recital 26 in the preamble[261].

> While that recital implies that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions set out in Article 15(c) of the Directive have been met in respect of a specific person, its wording nevertheless allows -- by the use of the word 'normally' -- for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.[262]

In that regard, 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.[263]

The assessment of whether there is an exceptional situation or not prevailing in a country, should, as stated in the quote above, be left to the Member States to decide.

The ECJ did not define the term "internal armed conflict" or discuss relevant criteria for determining when a situation can be defined as an internal armed conflict. As will be seen below, State practice shows that Member States have interpreted the term "armed conflict"very differently, thus a clarification by the ECJ on this point could have been an important contribution to the interpretation of article 15(c).

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261. Ibid para 36
262. Ibid para 37
263. Ibid para 39

ECJ Case 2; Cessation

ECJ C-175/08 Aydin Salahadin Abdulla v Bundesrepublik Deutschland, C-176/08 Kamil Hasan v Bundesrepublik Deutschland, C-178/08 Ahmed Adem Hamrin Mosa Rashi v Bundesrepublik Deutschland, C-179/08 Dler Jamal v Bundesrepublik Deutschland, 2 March 2010

Four cases were joined in a main proceeding before the ECJ in regard to cessation of refugee status, regulated in QD article 11. Judgment from the ECJ was delivered on 2 March 2010.

The appellants, all Iraqi citizens, travelled to Germany between 1999-2002 and applied for asylum. All four were recognised as refugees and granted refugee status in 2001 and 2002, due to fear of percecution by Saddam Hussein´s regime, the Baath Party.

German law requires that authorities revoke a decision of granting refugee status as soon as the ”ceased circumstances” clause can be applied. The latest reform of Germany's Aliens and Refugee Act in 2004 introduced an obligation for the authorities to review refugee status in each individual case with a view of cessation, three years after the recognition decision had become final.[264]

The questions posed to the ECJ concern the criteria for cessation of refugee status under QD Article 11(1)(e) as well as the applicable standard and burden of proof in this context.

The Court (Grand Chamber) ruled that:

1. Article 11(1)(e) … must be interpreted as meaning that:
– refugee status ceases to exist when, having regard to a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which justified the person's fear of persecution for one of the reasons referred to in Article 2(c) …, on the basis of which refugee status was granted, no longer exist and that person has no other reason to fear being 'persecuted' within the meaning of Article 2(c) …;
– for the purposes of assessing a change of circumstances, the competent authorities of the Member State must verify, having regard to the refugee's individual situation, that the actor or actors of protection referred to in Article 7(1) of Directive 2004/83 have taken reasonable steps to prevent the persecution, that they therefore operate, inter alia, an effective legal system for the detection, prosecution and punishment of acts constituting persecution and that the national concerned will have access to such protection if he ceases to have refugee status;
– the actors of protection referred to in Article 7(1)(b) of Directive 2004/83 may comprise international organisations controlling the State or a substantial

264. UNHCR Statement on the Ceased Circumstances Clause page 9.

part of the territory of the State, including by means of the presence of a multinational force in that territory.

2.When the circumstances which resulted in the granting of refugee status have ceased to exist and the competent authorities of the Member State verify that there are no other circumstances which could justify a fear of persecution on the part of the person concerned either for the same reason as that initially at issue or for one of the other reasons set out in Article 2(c) of Directive 2004/83, the standard of probability used to assess the risk stemming from those other circumstances is the same as that applied when refugee status was granted.

3.In so far as it provides indications as to the scope of the evidential value to be attached to previous acts or threats of persecution, Article 4(4) of Directive 2004/83 may apply when the competent authorities plan to withdraw refugee status under Article 11(1)(e) of that directive and the person concerned, in order to demonstrate that there is still a well-founded fear of persecution, relies on circumstances other than those as a result of which he was recognised as being a refugee. However, that may normally be the case only when the reason for persecution is different from that accepted at the time when refugee status was granted and only when there are earlier acts or threats of persecution which are connected with the reason for persecution being examined at that stage.

ECJ Case 3; Exclusion

ECJ C –31/09 Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal, 17 June 2010

This case concerns the interpretation of QD article 12(1)(a). This provision applies to persons who fall within the scope of Article 1(D) of the GC, relating to protection or assistance from organs or agencies of the United Nations other than UNHCR.

An opinion from Advocate General Sharpston was delivered on 3 March 2010, and a judgment from the ECJ was delivered on 17 June 2010.

Summing up, the ECJ rejects the argument that the mere fact that a person could receive protection or assistance from an agency of the United Nations other than UNHCR entitles him to refugee status under QD Article 12(1). It adds that formal registration with such an agency is not a requirement, but actual receipt of protection or assistance is. Other issues raised are not considered by the ECJ. The Advocate General had added that persons who may at some point have received such protection or assistance may not be entitled to automatic refugee status if they voluntarily gave up such protection or assis-

tance. This assessment is based on her interpretation of the GC art 1(D).

ECJ Case 4; Exclusion (pending)

ECJ C 57/09 B. t. Duitsland (hereafter referred to "case B") and C 101/09 D. t. Duitsland (hereafter referred to as "case D"), Opinion from the General Advocate, 1 June 2010.

This case concerns the interpretation of QD articles 12(2)(b) and (c) on which grounds Member States can exclude a person from being recognised as a refugee.

General Advocate Paolo Mengozzi gave his opinion concerning these questions on both cases in conjunction on 1 June 2010 which will be referred to in the following. The ECJ has not yet given judgment (mid-October 2010).

The General Advocate states that it is not sufficient to be on the list in annex to the Council Common Position on the application of specific measures to combat terrorism. There should be a three step approach in order to conclude whether or not a person should be excluded. Member States should first assess the organisation or the group in question and which activities this organisation or group had during the period the applicant was assosiated. Secondly, the Member States have to assess the personal responsibility according to QD article 12(2). Thirdly, when a personal responsibility has been established, Member States should decide if the acts commited actually do fall under the QD articles 12(2) (b) and 12 (2)(c).

Since the provisions in the QD provide minimum standards, and since it is the Member States which have knowledge of the actual cases, it should up to the national Member States to apply the criteria and carry out assessments in the individual case, and not the ECJ.

There is no requirement that the person still poses a danger.

The General Advocate argues that there should be a proportionality test where the consequenses of excluding a person must be weighed against the seriousness of acts committed. Member States should secure an application of QD articles 12(2)(b) and (c) in proportionality with the purpose of the provisions and the humanitarian character of refugee law.

Finally the General Advocate states that the Member States can grant a person, who is excluded, protection, as long as this form of protection cannot be confused with refugee protection in accordance with the QD.

ECJ Case 5; Institutional competence

ECJ C-133/06 European Parliament v. Council of the European Union, 6 May 2008

When the PD was adopted on 1 December 2005, the Directive contained provisions allowing the Council to adopt and amend lists of 'safe third countries' and 'European safe countries' after mere consultation of the Parliament.

The European Parliament that brought this case before the ECJ, wanted primarily, the annulment of Articles 29(1) and (2) and 36(3) of the PD, alternatively, the annulment of that directive in its entirety.[265]

The question raised in this case if whether the adoption of third country list was a part of the "legislation defining the common rules and basic principles" referred to in Article 67(5), or new measures that should have been adopted according to the co-decision procedure.[266]

The ECJ concluded that

> by that legislative act, the Council adopted 'Community legislation defining the common rules and basic principles' within the meaning of the first indent of Article 67(5) EC, and therefore the co-decision procedure is applicable.

The ECJ therefore annulled Articles 29 (1), 29 (2) (Minimum common list of third countries regarded as safe countries of origin) and 36 (3)(The European safe third countries concept) of the PD in its judgment of 6 May 2008 and confirmed that the EP should be granted co-legislative powers.
The result is that no common list of 'safe countries of origin' has been adopted. Instead, different lists still exist at national level, generating differences in the treatment of asylum applications[267].

ECJ Case 6; Effective remedy (pending)

ECJ C –69/10 Brahim Samba Diouf v Ministre du Travail, de l´Emploi et de l´Immigration. Reference for a preliminary ruling from the Tribunal administratif du Grande-Duché de Luxembourg 3 chambre lodged on 5. February 2010

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265. CJEU C-133/06 para 1

266. The first indent of Article 67(5) EC provides that the Council is to adopt the measures provided for in Article 63(1) and (2)(a) EC in accordance with the co-decision procedure referred to in Article 251 EC provided that it has adopted 'Community legislation defining the common rules and basic principles governing these issues', that is to say governing the asylum policy provided for by Article 63(1) EC and some of the measures on refugees and displaced persons, those referred to in Article 63 2(a) (EC).

    The question raised in this case is whether the definition of the common rules and basic principles was completed by the adoption of the contested directive, with the result that the co-decision procedure henceforth applies in respect of the adoption of any subsequent measure on those matters, in particular in respect of the establishment of the lists of safe countries.

267. UNHCR March 2010, pages 65-72

This case concerns interpretation of PD article 39 and the right to effective remedy. This is the first time after the Treaty of Lisbon entered into force, that a lower court has used it´s right to request the ECJ for a preliminary ruling.

In sum, the referring court asks whether the right to effective remedy in accordance with art 39 PD precludes denial of the right to appeal when an application for international protection is channeled into an accelerated procedure.

The court has not yet (by mid-October 2010), issued an opinion or delivered a decision in this case.

ECJ Case 7; Transfer deadlines

ECJ C-19/08 Migrationsverket (Swedish Immigration Board) v. Petrosian and Others, 29 January 2009

This case concerns the interpretation of DR art 20(1)(d) and art 20(2) and if the question of whether responsibility for the examination of an application for asylum passes to the Member State where the application was lodged if the transfer is not carried out within six months.

Summing up, the ECJ concludes that Article 20(1)(d) and Article 20(2) of the DR are to be interpreted as meaning that,:

> where the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation.[268]

ECJ Case 8; Relation between the Dublin II Regulation and the EU Human Rights acquis – Greece (pending)

ECJ C-411/10 Court of Appeal (England & Wales) (Civil Division) (UK) 18 August 2010 – NS v Secretary of State for the Home Department

This case concerns interpretation of DR art 3 and thus whether applying art 3(2), the "sovereignty clause", in order for Member States to respect their Human Rights obligations and not return asylum applicants to Greece in the light of the Charter of Fundamental Rights of the EU, and of various other agreements.

Two "test cases" have been brought before the ECJ, one from the Court of Appeal (England and Wales) UK and one from the Irish High Court. At the

268. Ibid, para. 53.

time of finalization of this report (mid-October 2010), only the questions raised by the UK have so far been made public. At present no statement by the General Advocate is available.

ECJ Case 9; Conflict of rights

ECJ C-540/03 Parliament v Council 27 June 2006

This case concerns whether some of the provisions in the FUD are contrary to the rights enshcrined in the ECHR.

In December 2003, three months after the Directive was adopted, the EP brought action against the Council arguing that Article 4 (4), 4 (6) and Article 8 in the Directive, were not compliant with the right to respect for family life and the right to non-discrimination.

The action for annulment was dismissed by the Court.

The Court emphasizes that the ECHR does not guarantee the right to family reunification, each case must be assessed individually with respect to the interests of the applicant and the State, leaving the State a margin of appreciation.

The Court further states that

> the final subparagraph of Article 4(1) of the Directive cannot be regarded as running counter to the right to respect for family life. In the context of a directive imposing precise positive obligations on the Member States, it preserves a limited margin of appreciation for those States which is no different from that accorded to them by the ECtHR, in its case-law relating to that right, for weighing, in each factual situation, the competing interests.[269]

The Court does not find that the conditions for integration to be contrary to the right set out in Article 8 of the ECHR. This condition will merely be a condition assessed within the States margin of appreciation. According to the Court, the choice of the age of 12 years does not appear to amount to a criterion that would infringe the principle of non-discrimination on grounds of age.[270]

Assessing Article 4 (6), the Court concludes in the same way, arguing that the provision

> cannot be regarded as running counter to the fundamental right to respect for family life, to the obligation to have regard to the best interests of children or to the principle of non-discrimination on grounds of age, either in itself or in that it expressly or impliedly authorises the Member States to act in such a way.[271]

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269. CJEU C-540/03 Judgment para 62
270. Ibid para 74
271. Ibid para 90

Article 8 of the Directive allows the Member States to impose a waiting period of up to three years, between submission of the application for family reunification and the issue of a residence permit, to the family members.

In line with its previous arguments, the ECJ does not find that the provision has the effect of precluding any family reunification. The provision merely preserves a limited margin of appreciation for the Member States.

The Court emphasizes that the Member States in analysis must have due regards to fundamental rights and the provisions in the rest of the Directive, especially the best interest of minor children, pursuant to Article 5 (5).

While the Directive leaves the Member States a margin of appreciation, it is sufficiently broad to enable them to apply the rules of the Directive in a manner consistent with the requirements flowing from the protection of fundamental rights. The Court conclude that none of the three derogation provisions could be regarded as running counter to the rights at issue.

ECJ Case 10; Income requirement, Family reunification/formation

ECJ C-578/08 Rhimou Chakroun v Minister van Buitenlandse Zaken 4 March 2010

This case concerns the interpretation of Articles 2 (d) and 7 (1) (c) of the Family Reunification Directive.

The judgment was delivered on 4 March 2010 and an opinion from Advocate General Sharpstone was issued on 10 December 2009.

The Court emphasizes in its judgment that the objective of the Directive is to promote family reunification. Article 4(1) imposes precise positive obligations, with corresponding clearly defined individual rights, on the Member States. Contrary to the provisions assessed in Case C 540/03 (see above under case 8), the Court states that Member States do not have a margin of appreciation in assesseing this provision.[272] However, FUD article 7(1) allows Member States to require that certain conditions are fulfilled, but that "that faculty must be exercised in a manner which avoids undermining the objective of the Directive".[273]

The Court and the General Advocate agree on the first question, concluding that Article 7(1)(c) of the Directive must be interpreted as precluding a Member State from adopting rules which result in family reunification being refused to a sponsor who has proved that he has stable and regular resources which are sufficient to maintain himself and the members of his family, but who, given the level of his resources, will nevertheless be entitled to claim special assistance.

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272. Ibid para 41
273. Ibid para 47

Considering the second question, whether the Directive allows a distinction to be drawn according to whether a family relationship was established before or after the sponsor's entry into the Member State, the Court and the General Advocate also agree on this question.

On the grounds that the Directive does not differentiate between family reunification and family formation, the need to interpret the provisions effectively according to the objective, the Court states that "…Member States did not have discretion to reintroduce that distinction in their national legislation transposing the Directive[274]"

Both the Court and the Advocate General therefore conclude that the FUD must be interpreted as precluding national legislation which, in applying the income requirement set out in Article 7(1)(c), draws a distinction according to whether the family relationship was established before or after the sponsor entered the territory of the host Member State.

The Advocate General states that

> I do not see that any objective distinction can be drawn systematically between the two third country nationals wishing to live in a Member State in order to work and start a family there, one of whom marries before emigrating while the other saves up to marry on a visit to his or her country of origin.[275]

She further concludes that the Directive

> precludes the drawing of a distinction such as that in issue, to the extent that such a distinction is not based on any objective factor related to the level of resources required to maintain the sponsor and his or her family and applies without regard to the circumstances of each case[276].

ECJ Case 11; Period of detention

Case C-357/09 Saïd Shamilovich Kadzoev v. Direktsia 'Migratsia' pri Ministerstvo na vatreshnite raboti, 30 November 2009

The reference for a preliminary ruling concerns the interpretation of Article 15(4) to (6) of the Returns Directive. A judgment from the Court was delivered on 30 November 2009.

The Court (Grand Chamber) ruled:

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274. Ibid para. 64
275. Opinion para. 51
276. Opinion para. 55

Article 15(5) and (6) of Directive ... must be interpreted as meaning that the maximum duration of detention laid down in those provisions must include a period of detention completed in connection with a removal procedure commenced before the rules in that directive become applicable.

A period during which a person has been held in a detention centre on the basis of a decision taken pursuant to the provisions of national and Community law concerning asylum seekers may not be regarded as detention for the purpose of removal within the meaning of Article 15 of Directive 2008/115.

Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the period during which execution of the decree of deportation was suspended because of a judicial review procedure brought against that decree by the person concerned is to be taken into account in calculating the period of detention for the purpose of removal, where the person concerned continued to be held in a detention facility during that procedure.

Article 15(4) of Directive 2008/115 must be interpreted as not being applicable where the possibilities of extending the periods of detention provided for in Article 15(6) of Directive 2008/115 have been exhausted at the time when a judicial review of the detention of the person concerned is conducted.

Article 15(4) of Directive 2008/115 must be interpreted as meaning that only a real prospect that removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6), corresponds to a reasonable prospect of removal, and that that reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.

Article 15(4) and (6) of Directive 2008/115 must be interpreted as not allowing, where the maximum period of detention laid down by that directive has expired, the person concerned not to be released immediately on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose.

ECJ Case 12; Family Reunification

ECJ C 127/08 Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform, 25 July 2008

Four cases concerning the interpretation of Article 3(1) of the Citizen´s Rights Directive were heard together before the national court, and joined in the main proceedings. The cases concerns whether a Member State can have requirements that non-EU national spouses of Union citizens must have been lawfully resident in another Member State prior to coming to the host Member State.

In the judgment, the Court first of all finds that there are no provisions in the Directive which contain a condition for lawful stay. The Court therefore

concludes that the Directive precludes national legislation which requires a national of a non-member country, who is the spouse of a Union citizen residing in that Member State, to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive.

The Court confirms that the Court came to a different conclusion in the Akrich case in 2001, when the issue was still regulated by Article 10 in Regulation No 1612/68. In this case the Court concluded that "in order to benefit from the rights provided for in Article 10 ...the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State. In the present case, the Court stated that this conclusion must be reconsidered[277].

Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State … and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.

ECJ Case 13; Child in education

ECJ C-480/08 Maria Teixeira v London Borough of Lambeth, Secretary of State for the Home Department, and ECJ C-310/08, London Borough of Harrow v Nimco Hassan Ibrahim, Secretary of State for the Home Department, 23 February 2010

This case concerns the interpretation of Article 12 in Regulation (EEC) No 1612/68 in relation to the Citizen´s Rights Directive.

This Article provides that

> The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

The Court found that:

A national of a Member State who was employed in another Member State in which his or her child is in education can, in circumstances such as those of the main proceedings, claim, in the capacity of primary carer for that child, a

277. Ibid para 58.

right of residence in the host Member State on the sole basis of Article 12 of Regulation (EEC) No 1612/68. The right of residence in the host Member State of the parent who is the primary carer of a child exercising the right to pursue his or her education in accordance with Article 12 of Regulation No 1612/68 is not conditional on that parent having sufficient resources not to become a burden on the social assistance system of that Member State during the period of residence and having comprehensive sickness insurance cover there.

The right of residence in the host Member State of the parent who is the primary carer for a child of a migrant worker, where that child is in education in that State, is not conditional on one of the child's parents having worked as a migrant worker in that Member State on the date on which the child started in education.

The right of residence in the host Member State of the parent who is the primary carer for a child of a migrant worker, where that child is in education in that State, ends when the child reaches the age of majority, unless the child continues to need the presence and care of that parent in order to be able to pursue and complete his or her education.

Qualification Directive	Case	Questions raised	Judgment	Conclusion from ECJ and relation to Norwegian law
	C-465 Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie, 17 February 2009	Subsidiary protection QD art 15 (c) ECHR art 3 NIA section 28 (1)(b)	2009	Art 15 c must be interpreted separately, but so far in line with ECtHR interpretation of ECHR art 3. Individual risk assessed in relation to the level of general violence. Decision from the Immigration Appeals Board 14 October 2010
	C-175/08 Aydin Salahadin Abdulla v Bundesrepublik Deutschland, C-176/08 Kamil Hasan v Bundesrepublik Deutschland, C-178/08 Ahmed Adem Hamrin Mosa Rashi v Bundesrepublik Deutschland, C-179/08 Dler Jamal v Bundesrepublik Deutschland, 2 March 2010	Cessation QD art 11(1)(e) GC art 1C(5) NIA section 37	2010	ECJ underlines that the changes must be significant, durable and that effective protection exist in home country. Norwegian Immigration authorities do not apply the cessation clauses systematically Norwegian case before Supreme Court concludes that changed personal circumstances fall under NIA section 37 GC art 1C(5)
	C -31/09 Nawras Bolbol v Bevándorlási és Állampolgársági Hivatal, 17 June 2010	Exclusion UNRWA refugees QD art 12 (1)(a) GC art 1 D NIA section 31	2010	ECJ and the UNHCR partly different interpretation of GC 1 D Norwegian case before Lagmannsretten (Court of Appeal) 1.12.2009. Appealed.
	C -57/09 B. t. Duitsland and C-101/09 D. t. Duitsland, 9 November 2010	Exclusion, applicant's name on EU list of terror organizations QD art 12 (2)(b)-(c) GC art 1 (F) NIA art 31	2010	Individual assessment required. Name on list not sufficient. Norwegian practice in line.
Procedures Directive				
	C-133/06 European Parliament v Council of the European Union, 6 May 2008	Institutional Competence, lists of safe countries PD art 29(1)-(2), art 36(3)	2008	Clarify institutional competence regarding adoption of new legal acts. Not directly relevant for Norway.
	C -69/10 Brahim Samba Diouf v Ministre du Travail, de l´Emploi et de l´Immigration. Reference for a preliminary ruling from the Tribunal administratif du Grande-Duché de Luxembourg 3 chambre lodged on 5 February 2010	Klagemuligheter, hurtigprosedyre PD art 39, ECHR art 6 and art 13	Pending	
Reception Conditions Directive				

Dublin II Regulation	Case	Questions raised	Judg ment	Conclusion from ECJ and relation to Norwegian law
	C-19/08 Migrationsverket v. Petrosian and others, 29 January 2009	Transfer deadlines DR art 20(1)(d) and (20)(2)	2009	Norwegian practice in line
	C-411/10 Court of Appeal, NS v Secretary of State for the Home Department 9 October 2010	Relation between DR, other EU legal framework; Charter of Fundamental Rights DR art 3	Pending	
Family Reunification Directive				
	C-540/03 Parliament v Council 27 June 2006	Conflict of rights between directive and ECHR FRD art 4, art 6, art 8 ECHR art 8, art 14	2010	The directive must be interpreted in line with the ECHR, no conflict of rights. Not directly relevant for Norway.
	C-578/08 Rhimou Chakroun v Minister van Buitenlandse Zaken 4 March 2010	Income requirement FRD art 2 (d) and 7 (1)(c) NIA section 40a, and 58 NIR sections 7-10	2010	In breach with the FRD to operate with two different income requirements for family reunification and family formation. Norway differentiates between family reunification and family establishment. Both have the same income requirement, but there is a an additional "four years requirement" of education or work in order to allow for family establishment.
Returns Directive				
	C-357/09 Saïd Shamilovich Kadzoev v. Direktsia 'Migratsia' pri Ministerstvo na vatreshnite raboti, 30 November 2009	Period of detention RD art 15 (4)-(6) NIA	2009	A person can be detained for a maximum of 18 months, when the purpose is removal. Norwegian law and practice in line.
Citizens Rights Directive				
	C-127/08 Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform, 25 July 2008	Family reunification, condition of legal stay. CRD art 3(1) NIA chapter 13	2008	MS can not require previous legal stay in order to grant family reunification with a EU/EEA citizen. Norwegian law and practice in line.
	C-480/08 Maria Teixeira v London Borough of Lambeth, Secretary of State for the Home Department, and ECJ C-310/08, London Borough of Harrow v Nimco Hassan Ibrahim, Secretary of State for the Home Department, 23 February 2010	Child in education, sufficient resources CRD art 7(1)-(2) Regulation No 1612/68 art 12 NIA section 114 cf NIR section 15-19	2010	Parents have the right to stay in a MS until the child has finish studies. Sufficient resources not a requirement. Norwegian law in line, practice unclear.

List of abbreviations

CEAS	Common European Asylum System
CEPS	Centre for European Policy Studies
CRC	Convention on the Rights of the Child
CRD	Citizens Rights Directive
EASO	European Asylum Support Office
DR	Dublin Regulation
EC	European Communities
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
CJEU	Court of Justice of the European Union
ECtHR	European Court of Human Rights
EEA	European Economic Area
EP	European Parliament
FRD	Family Reunification Directive
GC	Geneva Convention (Convention Relating to the Status of Refugees)
NIA	Norwegian Immigration Act
NIR	Norwegian Immigration Regulation
Odysseus	Odysseus Academic Network for legal Studies on Immigration and Asylum in Europe
PD	Procedures Directive
RCD	Reception Conditions Directive
RD	Returns Directive
QD	Qualification Directive
TEC	Treaty Establishing European Communities
TEU	Treaty European Union
TFEU	Treaty of the Functioning of the European Union (Treaty of Lisbon)
TP	Temporary Protection Directive
UNHCR	United Nations High Commissioner for Refugees

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Institute for social research
Report 2011:3

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Tittel/Title
Normative European Jurisprudence in a Refugee and Migration Context

Sammendrag
Denne studien omfatter sammendrag og analyse av viktige dommer innen asyl- og innvandringsfeltet fra EU-domstolen hvor EU-domstolen har fortolket bestemmelser i Statusdirektivet, Prosedyredirektivet, Mottaksdirektivet, Dublin II-forordningen og Returdirektivet. Når det gjelder Familiegjenforeningsdirektivet og Oppholdsdirektivet har forfatterne valgt ut noen prinsipielle og aktuelle dommer.

Norge er nært knyttet til EU gjennom Schengensamarbeidet, Dublinsamarbeidet og EØS-avtalen og denne tilknytningen gjør at vi er rettslig bundet av det såkalte "Schengen acquis", Dublin II-forordningen, Returdirektivet og Oppholdsdirektivet. Forpliktelsene fremgår av Utlendingsloven 2008. Selv om Norge ikke er bundet av alle EU-instrumentene innen asyl og innvandringsfeltet, er fortolkningen også av disse regelverkene derfor viktig for oss. Flere av problemstillingene som domstolen har tatt stilling til har også vært oppe til vurdering i norsk utlendingsforvaltning eller i det norske domstolssystemet.

Utlendingsloven gjenspeiler på flere områder EU-regelverket. EU-medlemslandene er dessuten bundet av de samme internasjonale forpliktelsene som Norge, som Flyktningkonvensjonen og Den europeiske menneskerettighetskonvensjon (EMK). EU-domstolens og EU-medlemslandenes forståelse av disse vil derfor kunne være av betydning også i Norge.

I tillegg har regjeringen en klar målsetning om at norsk asylpraksis og migrasjonspolitikk i hovedsak skal samsvare med andre sammenlignbare land som i all hovedsak er bundet av EU-regelverket. Kunnskap om EU-domstolens fortolkning er en forutsetning for å forstå europeiske lands praksis. En hovedanbefaling fra forfatterne av denne studien er derfor at norske utlendingsmyndigheter følger avgjørelsene fra domstolen nøye. Slik man allerede har sett, vil disse kunne ha innflytelse i relasjon til norsk rettsanvendelse selv om Norge ikke er direkte forpliktet.

Abstract
The study encompasses a summary and an analysis of important judgments by the European Court of Justice (ECJ) in the area of asylum and migration where the ECJ has pronounced itself in regard to the Qualification Directive, Procedures Directive, the Reception Conditions Directive, the Dublin Regulation and the Returns Directive. In regard to the Family Reunification Directive and the Citizens' Rights Directive, the authors have presented some important judgments of topical interest.

Norway is linked to the EU through its Schengen and Dublin cooperation and the European Economic Area agreement (EEA). These agreements imply that Norway is legally bound by the socalled "Schengen acquis", the Dublin Regulation, the Returns Directive and the Citizens' Rights Directive. Norway's legal obligations in this area are reflected in the Immigration Act 2008. In spite of Norway not being legally bound by all the EU instruments in the asylum and migration area, the interpretation of such instruments is of relevance to us. The ECJ has pronounced itself on a number of issues which have also been dealt with at national level in Norway, both in the administration and in the judiciary.

The Immigration Act in many ways reflects EU legislation. Moreover, EU Member States, like Norway, are bound by other international obligations such as the Geneva Convention on Refugees and the European Convention on Human Rights (ECHR). The interpretation of the ECJ and the Member States in regard to these instruments is also of interpretative importance to Norway.

In addition, the Norwegian government has a clear ambition of aligning Norwegian asylum practice and migration policy with other European countries which are bound by the EU asylum acquis. Knowledge of ECJ interpretations is a prerequisite for understanding the practice in other European countries. One of the major recommendations of this study is therefore for Norwegian authorities to follow the ECJ developments closely. As the study shows, we have already seen examples of EU interpretative influence in Norwegian legal practice in spite of Norway not being formally bound by ECJ judgments.