Training Manual

The Role of the EU Charter of Fundamental Rights in Asylum Cases

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Introduction to the Manual

Nine years after the Charter of Fundamental Rights of the European Union has entered into force it is still not applied widely by legal practitioners at the national level. This is, on the one hand, due to the fact that the Charter does not entail almost anything completely new. The text in its preamble makes it clear that the Charter *reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights*. The provisions of the Charter also, in no way, can extend the competencies of the EU.

National laws, when implementing national constitutions, the European Convention on Human Rights, the case law of the European Court of Human Rights and EU law should therefor, in principle, be in line with what the Charter guarantees for. Still, the Charter is more than just describing what is there insofar, as it has to serve as a point of reference for the interpretation of the very content of EU Directives and their legislative effects in Member States.

Having said that, other very important factors for not applying Charter provisions, are pertaining uncertainties in regard to when they should be applied, and when not. The case law of the Court of Justice of the European Union is not clear enough on this question, to make it an easy task to decide on.

In the course of the project "Judging the Charter" we had the opportunity to obtain the views of judges and other legal practitioners on why they apply the Charter and why they do not. Apart from the reasons mentioned above (the impression that national laws are in line with fundamental rights and insecurities in relation to Charter applicability) they underlined the following aspect: what lawyers need in order to be motivated to make use of the Charter, is to see that the Charter brings additional elements that would change legal evaluation of a particular case. In fact, one area of law, where the Charter has already made some changes in legal practise is the field of asylum and migration, and, specifically, questions in relation to asylum procedures.

This Manual aims to present and discuss the core aspects of the European asylum law and its interrelation with Charter rights, and to provide guidance for judges and other legal practitioners as well as for trainers of these target groups, on how to apply Charter rights and principles.

The Manual is composed of two parts. Part one provides for an overview of the legal system, whilst part two focuses on training materials and entails a range of case scenarios based on the jurisprudence of the CJEU. Those case studies can be used in training sessions as well as for self-learning. Further guidance and information also on other thematic areas can be found on the project website (http://charter.humanrights.at/)

We hope that this Manual will contribute to enhancing the knowledge about Charter rights and principles and to application of them in legal practise in the field of asylum and migration. And this will hopefully lead to raising the practical relevance of the Charter in the years to come — stressing the need to set fundamental rights at the core of any legal reasoning, including the sensitive field of asylum and migration.

Łukasz Bojarski and Katrin Wladasch

The Charter of Fundamental Rights — General Introduction

The Charter of Fundamental Rights of the European Union has entered into force on December 1st 2009 and became legally binding with equal legal value as the Treaties. Since then it is a decisive point of reference, when it comes to drafting new legislation as well as for the interpretation of existing laws both for European institutions and for Member States enforcing EU Law.

Article 6 of the Treaty on the European Union (TEU), in addition to giving the Charter equal legal value, refers to the European Convention on Human Rights (ECHR) as well as to other fundamental rights stemming from the constitutional traditions common to the Member States, both recognized as general principles of EU law.

It must also be underlined that Article 6 of the TEU affirms that ***the provisions of the Charter shall not extend in any way the competences of the Union as defined in the "Treaties***" and similarly, Article 51 of the Charter states that the ***Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.*** The power of EU institutions to promote and protect fundamental rights is therefore limited to the scope of power of these institutions established by the treaties. This has also to be taken into account, when reasoning about the applicability of Charter rights in a concrete case at the national level.

Many of the rights guaranteed by the Charter have their equivalents in the ECHR. Article 52.3. of the Charter governs the relationship betweenthe two sources of rights stating that in case of ***rights, which correspond to rights guaranteed by the*** [ECHR]***, the meaning and scope of those rights shall be the same as those laid down by the said Convention.*** The Convention is therefore treated as a minimal standard of protection — the EU can offer more in the area of fundamental rights protection, but never less.

The CJEU had referred to the ECHR already before the entry into force of the Charter as a source of common legal standards in relation to fundamental rights. The Court however does not limit the need for consistency to the written provisions but also takes into account the jurisprudence of the ECtHR when reasoning on the meaning of rights (see for example in ***J. McB. v. L.E.***, C-400/10 PPU). In some cases the Luxembourg court widened the scope of the protection in comparison to the Strasbourg one. For instance, in ***DEB***, C-279/09 — after having engaged in a thorough analysis of the ECtHR's case law — the CJEU mainly relied on Article 47 of the Charter to expand the right to legal aid also to legal persons and not only to natural persons, thus reaching an outcome that was wider than the ECtHR's jurisprudence. In ***Volker*** (joined cases Volker und Markus Schecke GbR, C-92/09, Hartmut Eifert, C-93/09), where obligations to publish data were contested with a reference to data protection, the CJEU quoted several cases of the ECtHR to support a broad interpretation of Articles 7 and 8 of the Charter.

On the other hand also the ECtHR is bound by an equivalent clause in Article 53 of the ECHR and takes into account Charter rights and their interpretation by the Luxembourg Court. In ***Goodwin*** (Christine Goodwin v. The United Kingdom, appl. 28957/95) the Court referred to Article 9 of the Charter for a dynamic interpretation of Article 12 of the ECHR widening the concept of a married couple beyond that of a man and a woman.

Human Rights Protection at the National Level and the Charter

It is the obligation of states and their national legal systems to guarantee for the protection of fundamental rights. All EU Member States are parties to the ECHR and have fundamental rights protection guarantees enshrined in their constitutions. Charter rights and principles shall serve as an additional source of guidance and interpretation for Member States when implementing Union law (Article 51.1 of the Charter). When this exactly is the case, has been at the core of a range of preliminary questions referred by national courts to the CJEU in the course of the last ten years.

In principle, the Charter applies:

- when a Member State's legislative activity and judicial and administrative practices fulfil obligations under EU law ("implementing EU law") [1]
- when a Member State authority exercises a discretion that is the outcome of EU law [2]
- when national actions dealing with the disbursement of EU funds may constitute an implementation of EU law. [3]

It is mostly the first situation that in practise causes difficulties. What does implementing EU law, within the scope of Article 51 mean? In a much disputed judgment delivered in 2013 the Court seemed to opt for a rather broad interpretation. In ***Åkerberg Fransson,*** C-617/10, a national regulation, which had not been enacted in order to implement EU law was challenged. The application of the regulation (Swedish income tax law), however, affected law in an area regulated by EU law (law on VAT). This, together with the obligation of Member States to counter fraud affecting the interests of the European Union (Article 325 TFEU), led the Court to the decision that ***where national legislation falls within the scope of European Union law, situations cannot exist, which are covered in that way by European Union law without those fundamental rights being applicable.***

The Court however, narrowed this approach in subsequent case law. In ***Siragusa***, C-206/13, it developed a standard on what ***implementing Union law by a national legislation*** means in concrete:

- National legislation relevant for the case aims at implementing EU law,
- the objectives pursued by national law have to overlap to a high extent with those covered by EU law — it is not sufficient, when national legislation merely indirectly affects EU law,
- "specific" rules of EU law on the matter do exist, which includes EU rules "capable of affecting" the situation at stake.
- Charter rights are not applicable, if Union law does not create any obligations for Member States relevant for the concrete case.

The "Siragusa Formula" has been confirmed in further case law, like ***Hernandez***, C-198/13, and ***Torralbo Marcos***, C-265/13. Still, it lacks sufficient clarity in order to be a real guidance for judges, who decide on the national level.

[1] C-300/11, ZZ v. Secretary of State for the Home Department, judgment of 4 June 2013.

[2] C-4/11, Bundesrepublik Deutschland v. Kaveh Puid, judgment of 14 November 2013.

[3] C-401/11, Blanka Soukupová v. Ministerstvo zemedelstvi, judgment of 11 April 2013.

The Charter and the Right to Asylum - Introduction

Sources of interpretation

The right to asylum is enshrined in Article 18 of the Charter under the Title II "Freedoms". The Article states that ***the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.*** The legal basis of the provision can be found in Article 78 TFEU (ex Articles 63, points 1 and 2, and 64(2) TEC), which establishes EU competence in the fields of asylum, subsidiary protection and temporary protection, and calls for respect of the 1951 Geneva Convention on refugees (hereinafter, the Refugee Convention).[4]

At the outset, what may strike the prospective interpreter of Article 18 CFREU as odd is the fact that it appears to lack an autonomous definition of the concept of asylum, as well as of the scope and content of the protected right. It should, however, be recalled in this regard that, within the EU legal framework, practitioners often need to resort to secondary or external sources of law — such as the various working documents of the legislative procedure and the constitutional traditions common to the Member States — in order to be able to pinpoint the true meaning of a provision.[5] In the present case, the ***travaux preparatoires*** to the Charter showcase the tensions among its drafters with regards to the desired scope of the protection granted to asylum-seekers, which have led them to resort to this rather minimalistic wording, following the recommendations of the Office of the United Nations High Commissioner for Refugees (hereinafter, UNHCR).[6]

All interpretative approaches to Article 18 CFREU must, first and foremost, be guided by the Article's text, as well as by the rules established in the Charter's preamble with regards to the sources of law, which are to be employed for its interpretation. According to the latter, the Charter does not introduce novel rights to the EU legal order, but instead is aimed at sreaffirming, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the ECHR, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the CJEU and of the ECtHR. In addition, due regard should be had to the explanations, which were prepared under the authority of the Praesidium of the European Convention, which drafted the Charter, and were updated under its responsibility.[7]

Of equal importance, especially as regards the right to asylum, in light of the rich case law produced by the Strasbourg Court in that particular field, is Article 52(3) CFREU, according to which insofar as the Charter ***contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights***

shall be the same as those laid down by the said Convention. These diverse sources of law, in conjunction with asylum-related secondary EU legislation, coalesce to formulate the unique content of asylum in an autonomous way, specific to the EU legal order.

Definition of asylum in EU law

Within the Common European Asylum System (CEAS), the notion of asylum is primarily understood as the protection afforded to those who qualify as refugees, according to the conditions laid down in the Qualification Directive (Directive 2011/95/EU, recast). It is worth noting that, while, as stated in its preamble (16), the directive *seeks to ensure full respect for human dignity and the right to asylum,* it does not, however, reference the term within its main body. Instead, it focuses on the "granting of refugee status" (Article 13), while underscoring the role of the Refugee Convention in establishing the content of the protection afforded to those enjoying said status (Article 20). In any event, the stated purpose of ensuring full respect for and observance of the right to asylum as enshrined in Article 18 CFREU is a common denominator in the CEAS legislation. [8]

At this point, in order to further define the content of the right to asylum as applied within the EU legal framework, it is useful to make recourse to the relevant UNHCR statement, issued in the context of a reference for a preliminary ruling addressed to the CJEU by the Administrative Court of Sofia in the case of *Zuheyr Freyeh Halaf v. the Bulgarian State Agency for Refugees* (C-528/11). [9] According to the guidelines provided therein, central to the realisation of the right to asylum is the principle of *non-refoulement*, described as *the cornerstone of international refugee protection*. The principle is instituted in Article 33 of the Refugee Convention, as well as Article 19(2) CFREU, and precludes the removal, expulsion or extradition of all persons to a State, where there is a serious risk that they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. Article 19(2) CFREU corresponds, within the meaning of Article 52(3) CFREU, to Article 3 ECHR, as applied in asylum cases, and its interpretation must incorporate the relevant Strasbourg case law. [10]

However, the protection afforded to asylum-seekers is not limited to the application of *non-refoulement*, but also encompasses, inter alia, (i) the access to fair and effective processes for determining their status and protection needs, consistent with the Refugee Convention;[11] (ii) the need to admit refugees to the territories of States; (iii) the need for rapid, unimpeded and safe UNHCR access to persons of concern; (iv) the need to apply scrupulously the exclusion clauses stipulated in Article 1F of the Refugee Convention; (v) the obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards; (vi) the responsibility of host states to safeguard the civilian and peaceful nature of asylum; and (vii) the duty of refugees and asylum-seekers to respect and abide by the laws of host States.[12] The outcome of the asylum procedure, i.e. the official recognition of a person applying for international protection as a refugee, or the rejection of their application, is of a purely declaratory character, as refugee status is acquired in the very moment a person fulfils the criteria set out to that effect. Hence, a division drawn between asylum-seekers and recognised refugees, as is the case with the Qualification Directive,[13] is inconsistent with the general teleology of the Refugee Convention.[14]

The Charter's added value in terms of safeguarding asylum-seekers' rights

In light of the above, one may ponder on the extent of the Charter's contribution to the protection of asylum-seekers. Indeed, asylum, as an institution of international law, has a long history. It was first recognised as an individual right in Article 14 of the 1948 Universal Declaration of Human Rights, which states that ***everyone has the right to seek and to enjoy in other countries asylum from persecution***. Nonetheless, as its name suggests, the Declaration is a non-binding document, while the nature of asylum as an individual right on the one hand side, and as a state prerogative on the other, remains disputed. In fact, at the time of the Charter's adoption, the right to be granted asylum — not only to have access to the relevant procedure — was not explicitly recognised in any human rights instrument applicable at the international or EU levels, including the Refugee Convention.

The incorporation of such a right within a legally binding instrument, specifically aimed at ensuring the protection of fundamental rights, and capable of overriding contrary national provisions, clearly indicates that the EU legislator has prioritised a rights-based approach in this case. Indeed, Article 18 CFREU has consistently been deemed to guarantee the individual right of every person, who meets the relevant requirements to be granted asylum and to enjoy international protection from persecution, in a way which mirrors the corresponding provisions of similar regional texts, such as the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights. [15]

Furthermore, the rights enshrined in the Charter, unless otherwise specified in its text, apply to all persons residing in EU territory, regardless of status or other individual characteristics. [16] Thus, the Charter protects EU citizens, third-country nationals, asylum-seekers, and beneficiaries of international protection equally, while discrimination on the basis of any ground, including sex, race, colour, ethnic or social origin, genetic features, religion or belief, political or any other opinion, membership of a national minority, disability, or sexual orientation, is strictly prohibited (Article 21(1) CFREU). Discrimination on grounds of nationality is also proscribed, within the scope of application of the EU Treaties, and without prejudice to their specific provisions (Article 21(2) CFREU), in particular thatof Article 18 TFEU, to which Article 21(2) CFREU corresponds and with which its application must comply.[17] This renders the differential treatment of asylum-seekers on the basis of their respective countries of origin highly problematic.

Finally, the Charter contains certain procedural safeguards, which are of great significance when it comes to securing the rights of asylum-seekers and guaranteeing a fair processing of their application. These include the right to good administration (Article 41 CFREU) and the right of access to documents (Article 42 CFREU), which both apply to all persons residing within the territory of the EU Member States, despite the fact that they are found under Title V on the rights of EU citizens, and guarantee their right to have their affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union, and to have access to all procedural documents, whatever their medium. Also of paramount importance to the protection of asylum-seekers is Article 47 CFREU on the right to an effective remedy and to a fair trial, which secures that everyone whose rights, as

established in EU law, are violated will have access to a fair and public hearing, within a reasonable time, by an independent and impartial tribunal previously established by law. The Article also guarantees the right to seek legal advice, defence, and representation, as well as to have legal aid made available to those who lack sufficient resources, when necessary in order to ensure effective access to justice.

A detailed analysis of the particular human rights-related issues arising during the asylum process follows below.

[4] Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), Explanation on Article 18 — Right to asylum.

[5] See Case 15/60, Simon v. Court of Justice of the European Communities [1961] ECR 225, 220.

[6] M.T. Gil-Bazo, "The Charter of Fundamental Rights of the European Union and the right to be granted asylum in the Union's law", ***Refugee Survey Quarterly***, Vol. 27, No. 3.

[7] Explanations to the Charter, ***ibid.*** 1.

[8] See, among others, Qualification Directive (2011/95/EU), preamble (16); Dublin Regulation (604/2013), preamble (39); Procedures Directive (2013/32/EU), preamble (60) et al.

[9] Available at www.refworld.org (http://www.refworld.org/docid/5017fc202.html) (accessed on 15/05/2018).

[10] Explanations to the Charter, ***ibid.*** 1, explanation on Article 19. See cases C-465/07 ***Meki Elgafaji, Noor Elgafaji v. Staatssecretaris van Justitie*** [2009] ECLI:EU:C:2009:94; joint cases C-411/10 and C-493/10, ***N.S. v. Secretary of State for the Home Department*** and ***M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*** [2011], ECLI:EU:C:2011:865. On the application of the principle by the ECtHR, see, among others, ***Ahmed v. Austria***, judgment of 17 December 1996, 1996-VI, p. 2206, and ***Soering***, judgment of 7 July 1989.

[11] In accordance with Article 47 CFREU on the right to an effective remedy.

[12] UNHCR statement ***ibid.*** 5.

[13] Articles 2(e), (i), 13, et al.

[14] S. Peers, ***EU immigration and asylum law (text and commentary) Volume 3, EU Asylum Law,*** Brill, 2015, p. 83.

[15] See, among others, Gil-Bazo, ***ibid***; S.F. Nicolosi, Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union, ***European Law Journal,*** Vol. 23, No. 1-2, August 2017, pp. 94—117.

[16] S. Peers, Immigration, Asylum and the European Union Charter of Fundamental Rights, ***European Journal of Migration and Law*** 3: 141—169, 2001.

[17] Explanations to the Charter, ***ibid.*** 1, explanation on Article 21.

The Charter and the Dublin Regulations

Introduction and Overview

The establishment of a unified system for the regulation of the entrance and residence of third country-nationals in the EU has always been a top priority, ever since the abolition of its internal frontiers and the establishment of the freedom of movement.

The Schengen Convention was superseded in 1997 within the EU by the Dublin Convention, which gave the Dublin system, as it stands today, its name. The Dublin Convention introduced a guarantee for asylum applicants that their applications would be examined by one of the Member States, without being referred successively from one state to another without any of these States acknowledging competence for examining the application (Recital 4, Dublin Convention).

However, the criteria and mechanisms, which determine the Member State responsible for examining an asylum application lodged in one of the EU Member States by a third-country national, was established through EU Council Regulation No. 343/20033 (also referred to as 'Dublin II'). Dublin II was replaced by Regulation No. 604/20134 of the European Parliament and the Council (Dublin III). In general, EU legislation articulated through the Common European Asylum System (CEAS) was reformed between 2011 and 2013 on the basis of Article 78 of the Treaty on the Functioning of the European Union (TFEU).

Article 78 para. 1 of the TFEU provides that ***the Union shall develop a common policy on asylum … with a view to offering appropriate status to any third-country national requesting international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the [1951] Geneva Convention … and other relevant treaties.***

To this effect, the CEAS does not only regulate the distribution of competence for examining asylum claims, but also the reception of asylum seekers, the procedures for obtaining international protection as well as the conditions and content thereof.

In essence, though, the Dublin Regulation has been the cause of much scrutiny and debate, especially in relation to the obligations of Member States under the Charter as well as those under the ECHR, which are linked to the allocation of the responsibility for the assessment of individual asylum applications. In other words, human rights violations may occur when an asylum seeker is returned to the first State of entry and the receiving State either has no asylum system in place or the existing one is inefficient.

The Dublin system is based on mutual trust — on the assumption that each Member State respects the rights of asylum seekers in accordance with international and European law. More specifically, mutual trust here implies that all Member States are safe countries for asylum seekers. This concept was further reinforced by the CEAS. Yet, despite the developments in the framework of the CEAS, there were — and still are — significant differences in national asylum systems and reception conditions. It should be highlighted that the Dublin regulation is also

grounded on the presumption that all EU Member States, as well as states bound by its provisions through bilateral agreements, shall ensure the safeguarding of EU fundamental rights.

The Preamble of the recast Dublin III Regulation clearly stipulates that: ***with respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights.*** This very assumption underlines the basis of the mutual trust mentioned above.

Overview of the Dublin III Regulation: Chapters and their main contents

1. General Provisions

- Subject matter (Article 1)
- Definitions (Article 2)

2. General principles and safeguards

- Access to the procedure for examining an application for international protection (Article 3)
- Right to information (Article 4)
- Personal interview (Article 5)
- Guarantees for minors (Article 6)

3. Criteria for determining the Member State responsible

- Hierarchy of criteria (Article 7)
- Minors (Article 8)
- Family members who are beneficiaries of international protection (Article 9)
- Family members who are applicants for international protection (Article 10)
- Family procedure (Article 11)
- Issue of residence documents or visas (Article 12)
- Entry and/or stay (Article 13)
- Visa waived entry (Article 14)
- Application in an international transit area of an airport (Article 15)

4. Dependent persons and discretionary clauses

- Dependent persons (Article 16)
- Discretionary clauses (Article 17)

5. Obligations of the Member State responsible

- Obligations of the Member State responsible (Article 18)
- Cessation of responsibilities (Article 19)

5. Procedures for taking charge and taking back

- Obligations of the Member State responsible (Article 18)
- Cessation of responsibilities (Article 19))

6. Procedures for taking charge and taking back

- Start of the procedure (Article 20)
- Submitting a take charge request (Article 21)
- Replying to a take charge request (Article 22)
- Submitting a take back request when a new application has been lodged in the requesting Member State (Article 23)
- Submitting a take back request when no new application has been lodged in the requesting Member State (Article 24)
- Replying to a take back request (Article 25)
- Notification of a transfer decision (Article 26)
- Remedies (Article 27)
- Detention (Article 28)
- Transfer: Modalities and time limits (Article 29)
- Costs of transfer (Article 30)
- Exchange of relevant information before a transfer is carried out (Article 31)
- Exchange of health data before a transfer is carried out (Article 32)
- A mechanism for early warning, preparedness and crisis management (Article 33)

7. Administrative cooperation

- Information sharing (Article34)
- Competent authorities and resources (Article 35)
- Administrative arrangements (Article 36)

8. Conciliation

- Conciliation (Article 37)

9. Transitional provisions and final provisions

CJEU Case Law

N.S./M.E. *case* — the UK and Irish courts submitted preliminary questions to the CJEU, in relation to the returns of Afghan asylum seekers to Greece under the Dublin Regulation. One of these questions concerned the discretionary power in Article 3.2 of the Dublin Regulation, which allows a Member State to deviate from the Dublin responsibility rules, and whether this could in certain circumstances constitute an obligation. This was particularly relevant to the application of the EU Charter, since according to its Article 51.1 its provisions are addressed to Member States only when they are implementing EU law. There is no doubt that the provisions of the Dublin Regulation are part of EU law. In the end, the Court replied in the

affirmative by stating that a Member State must itself examine an asylum claim when it is necessary for the protection of fundamental rights, such as that of Article 4 of the EU Charter, in accordance with the sovereignty clause of Article 3.2 of the Dublin Regulation.

The CJEU began its reasoning by clarifying that Member States should not only interpret their national law in a manner consistent with European Union Law but also make sure that they do not rely on an interpretation of an instrument of secondary legislation, which would be in conflict with the fundamental rights protected by the European legal order or with the general principles of European Union law (para. 77). It then continued by referring to the principle of 'mutual confidence' (mutual trust) in order to support the presumption that all the participating States, whether Member States or third states, observe fundamental rights, including the rights based on the Geneva Convention, the 1967 Protocol, and on the ECHR; and that the Member States can have confidence in each other on that regard. It further added that the ***raison d'etre*** of the European Union and the creation of an area of freedom, security, and justice and, in particular, the Common European Asylum System, is based on this mutual trust and the presumption of compliance with European Union law and fundamental rights (paras. 79-83).

After highlighting the importance of mutual trust within the EU legal order, the Court moved on to indicate that certain exceptional circumstances could call for a suspension of this mutual trust, which would allow the state to refrain from returning an asylum seeker to the competent state. It stated that any transfer would be incompatible with this provision, if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, which could lead to inhumane and degrading treatment, according to Article 4 of the Charter (para. 86).

At this point the Court examined ***ad hoc*** the concerns rising from the situation in Greece, the Member State to which the asylum seekers were to be sent to as the first state of entry. Here, the Court could not ignore the very recent judgment of the ECtHR in the M.S.S. case. It reaffirmed that the extent of the infringement of fundamental rights described in that judgment shows that there existed in Greece, at the time of the transfer of the applicant M.S.S., a systemic deficiency in the asylum procedure and in the reception conditions of asylum seekers.

Yet, the most important statement made by the Court concerned the principle of mutual trust: ***In those circumstances, the presumption*** [of mutual confidence] ***underlying the relevant legislation*** [Dublin Regulation], ***stated in paragraph 80 above, that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable***. The CJEU took into consideration the principles laid down by the ECtHR in the M.S.S case and followed the reasoning of the Strasbourg Court by claiming that the presumption of compliance with the fundamental rights of the European Union, on which the Dublin regulation is based on, is not absolute but rebuttable.

Furthermore, the CJEU held that Article 4 of the EU Charter (prohibition of torture): ***must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot***

be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.

In conclusion, it seems that the threshold set by the CJEU for the rebuttal of the principle of mutual trust is reached when the State responsible suffers from 'systemic flaws' in the asylum procedure and reception conditions for asylum, which result in inhuman or degrading treatment, within the meaning of Article 4 of the EU Charter, of asylum seekers transferred to the territory of that Member State.

The two landmark decisions led to a suspension of all transfers through the Dublin Regulation to Greece. Dublin II was recast leading to Dublin III and a new provision was added echoing the findings of the two courts. This new provision (Article 3.2 of the Dublin III Recast) added a prohibition of transfers to states with *systemic flaws in the asylum procedure and the reception conditions for applicants in that Member State*, which could lead to inhuman or degrading treatment within the meaning of Article 4 of the EU Charter.

However, in practice, Member States still remained confused, since there was no further definition of the term 'systemic flaws'. Some states assumed they had to request an opinion from the UNHCR in order to stop a transfer under the Dublin Regulation.

The ***Halaf*** judgment (C-528/11) clarified that although Member States are free to do so, no additional request to the UNHCR is necessary to stop a transfer, especially when other UNHCR documents can indicate that the responsible Member State is in breach of the EU asylum rules. Through this judgment the Court also pointed out that states could make use of the sovereignty clause at their own discretion without being subject to any particular condition.

In the ***Puid*** case (C-4/11), the CJEU reiterated that transfer to the Member State identified as responsible in accordance with the criteria in Chapter III of the Dublin II Regulation is precluded where *the Member States cannot be unaware that systemic deficiencies in the asylum procedure and in the conditions for the reception of asylum seekers in the* [identified] *Member State provide substantial grounds for believing that the asylum seeker concerned would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights.*

The ***Abdullahi*** decision (C-394/12), however, underlined the need to prove 'systemic deficiencies' in the asylum procedure and reception conditions in a Member State, in order to preclude a transfer. With the aforementioned judgment, the Court appeared to limit the possibilities of asylum seekers to challenge a transfer decision as provided for in Article 19.2 of the Dublin II Regulation.

Since the Dublin III Regulation, however, the effect of this judgment was limited, given that it introduced enhanced appeal possibilities, which entered into force twenty-one days later. What is more, the *Abdullahi* judgment also appears to provide a narrow protection against *refoulement* since it does not allow for the possibility that a real risk of ill-treatment could in principle arise for reasons entirely unrelated to problems with the implementation of the CEAS in the Member State responsible, and/or to the question of whether that Member State complies with fundamental rights. In other words, for transfer to be precluded under EU law, it

would seem that it is necessary and not merely sufficient that the real risk of ill-treatment contrary to Article 4 of the EU Charter is grounded on systemic deficiencies in the asylum system of the Member State concerned.

The CJEU has recently however recognised that a real risk of being subject to inhuman and degrading treatment could result even from the exceptionally high number of third-country nationals wishing to obtain international protection in the Member State of first entry (***A.S. v. Slovenia***, C-490/16) or from illnesses and of serious mental disorders (***C.K. and Others***, C-578/16; ***A.S.***, C-490/16).

Role of the Charter in relation to the Dublin Regulation

Case-law has shown that the return of an asylum seeker might give rise to a breach of the principle of ***non-refoulement*** through the violation of Article 3 of the ECHR or Article 4 of the EU Charter (prohibition of torture). This has been most problematic because of the principle of 'mutual trust'.

The analysis also shows that the CJEU, which was at first reluctant to examine in depth issues that might arise from the Charter, used the Dublin Regulation in order to set the foundations for a more fundamental-rights approach (***N.S./M.E.*** case). The Dublin Regulation appears to have offered the CJEU significant opportunities to reaffirm the constitutional value of the EU Charter. The CJEU's rulings have also had a significant effect on the shaping of the Dublin Regulation. Problematic provisions of the Dublin Regulations were recast so as to reflect the rulings of the CJEU as well as those of the ECtHR (Dublin III, Article 3, para 2).

It must also be recalled that, in an attempt to remedy the asylum crisis, the EU Council through its decision of September 2015 (No. 2015/1601), committed to consider options for an emergency relocation mechanism pursuant to para. 3 Article 78 of the TFEU. Unlike Dublin III, the Council Decision sought to address the unequal burden on the Southern Member-States. The legality of this Council Decision was challenged before the CJEU by Hungary and Slovakia.

Reading the opinion of Advocate General Yves Bot, it is necessary to highlight a crucial issue for the Dublin System, which is founded in the Charter itself: solidarity among the Member States. Bot stated that the present actions provide the opportunity to recall that solidarity is among the cardinal values of the Union and is even among the foundations of the Union. He continued that it is therefore appropriate to emphasise at the outset the importance of solidarity as a founding and existential value of the Union. Although surprisingly absent from the list in the first sentence of Article 2 TEU of the values on which the Union is founded, solidarity is, on the other hand, explicitly mentioned in the Preamble to the Charter as forming part of the 'indivisible, universal values' on which the Union is founded (para. 19).

With the benefit of hindsight, it can now be said that the Charter has been the source of very significant changes in EU law. The Charter has forced the Union to take fundamental rights even more seriously, a move that has consequently pushed the CJEU in the same direction.

The Charter and the Qualification Directive

Introduction/Overview

The Qualification Directive (QD) 2004/83/EC was amended by the Directive 2011/95/EU in order to reflect the objective of the Lisbon Treaty to develop a common policy on asylum with a 'uniform status' for refugees and other persons in need of international protection. Directive 2011/95/EU had to be transposed by 21 December 2013. Denmark is not bound by the Directive; UK and Ireland chose not to opt in to the Recast Qualification Directive.

The Recast Qualification Directive regulates 'subsidiary protection' if protection on the basis of the Geneva Refugee Convention (GRC) is not possible.

The Directive is the first supranational codification of a specialist complementary protection regime based on general human rights obligations, in particular on the principle of ***non-refoulement***. Apart from that, it contains the rights attached to refugee status and subsidiary protection status.

The Geneva Refugee Convention is regarded as the cornerstone of the regime. Standards of the Qualification Directive should "guide the competent national bodies of Member States in the application of the Geneva Convention". Interpretative guidance of the UNHCR is considered to be "valuable" in this context. But also "other relevant treaties" are of importance for the interpretation of the Directive. Standards for the definition and the content of subsidiary protection were drawn "from international obligations under human rights instruments and practices existing in Member States". Reference is made to the "best interests of the child" and the UN Convention on the Rights of the Child.

The Recast Qualification Directive refers in its preamble to the Charter: ***this Directive respects the fundamental rights and observes the principles recognised 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 the right to asylum of applicants for asylum and their accompanying family members and to promote the application of Articles 1 (human dignity), 7 (respect for private and family life), 11 (freedom of expression and information), 14 (right to education), 15 (freedom to choose an occupation and right to engage in work), 16 (freedom to conduct a business), 18 (right to asylum), 21 (non-discrimination), 24 (the rights of the child), 34 (social security and social assistance) and 35 (health care) of that Charter, and should therefore be implemented accordingly***.

The Court of Justice has several times stressed the obligation to interpret the Directive ***in a manner which respects*** […] ***fundamental rights*** or ***in a manner consistent with the rights recognised by the Charter***. Further, Member States must ***interpret their national law in a manner consistent with EU law*** and ***also make sure they do not rely on an interpretation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law***.

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- More favourable standards (Article 3)

11. Assessment of applications for international protection

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Qualification for being a refugee

- Acts of persecution (Article 9)
- Reasons for persecution (Article 10)
- Cessation (Article 11)
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13. Refugee Status

- Granting of refugee status (Article 13)
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14. Qualification for Subsidiary Protection

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- General rules (Article 20)
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CJEU Case Law

The ***Case A, B & C*** (C-148/13, C-149/13) concerned three men applying for asylum in the Netherlands. They claimed to fear persecution on account of their homosexuality. In all three cases the *Staatssecretaris* (and later the *Rechtbank's-Gravenhage*, the District Court of The Hague) rejected the applications arguing that the statements concerning their homosexuality lacked credibility. In the appeals procedure, the Dutch Council of State referred a question to the Court of Justice asking whether, in light of the EU Fundamental Rights Charter (Article 3 CFREU, Right to the Integrity of the Person; Article 7 CFREU, Respect for Private and Family Life) there were any limitations regarding the verification of the sexual orientation of an applicant. The Court made in its reasoning clear that the Qualification Directive had to be interpreted in accordance with the Charter, in particular with Article 1 (Human Dignity) and Article 7 CFREU.

The Court stated in the operative part of the judgment, inter alia, that Article 4 of the Qualification Directive ('assessment of facts and circumstances') in the light of Article 7 of the Charter *must be interpreted as precluding* [[…]] *the competent national authorities from carrying out detailed questioning as to the sexual practices of an applicant for asylum*. Further, Article 4 of the Qualification Directive, read in the light of Article 1 of the Charter *must be interpreted as precluding,* [[…]] *the acceptance by those authorities of evidence such as the performance by the applicant for asylum concerned of homosexual acts, his submission to 'tests' with a view to establishing his homosexuality or, yet, the production by him of films of such acts*.

In the ***Case Y and Z*** (C-71/11 and C-99/11) two men, who had applied for asylum in Germany, claimed that their membership to the Muslim Ahmadi community had forced them to leave Pakistan. They argued that they had experienced persecution, and that, according to the Pakistani Criminal Code, members of the Ahmadi religious community may face imprisonment of up to three years, or may be punished by death or life imprisonment or a fine.

The first instance refused their claims. On appeal, the Federal Administrative Court decided to stay the proceedings and submitted a preliminary reference to the CJEU concerning the interpretation of Article 9.1(a) Qualification Directive ('acts of persecution'). While the Federal Administrative Court referred in its question to Article 9 ECHR (freedom of religion), but not to the Charter, the Court of Justice interpreted the question as follows: Is Article 9.1(a) of the

Directive *to be interpreted as meaning that any interference with the right to religious freedom that infringes Article 10.1 of the Charter may constitute an 'act of persecution'* [[…]]" and must "*a distinction* [[…]] *be made between the 'core areas' of religious freedom and its external manifestation?*

The CJEU in its operative part interpreted Article 9.1(a) Qualification Directive *as meaning that: not all interference with the right to freedom of religion which infringes Article 10.1 of the Charter* [[…]] *is capable of constituting an 'act of persecution'* [[…]]. It also held that *there may be an act of persecution as a result of interference with the external manifestation of that freedom, and for the purpose of determining whether interference with the right to freedom of religion which infringes Article 10.1 of the Charter* [[…]] *may constitute an 'act of persecution', the competent authorities must ascertain, in the light of the personal circumstances of the person concerned, whether that person, as a result of exercising that freedom in his country of origin, runs a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment by one of the actors referred to in Article 6 of Directive 2004/83.*

In ***Case M.M.*** (C-277/11) Mr M's application for refugee status was rejected and afterwards a subsequent application for subsidiary protection as well. Mr M, appealed against the subsidiary protection decision before the High Court arguing that it did not comply with EU law, in particular with the right to defence since there was no oral hearing. The High Court stayed the proceedings and asked the CJEU whether the requirement to cooperate with an applicant (art 4.1 Qualification Directive) obliges the authorities of a Member State to supply an applicant for subsidiary protection (after the rejection of the application for refugee status) with the results of such an assessment before a negative decision is finally made so as to enable him or her to address those aspects of the proposed decision.

The Court answered in the operative part of its judgments that *in the case of a system such as that established by the national legislation at issue* [[…]], *a feature of which is that there are two separate procedures, one after the other, for examining applications for refugee status and applications for subsidiary protection respectively, it is for the national court to ensure observance, in each of those procedures, of the applicant's fundamental rights and, more particularly, of the right to be heard in the sense that the applicant must be able to make known his views before the adoption of any decision that does not grant the protection requested.* The Court held that in a system as in Ireland, *the fact that the applicant has already been duly heard, when his application for refugee status was examined, does not mean that that procedural requirement may be dispensed with in the procedure relating to the application for subsidiary protection.*

In its reasoning the Court referred to the right to be heard in all proceedings, which would be *now affirmed not only in Articles 47 and 48 of the Charter, which ensure respect of both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 thereof, which guarantees the right to good administration(para 82).*

The Court specified that according to Article 41.2 CFREU the right to good administration would include *the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy, and the obligation of the administration to give reasons for its decisions* (para. 83).

The Court also stated that the provision was *of general application* (para. 84) and that the Court had *always affirmed the importance of the right to be heard and its very broad scope in the EU legal order, considering that that right must apply in all proceedings which are liable to culminate in a measure adversely affecting a person* (para. 85). The observance of this right would be required *even where the applicable legislation does not expressly provide for such a procedural requirement* (para. 86).

The Court also stressed that the right to be heard *guarantees every person the opportunity to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely* (para. 87) and that it requires *the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision; the obligation to state reasons for a decision which are sufficiently specific and concrete to allow the person to understand why his application is being rejected is thus a corollary of the principle of respect for the rights of the defence* (para 88).

The Court concluded that *the right* [[…]] *of the applicant for asylum to be heard must apply fully to the procedure in which the competent national authority examines an application for international protection pursuant to rules adopted in the framework of the Common European Asylum System* (para 89).

In ***Case El Kott*** (C-364/11) three men had to leave United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) refugee camps in Lebanon based on threats to their security. In Hungary, their asylum applications were rejected. Mr El Kott and Mr Radi were ordered not to be returned to Lebanon whilst Mr Ismail was granted a subsidiary protection. The applicants sought recognition as refugees based on Article 1D (2) Refugee Convention, to which the second sentence of art 12.1(a) Qualification Directive refers. The Budapest Municipal Court stayed the proceedings and asked the CJEU about the meaning of benefits of the Qualification Directive (recognition as a refugee; either of the two forms of protection covered by the Directive; or neither automatically but merely inclusion within the scope *ratione personae* of the Directive). The Court further asked the meaning of the cessation of UNRWA's protection or assistance (residence outside its area of operations; cessation of UNRWA and cessation of the possibility of receiving UNRWA's protection or assistance; or an involuntary obstacle caused by legitimate or objective reasons such that the person entitled thereto is unable to avail himself of that protection or assistance).

In its operative part the judgment of the CJEU answered that Article 12.1(a) Qualification Directive had to be interpreted as meaning that the cessation of protection/assistance from UN organs/agencies other than the UNHCR 'for any reason' would include the situation in which a person who, after actually availing him/herself of such protection/assistance, ceases to receive it for a reason beyond his or her control and independent of his or her volition. The second sentence of Article 12.1(a) Qualification Directive had to be interpreted as meaning that, if national authorities have established that the condition relating to the cessation of the protection/assistance provided by UNRWA is satisfied, the fact that the person is *ipso facto entitled to the benefits of* [the] *Directive* means that that Member State must recognise him as a refugee within the meaning of Article 2(c) of the Qualification Directive and that person must automatically be granted refugee status (if he or she is not caught by Article 12.1(b) or 2 and 3 of the Directive).

In its reasoning the CJEU referred also to the Charter: It held that *the interpretation of the words 'shall ipso facto be entitled to the benefits of* [the] *Directive'* [[…]] *does not, contrary to what is maintained by a number of governments* [[…]], *lead to discrimination, prohibited by the principle of equal treatment enshrined in Article 20 of the Charter* (para. 78).

The ***Case X, Y & Z*** (C-199/12, C-200/12) concerned three men from Sierra Leone, Uganda and Senegal applying for asylum in the Netherlands. They applied for asylum since they feared persecution given the criminalisation of homosexuality in their countries of origin (criminal offence punishable by a maximum life sentence in Sierra Leone and Uganda, and up to 5 years in Senegal). In none of the cases the applicants had demonstrated that they had already been persecuted or threatened with persecution on account of their sexual orientation.

The Dutch Council of State asked the CJEU: 1) whether third country nationals with a homosexual orientation form a 'particular social group' capable of qualifying for protection under art 10(1)(d) Qualification Directive; 2) whether they can be expected to conceal their orientation or exercise restraint in their country of origin in order to avoid persecution; 3) whether the criminalisation of homosexual activities and the threat of imprisonment in relation thereto constitute an act of persecution within the meaning of art 9(1)(a), read in conjunction with art 9.2(c) QD.

The CJEU answered that *the existence of criminal laws* [[…]], *which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group* in the sense of art 10(1)(d) Qualification Directive. Further, the Court held that *the criminalisation of homosexual acts per se does not constitute an act of persecution* while *a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin* [[…]] *must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution.*

Finally, the CJEU stated that *when assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation.*

In its reasoning the CJEU referred to the Charter. The Court made it clear that *the fundamental rights specifically linked to the sexual orientation concerned* [[…]] *such as the right to respect for private and family life, which is protected by Article 8 of the ECHR, to which Article 7 of the Charter corresponds, read together, where necessary, with Article 14 ECHR, on which Article 21(1) of the Charter is based, is not among the fundamental human rights from which no derogation is possible* (paras 58-59). The Court also stated that *the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9.1 of the Directive* (para 55), *but that the term of imprisonment which* [[…]] *punishes homosexual acts is capable, in itself of constituting an act of persecution* [[…]], *provided that it is actually applied in the country of origin which adopted such legislation.* (para 56). Further, the Court held that a *sanction infringes Article 8 ECHR, to which Article 7 of the Charter corresponds, and constitutes punishment which is disproportionate or discriminatory within the meaning of Article 9.2(c) of the Directive* (para 57).

Role of the Charter in relation to the Qualification Directive

The Qualification Directive, but also national law, must be interpreted in the light of the Charter. However, even the Charter has alreadyplayed a certain role in the jurisprudence of the Court of Justice of the European Union, this could certainly be expanded.

Several judgments of the CJEU in the preliminary reference procedure concerning the interpretation of the Qualification Directive do not refer to the Charter. In many cases the Charter was only referred to in the reasoning of a judgment as an interpretative instrument, but without playing a substantive role. In a few cases, the Charter has played a substantive role — in these few cases in particular Articles 4, 9 and 12 of the Qualification Directive were interpreted in the light of the Charter. In particular, arts 1, 7, 10, 20, 21 and 41 CFREU were used to interpret the Directive.

There was only one case, where the question of the preliminary reference request referred itself to the Charter (*A, B, & C*: reference to Articles 3 and 7 CFREU). There were two cases, where the Court of Justice in the operative part of its judgment referred to the Charter (*A, B, & C*: Articles 1, 7 CFREU; *Y and Z*: Article 10 CFREU). In *M.M.* the Court referred to the right to be heard. There were several cases, in which the Court of Justice referred (solely or also) in its reasoning to the Charter (only in reasoning: *El Kott:* Article 20, *M.M.*: Article 41, also Article 47 and 48 CFREU; *X, Y & Z*: Article 7, also Articles 1 and 18 CFREU).

To sum up, the Charter could be used much more and play a more significant role in interpreting the Qualification Directive. However, also referring Courts should use the Charter more extensively in their questions referred to the Court of Justice.

The Charter and Procedural Requirements in Asylum Procedures

Introduction/Overview

The Asylum Procedures Directive, with the Qualification Directive (Article 4) and the Dublin III Regulation, regulates the mechanisms to be applied for treating asylum and subsidiary protection applications within the Common European Asylum System (CEAS).

The Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (Asylum Procedures Directive) was first adopted by the Council on December 1st, 2005. After almost a decade from its adoption, the number of exceptions allowed to Member States, and the proliferation of different schemes within the European Union, led the European Parliament and the Council to adopt Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

The 2013 Asylum Procedures Directive sets clearer rules for the submission of an asylum application, provides for specific clauses on asylum procedures at the borders, and indicates quicker and more efficient procedures, establishing that an asylum procedure should not last more than six months.

The scope of the recast Directive is broader than that of the previous Directive. It covers applications for international protection lodged in the territory and at the border, but also in the territorial waters and in the transit zones of the Member States (Article 3.1). In the case of applications made in territorial waters, the Member States should guarantee that applicants are given access to their territory and that their applications are examined in accordance with the Directive (Recital 26). In contrast, what a Member State does in an adjoining area, or in the high seas, does not seem to fall within the scope of the Directive. However, it should be recalled that rescue operations in high seas carried out by Frontex or by the Member States implementing the Schengen Borders Code should abide by the Charter of Fundamental Rights, guaranteeing, in particular, the prohibition of any form of torture and inhumane or degrading punishment or treatment (Article 4), the right to asylum (Article 18), and the prohibition of *refoulement* (Article 19).

As regards decisions on asylum applications, the new Directive reaffirms that applications should be examined individually (Article 10.3(a)), and provides, among other things, that a determining authority responsible for the examination of applications should be designated (Article 4) and that the personnel of such an authority should be properly trained (Article 4.3). Moreover, under the recast Directive, the registration of an application should take no more than three working days after the application is made (Article 6).

The Directive also establishes who may make an application for international protection and in which circumstances, including on behalfof dependants or minors (Article 7), the obligation for states to provide for informationand counselling in detention facilities and at border

crossing points (Article 8), and theright of applicants to remain in Member States, where the examination of their application is pending (Article 9).

Decisions on asylum applications should be given in writing (Article 11.1) and, when an application is rejected, the reasons in fact and in law should be stated in the decision. Applicants have the right to an effective remedy before a court or tribunal against a rejection decision (Article 46). This remedy should provide for a complete and ***ex nunc*** examination of both facts and points of law, including, where applicable, an examination of international protection needs pursuant to Directive 2011/95/UE, at least in the appeals procedures before a court or tribunal of first instance (Article 46.3).

In assessing applications and appeals, national courts should take into account the general principles of EU law on access to justice and, in particular, Articles 2 and 6 of the Treaty of European Union (TEU) and Articles 18, 20, 21, 47, and 51—53 of the Charter of Fundamental Rights of the European Union.

The right to an effective remedy, as set out in Article 47 of the Charter, and the principle of effectiveness limit the possibility of Member States to take advantage of exceptions to the right to remain in the state concerned.

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- Information and counselling in detention facilities and at border crossing points (Article 8)
- Right to remain in the Member State pending the examination of the application (Article 9)
- Applications made on behalf of dependants or minors (Article 7)
- Information and counselling in detention facilities and at border crossing points (Article 8)
- Right to remain in the Member State pending the examination of the application (Article 9)
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- Withdrawal of international protection (Article 44)

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5. Appeals Procedures

- The right to an effective remedy (Article 46)

6. General and Final Provisions

CJEU Case Law

A judgment in the case ***Tall*** (C-239/14) was adopted by the CJEU on 17 December 2015. Mr Tall, a Senegalese national, submitted an application for asylum in Belgium. His application was rejected both in the first instance and by the *Conseil d'État*. The applicant lodged a second application for asylum, relying on new evidence, but the *Commissariat général aux réfugiés et aux apatrides* decided not to take the application into consideration. Hence, the *Centre Publique d'Action Social* withdrew the social assistance that the applicant was receiving and served an order to leave the territory on him. The applicant decided to appeal against these decisions.

The Labour Court of Liège declared Mr Tall's appeal both well founded and admissible, on the ground that the decision to withdraw social assistance could not enter into force until the date of expiry of the period for departure. However, according to the same court, it was not possible for Mr Tall to bring a legal action having suspensory effect against the decision of not taking a subsequent asylum application into consideration. Under Belgian legislation, the only remedies against a decision not to take a subsequent asylum application into consideration are appeals seeking annulment and suspension due to 'extreme urgency', which, as they do not have suspensory effects, deprive the person concerned of the right to residence and the right to social assistance. For these reasons, the referring court asked the CJEU whether *Article 39 of Directive 2005/85, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, is to be interpreted as precluding national legislation which does not confer suspensory effect upon an appeal brought against a decision, such as the one at issue in the main proceedings, not to further examine a subsequent application for asylum*.

As regards the substance of the case, the CJEU emphasised that *any interpretation of Directive 2005/85 must* [[…]] *respect the fundamental rights and observe the principles recognised in particular by the Charter*. For these reasons, the CJEU referred to Article 47 on the right to an effective remedy and to a fair trial and Article 19.2 of the Charter, stating that *no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*.

The CJEU also referred to the case-law of the European Court of Human Rights (ECHR), in accordance to which *when a State decides to return a foreign national to a country where there are substantial grounds for believing that he will be exposed to a real risk of ill-treatment contrary to Article 3 ECHR, the right to an effective remedy provided for in Article 13 ECHR requires that a remedy enabling suspension of enforcement of the measure authorising removal should, ipso jure, be available to that foreign national* (paras 50—60).

According to the CJEU, *in the present case, the dispute in the main proceedings concerns only the lawfulness of a decision not to further examine a subsequent application for asylum*, and *the lack of suspensory effect … is, in principle, compatible with Articles 19(2) and 47 of the Charter. Although such a decision does not allow a third-country national to receive international protection, the enforcement of that decision cannot, as such, lead to that national's removal.*

By contrast, according to the CJEU, *an appeal must necessarily have suspensory effect when it is brought against a return decision whose enforcement may expose the third-country national concerned to a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, thereby ensuring that the requirements of Articles 19.2 and 47 of the Charter are met in respect of that third-country national.*

For these reasons, the CJEU concluded that *Article 39 of Council Directive 2005/85/EC, read in the light of Articles 19(2) and 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding national legislation which does not confer suspensory effect on an appeal brought against a decision, such as the one at issue in the main proceedings, not to further examine a subsequent application for asylum* (para 61).

Case (C-348/16) refers to a Malian, who arrived in Italy in 2015 and submitted an application for international protection. On 10 March 2016 he was interviewed by the Regional Commission for the grant of international protection, that rejected his application. On 3 May 2016 Mr Sacko lodged an appeal against the decision of the Commission, but the Tribunale di Milano considered the application as manifestly unfounded. Under the Italian law in force at that time, the judge could follow two procedural patterns: it could hold a hearing with the parties or opt for deciding without hearing the applicant, when he/she found that the solution that could be reached on the basis of the evidence existing in the case file would be no different even if a further interview would be conducted with the applicant.

The referring court indicated that it was minded to dismiss Mr Sacko's appeal as manifestly unfounded, without first giving him the opportunity to be heard. However, as it entertained doubts as to whether that approach was compatible with EU law, the Tribunale di Milano decided to stay proceedings and to refer to the CJEU for a preliminary ruling. In particular, the Tribunale asked the court, if *Directive 2013/32 (in particular, Articles 12, 14, 31 and 46) must be interpreted as permitting a procedure, such as the Italian procedure (under Article 19.9 of Legislative Decree No 150 of 2011), whereby a judicial authority seized by an asylum-seeker — whose application has been rejected by the administrative authority responsible for considering applications for asylum after it has conducted a full examination, including an interview — may, in cases where the application for judicial review is manifestly unfounded and the administrative authority's rejection of the application is thus incontrovertible, dismiss the application for judicial review without preparatory inquiries and without being required to afford the applicant a further opportunity to be heard?*

The Court considered that *fundamental rights, such as respect for the rights of the defence, which includes the right to be heard, do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not entail, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed* (para 38). The Court also noted that *an interpretation of the right to be heard, guaranteed by Article 47 of the Charter, to the effect*

that it is not an absolute right is confirmed by the case-law of the European Court of Human Rights, in the light of which Article 47 of the Charter must be interpreted, as the first and second paragraphs of that Article correspond to Article 6(1) and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (para 39).

In the light of those considerations, the Court stated that the *Directive 2013/32, in particular Articles 12, 14, 31 and 46 thereof, read in the light of Article 47 of the Charter, must be interpreted as not precluding the national court or tribunal hearing an appeal against a decision rejecting a manifestly unfounded application for international protection from dismissing the appeal without hearing the applicant where the factual circumstances leave no doubt as to whether that decision was well founded, on condition that, first, during the proceedings at first instance, the applicant was given the opportunity of a personal interview on his or her application for international protection, in accordance with Article 14 of the directive, and the report or transcript of the interview, if an interview was conducted, was placed on the case-file, in accordance with Article 17(2) of the directive, and, second, the court hearing the appeal may order that a hearing be conducted if it considers it necessary for the purpose of ensuring that there is a full and ex nunc examination of both facts and points of law, as required under Article 46(3) of the directive* (para 49).

In the case of ***Mr Gnandi*** (C-181/16), adopted by the CJEU on 19 June 2018, a Togolese national, submitted an application for international protection to the Belgian authorities, which was rejected. Subsequently, the Belgian authorities issued a return decision against Mr Gnandi. Mr Gnandi brought an appeal against the decision on asylum refusal and requested the annulment and suspension of execution of the order requiring him to leave the territory.

Both appeals were dismissed by the Council for Asylum and Immigration Proceedings in two separate judgments. Mr Gnandi brought an appeal against those two judgments before the Council of State, which set aside the judgment of the Council for Asylum and Immigration Proceedings on asylum refusal and referred the case back to it. In the case concerning the order to leave the territory the Council of State decided to refer the case to the CJEU.

The legal question considered by the CJEU was, whether Directive 2008/115, read in conjunction with Directive 2005/85 and in the light of the principle of ***non-refoulement*** and the right to an effective remedy, enshrined in Article 18, Article 19(2) and Article 47 of the Charter, must be interpreted as precluding the adoption of a return decision under Article 6(1) of Directive 2008/115 in relation to a third-country national, who has applied for international protection, immediately after the rejection of that application by the determining authority, and thus before the conclusion of any appeal proceedings brought against that rejection.

The CJEU held, that a third-country national is staying illegally, within the meaning of the Return Directive 2008/115, as soon as his application for international protection is rejected at first instance by the determining authority, irrespective of the existence of an authorisation to remain and the outcome of an appeal against that rejection pending.

The Court stated however, that Directive 2008/115, read in conjunction with Directive 2005/85 and in the light of the principle of ***non-refoulement*** and the right to an effective remedy, enshrined in Article 18, Article 19(2) and Article 47 of the Charter, must be interpreted as not

precluding the adoption of a return decision in respect of a third-country national whose application for international protection was rejected by the determining authority, and thus before the conclusion of any appeal proceedings brought against that rejection.

However, the Member States should ensure the full effectiveness of an appeal against a decision rejecting an application for international protection, in accordance with the principle of equality of arms, which means, ***inter alia***, that all the effects of the return decision must be suspended until the decision on the appeal.

In that regard, it is not sufficient for the Member State concerned to refrain from enforcing the return decision. Pending the outcome of an appeal, the person concerned must be entitled to benefit from the rights arising under Reception Directive 2003/9 i.a. — an applicant must be allowed to remain, pending the outcome of an appeal against that rejection. The period granted for voluntary departure should not start to run as long as the person concerned is allowed to remain. In addition, during that period, that person may not be held in detention with a view to removal. Furthermore, Member States are required to allow the person concerned to rely on any change in circumstances that occurred after the adoption of the return decision, and that may have a significant bearing on the assessment of his situation under Returns Directive. Member States also must ensure that return procedures are fair and transparent.

Role of the Charter in relation to the Procedures Directive

Most CJEU preliminary rulings on the interpretation of the Asylum Procedures Directive do not make reference to the Charter of Fundamental Rights. When reference to the Charter is made, this instrument has been used by the Court for the interpretation and the examination of the substance of a case (***H.I.D.*** and ***B.A.***, C-175/11; ***Samba Diouf***, C-69/10), or in the conclusions (***Tall,*** C-239/14; ***Sacko Moussa***, C-348/16, ***Gnandi*** C-181/16). In all the cases identified, reference is made to Article 47, "Right to an effective remedy and to a fair trial". In ***Tall*** and in ***Gnandi***, however, reference was also made to Article 19, "Protection in the event of removal, expulsion or extradition", paragraph 2, "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment". In ***Gnandi*** the CJEU made also reference to Article 18 of the Charter, to which he does not refer too often in its case law.

Finally, it can be stated that the Charter could assume a more prominent role in order to interpret the Procedure Directive. In this respect, it would seem useful that also referring Courts refer to the Charter in their preliminary ruling — as was in Tall, where the reference to the Charter of Fundamental Rights was made in the request for a preliminary ruling submitted by a Belgian Court.

It should be also remembered that following the increase in migration flows and the crisis in the Common European Asylum System the Commission proposed to replace the Asylum Procedures Directive with a Regulation. With this Proposal, the whole procedure is shorter and

simplified. In particular, the Proposal provides that the examination procedure should last for a period of no more than six months, which may be extended by a period of three months (Article 34, paras 2-3).

The introduction of strict time limits at all stages of the procedure is considered necessary by the Commission in order to simplify the procedures and increase their effectiveness. Clearly, the Commission made an effort to strike a balance between the right to have an application examined within a reasonable time limit and the rights to an effective remedy and to defence. This is why the Commission has stressed that the proposed restrictions respect the fundamental rights recognised in the Charter (para 79 of the Proposal), such as the right to human dignity (Article 1), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4), the right to protection of personal data (Article 8), the right to asylum (Article 18), protection in the event of removal, expulsion or extradition (Article 19), non-discrimination (Article 21), equality between women and men (Article 23), the rights of the child (Article 24), and the right to an effective remedy and to a fair trial (Article 47).

The Charter and the Reception Conditions Directive

Introduction/Overview

The current Reception Conditions Directive[18] adopted in 2013 is a recast of the Council Directive 2003/9/CE on minimum standards for the reception of asylum seekers. The deadline for Member States to transpose the Directive into national law was 20 July 2015.

The Directive aims to provide a more harmonised standard for the reception of applicants, which should ensure a dignified standard of living and comparable living conditions in all Member States. Still, in line with Article 4, Member States may introduce or retain more favourable provisions in the field of reception conditions as long as they are compatible with this Directive.

The Directive applies to all third-country nationals and stateless persons who applied for international protection anywhere in the Member States and in respect of which a final decision has not yet been taken (Article 2). In order to ensure equal treatment of applicants throughout the EU, this Directive applies during all stages and types of procedures concerning applications for international protection, including to asylum-seekers with their transfer pending under the Dublin Regulation (Recital 8).

The Directive ensures access to material reception conditions for applicants, including housing, food, clothing and a daily expenses allowance (Article 2), as well as access to health care, including appropriate mental health care where needed and employment.

The Directive also provides space for Member States to reduce or, in exceptional and duly justified cases, withdraw material reception conditions (Article 20).

In line with the Directive, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively. For more information on detention, please check the following Chapter of the Manual.

Member States are obliged to 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, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation). For this reason, Member States need to conduct an individual assessment of the special reception needs of vulnerable persons. Particular attention is given to unaccompanied minors (Article 24) and victims of torture (Article 25).

Applicants to international protection have a right to access the labour market, at the latest nine months after lodging their application (Article 15(1)). However, for reasons of labour market policies, Member States may give priority to Union citizens, nationals of states parties to the Agreement on the European Economic Area, and to legally resident third-country nationals (Article 15(2)).

In spite of the Directive, asylum seekers today have very different reception conditions across Europe. In some countries their basic needs are not met and asylum seekers face significant obstacles to access employment, education and health care.

Overview: Chapters and their main contents

19. Purpose, definitions and scope

- Purpose (Article 1)
- Definitions (Article 2)
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20. General provisions on reception conditions

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- Vocational training (Article 16)
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- Health care (Article 19)

21. Reduction or withdrawal of material reception conditions

- Reduction or withdrawal of material reception conditions (Article 20)

22. Provisions for vulnerable persons

- General principle (Article 21)
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- Minors (Article 23)
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23. Appeals

- Appeals (Article 26)

24. Actions to improve the efficiency of the reception system

- Competent authorities (Article 27)
- Guidance, monitoring and control system (Article 28)
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25. Final provisions

- Reports (Article 30)
- Transposition (Article 31)
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CJEU Case Law

In ***Cimade et Gisti*** (C-179/11) the CJEU ruled that Council Directive 2003/9 laying down minimum standards for the reception of asylum seekers in the Member States must be interpreted as meaning that a Member State, in receipt of an application for asylum, is obliged to grant the minimum conditions for reception of asylum seekers as laid down in the Directive even to an asylum seeker in respect of whom it decides to call upon another Member State, as the Member State responsible for examining his application for asylum, to take charge of or take back that applicant. The obligation ceases only when that applicant has actually been transferred by the requesting Member State.

The general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter, under which human dignity must be respected and protected, preclude an asylum seeker from being deprived — even for a temporary period of time after the making of the application for asylum and before being actually transferred to the Member State responsible — of the protection of the minimum standards laid down by that Directive. The CJEU restated that the provisions of Directive 2003/9 must be interpreted in the light of the general scheme and purpose of the Directive and in accordance with recital 5 in the preamble to that Directive, while respecting the fundamental rights and observing the principles recognised in particular by the Charter. Having in mind the requirements of Article 1 of the Charter, under which human dignity must be respected and protected, the asylum seeker may not be deprived — even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State — of the protection of the minimum standards laid down by that Directive.

In ***Saciri*** (C-79/13) the Court had to decide on the case of the Saciri family, who had lodged an asylum application in Belgium, in October 2010, and was told by Belgian authorities (Fedasil), that they could not be provided with accommodation and directed to the competent centre for social welfare. Unable to find housing, the family sought financial aid from the centre for social welfare but this was refused because they were supposed to be at the state reception facilities, despite the fact that such housing was unavailable. The Saciri family brought an

application for interim measures before the court against the Fedasil and centre for social welfare. The court ordered Fedasil and the centre for social welfare to offer the Saciri family reception facilities and to pay them an amount as financial aid respectively. Fedasil placed the family in a reception centre for asylum seekers. The Saciri family appealed against the decision of Fedasil and the social welfare centre before the Labour Court in Leuven. The Court declared the action against the social welfare centre to be unfounded, while ordering Fedasil to pay the Saciri family the sum of EUR 2.961,27. Fedasil appealed against that judgment before the Brussels Higher Labour Court. On appeal against this order, the Brussels Higher Labour Court sought clarification from the CJEU.

The Brussels Higher Labour Court asked, whether a Member State which grants the material reception conditions in the form of financial allowances (and not in kind) is bound to award those allowances from the time of the introduction of the asylum application "while ensuring that the amount of those allowances is such as to enable asylum seekers to obtain accommodation, in compliance with the conditions laid down in Articles 13(1) and (2) and 14(1), (3), (5) and (8) of that Directive". In that regard, the CJEU recalls that the period during which the material reception conditions must be provided is to begin when the asylum seeker applies for asylum. Furthermore, the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter, under which human dignity must be respected and protected, preclude the asylum seeker from being deprived — even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State — of the protection of the minimum standards laid down by that Directive.

Subsequently, the CJEU states that the financial aid granted must be sufficient to ensure a dignified standard of living, adequate for the health of applicants and capable of ensuring their subsistence. In addition, the Court states that the Member States are required to adjust the reception conditions to the situation of persons having specific needs, as referred to in Article 17 of the Directive. Accordingly, the financial allowances must be sufficient to preserve family unity and the best interests of the child meaning that the amount of the allowances must enable minor children to be housed with their parents.

The material reception conditions laid down in Article 14(1), (3), (5) and (8) of Directive 2003/9 do not apply to the Member States, who have opted to grant those conditions in the form of financial allowances only. Nevertheless, the amount of those allowances must be sufficient to enable minor children to be housed with their parents, so that the family unity of the asylum seekers may be maintained.

The CJEU also held that where the accommodation facilities specifically for asylum seekers are overloaded, the Member States might refer the asylum seekers to bodies within the general public assistance system, provided that that system ensures that the minimum standards laid down in Reception Directive are met.

Role of the Charter in relation to the Reception Conditions Directive

The Reception Directive but also national law must be interpreted in the light of the Charter. The Preamble of the Directive (recital 35) states that the Reception Directive respects the fundamental rights and observes the principles recognised in particular by the Charter. In particular, the Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly In ***Cimade*** the CJEU noted in reference to the Reception Conditions Directive, in order to observe fundamental rights, the right to human dignity must be respected and protected — asylum seekers may not be deprived, even for a temporary period of time, of the protection of the minimum standards laid down by that Directive. In ***Saciri,*** the CJEU found that the financial support provided by the state must be sufficient to ensure a dignified standard of living and it must be sufficient to preserve family unity and the best interests of the child. In both of these cases the Court made reference to the Article 1 of the Charter referring to the need to observe fundamental rights of applicants.

The ECRE has also developed a paper on how Reception Conditions Directive read in light of the Article 41 and Article 47 of the Charter can ensure better protection for those seeking international protection. [19]

[18] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)

[19] ECRE (2013): An examination of the Reception Conditions Directive and its recast in light of Article 41 and 47 of the Charter of Fundamental Rights of the European Union, available here (https://www.peacepalacelibrary.nl/ebooks/files/37081911X.pdf)

The Charter and the Detention of Migrants and Asylum Seekers

Introduction/Overview

Detention represents a widespread Member States practice in the field of immigration, including asylum. In the recent years, European law converged to measures aiming to fight irregular immigration rising in Europe. Some of the measures taken included the criminalization of entering illegally or remaining illegally there after a legal entrance. Furthermore, detention is also used as precautionary measure for administrative purposes, for example, during the identification and evaluation of the status of the migrant. Also, detention is applied in proceedings on the determination of an application for international protection, including detention aimed a securing the transfer of the applicant to the Member State responsible for examining his application. Finally, detention is applied in the procedure of expulsion.

In line with Article 5 ECHR, the lawful arrest or detention of a person in order 'to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition' is not inconsistent with international and European legal framework. In fact, the possibility of detaining asylum seekers and refugees is not forbidden in principle. However, the possibility to detain asylum seekers and migrants is always an exception to the fundamental right to freedom and, in this vein, it must be restricted particularly. Accordingly, it must be prescribed by law and must not be arbitrary. Even if applied, the deprivation of freedom must be accompanied by a set of important safeguards and by humane and dignified treatments.

Furthermore, in this respect it is worth to mention the Article 31 of the 1951 Geneva Convention. Said provision states that penalties must not be imposed, on account of irregular entry or presence, on *refugees who, coming directly from a territory where their life or freedom was threatened* [[…]], *enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.*

EU law provides the basis for a detention of asylum seekers and migrants in a number of pieces of secondary legislation.

Provisions on the detention of asylum seekers can be found in the **Reception Conditions Directive 2013/33** (recast). Article 2(h) of the 2013/33 Directive contains a definition of "detention" — described as confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.

Article 8 of the 2013/33 Directive contains a ground rule concerning detention of asylum seekers, namely precluding holding a person in detention for the sole reason that he or she is an applicant for international protection. This rule is reiterated in Article 26(1) of the Procedures Directive 2013/32.

The Reception Conditions Directive provides that detention may be considered as a measure of last resort, and only for as short a period as possible. The Directive stresses the importance of a consideration of alternatives to detention.

The Directive is also setting the list of grounds for a detention. An applicant for asylum may be detained only:

- in order to determine or verify his or her identity or nationality;

- in order to determine those elements on which the application for international protection is based, that could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant;

- in order to decide, in the context of aprocedure, on the applicant's right to enter the territory;

- when he or she is detained, subject to a return procedure, and there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision;

- when protection of national security or public order so requires;

- to secure transfer under the Dublin Regulation.

With regard to the most relevant safeguard measures of Directive 2013/33, it provides in its Article 9, that detention of applicants shall be ordered in writing by judicial or administrative authorities. The detention order shall state the factual and legal reasons on which it is based. It also provides for speedy judicial review of the lawfulness of the detention, if detention is ordered by administrative authorities. The Article also provides for the right to access to free legal assistance and representation in detention proceedings.

Directive 2013/33 regulates also the conditions of the detention. According to Article 10 of the Directive, detention of applicants shall take place in specialised detention facilities. In exceptional cases, where a Member State is obliged to resort to prison accommodation, the detained applicant shall be kept separately from ordinary prisoners. According to the Directive detained applicants shall have access to open-air spaces. It also guarantees that persons representing the United Nations High Commissioner for Refugees (UNHCR), family members, lawyers and NGO representatives have the possibility to communicate with and visit detained applicants. The Directive stresses the importance of providing the detained applicants with information explaining the rules applied in the detention centre.

Special attention is provided by Directive 2013/33 to the detention of vulnerable persons and applicants with special reception needs. According to Article 9, ***the health, including mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities***. The Directive requires regular monitoring and adequate support for vulnerable persons, taking into account their particular situation.

The Directive moreover clearly states that minors shall be detained only as a measure of last resort, and only when other less coercive alternative measures cannot be applied effectively. Detention of minors shall be for the shortest period of time. They shall have the possibility to

engage in leisure activities. According to the Directive, unaccompanied minors shall be detained only in exceptional circumstances. They can never be detained in prison accommodation and should be also accommodated separately from adults.

Female applicants shall be accommodated separately from male applicants, unless the latter are family members and all individuals concerned consent thereto.

The **Procedures Directive 2013/32** contains a few provisions on detention. According to Article 8, if there are indications that migrants held in detention facilities may wish to make an application for international protection, they should be provided with information on the possibility to do so. Additionally, Article 26 requires Member States to ensure the possibility of speedy judicial review of the applicant's detention.

Dublin III Regulation in Article 28 provides, that detention cannot be imposed on theapplicant solely because he or she is subject to the procedure established by this Regulation. It states, that detention may be imposed in order to secure transfer procedures, only when there is a significant risk of absconding, on the basis of an individual assessment, and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively. The detention shall be for as short a period as possible, and shall last no longer than the time reasonably necessary to fulfil the required administrative procedures with due diligence, until the transfer is carried out

The so-called **Returns Directive**, **2008/115/EC**, contains provisions on the detention of irregularly staying migrants, who are the subject of return procedures in order to prepare the return and/or carry out the removal process. The Directive guarantees safeguards measures and procedures. In particular, it introduced a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.

The Preamble of the Returns Directive contains an explicit reference to the Charter of Fundamental Rights. Paragraph 16 of the Preamble states: ***This Directive respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union***. Therefore, the Charter represents the instrument through which to interpret and to implement the provisions of the 'Returns Directive'.

The Preamble of the Directive also underlines that ***the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure*** and that decisions ***should be adopted on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay***. The fundamental assumption is that the use of detention should be subject to the principle of proportionality with regard to the means used and objectives pursued and that third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights.

It is worth to remember that this Directive in contrast to the Reception Conditions Directive does not define 'detention'. With regard to the most relevant safeguards measures and procedures provided by it, Article 15 of the Directive establishes that detention must be ordered in writing with reasons given in fact and in law by a competent authority, namely an administrative or judicial authority. It also establishes that third-country migrants may be

held in detention up to 6 months, a period that may extend to a maximum of 18 months. Special attention is provided by the Directive for the conditions of detention. In particular, Article 16 provides that particular attention must be paid to the situation of vulnerable persons. In addition, Article 17 provides for specific measures for unaccompanied minors and families with minors. These measures are in line with the principle of the 'best interest of the child' enshrined in the 1989 United Nations Convention on the Rights of the Child.

The detention of asylum seekers is being increasingly challenged before European and national courts. Therefore, in recent years a significant jurisprudence has developed, in particular, of the CJEU and the ECHR, which clearly shows the need to balance the different interests and the different needs with regard to detention, which are all legally relevant and protected.

CJEU Case Law

The body of cases might be divided into four different groups.

Preliminary rulings, concerning the detention of asylum seekers and irregularly staying third-country nationals, where the Charter was invoked can be divided into four groups.

The first group deals with the references questioning the validity of EU secondary law.

The second group concerns the interpretation of Dublin III Regulation provisions allowing the detention of asylum seekers who are to be transferred to another Member State.

The third group concentrates on procedural guarantees of those detained.

The fourth group is composed of judgments were the Charter was not directly invoked, yet the Court of Justice referred to fundamental rights of those detained.

In the first group of cases, the Court of Justice analysed the validity of EU secondary law in the light of the right to liberty and security, provided for by Article 6 of the Charter. In cases ***C-601/15 J. N.*** and ***C-18/16 K.***, the Court of Justice ruled on the validity of Articles 8(3)e and 8(3)a-b of the Reception Directive respectively.

The essence of the dispute was, whether it was permissible to detain asylum seekers during an asylum procedure to verify their identity or nationality, to gather relevant information in their asylum procedures, or for reasons of national security or public order. The referring national court noticed that EU secondary legislation provides asylum seekers with a right to remain in the Member State during the first instance asylum procedure. The referring court also observed that Article 5.1.f ECHR permits the lawful detention of a person against whom action is being taken with a view to deportation or extradition. Consequently, the national court wondered whether actions taken against asylum seekers, who can lawfully reside on the territory of the Member State while his/her asylum application is examined, could be considered as actions taken with a view to deportation. And if not, whether the detention of such an asylum seeker does not amount to an unlawful deprivation of liberty.

The Court of Justice ruled in both cases that the EU secondary law does not infringe the Charter, and is compatible with rights guaranteed by the ECHR. In both cases the Court of Justice focused it's rulings around conditions, which must be met for the deprivation of liberty

of an asylum seeker to be lawful. The Court highlighted that the EU secondary legislation must be interpreted in conformity with provisions of the Charter.

Each restriction of liberty has to be provided by law, not to affect the essence of the right to liberty, and meet a proportionality test. What is important, the Court of Justice did not simply rely on the jurisprudence of the European Court of Human Rights. While analysing the validity of the EU law, the CJEU primarily relied on the Article 6 of the Charter, analysed in conjunction with the Article 52 of the Charter, outlining permissible limitations of fundamental rights. Using such an approach the Court stressed, that the level of protection afforded by EU law is compatible with the protection afforded by the ECtHR. The CJEU highlighted that the ECHR does not generally preclude the detention of asylum seekers, as after a negative asylum decision they can be subject to deportation procedure.

It was highlighted by the Court of Justice that the **detention of asylum seekers must always meet the test of "strict necessity"**. Detaining an asylum seeker is only permissible after an individual assessment of his case, when a permissible ground for detention does require so and no alternative measure can be used. The Court also reiterated the definition of "public order and public security", so that this ground for the detention of asylum seekers is not overused.

Introduction of the test of "strict necessity" to the detention of asylum seekers is a significant development. It must be highlighted that protection afforded by the ECHR does not require the test of "necessity" to be met for the detention of asylum seekers to be lawful.[20] From this perspective, protection against the restriction of the right to liberty afforded by the Charter is stronger.

The Court of Justice stressed that while interpreting EU law, the ECHR must be taken into account. Necessary consistency between those two instruments must be ensured and the interpretation of the Charter cannot lead to a weaker protection than the one afforded by the ECtHR. Yet, it cannot adversely affect the autonomy of the EU law and the Court of Justice.

The CJEU acknowledged the importance of Article 6 of the Charter and the gravity of an interference with that right by detention. Although not eliminating the EU provisions allowing for the detention of asylum seekers, the Court of Justice tried to limit an overuse of the detention of asylum seekers by introducing the test of "strict necessity" to all permissible grounds of detention, and by providing a narrow definition of the notion of "public order and public security".

The second group of cases where the Court of Justice ruled on the detention of asylum seekers, and referred to the provisions of the Charter, concerns the detention under the Dublin III Regulation — that is asylum seekers waiting to be transferred to another Member State responsible for the examination of their application for asylum. The CJEU issued two rulings in this category. Both of them significantly influenced the practice of Member States in terms of the detention of asylum seekers waiting for the transfer under Dublin III Regulation.

In its judgment in the case ***Al Chodor,*** C-582/15, the Court of Justice **stressed the importance of judicial protection and the protection against arbitrary detention provided for by the Charter**. The Dublin III Regulation allows for the detention of asylum seekers, when they are

to be transferred to another Member State and pose significant risk of absconding. The CJEU held that **in order to genuinely protect against arbitrary detention, the objective criteria indicating the presence of a risk of absconding must be clearly provided by national law**. In the absence of such objective criteria detention of asylum seekers under Dublin III Regulation will not be permissible, as it would violate the right to liberty and security of asylum seekers. The Court stressed that **the national legislation must be sufficiently clear, predictable, accessible and it has to protect against arbitrariness**.

The ruling significantly increased the level of protection against arbitrary detention of asylum seekers. At the time some Member States still did not list objective criteria of the "risk of absconding" in their national legislation, i.e. France, the Czech Republic or the UK. These legal systems allowed for broad usage of detention of transferable asylum seekers. After the ruling of the CJEU the detention of asylum seekers waiting to be transferred to another Member State under the Dublin III Regulation became more predictable.

In the other significant ruling, ***Mohammad Khir Amayry***, C-16/16, the CJEU clarified **the maximum time period that an asylum seeker can be detained while waiting for a transfer to another Member State**. The Dublin III Regulation only to a limited degree regulates the maximum period of detention of transferable asylum seekers. The Court of Justice strengthened the protection afforded to those asylum seekers. In its preliminary ruling the Court highlighted that, when a limitation on the exercise of the right to liberty and security is introduced by EU secondary law Article 6 of the Charter must be observed. Although not definitely stating the maximum permissible period of detention, the Court of Justice found that 3 months detention exceeds the period which is reasonably necessary to transfer an asylum seeker while acting with due diligence. **Detention cannot exceed the period necessary for the purposes of the transfer procedure.**

The reference to the obligation of state authorities to act with due diligence in procedures concerning detained asylum seekers is comparable to the obligation deriving from the jurisprudence of the European Court of Human Rights. Detention for the purpose of deportation is permissible only as long as it is not arbitrary. One of the aspects while examining the arbitrariness of the detention is whether state authorities acted with due diligence towards the detained foreigner. Although not directly referencing to the jurisprudence of the European Court of Human Rights, the Court of Justice applied similar standards to analyse the lawfulness of the detention of asylum seekers under EU secondary law in the above-mentioned cases.

The third group of preliminary rulings referencing the Charter in detention cases concerns procedural safeguards. The Court of Justice acknowledges the role of procedural guarantees in the proper administration of the detention policy. Through its jurisprudence the Court tries to reconcile the need to guarantee fundamental rights of third-country nationals and the necessity to guarantee for effective deportation proceedings throughout the EU.

In its judgment ***Mahdi,*** C-146/14, the Court of Justice clarified that **the decision extending the detention of a third-country national in a return procedure must be given in writing and include the reasons in fact and in law for that decision.** Furthermore, the CJEU held, that the domestic court supervising the extension of the detention must be authorized to

apply less coercive measures, to release a third-country national, and to take into account all facts and evidence submitted by the state authority, the third-country national, or gathered by its own motion.

In a motion for a preliminary ruling, the domestic court referred to Articles 6 ECHR and 47 of the Charter (right to an effective remedy and a fair trial). The Court of Justice recalled the principle of procedural autonomy. Member States are competent to determine procedural requirements relating to a detention-review measure. Yet, what was highlighted is that the procedural autonomy must ensure the observance of the fundamental rights.

The Court of Justice clarified that according to its established jurisprudence, **knowledge of the reasons of the decision is essential to enable the third-country national to defend his/her rights in the best possible conditions, decide whether to appeal the decision and to enable the supervising court to genuinely review the legality of the detention decision.** Those are all elements necessary to guarantee a right to a fair trial and to an effective remedy, and therefore cannot be ignored by Member States.

The question of procedural guarantees of detained third-country nationals was also brought to the attention of the Court of Justice by the Dutch court in ***M.G. and M.R.,*** C-383/13. The issue before the Court of Justice focused around legal consequences of the breach of the right to be heard in proceedings on the extension of detention.

The CJEU pointed to the fact, that EU secondary law does not include procedural rules for the extension of the detention of third-country nationals in the deportation procedure. Yet, **the right to be heard constitutes an important element of the right to defence and thus, it is among the fundamental rights enshrined in the Charter. Member States are obliged to respect those rights while applying EU secondary law, regardless whether those rights were explicitly incorporated into EU secondary legislation or not.**

On the other hand the Court of Justice stressed that the right of defence is not an absolute one and may be restricted in accordance with Article 52 of the Charter. Procedural autonomy of Member States requires states to adopt national law in this regard. Such a law has to respect the principle of equivalence — rules governing the detention of third-country nationals should be the same as those to which individuals in comparable situations are subject under national law; and the principle of effectiveness — national law cannot make it impossible in practice, or excessively difficult, to exercise the rights of defence.

Finally, the CJEU held that **an infringement of the right to defence does not, under EU law, automatically result in an annulment of the decision to prolong the detention of third-country national in deportation proceedings**. Such a consequence can be subscribed when the outcome of the procedure might have been different, had the right of the defence been properly observed.

The last, fourth group of preliminary rulings is a group where the Charter itself was not directly referenced, yet the Court of Justice acknowledged the obligation to observe fundamental rights of third-country nationals while deciding on their detention.

In one of those rulings, ***Pham,*** C-474/13, the CJEU held that **third-country nationals detained for deportation purpose cannot be detained together with ordinary prisoners**. The obligation to respect fundamental rights and the dignity of third-country nationals prohibits such a treatment. Furthermore, the Court of Justice stressed that the wish of a third-country national is irrelevant in the situation. Under no circumstances can the third-country national waiting for the deportation be detained together with ordinary prisoners.

In other cases the CJEU referred to fundamental rights and reaffirmed principles deriving from the jurisprudence of the European Court of Human Rights, which have to be respected. In the case ***El Dridri,*** C-61/11, the Court of Justice reaffirmed the principle of proportionality stating that **the length of the deprivation of liberty should not exceed that required for the purpose pursued**. In the case ***Kadzoev,*** C-357/09, although not directly referencing to fundamental rights, the Court of Justice clarified the notion of "lack of reasonable prospect of removal". Deciding whether towards a detained third-country national there is **a reasonable prospect of removal, is a significant element while analysing whether domestic authorities acted in a good faith** and thus whether the detention was arbitrary or not.

To conclude, in the jurisprudence of the Court of Justice in detention cases the Charter started to play a more significant role. The CJEU frequently relies on the judgments or standards set by the European Court of Human Rights. Yet, it also proposes its own unique solutions based on the Charter. What is worth remembering is that all EU Member States are also subject to the jurisdiction of the ECtHR. In consequence, when it comes to fundamental rights of detained third-country nationals both the Court of Justice and the European Court of Human Rights could adjudicate on the same case.

The Role of the Charter in relation to Detention

The detention of asylum seekers in asylum and transfer procedures, and irregularly staying third-country nationals in return procedure, was, as we showed above, on numerous occasions a subject of a preliminary ruling of the Court of Justice. In the vast majority of cases the Court of Justice either directly referenced the Charter of Fundamental Rights or referred to the need to observe fundamental and human rights without explicitly mentioning the Charter.

What is worth highlighting is the growing tendency of the Court of Justice to directly rely on the Charter while adjudicating detention cases. As of today (July 2018), all of the preliminary references concerning the detention of asylum seekers under Dublin III Regulation and the Reception Directive 2013/33/EU contain a direct reference and analysis of the Charter.

In many judgments, referring to the Charter, the CJEU interpreted EU law in order to protect individuals underlining that detention is a serious interference with the right to freedom and it should be made with exceptionally strict and precise interpretation of its provisions.

Still, the judgments regarding the validity of the grounds for detention might be seen as controversial. It seems that the level of interference with the right to liberty and security, set out in the Charter, in these judgments is lower than with the one guaranteed by the ECHR. And this, in turn, raises doubts about the correct application of Article 52 (3) of the Charter.

[20] ECtHR, Saadi v. the United Kingdom, application no. 13229/03, 29 January 2008, para. 72.

The Charter and other EU legislation relevant to the field of asylum

Besides the legislation described above there are also several other EU directives and regulations, which are relevant to the field of asylum or migration and contain references to fundamental rights or to the Charter. There is also a number of CJEU judgments interpreting those provisions and containing references to the Charter. Below we provide relevant quotations from the legislation and information about the rulings.

The Returns Directive[21]

Article 1 of the Returns Directive states, that ***this Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations***.

Recital (24) of the Returns Directive refers directly to the Charter: ***This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union***.

The Returns Directive contains provisions concerning definitions of irregular stay, return decision, entry-ban, remedies to appeal against decisions related to return and detention for the purpose of removal.

Recital 9 of the Returns Directive states that ***a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force***. Therefore provisions of this Directive apply to failed asylum seekers.

Several CJEU judgments interpreting the Returns Directive contain references to the Charter.

In the judgment ***Mahdi,*** C-146/14 PPU,the CJEU stated that *Articles 15(3) and (6) of the Returns Directive* [dealing with extension of detention], ***read in the light of Articles 6 and 47 of the Charter, must be interpreted as meaning that any decision adopted by a competent authority, on expiry of the maximum period allowed for the initial detention of a third-country national, on the further course to take concerning the detention must be in the form of a written measure that includes the reasons in fact and in law for that decision***.

In the judgment ***Sophie Mukarubega,*** C-166/13, the CJEU ruled, that the right to be heard in all proceedings is affirmed in Articles 47 and 48 of the Charter but also in its Article 41, which guarantees the right to good administration. However, the CJEU stated that Article 41 is addressed not to the Member States, but solely to the institutions, bodies, offices and agencies of the European Union. Therefore the applicant for a resident permit cannot derive from Article 41(2)(a) of the Charter a right to be heard in all proceedings related to his/her

application. However, the Court stated that such a right is inherent to the right to defence, which is a general principle of EU law. The CJEU reaffirmed its views concerning the application of Article 41 to return proceedings in its judgment *Khaled Boudjlida,* C-249/13.

In its judgment ***Abdida,*** C-562/13, the CJEU ruled, that the return of the third country national suffering from a serious illness may violate Article 19(2) of the Charter. The Court also stated that an appeal against a return decision in respect to such person should have suspensive effect as stated in Article 47 of the Charter.

The Family Reunification Directive[22]

Article 1 of the Family Reunification Directive states that its purpose is *to determine the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States*.

Recital (2) reads that the Directive *respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union*.

According to Recital (8) *special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification*.

Chapter V of the Directive provides for a specific regulation concerning the family reunification of refugees (more favourable compared to other categories of migrants).

In the judgment on the joined cases ***O., S.,*** C-356/11, and ***L.,*** C-357/11, (this judgment does not refer to the family reunification of refugees, however it contains reference to the Charter), the CJEU ruled that *while Member States have the faculty of requiring proof that the sponsor has stable and regular resources, which are sufficient to maintain himself and the members of his family, that faculty must be exercised in the light of Articles 7 and 24(2) and (3) of the Charter, which require the Member States to examine applications for family reunification in the interests of the children concerned and also with a view to promoting family life*. The CJEU repeated its position in the judgment ***Khachab,*** C-558/14.

Long-Term Residents Directive[23]

According to Article 1 of the Directive it determines:

(a) the terms for conferring and withdrawing long-term resident status granted by a Member State in relation to third-country nationals legally residing in its territory, and the rights pertaining thereto; and

(b) the terms of residence in Member States other than the one which conferred long-term status on them for third-country nationals enjoying that status.

The Directive provides permanent status of long-term resident to third-country nationals, who have resided legally and continuously within its territory for five years, immediately prior to the submission of the relevant application.

Recital (3) of this Directive reads that it respects the fundamental rights and observes the principles recognised in particular by the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the Charter.

Directive 2011/51/EU amending the long-term residents Directive [24] extended its scope to beneficiaries of international protection.

The Schengen Border Code[25]

Adopted in 2016, the code replaced the previous border code of 2006.[26]

The Schengen Border Code provides for the absence of border control of persons crossing the internal borders between the Member States of the Union. It also lays down rules governing the border control of persons crossing the external borders of the Member States of the Union.

Recital (36) of the Code states that it respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. It should be applied in accordance with the Member States' obligations as regards international protection and *non-refoulement*.

Article 4 of the Schengen Border Code reads that *when applying this Regulation, Member States shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights* [...].

In the judgment ***Zakaria,*** C-23/12, the CJEU interpreted provisions of the Schengen Border Code of 2006. The CJEU ruled that according to Article 6 of the Code, border guards shall, in the performance of their duties, fully respect human dignity. The CJEU stated that it is for the Member States to provide in their domestic legal system for the appropriate legal remedies in order to ensure, in compliance with Article 47 of the Charter, the protection of persons claiming the rights derived from Article 6 of the Schengen Border Code. Although this case concerned a person entering the Schengen territory on the basis of a visa, the judgment also applies to refugees who submit applications for international protection at the border.

The Visa Code [27]

Article 1 of the Visa Code states that *this Regulation establishes the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding three months in any six-month period.*

Recital (29) of the Visa Code reads that the *Regulation respects fundamental rights and observes the principles recognised in particular by the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms and by the Charter of Fundamental Rights of the European Union.*

Article 25 of the Visa Code provides for the possibility to issue visa with limited territorial validity, in case the Member State concerned considers it necessary on humanitarian grounds,for reasons of national interest or because of international obligations. In its judgment ***X and X, C-638/16 PPU***,the CJEU dealt with the case of Syrian nationals, who submitted applications for visas on the basis of Article 25(1)(a) of the Visa Code. They

submitted applications with a view to applying for asylum in Belgium, immediately upon their arrival and, thereafter, to being granted a residence permit with a period of validity not limited to 90 days. The CJEU stated that such an application falls outside the scope of the Visa Code, in particular Article 25(1)(a) thereof. For that reason the provisions of the Charter (in particular, Articles 4 and 18 thereof) do not apply to such situation.

[21] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. Official Journal of the European Union, L 348/98.

[22] Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, Official Journal of the European Union L 251, 03/10/2003 P. 0012 — 0018.

[23] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents Official Journal of the European Union, L 16, 23.1.2004, p. 44—53.

[24] Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection.

[25] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) Official Journal of the EU, L 77, 23.3.2016, p. 1—52.

[26] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) Official Journal of the EU, L 105, 13.4.2006, p. 1—32.

[27] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) Official Journal of the EU, L 77, 23.3.2016, p. 1—52.

Methodological information for the trainers

Introduction to European institutions and EU law

The following case scenarios were developed for the trainings organized by project partners during the project "Judging the Charter". We conducted several trainings in project countries for judges but also lawyers and other legal practitioners, like for example staff of ombudsmen institutions and equal treatment bodies. Trainings were devoted to the practical usage of the Charter of Fundamental Rights, including the formulation of preliminary reference questions. Some of the trainings were focused on the field of asylum law. In these training sessions we had a chance to test training materials prepared beforehand.

From experience gained during national trainings we can share information that might be of the assistance for those, who will use this manual in their educational activities.

The application of the Charter in national procedures, including when referring a question to the Court of Justice of the European Union, is not an easy task. It requires detailed knowledge of European law and the jurisprudence of the CJEU.

From our experience we know that, before moving to more detailed and specialised trainings, like on asylum law, one should make sure that participants have a basic understanding of European institutions and EU law. Lawyers, and especially judges, do not rush to reveal gaps in their knowledge, therefore it is important to make sure that they have a basic understanding.

We have developed different materials in order to contribute to an easy understanding of the Charter basics as for instance:

- the table comparing the systems of the European Union and Council of Europe,
- the Charter in a nutshell — a one page table with all the rights and principles of the Charter listed,
- the graph that aims at making cases of Charter applicability more evident,
- Case Studies and exercises on questions of applicability.

Those materials can be found on the project website: http://charter.humanrights.at/ (http://charter.humanrights.at/). If not done in a separate training session, trainings on the Charter and asylum should also refer to these basics and specifically to the Charter and its application (especially Article 51).

Practical training value

All trainings conducted were evaluated. What was valued the most by the participants was their practical character. Working on a real case, discussing different strategies and interpretations in small groups, answering the legal questions, formulating an opinion and delivering the verdict, is what lawyers like to do, have competences to do, and it is how they learn. We heard opinions that despite some previous seminars or courses that were of more

traditional lecturing style, participants for the first time really understood and learned the subject matter. In order to achieve this objective we designed case scenarios. Participants were provided with case studies, a selection of relevant legislation, and clear detailed instructions what was expected from them. Only after the presentation of the results of their discussions in small working groups they were told the facts of the real case, the ruling of the CJEU (or a national court), and were provided with the written answers to the scenario. In the following chapter we include all the materials, so in the preparation of the training one should decide what part is to be distributed to participants at the beginning and what part at the end of work.

Case scenario structure

In the next chapter we included several case scenarios that might be used in trainings or treated as an inspiration for developing ones own materials.

The scenarios are divided into thematic fields mirroring the order of the first part of the manual. Each important subject matter referred to in the Manual has its reflection in the scenarios.

Each *scenario* has the same structure and is provided in a ready to print format.

1. Facts of the case

In some cases facts reflect closely real situations and cases that were dealt with by the national authorities and courts as well as by the CJEU. In some cases the jurisprudence of the CJEU is just an inspiration, so even if the issue is the same, the case scenario might differ from the real one.

In each scenario we inform, on which case of the CJEU the scenario is based on, and what issues can be addressed by working with this particular scenario.

2. Arguments to be considered

In some cases there is a need to share additional information with trainees in order for them to grasp the key issues they have to concentrate on or because there are some factors they simply need to know in order to be able to solve the case.

3. Legal Framework

It is important that participants are not left with the big volume of law relevant for the case as from the practical point of view that would require dedication of much more time than is available during the training. So, in our scenarios, we include the most important and necessary regulations. That can be both European and national law. Of course participants should also have a text of the Charter available.

4. Questions

Pre-formulated questions indicate the direction of research and ensure focus. Since the cases are interesting and of precedent character, it is probable that the discussions within small groups could last too long. So it is important to focus on the delivery of an answer. This also provides an opportunity for the comparison of answers delivered by different groups.

Information for trainers

Information for trainers is provided on a separate page. This part is obviously not distributed to participants before they deliver their own answers. Once they decide on their answers they may compare both. Also, it is important that answers include selected, most relevant quotations from the rulings of the CJEU. It is up to the trainers, if they want to distribute this information or just refer to it by providing information in their own words.

Follow-Up Questions

Since the scenarios are based on cases stemming from different countries and jurisdictions, it is important for participants to refer also to ones own daily routine and legal reality. This might be done by trainers already when tailoring a scenario to the specific need of the target group (when we adapt both, facts and legal framework sections, to our national situation). If this is not done, it can be interesting to discuss follow up questions that introduce, ***inter alia***, the national context. Participants may elaborate, how they would evaluate and decide on a similar case in their country. But one can also formulate other follow-up questions inspired by the case, for instance regarding the development of the jurisprudence line or legislative developments.

Guidance for facilitators

In the preparation of national trainings we put stress on detailed guidance for facilitators. Not all experts on the substance have experience in the application of interactive teaching methods and it is important to deliver them necessary instructions. It might be by providing them detailed sessions scenarios that include subsequent elements of the session with instruction on how to proceed and how much time shall be dedicated to particular steps. It is important that during the training all necessary elements are taken into account, no questions are left unanswered or debrief is not done due to the shortage of time.

But instead of preparing a detailed timetable it might be also enough to provide just a framework for the session. Following is an exemplary framework structure of a training session.

1. Facilitator introduces the subject matter of the session, formulates expectations and outcomes.

2. Facilitator distributes the case study among participants, divided into small groups (not more that 5,6 persons in a group). Depending on the number of groups it might be the same case for all, or different cases. If we have more than three groups, it might be more efficient to distribute different cases (for instance one case for two groups and second case for the other two). In such a situation groups still will be able to compare their results but we will avoid repeating the same issues or arguments four or more times.

3. Participants should read the case scenario and discuss the questions. In the time given their task is also to prepare answers. Facilitators may suggest distribution of roles in a small group to organize the working process well (for instance: introduce moderators of the small group discussions making sure that everybody has a chance to take part; time keepers making sure

that all tasks will be completed; note keepers drafting the arguments of the group; rapporteurs, who will presents the results of the group's work). During the work in small groups training facilitators should monitor the situation, be available for additional instructions, make sure that the tasks are clear for the groups.

4. The results of the working groups are subsequently presented in the plenary. Participants should have a chance to present their findings but also to answer questions from other participants and facilitators. It is important that all groups have a chance to present their opinions. If groups were working on the same scenario, the facilitator may ask different groups to touch upon different issues and compare them with others. This approach ensures the participation of all. If we ask each group, one by one, to present the whole case, it might become boring and frustrating as each subsequent group would have to repeat similar things.

5. After the participants have discussed the questions and provided their opinions and answers, the facilitator should present and discuss with participants the findings of the CJEU, especially underlying the elements that are different from the conclusions of the small groups.

6. Finally there should be some time for follow-up questions (we may also ask participants to think it over and discuss during the break or later on). Also, in the general debrief of the session, the facilitator may formulate some questions regarding participants experience during the session and ask them for the evaluations. There should be also time for any remaining questions.

Case Scenarios

The Charter and the Dublin Regulations — case scenarios

Non-refoulement?

Case study based on CJEU case N.S. and M. E. (C-411/10 t C- 493/10)

To be used in the context of safe country.

Case Study (http://charter.humanrights.at/upload/Non_refoulement.pdf)
Instruction for trainers
(http://charter.humanrights.at/upload/Non_refoulement%20Trainers%20.pdf)

Dublin? Transfer?

Case study based on the case of the CJEU C-394/12, Shamso Abdullahi v Bundesasylamt.

To be used when discussing the criterion of Article 10(1) for determining the responsibility for examining an asylum application under Regulation 343/2003

Case Study (http://charter.humanrights.at/upload/Dublin_Transfer.pdf)
Instruction for trainers
(http://charter.humanrights.at/upload/Dublin_Transfer%20Trainers.pdf)

Transfer under Dublin regulation

Case study based on the case of the CJEU: C- 578/16 PPU, C. K., H. F., A. S. v Republika Slovenija.

Issues that can be addressed by working with this case:

- applicability of the Charter in transfers of the applicants to the Member State responsible for examining their asylum application (Dublin transfers),
- factors affecting the obligation to transfer an asylum seeker under the Dublin III regulation

Case Study (http://charter.humanrights.at/upload/Dublin transfer health.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/Dublin transfer health trainers.pdf)

Discretionary clause

Case study based on CJEU case C. K., H. F., A. S., C-578/16 PPU

To be used in discussing what constitutes inhuman and/or degrading treatment within the meaning of Article 4 of the Charter in the context of a transfer of asylum seekers

Case Study (http://charter.humanrights.at/upload/Discretionary Clause.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/Discretionary Clause Trainers.pdf)

Transfer under Dublin III regulation — appeal procedures

Case study based on the case of the CJEU: Majid Shiri, C-201/16

Issue that can be addressed by working with this case:

- right to an effective remedy within Dublin procedures.

Dublin effective remedy:
Case Study (http://charter.humanrights.at/upload/Dublin effective remedy.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/Dublin effective remedy trainers.pdf)

Dublin transfers of unaccompanied minors

Case Study based on the case of the CJEU MA, BT, DA v. Secretary of State for the Home Department

Can be used for elaborating on questions related to:

- the Member State responsibilities for asylum procedures (Article 6 of Dublin Regulation 343/2003),
- the relevance of the best interest of the child in the light of Article 24 of the Charter.

Case Study (http://charter.humanrights.at/upload/Dublin_Transfer.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/Dublin_Transfer_Solution.pdf)

The Charter and the Qualification Directive — case scenarios

Religious persecution as reason of granting international protection

Case study based on the joined cases of the CJEU: C-71/11, C-99/11, YZ

Issues that can be addressed by working with this case:

- freedom of the religion as enshrined in the Article 10 of the Charter in the context of asylum proceedings,
- qualification criteria in cases involving violation of the freedom of religion.

Religious Persecution:
Case Study (http://charter.humanrights.at/upload/religious persecution.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/religious persecution trainers.pdf)

Fear of persecution?

Case study based on the joined cases of the CJEU: X, Y, Z, C-199/12 to C-201/12

To be used in relation to Qualification Directive and the definition of a social group

Case Study (http://charter.humanrights.at/upload/Fear Persecution.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/Fear Persecution Trainers.pdf)

Verifying sexual orientation of asylum seekers?

Case study based on the joined cases of the CJEU: A, B, C, C-148/13 to C-150/13

To be used in relation to verification of sexual orientation as a ground for asylum

Sexual orientation as a ground of asylum:
Case Study (http://charter.humanrights.at/upload/Sexual Orientation Asylum Seekers.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/Sexual Orientation Asylum Seekers Trainers.pdf)

Removal of persons suffering from serious mental or physical illness

Case Study based on the case M.P. C-353/16

Can be used in order to illustrate the Court's case law in relation to the notion of serious harm under the Qualification Directive in the light of Article 4 of the Charter.

Serious Illness:
Case Study (http://charter.humanrights.at/upload/Serious Illness and Serious Harm.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/Serious Illness and Serious Harm_Trainers.pdf)

Confirming sexual orientation?

Case study based on CJEU case F., C-473/16

To be used in discussing the assessment of the facts and circumstances relating to a declared sexual orientation of an applicant.

Case Study (http://charter.humanrights.at/upload/Confirming Sexual Orientation.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/Confirming Sexual Orientation Trainers.pdf)

The Charter and Procedural Requirements in Asylum Procedures — case scenarios

Accelerated proceedings and the right to effective remedy

Case study based on the case of the CJEU: C-69/10, Samba Diouf

Issue that can be addressed by working with this case:

- right to effective remedy in accelerated asylum proceedings.

Accelerated Proceedings:
Case Study (http://charter.humanrights.at/upload/accelerated proceedings effective remedy.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/accelerated proceedings effective remedy trainers.pdf)

Exclusion from being refugee under secret evidence

Case study based on the case of the CJEU: C-300/11, ZZ v Secretary of State for the Home Department

Issues that can be addressed by working with this case:

- right to be heard in asylum cases,
- procedural guarantees in migration cases based on secret evidence.

Secret Evidence:
Case Study (http://charter.humanrights.at/upload/exclusion secret evidence.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/exclusion secret evidence trainers.pdf)

The Charter and the Reception Conditions Directive — case scenario

Material reception conditions for applicants for international protection

Case study based on the case of the CJEU: C-79/13 Saciri

Issue that can be addressed by working with this case:

- period and quality of material reception conditions available for asylum seekers.

Reception Conditions:
Case Study (http://charter.humanrights.at/upload/reception conditions.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/reception conditions trainers.pdf)

The Charter and Detention of Migrants and Asylum Seekers — case scenarios

Detention of asylum seekers on grounds of national security and public order

Case Study based on the case of the CJEU J.N. v. Staatssecretaris van Veiligheid en Justitie, C-601/15

Issues that can be adressed by working with this case:

- Grounds of detention under the Reception Conditions Directive,
- Article 52 and the relationship between the Charter and the ECHR.

Public Order and Detention:
Case Study (http://charter.humanrights.at/upload/Public Order and Detention.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/Public Order and Detention Trainers.pdf)

Restriction of liberty in asylum proceedings 1

Case study based on the case of the CJEU: K. v Staatssecretaris van Veiligheid en Justitie, C-18/16

Issues that can be addressed by working with this case:

- grounds of detention under the Reception Conditions Directive,
- applicability of the Charter to the asylum seekers detention cases.

Detention in asylum proceedings – Case Study I:
Case Study (http://charter.humanrights.at/upload/Detention asylum proceedings I.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/Detention asylum proceedings I_Trainers.pdf)

Restriction of liberty in asylum proceedings 2

Case study based on the case of the CJEU: C-60/16, Mohammad Khir Amyry v. Migrationsverket

Issue that can be addressed by working with this case:

- detention of asylum seekers under Dublin regulation.

Detention in asylum proceedings – Case Study II:
Case Study (http://charter.humanrights.at/upload/Detention asylum proceedings II.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/Detention asylum proceedings

II_Trainers.pdf)

The Charter and other EU legislation relevant to the field of asylum — case scenarios

Humanitarian Visa

Case study based on the case C-638/16 PPU

To be used when discussing the interpretation of Article 25(1) of the Visa Code (issue of humanitarian visa)

Case Study (http://charter.humanrights.at/upload/Humanitarian Visa.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/Humanitarian Visa Trainers.pdf)

EU Turkey Statement

Case Study based on CJEU cases T-192/16, T-193/16 and T-257/16

To be used in discussing legal standing in relation to the Charter

Case Study (http://charter.humanrights.at/upload/EU Turkey Statement.pdf)
Instruction for trainers (http://charter.humanrights.at/upload/EU Turkey Statement Trainers.pdf)

Case Law

List of CJEU and national Case Law used in the Manual

A, B, C, Joined Cases C-148/13 to C-150/13 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=160244&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=587083)

A.S. v Republika Slovenija, C-490/16 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=193201&pageIndex=0&doclang=PL&mode=req&dir=&occ=first&part=1&cid=792476)

Abdida, C-562/13 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=160943&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=588884)

Al Chodor, C-528/15 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=188907&pageIndex=0&doclang=PL&mode=lst&dir=&occ=first&part=1&cid=691726)

Alheto, C-585/16 (http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-585/16)

Aziz Hasan, C-360/16 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=198763& pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=882271)

Boudjlida, C-249/13 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=160563&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=935029)

CIMADE, GISTI, C/179-11 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=127563&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=687343)

Danqua, C-429/15 (http://curia.europa.eu/juris/liste.jsf?language=en&num=C-429/15)

El Dridri, C-61/11 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=82038&pageIndex =0&doclang=pl&mode=lst&dir=&occ=first&part=1&cid=358236)

El Hassani, C-403/16 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=197721&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1022296)

El Kott, C-364/11 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=131971&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=697523)

F., C-473/16 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=198766&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=213610)

Ghezelbash, C-63/15 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=179661&pageIndex=0&doclang=PL&mode=lst&dir=&occ=first&part=1&cid=691516)

Gnandi, C-181/16 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=203108&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=351732)

H.I.D., B.A., C-175/11 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=133247&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=930151)

J.N., C-601/15 PPU (http://curia.europa.eu/juris/document/document.jsf?text=&docid=174342&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=688439)

K. v Staatssecretaris van Veiligheid en Justitie, C-18/16 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=194431&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2514430)

K., H. F., A. S. v Republika Slovenija, C-578/16 PPU (http://curia.europa.eu/juris/document/document.jsf?text=&docid=187916&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=692874)

Kadzoev, C-357/09 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=72526&pageIndex =0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=358312)

Karim, C-155/15 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=179663&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=691148)

Khachab, C-558/14 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=176803&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=884021)

M. M., C-277/11 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=130241&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=697349)

M'Bodj, C-542/13 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=160947&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=923012)

MA and Others v. Secretary of State for the Home Department, C-648/11 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=138088&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=690829)

Mahdi, C-146/14 PPU (http://curia.europa.eu/juris/document/document.jsf?text=&docid=153314& pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=928)

Majid Shiri, also known as Madzhdi Shiri, C-201/16 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=195947&pageIndex=0&doclang=PL&mode=lst&dir=&occ=first&part=1&cid=2531886)

Mohammad Khir Amayry v Migrationsverket, C-60/16 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=194404&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2532752)

Moussa Sacko, C-348/16 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=193210&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=355381)

MP, C-353/16 (http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-353/16)

NS and ME, C-411/10 and C-493/10 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=117187&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=689578)

O, S v Maahanmuuttovirasto (C-356/11) (http://curia.europa.eu/juris/document/document.jsf?text=&docid=131491&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=932179) and **Maahanmuuttovirasto v L** (C-357/11) (http://curia.europa.eu/juris/document/document.jsf?text=&docid=131491&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=932179)

Pham, C-474/13 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=155107&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=358091)

Puid, C-4/11 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=144489&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=690017)

Saciri, C-79/13 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=148395&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=688070)

Sadikou Gnandi, C-181/16 (http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-181/16)

Samba Diouf, C-69/10 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=108325&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=929730)

Shamso Abdullahi, C-394/12 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=145404&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=691008)

Slovak Republic and Hungary v. Council, Joined Cases C-643/15 and C 647/15 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=194081&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1092856)

Sophie Mukarubega, C-166/13 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=159241&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=768588)

T-192/16, T-193/16 and T-257/16, T-192/16, T-193/16 and T-257/16 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=188483&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=831424)

Tall, C-239/14 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=173121&pageIndex=0&doclang=PL&mode=lst&dir=&occ=first&part=1&cid=415160)

X and X, C-638/16 PPU (http://curia.europa.eu/juris/document/document.jsf?text=&docid=188626&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=354462)

X, Y, Z, Joined Cases C-199/12 to C-201/12 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=144215&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=697691)

Y Z, C-71/11 and C-99/11 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=126364&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=697132)

YS, M, S, C-141/12 and C-372/12 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=155114&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=932555)

Zakaria, C-23/12 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=132523&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=932401)

ZZ, C-300/11 (http://curia.europa.eu/juris/liste.jsf?num=C-300/11)

Teaching Materials

1. **An Introduction to the Common European Asylum System for Courts and Tribunals. (https://publications.europa.eu/en/publication-detail/-/publication/9a3edb48-4d06-41dd-a16e- 5438b2916e1b/language-en)**
A Judicial Analysis. Material was produced by the International Association of Refugee Law Judges European Chapter under contract to EASO.

2. **Judicial Trainer's Guidance Note. (https://publications.europa.eu/en/publication-detail/-/publication/144d01f7-ed01-11e6-ad7c- 01aa75ed71a1/language-en/format-PDF/source-search)**
To be read in conjunction with: An Introduction to the Common European Asylum System (CEAS) for Courts and Tribunals. A Judicial Analysis. Material produced by the International Association of Refugee Law Judges European Chapter (IARLJ-Europe) under contract to EASO.

3. **Handbook on European law relating to asylum, borders and immigration. (http://fra.europa.eu/en/publication/2013/handbook-european-law-relating-asylum-borders-and- immigration)**
Handbook produced by the European Court of Human Rights and the FRA.

4. **Preliminary Deference? (https://www.ecre.org/wp-content/uploads/2017/03/CJEU-study-Feb-2017-NEW.pdf)**
The impact of judgmentss of the Court of Justice of the EU in cases X.Y.Z., A.B.C. and Cimade and Gisti on national law and the use of the EU Charter of Fundamental Rights. Study prepared by the European Council on Refugees and Exiles (ECRE).

5. **The application of the EU Charter of Fundamental Rights to asylum procedural law. (https://www.ecre.org/wp-content/uploads/2014/10/EN-The-application-of-the-EU-Charter-of- Fundamental-Rights-to-asylum-procedures-ECRE-and-Dutch-Council-for-Refugees-October-2014.pdf)**
Publication by European Council on Refugees and Exiles (ECRE) and the Dutch Council for Refugees.

6. **The Case Law of the European Regional Courts: (http://www.refworld.org/docid/558803c44.html)**
the Court of Justice of the European Union and the European Court of Human Rights Refugees, asylum-seekers, and stateless persons. Manual prepared by the UN High Commissioner for Refugees (UNHCR).

Information about partner organizations

The Ludwig Boltzmann Institute of Human Rights(BIM), founded in 1992, is an independent human rights research institution under the umbrella of the Ludwig Boltzmann Association, a leading Austrian research association. Currently with a staff of 50 persons, the primary focus of BIM is on research activities in the field of human rights at national, European and international levels. BIM's main objective is to offer a link between academic research and legal practice. A considerable amount of work is devoted to empirical research and project implementation. The research is based on a holistic approach, covering civil, political, economic, social, cultural and collective human rights. As human rights are relevant for all areas of life, the BIM is pursuing a 'human rights based approach', which needs to be multidimensional and interdisciplinary.

Through cooperation with international, European and national institutions — like EU, OSCE, Council of Europe, UN, ICTY, Austrian and foreign ministries — as well as other human rights research institutes and NGOs, BIM provides studies, analysis and data on human rights issues in areas such as international, European and national law, politics, education and the media. BIM is closely connected to the University of Vienna, and coordinated the activities of the University's 'Interdisciplinary Research Platform 'Human Rights in the European Context', which assembled representatives of 12 departments with the purpose of strengthening the inter-disciplinary research on the topic of Human Rights in Europe. BIM is a member of various national and international networks, including the Association of Human Rights Institutes (AHRI), the European Inter-University Centre for Human Rights and Democratisation (EIUC), the European Rights Network Justicia, acts as observing member to the OSCE Civic Solidarity Platform, has special consultative status at the Economic and Social Council (ECOSOC) of the United Nations and has recently become member of the International Detention Coalition. It is also involved in various thematic Austrian rights networks (Austrian National Coalition, ECPAT Austria, Litigation Association of NGOs against Discrimination etc.). BIM staff are also engaged extensively in human rights teaching and training, and are involved in various university courses and post-graduate programmes at several European universities.

The BIM itself is currently involved in two FP7 and in one H2020 project and focuses on the following areas of research: **Human Dignity and Public Security; Equality and Diversity, Antidiscrimination, Migration and Asylum; European Neighbourhood and Integration Policy; Human Rights in Development Cooperation and Business; Women's Rights, Children's Rights, Anti-Trafficking; Human Rights Education / Education for Democratic Citizenship**.

For further information please see the BIM's website (http://bim.lbg.ac.at/)

The **Centre for European Constitutional Law** (www.cecl.org (http://www.cecl.gr/)) is a renowned European research institute. It is a non-governmental organization, located in Athens and operating as a public benefit institution.

The Centre aims to promote the development of democratic institutions and the welfare state; to deepen European integration; and to strengthen international cooperation under the principle of respect to the cultural identity of each state.

The specific objectives of the Centre are to undertake theoretical and applied research in the fields of Greek, European and comparative public law and public policies; to provide institutional knowhow and capacity-building to public bodies in Greece, developing countries and member-states of the European Union; and to promote public awareness on developments in the European area.

To this date, the Centre has undertaken research, consulting and institution-building projects in more than 20 countries worldwide, and maintains an active network of collaborating institutions and highly qualified experts.

CECL hosts the National Focal Point (NFP) of the expert network operated by the Fundamental Rights Agency (FRANET), has consultative status with the United Nations Economic and Social Council (ECOSOC) and participates with observer status in various UN events and in particular in the United Nations Convention against Corruption and the United Nations Convention on the Rights of People with Disabilities. It is also a mandated body by the European Commission for the participation in Twinning projects. The CECL is also certified for the services it offers by ISO 9001:2008.

Three specialised units operate within the structure of the Centre, namely:

- The Better Regulation Unit
- The Educational Policy Unit
- The Social Policy Unit

Moreover, a ***Training Department*** operates within the structure of the Centre, the objective of which is to transfer specialized know-how and new skills to legal practitioners, entrepreneurs and business managers.

INPRIS — the Institute for Law and Society — is a Polish legal think tank founded in 2009. Our mission is to improve the quality of the law and standards of governance in Poland. Research and changes are especially needed in connection with the organization of the legislative process and the functioning of the judiciary, as well as the institutional development of the public administration and the civic sector.

INPRIS is an independent institution that is open to cooperation with various groups and experts both in Poland and abroad. Our focus is interdisciplinary: we combine legal analysis with insights from other fields of study (e.g. economics, sociology, psychology and information science)

Innovativeness in drafting and applying legislation, communicating understanding of the law, judicial independence, legal education and research is a particularly important goal for INPRIS.

Our activities take on many forms: we conduct research, prepare reports, expert analyses and legislative recommendations and organize conferences and seminars. We are also active in the fields of education (addressed toward activists in NGOs, lawyers and university students), legal monitoring and advocacy. More (http://www.inpris.pl/en/home/).

CNR-ISGI, Institute for International Legal Studies, is the scientific organ of the National Research Council of Italy (CNR) competent in the field of international and EU law (Website (http;//www.isgi.cnr.it)).

Established in 1986, ISGI was initially entrusted with the main research "The Italian Practice of International Law", aimed at detecting and evaluating the Italian contribution to the evolution of international customary law. The Institute has developed a unique scientific competence on the implementation of international treaties and EU law within the Italian legal order.

ISGI has a prominent competence in the sector of the protection of fundamental rights and freedoms in international, European and national law, with particular regard to migrants and persons with disability, international humanitarian law. Its research activities cover also the

law of the United Nations, environmental law and sustainable development, space law, and the law of the sea.

A special focus has been put by ISGI on research activities concerning migration and asylum law. ISGI is currently involved in the EU Project Judging the Charter. The Charter in Judicial Practice with a special focus on the Case of Protection of Refugees and Asylum Seekers (JUST/2015/JTRA/AG/EJTR/8682) and in a Joint Project with the Institute for Legal Studies of the Hungarian Academy of Sciences on Human Rights of Asylum Seekers in Italy and Hungary: Influence of International and EU Law on Domestic Actions.

In 2012, the EU granted the Project Making the EU Charter of Fundamental Rights a Living Instrument (JUST/2012/FRAC/AG/2705) of the Ludwig Boltzmann Institute of Human Rights (Applicant), the ISGI, the State University of Milan and the Institute for Law and Society of Warsaw.

In 2014-2016, it participated as member in the National Contact Point of the European Migration Network. Furthermore, It has been involved in several European and national granted Projects: the Progetto FEI: Partecipare per integrarsi. Buone pratiche transnazionali per azioni locali, granted by the Italian Minister of Interior (2014-2015); the Progetto Migrazioni, granted by the Italian Government (2008-2013); the EU Project "PRISM-Preventing, Redressing and Inhibiting hate speech in new Media" (JUST/2013/FRAC/AG/6214); the MARSAFENET COST Action IS1 105, funded by Horizon 2020, a network of experts focusing on international law of the sea by different perspectives including human rights of migrants (2012-2016). In this vein, in 2014-2015, it carried out a research on multidisciplinary features of desertification of the Lake Chad, including the phenomenon of migration in the area of Sahel and the issue of so called "environmental refugees". The main scientific results of this research were divulgated at the Conference "The Lake Chad: a source of food and water between environmental disaster and international cooperation. What role for Italy?", organized at EXPO Milan (Biodiversity Park) on 14 October 2015.

As the Italian correspondent of the Asser Institute of the Hague, ISGI elaborates the annual Report on the Italian practice of international humanitarian law published in the Yearbook of International Humanitarian Law.

Key areas of activity include also training and expert consultancy in cooperation with universities, national and international institutions, such as, inter alia, Sapienza University of Rome, Roma Tre University, Ministry of Foreign Affairs, Ministry of Labour, Health and Social Policy, T.M.C. Asser Institute of the Hague, ESA, UNIDROIT and UNESCO.

REPUBLIKA HRVATSKA
Pučki pravobranitelj

Pučki pravobranitelj

The Ombudswoman of the Republic of Croatia is a commissioner of the Croatian Parliament responsible for the promotion and protection of human rights and fundamental freedoms enshrined in the Constitution, laws and international legal instruments on human rights and freedoms ratified by the Republic of Croatia.

She is independent and autonomous in her work. As a commissioner of the Croatian Parliament responsible for the promotion and protection of human rights and freedoms and the performance of the mandates of the National Equality Body as well as the National Preventive Mechanism for the protection of persons deprived of their liberty, the Ombudswoman acts within her competences laid down by the Constitution of the Republic of Croatia, the Ombudsman Act, the Anti-discrimination Act and the Act on the National Preventive Mechanism. In 2008 the institution was accredited as an independent national institution for the promotion and protection of human rights with status "A" according to the Paris Principles. It was reaccredited with the same status in 2013. If she deems it necessary, she can issue recommendations, opinions, suggestions and warnings to the state bodies, bodies of local and regional self-government units and legal persons vested with public authority as well as to legal and natural persons, in line with the special law. She can request from them all the necessary information, data, explanations and other types of documentation and they are obliged to deliver the requested documentation and/or data within the legally set deadlines.

Ombudswoman/Ombudsman and her/his deputies are appointed by the Croatian Parliament for a term of 8 years. In 2013 Ms Lora Vidović was appointed as the Ombudswoman of the Republic of Croatia.

Short CVs of authors and contributors

Jacek Białas is an attorney and lawyer at the Strategic Litigation Program of the Helsinki Foundation for Human Rights, he specializes in asylum and migration law. He represents foreigners in a number of strategic cases before national courts and the European Court of Human Rights and the EU Court of Justice. He participates in legislative works on draft legal acts concerning foreigners, author of publications on foreigners' rights. He conducted trainings on foreigners' rights for judges, police officers, public and local government officials etc. Member of the Program Board of the Amnesty International Poland. In INPRIS he is an expert in the field of asylum law within the "Judging the Charter" project concerning the application of the EU Charter of Fundamental Rights.

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Training Manual

The Role of the EU Charter of Fundamental Rights in Asylum Cases