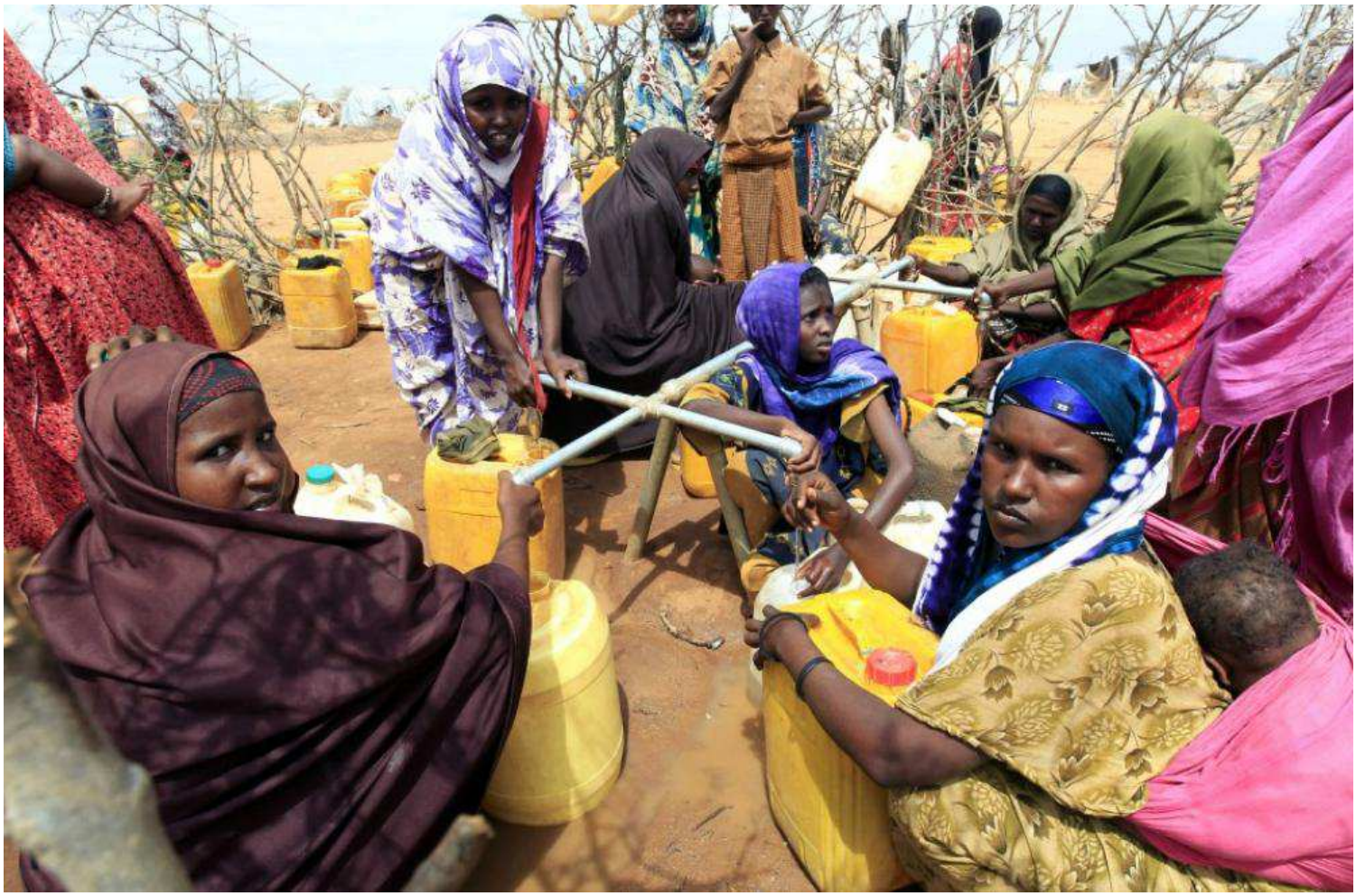

Human Rights Problems in the Field of Return

Training Document

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EURÓPAI VISSZATÉRÉSI ALAP

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International Norms of Return and the Removal of Persons not in need of International Protection

Igor Ciobanu

Regional Protection Officer, Office of the United Nations High Commissioner for Refugees (UNHCR)

Refugees come from a wide range of population segments including economic and other categories of migrants. Due to limited migration opportunities, many non-refugees attempt to enter other countries as asylum seekers. Against a background of large-scale migration flows, the protection of refugees can be ensured by encouraging states to develop migration policies that do not jeopardise the protection of refugees and, on the basis of asylum law, are conducive to a more positive environment by reducing burdens on asylum systems.

Most Central-European governments approach asylum issues in the context of illegal immigration. The protective environment of this region testifies to a strict border control system designed to protect the EU's eastern and southern borders against illegal migration by way of a method that does not sufficiently take into account asylum seekers' need for protection.

European countries intensify cooperation at operative level in order to organise joint return flights or to ensure the mutual recognition and regulatory means to facilitate the enforcement of removal orders. FRONTEX (European Agency for the Management of Operational

Cooperation at the External Borders of the Member States of the European Union) has also been assigned to promote operative cooperation in the field of refoulement. The EU allocates increasing amounts of funding, including EUR 676 million from the European Return Fund between 2008 and 2012, to governments to support measures to remove people.
There is also a very strong guiding principle whereby the EU seeks to sign and enforce readmission agreements with several countries of origin.

The right to leave and return under Human Rights Norms

Article 13(2) of the Universal Declaration of Human Rights adopted on 10 December 1948 states that "Everyone has the right to leave any country, including his own, and to return to his country." International law lays down the right of persons to return to their own countries as well as their right to leave any country, including their own. In addition to the right to move to and reside freely in one's own country, the right to leave and return constitutes the right referred to as the right to freedom of movement.

The right of return is laid down in Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR), whereby "No one shall be arbitrarily deprived of the right to enter his own country." This right is also reinforced in a number of other binding human rights and humanitarian legal instruments. While the right to leave (Article 12(2) of the ICCPR) supports the system of international protection of refugees, the right of return to one's own country (Article 12(4) of the ICCPR) supports refugees' voluntary return. In international legal norms, the right of return to one's home country recognises the special relationship between the individual and his/her own country. That entails the obligation of states to admit their own nationals rather than arbitrarily preventing return to one's own country by means of legislative, administrative or judicial measures. Although originally seen as a means to reinforce the right to leave, the right of return, also referred to as the "right of entry" in international conventions, has meanwhile become an issue in its own right. The individual's right to return to his/her home country recognises the special relationship between the individual and that country. The right of entry also authorises the individual for first entry if he/she was born outside the territory of the given country. Depending on special circumstances, it can also refer to people who, despite not being nationals of a particular country, cannot be considered foreign nationals either due to their special relationship with or

need related to that country e.g. in the case of certain categories of long-term stay or being descendants of nationals or being stateless.

International Norms of Return

Apart from international legal instruments applicable to everyone including returning persons, in recent years work has begun at political and legal levels towards determining criteria/requirements applicable to situations of return, be it voluntary or forced. A number of international, regional inter-governmental and non-governmental organisations, such the EU, the Council of Europe, the UNHCR, ECRE (European Council on Refugees and Exiles), the International Law Commission, national NGOs and others have worked out legal regulations and/or guidelines on return procedures and different considerations of pre-expulsion detention.

They include *inter alia* the following:

- **EU Directive on Return;**
- **European Convention on Human Rights (ECHR);**
- **Council of Europe Guidelines on Forced Return;**
- **Recommendations of the Committee for the Prevention of Torture;**
- **UNHCR Protection Policy Study on the return of persons not in need of international protection: The role of the UNHCR;**
- **Trilateral agreements between the UNHCR, the EU member states and countries of origin**.

The principle of non-refoulement

The non-refoulement principle is at the heart of international refugee protection and is the cornerstone of refugee law. Article 33 of the Convention Related to the Status of Refugees (1951) **prohibits the removal or refoulement of refugees to a territory where they would probably face persecution, torture or other serious human rights violations**. The applicability of the non-refoulement principle is embedded in international case law.

The non-refoulement principle is part of international case law, which is also reflected, albeit with different meanings, in many universal and regional instruments. It is reinforced by many UN General Assembly resolutions just as in UNHCR Executive Committee Conclusions.

States are required to comply with obligations stemming from the non-refoulement principle and which are rooted in the applicable international and regional human rights instruments. There are many universal and regional human rights norms strengthening protection against removal or return. The UN Convention against torture contains the absolute prohibition of removal or refoulement without any exceptions. Likewise, the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) protect individuals against the violation of non-refoulement principle with no exception in the event of torture and inhuman or humiliating treatment. In practice, the prohibition of return and the non-refoulement principle ensure absolute protection of the fundamental rights in these contexts. **Unless voluntary**, **the return of refugees violates the prohibition of removal and the principle of non-refoulement.**

Definitions

The forced return of individuals is a complex process that states must manage with circumspection in order to comply with internationally adopted rules. From this aspect, it is important clarify a few terms that are relied on by the UNHCR and that can cause confusion. It is necessary to distinguish between voluntary repatriation (which affects refugees and persons in need of international protection) and the return of individuals who do not need international protection:

- **Person not in need of international protection:** A person who, after due consideration of their claims to asylum in fair procedures, is found not to qualify for refugee status on the basis of the criteria laid down in the 1951 Convention Related to the Status of Refugees and its 1967 Protocol, nor to be in need of international protection on grounds of international obligations or national law.

- **Person in need of special treatment:** Any person in need of special support to enable him/her to exercise his/her human rights in their entirety. Children, especially unaccompanied minors, individuals affected by human trafficking, vulnerable women, and elderly or disabled persons are groups that often have special needs.

- **Return**: The process or act of returning from the host country to the country of customary residence.

- **Forcible return:** The physical removal enforced by the host country's authorities of the individual to the country of origin or a third country.

- **Voluntary return**: The return of the individual to his/her country of origin or the country of customary residence of his/her own accord or based on an informed choice, without the use of coercive measures.

- **Voluntary repatriation**: The return of refugees in safety and dignity to their country of origin based on their free and informed choice. Voluntary repatriation can take place in an organised manner (i.e. under aegis of the country concerned and/or UNHCR) or spontaneously (when refugees repatriate using their own means with limited or no direct intervention from governing authorities or the UNHCR).

Directive on Return

The EU Directive on common standards and procedures in Member States for returning illegally staying third-country nationals took effect on 13 January 2009. The deadline for member states to transpose the Directive into national legislation was 24 December 2010. The Directive lays down common rules in many issues relevant to return procedures. It can be applicable to any third-country national whose stay has no legal grounds (e.g. his/her visa expired; his/her residence permit has expired or been withdrawn; his/her request for recognition as refugee has been rejected with a final and binding effect; or his/her refugee status has been revoked).

The Directive does **not apply** to persons in whose case the process of recognition as refugee is in progress. Its goal is to lay down common norms and procedures for the return of illegally staying third-country nationals "in compliance with fundamental rights as general principles of community law and with international law including the protection of refugees and human rights obligations". It defines "illegal stay" as the presence on the territory of a Member State of a third-country national who does not fulfil, or no longer fulfils the conditions of entry or other conditions for entry, stay or residence in that Member State.

The fact that the definition of illegal stay serves as the starting point of the applicability of the Directive means that its purpose is not the regulation of the causes or procedure of residence. The Directive states that resolutions made on the basis thereof must be adopted on a case by case basis and against objective criteria, which means that in addition to the mere fact of illegal stay other considerations must also be taken into account. It also adds that in executing the Directive the best interest of the child and respect for family life must be the paramount considerations of member states. Furthermore, it states that the Directive must be applied without prejudice to obligations arising from the Geneva Convention relating to the status of refugees.

The Directive deals with different aspects of return procedures. It regulates the adoption of removal orders and entry bans. It ensures a number of procedural guarantees for the subjects of removal procedures such as the right of appeal, the revision of removal orders, emergency medical care and, in the case of children, schooling prior to the execution of removal. The Directive also determines the rules of detaining third-country nationals during the removal procedure setting the maximum duration and the conditions of detention. Furthermore, it lays down the rules of keeping children and families indentation. Just as with other EU legal instruments, the provisions of the Directive are not only simply to be complied with but the must be applied in a manner that is in conformity with international human rights and refugee protection rules such as the European Convention on Human Rights and other relevant documents.

The obligation to look for alternative solutions prior to detention

The European Union Agency for Fundamental Rights (EU-FRA) has recently published a study consultation memorandum on member states' legal practices in respect of returns, a chapter of which discusses detention and its alternatives.

In FRA's opinion, detention as a legal institution should not be resorted to if less coercive methods are also suitable to attain the desired legitimate objective. In order to promote the use of less restrictive measures, EU member states are encouraged to regulate in their national legislation those alternative forms of detention which require authorities to examine in each case whether forced return can be achieved with the use of less forcible means before a detention order is issued and to give due explanation thereof in the absence of such examination.

Guideline 6.1 of the Council Europe's Twenty Guidelines on Forced Return indicates that detention should be resorted to only in cases where the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures. Based on this guideline, Article 15(1) of the Return Directive stipulates that deprivation of liberty may only be ordered if "other sufficient but less coercive measures can be applied effectively in a specific case".
Reading it together with Paragraph 16 of the Preamble to the Directive whereby "Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient", Article 15(1) imposes an obligation to examine in every single case whether alternative solutions instead of detention would be sufficient before resorting to deprivation of liberty.

As seen from the examples below, the obligation to first examine alternative solutions is based on either legal regulations or legal practices. In Austria, authorities are required to rely on less coercive measures in all cases where deprivation of liberty is unnecessary to achieve the desired goal. The detention order must include an explanatory statement as to why such measures are dispensed with. We can find similar obligations to examine alternative measures prior to detention in Germany, Denmark, the Netherlands and Slovenia. In the United Kingdom, dispensing with detention is a basic principle, which means that alternative solutions must be relied on wherever possible. Foreign nationals have the right to request a bail and be informed about this right.

The Directive respects and complies with, in particular, the fundamental rights and principles recognise by the EU Charter of Fundamental Rights emphasising that in implementing the Directive member states should pay adequate attention to
a) the best interest of the child as paramount consideration,
b) family life,
c) the state of health of the third-country national concerned,
and should **respect the non-refoulement principle.**
In the event of detention, it must have the shortest possible duration. During detention, the detainee must be treated humanely and his/her personal dignity must be respected. The detention of children and other vulnerable persons must be avoided.

The possible imposition of an EU-wide (re)-entry ban on persons expelled from the EU gives rise to serious concerns. Such a re-entry ban would be difficult to reconcile with the right to seek recognition as refugee and enjoy a refugee status as any expelled persons may feel the need to flee persecution in the future. A re-entry ban may also be an obstacle to the family reunification of refugees set forth in the Family Reunification Directive.

Voluntary repatriation

The UNHCR addresses voluntary repatriation of refugees in a broad sense. In this respect it should be noted that the UNHCR uses a definition of refugee that encompasses both individual persecution covered by the 1951 Convention and serious internal unrest and conflict with a more general impact – especially in Africa and Latin America – recognised in international conventions. Voluntary repatriation therefore concerns persons who have been found to be in need of international protection and in whose case it must take place on a voluntary basis and in safety and dignity.

The General Assembly and the UNHCR Executive Committee (of which Hungary has been a member since 1991) has put high on its general operative agenda the facilitation of voluntary repatriation in safety and dignity – not least because voluntary repatriation is the most preferred and sustainable option.

From the UNHCR's aspect, the essence of voluntary repatriation is to return to a state of physical safety and legal and financial security by means of the complete restoration of national protection, and it can only take place if it meets a number standards, taking into account the following:

- There has been a basic change in respect of the original cause of flight;
- There is every sign that the change is irrevocable and the general situation is improving;
- National protection within the country is effective and available.

The UNHCR always demands guarantees to make sure that expulsion only takes place after the individual's need for protection has been assessed fully and fairly. When forced removal takes place despite that, it can only happen if the third country ensures access to full and fair asylum procedure and, if needed, effective protection in the same country.

Return of unaccompanied and separated minors

According to the basic principle of the UN Convention on the Rights of the Child (UNCRC), in all cases of return affecting children, the best interest of the child must be the paramount consideration. The best interest of children as paramount consideration must be assessed with the involvement of specialised social institutions – such as child welfare institutions responsible for protecting the rights of the child – and the assigned guardian.

At the EU level, the best interest of the child as paramount consideration has been incorporated into legislation through the EU Charter of Fundamental Rights, the Lisbon Treaty and a few EU directives. Article 5 of the EU Return Directive lays down the member states' obligation to take into account the best interest of the child as paramount consideration while Article 10 lays down the right of unaccompanied minors to be granted "assistance by appropriate bodies other than the authorities enforcing return".

During the return trip the unaccompanied minor must be escorted by a trained and known child protection expert in order to ensure the minor's arrival in safety and to offer help in dealing with emotional problems arising from the return.

Member states may never return an unaccompanied or separated child without making sure appropriate care is provided and custody rights are settled. Minors must be transferred to a family member or a foster parent from the country of origin.

Return of persons not in need of international protection

In the UNHCR's experience, most refugees want to return when it is possible to do so in safety and dignity. The majority does indeed return without any assistance and support. However, in this section we are not talking about the voluntary repatriation of refugees but about those people who do not need international protection. In other words, what to do with persons who claim recognition as refugees but in actual fact are not in need of international protection and circumstances in their country of origin could allow some of them to return but they simply refuse to do so.

It should also be noted that the mere fact that the authorities of a state did not find a person eligible for refugee status does not always mean to the UNHCR that he/she is not in need of international protection. The person denied recognition as refugee may continue to be eligible for international protection if he/she has been denied asylum even though he/she in fact is

eligible for asylum but is not recognised as a refugee, e.g. when the refugee status was denied due to an unreasonably high burden of proof or according to the restrictive interpretation of the 1951 Convention.

This is generally accepted and also by the Executive Committee and it may happen when persons cannot be expelled due to armed conflict or general unrest. Recognition of their continued need for protection should, according to the UNHCR, include the facilitation of their continued stay in the host country both legally and politically. In Europe in general and Hungary in particular, such persons are often granted additional protection or their continued stay is tolerated.

Let me remind you of the agreement reached on a number of conclusions following a highly productive discussion at the Global Consultations on International Protection held with support from the Ministry of the Interior and the UNHCR in Budapest in June 2011. Below I will present a few conclusions that concern this particular group of persons:

- **Those unsuccessful asylum applicants who cannot be expelled through no fault of their own must in some form be provided legal residence and a legal status.**
- **The voluntary return of persons not in need of international protection is the most preferred mode of return and therefore must be encouraged. Whether voluntary or otherwise, return must take place while preserving the safety and human dignity of the person concerned**.
- **The importance of counselling must not be underestimated in supporting the voluntary return of persons not in need of international protection, especially when counselling already took place in the early phase of the procedure**. **In this regard, NGOs have a particularly important part to play.**
- **Special programmes that are targeted at facilitating the voluntary return of illegal migrants have proved to be highly successful where they were applied together with international organisations such as IOM (International Organization for Migration) in conjunction with government or NGO support. Examples are mass information campaigns, the examination of possible promoting factors, and programmes designed to help the return, and reintegration into society, of victims of human trafficking.**
- **The receiving state must treat returning persons in compliance with fundamental human rights and standards laid down in the European Convention on Human Rights**

(ECHR) and UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).

Conclusion No. 96 (LIV) - 2003 of the Executive Committee on the return of persons found not to be in need of international protection calls on states to cooperate regarding the efficient and expeditious return of persons found not to be in need of international protection, to their countries of origin, other countries of nationality or countries with an obligation to receive them back, notably by;

- cooperating actively, including through their diplomatic and consular offices, in establishing the identity of persons presumed to have a right to return, as well as determining their nationality, where there is no evidence of nationality in the form of genuine travel or other relevant identity documents for the person concerned;
- finding practical solutions for the issuance of appropriate documentation to persons who are not or no longer in possession of a genuine travel document.

In conclusion, states, important intergovernmental organisations, especially IOM and the EU but also UNHCR, and NGOs must be called on to cooperate closely in developing bilateral and regional re-admission agreements in order to promote the return and readmission in safety and dignity of persons in need of international protection and, in the case of children, the protection of their best interests as a paramount consideration.

Transposition of the Return Directive into Hungarian law
Dr Ildikó Figula

As of 1 May 1999, the date of entry into effect of the Treaty of Amsterdam amending the Treaty establishing the European Union and the treaties establishing the European Communities, refugee affairs and alien policing as part of justice and internal affairs were placed under the so-called community pillar, i.e. the first pillar, of the European Union.
The result was primary emphasis on legal approximation and regulation in this field through Community-level directives and regulations on matters related to migration, asylum and borders.

At its November 2004 Brussels Session, the European Council thought it justified to create an effective repatriation policy based on common norms, the primary purpose of which would be to facilitate the return of persons concerned to their home country while respecting their human rights.

The EU has put together a general programme entitled "Solidarity and the Management of Migration Flows" with a budget of HUF 4032.23 million for the period 2007-2013.
There are four Funds operating under the programme including the European Return Fund with a budget of HUF 676 million for the same period.

(It is also the purpose of this Fund to fairly share financial burdens between member states within the EU and therefore member states must make regular reports in the field of migration and immigration policies and the Commission also often performs inspections.)

The three main components of the European Union's immigration policy are:
a.) combating illegal immigration (underpinned by the "Return Directive")
b.) encouraging the immigration of skilled labour (the "Blue Card Directive" deals with this issue)
c.) sanctioning the employment of illegal immigrants.

This conference focuses on what is known as the "Return Directive", which is the 2008/115/EC Directive on common standards and procedures in member states for returning illegally staying third-country nationals, adopted by the European Parliament and the European Council on 16 December 2008.

The Directive lays down minimum standards for:
- the maximum duration of detention
- the extension of detention and
- effective legal remedies.
- It includes legal guarantees, e.g. making free legal assistance mandatory.

- It seeks to make legal remedies more effective.
- It emphasises proportionality and effectiveness in respect of coercive measures.
- It considers voluntary repatriation as a way to leave the country a preferred option.

The deadline for member states to transpose the Directive into national law was 24 December 2010, the deadline in respect of free legal assistance being 24 December 2011 (Hungary availed itself of the option to transpose the Directive on the final date).

It should be noted that the European Union's "Return Directive" met with mixed reception worldwide. Some countries welcomed e.g. the common rules on proportionality and effectiveness in respect of coercive measures and on maximum detention duration while others were of the view that it would tighten refugee policies and the EU's actions against immigrants (e.g. in his open letter to the European Parliament, the Bolivian President accused the EU of setting up concentration camps).

Hungarian legislature transposed the "Return Directive" into Hungarian law by means of Act CXXXV of 2010 amending several acts, primarily Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (hereinafter: Third Country Act, TCA).

Emphasis must be laid on the evaluation of the transposition of the Return Directive into national law because unless transposition has been successful the European Commission can launch an infringement procedure against Hungary. Also, failure to fulfil the transposition obligation or insufficient transposition entails as a legal consequence the replacement by law enforcement agencies (not only member state courts but also agencies dealing with such matters) of member state law with the provisions of the Directive, as was expounded by the European Court of Justice in Case C-61/2011 of 28 April 2011.

(The "legal case" explicitly deals with the "Return Directive" and has concluded that in Italy the national regulation imposing imprisonment on third-country nationals illegally staying in the country and refusing to comply with the removal order contravenes the Directive. It has stated that member state courts must disregard the application of all national provisions that contravene the solution laid down in the Directive.)

Before examining the issue of transposing the "Return Directive" into national law, I would like to share a few general thoughts about the question of sources of law.

I. Member state law

Based on our Fundamental Law, among sources of law referred to as legal regulations in the field of alien policing and refugee policy we primarily encounter acts and government decrees.

The Fundamental Law includes relatively few provisions on refugee matters. Article XIV of the Fundamental Law lays down the following:

"(1) No Hungarian citizen may be expelled from the territory of Hungary and every Hungarian citizen may return from abroad at any time. Any foreign citizen staying in the territory of Hungary may only be expelled by a lawful decision. Collective expulsion shall be prohibited.
(2) No person may be expelled or extradited to a state where he or she faces the danger of a

death sentence, torture or any other inhuman treatment or punishment.
(3) Hungary shall grant asylum to all non-Hungarian citizens as requested if they are being persecuted or have a well-founded fear of persecution in their native countries or in the countries of their usual residence due to their racial or national identities, affiliation to a particular social group, or to their religious or political persuasions, unless they receive protection from their countries of origin or any other country ."

The most important sources of law in this area:

- Act I of 2007 on the Admission and Residence of Persons with the Right of Free Movement and Residence (hereinafter: Free Movement Act, FMA);
- Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (Third Country Act, TCA)
- Act LXXX of 2007 on Asylum (hereinafter: Asylum Act, AA) and
- Their implementing regulations (113/2007 (24 May); 114/2007 (24 May) KmR; and 301/2007 (09 October) KmR.).

II. European Union Law

By its accession to the European Union, Hungary accepted and submitted itself to norms made at community level with binding effect on Hungary. Article E(2) of the Fundamental Law lays down the following:
"With a view to participating in the European Union as a member state, Hungary may exercise some of its competences arising from the Fundamental Law jointly with other member states through the institutions of the European Union under an international agreement, to the extent required for the exercise of the rights and the fulfilment of the obligations arising from the Founding Treaties."
Article E(3): "The law of the European Union may stipulate a generally binding rule of conduct subject to the conditions set out in Paragraph (2)."

In the EU, we distinguish between primary and secondary sources of law. The founding treaties and also the Treaty on the Functioning of the European Union as amended by the Treaty of Lisbon are referred to as primary source of law. Since the Treaty of Lisbon, the Charter of Fundamental Rights has also become a primary source of law, whose special importance in the field of asylum law lies in the fact that similarly to the European Covenant on Human Rights, in Article 4 it lays down the prohibition of torture and inhuman treatment.

Secondary sources of law are regulations and directives. In asylum law, the following directives and regulations have been transposed:
1./ "Asylum Procedures Directive", namely Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status
2./ "Qualification Directive", namely Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
3./ "Reception Conditions Directive", namely Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers
4./ "Temporary Protection Directive", namely Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons
5./ "Return Directive", namely Council Directive 2008/115/EC
6./ "Blue Card Directive", namely Council Directive 2009/50/EC

7./ “Dublin II Regulation”, namely Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national
8./ “Eurodac Regulation”, namely Council Regulation 2725/2000/EC concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention. (These latter two sources of law are not at the level of directives but are regulations, i.e. their application is mandatory without transposition. Considering that, Act LXXX of 2007 contains provisions related to this Regulation.)

Theory also refers to the rulings of the European Court of Justice as a source of law. That is particularly important as we can explicitly cite European Court of Justice rulings to be presented later in our judgments. The European Court of Justice has exclusive competence in the interpretation (and validity) of EU law. Consequently, if the interpretation of a legal norm laid down in a Regulation or Directive has already been rejected by the European Court of Justice, that will be binding on member state courts, too.

III. International Law

Pursuant to Article Q(3) of our Fundamental Law, “Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in the form of legislation.”

In refugee matters and alien policing procedures, the cornerstone is the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, which was transposed into national law by the promulgation of Law Decree XV of 1989.

The Law Decree itself contains two articles altogether (signed, interestingly enough, by the Presidential Council of the People’s Republic of Hungary), but it also contains the full text of the Convention in both English and Hungarian. (By April 2011, the Convention had been signed by 144 countries, including Hungary, which signed it on 14 March 1989).

The next international source of law is the Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, which was promulgated and thus transposed into Hungarian law by Act XXXI of 1993.

In connection with refuge matters and alien policing procedures, the European Court of Human Rights in Strasbourg has mostly dealt with and interpreted the prohibition of torture laid down in Article 3 of this Convention, whereby “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

In relation to the Return Directive, it is inevitable that the non-refoulement principle and the role of country information in return are dealt with.

Ad. A. Non-refoulement

Article XIV(2) of the Fundamental Law lays down the following:
“No person may be expelled or extradited to a state where he or she faces the danger of a death sentence, torture or any other inhuman treatment or punishment”.

Article 33 of the Geneva Convention formulates non-refoulement as follows:

"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is."

In its Section 45(1), Act LXXX of 2007 on Asylum determines non-refoulement as follows: "The obligation of non-refoulement shall be respected where the person seeking recognition of refugee status is exposed to being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, or is likely to be subjected to the behaviours specified in Article XIV(2) of the Fundamental Law in his/her country of origin, and there is no safe third country offering refuge to the said person."
(Note that the Fundamental Law specifies those behaviours which may give rise to non-refoulement including a death sentence, torture or any other inhuman treatment or punishment.)

The question arises that in cases where for reasons specified in Section 45(1) of the Asylum Act the risk of the behaviours referred to in Article XIV(2) of the Fundamental Law exists, what protection a person who has in fact also applied for asylum can seek.

According to Section 12(1) of the Asylum Act "The Republic of Hungary shall grant subsidiary protection status to an alien who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin would face a real risk of suffering serious harm, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country."

Section 61 the Asylum Act discusses in detail serious harm referred to in Section 12(1), whereby serious harm consists of
a) any threat of the death penalty;
b) torture, cruel, inhuman and degrading treatment or punishment;
c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

The alien policing authority must in all cases examine the question of non-refoulement in ordering and enforcing expulsion, which is laid down in Section 52(1) of the TCA: "The immigration authority shall take into account the principle of non-refoulement in the proceedings relating to the ordering and enforcement of expulsion measures".

In respect of return, in order for an informed decision to be made on the question of return it is indispensable to obtain country information.

Ad. B. Country information

The obtainment of country information must be dealt with at several stages of the alien policing procedure but literature determines requirements related to country information primarily for verifying the truthfulness of reasons for seeking refuge indicated in the asylum application of the applicant.

Obtaining country information is important in several areas in the asylum procedure:

- verifying the truthfulness of reasons to seek refuge in the procedure of applying for international protection
- obtaining country information in respect of the country of origin in relation to Section 45 of the Asylum Act
- if pursuant to Section 51(2)e) of the Asylum Act the application is inadmissible, in the event that there is a country that qualifies as a safe third country for the applicant.
- Section 52(1) of the TCA makes the obtainment of country information mandatory.

Requirements related to country information are laid down in both national and EU law.

1. Its use is mandatory

Section 52(1) of the TCA makes the obtainment of country information mandatory in the procedure of ordering and enforcing return and expulsion.

Section 41(2) of the Asylum Act obliges the refugee authority and, if necessary, the court to obtain a report from agencies responsible for the provision of country information under the competent minister during the evidentiary procedure.

Article 4(3)a) of the Qualification Directive and Article 8(2) of the Asylum Procedures Directive lay down the obligation to obtain country information during the asylum procedure.

2. The definition of relevant country information

Pursuant to Article 71 of Government Decree 301/2007 (9 November) on implementing Act LXXX of 2007 (hereinafter: Implementing Decree), that piece of information shall qualify as relevant
a) which is connected to the individual circumstances of the applicant
b) describes or analyses the actual situation prevailing in the country of the person seeking recognition, refugee, beneficiary of subsidiary and temporary protection and/or in third countries relevant for the recognition or the revocation thereof, and
c) substantially helps to state whether in the case of the person seeking recognition, refugee, beneficiary of subsidiary and temporary protection there is a well-founded fear of being persecuted or a real risk of suffering serious harm, and whether in the case of the person seeking recognition, refugee, beneficiary of subsidiary and temporary protection a certain country is considered as a safe country of origin compliant to Section 2 h) of the Act, or as a safe third country compliant to Section 2 i) of the Act;

3. All relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied should be assessed.
(This is laid down in Article(3)a) of the Qualification Directive.

4. It should be objective, accurate and impartial.

Section 70 of the Implementing Decree stipulates the following:
The country information centre shall update the information on a regular basis by
a) obtaining up-to-date information and
b) correcting obsolete information which does not reflect reality any longer.

This is formulated by Article 8(2)b) of the Asylum Procedure Directive as follows:
“Precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in the countries of origin of applicants for asylum and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions;”

5. Country information must be up-to-date, i.e. relevant on the date the decision is made.

Section 70(9) of the Implementing Decree provides that “The country information centre shall update the information on a regular basis by
a) obtaining up-to-date information and
b) correcting obsolete information which does not reflect reality any longer.”

Article 8(2)b) of the Asylum Procedures Directive quoted above includes being up-to-date as requirement related to country information.
It should be added and stressed that Article 4(3)a) of the Qualification Directive explicitly stipulates the obtainment of facts relevant at the time the decision is taken on the application.

That is an important guideline in respect of judicial enforcement, as while Article 339/A of the Civil Procedure Act provides for the review of the decision in view of facts and the regulatory environment existing at the time the decision requested to be reviewed is taken, in an asylum procedure – but also during the review of a decision taken in an alien policing expulsion case – the decision must be taken according to the situation existing at the time the judgment is passed.

(In Clause 136 of its ruling on the famous case of Salah Saah, the European Court of Human Rights confirmed this principle in the assessment of non-refoulement.)

EURÓPAI VISSZATÉRÉSI ALAP

Human rights aspects of return

Serbia, as a safe third country

Dr. Anita Nagy

I. International background related to return and expulsion: international treaties related to the most important fundamental rights, of which the following fundamental rights deserve special attention:

1. Right to personal freedom

● International Convention on Civil and Political Rights (document approved at the 21st meeting of the UN General Assembly on the 16th of December 1966, which was announced by Act 8 of 1976, Article 9.

● European Treaty on Human Rights (Treaty prepared in Rome, on the 4th of November 1950 and the attached complementary records, which was first announced by Act XXXI of 1993), Article 5.

● Charter on Fundamental Rights of the European Union (the Charter on Fundamental Rights of the European Union was approved of by the European Parliament on the 29th of November 2007, which was signed by the leaders of the institutions of the European Union on the 12th of December 2007), Article 6.

2. Prohibition of torture, inhuman and humiliating treatment

● International Charter on Civil and Political Rights, Article 7

● European Treaty on Human Rights, Article 3

● Charter on Fundamental Rights of the European Union, Article 4

3. Respect for family life

● International Charter on Civil and Political Rights, Article 23

● European Treaty on Human Rights, Article 8

● Charter on Fundamental Rights of the European Union, Article 7

4. Best interests of the children

● International Charter on Civil and Political Rights, Article 24

● Treaty on children's rights, 20th of November 1989, New York, Article 3

● Charter on Fundamental Rights of the European Union, Article 24

The European Convention on Human Rights is a framework convention, which is given content and meaning by the Strasbourg Court of Justice. As time went by, the above Court, in practice 'fell victim' of its own success, since the public (should it be a private individual or a state) have so much confidence in this judicial forum, that the Court can finalise the cases only after very lengthy procedures.

Legal representatives often refer to the decisions of the European Court of Human Rights in different alien policing and refugee cases and a number of legal principles have also been included by the Hungarian courts into their judicial practice.

For example, in the refugee cases, the (ex) Metropolitan Tribunal often made a reference in its judgements to the following: „it is a coherent practice of the European Court of Human Rights that during the examination of Article 3, fact-finding in all cases refers to the time and date of taking the decision by the court (Chahal versus the United Kingdom case, application No. 70/1995/576/662, 11th of November 1996; furthermore, Salah Sheekh versus Holland case, application No. 1948/04, 11th of January 2007.)".

This is important, because this way the consequences of a possible civil war breaking out after the date of the decision might be taken into account also during the court procedure, while respecting the stipulations of Paragraph 339/A of Act III of 1952 on the order of civil procedures. Typically, this was the situation in the case of Syria, when the aggravating internal armed conflict demanding the lives of several hundreds of thousand people, broke out and became increasingly serious during the court proceedings.

II. Two large-scale cases of the European Court of Justice affecting return

1. In its judgement dated on 28th of April 2011, the European Court of Justice, in the Hassen El Dridi, alias Soufi Karim case, took a decision in the application presented by the Italian Corte d'appello di Trento for preliminary decision. The enacting terms of the decision taken in the case No. C-61/11 PPU:

„In the cases related to the return of illegally staying third-country nationals, the Directive of the European Parliament and of the Council, and especially Articles 15 and 16 of thereof, shall be interpreted so that when those regulations of any Member State which are similar to those in the basic case are contradictory, and the said regulations ordain that illegally staying third-country nationals shall be sentenced with imprisonment only because the named person – violating the decision on the obligation to leave the territory of the said country within a certain period of time – shall continue to stay on the said territory without legal reasons".

Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals

The El-Dridi case deserves special attention also because it contains an exhaustive, beautiful and logical correspondence with regard to the direct implementation of the Directives (points 46 and 47), and provides a guideline on how a Directive should be interpreted regarding its objective and subject. The judgement also discusses in detail the most fundamental principles of the „Return Directive" referred to in the enacting terms, underlines and reinforces the principles of gradualism and proportionality (points 55 - 57), which the Member States shall respect during the application of law.

2. In its judgement made in the Said Shamilovich Kadzoev (Huchbarov) case, dated on 30th of November 2009, the European Court of Justice took a decision in the application presented by the Bulgarian Administrativen sad Sofia-grad for preliminary decision. The enacting terms of the decision taken in the case No. C-357/09 PPU:

„1) Article 15 (5) and (6) of Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals shall be interpreted in a way

that the maximum term of detention mentioned thereof shall also include the term spent in detention within the framework of the expulsion procedure initiated prior to the date when the Directive came into force.

2) The time period which was spent by the named person in alien policing detention room in accordance with the application of national and community regulations shall not be considered, in accordance with Article 15 of Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals as detention effectuated for the purpose of expulsion.

3) Article 15 (5) and (6) of Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals shall be interpreted in a way that the term of detention effectuated for the purpose of expulsion shall include the time period when the implementation of the decision on expulsion was suspended, because the affected person initiated a judicial legal remedy procedure against the said decision, if and when, during the term of the named procedure, the person in question continued to stay in alien policing detention.

4) Article 15 (4) of Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals shall be interpreted in a way that it shall not be applicable if the possibilities for the extension of detention terms mentioned in Article 15 (6) of Directive 2008/115 have been exhausted at the time of the judicial supervision of the detainee's detention.

5) Article 15 (4) of Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals shall be interpreted in a way that only the realistic possibility to assure expulsion within the deadlines mentioned in Article 15 (5) and (6) shall be qualified as the realistic possibility for expulsion, and/or the latter does not exist if it seems highly unlikely that the affected person shall be received, within the named deadlines, by a third country.

6) Article 15 (4) and (6) of Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals shall be interpreted in the

following way: it is not made possible that after the expiry of the maximum term of detention mentioned in the present Directive the person in question shall be liberated without delay, because he/she has no valid documents, he/she behaved violently, and has neither own assets for living or place of residence, or tools provided in the Member State for the purpose are not available for him/her."

In the Kadzoev case, the European Court of Justice gives guidelines on how to interpret the maximum term of detention, and in point 66 the Court clearly states that „there is no rational possibility for expulsion if it seems quite unlikely that the affected person shall be accepted, within the named deadlines, by a third country." In point 65 it is an important conclusion that „for the existence of the »rational possibility of expulsion« mentioned in Article 15 (4) of Directive 2008/115 to be considered realistic, it is also necessary that at the time of the supervision of the legality of detention by the national court there should seem to be a realistic opportunity for the execution of expulsion within the deadlines defined in Article 15 (5) and (6) of the present Directive."

The European Court of Justice excludes the possibility for detention (point 70), if detention should take place only for reasons related to public order: „Directive 2008/115 may not create the grounds for the possibility to detain a person due to reasons related to public order or public security."

III. The notions of safe third country and country of origin

1. During the past years, due to the development of judicial practice in international refugee law, country information has become one of the most predominant factors of decisions taken in refugee cases, since in the majority of the applications for refugee status presented in Europe, the affirmative or questioning nature of country information is of decisive importance. The internationally acknowledged norms of high-level country information related research and utilisation have been developed, and there are a large number of attempts also at the level of the European Union to harmonise, or – in the longer term - unify the respective practices of the Member States.

Country-information research and the related training and counselling have, by now, become separate professions in Europe, and the rapidly increasing significance of these professions is indicated by the fact that in every country the number of specialists working at the refugee offices is higher than the number of the respective people working at the courts or NGOs.

By now, the EU has arrived to the second phase of developing a common refugee system. In this phase, the strategic objective is to achieve a higher level of common norms in protection and to unify, to the extent possible, the refugee systems of the individual Member States. In addition to assuring further harmonisation of the judicial systems with regard to refugee and asylum seekers, the objective of Hague programme is to reinforce co-operation at political level among the Member States. It includes co-operation in the area of collecting information on the country of origin of the refugees (which is referred to as 'country information'). Country information plays a fundamental role in the asylum/refugee process.

In the interest of conducting just and correct asylum/refugee procedures, high-level country of origin information reflecting the situation in a well-balanced manner are necessary. Country information is a crucial tool not only for immigration authorities and judicial bodies, but also for the refugees and their representatives. Collection, examination and presentation of country information are important when judging the refugee status applications presented to the Member States. Based on country information the national authorities in charge can certify the information based on which those who apply for refugee status ask for international protection.

According to the terminology used by the Geneva Convention forming the cornerstone of refugee law, refugee is the person, who "for racial, religious reasons, national belonging, or his/belonging to a certain social group, or political conviction, due to the person's well-founded fear from persecution stay outside of his/her country of citizenship, and can not, or due to fear from persecution, does not want to benefit from the protection of the country thereof; or who, not having a citizenship, and staying outside of their normal place of residence, due to such events can not, or due to fear from persecution do not want to return to thereof." The UN High Commission for Refugees (UNHCR), when interpreting the above definition, gives, besides others, the following guideline: "The authority defining the refugee status shall not be in charge of 'judging' the situation prevalent in the country of origin of the applicant. However, the statements made by the applicant may not be treated in an abstract manner, thus those shall be evaluated in correlation with the relevant background circumstances. Knowledge about the conditions in the country of origin of the applicant – though this is not the number-one objective – is an important factor in weighing the trustfulness of the applicant. In general, the fear

of the applicant should be considered well-founded, if the applicant reasonably proves that applicant's further stay in the country of origin became unsupportable due to reasons laid down in the definition of refugee, and/or will become unbearable due to the same reasons, should the applicant return to thereof."

The above reflect the professional approach generally accepted in refugee/asylum cases, according to which the personal fear of the asylum-seeker/applicant for refugee status shall be objective in the mirror of the situation pertaining to the country of origin. Since the majority of the asylum-seekers leave their native country only with a small luggage, in general it can not be expected that the application for refugee status shall be supported with facts. Though „tangible" proofs might also be available to create the foundations for the application for refugee status (like, for example, expert opinion of a psychologist, or medical doctor, or an official document), in general, these, by themselves, are not satisfactory for taking the decision in refugee cases. When examining the righteousness of the application for international protection, the single, but always available objective element is the country information, which facilitates for the authorities to verify how much what has been said by the applicant (subjective element) is in harmony with the realities (objective element), namely, how well-founded the applicant's fear from persecution is.

The relevant Hungarian legal regulations on refugee law – though they fail to specifically mention country information – contain several stipulations of which the responsibility of the refugee authority on individualized investigation of country information and the indication to country information in the decision on refugee status can be deducted. Furthermore, these regulations also provide some sort of, limited, guidelines on how to perform the investigation.

The practical role of country information in the refugee procedure can be summarised in the following three points:

- Control

Acquire and gather information on controlling the statements made by the applicant with regard to the applicant's situation prior to escape and on deciding upon the trustworthiness of the applicant.

- Forecast

Elucidating the information necessary to assess whether the applicant, should he/she return home, be subject to persecution, torture, inhuman and humiliating treatment, or punishment.

- Preparation

Information shall be accumulation to help the decision-makers and legal representatives to be prepared for the interviews and court procedures.

In Hungary, until the start of the refugee procedure, for request, the **authority in charge shall, ex officio, investigate whether a returned foreigner shall be subject to torture, inhuman, humiliating treatment or penalty, or subject to death penalty in the given country of origin or third country or not.**

While in the case of the refugees the precondition for protection granted by the Geneva convention of 1951 is the declaration issued by the authorities on the refugee status, the prohibition of torture is a so-called absolute human right, and exception from it may not be made under any circumstances, and, in accordance with Article 3 of the European Charter on Human Rights, everybody shall be entitled to thereof. **"Forcible return, refusal, and/or expulsion may not be ordained, and/or may not be executed to a country which, with regard to the person in question, is not classified a safe country of origin or safe third country, thus, especially to those countries, where the foreigner, for racial, religious reasons, his/her national and social belonging, or political views would be exposed to the danger of persecution, furthermore, not to the territory of a country, or to the borders of a territory, where, for important reasons, it can be feared that the returned, refused or expelled foreigner would be the subject of torture, inhuman, humiliating treatment or death penalty."**

The four basic criteria of country information are the following:

1. Relevance

Country information shall relate to the essence of the application for refugee status, in other words, it should serve the assessment of the soundness of fear from persecution; the precondition defined in the Hungarian legal regulations and the Qualification Directive and Article 4 (3) point a./ of Directive 2004/83 EC of the Council is individualisation. Country information shall reflect the personal history of the applicant.

In order to identify the relevant country information, the international interpretation of the term of persecution shall be known together with the special circumstances of the individual case.

2. Reliable and balanced information

If possible, country information shall come from diverse and reliable sources. This criteria has been implemented both in the legal regulations, the Procedural Directive – directive 2005/85 EC of the Council – and also in practice.

This requirement appears both in the case law of the European Court of Human Rights and that of the national courts.

3. Accuracy and timeliness

Selection and publication of country information published by the different sources shall be of high level. One of the major preconditions for this is the timeliness of the information, which is a variable criterion depending on the nature of the case. Timeliness also depends on whether we the country information shall be used for control or for forecast purposes. The Procedural Directive words the expectation for precise and up-to-date information. Timeliness is one of the core requirements of accuracy, which is interpreted both by the Strasbourg Court of Justice and the Qualification Directive so that the situation existing in the country of origin at the time of taking the decision shall be examined.

4. Information shall be transparent and retrievable

For the purpose to guarantee legal security, and also for a number of practical reasons, it is necessary to make adequate references. The basic rule is that the same principles shall be applied to the references made to country information as in the case of references to legal regulations. Consequently, the following shall be indicated: the source of information, the title of the text, the date of issue or the term to which the text refers and the internet access to the text shall be indicated. The Procedural Directive contains a number of requirements. Country information is of decisive nature in the majority of applications for refugee status, meaning that it may decide whether an applicant receives the refugee status, receives additional protection, or is returned to his/her home country.

The most frequent information providers

• international (UN, Council of Europe, European Union, etc.);

• governmental (Department of Foreign Affairs of the USA, German Federal Office for Refugees, British Department of Interior Affairs, Canadian Immigration and Refugee Commission, etc.);

• non-governmental (Amnesty International, Human Rights Watch, Human Rights Organisations, etc.);

• media sources (BBC, CNN, AFP, Reuters, etc.).

The practice of the Strasbourg Court of Justice changed in the mid-1990s; in the Chahal case, the Court also took part in information gathering. This tendency continued in the Hilal and the N cases. In the Salah Seeks case of 2007, the Court used extensive and rich country information to decide upon the case. In the Salah Sheekh versus Holland case, the applicant with Somali citizenship was intended to be forcibly returned to the Northern part of the country, which was considered to be relatively safe, but there the applicant had neither personal contacts nor he possessed the conditions for legal entry and stay. Consequently, according to the Strasbourg Court there existed the danger that he shall have to return from there to the Southern part of the country, where, there existed the threat of violating Article 3.

2. Serbia as a safe third country

In alien policing and refugee cases, the Hungarian authorities considered Serbia a safe third country, thus they regularly and in large numbers sent back foreigners to the said country. Based on a number of available public data, the UN High Commission for Refugees questioned this standpoint, and the opinion shared by the majority of the courts acting in administrative cases was that foreigners might not be returned to Serbia, unless the existence of legal guarantees can be verified.

Attached, you can read the study prepared by the UNHCR titled: 'Serbia as a country providing refuge.

In the majority of the cases, the affected group of foreigners was earlier returned to Greece by the authorities, but since the judgement of the European Court of Human Rights dated on the 21st of January 2011 issued in the M.S.S. versus

Belgium and Greece case (case number 30696/09), this practice has practically become impossible to be followed.

Besides others, in its judgement the European Court of Human Rights concluded that – in accordance with the „Dublin II" regulation – return to Greece, due to the loopholes in the Greek refugee procedures, shall be classified as a clear violation of the ECHR. In accordance with the verdict of the Court, should a Member State (in this case, Belgium) expose the applicants for refugee status to the Greek refugee procedures, with this it violates, besides others, Articles 3 and 13 of the ECHR.

JUDGMENT OF THE COURT (First Chamber)

28 April 2011

Area of freedom, security and justice – Directive 2008/115/EC – Return of illegally staying third-country nationals – Articles 15 and 16 – National legislation providing for a prison sentence for illegally staying third-country nationals in the event of refusal to obey an order to leave the territory of a Member State – Compatibility

In Case C-61/11 PPU,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Corte d'appello di Trento (Italy), made by decision of 2 February 2011, received at the Court on 10 February 2011, in the criminal proceedings against

Hassen El Dridi, alias Karim Soufi,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, J.-J. Kasel, M. Ilešič (Rapporteur), E. Levits and M. Safjan, Judges,

Advocate General: J. Mazák,

Registrar: A. Impellizzeri, Administrator,

having regard to the request by the national court of 2 February 2011, received at the Court on 10 February 2011 and supplemented on 11 February 2011, that the reference for a preliminary ruling be dealt with under an urgent procedure, in accordance with Article 104b of the Court's Rules of Procedure,

having regard to the decision of 17 February 2011 of the First Chamber granting that request,

having regard to the written procedure and further to the hearing on 30 March 2011,

after considering the observations submitted on behalf of:

– Mr El Dridi, by M. Pisani and L. Masera, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and L. D'Ascia, avvocato dello Stato,

– the European Commission, by M. Condou-Durande and L. Prete, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 15 and 16 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

2 The reference has been made in proceedings brought against Mr El Dridi, who was sentenced to one year's imprisonment for the offence of having stayed illegally on Italian territory without valid grounds, contrary to a removal order made against him by the Questore di Udine (Chief of Police, Udine (Italy)).

Legal context

European Union legislation

3 Recitals 2, 6, 13, 16 and 17 in the preamble to Directive 2008/115 state:

'(2) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

[…]

(6) Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure. …

[…]

(13) The use of coercive measures should be expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued. …

[…]

(16) The use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the removal process and if the application of less coercive measures would not be sufficient.

(17) Third-country nationals in detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law. Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should, as a rule, take place in specialised detention facilities.'

4 Article 1 of Directive 2008/115, entitled 'subject-matter', provides:

‘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.’

5 Article 2(1) and (2) of that directive provides:

‘(1) This Directive applies to third-country nationals staying illegally on the territory of a Member State.

(2) Member States may decide not to apply this Directive to third-country nationals who:

[…]

(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.’

6 Article 3(4) of Directive 2008/115 defines the term ‘return decision’, for the purposes of that directive, as ‘an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return’.

7 Article 4(3) of that directive states:

‘This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.’

8 According to Article 6(1) of the same directive, ‘Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5’.

9 Article 7 of Directive 2008/115, entitled ‘voluntary departure’, is worded as follows:

‘(1) A return decision shall provide for an appropriate period for voluntary departure of between seven and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4. Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall inform the third-country nationals concerned of the possibility of submitting such an application.

[…]

(3) Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of the period for voluntary departure.

(4) If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public

policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.'

(10) Article 8(1) and (4) of that directive provides:

'(1) Member States shall take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 7.

[…]

(4) Where Member States use – as a last resort – coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force. They shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.'

11 Article 15 of that same directive, under Chapter IV thereof, relating to detention for the purpose of removal, reads as follows:

'(1) Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

(a) there is a risk of absconding or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

[…]

(3) In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or *ex officio*. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

(4) When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

(5) Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

(6) Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law in cases

where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.'

12 Article 16 of Directive 2008/115, entitled 'Conditions of detention', provides in paragraph 1:

'Detention shall take place as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.'

13 According to Article 18 of Directive 2008/115, entitled 'Emergency situations':

'(1) In situations where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide … to take urgent measures in respect of the conditions of detention derogating from those set out in [Article] 16(1) … .

(2) When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.

(3) Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under this Directive.'

14 According to the first subparagraph of Article 20(1) of Directive 2008/115, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply therewith, with the exception of Article 13(4), by 24 December 2010.

15 Pursuant to Article 22 thereof, that directive entered into force on 13 January 2009.

National legislation

16 Article 13(2) and (4) of Legislative Decree No 286/1998 of 25 July 1998 consolidating the provisions regulating immigration and the rules relating to the status of foreign national (Ordinary Supplement to GURI No 191 of 18 August 1998), as amended by Law No 94 of 15 July 2009 on public security (Ordinary Supplement to GURI No 170 of 24 July 2009) ('Legislative Decree No 286/1998'), provides:

'(2) The expulsion shall be ordered by the prefect where the foreign national:

a) entered the territory of the State without going through border control and has not been returned […];

b) has remained on the territory of the State … without applying for a residence permit within the period imposed, except where that delay is due to *force majeure*, or despite the revocation or cancellation of the residence permit, or without applying for renewal of a residence permit which had expired over 60 days previously. . […]

(4) The expulsion shall always be carried out by the Questore with deportation by the law enforcement authorities, except as provided for in paragraph 5.'

17 Article 14 of Legislative Decree No 286/1998 is worded as follows:

'(1) Where it is not possible to effect immediately the expulsion by deportation or return because it is necessary to provide assistance to the foreign national, conduct further checks on his identity or nationality, acquire travel documents, or because of the unavailability of the carrier or other suitable means of transport, the Questore shall order that the foreign national is to be detained, for the length of time which is strictly necessary, in the nearest detention centre among those identified or established by decree of the Minister for the Interior, in agreement with the Ministers for Social Solidarity and the Treasury, for the Budget and for Economic Planning.

…

(5a) Where it is not possible to place the foreign national in a detention centre, or where the stay in such a centre has not allowed for the expulsion or return by deportation to be carried out, the Questore shall order the foreign national to leave the territory of the State within five days. The order shall be in writing and state the consequences of the illegal stay on the territory of the State in terms of penalties, including in the event of a repeat offence. The order of the Questore may include the presentation to the person concerned of the documents necessary to go to the diplomatic mission or consular post of his country in Italy, and also to return to the country to which he belongs or, if that is not possible, to the country from which he came.

(5b) A foreign national who remains illegally and without valid grounds on the territory of the State, contrary to the order issued by the Questore in accordance with paragraph 5a, shall be liable to a term of imprisonment of one to four years if the expulsion or the return has been ordered following an illegal entry into the national territory …, or if application has not been made for a residence permit or the person concerned has not declared his presence on the territory of the State within the period imposed where there is no *force majeure*, or if his residence permit has been revoked or cancelled. A term of imprisonment of six months to one year shall apply if the expulsion was ordered because the residence permit expired more than 60 days previously and application for renewal has not been made, or if the application for a residence permit was rejected … . In any event, save where the foreign national is placed in detention, a new expulsion order with deportation by the law enforcement authorities shall be issued for the non-execution of the removal order issued by the Questore pursuant to paragraph 5a. Where deportation is not possible, the provisions of paragraphs 1 and 5a of the present Article shall apply … .

(5c) A foreign national who is the recipient of the expulsion order referred to in paragraph 5b and a new removal order as referred to in paragraph 5a and who remains illegally on the territory of the State shall be liable to a term of imprisonment of between one and five years. In any event, the provisions of the third and last sentences of paragraph 5b shall apply.

(5d) Where the offences referred to in the first sentence of paragraph 5b and paragraph 5c are committed, the rito direttissimo [expedited procedure] shall be followed and the arrest of the perpetrator shall be mandatory.'

The dispute in the main proceedings and the question referred for a preliminary ruling

18 Mr El Dridi is a third-country national who entered Italy illegally and does not hold a residence permit. A deportation decree was issued against him by the Prefect of Turin (Italy) on 8 May 2004.

19 An order requiring his removal from the national territory, issued on 21 May 2010 by the Questore di Udine pursuant to that deportation decree, was notified to him on the same day. The reasons for that removal order were that no vehicle or other means of transport was available, that Mr El Dridi had no identification documents and that it was not possible for him to be accommodated at a detention facility as no places were available in the establishments intended for that purpose.

20 A check carried out on 29 September 2010 revealed that Mr El Dridi had not complied with that removal order.

21 Mr El Dridi was sentenced at the conclusion of an expedited procedure by a single judge of the Tribunale di Trento (District Court, Trento) (Italy) to one year's imprisonment for the offence set out in Article 14(5b) of Legislative Decree No 286/1998.

22 He appealed against that decision before the Corte d'appello di Trento (Appeal Court, Trento).

23 That court is in doubt as to whether a criminal penalty may be imposed during administrative procedures concerning the return of a foreign national to his country of origin due to non-compliance with the stages of those procedures, since such a penalty seems contrary to the principle of sincere cooperation, to the need for attainment of the objectives of Directive 2008/115 and for ensuring the effectiveness thereof, and also to the principle that the penalty must be proportionate, appropriate and reasonable.

24 It states in that regard that the criminal penalty provided for in Article 14(5b) of Legislative Decree No 286/1998 comes into play subsequent to the finding of an infringement of an intermediate stage of the gradual procedure for implementing the return decision, provided for by Directive 2008/115, namely non-compliance simply with the removal order. A term of imprisonment of one to four years seems, moreover, to be extremely severe.

25 In those circumstances, the Corte d'appello di Trento decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In the light of the principle of sincere cooperation, the purpose of which is to ensure the attainment of the objectives of the directive, and the principle that the penalty must be proportionate, appropriate and reasonable, do Articles 15 and 16 of Directive 2008/115 … preclude:

– the possibility that criminal penalties may be imposed in respect of a breach of an intermediate stage in the administrative return procedure, before that procedure is completed,

by having recourse to the most severe administrative measure of constraint which remains available?

– the possibility of a sentence of up to four years' imprisonment being imposed in respect of a simple failure to cooperate in the deportation procedure on the part of the person concerned, in particular where the first removal order issued by the administrative authorities has not been complied with?'

The urgent procedure

26 The Corte d'appello di Trento asked for the reference for a preliminary ruling to be dealt with under the urgent procedure pursuant to Article 104b of the Court's Rules of Procedure.

27 The referring court justified its request by stating that Mr El Dridi is being detained in order to enforce the sentence imposed on him by the Tribunale di Trento.

28 The First Chamber of the Court, after hearing the Advocate General, decided to grant the referring court's request for the reference for a preliminary ruling to be dealt with under the urgent procedure.

Consideration of the question referred

29 By its question, the referring court asks, in essence, whether Directive 2008/115, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.

30 The national court refers in that regard to the principle of sincere cooperation laid down in Article 4(3) TEU, and to the objective of ensuring the effectiveness of European Union law.

31 It must be borne in mind in that regard that recital 2 in the preamble to Directive 2008/115 states that it pursues the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and also their dignity.

32 As is apparent from both its title and Article 1, Directive 2008/115 establishes 'common standards and procedures' which must be applied by each Member State for returning illegally staying third-country nationals. It follows from that expression, but also from the general scheme of that directive, that the Member States may depart from those standards and procedures only as provided for therein, inter alia in Article 4.

33 It follows that, although Article 4(3) allows Member States to adopt or maintain provisions that are more favourable than Directive 2008/115 to illegally staying third-country nationals provided that such provisions are compatible with it, that directive does not however allow those States to apply stricter standards in the area that it governs.

34 It should also be observed that Directive 2008/115 sets out specifically the procedure to be applied by each Member State for returning illegally staying third-country nationals and fixes the order in which the various, successive stages of that procedure should take place.

35 Thus, Article 6(1) of the directive provides, first of all, principally, for an obligation for Member States to issue a return decision against any third-country national staying illegally on their territory.

36 As part of that initial stage of the return procedure, priority is to be given, except where otherwise provided for, to voluntary compliance with the obligation resulting from that return decision, with Article 7(1) of Directive 2008/115 providing that the decision must provide for an appropriate period for voluntary departure of between seven and thirty days.

37 It follows from Article 7(3) and (4) of that directive that it is only in particular circumstances, such as where there is a risk of absconding, that Member States may, first, require the addressee of a return decision to report regularly to the authorities, deposit an adequate financial guarantee, submit documents or stay at a certain place or, second, grant a period shorter than seven days for voluntary departure or even refrain from granting such a period.

38 In the latter situation, but also where the obligation to return has not been complied with within the period for voluntary departure, Article 8(1) and (4) of Directive 2008/115 provides that, in order to ensure effective return procedures, those provisions require the Member State which has issued a return decision against an illegally staying third-country national to carry out the removal by taking all necessary measures including, where appropriate, coercive measures, in a proportionate manner and with due respect for, inter alia, fundamental rights.

39 In that regard, it follows from recital 16 in the preamble to that directive and from the wording of Article 15(1) that the Member States must carry out the removal using the least coercive measures possible. It is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him.

40 Under the second subparagraph of Article 15(1) of Directive 2008/115, that deprivation of liberty must be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence. Under Article 15(3) and (4), such deprivation of liberty is subject to review at reasonable intervals of time and is to be terminated when it appears that a reasonable prospect of removal no longer exists. Article 15(5) and (6) fixes the maximum duration of detention at 18 months, a limit which is imposed on all Member States. Article 16(1) of that directive further requires that the persons concerned are to be placed in a specialised facility and, in any event, kept separated from ordinary prisoners.

41 It follows from the foregoing that the order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his

voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility; the principle of proportionality must be observed throughout those stages.

42 It is clear that even the use of the latter measure, which is the most serious constraining measure allowed under the directive under a forced removal procedure, is strictly regulated, pursuant to Articles 15 and 16 of that directive, inter alia in order to ensure observance of the fundamental rights of the third-country nationals concerned.

43 In particular, the maximum period laid down in Article 15(5) and (6) of Directive 2008/115 serves the purpose of limiting the deprivation of third-country nationals' liberty in a situation of forced removal (Case C-357/09 PPU *Kadzoev* [2009] ECR I-11189, paragraph 56). Directive 2008/115 is thus intended to take account both of the case-law of the European Court of Human Rights, according to which the principle of proportionality requires that the detention of a person against whom a deportation or extradition procedure is under way should not continue for an unreasonable length of time, that is, its length should not exceed that required for the purpose pursued (see, inter alia, ECHR, *Saadi* v *United Kingdom*, 29 January 2008, not yet published in the *Reports of Judgments and Decisions*, § 72 and 74), and of the eighth of the 'Twenty guidelines on forced return' adopted on 4 May 2005 by the Committee of Ministers of the Council of Europe, referred to in recital 3 in the preamble to the directive. According to that guideline, any detention pending removal is to be for as short a period as possible.

44 It is in the light of those considerations that it must be assessed whether the common rules introduced by Directive 2008/115 preclude national legislation such as that at issue in the main proceedings.

45 It should be observed in that regard first that, as is apparent from the information provided both by the referring court and by the Italian Government in its written observations, Directive 2008/115 has not been transposed into Italian law.

46 According to settled case-law, where a Member State fails to transpose a directive by the end of the period prescribed or fails to transpose the directive correctly, the provisions of that directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise may be relied on by individuals against the State (see, to that effect, inter alia, Case 152/84 *Marshall* [1986] ECR 723, paragraph 46, and Case C-203/10 *Auto Nikolovi* [2011] ECR I-0000, paragraph 61).

47 That is true of Articles 15 and 16 of Directive 2008/115, which, as is clear from paragraph 40 of this judgment, are unconditional and sufficiently precise, so that no other specific elements are required for them to be implemented by the Member States.

48 Moreover, a person in Mr El Dridi's situation comes within the personal scope of Directive 2008/115, since, under Article 2(1) thereof, that directive applies to third-country nationals staying illegally on the territory of a Member State.

49 As observed by the Advocate General in points 22 to 28 of his View, that finding is not affected by Article 2(2)(b) of that directive, which allows Member States to decide not to apply the directive to third-country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures. The order for reference indicates that the obligation to

return results, in the main proceedings, from a decree of the Prefect of Turin of 8 May 2004. Moreover, the criminal penalties referred to in that provision do not relate to non-compliance with the period granted for voluntary departure.

50 It must be observed, second, that even though the decree of the Prefect of Turin of 8 May 2004, in so far as it establishes an obligation for Mr El Dridi to leave the national territory, is a 'return decision' as defined in Article 3(4) of Directive 2008/115 and referred to, inter alia, in Articles 6(1) and 7(1) thereof, the removal procedure provided for by the Italian legislation at issue in the main proceedings is significantly different from that established by that directive.

51 Thus, whilst that directive requires that a period of between seven and 30 days be granted for voluntary departure, Legislative Decree No 286/1998 does not provide for recourse to that measure.

52 Next, as regards the coercive measures which the Member States may implement under Article 8(4) of Directive 2008/115, such as, inter alia, deportation as provided for by Article 13(4) of Legislative Decree No 286/1998, it is clear that in a situation where such measures have not led to the expected result being attained, namely, the removal of the third-country national against whom they were issued, the Member States remain free to adopt measures, including criminal law measures, aimed inter alia at dissuading those nationals from remaining illegally on those States' territory.

53 It should be noted, however, that, although in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, this branch of the law may nevertheless be affected by European Union law (see, to that effect, Case 203/80 *Casati* [1981] ECR 2595, paragraph 27; Case 186/87 *Cowan* [1989] ECR 195, paragraph 19; and Case C-226/97 *Lemmens* [1998] ECR I-3711, paragraph 19).

54 It follows that, notwithstanding the fact that neither point (3)(b) of the first paragraph of Article 63 EC, a provision which was reproduced in Article 79(2)(c) TFEU, nor Directive 2008/115, adopted inter alia on the basis of that provision of the EC Treaty, precludes the Member States from having competence in criminal matters in the area of illegal immigration and illegal stays, they must adjust their legislation in that area in order to ensure compliance with European Union law.

55 In particular, those States may not apply rules, even criminal law rules, which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.

56 According to the wording of the second and third subparagraphs respectively of Article 4(3) TEU, the Member States inter alia 'shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union' and 'shall … refrain from any measure which could jeopardise the attainment of the Union's objectives', including those pursued by directives.

57 Regarding, more specifically, Directive 2008/115, it must be remembered that, according to recital 13 in the preamble thereto, it makes the use of coercive measures expressly subject to the principles of proportionality and effectiveness with regard to the means used and objectives pursued.

58 Consequently, the Member States may not, in order to remedy the failure of coercive measures adopted in order to carry out forced removal pursuant to Article 8(4) of that directive, provide for a custodial sentence, such as that provided for by Article 14(5b) of Legislative Decree No 286/1998, on the sole ground that a third-country national continues to stay illegally on the territory of a Member State after an order to leave the national territory was notified to him and the period granted in that order has expired; rather, they must pursue their efforts to enforce the return decision, which continues to produce its effects.

59 Such a penalty, due inter alia to its conditions and methods of application, risks jeopardising the attainment of the objective pursued by that directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals. In particular, as observed by the Advocate General in point 42 of his View, national legislation such as that at issue in the main proceedings is liable to frustrate the application of the measures referred to in Article 8(1) of Directive 2008/115 and delay the enforcement of the return decision.

60 That does not preclude the possibility for the Member States to adopt, with respect for the principles and objective of Directive 2008/115, provisions regulating the situation in which coercive measures have not resulted in the removal of a third-country national staying illegally on their territory.

61 In the light of the foregoing, it will be for the national court, which is called upon, within the exercise of its jurisdiction, to apply and give full effect to provisions of European Union law, to refuse to apply any provision of Legislative Decree No 286/1998 which is contrary to the result of Directive 2008/115, including Article 14(5b) of that legislative decree (see, to that effect, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 24; Case C-462/99 *Connect Austria* [2003] ECR I-5197, paragraphs 38 and 40; and Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-0000, paragraph 43). In so doing, the referring court will have to take due account of the principle of the retroactive application of the more lenient penalty, which forms part of the constitutional traditions common to the Member States (Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraphs 67 to 69, and Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 59).

62 Consequently, the answer to the question referred is that Directive 2008/115, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.

Costs

63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

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, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.

Signatures

Serbia as a Country of Asylum

Observations on the Situation of Asylum-Seekers and Beneficiaries of International Protection in Serbia

August 2012

UNHCR
The UN Refugee Agency

Contents

Introduction

1. The Office of the United Nations High Comissioner for Refugees (UNHCR) has a mandate to monitor the implementation of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol by virtue of its Statute in conjuction with Article 35 of the 1951 Convention and Article II of 1967 Protocol.

2. In light of the recent increase in the numbers of asylum claims lodged in the Republic of Serbia ("Serbia"), as well as the practice of some European Union ("EU") countries of returning asylum-seekers to Serbia on the basis of the "safe third country concept,"[1] UNHCR has undertaken to assess Serbia's asylum procedure, to making concrete recommendations for improvements, and to evaluate Serbia as a country of asylum.[2]

3. The present paper provides an assessment of the Serbian asylum system, including access to procedures, quality of the asylum adjudication mechanisms, treatment of unaccompanied and separated children, as well as reception, accommodation and detention issues. Particular emphasis is given to the application of safe third country considerations in assessing asylum claims.

4. UNHCR concludes that there are areas for improvement in Serbia's asylum system, noting that it presently lacks the resources and performance necessary to provide sufficient protection against *refoulement,* as it does not provide asylum-seekers an adequate opportunity to have their claims considered in a fair and efficient procedure. Furthermore, given the state of Serbia's asylum system, Serbia should not be considered a safe third country, and in this respect, UNHCR urges States not to return asylum-seekers to Serbia on this basis.

1 The "safe third country concept" presumes that the applicant could and should already have requested asylum if he/she passed through a safe country en route to the country where asylum is being requested. This notion is applied in most European States, although it is less widely used elsewhere. See generally UN High Commissioner for Refugees, Global Consultations on *International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures),* 31 May 2001, EC/GC/01/12, http://www.unhcr.org/refworld/docid/3b36f2fca.html.

2 See also, Hungarian Helsinki Committee, *Serbia as a Safe Third Country: A Wrong Presumption,* September 2011, http://www.unhcr.org/refworld/docid/4e815dec2.html, and Hungarian Helsinki Committee, *Serbia as a Safe Country: Revisited,* June 2012, http://www.unhcr.org/refworld/docid/4fe86f992.html.

General Background[3]

5. Serbia is a party to the United Nations 1951 Convention relating to the Status of Refugees and its 1967 Protocol, and its Constitution provides for a right to asylum.[4] In furtherance of this right, the Law on Asylum was adopted in November 2007, and Serbia assumed full responsibility for refugee status determination ("RSD") upon its entry into force on 1 April 2008.[5]

6. Serbia has been hosting refugees from the countries of the former Yugoslavia, since the conflicts of 1992 to 1995. Their refugee status does not derive from the 2007 Law on Asylum, and the current asylum system, which is the subject of this paper. They enjoy rights similar to nationals and most have access to simplified naturalization in Serbia. Currently, an estimated 66,000 refugees from Croatia remain in Serbia, pending the identification of durable solutions. In addition, Serbia continues to host approximately 210,000 persons who were displaced from Kosovo in 1999, some 97,000 of whom are in need of assistance.[6] The Serbian government continues providing a range of services to these displaced populations. The international community, led by the European Union and States in the region, and facilitated by UNHCR, has committed to ensuring durable solutions for the displaced throughout the region (mainly through housing support) and which will benefit refugees in Serbia.[7]

7. Beyond the legacies of regional displacement, Serbia at present is primarily a country of transit for mixed migratory flows from Asia and the Middle East towards EU member States. Government sources have conveyed their view to UNHCR that approximately one-third of irregular migrants arriving in Serbia apply for asylum in order to avoid detention that would otherwise apply to them as irregular migrants. In comments to the State news agency (TANJUG), the Director of the Police, Mr. Milorad Veljovic, stated that between January and November 2011, some 9,500 irregular migrants were identified in Serbia.[8] According to official figures, some 3,132 persons expressed their intention to seek asylum in 2011, albeit with the vast majority moving onward to EU countries, either before registering with the Asylum Office, or at another step in the process before the determination of their claim in Serbia.

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3 Unless otherwise indicated, sources of information contained in this paper include statements from the Serbian Ministry of Interior, UNHCR offices in Serbia, Hungary, or the former Yugoslav Republic of Macedonia, and public media and reports from UNHCR's NGO implementing partners.

4 *Constitution of the Republic of Serbia,* 30 September 2006, available at: http://www.unhcr.org/refworld/docid/4b5579202.html. Article 57 states "any foreign national with reasonable fear of persecution based on his/her race, gender, language, creed, ethnic affiliation or affiliation with another group, or his/her political opinions, shall have the right to asylum in the Republic of Serbia." It further provides that the procedure for granting asylum shall be regulated by the law.

5 *Law on Asylum* [Serbia], 26 November 2007, available at: http://www.unhcr.org/refworld/docid/47b46e2f9.html. Prior to 1 April 2008, UNHCR carried out RSD under its mandate for asylum applicants within the territory of Serbia.

6 See, *Assessment of the needs of internally displaced persons in the Republic of Serbia,* carried out by UNHCR and the Commissariat for Refugees of the Republic of Serbia in 2010, available at: http://www.unhcr.rs/media/IDP Needs AssessmentENGLISH.pdf

7 See, *Joint Declaration on Ending Displacement and Ensuring Durable Solutions for Vulnerable Refugees and Internally Displaced Persons,* signed by the governments of Bosnia and Herzegovina, Montenegro, Republic of Croatia and Republic of Serbia on 7 November 2011, available at: http://www.unhcr.org/4ec22a979.pdf

8 TANJUG, *Illegal Migrants - Common Problem,* 12 December 2011, available at: http://www.tanjug.rs/news/26947/illegal-migrants--common-problem.htm.

Introduction to the Serbian Asylum System

8. The Ministry of Interior ("MoI") and the Serbian Commissariat for Refugees ("SCR" -- an independent governmental body), each have pre-assigned competencies for different parts of the asylum system, as provided for in the Law on Asylum. The Asylum Office, which has yet to be officially established and currently operates on an *ad hoc* basis under the Border Police Directorate of the MoI, has the responsibility to administer the asylum procedure. In contrast, the SCR manages the reception centres for asylum-seekers.

9. With the assistance of UNHCR and EU funding, Serbia has established a legal framework on asylum that is by and large in compliance with international standards, following the adoption of the Law on Asylum in 2007. In addition to the law, Serbia has made significant efforts to develop its reception infrastructure for asylum-seekers in view of the recent increase in arrivals. However, this increase has also meant that Serbia's *ad hoc* Asylum Office has come under pressure and presently lacks the capacity and personnel to process the number of asylum-seekers. In 2008, 77 persons were registered as asylum-seekers in Serbia. The number of asylum applications rose to 275 in 2009. In 2010, the number of asylum-seekers increased to 522. More than 3,100 persons were identified as asylum-seekers in Serbia in 2011, with fewer than 500 managing to register their claims with the Asylum Office.

10. Although many asylum-seekers simply abandon their claims at an early stage in the procedure in order to move on, there are also a number of shortcomings in the quality and efficiency of the asylum process that could support an asylum-seeker's decision to leave Serbia. While many perceive a limited possibility to eventually receive status when applying, few asylum-seekers are registered and even fewer manage to submit full applications and to be interviewed. Since the government assumed responsibility from UNHCR for RSD in 2008 (see paragraph 36 for further detail), there has been no positive grant of refugee status. While this fact is not as such sufficient to conclusively demonstrate a problem with quality of asylum decisions (without an analysis of those cases), most of the denials are made on the basis that the applicant comes from a designated safe third country, with no evaluation of the merits of the claim.

11. While the numbers of asylum-seekers in Serbia were significantly higher in 2011 than in neighbouring countries, it shares a number of its current challenges in the field of asylum with them, including limited capacity and experience in administering asylum systems.

1. Access to the asylum procedure

12. Persons seeking international protection in Serbia may express their wish to seek asylum upon first contact with the authorities in one of two ways, either at the border or after they have entered the territory. In both cases, registration is conducted by the police. According to the Asylum Office, the vast majority of asylum-seekers apply once they are in the territory and are referred to the Asylum Office by ordinary police officers. Very few referrals are made at the border, from border police. Referrals at the border generally occur when individuals are caught attempting to exit Serbia in an irregular manner (mostly to Hungary).

13. UNHCR's Office in the former Yugoslav Republic of Macedonia has reported instances where third country nationals who are caught attempting to enter Serbia irregularly are immediately returned to the custody of the border police in that country. Some reportedly attempt to claim asylum before Serbian border guards. On some occasions, these individuals are brought before a municipal judge in southern Serbia (in Presevo, Bujanovac or Vranje), sentenced for illegal border crossing, and then after serving a short term in prison, deported to the former Yugoslav Republic of Macedonia. Interviews with asylum-seekers deported from Serbia suggest that deportations do not always follow official procedures at the border. Instead, Serbian police reportedly bring individuals in buses close to the border and order them to return to the former Yugoslav Republic of Macedonia on their own.

14. In terms of applying for asylum at the airport, Serbia reported to the European Commission that in 2009 and 2010 approximately 1,500 foreigners were denied entry at Belgrade International Airport.[9] In the same period, only one person was admitted into the asylum procedure from the airport, and in that case, the intervention of UNHCR was required. The Border Police Directorate has stated that none of the persons denied entry at the airport had expressed an intention to seek asylum in Serbia. In contrast, when UNHCR carried out mandate RSD (from 1976 to 2008), more than a dozen individuals expressed their intention to apply for asylum at the airport annually. The Asylum Office does not visit the airport regularly and officials claim that they are not aware of, and do not receive, asylum claims from the airport. In 2011 and the first six months of 2012, the situation remained the same.

Recommendations:

- Ensure access to the country's territory for asylum-seekers in full respect of the principle of *non-refoulement* as established in international refugee and human rights law;
- Devise effective entry mechanisms (border monitoring) over the manner in which border authorities meet their obligation to provide asylum-seekers with access to regular asylum procedure.[10] This would also include training and mechanisms to ensure the sustainability of training;
- Require the authorities to conduct personal interviews before any return decision is made, in order to prevent potential *refoulement*.

9 Information requested by the European Commission (EC) from the Government of Serbia for the preparation of the Opinion on the application of Serbia for membership of the European Union, November 2010, available at: http://www.media.srbija.gov.rs/medeng/documents/questionnaire srb.pdf. Serbia's response to the EC Questionnaire, available on the website of the Government of the Republic of Serbia, Chapter 24, Question 14, available at: http://www.srbija.gov.rs/?change lang-en.

10 See, UN High Commissioner for Refugees, *Protection Training Manual for European Border and Entry Officials,* 1 April 2011, available at: http://www.unhcr.org/refworld/docid/4ddf40d12.html

2. Detention of asylum-seekers and restrictions on freedom of movement

15. Serbia is to be congratulated for largely respecting the freedom of movement and the right to liberty of asylum-seekers. The authorities in Serbia do not generally apply restrictions to the freedom of movement of asylum-seekers, or detain them during the asylum procedure, even though there is a basis to do so in the Asylum Law.

16. Article 51 of the Law on Asylum stipulates that restrictions on movement can be imposed in three cases: (1) to establish identity; (2) to ensure the presence of a foreigner in the course of the asylum procedure, if (a) there are reasonable grounds to believe that an asylum application was filed with a view to avoiding deportation, or if (b) it is not possible to establish other essential facts on which the asylum application is based without the presence of the foreigner in question; and (3) to protect national security and public order in accordance with the law. Measures to restrict movement can entail (1) an obligation for asylum-seekers to reside at *Padinska Skela,* the Reception Centre for Foreigners, where they are under intensified police surveillance; and (2) imposing a ban on leaving the Asylum Centre, a particular address and/or a designated area.[11]

3. Quality of the asylum procedure

17. While the legislative framework and the national reception system are in place, Serbia's national asylum system, in particular, the Asylum Office, as currently set up, cannot process the recent significant increase of asylum-seekers. In addition, the recognition rate[12] is zero since the Government assumed its responsibility for the asylum procedure in 2008. This can be attributed to several factors, in particular, an over-reliance on the "safe third country concept" (see 3.1.5.).

Year	Declared intention to seek asylum	Registered by Asylum Office[13]	Submitted asylum application[14]	Interviewed	Refugee status	Subsidiary protection
2011	3,134	488	248	118	0	0
2012 (first 6 months)	974	298	182	47	0	0

18. The primary obstacle to ensuring the quality of the asylum procedure is the fact that the Asylum Office is yet to be officially established. It is currently operating on an *ad hoc* basis under the Border Police Directorate of the MoI. With seven out of eleven positions filled at the time of this writing, and with only four of the seven staff members directly involved in interviewing and meeting with asylum-seekers, the Asylum Office lacks a sufficient number of qualified personnel to adjudicate asylum claims in an efficient but thorough manner. Moreover, there is no budget allocated to the Asylum Office by the MoI, and essential services, such as expenses for interpretation in the asylum proceedings and free legal assistance to asylum applicants, continue to be covered by UNHCR.

11 Law on Asylum, Article 52.

12 The "recognition rate" is the percentage of positive decisions for refugee status against the total number of substantive first instance decisions for a given period.

13 Registered persons are those who have undergone the second step in the asylum procedure, which includes establishing an identity, fingerprinting, taking photographs. The law provides that at the end of this phase of the procedure, asylum-seekers are to be issued an ID card.

14 Submission of an asylum application is a third step in the process, when asylum-seekers actually file its asylum claim.

19. Another concern is that the Asylum Office, based within the Border Police Directorate, is not independent from the police structure. Asylum procedures are conducted by police officers who are often inadequately trained in the principles and application of international refugee protection. While Article 19 of the Law on Asylum stipulates that authorized officers conducting the asylum procedure in the Asylum Office shall be specially trained for performance of these tasks, their primary expertise, as professional police officers, is in criminal law enforcement and border control; they lack sufficient training on issues related to the asylum procedure and refugee protection. Those who are trained on protection matters are often subject to rotation within the MoI structure, necessitating further training for the newly-posted, and depriving the Asylum Office of developed skills, relevant experience and continuity.

20. Placing police in the role of interviewer during the asylum procedure may additionally undermine the perception of confidentiality and impartiality, which is crucial in creating conducive conditions for applicants during the personal interview. UNHCR recommends that a civilian authority be assigned this role, along with responsibility for taking decisions, under future development of the asylum system.[15]

Recommendations:

- Ensure that the Asylum Office is formally established in line with the Law on Asylum and allocated appropriate budget and staffing;
- The Asylum Office should be (part of) a civilian authority;
- Establish training programmes for law enforcement officials, police and other concerned personnel concerning the 1951 Convention, and put in place mechanisms to ensure the sustainability of training programmes.

3.1. First instance procedure and practice

21. The first instance procedure, carried out by the Asylum Office, consists of five steps: (1) expression of intention to seek asylum and recording of data by the police; (2) registration of the asylum-seeker; (3) lodging an asylum application; (4) formal interview; and (5) decision making.

22. The Law on Asylum does not define any set period within which the Asylum Office should complete the first two steps of the asylum procedure. However, in accordance with the Law on Administrative Procedures, a maximum period of 60 days (two months) is applicable from the third step, lodging the asylum application, to the final step, the issuance of the decision of the Asylum Office. In practice, due to procedural delays described in the following sub-sections, these last three steps often exceed the prescribed 60 days deadline.

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15 See UN High Commissioner for Refugees, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009),* August 2010, p. 10, available at: http://www.unhcr.org/refworld/docid/4c63ebd32.html; See also, UN High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations,* March 2010, available at: http://www.unhcr.org/refworld/docid/4bab55752.html.

3.1.1. Expression of the intention to seek asylum and recording of data[16]

23. The first step of the asylum procedure is initiated when an authorized officer of the MoI, usually a police officer, registers the intention of persons to seek asylum. In the vast majority of cases, asylum-seekers are referred directly to one of the two Asylum Centres, managed by the SCR.

24. When a person expresses the intention to seek asylum at the border or with a police officer in the territory, the authorized police officer records his/her personal data. The procedure encompasses the issuance of a prescribed certificate containing personal data the person has provided or that could be established on the basis of identification papers and other documents carried by the asylum-seeker. The certificate serves as proof that the person has expressed his/her intention to seek asylum and that he/she has the right to reside at the Asylum Centre for a period of 72 hours (see 3.1.2). The police, at this stage, do not provide information regarding the asylum-seeker's rights and obligations.

25. An authorised officer is entitled to search the asylum-seeker and his/her belongings in order to find personal identification papers and other documents necessary for the issuance of the certificate. UNHCR is not aware of any complaints that this search, when performed, is done in an inappropriate manner.

Between 1 January and 31 December 2011, 3,132 persons expressed the intention to apply for asylum in Serbia. From January to the end of June 2012, 974 persons expressed the intention to apply for asylum in Serbia.

3.1.2. Registration by the Asylum Office of an asylum-seeker and securing accommodation in the Asylum Centre[17]

26. The second step, registration of the asylum-seeker by a member of the Asylum Office, is normally conducted at one of the two Asylum Centres in Banja Koviljaca and Bogovadja (see 5.2 and 5.3). The Law on Asylum prescribes that each asylum-seeker should arrive at the Asylum Centre or be escorted there within 72 hours from the expression of intent.[18]

27. In 2011 3,132 persons expressed their intention to apply for asylum in Serbia, and 488 persons were registered by the Asylum Office. The gap between the numbers of those expressing intention and those who complete the second step of registration can be attributed to several factors. While it is true that a number of persons do not appear at the Asylum Centres after their intention to apply for asylum has been registered, the lack of space in the Asylum Centres can effectively prevent an asylum-seeker from completing the second step of registration. In practice, before lodging an application for asylum, the asylum-seeker must first have secured a space within one of the Asylum Centres. While asylum-seekers who appear at the Asylum Centre may be issued with a document by the SCR (but not the Asylum Office), the document is not recognized by other State authorities, and needs to be renewed frequently (every two to three days). Through the use of this document, the authorities claim to have some control over the number of "active" asylum-seekers pending admission to the Asylum Centres. Yet, as it can take weeks or even months until a space becomes available, some asylum-seekers leave Serbia before officially lodging their asylum applications with the Asylum Office.

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16 Law on Asylum, Articles 22 and 23.

17 Law on Asylum, Article 24.

18 Law on Asylum, Article 22.

28. A second reason for failure by asylum-seekers to lodge full asylum applications at the next step is the limited staffing of the Asylum Office (see paragraph 18). Currently, there are two Asylum Office staff members who travel to the Asylum Centres to register asylum-seekers, on an *ad hoc* basis. As the Law on Asylum does not set a time limit within which this second step of registration must be completed, this step can take weeks or longer.

29. While the Law on Asylum does not limit the right to the issuance of an officially recognized personal identity card to asylum-seekers with accommodation in an Asylum Centre, in practice this official proof of status is only available to those living at the Asylum Centres. Moreover, there can be delays of up to two months to receive this card, issued by the Asylum Office.

Between 1 January and 31 December 2011, 488 persons were registered by the Asylum Office and 422 persons were issued identity cards. From January to the end of June 2012, 298 persons were registered by the Asylum Office, and 154 were issued identity cards.

Recommendations:

- Ensure that all asylum-seekers are registered and issued a document immediately, including those awaiting admission or accommodated at Asylum Centers or elsewhere;
- Officially recognized ID cards should be available to all asylum-seekers in the initial stages of the procedure.

3.1.3. Lodging an asylum application[19]

30. Before lodging an asylum application, the asylum-seeker is informed by the Asylum Office of his/her rights and obligations, especially regarding the rights to residence, a free interpreter/translator, legal aid and access to UNHCR. According to NGO legal aid providers, asylum-seekers are usually well informed regarding the procedure in Serbia and the availability of free legal aid provided by NGOs. A corresponding duty to inform exists as per Article 10 of the Law on Asylum.

31. Once registered with the Asylum Office, the third procedural step is that an asylum-seeker must submit his or her application for asylum within fifteen days. According to the law, the Asylum Office may extend this time limit upon the substantiated request of the applicant. In practice, the time limit is usually ignored, as filling the application form requires a second appointment with a staff member from the Asylum Office as well as, if needed, with an interpreter. The recently increased number of asylum-seekers, combined with the limited availability of the two responsible Asylum Office staff members, leads to long waiting times to lodge asylum applications. As a result, some asylum-seekers leave Serbia before completing this third step.

Between 1 January and 31 December 2011, 248 asylum applications were submitted to the Asylum Office. From January to the end of June 2012, 182 asylum applications were submitted to the Asylum Office.

19 Law on Asylum, Article 25.

3.1.4. Interview[20]

32. The fourth step in the process is the formal asylum interview, which requires an additional visit by Asylum Office staff to the Asylum Centre. The Law on Asylum stipulates that the Asylum Office should try to establish all the facts relevant for making a decision, including, in particular: the identity of the asylum-seeker, the grounds for asylum, the asylum-seeker's travel route from his or her country of origin, and whether or not the asylum-seeker has previously sought asylum in another country.

33. Interviews focus upon the travel route taken, i.e. how many and which countries the asylum-seeker passed through, and how he or she entered Serbia. This line of questioning is standard for border police with a law enforcement background who have not received sufficient training in asylum procedure. Additionally, an overly broad interpretation of Article 26 of the Asylum Law on the concept of safe third country serves to limit the full evaluation of the substance of the asylum claim. In effect, by not focusing sufficiently on the areas of an individual's claim necessary to establish its validity (or not), the interview usually does not provide a sufficient basis for consideration of the merits. The interviews are conducted in a way to focus on assessing the applicability of the "safe third country concept" during the interview stage, rather than establishing any possible grounds for international protection.

34. While the border police officers from the Asylum Office involved in interviews do not wear police uniforms, the applicants may fear and/or distrust the police as a result of their experiences in their country of origin, and an interview conducted by police officials may trigger or exacerbate post-traumatic stress disorder in applicants who have suffered persecution or serious harm at the hands of the police, military or militarized groups in their countries of origin. This undermines the perception of confidentiality and impartiality, crucial in creating the conditions conducive to the complete disclosure of facts by applicants during personal interviews.

Between 1 January and 31 December 2011, 75 cases (118 persons) were interviewed. From January to the end of June 2012, 33 cases (47 persons) were interviewed.

Recommendations:

- All personal interviews should be conducted by qualified and trained personnel focusing on establishing all relevant facts for an asylum decision based on the merits of the claim;
- The police should not be designated as determining authority and should not be involved in the conduct of personal interviews.

3.1.5. Processing and decision-making[21]

35. Following the formal interview, the Asylum Office examines the case and issues a first-instance decision. The Asylum Office may take a decision to recognize the claimant as a refugee, to grant subsidiary protection, or to refuse an asylum application and order the applicant to leave the territory, unless he/she has other grounds for residence. The Asylum Office may also decide to suspend the asylum procedure.

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20 Law on Asylum, Article 26.

21 Law on Asylum, Articles 27-34.

36. In practice, the Asylum Office has not granted refugee status since assuming responsibility for the asylum procedure in 2008 and has granted subsidiary protection in only five cases. Virtually all cases are rejected on the basis that the applicants come from a safe third country, without an evaluation of the merits. In 2011, out of 55 decisions issued by the Asylum Office, 53 were rejections on this basis. This broad application of the "safe third country concept," found in Article 33(6) of the Law on Asylum, has been confirmed at the second and third instance levels. A 2011 Administrative Court decision confirmed that the list of safe third countries established by the Government should be applied automatically and without examination; in other words, without consideration of whether the listed country is in fact a safe third country for the person in a specific case.[22]

37. The list of safe third countries adopted by the Government of Serbia is, in UNHCR's view, excessively inclusive and broadly applied, and includes all neighbouring countries. The list includes Greece, which, according to the European Court of Human Rights,[23] has been found to be unable to provide effective international protection to refugees. In December 2009 UNHCR issued a position paper entitled "Observations on Greece as a country of asylum,"[24] advising Governments to refrain from returning asylum-seekers to Greece under the Dublin Regulation or otherwise. Serbia's list of safe third countries also includes Turkey, even though Turkey maintains the geographical limitation on the 1951 Refugee Convention with regard to refugees originating from outside Europe. If asylum-seekers are to be returned to these countries, they run the genuine risk of finding themselves in limbo, without access to protection, and at possible risk of *refoulement.*

38. The Asylum Office applies the "safe third country concept" to all asylum-seekers who have transited through countries on the list, without ensuring adequate safeguards in the individual case, such as a guarantee of readmission and access to the asylum process in the so-called safe third country.

39. As per Articles 29, 30, and 31 of the Law on Asylum, an asylum application is denied if it has been established that the claim is unfounded or if there are statutory reasons for refusing asylum.[25] The Asylum Office is obliged to provide written justification for its decision. A foreigner whose asylum application has been rejected may lodge a new application if he/she provides evidence that the circumstances relevant for the recognition as a refugee, or for the granting of subsidiary protection, have substantially changed in the meantime (Article 32).

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22 See, Administrative Court Ruling, 8 U 3815/11 7 July 2011, available at: http://www.unhcr.rs/media/judgement8U381511formatted.pdf.

23 *M.S.S. v. Belgium and Greece,* Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: http://www.unhcr.org/refworld/docid/4d39bc7f2.html.

24 UN High Commissioner for Refugees, *Observations on Greece as a country of asylum,* December 2009, available at: http://www.unhcr.org/refworld/pdfid/4b4b3fc82.pdf.

25 Article 29: The Asylum Office shall issue a decision rejecting the asylum application of an alien if it has established that the claim is unfounded or that there are statutory reasons for denying the right to asylum. The decision referred to in paragraph 1 of this Article shall include a justification. Article 30: An asylum application shall be considered unfounded if it has been established that a person who filed the application does not meet the requirements prescribed for granting the right to refuge or subsidiary protection, and in particular: 1) if the asylum application is based on untruthful reasons, fraudulent data, forged identification papers or documents, unless the applicant can provide valid reasons for that; 2) if the statements given in the asylum application regarding facts of relevance to the decision on asylum contradict the statements made in an interview with the asylum seeker in question or other evidence gathered in the course of the procedure (if, contrary to the statements given in the application, it has been established in the course of the procedure that the asylum application was submitted for the purpose of postponing deportation, that the asylum seeker has come for purely economic reasons and the like); 3) if the asylum seeker refuses to make a statement regarding the reasons for seeking asylum or if his/her statement is unclear or does not contain information indicating persecution. Article 31: The right to asylum shall not be recognised to a person with respect to whom there are serious reasons to believe that: 1) he/she has committed a crime against peace, a war crime, or a crime against humanity, according to the provisions of international conventions adopted with a view to preventing such crimes; 2) he/she has committed a serious non-political crime outside the Republic of Serbia prior to entering its territory; 3) he/she is responsible for acts contrary to the purposes and principles of the United Nations. The right to asylum shall not be recognised to a person who enjoys protection or assistance from some of the institutions or agencies of the United Nations, other than UNHCR. The right to asylum shall not be recognised to a person to whom the competent authorities of the Republic of Serbia recognise the same rights and obligations as to the citizens of the Republic of Serbia.

40. On the basis of Article 33 of the Law on Asylum, the Asylum Office rejects an asylum application without examining the eligibility of an asylum-seeker's claim if the applicant: (i) has an internal flight alternative in the country of origin, (ii) is from a safe country of origin; (iii) already enjoys protection from another State or UN body other than UNHCR; (iv) has the citizenship of a third country; (v) arrived from a safe third country; (vi) had been denied asylum in another country which observes the Geneva Convention; or (vii) has deliberately destroyed a travel document or other documents which may be of relevance to the decision on asylum. In contrast, UNHCR would recommend an examination of the substance of the claim in all of the above instances.

41. The procedure for granting asylum is suspended *ex officio* if an asylum-seeker (i) abandons his/her asylum application; (ii) despite having received a duly served summons, fails to appear for a hearing or declines to make a statement, without providing a valid reason; (iii) without a valid reason, fails to notify the Asylum Office of a change of residential address within three days of the said change; (iv) if he/she prevents the service of a summons or another written official communication in some other way; or (v) leaves the Republic of Serbia without the approval of the Asylum Office.[26]

42. The MoI has informed UNHCR that in 2011, not a single asylum application was reopened after the applicant left the Asylum Centre before the completion of the asylum procedure. This is confirmed by APC, a Serbian NGO providing free legal advice to asylum-seekers.

43. Several asylum-seekers, with support from UNHCR's legal assistance implementing partner, tried to reinstate their asylum claims *("restitution in integrum")* after being deported back to Serbia from Hungary in 2011. However, none of these asylum-seekers were successful. Those who are returned from Hungary have no access to accommodation in Asylum Centres, and therefore are not able to re-register as asylum-seekers. The SCR denies accommodation to those who earlier left the Asylum Centres.

Between 1 January and 31 December 2011, 55 decisions (covering 87 asylum-seekers) were made, out of which 53 cases (85 individuals) were rejected on the basis of the "safe third country concept," and two cases were rejected on the merits of claim. From January to the end of June 2012, 29 decisions (covering 40 asylum-seekers) were made. They were all rejected on the basis of the "safe third country concept." No applicants were granted refugee status or subsidiary protection.

Recommendations:

- Appropriate mechanisms for the designation and review of safe third countries should be in place such as "benchmarks" and criteria that would trigger and inform such a review.
- The "safe third country concept" should be applied only when adequate safeguards are in place for every individual such as ensuring that he/she will be re-admitted to the territory of the safe third country and have the asylum claim examined in fair and efficient procedure;
- Serbia's list of safe third countries should be amended to include only countries where effective protection is available for asylum-seekers and refugees;
- Asylum –seekers who are returned to Serbia without having had access to a full and fair asylum system elsewhere should have their previous procedural rights and accommodation benefits reinstated.

26 Law on Asylum, Article 34.

3.2. Second and Third Instance procedure and practice

44. An appeal against first-instance decisions of the Asylum Office may be lodged to the Asylum Commission (the second-instance body) within 15 days of the receipt of the decision.[27] According to the Law on General Administrative Procedures, the appeal has suspensive effect. The time limit for making a second-instance decision is 60 days from the day when the competent authority receives the appeal.

45. The Asylum Commission is comprised of nine members, each with a four-year term in office. It is ostensibly an independent governmental body. However, it uses the facilities of the Border Police Department, the Head of the Asylum Commission is also the Assistant to the Head of Directorate of Border Police, and the members of the Asylum Commission are police officers or other government agents, with no or limited specific training or expertise on asylum matters. All these factors present at best an appearance of lack of independence, and at worst risk compromising the impartiality and independence of the asylum appeals body.

46. The Asylum Commission, which makes its decisions by majority vote, has not overturned any negative decisions, which were based on the application of the "safe third country concept." It should be noted the mandate for the members of the Asylum Commission expired on 17 April 2012. No new members have yet been appointed at the time of publication. At the time of this writing, the Serbian Government has explained that the delay in nominations should be quickly resolved now that the new Government has been nominated.

47. An asylum-seeker has the right to lodge an administrative appeal with the Administrative Court against the second-instance decision of the Asylum Commission.[28] The Administrative Court generally conducts its review based solely on errors of law, although the Court is entitled to re-examine the merits of the case as well.

Between 1 January and 31 December 2011, the second-instance Asylum Commission issued 35 decisions on appeals by asylum-seekers, and the third-instance Administrative Court issued 8 decisions. No negative decisions were overturned. From January to 17 April 2012, the Asylum Commission issued 10 decisions, and from January to the end of June 2012, the Administrative Court issued 2 decisions. No negative decisions were overturned.

Recommendations:

- In cooperation with UNHCR review the appeal system to make it fair and efficient;
- Ensure training of competent judges on relevant international standards pertaining to asylum refugee protection.

27 Law on Asylum, Article 35.

28 Law on General Administrative Procedure, "Official Gazette of the Federal Republic of Yugoslavia" No. 33/97, 31/01. English translation available at: http://www.mpravde.gov.rs/images/23 law administrative procedure.pdf.

4. Unaccompanied and separated children

48. According to the MoI, since 2008, 941 child asylum applicants were registered in Serbia, of which 567 were unaccompanied or separated. In the first six months of 2012, 176 unaccompanied and separated child asylum applicants were registered; a majority are 16 or 17 year-old Afghan males. Like most other asylum-seekers, they often leave Serbia before a first-instance decision is made. Based on the overall migration trends and increase in asylum-seekers in the region, it is possible that a number of unaccompanied or separated minors remain undetected and without institutional support while transiting through Serbia.

4.1. Identification and referral

49. Article 15 of the Law on Asylum establishes the principle of providing care for asylum-seekers with special needs, including children. It is welcomed that in most cases, when identified, unaccompanied and separated children are accorded this special care.

50. However, there are problems with the process of identification of unaccompanied children. The police typically identify and make initial contacts with unaccompanied children without the support of qualified civilian staff such as social workers or child welfare personnel. In addition, interpreters are rarely available at this point of initial contact. An additional serious concern is that there are no formal age assessment procedures. Very often it is only during the first interview with a free legal adviser and thanks to the presence of interpreters that the applicant has the opportunity to assert that he or she is a child.[29]

51. Unaccompanied child asylum-seekers identified during their first contact with the police are referred to a local Centre for Social Work where a temporary custodian is appointed. Accompanied by the temporary custodian, the child is then transferred to the Centre for Accommodation of Underage Foreigners Unaccompanied by Parents or Custodians,[30] one of the units within the Institution for Education of Children and Adolescents, also known as the *Vasa Stajic* Centre in Belgrade.[31] The *Vasa Stajic* Centre has the capacity to accommodate twelve children. Alternatively, asylum-seeking children may be taken to the Institution for Education of Children and Adolescents in Nis, which has an accommodation capacity of ten children. These institutions are able to accommodate only male children between seven and eighteen years of age. Separate *ad hoc* arrangements are made for unaccompanied female children, as necessary. In practice, however, despite these provisions, once a temporary guardian from the social welfare centre is appointed, both unaccompanied and separated children are transferred to the Asylum Centres.

52. The conditions at the Asylum Centres are not ideal for unaccompanied child asylum-seekers. While there are some activities organised for young children, there are no appropriate courses or programmes for school-age children or teenagers at the Asylum Centres. Neither accompanied nor unaccompanied children in the asylum process attend school.

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29 The majority of the accepted persons claim that they are aged 15 to 16. If these persons do not have personal documents to prove the claimed age, there are no other mechanisms to determine their biological age. Very often individuals who manifestly appear to be adults claim to be minors. .

30 The Centre is a separate unit, founded according to the Decision on Social Protection Institution Network of the Government of the Republic of Serbia (Official Gazette RS, no. 51/08).

31 The Institution is partially funded by the Ministry of Labour and Social Policy and partially from the Vozdovac Municipality budget, i.e. the city of Belgrade. How¬ever, the resources were not allocated directly for accommodation of children asylum-seekers.

4.2. Reception

53. Unaccompanied asylum-seeking children often arrive in poor physical condition, most commonly with skin diseases.[32] The Government asserts that it provides resources for the treatment of all uninsured patients, including asylum-seekers. During the initial reception phase, only basic medical examinations are performed. The expenses related to the purchase of medicines, medical examinations and treatments are ultimately covered, but no resources are specifically allocated by the Ministry of Health for these services.

54. Immediately after the initial reception phase, unaccompanied and separated children are informed about their rights and obligations during their stay in the institution. In case they express an intention to seek asylum, which most do immediately after admission to a reception facility, they are provided with an interpreter and given the possibility to consult with representatives of a non-governmental organization providing free legal assistance within the shortest possible time. The expenses of interpretation are covered by UNHCR.

55. After expressing the intention to apply for asylum, the unaccompanied and separated child asylum-seekers are taken to the police, specifically to the Department for Foreigners in Belgrade, where the employees of the Asylum Office implement all steps set out in the first-instance procedure. First the applicants are registered (the child is photographed and fingerprinted in the presence of the responsible adult); next they are issued identity cards, given the possibility to apply for asylum, and then interviewed. The law requires that the legal representatives, UNHCR, and the interpreter are present during the interview of unaccompanied and separated children. This rule is applied in practice.

4.3. Guardianship

56. Although the legal framework makes provision for the appointment of guardians for unaccompanied and separated asylum-seeking children, there are a number of serious gaps in these arrangements. The first is that a child will have up to three different guardians during the asylum process. According to Article 16 of the Law on Asylum, a guardian must be appointed for an unaccompanied or separated child by the guardianship authority before the submission of an asylum application. After establishing first contact and identifying an unaccompanied child asylum-seeker, the border authorities or the police have to ensure that a temporary custodian is appointed. As described above, this is usually done in co-operation with the local Centre for Social Work. After the initial procedure and referral to either institution in Belgrade or in Nis, another temporary custodian is appointed. Finally, after referral to the Asylum Centre in Banja Koviljaca or Bogovadja, a third temporary custodian is appointed.

57. While legal representation and the presence of a custodian are secured throughout the asylum proceedings, these referrals from one custodian to another do not guarantee effective and quality guardianship for the child asylum-seekers and make it difficult, if not impossible, for a relationship of trust to develop between the child and the custodian. In addition, the guardians are not sufficiently trained to meet the needs of unaccompanied child asylum-seekers. In practice, guardians and social workers rarely visit children in the Asylum Centres beyond the first contact. Best practice in other jurisdictions point to the appointment of a single guardian throughout the asylum process.

58. The Government defends this chain of guardianship arrangements as needed since one single guardian could not ensure presence at all required locations.

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32 "Underaged Asylum-seekers in Serbia: At the Verge of Dignity," Group 484, Belgrade, 2011, available at, http://goo.gl/IY42H.

4.4. Asylum procedures for unaccompanied child asylum-seekers

59. There is no separate asylum procedure for unaccompanied or separated child asylum-seekers. In 2011, Serbia recorded an increase in the number of unaccompanied and separated asylum-seeking children over previous years. In 2010, 76 unaccompanied and separated children expressed the intention to seek asylum in Serbia. In 2011, 257 unaccompanied and separated children expressed the intention to seek asylum. Due primarily to slow administrative processing and the delayed appointment of the legal representatives, unaccompanied and separated children in the first half of 2011 lodged only four asylum applications. From January to the end of June 2012, 176 unaccompanied and separated children expressed their intention to seek asylum, of which 8 lodged their claim and one interview was conducted.

Recommendations:

- Establish age determination procedures;
- Increase reception capacity for child asylum-seekers in specialised centres and ensure adequate arrangements for reception of female child asylum seekers are established;
- Adhere in practice to the principle of the best interest of the child in all phases of the asylum procedure;
- Ensure training of all relevant personnel involved in asylum procedure of child asylum-seekers in order to increase understanding of their needs and to secure adequate response;
- Secure effective guardianship, preferably with a single guardian throughout the asylum process;
- Secure a dedicated budget for all needed services relevant to the well-being of child asylum-seekers.

5. Accommodation and other reception assistance for asylum-seekers

5.1. General situation

60. Until the final decision on an asylum application is made, asylum-seekers are to be provided with accommodation at one of the two existing Asylum Centres located in Banja Koviljaca and Bogovadja. The Centre in Banja Koviljaca is the original Centre; the Centre in Bogovadja opened in June 2011 in response to the growing number of asylum-seekers. However, it did not resolve the problem, as the capacities of the two Asylum Centres, currently at approximately 280 persons, is still not sufficient to accommodate all new asylum-seekers.

61. When the centres are full, SCR does not provide alternative accommodation or any assistance to asylum-seekers referred by the police to the Centres. Asylum-seekers pending admission arrange accommodation on their own and at their own expense by renting available rooms in the areas near the Asylum Centres. This practice is not in conformity with Article 39 of the Law on Asylum, which stipulates that asylum-seekers are entitled to accommodation.

62. While the Asylum Centre in Banja Koviljaca is an integrated institution within SCR, an employee of the SCR manages the Asylum Centre in Bogovadja under a temporary arrangement with the facility and staff belonging to the Serbian Red Cross. Both Centres are financed from the State budget. There are by-laws that regulate in detail all the issues concerning these Centres.[33]

63. A person may be accommodated in the Centre provided he/she has been referred there by the responsible officials of the MoI upon expressing his/her intention to seek asylum in Serbia. Transport is provided only for unaccompanied child asylum-seekers. The majority of asylum-seekers know where the Centres are and travel on their own. According to the rules on accommodation conditions and the provision of basic living conditions in the Asylum Centre, referred individuals are admitted from 8:30 am to 4:30 pm during weekdays.

64. The Centres provide a bed with linen, access to bathrooms, heating, use of electricity and water, necessities for personal hygiene and hygiene of the facilities. As stipulated in the Law on Asylum, basic living conditions are provided along with the accommodation and these include: food (three meals a day and additional meals for persons with special health regime), clothes, and a small allowance. Further to this, limited additional facilities are available for asylum-seekers within the Centres (TV room and play room for children).

65. A medical examination is obligatory for asylum-seekers during their reception in the Asylum Centre, in accordance with the regulations of the Minister responsible for health issues. HIV/AIDS testing is not mandatory. During medical examinations, asylum-seekers are informed of the possibility for voluntary and confidential counselling and administration of tests for HIV/AIDS and syphilis.

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33 See, e.g., Rulebook on Medical Examinations of Persons Seeking Asylum upon Arrival to Asylum Centre, Official Gazette of RS, No. 93/2008; Rulebook on Housing Conditions and the Provision of Basic Living Conditions in the AsylumCentre, Official Gazette of RS, No 31/2008; Rulebook on Social Assistance for the Persons Seeking or Having Been Granted Asylum, Official Gazette of RS, No. 44/2008; Rulebook on Method of Keeping Records and Contents on Persons Accommodated at the Asylum Centre, Official Gazette of RS, No. 31/2008; Rulebook on House Rules within the Asylum Centre, Official Gazette of RS, No. 31/2008, Rulebook on Medical Examinations of Persons Seeking Asylum upon Arrival to the Asylum Centre, Official Gazette of RS, No. 93/2008.

66. Medical care for asylum-seekers and refugees, except in the case of most serious emergencies, is not provided free of charge. There is no clear Ministry of Health instruction regarding the provision of health services to asylum-seekers and refugees. In the absence of the allocation of national financial resources to ensure such support to asylum-seekers, UNHCR, either directly or through its implementing partner, the Danish Refugee Council ("DRC"), provides basic health services to asylum-seekers in need who are accommodated in the Asylum Centres. This is based on the well-established close co-operation between DRC, UNHCR, the local primary health facilities, and the Ministry of Health. Necessary medicines and specialized medical devices, such as eyeglasses or crutches, as prescribed by local doctors, can be provided on an *ad hoc* basis to asylum-seekers through this UNHCR/DRC medical programme. However, resources are limited. As the Centres are located outside Belgrade, interpretation facilities to assist access to healthcare are also limited.

67. With respect to the conditions of accommodation, the principles of non-discrimination, family unity, gender equality and care for persons with special needs are respected. Although not mandated by law, separate accommodation is provided for single women. Asylum-seekers are obliged to respect house rules and cooperate with the relevant State officials.

68. Information leaflets in different languages are available explaining the rights and obligations of persons accommodated in the Centres. The Centres are open facilities and there are no restrictions concerning freedom of movement. Asylum-seekers may leave the area of the Centres; however, an absence for longer than 24 hours requires formal advance notice to the manager. In case an asylum-seeker who has not provided such advance notice does not return within 24 hours, he/she loses his/ her place in the Asylum Centre.

5.2. Situation in the Asylum Centre in Banja Koviljaca

69. Banja Koviljaca is a town approximately 130 km from Belgrade (2.5 hour drive), near the border with Bosnia and Herzegovina. The town is under the administration of the municipality of Loznica. The Asylum Centre in Banja Koviljaca has capacity to accommodate 88 persons. There are three floors with rooms, which enable separate accommodation of single males, families and single women, with or without children. Each of the floors has two separate bathrooms with several shower cabins. There are several rooms in the main part of the building for social activities: a kindergarten, TV room and a small meeting room. UNHCR's implementing partners regularly visit the facility and provide various psychosocial support services to asylum-seekers, including special programmes for children.

70. In the second half of 2011, an accommodation shortage led to tensions in Banja Koviljaca, with 100 to 200 asylum-seekers awaiting admission outside the Asylum Centre. These asylum-seekers were congregating in town awaiting accommodation and registration with the asylum authorities at the Asylum Centre. In addition to asylum-seekers, a substantial number of irregular migrants (those who neither applied for asylum nor had any intention of doing so) were also present in Banja Koviljaca. Police informed UNHCR that their number was around 800, whereas the media reported around 2,500.[34] In October 2011, after the alleged assault and rape of a female tourist in Banja Koviljaca involving a group of four migrants (none of whom were registered asylum-seekers), the local population organized public demonstrations demanding the relocation of the Asylum Centre. Currently, the presence of foreigners (asylum-seekers and migrants alike) not accommodated at the Asylum Centre has noticeably decreased. This could be attributed to increased police presence in town starting in early 2012.

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34 Cf. http://www.b92.net/eng/news/society-article.php?yyyy=2011&mm=11&dd=06&nav id=77208; http://www.smedia.rs/vesti/vest/79599/Banja-Koviljaca-Protest-Ilegalni-imigranti-Azilanti-Banja-Koviljaca-odlazite.html

5.3. Situation in the Asylum Centre in Bogovadja

71. The facility is located near the village of Bogovadja, some 70 kilometres southwest of Belgrade. It is an isolated location, situated in a forest two kilometres from the centre of village Bogovadja, twelve kilometres from the nearest town of Lajkovac, and four kilometres from the main road BelgradeCacak-Uzice. The population of Bogovadja is around 550 persons (212 households). There are no public transportation services between the facility and the village. The bus station is some 4 km away from the facility on the Cacak-Belgrade main highway where buses in both directions stop hourly.

72. The Serbian Red Cross premises that house the facility were previously used as a resort for children. The facility is comprised of three connected buildings for guests (accommodation, canteen with kitchen, classrooms, common recreation rooms, first aid ambulance, and offices) and two separate technical buildings (heating, warehouse, laundry and apartment for housekeeper). There are also four playgrounds, and it has the capacity to accommodate up to 200 persons.

73. There is an ambulance room with basic equipment for first aid in the facility. A visit by a medical doctor or nurse can be arranged if needed. There is an elementary health centre in the near-by village (two kilometres away), providing only basic medical services for adults. For specialized cares and examinations, there is a health centre in Lajkovac (twelve kilometres away).

74. UNHCR's implementing partners regularly visit the facility and provide various psychosocial support services to asylum-seekers, including special programmes for children.

Recommendations:

- In line with international and European standards, basic health services should be provided to asylum-seekers free of charge;
- Ensuring an adequate reception capacity for asylum-seekers is essential. The reception system needs to be flexible, in order to respond to fluctuations in the numbers of asylum applications and to the actual length of the asylum procedure;
- Enhance cooperation and coordination of all relevant state organs in the field of asylum and refugee protection.

6. Risk of deportation

75. The risk of deportation to countries of origin is relatively small for persons transferred to Serbia under readmission agreements. To UNHCR's knowledge, even though Serbia has readmission agreements with the European Community[35] and a number of bilateral agreements with EU and other States, foreign citizens are transferred to Serbia only from Hungary, Croatia and Bosnia and Herzegovina. Upon reception by the border police in Serbia on their return, third-country nationals are routinely taken to the local courts and sentenced for irregular border crossing with either a short term prison term (10 to 15 days) or a fine (usually equivalent of 50 Euros). They are usually issued an order to leave the territory of Serbia within three days, but this is not enforced. As there is no removal procedure in place, they are generally left to depart on their own, and many resume their journey towards Western Europe.

76. However, UNHCR received reports in November 2011 and again in February 2012 that migrants transferred from Hungary to Serbia were being put in buses and taken directly to the former Yugoslav Republic of Macedonia.[36] This coincides with reports in the local media in Serbia at that same time, that the police had destroyed makeshift camps near the Hungarian border on the outskirts of the Serbian city of Subotica. There have been other reports that the Serbian police have rounded up irregular migrants in Serbia and were similarly sent back to the former Yugoslav Republic of Macedonia. However, there are no reports that persons who have managed to apply for asylum in Serbia have been subject to such deportations.

77. UNHCR has not received information that unaccompanied children have been returned from Hungary. However, such returns do occur from Croatia. UNHCR was notified of one such return from Croatia and followed up on the case with the competent authorities in Serbia. The children in question were referred to the asylum procedure immediately upon transfer from Croatia. Later, however, they all left the Asylum Centre before having their asylum claims examined.

78. There is no reception assistance provided to persons transferred to Serbia under the readmission agreements. As stated above, they are immediately taken to local courts and sentenced for irregular border crossing. There is no system in place to distinguish asylum-seekers from other types of migrants, or to guarantee access to the asylum procedure for persons who might have tried to access the asylum procedure outside Serbia, or whose asylum applications were denied on the basis of Serbia being a safe third country. UNHCR is not able to systematically monitor these returns, and cannot assess what happens to these individuals upon return to Serbia.

Recommendations:

- Third country nationals returned under readmission agreements should be given full access to the Serbian asylum procedure, particularly when there is reason to believe that access to a full and substantive procedure had been denied elsewhere, e.g. in application of safe third country considerations.

35 European Union, *Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorization,* 18 September 2007, http://www.unhcr.org/refworld/docid/47fdfb110.html.

36 UNHCR in Skopje visited a group of deportees from Serbia who stated that after being returned from Hungary, they were transported through Serbia in buses, and ordered to cross into the territory of the former Yugoslav Republic of Macedonia in an irregular manner.

Conclusion

79. UNHCR has worked closely and intensively with the Serbian asylum authorities both before and after Serbia assumed responsibility for the conduct of the asylum procedure in April 2008. Despite some incremental improvements notably with regard to reception standards, Serbia's asylum system has been unable to cope with the recent increases in the numbers of asylum applicants. This has exposed significant shortcomings in numbers of personnel, expertise, infrastructure, implementation of the legislation and government support. The increase in the number of asylum-seekers has also brought to light shortcomings in the structural relationship between the Asylum Office managed by the MoI, and the Asylum Centres, managed independently by the SCR; at the time of this writing, the capacity (available bed space) in the Asylum Centres remains linked to accessing the asylum procedure. The current system is manifestly not capable of processing the increasing numbers of asylum-seekers in a manner consistent with international and EU norms. These shortcomings, viewed in combination with the fact that there has not been a single recognition of refugee status since April 2008, strongly suggest that the asylum system as a whole is not adequately recognizing those in need of international protection.

80. There is a need to set up a fair and efficient asylum procedure that is not only consistent with the existing legislative framework, but is also capable of adequately processing the claims of the increasing number of asylum-seekers in a manner consistent with international standards. This would require greater investment of resources by the government, continued and dedicated engagement with UNHCR and other relevant international actors, particularly concerning the asylum procedure, and deepened coordination among the respective ministries.

81. Until such a system is fully established in Serbia, for the reasons stated above, UNHCR recommends that Serbia not be considered a safe third country of asylum, and that countries therefore refrain from sending asylum-seekers back to Serbia on this basis.

UNHCR, August 2012

Note on Dublin transfers to Hungary of people who have transited through Serbia -- update

UNHCR observations on Hungary as a country of asylum

This paper is an update of the October 2012 UNHCR position paper urging countries to refrain from returning asylum-seekers to Hungary under the Dublin II Regulation, where they had transited through Serbia prior to their arrival in Hungary. UNHCR acknowledges the subsequent progress in asylum practice in Hungary, and accordingly amends its previous position.

In April 2012 UNHCR issued a report entitled '*Hungary as a country of asylum: observations on the situation of asylum-seekers and refugees in Hungary',*[1] which should be read in conjunction with this paper. It was followed by a report in September 2012 entitled '*Serbia as a country of asylum: observations on the situation of asylum-seekers and protection beneficiaries in Serbia'*.[2] Both documents review access to asylum procedures, standards of reception conditions, quality of asylum decision-making, detention practice, treatment of persons with special needs, and other issues.

Current situation

In November 2012, the Hungarian Parliament adopted a comprehensive package of legal amendments.[3] UNHCR welcomes these initiatives and the reported aim[4] of ensuring that those asylum-seekers whose asylum claims have not yet been decided may remain in the territory of Hungary pending an in-merit examination, and will not be subject to detention, as long as they apply immediately. Furthermore, UNHCR appreciates the reported intention to introduce additional legal guarantees regarding detention to ensure, *inter alia,* unhindered access to basic facilities, such as toilets, and the access of detainees with special needs to appropriate treatment.

[1] UNHCR , '*Hungary as a country of asylum: observations on the situation of asylum-seekers and refugees in Hungary*' , April 2012 ('UNHCR Hungary report'), http://www.unhcr.org/refworld/docid/4f9167db2.html

[2] UNHCR, *Serbia as a country of asylum: observation on the situation of asylum-seekers and protection beneficiaries in Serbia,'* September 2012 ('UNHCR Serbia report'), http://www.unhcr.org/refworld/docid/50471f7e2.html.

[3] Implementing instructions at the ministerial (Ministry of Interior) level are being drafted as of the time of this writing, and therefore are not the subject of this review.

[4] The draft amendments have not yet been shared officially with UNHCR or its NGO interlocutors for comments.

United Nations High Commissioner for Refugees – Bureau for Europe
11b Rue van Eyck, 1050 Brussels Tel.: +32 2 627 5999 Fax: +32 2 627 5978 E-mail: belbrbe@unhcr.org

UNHCR observes that Hungary no longer denies an examination on the merits of asylum claims where asylum-seekers transit via Serbia or Ukraine prior to their arrival in Hungary. Such asylum-seekers are no longer returned to Serbia or Ukraine.[5] In addition, access to asylum procedures in Hungary has improved for those asylum-seekers returned to Hungary under the Dublin II system whose claims had not been examined and decided in Hungary (i.e. those for whom no final in-merit decision on the substance of the claim for international protection had been taken). Such asylum-seekers have access to an in-merit examination of their claims upon their return, provided they make a formal application to (re-)initiate the examination of the previously-made asylum claim. They will then not be detained and may await the outcome of their procedure in Hungary.

Some improvements have also been observed with regard to the detention of asylum-seekers. UNHCR notes that the number of asylum-seekers detained has significantly declined in 2012 (e.g. from 171 in February 2012 to 30 in December 2012). Asylum-seekers who apply for asylum immediately upon their arrival, or at the latest during their first interview with the aliens police, are no longer detained. At the same time, persons who fail to apply immediately, or who otherwise fail to communicate such intention effectively, continue to be subject to detention for the duration of the entire asylum procedure.

UNHCR further recognizes the efforts of the Hungarian authorities to improve the monitoring of detention conditions by the National Police HQs and by the Chief Prosecutor's Office. In addition, a working group[6] has been established to review the judicial practices that had permitted the return of asylum-seekers to Serbia without an examination of the merits of their claims for protection, and that allowed for the routine prolongation of administrative detention of asylum-seekers without the need to demonstrate the justification for detention in the specific circumstances of the case.

Nevertheless, a comprehensive and structural review remains necessary to ensure that fundamental improvements to the strict detention regime and the related conditions imposed on detained asylum-seekers (and irregular migrants) will be guaranteed in law and sustained in practice.

[5] UNHCR, *Note on Dublin transfers to Hungary of people who have transited through Serbia*, October 2012, http://www.unhcr.org/refworld/docid/507298a22.html.

[6] This working group comprises judges of the Curia (Hungary's highest civil court), judges responsible for the review of administrative decisions in refugee status determination and on detention, as well as academic experts.

Conclusion

UNHCR has previously expressed concerns regarding Hungary's treatment of the asylum claims of most Dublin II transferees as subsequent applications without guaranteed protection from removal to third countries before an examination of the merits of asylum claims. UNHCR takes note of and acknowledges positive changes in practice and the government's stated intention to amend legislation to further strengthen guarantees and procedures to ensure that asylum-seekers who transited through Serbia or the Ukraine have access to a full in-merit procedure. UNHCR will continue its work with the Government of Hungary to further improve the asylum system and address the remaining gaps. Together with the authorities, UNHCR and its partners continue to systematically monitor the actual practice and will periodically review its position as appropriate to reflect changes in practice and legislation.

UNHCR

December 2012

The Return Directive, the international protection law

Anna Bengtsson

In December 2008, *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* (hereinafter: the Return Directive or the Directive) was approved in the frame of co-decision procedure.

The preamble of the Directive prescribes that a fair and efficient asylum system should be in place which fully respects the principle of non-refoulement. It also specifies that the Return Directive shall be applied without prejudice to the obligations resulting from the Geneva Convention relating to the status of refugees of 28 July 1951 as amended by the New York protocol of 31 January 1967. It also declares that the Directive respects and observes the fundamental rights and principles recognised in particular by the Charta of fundamental rights of the European Union.

Since the entry into force of the Lisbon Treaty in December 2009, the Charter of Fundamental Rights has become a binding primary European Union law.
Article 18 of the Charter declares that '*[a] the right of 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 establishing the European Community (hereinafter: Treaties)*'. In other words the Member States must respect their obligations arising from the Geneva Convention of 1951.
In addition to references to the Geneva Convention of 1951 and the provisions on asylum law included in the preamble, the operative clauses of the text make mention of the principle of non-refoulement three times: in Article 4. (4) b), in the last indent of Article 5 and in Article 9 (1) a).

Article 4 of the Directive specifies that the Member States shall respect the principle of non-refoulement also with regard to those third country nationals who are excluded from the scope of the Directive. Article 2 (2) of the Directive defines these persons as such persons, who are apprehended or intercepted by the competent authorities 'in connection with' the irregular crossing of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State and/or who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction.

Article 5 also obliges the Member States to respect the principle of non-refoulement when implementing the Directive. It is a general safety clause which is applicable to third country nationals being under the scope of the Directive.

As further guarantee, Article 9 (1) a) obliges the Member States to postpone removal when it would violate the principle of non-refoulement. This special guarantee is intended to provide guarantee for persons whose international protection related claims occur on-site ('*sur place'*).

In addition, Article 11 (5) lays down that even in cases where return decision is accompanied by an entry ban – which entry ban prevents the third country national from entering the territory of the European Union for a certain length of time – ordering the entry ban cannot infringe their right to refugee status or subsidiary protection status as defined in the Recognition of Refugees Directive.

The risk of not having access to international protection exists in two categories of third country nationals: in case of those against whom an entry ban was ordered; and in case of those who because of this are excluded from the scope of the Directive as '*they were apprehended or intercepted by the competent authorities in connection with the illegal crossing [...] of the external border of a Member State*'.

Entry ban and protection claims

Entry ban is a public administration or judicial decision or act prohibiting the entry (return) into the territory of the EU and stay on the territory of the Member States for a specified period of time.

Article 11 (1) provides that the return decision for a third country national should be coupled with an entry ban in two specific cases. At the same time, broad scale of consideration is provided to

Member States by giving them the opportunity to order an entry ban 'in other cases' as well. Potentially all return decisions may be accompanied by an entry ban.

Article 11 (5) contains a general safety clause which has been included in the text in order to prevent the entry ban from directly resulting in the erosion of the right to apply for asylum. In spite of this clause, the lack of guarantees for appropriate procedures may give rise to concerns in terms of respecting the principle of non-refoulement.

In the event of changed circumstances in the country of origin and/or the change of the circumstances in relation with the third country national resulting in international protection claims, the existing entry ban and the related SIS alert would probably prevent the entry of the applicants for asylum to the territory of the European Union and consequently would prevent their access to an asylum procedure. The reason is that the third country national is refused entry at the external border and is refused to be granted a visa at the local representation of the European Union Member State.

The principle of non-refoulement may be infringed in Article 11 (4) of the Directive. The entry ban and the related SIS alerts are applied all over the EU. If a third country national who is subject of an entry ban attempts to enter the territory of the EU through a Member State different from the one ordering the entry ban, this Member State shall consult '*the Member State having issued the entry ban*'. Until consultation is finished, no permit of entry can be given to the third country national. That would result in the infringement of Article 33 of the Geneva Convention of 1951.

Third country nationals excluded from under the scope of the Directive

In accordance with Article 2 (2), third country nationals apprehended or intercepted in connection with irregular crossing cannot be considered as included in the scope of the Directive. The Directive gives no definition of what is to be meant by the concept of '*in connection with irregular crossing*'.

Because of the visa systems and other entry limitations, a number of persons requesting protection are forced to illegally enter the EU. According to the main rule, they all qualify as persons excluded from the scope of the Directive. Consequently, they could not enjoy certain guarantees provided in the Directive and would have difficulties to apply the safety clause

against non-refoulement in Article 4. (4).

As they are excluded from the scope of the Directive, Member States are not obliged to issue return decision based on Article 6 (1). For the same reason, the Directive does not guarantee for them access to effective legal remedy as prescribed in Article 13.

From practical aspects, persons excluded from the scope of the Directive have difficulties to apply for protection and provide evidence that their return may infringe the principle of non-refoulement.

With respect to third country nationals excluded form the scope of the Directive evidences of the infringement of the principle of non-refoulement have been identified in the context of the application of readmission agreements.

Article 2. (2) allows Member States to apply accelerated procedures – generally – prescribed in bilateral and European Union readmission agreements. By applying this accelerated procedure, a person who was apprehended following irregular crossing in the vicinity of the border of a Member State and from the territory of a state being a party to the readmission agreement – the Member State may submit a readmission request within 2 workdays following the apprehension of such person. The requested state shall respond within 2 workdays dated from the receipt of such request. If no response is received within this short deadline, receipt can be considered accepted. In other words: by applying the accelerated readmission procedure, the third country national may be returned to the third country where it is exposed to the risk of persecution and where within 4 days it is exposed to further return.

This rather short deadline makes access to asylum procedure and effective legal remedy against re-foulement impossible in practice.

The application of Article 2. (2) and the exclusion from enjoying certain guarantees provided for in the Directive may result in the infringement of the principle of non-refoulement in other cases as well. That would be the situation in case of a third country national who would be soon returned and would soon become '*sur place*' refugee as the situation of the country of origin suddenly changes. As this person is excluded from the scope of the Directive, the postponement of the removal based on Article 9. (1) will not be guaranteed. In addition, he would not have access to the legal remedy provided for in Article 13 either.

Applications for international protection submitted by third country nationals under detention for removal purposes

Preamble (9) declares the following:

> '[...] 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'.

This provision is important because it regulates when the applicant for asylum in detention preceding removal and refused falls under the asylum acquis, and when it is included under the scope of the Return Directive.

In cases where national rules of law provide for suspension, the decision terminating the right of stay refers to final court or regional court resolution, that is, to such a resolution against which no legal remedy can be submitted. In cases where requests for temporary measure must be submitted to a court or regional court until the second instance procedure is closed for the purpose of obtaining a right of stay, '*the decision ending the right of stay*' refers to the resolution on temporary measure. If a positive decision is made on the application for temporary measure, in that case, the decision ending the right of stay is a final resolution.

This was repeated by the Court of the European Union in the case Said Shamilovich Kadzoev vs. Direktsia 'Migratsia' pri Ministerstvo na vatreshnite raboti (Migration Directorate of the Ministry of Interior).

Applicants for international protection are not included in the scope of the Return Directive. This is applicable to third country nationals who are in detention for the purpose of preparation of return and/or the implementation of removal procedure. Following the submission of application for asylum, the Return Directive cannot be applied in the interest of keeping them in detention preceding removal. These applicants are included under the scope of a different legal regulation applicable in respect of the refugee acquis.

In that context, Article 18 (1) of the Directive on refugee procedures clearly declares that Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum. Yet the Directive on the reception of applicants for asylum allows Member States to limit the residence of applicants for international protection to a definite place of residence in line with their national law if it proves to be necessary for reasons of law or public order.

The Member States must decide – in accordance with the conditions stated in European Union and national law – whether a third country national held in detention prior to removal

should also be held in detention following his submission of an application for asylum. A claim can be submitted against the decision on the 'limitation' of the residence of the applicant for international protection to a definite place. Following this, the National Court shall establish if stay in an alien policy detention facility following the submission of the application for asylum during detention preceding removal is in compliance with '*the conditions contained in the community and national provisions on asylum*'.

In addition, the detention of applicants for asylum must also be in conformity with international law. Pursuant to the guidelines of the United Nations High Commissioner for Refugees (UNHCR), detention of applicants for asylum can only take place in the following four cases:

1. control of personal identity;
2. determination of factors serving as the basis for application for refugee status or for asylum;
3. handling of cases where the refugees or asylum seekers destroyed their travel documents and/or documents related to their personal identity or they used false documents in order to deceive the authorities of the state in which state they intended to apply for asylum; or
4. protection of national security or public order.

In the first case the third country national submitting application for asylum in the course of detention preceding removal is already known. This way – according to the general rule – his/her detention can no longer be verified. The same is true for the third case.

In the second case the guidelines by the UN High Commissioner for Refugees make it clear that the applicant for asylum can be held in detention solely for the purpose of preliminary hearing conducted to determine the basis of the application for asylum. This cannot be used to verify detention during the full time of the procedure aiming at determining refugee status or for an indefinite period of time.

Detention for national security or public order reasons refers to cases where evidences are available to provide proof that the applicant for asylum has criminal records and/or has contacts which in case of giving permission for entry would probably mean a risk for public order and national security.

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2011

„European Union law – Principles – Fundamental rights – Implementation of European Union law – Prohibition of inhuman or degrading treatment – Common European Asylum System – Regulation (EC) No 343/2003 – Concept of 'safe countries' – Transfer of an asylum seeker to the Member State responsible – Obligation – Rebuttable presumption of compliance, by that Member State, with fundamental rights"

In Joined Cases C-411/10 and C-493/10,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom) and the High Court (Ireland), by decisions of 12 July and 11 October 2010, lodged at the Court on 18 August and 15 October 2010 respectively, in the proceedings

N. S. (C-411/10)

Secretary of State for the Home Department

and

M. E. (C-493/10),

A. S. M.,

M. T.,

K. P.,

E. H.

Refugee Applications Commissioner,

Minister for Justice, Equality and Law Reform,

intervening parties:

Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK) (C-411/10),

United Nations High Commissioner for Refugees (UNHCR) (UK) (C-411/10),

Equality and Human Rights Commission (EHRC) (C-411/10),

Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (IRL) (C-493/10),

United Nations High Commissioner for Refugees (UNHCR) (IRL) (C-493/10),

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, J. Malenosvský and U. Lõhmus, Presidents of Chambers, A. Rosas (Rapporteur), M. Ilešič, T. von Danwitz, A. Arabadjiev, C. Toader and J.J. Kasel, Judges,

Advocate General: V. Trstenjak,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 June 2011,

after considering the observations submitted on behalf of:

– N. S., by D. Rose, QC, M. Henderson and A. Pickup, Barristers, and by S. York, Legal Officer,

– M.E. and Others., by C. Power, BL, F. McDonagh, SC, and G. Searson, Solicitor,

– Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK) (Case C-411/10), by S. Cox and S. Taghavi, Barristers, and J. Tomkin, BL,

– Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (IRL) (Case C-493/10), by B. Shipsey, SC, J. Tomkin, BL, and C. Ó Briain, Solicitor,

– The Equality and Human Rights Commission (EHRC), by G. Robertson, QC, J. Cooper and C. Collier, Solicitors,

– The United Nations High Commissioner for Refugees (UNHCR) (UK), by R. Husain, QC, R. Davies, Solicitor, and S. Knights and M. Demetriou, Barristers,

– Ireland, by D. O'Hagan, acting as Agent, assisted by S. Moorhead, SC, and D. Conlan Smyth, BL,

– the United Kingdom Government, by C. Murrell, acting as Agent, and D. Beard, Barrister,

– the Belgian Government, by C. Pochet and T. Materne, acting as Agents,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the German Government, by T. Henze and N. Graf Vitzthum, acting as Agents,

– the Government of the Hellenic Republic, by A. Samoni-Rantou, M. Michelogiannaki, T. Papadopoulou, F. Dedousi and M. Germani, acting as Agents,

– the French Government, by G. de Bergues, and by E. Belliard and B. Beaupère-Manokha, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by M. Russo, avvocato dello Stato,

– the Netherlands Government, by C.M. Wissels and M. Noort, acting as Agents,

– the Austrian Government, by G. Hesse, acting as Agent,

– the Polish Government, by M. Arciszewski, B. Majczyna and M. Szpunar, acting as Agents,

– the Slovenian Government, by N. Aleš Verdir and V. Klemenc, acting as Agents,

– the Finnish Government, by J. Heliskoski, acting as Agent,

– the European Commission, by M. Condou-Durande and by M. Wilderspin and H. Kraemer, acting as Agents,

– the Swiss Confederation, by O. Kjelsen, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 22 September 2011,

gives the following

Judgment

1 The two references for preliminary rulings concern the interpretation, first, of Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1) and, second, the fundamental rights of the European Union, including the rights set out in Articles 1, 4, 18, 19(2) and 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and, third, Protocol (No 30) on the application of the Charter to Poland and to the United Kingdom (OJ 2010 C 83, p. 313; 'Protocol (No 30)').

2 The references have been made in proceedings between asylum seekers who were to be returned to Greece pursuant to Regulation No 343/2003 and, respectively, the United Kingdom and Irish authorities.

Legal context

International law

3 The Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 (United Nations Treaty Series, Vol. 189, p. 150, No 2545 (1954)) ('the Geneva Convention'), entered into force on 22 April 1954. It was extended by the Protocol relating to the Status of Refugees of 31 January 1967 ('the 1967 Protocol'), which entered into force on 4 October 1967.

4 All the Member States are contracting parties to the Geneva Convention and the 1967 Protocol, as are the Republic of Iceland, the Kingdom of Norway, the Swiss

Confederation and the Principality of Liechtenstein. The European Union is not a contracting party to the Geneva Convention or to the 1967 Protocol, but Article 78 TFEU and Article 18 of the Charter provide that the right to asylum is to be guaranteed with due respect for the Geneva Convention and the 1967 Protocol.

5 Article 33(1) of the Geneva Convention, headed 'Prohibition of expulsion or return ("refoulement")', provides:

'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

The Common European Asylum System

6 In order to achieve the objective, laid down by the European Council meeting in Strasbourg on 8 and 9 December 1989, of the harmonisation of their asylum policies, the Member States signed in Dublin, on 15 June 1990, the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (OJ 1997 C 254, p. 1; 'the Dublin Convention'). The Dublin Convention entered into force on 1 September 1997 for the twelve original signatories, on 1 October 1997 for the Republic of Austria and the Kingdom of Sweden, and on 1 January 1998 for the Republic of Finland.

7 The conclusions of the European Council meeting in Tampere on 15 and 16 October 1999 envisaged, inter alia, the establishment of a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to a place where they again risk being persecuted, that is to say, maintaining the principle of non-refoulement.

8 The Amsterdam Treaty of 2 October 1997 introduced Article 63 into the EC Treaty, which conferred competence on the European Community to adopt the measures recommended by the European Council in Tampere. That treaty also annexed to the EC Treaty the Protocol (No 24) on asylum for nationals of Member States of the European Union (OJ 2010 C 83, p. 305), according to which those States are to be regarded as constituting safe countries of origin in respect to each other for all legal and practical purposes in relation to asylum matters.

9 The adoption of Article 63 EC made it possible, inter alia, to replace between the Member States, with the exception of the Kingdom of Denmark, the Dublin Convention by Regulation No 343/2003, which entered into force on 17 March 2003. It is also on that legal basis that the directives applicable to the cases in the main proceedings were adopted, for the purpose of establishing the Common European Asylum System foreseen by the conclusions of the Tampere European Council.

10 Since entry into force of the Lisbon Treaty, the relevant provisions in asylum matters are Article 78 TFEU, which provides for the establishment of a Common European Asylum System, and Article 80 TFEU, which reiterates the principle of solidarity and fair sharing of responsibility between the Member States.

11 The European Union legislation of relevance to the present cases includes:

- Regulation No 343/2003;

- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18);

- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12, and corrigendum, OJ 2005 L 204, p. 24);

- Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13, and corrigendum, OJ 2006 L 236, p. 36).

12 It is also appropriate to mention Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ 2001 L 212, p. 12). As is apparent from recital 20 in the preamble to that directive, one of its objectives is to provide for a solidarity mechanism intended to contribute to the attainment of a balance of effort between Member States in receiving and bearing the consequences of receiving displaced persons in the event of a mass influx.

13 The recording of the fingerprint data of foreign nationals illegally crossing an external border of the European Union makes it possible to determine the Member State responsible for an asylum application. Such recording is provided for by Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (OJ 2000 L 316, p. 1).

14 Regulation No 343/2003 and Directives 2003/9, 2004/83 and 2005/85 refer, in their first recitals, to the fact that a common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community. They also refer, in their second recitals, to the conclusions of the Tampere European Council.

15 Each of those texts states that it respects the fundamental rights and observes the principles recognised, in particular, by the Charter. Among others, recital 15 in the preamble to Regulation No 343/2003 states that it seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter; recital 5 in the preamble to Directive 2003/9 states that, in particular, that directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the Charter; and recital 10 in the preamble to Directive 2004/83 states that, in particular, that directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.

16 Article 1 of Regulation No 343/2003 lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national.

17 Article 3(1) and (2) of that regulation provide:

'1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application

shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.'

18 In order to determine which is 'the Member State responsible' for the purposes of Article 3(1) of Regulation No 343/2003, Chapter III of that regulation lists objective and hierarchical criteria relating to unaccompanied minors, family unity, the issue of a residence document or visa, irregular entry into or residence in a Member State and applications made in an international transit area of an airport.

19 Article 13 of that regulation provides that, where no Member State can be designated according to the hierarchy of criteria, the default rule is that the first Member State with which the application was lodged will be responsible for examining the asylum application.

20 According to Article 17 of Regulation No 343/2003, where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible, call upon the other Member State to take charge of the applicant.

21 Article 18(7) of that regulation provides that failure by the requested Member State to act before the expiry of a two-month period, or within one month where urgency is pleaded, is to be tantamount to accepting the request, and entails the obligation, for that Member State, to take charge of the person, including the provisions for proper arrangements for arrival.

22 Article 19 of Regulation No 343/2003 is worded as follows:

'(1) Where the requested Member State accepts that it should take charge of an applicant, the Member State in which the application for asylum was lodged shall notify the applicant of the decision not to examine the application, and of the obligation to transfer the applicant to the responsible Member State.

(2) The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer unless the courts or competent bodies so decide on a case-by-case basis if national legislation allows for this.

…

(4) Where the transfer does not take place within the six months' time limit, responsibility shall lie with the Member State in which the application for asylum was

lodged. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the asylum seeker or up to a maximum of eighteen months if the asylum seeker absconds.

…'

23 The United Kingdom participates in the application of each of the regulations and the four directives mentioned in paragraphs 11 to 13 of the present judgment. Ireland, by contrast, participates in the application of the regulations and of Directives 2004/83, 2005/85 and 2001/55, but not Directive 2003/9.

24 The Kingdom of Denmark is bound by the Agreement which it concluded with the European Community extending to Denmark the provisions of Council Regulation (EC) No 2725/2000, approved by Council Decision 2006/188/EC of 21 February 2006 (OJ 2006 L 66, p. 37). It is not bound by the directives referred to in paragraph 11 of the present judgment.

25 The European Community has also concluded an Agreement with the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or Iceland or Norway, approved by Council Decision 2001/258/EC of 15 March 2001 (OJ 2001 L 93, p. 38).

26 The European Community has similarly concluded an Agreement with the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, approved by Council Decision 2008/147/EC of 28 January 2008 (OJ 2008 L 53, p. 3), and the Protocol with the Swiss Confederation and the Principality of Liechtenstein to the Agreement between the European Community and the Swiss Confederation concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Switzerland, approved by Council Decision 2009/487/EC of 24 October 2008 (OJ 2009 L 161, p. 6).

27 Directive 2003/9 lays down minimum standards for the reception of asylum seekers in Member States. Those standards concern in particular the obligations concerning the information and documents which must be provided to asylum seekers, the decisions which may be adopted by the Member States concerning residence and freedom of movement of asylum seekers within their territory, families, medical screening, schooling and education of minors, employment of asylum seekers and their access to vocational training, the general rules on material reception conditions and health care available to asylum applicants, the modalities for material reception conditions and the health care which must be granted to asylum applicants.

28 Directive 2003/9 also provides for an obligation to control the level of reception conditions and the possibility of appealing with regard to the matters and decisions covered by it. In addition, it contains rules concerning the training of the authorities and the necessary resources in connection with the national provisions enacted to implement the Directive.

29 Directive 2004/83 lays down minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. Chapter II thereof contains several provisions explaining how to assess applications. Chapter III

thereof lays down the conditions which must be satisfied in order to qualify for being a refugee. Chapter IV concerns refugee status. Chapters V and VI concern the conditions which must be satisfied in order to qualify for subsidiary protection and the status conferred thereby. Chapter VII contains various rules setting out the content of international protection. According to Article 20(1) of Directive 2004/83, that chapter is to be without prejudice to the rights laid down in the Geneva Convention.

30 Directive 2005/85 lays down the rights of asylum seekers and the procedures for examining applications.

31 Article 36(1) of Directive 2005/85, under the heading 'The European safe third countries concept' states:

'Member States may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II, shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2.'

32 The conditions laid down in Article 36(2) include:

– ratification of and compliance with the provisions of the Geneva Convention;

– the existence of an asylum procedure prescribed by law;

– ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), and compliance with its provisions, including the standards relating to effective remedies.

33 Article 39 of Directive 2005/85 sets out the effective remedies that it must be possible to pursue before the courts of the Member States. Article 39(1)(a)(iii) refers to decisions not to conduct an examination pursuant to Article 36 of the directive.

The actions in the main proceedings and the questions referred for a preliminary ruling

Case C-411/10

34 N.S., the appellant in the main proceedings, is an Afghan national who came to the United Kingdom after travelling through, among other countries, Greece. He was arrested in Greece on 24 September 2008 but did not make an asylum application.

35 According to him, the Greek authorities detained him for four days and, on his release, gave him an order to leave Greece within 30 days. He claims that, when he tried to leave Greece, he was arrested by the police and was expelled to Turkey, where he was detained in appalling conditions for two months. He states that he escaped from his place of detention in Turkey and travelled from that State to the United Kingdom, where he arrived on 12 January 2009 and where, that same day, he lodged an asylum application.

36 On 1 April 2009, the Secretary of State for the Home Department ('the Secretary of State') made a request to the Hellenic Republic, pursuant to Article 17 of Regulation No

343/2003, to take charge of the appellant in the main proceedings in order to examine his asylum application. The Hellenic Republic failed to respond to that request within the time limit stipulated by Article 18(7) of the Regulation and was accordingly deemed, on 18 June 2009, pursuant to that provision, to have accepted responsibility for examining the appellant's claim.

37 On 30 July 2009, the Secretary of State notified the appellant in the main proceedings that directions had been given for his removal to Greece on 6 August 2009.

38 On 31 July 2009, the Secretary of State notified the appellant in the main proceedings of a decision certifying that, under paragraph 5(4) of Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ('the 2004 Asylum Act'), his claim that his removal to Greece would violate his rights under the ECHR was clearly unfounded, since Greece is on the 'list of safe countries' in Part 2 of Schedule 3 to the 2004 Asylum Act.

39 The consequence of that certification decision was, in accordance with paragraph 5(4) of Part 2 of Schedule 3 to the 2004 Asylum Act, that the appellant in the main proceedings did not have a right to lodge an immigration appeal in the United Kingdom, with suspensive effect, against the decision ordering his transfer to Greece, an appeal to which he would have been entitled in the absence of such a certification decision.

40 On 31 July 2009, the appellant in the main proceedings requested the Secretary of State to accept responsibility for examining his asylum claim under Article 3(2) of the Regulation, on the ground that there was a risk that his fundamental rights under European Union law, the ECHR and/or the Geneva Convention would be breached if he were returned to Greece. By letter of 4 August 2009, the Secretary of State maintained his decision to transfer the appellant in the main proceedings to Greece and his decision certifying that the claim of the appellant in the main proceedings based on the ECHR was clearly unfounded.

41 On 6 August 2009, the appellant in the main proceedings issued proceedings seeking judicial review of the Secretary of State's decisions. As a result, the Secretary of State annulled the directions for his transfer. On 14 October 2009, the permission sought by the appellant for judicial review was granted.

42 The application was examined by the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) from 24 to 26 February 2010. By judgment of 31 March 2010, Mr Justice Cranston dismissed the application but granted the appellant in the main proceedings leave to appeal to the Court of Appeal (England & Wales) (Civil Division).

43 The appellant in the main proceedings appealed to that court on 21 April 2010.

44 It emerges from the order for reference, in which the Court of Appeal refers to the judgment of the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), that:

- asylum procedures in Greece are said to have serious shortcomings: applicants encounter numerous difficulties in carrying out the necessary formalities; they are not provided with sufficient information and assistance; their claims are not examined with due care;

- the proportion of asylum applications which are granted is understood to be extremely low;

- judicial remedies are stated to be inadequate and very difficult to access;

- the conditions for reception of asylum seekers are considered to be inadequate: applicants are either detained in inadequate conditions or they live outside in destitution, without shelter or food.

45 The High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court) considered that the risks of refoulement from Greece to Afghanistan and Turkey were not established in the case of persons returned under Regulation No 343/2003, but that view is contested by the appellant in the main proceedings before the referring court.

46 Before the Court of Appeal (England & Wales) (Civil Division), the Secretary of State accepted that 'the fundamental rights set out in the Charter can be relied on as against the United Kingdom and … that the Administrative Court erred in holding otherwise'. According to the Secretary of State, the Charter simply restates rights which already form an integral part of European Union law and does not create any new rights. However, the Secretary of State contended that the High Court of Justice (England & Wales) Queen's Bench Division (Administrative Court) was wrong to find that she was bound to take into account European Union fundamental rights when exercising her discretion under Article 3(2) of the Regulation. According to the Secretary of State, that discretionary power does not fall within the scope of European Union law.

47 In the alternative, the Secretary of State contended that the obligation to observe European Union fundamental rights does not require her to take into account the evidence that, if the appellant were returned to Greece, there would be a substantial risk that his fundamental rights under European Union law would be infringed. She maintained that the scheme of Regulation No 343/2003 entitles her to rely on the conclusive presumption that Greece (or any other Member State) would comply with its obligations under European Union law.

48 Finally, the appellant in the main proceedings contended before the referring court that the protection conferred by the Charter is higher than and goes beyond that guaranteed by, inter alia, Article 3 of the ECHR, which might lead to a different outcome in the present case.

49 At the hearing of 12 July 2010, the referring court decided that decisions on certain questions of European Union law were necessary for it to give judgment on the appeal.

50 In those circumstances, the Court of Appeal (England & Wales) (Civil Division) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1) Does a decision made by a Member State under Article 3(2) of … Regulation No 343/2003 whether to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the Regulation fall within the scope of EU law for the purposes of Article 6 [TEU] and/or Article 51 of the Charter …?

If Question 1 is answered in the affirmative:

2) Is the duty of a Member State to observe EU fundamental rights (including the rights set out in Articles 1, 4, 18, 19(2) and 47 of the Charter) discharged where that State sends the asylum seeker to the Member State which Article 3(1) [of Regulation No 343/2003] designates as the responsible State in accordance with the criteria set out in Chapter III of the regulation ("the responsible State"), regardless of the situation in the responsible State?

3) In particular, does the obligation to observe EU fundamental rights preclude the operation of a conclusive presumption that the responsible State will observe (i) the claimant's fundamental rights under European Union law; and/ or (ii) the minimum standards imposed by Directives 2003/9 …, 2004/83 … and 2005/85 …?

4) Alternatively, is a Member State obliged by European Union law, and, if so, in what circumstances, to exercise the power under Article 3(2) of the Regulation to examine and take responsibility for a claim, where transfer to the responsible State would expose the [asylum] claimant to a risk of violation of his fundamental rights, in particular the rights set out in Articles 1, 4, 18, 19(2) and/or 47 of the Charter, and/or to a risk that the minimum standards set out in Directives [2003/9, 2004/83 and 2005/85] will not be applied to him?

5) Is the scope of the protection conferred upon a person to whom Regulation [No 343/2003] applies by the general principles of European Union law, and, in particular, the rights set out in Articles 1, 18 and 47 of the Charter wider than the protection conferred by Article 3 of the ECHR?

6) Is it compatible with the rights set out in Article 47 of the Charter for a provision of national law to require a court, for the purpose of determining whether a person may lawfully be removed to another Member State pursuant to Regulation [No 343/2003], to treat that Member State as a State from which the person will not be sent to another State in contravention of his rights pursuant to the [ECHR] or his rights pursuant to the [Geneva Convention] and [the 1967 Protocol]?

7) In so far as the preceding questions arise in respect of the obligations of the United Kingdom, are the answers to [the second to sixth questions] qualified in any respect so as to take account of the Protocol (No 30)?'

Case C-493/10

51 This case concerns five appellants in the main proceedings, all unconnected with each other, originating from Afghanistan, Iran and Algeria. Each of them travelled via Greece and was arrested there for illegal entry. They then travelled to Ireland, where they claimed asylum. Three of the appellants in the main proceedings claimed asylum without disclosing that they had previously been in Greece, whilst the other two admitted they had previously been in Greece. The Eurodac system confirmed that all five appellants had previously entered Greece, but that none of them had claimed asylum there.

52 Each of the appellants in the main proceedings resists return to Greece. As is apparent from the order for reference, it has not been argued that the transfer of the appellants to Greece under Regulation No 343/2003 would violate Article 3 ECHR because of a risk of refoulement, chain refoulement, ill treatment or suspension of asylum claims. It is also not alleged that the transfer would breach another article of the ECHR. The appellants in the main proceedings argued that the procedures and conditions for asylum seekers in Greece are inadequate and that Ireland is therefore

required to exercise its power under Article 3(2) of Regulation No 343/2003 to accept responsibility for examining and deciding on their asylum claims.

53 In those circumstances, the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1) Is the transferring Member State under … Regulation (EC) No 343/2003 obliged to assess the compliance of the receiving Member State with Article 18 of the Charter …, … Directives 2003/9/EC, 2004/83/EC and 2005/85/EC and Regulation (EC) No 343/2003?

2) If the answer is yes, and if the receiving Member State is found not to be in compliance with one or more of those provisions, is the transferring Member Sate obliged to accept responsibility for examining the application under Article 3(2) of … Regulation (EC) No 343/2003?’

54 Cases C-411/10 and C-493/10 were, by order of the President of the Court of 16 May 2011, joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred for a preliminary ruling

The first question in Case C-411/10

55 By its first question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the decision adopted by a Member State on the basis of Article 3(2) of Regulation No 343/2003 to examine a claim for asylum which is not its responsibility under the criteria set out in Chapter III of that regulation falls within the scope of European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.

Observations submitted to the Court

56 N.S., the Equality and Human Rights Commission (EHRC), Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK), the United Nations High Commissioner for Refugees (UNHCR), the French, Netherlands, Austrian and Finnish Governments and the European Commission consider that a decision adopted on the basis of Article 3(2) of Regulation No 343/2003 falls within the scope of European Union law.

57 N.S. points out, in that regard, that the exercise of the power provided for by that provision will not necessarily be more favourable to the applicant, which explains why, in its assessment of the Dublin system (COM (2007) 299 final), the Commission proposed that exercise of the power provided for by Article 3(2) of Regulation No 343/2003 should be subject to the consent of the asylum seeker.

58 According to Amnesty International Ltd and the AIRE Centre (Advice on Individual Rights in Europe) (UK) and the French Government, in particular, the possibility provided for in Article 3(2) of Regulation No 343/2003 is justified by the fact that the purpose of the Regulation is to protect fundamental rights and that it might be necessary to exercise the power provided for by that article.

59 The Finnish Government emphasises that Regulation No 343/2003 forms part of a set of rules establishing a system.

60 According to the Commission, when a regulation confers a discretionary power on a Member State, it must exercise that power in accordance with European Union law (Case 5/88 *Wachauf* [1989] ECR 2609; Case C-578/08 *Chakroun* [2010] ECR I-1839; and Case C-400/10 PPU *McB.* [2010] ECR I-0000). It points out that a decision adopted by a Member State on the basis of Article 3(2) of Regulation No 343/2003 has consequences for that Member State, which will be bound by the procedural obligations of the European Union and by the directives.

61 Ireland, the United Kingdom, the Belgian Government and the Italian Government, on the other hand, consider that such a decision under Article 3(2) of the Regulation does not fall within the scope of European Union law. The arguments put forward are the clarity of the text, which provides for an option, the reference to a 'sovereignty' clause or 'discretionary clause' in the Commission documents, the raison d'être of such a clause, that is humanitarian grounds, and, lastly, the logic of the system established by Regulation No 343/2003.

62 The United Kingdom emphasises that a sovereignty clause is not a derogation within the meaning of Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 43. It also points out that the fact that the exercise of that clause does not implement European Union law does not mean that Member States are disregarding fundamental rights, since they are bound by the Geneva Convention and the ECHR. The Belgian Government, however, submits that carrying out the decision to transfer the asylum seeker implements Regulation No 343/2003 and therefore falls within the scope of Article 6 TEU and the Charter.

63 The Czech Government takes the view that the decision by a Member State falls within European Union law when that State exercises the sovereignty clause, but not when it does not exercise that power.

The Court's reply

64 Article 51(1) of the Charter states that the provisions thereof are addressed to the Member States only when they are implementing European Union law.

65 Scrutiny of Article 3(2) of Regulation No 343/2003 shows that it grants Member States a discretionary power which forms an integral part of the Common European Asylum System provided for by the FEU Treaty and developed by the European Union legislature.

66 As stated by the Commission, that discretionary power must be exercised in accordance with the other provisions of that regulation.

67 In addition, Article 3(2) of Regulation No 343/2003 states that the derogation from the principle laid down in Article 3(1) of that regulation gives rise to the specific consequences provided for by that regulation. Thus, a Member State which decides to examine an asylum application itself becomes the Member State responsible within the meaning of Regulation No 343/2003 and must, where appropriate, inform the other Member State or Member States concerned by the asylum application.

68 Those factors reinforce the interpretation according to which the discretionary power conferred on the Member States by Article 3(2) of Regulation No 343/2003 forms part of the mechanisms for determining the Member State responsible for an asylum application provided for under that regulation and, therefore, merely an element of the Common European Asylum System. Thus, a Member State which exercises that

discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter.

69 The answer to the first question in Case C-411/10 is therefore that the decision by a Member State on the basis of Article 3(2) of Regulation No 343/2003 whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter.

The second to fourth questions and the sixth question in Case C-411/10 and the two questions in Case C-493/10

70 By the second question in Case C-411/10 and the first question in Case C-493/10, the referring courts ask, in essence, whether the Member State which should transfer the asylum seeker to the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible is obliged to assess the compliance, by that Member State, with the fundamental rights of the European Union, Directives 2003/9, 2004/83 and 2005/85 and with Regulation No 343/2003.

71 By the third question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the obligation on the Member State which should transfer the asylum seeker to observe fundamental rights precludes the operation of a conclusive presumption that the responsible State will observe the claimant's fundamental rights under European Union law and/or the minimum standards imposed by the abovementioned directives.

72 By the fourth question in Case C-411/10 and the second question in Case C-493/10, the referring courts ask, in essence, whether, where the Member State responsible is found not to be in compliance with fundamental rights, the Member State which should transfer the asylum seeker is obliged to accept responsibility for examining the asylum application under Article 3(2) of Council Regulation (EC) No 343/2003?

73 Finally, by its sixth question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether a provision of national law which requires a court, for the purpose of determining whether a person may lawfully be removed to another Member State pursuant to Regulation No 343/2003, to treat that Member State as a 'safe country' is compatible with the rights set out in Article 47 of the Charter.

74 Those questions should be considered together.

75 The Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted. Article 18 of the Charter and Article 78 TFEU provide that the rules of the Geneva Convention and the 1967 Protocol are to be respected (see Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others* [2010] ECR I-1493, paragraph 53, and Case C-31/09 *Bolbol* [2010] ECR I-5539, paragraph 38).

76 As stated in paragraph 15 above, the various regulations and directives relevant to in the cases in the main proceedings provide that they comply with the fundamental rights and principles recognised by the Charter.

77 According to settled case-law, the Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not

rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28).

78 Consideration of the texts which constitute the Common European Asylum System shows that it was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard.

79 It is precisely because of that principle of mutual confidence that the European Union legislature adopted Regulation No 343/2003 and the conventions referred to in paragraphs 24 to 26 of the present judgment in order to rationalise the treatment of asylum claims and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple claims by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum claim and thus to avoid forum shopping, it being the principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States.

80 In those circumstances, it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR.

81 It is not however inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights.

82 Nevertheless, it cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003.

83 At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.

84 In addition, it would be not be compatible with the aims of Regulation No 343/2003 were the slightest infringement of Directives 2003/9, 2004/83 or 2005/85 to be sufficient to prevent the transfer of an asylum seeker to the Member State primarily responsible. Regulation No 343/2003 aims – on the assumption that the fundamental rights of the asylum seeker are observed in the Member State primarily responsible for examining the application – to establish, as is apparent inter alia from points 124 and 125 of the Opinion in Case C-411/10, a clear and effective method for dealing with an asylum application. In order to achieve that objective, Regulation No 343/2003 provides that responsibility for examining an asylum application lodged in a European Union country rests with a single Member State, which is determined on the basis of objective criteria.

85 If the mandatory consequence of any infringement of the individual provisions of Directives 2003/9, 2004/83 or 2005/85 by the Member State responsible were that the

Member State in which the asylum application was lodged is precluded from transferring the applicant to the first mentioned State, that would add to the criteria for determining the Member State responsible set out in Chapter III of Regulation No 343/2003 another exclusionary criterion according to which minor infringements of the abovementioned directives committed in a certain Member State may exempt that Member State from the obligations provided for under Regulation No 343/2003. Such a result would deprive those obligations of their substance and endanger the realisation of the objective of quickly designating the Member State responsible for examining an asylum claim lodged in the European Union.

86 By contrast, if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.

87 With regard to the situation in Greece, the parties who have submitted observations to the Court are in agreement that that Member State was, in 2010, the point of entry in the European Union of almost 90% of illegal immigrants, that influx resulting in a disproportionate burden being borne by it compared to other Member States and the inability to cope with the situation in practice. The Hellenic Republic stated that the Member States had not agreed to the Commission's proposal that the application of Regulation No 343/2003 be suspended and that it be amended by mitigating the criterion of first entry.

88 In a situation similar to those at issue in the cases in the main proceedings, that is to say the transfer, in June 2009, of an asylum seeker to Greece, the Member State responsible within the meaning of Regulation No 343/2003, the European Court of Human Rights held, inter alia, that the Kingdom of Belgium had infringed Article 3 of the ECHR, first, by exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece, since the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities and, second, by knowingly exposing him to conditions of detention and living conditions that amounted to degrading treatment (European Court of Human Rights, *M.S.S.* v. *Belgium and Greece*, § 358, 360 and 367, judgment of 21 January 2011, not yet published in the *Reports of Judgments and Decisions*).

89 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.

90 In finding that the risks to which the applicant was exposed were proved, the European Court of Human Rights took into account the regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting Regulation No 343/2003 in order to improve the efficiency of the system and the effective protection of fundamental rights (*M.S.S.* v *Belgium and Greece*, § 347-350).

91 Thus, and contrary to the submissions of the Belgian, Italian and Polish Governments, according to which the Member States lack the instruments necessary to assess compliance with fundamental rights by the Member State responsible and, therefore, the risks to which the asylum seeker would be exposed were he to be transferred to that Member State, information such as that cited by the European Court of Human Rights enables the Member States to assess the functioning of the asylum system in the Member State responsible, making it possible to evaluate those risks.

92 The relevance of the reports and proposals for amendment of Regulation No 343/2003 emanating from the Commission should be noted – these must be known to the Member State which has to carry out the transfer, given its participation in the work of the Council of the European Union, which is one of the addressees of those documents.

93 In addition, Article 80 TFEU provides that asylum policy and its implementation are to be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Directive 2001/55 is an example of that solidarity but, as was stated at the hearing, the solidarity mechanisms which it contains apply only to wholly exceptional situations falling within the scope of that directive, that is to say, a mass influx of displaced persons.

94 It follows from the foregoing that in situations such as that at issue in the cases in the main proceedings, to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, 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 Article 4 of the Charter.

95 With regard to the question whether the Member State which cannot carry out the transfer of the asylum seeker to the Member State identified as 'responsible' in accordance with Regulation No 343/2003 is obliged to examine the application itself, it should be recalled that Chapter III of that Regulation refers to a number of criteria and that, in accordance with Article 5(1) of that regulation, those criteria apply in the order in which they are set out in that chapter.

96 Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to Greece, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

97 In accordance with Article 13 of Regulation No 343/2003, where the Member State responsible for examining the application for asylum cannot be designated on the basis of the criteria listed in that Regulation, the first Member State with which the application for asylum was lodged is to be responsible for examining it.

98 The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, that Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

99 It follows from all of the foregoing considerations that, as stated by the Advocate General in paragraph 131 of her Opinion, an application of Regulation No 343/2003 on the basis of the conclusive presumption that the asylum seeker's fundamental rights will be observed in the Member State primarily responsible for his application is incompatible with the duty of the Member States to interpret and apply Regulation No 343/2003 in a manner consistent with fundamental rights.

100 In addition, as stated by N.S., were Regulation No 343/2003 to require a conclusive presumption of compliance with fundamental rights, it could itself be regarded as undermining the safeguards which are intended to ensure compliance with fundamental rights by the European Union and its Member States.

101 That would be the case, inter alia, with regard to a provision which laid down that certain States are 'safe countries' with regard to compliance with fundamental rights, if that provision had to be interpreted as constituting a conclusive presumption, not admitting of any evidence to the contrary.

102 In that regard, it should be pointed out that Article 36 of Directive 2005/85, concerning the safe third country concept, provides, in paragraph 2(a) and (c), that a third country can only be considered as a 'safe third country' where not only has it ratified the Geneva Convention and the ECHR but it also observes the provisions thereof.

103 Such wording indicates that the mere ratification of conventions by a Member State cannot result in the application of a conclusive presumption that that State observes those conventions. The same principle is applicable both to Member States and third countries.

104 In those circumstances, the presumption underlying the relevant legislation, stated in paragraph 80 above, that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable.

105 In the light of those factors, the answer to the questions referred is that European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.

106 Article 4 of the Charter of Fundamental Rights of the European Union 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.

107 Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to

another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

108 The Member State in which the asylum seeker is present must, however, ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

The fifth question in Case C-411/10

109 By its fifth question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether the extent of the protection conferred on a person to whom Regulation No 343/2003 applies by the general principles of EU law, and, in particular, the rights set out in Articles 1, concerning human dignity, 18, concerning the right to asylum, and 47, concerning the right to an effective remedy, of the Charter, is wider than the protection conferred by Article 3 of the ECHR.

110 According to the Commission, the answer to that question must make it possible to identify the provisions of the Charter the infringement of which by the Member State responsible would result in the secondary responsibility of the Member State which has to decide on the transfer.

111 Even if the Court of Appeal (England & Wales) (Civil Division) did not expressly provide reasons, in the order for reference, why it required an answer to the question in order to give judgment, a reading of that decision in fact suggests that that question can be accounted for by the decision of 2 December 2008 in *K.R.S.* v. *United Kingdom*, not yet published in the *Reports of Judgments and Decisions*, in which the European Court of Human Rights held inadmissible an application claiming that Article 3 and 13 of the ECHR would be infringed were the applicant to be transferred by the United Kingdom to Greece. Before the Court of Appeal (England & Wales) (Civil Division), a number of parties claimed that the protection of fundamental rights stemming from the Charter is wider than that conferred by the ECHR and that, taking the Charter into account, their request not to transfer the applicant in the main proceedings to Greece would have to be granted.

112 After the order for reference was made, the European Court of Human Rights reviewed its position in the light of new evidence and held, in *M.S.S.* v *Belgium and Greece*, not only that the Hellenic Republic had infringed Article 3 of the ECHR owing to the applicant's detention and living conditions in Greece and also Article 13 of the ECHR read in conjunction with the aforesaid Article 3 on account of the deficiencies in the asylum procedure conducted in the applicant's case, but also that the Kingdom of Belgium had infringed Article 3 of the ECHR by exposing the applicant to the risks linked to the deficiencies in the asylum procedure in Greece and to detention and living conditions in Greece which did not comply with that article.

113 As follows from paragraph 106 above, a Member State would infringe Article 4 of the Charter if it transferred an asylum seeker to the Member State responsible within the

meaning of Regulation No 343/2003 in the circumstances described in paragraph 94 of the present judgment.

114 Articles 1, 18 and 47 of the Charter do not lead to a different answer than that given to the second to fourth questions and to the sixth question in Case C-411/10 and to the two questions in Case C-493/10.

115 Consequently, the answer to the fifth question in Case C-411/10 is that Articles 1, 18 and 47 of the Charter do not lead to a different answer than that given to the second to fourth questions and to the sixth question in Case C-411/10 and to the two questions in Case C-493/10.

The seventh question in Case C-411/10

116 By its seventh question in Case C-411/10, the Court of Appeal (England & Wales) (Civil Division) asks, in essence, whether, in so far as the preceding questions arise in respect of the obligations of the United Kingdom, the answers to the second to sixth questions should be qualified in any respect so as to take account of Protocol (No 30).

117 As noted by the EHRC, that question arises because of the position taken by the Secretary of State before the High Court of Justice (England & Wales) (Administrative Court) that the provisions of the Charter do not apply in the United Kingdom.

118 Even if the Secretary of State no longer maintained that position before the Court of Appeal (England & Wales) (Civil Division), it must be noted that Protocol (No 30) provides, in Article 1(1), that the Charter is not to extend the ability of the Court of Justice or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it affirms.

119 According to the wording of that provision, as noted by the Advocate General in points 169 and 170 of her Opinion in Case C-411/10, Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, according to the third recital in the preamble to Protocol (No 30), Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.

120 In those circumstances, Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.

121 Since the rights referred to in the cases in the main proceedings do not form part of Title IV of the Charter, there is no need to rule on the interpretation of Article 1(2) of Protocol (No 30).

122 The answer to the seventh question in Case C-411/10 is therefore that, in so far as the preceding questions arise in respect of the obligations of the United Kingdom, the

answers to the second to sixth questions referred in Case C-411/10 do not require to be qualified in any respect so as to take account of Protocol (No 30).

Costs

123 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1) The decision adopted by a Member State on the basis of Article 3(2) of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III of that Regulation, implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter of Fundamental Rights of the European Union.

2) European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union.

Article 4 of the Charter of Fundamental Rights of the European Union 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.

Subject to the right itself to examine the application referred to in Article 3(2) of Regulation No 343/2003, the finding that it is impossible to transfer an applicant to another Member State, where that State is identified as the Member State responsible in accordance with the criteria set out in Chapter III of that regulation, entails that the Member State which should carry out that transfer must continue to examine the criteria set out in that chapter in order to establish whether one of the following criteria enables another Member State to be identified as responsible for the examination of the asylum application.

The Member State in which the asylum seeker is present must ensure that it does not worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time. If necessary, the first mentioned Member State must itself examine the application in

accordance with the procedure laid down in Article 3(2) of Regulation No 343/2003.

3) **Articles 1, 18 and 47 of the Charter of Fundamental Rights of the European Union do not lead to a different answer.**

4) **In so far as the preceding questions arise in respect of the obligations of the United Kingdom of Great Britain and Northern Ireland, the answers to the second to sixth questions referred in Case C-411/10 do not require to be qualified in any respect so as to take account of Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom.**

JUDGMENT OF THE COURT (Grand Chamber)

30 November 2009

„Visas, asylum, immigration and other policies related to free movement of persons – Directive 2008/115/EC – Return of illegally staying third-country nationals – Article 15(4) to (6) – Period of detention – Taking into account the period during which the execution of a removal decision was suspended – Concept of 'reasonable prospect of removal"

In Case C-357/09 PPU,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the Administrativen sad Sofia-grad (Bulgaria), made by decision of 10 August 2009, received at the Court on 7 September 2009, in the proceedings concerning

Said Shamilovich Kadzoev (Huchbarov),

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, C. Toader, Presidents of Chambers, C.W.A. Timmermans, P. Kūris, E. Juhász, G. Arestis, L. Bay Larsen (Rapporteur), T. von Danwitz and A. Arabadjiev, Judges,

Advocate General: J. Mazák,

Registrar: N. Nanchev, Administrator,

having regard to the request of the referring court of 10 August 2009, received at the Court on 7 September 2009 and supplemented on 10 September 2009, that the reference for a preliminary ruling be dealt with under an urgent procedure pursuant to Article 104b of the Rules of Procedure,

having regard to the decision of the Second Chamber of 22 September 2009 granting that request,

having regard to the written procedure and further to the hearing on 27 October 2009,

after considering the observations submitted on behalf of:

– Mr Kadzoev, by D. Daskalova and V. Ilareva, advokati,

– the Bulgarian Government, by T. Ivanov and E. Petranova, acting as Agents,

– the Lithuanian Government, by R. Mackevičienė, acting as Agent,

– the Commission of the European Communities, by S. Petrova and M. Condou-Durande, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 15(4) to (6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

2 The reference was made in the course of administrative proceedings brought on the initiative of the director of the Direktsia 'Migratsia' pri Ministerstvo na vatreshnite raboti (Directorate for Migration at the Ministry of the Interior) requesting the Administrativen sad Sofia-grad (Sofia City Administrative Court) to rule of its own motion on the continued detention of Mr Kadzoev (Huchbarov) at that directorate's special detention facility for foreign nationals ('the detention centre') in Busmantsi in the district of Sofia.

Legal context

Community legislation

3 Directive 2008/115 was adopted on the basis in particular of Article 63(3)(b) EC. According to recital 9 in the preamble to the directive:

'In accordance with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [OJ 2005 L 326, p. 13], 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.'

4 Article 15 of Directive 2008/115, which forms part of the chapter on detention for the purpose of removal, reads as follows:

'(1) Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:

a) there is a risk of absconding or

b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

(2) Detention shall be ordered by administrative or judicial authorities.

Detention shall be ordered in writing with reasons being given in fact and in law.

When detention has been ordered by administrative authorities, Member States shall:

a) either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention;

b) or grant the third-country national concerned the right to take proceedings by means of which the lawfulness of detention shall be subject to a speedy judicial review to be decided on as speedily as possible after the launch of the relevant proceedings. In such a case Member States shall immediately inform the third-country national concerned about the possibility of taking such proceedings.

The third-country national concerned shall be released immediately if the detention is not lawful.

(3) In every case, detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.

(4) When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

(5) Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. Each Member State shall set a limited period of detention, which may not exceed six months.

(6) Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further 12 months in accordance with national law in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

a) a lack of cooperation by the third-country national concerned, or

b) delays in obtaining the necessary documentation from third countries.'

5 Under Article 20 of Directive 2008/115, Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive, with the exception of Article 13(4), by 24 December 2010.

6 In accordance with Article 22 of the directive, it entered into force on 13 January 2009.

National legislation

7 Directive 2008/115 was transposed into Bulgarian law by the Law on foreign nationals in the Republic of Bulgaria (DV No 153 of 1998), as amended on 15 May 2009 (DV No 36 of 2009) ('the Law on foreign nationals').

8 According to the referring court, Article 15(4) of the directive has, however, not yet been transposed into Bulgarian law.

9 Under Article 44(6) of the Law on foreign nationals, where a coercive administrative measure cannot be applied to a foreign national because his identity has not been established or because he is likely to go into hiding, the body which adopted the measure may order the foreign national to be placed in a detention centre for foreign nationals in order to enable his deportation from the Republic of Bulgaria or expulsion to be arranged.

10 Before the transposition of Directive 2008/115, detention in such a centre was not subject to any time-limit.

11 Now, under Article 44(8) of the Law on foreign nationals, '[t]he detention shall last as long as the circumstances set out in paragraph 6 above pertain but may not exceed six months. Exceptionally, where the person refuses to cooperate with the competent authorities, where there is a delay in obtaining the documents essential for deportation or expulsion, or where the person constitutes a threat to national security or public order, the period of detention may be extended to 12 months'.

12 Article 46a(3) to (5) of the Law on foreign nationals provide:

'(3) Every six months the head of the detention centre for foreign nationals shall present a list of the foreign nationals who have been detained for more than six months owing to impediments to their removal from Bulgarian territory. The list is to be sent to the administrative court of the place where the detention centre is situated.

(4) At the end of each period of six months' detention in a detention centre, the court deliberating in private shall of its own motion determine whether the period of detention is to be extended, replaced, or terminated. No appeal shall lie against the court's decision.

(5) Where the court annuls the contested detention order or orders the foreign national to be released, the latter shall be immediately released from the detention centre.'

The main proceedings and the reference for a preliminary ruling

13 On 21 October 2006 a person was arrested by Bulgarian law enforcement officials near the border with Turkey. He had no identity documents and said that his name was Said Shamilovich Huchbarov, born on 11 February 1979 in Grozny (Chechnya). He stated that he did not wish the Russian consulate to be informed of his arrest.

14 By decree of 22 October 2006 of the competent police department, a coercive administrative measure of deportation was imposed on him.

15 He was placed in the detention centre on 3 November 2006, to be detained until it was possible to execute the decree, that is, until documents were obtained enabling him to travel abroad and sufficient funds guaranteed to purchase a ticket to Chechnya. The decree became enforceable on 17 April 2008, following judicial review proceedings.

16 On 14 December 2006 he declared to the authorities of the detention centre that his real name was not Huchbarov but Kadzoev.

17 In the course of two administrative proceedings before the Administrativen sad Sofia-grad, a birth certificate was produced showing that Mr Kadzoev was born on 11 February 1979 in Moscow (former Soviet Union) of a Chechen father, Shamil Kadzoev, and a Georgian mother, Loli Elihvari. However, a temporary identity card for a national of the Chechen Republic of Ichkeria, valid until 3 February 2001, issued in the name of Said Shamilovich Kadzoev, born on 11 February 1979 in Grozny, was also produced. The person concerned nevertheless continued to present himself to the authorities under the names of either Kadzoev or Huchbarov.

18 In the period from January 2007 to April 2008, there was an exchange of correspondence between the Bulgarian and Russian authorities. Contrary to the view of the Bulgarian authorities, the Russian authorities claimed that the temporary identity card in the name of Said Shamilovich Kadzoev came from persons and an authority unknown to the Russian Federation, and could not therefore be regarded as a document proving the person's Russian nationality.

19 On 31 May 2007, while he was detained in the detention centre, Mr Kadzoev applied for refugee status. The action he brought against the refusal of the Bulgarian administrative authorities to grant that application was dismissed by judgment of the Administrativen sad Sofia-grad of 9 October 2007. On 21 March 2008 he made a second application for asylum, but withdrew it on 2 April 2008. On 24 March 2009 he made a third application for asylum. By decision of 10 July 2009, the Administrativen sad Sofia-grad dismissed his action and refused him asylum. No appeal lies against that decision.

20 On 20 June 2008 Mr Kadzoev's lawyer applied for the detention to be replaced by a less severe measure, namely the obligation for Mr Kadzoev to sign periodically a register kept by the police authorities at his place of residence. As the competent authorities considered that he had no actual address in Bulgaria, they rejected the application on the ground that the necessary conditions were not satisfied.

21 On 22 October 2008 a similar application was made, which was likewise rejected.

22 Following an administrative procedure brought at the request of Mr Kadzoev before the Commission for Protection against Discrimination, which gave rise to proceedings in the Varhoven administrativen sad (Supreme Administrative Court), that court, in agreement with the commission, accepted in its judgment of 12 March 2009 that it was not possible to establish with certainty the identity and nationality of Mr Kadzoev, so that it considered him to be a stateless person.

23 According to the order for reference, the help centre for survivors of torture, the office of the United Nations High Commissioner for Refugees and Amnesty International find it credible that Mr Kadzoev was the victim of torture and inhuman and degrading treatment in his country of origin.

24 Despite the efforts of the Bulgarian authorities, several non-governmental organisations and Mr Kadzoev himself to find a safe third country which could receive him, no agreement was reached, and he has not as yet obtained any travel documents. Thus the Republic of Austria and Georgia, to which the Bulgarian authorities applied, refused to accept Mr Kadzoev. The Republic of Turkey, to which the Bulgarian authorities also applied, did not reply.

25 The Administrativen sad Sofia-grad states that Mr Kadzoev is still detained in the detention centre.

26 The main proceedings were commenced by an administrative document filed by the director of the Directorate for Migration at the Ministry of the Interior, asking the Administrativen sad Sofia-grad to rule of its own motion, pursuant to Article 46a(3) of the Law on foreign nationals, on the continued detention of Mr Kadzoev.

27 That court states that, before the Law on foreign nationals in the Republic of Bulgaria was amended for the purpose of transposing Directive 2008/115, the duration of detention in the detention centre was not limited to any period. It points out that there

are no transitional provisions governing situations in which decisions were taken before that amendment. The applicability of the new rules deriving from the directive to periods and the grounds for extending them is therefore a matter on which interpretation should be sought, especially as, in the case at issue in the main proceedings, the maximum duration of detention laid down by the directive had already been exceeded before the directive was adopted.

28 Moreover, there is no express provision stating whether in a case such as the present one the periods referred to in Article 15(5) and (6) of Directive 2008/115 are to be understood as including the period during which the foreign national was detained when there was a legal prohibition on executing an administrative measure of 'deportation' on the ground that a procedure for recognition of humanitarian and refugee status had been initiated by Mr Kadzoev.

29 Finally, the referring court indicates that, if there is no 'reasonable prospect of removal' within the meaning of Article 15(4) of Directive 2008/115, the question arises whether the immediate release of Mr Kadzoev should be ordered in accordance with that provision.

30 In those circumstances, the Administrativen sad Sofia-grad decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1) Must Article 15(5) and (6) of Directive 2008/115 … be interpreted as meaning that:

a) where the national law of the Member State did not provide for a maximum period of detention or grounds for extending such detention before the transposition of the requirements of that directive and, on transposition of the directive, no provision was made for conferring retroactive effect on the new provisions, the requirements of the directive only apply and cause the period to start to run from their transposition into the national law of the Member State?

b) within the periods laid down for detention in a specialised facility with a view to removal within the meaning of the directive, no account is to be taken of the period during which the execution of a decision of removal from the Member State under an express provision was suspended owing to a pending request for asylum by a third-country national, where during that procedure he continued to remain in that specialised detention facility, if the national law of the Member State so permits?

2) Must Article 15(5) and (6) of Directive 2008/115 … be interpreted as meaning that within the periods laid down for detention in a specialised facility with a view to removal within the meaning of that directive no account is to be taken of the period during which execution of a decision of removal from the Member State was suspended under an express provision on the ground that an appeal against that decision is pending, even though during the period of that procedure the third-country national has continued to stay in that specialised detention facility, where he did not have valid identity documents and there is therefore some doubt as to his identity or where he does not have any means of supporting himself or where he has demonstrated aggressive conduct?

3) Must Article 15(4) of Directive 2008/115 … be interpreted as meaning that removal is not reasonably possible where:

a) at the time when a judicial review of the detention is conducted, the State of which the person is a national has refused to issue him with a travel document for his return and until then there was no agreement with a third country in order to secure the person's entry there even though the administrative bodies of the Member State are continuing to make endeavours to that end?

b) at the time when a judicial review of the detention is conducted there was an agreement for readmission between the European Union and the State of which the person is a national, but, owing to the existence of new evidence, namely the person's birth certificate, the Member State did not refer to the provisions of that agreement, if the person concerned does not wish to return?

c) the possibilities of extending the detention periods provided for in Article 15(6) of the directive have been exhausted in the situation where no agreement for readmission has been reached with the third country at the time when a judicial review of his detention is conducted, regard being had to Article 15(6)(b) of the directive?

4) Must Article 15(4) and (6) of Directive 2008/115 … be interpreted as meaning that if at the time when the detention with a view to removal of the third-country national is reviewed there is found to be no reasonable ground for removing him and the grounds for extending his detention have been exhausted, in such a case:

a) it is none the less not appropriate to order his immediate release if the following conditions are all met: the person concerned does not have valid identity documents, whatever the duration of their validity, with the result that there is a doubt as to his identity, he is aggressive in his conduct, he has no means of supporting himself and there is no third person who has undertaken to provide for his subsistence?

b) with a view to the decision on release it must be assessed whether, under the provisions of the national law of the Member State, the third-country national has the resources necessary to stay in the Member State as well as an address at which he may reside?'

The urgent procedure

31 The Administrativen sad Sofia-grad asked for the reference for a preliminary ruling to be dealt with under an urgent procedure pursuant to Article 104b of the Rules of Procedure.

32 The referring court justified its request by stating that the case raises the question whether Mr Kadzoev should be kept in detention in the detention centre or released. In view of his situation, the court stated that the proceedings should not be suspended for a prolonged period.

33 The Second Chamber of the Court, after hearing the Advocate General, decided to grant the referring court's request for the reference for a preliminary ruling to be dealt with under an urgent procedure, and to remit the case to the Court for it to be assigned to the Grand Chamber.

The questions referred for a preliminary ruling

Question 1(a)

34 By Question 1(a) the referring court essentially asks whether Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the maximum duration of detention laid down in those provisions must include also the period of detention completed before the rules in the directive become applicable.

35 It must be observed that Article 15(5) and (6) of Directive 2008/115 fix the maximum period of detention for the purpose of removal.

36 If the period of detention for the purpose of removal completed before the rules in Directive 2008/115 become applicable were not taken into account for calculating the maximum period of detention, persons in a situation such as that of Mr Kadzoev could be detained for longer than the maximum periods mentioned in Article 15(5) and (6) of that directive.

37 Such a situation would not be consistent with the objective of those provisions of Directive 2008/115, namely to guarantee in any event that detention for the purpose of removal does not exceed 18 months.

38 Moreover, Article 15(5) and (6) of Directive 2008/115 apply immediately to the future consequences of a situation that arose when the previous rules were in force.

39 The answer to Question 1(a) is therefore that Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the maximum duration of detention laid down in those provisions must include a period of detention completed in connection with a removal procedure commenced before the rules in that directive become applicable.

Question 1(b)

40 By Question 1(b) the referring court seeks to know whether, when calculating the period of detention for the purpose of removal under Article 15(5) and (6) of Directive 2008/115, the period must be included during which the execution of the removal decision was suspended because of the examination of an application for asylum by a third-country national, where, during the procedure relating to that application, he has remained in the detention centre.

41 It should be recalled that recital 9 in the preamble to Directive 2008/115 states that '[i]n accordance with … Directive 2005/85 … 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'.

42 In accordance with Article 7(1) and (3) of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18), asylum seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State, but when it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.

43 Article 21 of Directive 2003/9 provides that Member States are to ensure that negative decisions relating to the granting of benefits under that directive or decisions taken under Article 7 which individually affect asylum seekers may be the subject of an appeal within the procedures laid down in the national law. At least in the last instance, the possibility of an appeal or a review before a judicial body must be granted.

44 Under Article 18(1) of Directive 2005/85, Member States must not hold a person in detention for the sole reason that he or she is an applicant for asylum and, under Article 18(2), where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review.

45 Detention for the purpose of removal governed by Directive 2008/115 and detention of an asylum seeker in particular under Directives 2003/9 and 2005/85 and the applicable national provisions thus fall under different legal rules.

46 It is for the national court to determine whether Mr Kadzoev's stay in the detention centre during the period in which he was an asylum seeker complied with the conditions laid down by the provisions of Community and national law concerning asylum seekers.

47 Should it prove to be the case that no decision was taken on Mr Kadzoev's placement in the detention centre in the context of the procedures opened following his applications for asylum, referred to in paragraph 19 above, so that his detention remained based on the previous national rules on detention for the purpose of removal or on the provisions of Directive 2008/115, Mr Kadzoev's period of detention corresponding to the period during which those asylum procedures were under way would have to be taken into account in calculating the period of detention for the purpose of removal mentioned in Article 15(5) and (6) of Directive 2008/115.

48 Consequently, the answer to Question 1(b) is that a period during which a person has been held in a detention centre on the basis of a decision taken pursuant to the provisions of national and Community law concerning asylum seekers may not be regarded as detention for the purpose of removal within the meaning of Article 15 of Directive 2008/115.

Question 2

49 By this question the referring court asks essentially whether Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the period during which execution of the decree of deportation was suspended because of a judicial review procedure brought against that decree by the person concerned is to be taken into account in calculating the period of detention for the purpose of removal, where the person concerned continued to be held in a detention facility during that procedure.

50 It must be observed that Article 13(1) and (2) of Directive 2008/115 provide in particular that the third-country national concerned is to be afforded an effective remedy to appeal against or seek review of decisions related to return before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence. That authority or body must have the power to review decisions related to return, including the possibility of temporarily suspending their enforcement, unless a temporary suspension is already applicable under national legislation.

51 Neither Article 15(5) and (6) of Directive 2008/115 nor any other provision of that directive permits the view that periods of detention for the purpose of removal should not be included in the maximum duration of detention defined in Article 15(5) and (6) because of the suspension of execution of the removal decision.

52 In particular, the suspension of execution of the removal decision because of a procedure for judicial review of that decision is not one of the grounds for extending the period of detention laid down in Article 15(6) of Directive 2008/115.

53 The period of detention completed by the person concerned during the procedure in which the lawfulness of the removal decision is the subject of judicial review must therefore be taken into account for calculating the maximum duration of detention laid down in Article 15(5) and (6) of Directive 2008/115.

54 If it were otherwise, the duration of detention for the purpose of removal could vary, sometimes considerably, from case to case within a Member State or from one Member State to another because of the particular features and circumstances peculiar to national judicial procedures, which would run counter to the objective pursued by Article 15(5) and (6) of Directive 2008/115, namely to ensure a maximum duration of detention common to the Member States.

55 This conclusion is not called into question by the judgment in Case C-19/08 *Petrosian* [2009] ECR I-0000 relied on by the Bulgarian Government. In that case, which concerned the interpretation of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50, p. 1), the Court held that where, in the context of the procedure for transfer of an asylum seeker, the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer laid down in Article 20(1)(d) of that regulation begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation.

56 That interpretation of Article 20(1)(d) of Regulation No 343/2003 cannot be transposed to the context of the interpretation of Article 15(5) and (6) of Directive 2008/115. While the period at issue in the *Petrosian* case determines the time available to the requesting Member State for implementing the transfer of an asylum seeker to the Member State which is obliged to readmit him, the maximum periods laid down in Article 15(5) and (6) of Directive 2008/115 serve the purpose of limiting the deprivation of a person's liberty. Moreover, the latter periods set a limit to the duration of detention for the purpose of removal, not to the implementation of the removal procedure as such.

57 Consequently, the answer to Question 2 is that Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the period during which execution of the decree of deportation was suspended because of a judicial review procedure brought against that decree by the person concerned is to be taken into account in calculating the period of detention for the purpose of removal, where the person concerned continued to be held in a detention facility during that procedure.

Question 3

58 By this question the referring court seeks clarification, in the light of the facts of the case in the main proceedings, of the meaning of Article 15(4) of Directive 2008/115, in particular of the concept of a ‘reasonable prospect of removal’.

Question 3(c)

59 By Question 3(c) the referring court asks whether Article 15(4) of Directive 2008/115 is to be interpreted as meaning that there is no reasonable prospect of removal where the possibilities of extending the periods of detention provided for in Article 15(6) have been exhausted, in the situation where no agreement for readmission has been reached with the third country at the time when a judicial review of the detention of the person concerned is conducted.

60 It is clear that, where the maximum duration of detention provided for in Article 15(6) of Directive 2008/115 has been reached, the question whether there is no longer a ‘reasonable prospect of removal’ within the meaning of Article 15(4) does not arise. In such a case the person concerned must in any event be released immediately.

61 Article 15(4) of Directive 2008/115 can thus only apply if the maximum periods of detention laid down in Article 15(5) and (6) of the directive have not expired.

62 Consequently, the answer to Question 3(c) is that Article 15(4) of Directive 2008/115 must be interpreted as not being applicable where the possibilities of extending the periods of detention provided for in Article 15(6) of Directive 2008/115 have been exhausted at the time when a judicial review of the detention of the person concerned is conducted.

Questions 3(a) and (b)

63 As regards Questions 3(a) and (b), it should be pointed out that, under Article 15(4) of Directive 2008/115, detention ceases to be justified and the person concerned must be released immediately when it appears that, for legal or other considerations, a reasonable prospect of removal no longer exists.

64 As is apparent from Article 15(1) and (5) of Directive 2008/115, the detention of a person for the purpose of removal may only be maintained as long as the removal arrangements are in progress and must be executed with due diligence, provided that it is necessary to ensure successful removal.

65 It must therefore be apparent, at the time of the national court’s review of the lawfulness of detention, that a real prospect exists that the removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6) of Directive 2008/115, for it to be possible to consider that there is a ‘reasonable prospect of removal’ within the meaning of Article 15(4) of that directive.

66 Thus a reasonable prospect of removal does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.

67 Consequently, the answer to Questions 3(a) and (b) is that Article 15(4) of Directive 2008/115 must be interpreted as meaning that only a real prospect that removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6), corresponds to a reasonable prospect of removal, and that that reasonable prospect

does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.

Question 4

68 By this question the referring court asks essentially whether Article 15(4) and (6) of Directive 2008/115 allow the person concerned not to be released immediately, even though the maximum period of detention provided for by that directive has expired, on the grounds that he is not in possession of valid documents, his conduct is aggressive, and he has no means of supporting himself and no accommodation or means supplied by the Member State for that purpose.

69 It must be pointed out that, as is apparent in particular from paragraphs 37, 54 and 61 above, Article 15(6) of Directive 2008/115 in no case authorises the maximum period defined in that provision to be exceeded.

70 The possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115. None of the circumstances mentioned by the referring court can therefore constitute in itself a ground for detention under the provisions of that directive.

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

Costs

72 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1) Article 15(5) and (6) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals must be interpreted as meaning that the maximum duration of detention laid down in those provisions must include a period of detention completed in connection with a removal procedure commenced before the rules in that directive become applicable.

2) A period during which a person has been held in a detention centre on the basis of a decision taken pursuant to the provisions of national and Community law concerning asylum seekers may not be regarded as detention for the purpose of removal within the meaning of Article 15 of Directive 2008/115.

3) **Article 15(5) and (6) of Directive 2008/115 must be interpreted as meaning that the period during which execution of the decree of deportation was suspended because of a judicial review procedure brought against that decree by the person concerned is to be taken into account in calculating the period of detention for the purpose of removal, where the person concerned continued to be held in a detention facility during that procedure.**

4) **Article 15(4) of Directive 2008/115 must be interpreted as not being applicable where the possibilities of extending the periods of detention provided for in Article 15(6) of Directive 2008/115 have been exhausted at the time when a judicial review of the detention of the person concerned is conducted.**

5) **Article 15(4) of Directive 2008/115 must be interpreted as meaning that only a real prospect that removal can be carried out successfully, having regard to the periods laid down in Article 15(5) and (6), corresponds to a reasonable prospect of removal, and that that reasonable prospect does not exist where it appears unlikely that the person concerned will be admitted to a third country, having regard to those periods.**

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

Alien policing surveillance and the related problems

21 March 2013

Law Enforcement Academy

Figula, Ildikó

Legislative foundations for alien policing detention

A./ National law

- Act II of 2007 – on the entry into and stay of third country nationals;
- Government decree No. 114/2007. (24 May) – on the implementation of Act II of 2007;
- Decree No. 27/2007. (31 May) of the Ministry for Justice and Law Enforcement – on the regulations on detention ordained in alien policing procedures.

Community and international law

- Directive No. 2005/85/EC. – on minuimum standards on procedures in Member States for granting and withdrawing refugee status
  - Article 7. – the right to stay in the Member State while judging the application
  - Article 18. – the relationship between detention and the filing of application for refugee status (asylum seekers)
- Directive No. 2008/115/EC – on common standards and procedures in Member States for returning illegally staying third-country nationals

- Treaty on the protection of human rights and basic freedom rights – 04 November 1950, Rome.
  - Article 3. – prohibition of torture
  - Article 5. – right to freedom and safety

- European Charter on Fundamental Rights and Freedoms
  - Article 6. – right to freedom and safety
- Case law of the European Court
- Case law of the Strasbourg Court of Justice

Detention according to the Act on the entry and stay of third-country nationals (Act II of 2007)

Two forms of detention:

- Alien policing detention;
- Detention preparing return/expulsion might be ordained.

Ordaining authority: (the police or the Regional Office of the Office for Immigration and Citizenship -BÁH)

Term: 72 hours

Subsequently, the district council in charge according to the venue of detention may extend the term of detention each time with 30 days. (The power of the court does not cover the early termination of detention.)

The court examines the motion prepared, presented and reasoned by the alien policing authority,

- interviews the foreigner
- evaluates the motion presented by the authority (ordains the extention of detention in an order)

Criteria for evaluation:

Legislative conditions

- Hiding from the foreign authorities or hindering the execution of expulsion or return in other ways;
- Refuses the departure, or it can be assumed, based on other, well-founded reasons, that the person in question shall delay and/or interfere with the execution of expulsion or handing over (danger of escape);
- At the designated place of stay, severely or repeatedly violated the prescribed rules of behaviour;
- Failed to meet, even for notification, the regulation on being present at the prescribed place and this way hindered the implementation of the alien policing or Dublin procedures;
- Was freed from imprisonment imposed due to the intentional commitment of crime (jointly, reasons for detention).

The court shall jointly weigh the following conditions in the case of each detained person

- How much the detainee is ready to co-operate
- Has the detainee been, at an earlier date, the subject of any authority or criminal procedures and what findings can be made about the detainee in connection with those cases;
- With regard to the detainee's conditions can it be feared that the detainee shall withdraw himself/herself from the alien policing procedure, or, due to the nature, weight or method of the violation committed by the detainee can it be feared that the detainee, while executing the procedure, shall represent danger to public order.

During the extension with more than six months, it also has to be examined that the implementation of expulsion/return lasts for more than six months in spite of taking all the necessary measures, because

- the affected third-party nationals fail to co-operate with the authorities, or
- the receipt of the documentation necessary for the expulsion/return from the country of origin of the third-party national is delayed due to the procedures of the country of origin of the third-party national.

Should the detention be extended for any reason, it should be a basic condition that the authority takes and presents to the court all the necessary measures needed to execute the expulsion/return.

Reasons for the exclusion of detention

Should it become evident that the expulsion or return procedure can not be executed – the motion on the extension of detention shall be refused (reason excluding detention)

As 01 January 2013, should a third-country national be under alien policing procedure, the expulsion against the person may not be ordained and executed.

Basic principles worded in the preamble of the readmission directive

- (9) : The person applying for refugee status (asylum seeker) may not be considered as a person staying illegally in the Member State – until the decision on refusing the application comes into force.
- (10) : Priority shall be given to volunteer return.
- (11) : Legal assisstance shall be provided.
- (13) : In the case of coercive measures, the principles of proportionality and efficiency shall be applied.
- (16) : The enforcement of detention for the purpose of removal shall be avoided and the principle of proportionality shall be applied – detention can only considered reasonable, if it serves the preparation of expulsion and if the use of less coercive measures failed, or may fail to be satisfactory.
- (17) : Execution of detention: shall take place in a special alien policing detention room.

Rules of the readmission directive on detention Article 15

Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when

- there is an imminent danger for escape, or
- the person hinders or interferes with the preparation of the expulsion/return.

Detention shall be as short as possible.

Each and every Member State shall define a limited detention period, not exceeding six months, which can be extended with an additional period not exceeding twelve months, if, in spite of all the rational efforts, the execution of expulsion/return shall, expectedly, last longer, or

- the third-country national fails to co-operate, or
- receiving the necessary documents from the third country suffers delay.

Detention shall be ordained in writing, together with presenting the facts of the case and the legal reasoning thereof.

Legal remedy

With regard to legal remedy, the Member States may choose between the following options:

- either they prescribe the supervision, without delay, of the lawfulness of detention by the court,
- or guarantee the right to start the court procedure without delay on the supervision of the lawfulness of detention.

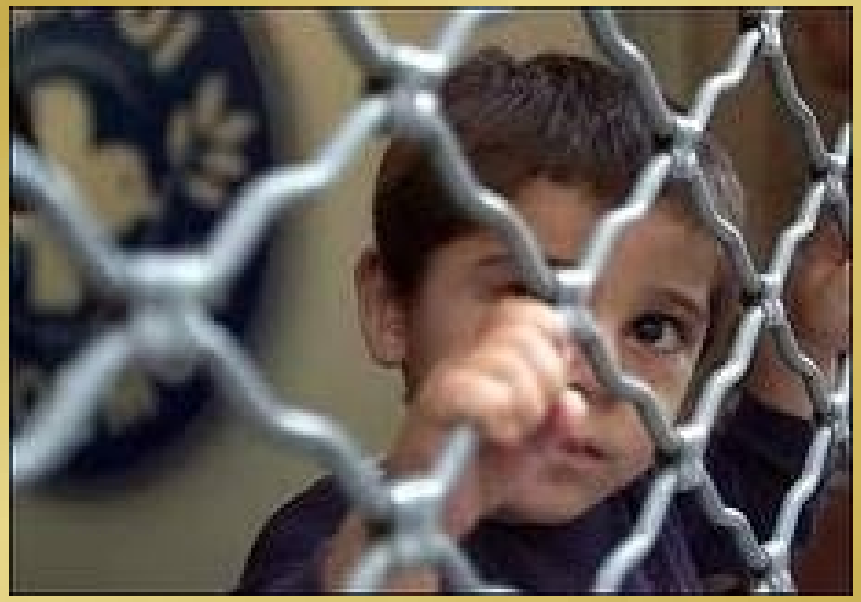
Rationality of detention shall be revised within rational periods, either for the request of the affected third-country national, or in ufficio.

Decisions of the European Court of Justice interpreting the readmission directive

C-61/11.PPU.– The Hassen el Dridi case –judgement
„The national regulation which ordains to penalise with imprisonment the third-country national staying illegally in the country who fails to obey the decision on leaving the territory of the country is contradictory to the stipulations of the readmission directive."

- C-357/09.PPU.– The Said Sharmilovitch Kadzoev case - judgement
- „Article 15 (5) and (6) of the readmission directive shall be interpreted so that the maximum term of detention mentioned thereof shall also include the time period spent in detention as a consequence of the removal procedure initiated before the readmission directive came into effect."
- „The time period during which the execution of the decision on removal was suspended shall also be included into this time period."
- „The time period which was spent by the person in question in alien policing detention rooms based on the decision made in accordance with the national and community stipulations on persons applying for refugee status (asylum seekers) shall not, in accordance with Article 15 of the readmission directive, be considered as detention effectuated for the purpose of removal."

The Hungarian reality

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„Guarded shelter” – misleading eufemism

In Hungary, there are five venues: Kiskunhalas, Nyírbátor, Győr, Budapest-Ferihegy and Békéscsaba.

Five district councils are in charge of ordaining the extention of alien policing detention:

- Pest Central District Court (in 2011: altogether 253 cases – consequntly, the judges of the so-called „team of investigation judges” are only criminal judges)
- Békéscsaba district council (in 2011: 719 cases) judges specialised in civil cases
- Nyírbátor City Court (in 2011: 855 cases)

  (until 20 March 2012. - 170 cases)

  (until 07 March 2013. - 37 cases)

  (In 2013, this work was performed only by judges specialised in civil cases.)
- Kiskunhalas district council (in 2011. - 3476 cases) (only judges specialised in criminal cases perform the work)
- Győr district council (in 2011. - 275 cases) (only judges specialised in criminal cases perform the work)

Problems regarding alien policing detention and the extention of alien policing detention by the court

- Report prepared for the Hungarian government on the visit in Hungary of the European Comittee for the prevention of torture and inhuman or humiliating treatment (CPT), 08 June 2010, pages 17-24.
  http://cpt.coe.int/documents/hun/2010-16-inf-hun.pdf
- The report of the special envoy of the United Nations dealing with the current forms of racism, ratial discrimination, xenophobia and intolerance, A/HRC/20/33/Add.1, 23 April 2012, Chapters 51. and 73-74.
  http://www.ohchr.org/Documents/Issues /Racism/A.HRC.20.33.Add.1.en.pdf
- Report of the commissioner of fundamental rights in case No. AJB-1953/2012, 10 September 2012.
  www.ajbh.hu/allam/jelentes/201201953.rtf
- Report of the commissioner of fundamental rights in case No. AJB 4019/2012, 25 June 2012.
  www.ajbh.hu/allam/jelentes/201204019.rtf

Experiences gained by the Helsinki Committee during the unannounced visit made at the Kiskunhalas city court on 13 December 2011.

- One hour - 31 detainees;
- Groups consisting of 5-8 people;
- The police failed to present the files – the court took its decisions without the files;
- In several cases, the age of the detainee was not known;
- Though guardians were present, they did not know who their clients were;
- Many of the parties interviewed indicated that they wanted to present an application for refugee status (asylum seekers) – the acting judge did not even enter the request into the record, but gave the information that the application should be presented in writing.

The judgements of the Strasbourg Court of Justice condemning Hungary in relation to alien policing detention

- Alaa Al-Tayyar Abdelhakim versus Hungary

  Number of the application: 13055/11.

  Judgement: 23 October 2012.
- Said versus Hungary

  Number of the application: 13457/11.

  Judgement: 23 October 2012.
- Lopkó and Tuoré versus Hungary

  Number of the application: 10816/10.

  Judgement: 20 September 2011.

International survey of the Helsinki Committee made on the supervision by the court of alien policing detention

Austria

- It is against the law to automatically keep in detention every applicant for refugee status (asylum seeker) falling under the Dublin procedure;
- Specific signs have to indicate that the applicant shall not stay at the open accommodation/reception centre;
- The fact in itself, that a foreigner does not want to leave the territory of the country might not be sufficient for detention.

Germany

- The precondition for alien policing detention is that the expulsion/return shall be executable in three months time.

Slovakia

- The decision ordaining detention shall also contain detailed reasoning and evidences on the necessity of detention;
- Alien policing detention of minors might not be ordained;
- It is against the law if the authority fails to implement the procedure necessary to define the age;
- The reasons for which the alternatives for detention are not considered to be assured shall also be explained in detail.

France

- Detention might be ordained only for that period of time, which is inevitably necessary for the execution of expulsion/return;
- In France, the maximum term of alien policing detention is 45 days, but judicial practice ordains the release of detainees prior to the expiry of the 45 days if the authority failed to take the necessary measures, for example, within the first 48 hours.

Holland

- Detention is unlawful, if reliable individuals or organisations guarantee the accommodation and provision of the foreigner in those cases when there is no chance for the removal of the foreigner within a limited period of time;
- When assuring the protection of public order is possible via the implementation of less radical methods.

USA

- Typically, the rational term of detention is 6 months – after the expiration of 6 months, the authority shall provide evidence on why the removal could not be enforced;
- The longer a foreigner is kept in alien policing detention, the shorter the term of the rationally foreseeable period shall be.

UN High Commissioner for Refugees – guidelines, 2012

1. The right to apply for refugee status shall be respected.
2. Every person who applies for refugee status (asylum seeker) shall be entitled to the right of personal freedom, safety and the freedom of movement.
3. Legal regulations on detention shall be respected.
4. No person might be detained arbitrarily, and the decision on detention shall be based on the evaluation of the personal conditions and circumstances of the person in question.
5. Detention may not be discriminative.
6. Detention for an unlimited period of time is unlawful; the maximum term of detention shall be prescribed by the law.
7. Ordaining and extending detention shall be subject to basic procedural guarantees.
8. Humane conditions shall be assured during detention and human dignity of the detainees shall be respected.
9. Individual circumstances and special needs of the asylum seekers shall be taken into consideration.
10. Independent monitoring and control mechanisms shall be applied during detention.

+(Alternative solutions to be applied in stead of detention.)

Proposal of the Hungarian Helsinki Committee on the reform of judicial supervision of alien policing detention

- Development of a rational and operational structure;
- Replacement of criminal approach with public administration approach;
- Termination of the unlawful alien policing detention of asylum seekers;
- Implementation of individual investigations and the „final resort” approach;
- Increase of the expected level of certainty as time goes by;
- Training.

Findings of the team analysing the alien policing legal practice of the Curia

- The designation and the remuneration of the guardians shall be unified;
- Managmeent of the files shall be unified;
- Reasoning of the decision shall also include the possibilities to apply alternative solutions;
- Criminalisation shall be avoided (for example, there should not be files with the title ‘criminal case’, third-country nationals shall not be labelled as perpetrators);
- If the detainee is a minor, is it the right practice that judges evaluate the case?;
- Fast collection of national information reports shall be assured (National Judicial Office).

END

Thanks for your attention!

EURÓPAI VISSZATÉRÉSI ALAP

Position of the Jurisprudence Analysing Group of the Curia (the Supreme Court)
Regarding Safe Third Country
Dr. Anita Nagy

The reason for the publication of the above position was that the jurisprudence regarding the interpretation of the safe third country gave rise to contradictory practice with respect to Serbia by the different courts of Hungary primarily due to issues of procedures. The Curia finally adopted the preparation material compiled by the judges of the Curia and the judges of the regional courts and associate professors and issued its ***Opinion 2/2012 (XII.10) KMK*** (Public Administration and Labour Law Division) *'regarding certain issues of the legal interpretation of safe third country'*.

A prerequisite to understanding this opinion and the preparation document of the position is having knowledge of the following:

1. legal background of safe third country,
2. practice of the European Court of Human Rights (hereinafter: **ECHR**) with regard to this subject,
3. difficulties arising in refugee cases regarding evidences.

Ad 1. Legal background of safe third country

The relevant provisions of Act LXXX of 2007 on refugee law (hereinafter: **Refugee Law Act**):

Section 51 (2) the application is inadmissible if

…

e) in respect of the applicant, there is a country which, with respect to the applicant qualifies as safe third country.

(3) The inadmissibility of the application can only be ascertained on the basis of sub-section (2) *e)* if the applicant

a) has already stayed in the safe third country and would have had an opportunity to request effective protection in accordance with section 2 *i)*;

b) has travelled across the territory of that country and would have had an opportunity to request effective protection in accordance with section 2 *i)*;

….

(4) In the event of those contained in sub-section (3) *a)-b)* the person requesting recognition must provide evidence that in that country he did not have an opportunity for effective protection as laid down in section 2 *i)*.

Section 2 For the purpose of this Act

…

i) ***safe third country:*** a country in respect of which the refugee authority has become convinced that the applicant was treated in accordance with the following principles:

ia) the applicant does not have to fear for his life and freedom for reasons of race, religion, nationality, membership of a particular social group or political opinion and is not threatened by serious harm;

ib) the principle of refoulement is respected in accordance with the Geneva Convention;

ic) the international law provision is recognised and applied stating that the applicant cannot be deported to the territory of a country where it would be exposed to the attitude defined in Article 14 (2) of the Fundamental Law; and

id) the opportunity is available to submit application for recognition as refugee and in case of recognition as refugee, protection in accordance with the Geneva Convention is provided;

In the context of the above provision I briefly described the different phases of the refugee

procedure: the ***preliminary*** assessment phase (Act on Asylum, Sections 47-55) followed by the ***detailed*** assessment phase (Act on Asylum, Sections 56-68). That is, we encounter the concept of safe third country in the ***preliminary*** phase since in case the authority decides that during his travels, the applicant had been in a country where he could have found refuge as the state was safe for him/her, this foreigner will not get any further beyond the screening procedure and will not get into the detailed assessment phase. In alien policing and refugee cases Serbia was considered by the Hungarian authorities as safe third country, therefore, they regularly sent large numbers of foreigners back into that state. On the basis of the available public data, the United Nations High Commissioner for Refugees disputed this position.

Ad 2. Practice of the European Court of Human Rights (hereinafter: ECHR) regarding this subject

I gave a detailed presentation on the judgement of the ECHR of 21 January 2011 on the case of **M.S.S. vs. Belgium and Greece** (case No. 30696/09) as this judgement has well highlighted the problems in the context of *Greece* that we have encountered in relation with *Serbia*.

In its judgement, the ECHR stated among others that – Removal to Greece according to the 'Dublin II' regulation qualifies as a clear infringement of the European Convention on Human Rights (ECHR) *because of the deficiencies of the refugee procedure in Greece*. Pursuant to the judgement of the court, if any Member State (in the present case, Belgium) exposes the asylum applicants to the refugee procedure in Greece thereby they infringe (among others) articles 3 and 13 of ECHR.
At this point, it is to be noted by all means that the judges of the (former) Metropolitan Regional Court declared ***the same*** in a number of their judgements made in late 2009!

During the period concerned (and partly even today) similar severe conditions prevail in Serbia as described in the judgement of the ECHR. Relating concerns have also been described by the UNO in its report made in August 2012 under the title Serbia as a country of asylum (*http://www.unhcr-centraleurope.org/hu/pdf/informacioforrasok/jogi-dokumentumok/unhcr-kezikonyvek-ajanlasok-es-iranyelvek/szerbia-mint-menedeket-nyujto-*

orszag-2012.-augusztus.html). The report identified severe deficiencies both with regard to access to the procedure as well as with regard to legal remedy and integration. The Refugee Office functioning on an *ad hoc* basis is unable to coop with handling the increasing number of applications and so far not one single foreigner has received refugee status (that is, the proportion of recognition is 0 %), the application of the concept of safe country of origin and safe third country gives reasons for concern, hearings are held by policemen (who have not received special training), and applications cannot be submitted as early as at the airport.

In that context I repeatedly called the attention of the audience (consisting of mostly young secretaries and judges at the beginning of their career) that working with foreigners is very much different from the ordinary work of a judge: it requires much broader knowledge and the thorough knowledge of international legal documents. In addition to theoretical knowledge, however, we should also bear in mind that very often we have to come to understanding people who are prosecuted often in their own home country and humanitarian attitude is a requirement especially with regard to refugees. When passing a decision we always must consider that we have never been to the country of origin and we must apply discretion with regard to the consequences for the future (repeated persecution, realistic chance of becoming a victim of the civil war).

Ad 3. Difficulties relating to provision of proof in refugee cases

Proof related rules in the different branches of law:

A. PROVISION OF PROOF IN CRIMINAL LAW

- Act XIX of 1998 on criminal procedure**:**

‘Section 4 *(1) The burden of proof lies with the accuser.*
(2) No fact not supported by evidence without any doubt can be considered to the detriment of the accused.’

B. PROVISION OF PROOF IN CIVIL LAW

- Act III of 1952 on the Code of Civil Procedure – Commentary

‘*Presentation* of evidence *is an activity* of the parties *involved*, other participants *of the court cases and of the court which has as its objective the development of the opinion of the court passing the judgement on the prevalence or non-prevalence of a certain fact and/or the truth or lack of truth of certain claims.’*

‘*The activity of the* ***court*** *is traditionally aiming at ordering the collection of evidence, the implementation thereof, the perception of evidence and their consideration. It is the task for the* ***parties*** *involved to search for the tools of evidences and to present the evidences to the court.*

The subjects of evidence are usually facts that are understood as happenings taking place in the external world and material phenomena of the external world as well as the phenomena and conditions of the psyche of men. From the aspect of deciding in a given litigious case, the subjects of evidence are those significant (relevant) facts that may also be called facts to be supported by proof. The subject of the proof can be a positive or negative fact alike and it regularly concerns a past event.’

‘The objective of provision of evidence is assurance to be attained by the judge

The primary purpose of evidence is to enhance the development of a firm belief of the court. This firm belief must reach the level of firm assurance. This level is reached by the court when it is able to establish the facts as they actually happened in objective reality.‘

C. COLLECTION OF EVIDENCE IN REFUGEE CASES

- Act LXXX of 2007 on Asylum **(hereinafter: Act on Asylum):**

‘Section 41 *(1) ‘To verify or substantiate in the course of the refugee procedure whether the criteria of recognition as a refugee, a beneficiary of subsidiary or temporary protection exist in respect of the person seeking recognition the following means of providing evidence may be used in particular;’*

As it is clear from the afore going, in refugee cases the level of necessary standard of proof is much lower, this is why the term evidence (proof) is not even used, instead in international technical jargon the term ‘***substantiate***’ is used.

The unbroken practice of the European Court of Human Rights uses the following formulae with regard to cases of Article 3 in respect of the standard of proof:

(...) substantial grounds are shown for believing that the real risk of torture, inhuman or

degrading treatment or punishment exists.

Being aware of the practice of the Court:
It does not have to reach the probability of 50% , that is the occurrence of torture, inhuman and degrading treatment or punishment does not have to be more probable than that it would not occur (see for example *Saadi* vs. Italy, Application No. 37201/06, 28 February 2008). At the same time it has to be more than just a 'mere possibility' (see for example *Vilvarajah* and others vs. United Kingdom, Applications No. 13163/87., 13164/87. and 13165/87, 30 October 1991)

Following these introductory thoughts I presented the main subject of my presentation, the position of the jurisprudence analysing working group of the Curia in respect of the interpretation of the concept of the safe third country:

I. During the review of rulings based on Section 51 (2) e) of Act LXXX of year 2007 on asylum (hereinafter: Act on Asylum), the country information on the third country concerned with the case, known as exact and authentic in any procedure by the judge, available at the point of time of decision by the court must be considered ***ex officio***. In this context, ***the country information of the United Nations High Commissioner for Refugees*** must be considered in every case.

In case of any doubt pursuant to Section 70, Sub-section (3) of Government Decree No. 301/2007.(XI.9.) Korm. on the implementation of the Act on Asylum (hereinafter: Act on Asylum) information can also be requested from the Office of Immigration and Nationality as country information centre as well as from other sources that can be controlled. When sending a request to the country information centre, the duration of the request is not included in the 8 days available for a procedure.

II. The ***overloading*** of the refugee system of any third country may result in the consequence that in this country it becomes impossible to ensure the rights due to asylum seekers. Such third countries cannot be considered safe from Asylum Law aspect.

III. The fact ***in itself*** that the applicant did not attempt to submit an asylum application in the given third country does not substantiate the statement that this third country should be

considered as safe third country with respect to the applicant.

Ad I. Pursuant to **Article 8,** Sub-section (2) a) and b) of Directive No. 2005/85/EC, the court shall, in the course of examining the applications, pass a decision individually, objectively and impartially; shall obtain precise and up-to-date information from various sources such as the United Nations High Commissioner for Refugees (UNHC) as to the general situation prevailing in the countries of origin of applicants for asylum and in countries through which they have transited.
In the course of statutory review of the authority procedure the use and evaluation as evidence of the report by the United Nations High Commissioner for Refugees pursuant to Section 206 (1) of the Code for Civil Procedure has an outstanding importance. If the court became familiar with the report through some other case, then the information contained therein must be treated as of which the court has ***official knowledge of***. From the above Directive it follows that the report of the ***United Nations High Commissioner for Refugees must be assessed in all cases*** as a separately identified information source. This also means that both in the reasons for the resolution on the application as well as in the reasons for the judgement by the court, explanation must be given that with regard to the given country no such report is available or it is so outdated that the information contained therein are no longer up-to-date. This latter circumstance must be justified in detail.

Due to the absolute nature of torture, inhuman, degrading treatment, both the authority as well as the court, when they have investigate the prohibition of removal and non-refoulement in relation with this prohibition, and examine whether it is a safe third country, they must consider the ***governing facts prevailing at the moment of their decision***.
What follows out of Section 72 (2) a) of the Act on Asylum is that not even the authority can neglect to obtain country information in a base case.
As a control of the statements of the Refugee Authority (to control whether the third country is safe), the ***court may also request country information*** [Section 70 (3) b] of the Act on Asylum]. The Office of Immigration and Nationality country information centre will respond to requests by the court pursuant to Section 70 (7) of the Act on Asylum within 15 days which term of procedure is not in harmony with the term of procedure of 8 days available for the court. As the court has the obligation to obtain information from a number of sources, therefore, it is justified to come to the conclusion that the term of procedure of 15 days falling

outside the scope of operation of the court cannot be included in the non-litigious procedure deadline.

With respect to the burden of proof in an asylum procedure, the refugee ***authority*** must assess (and if necessary, ***provide evidence*** in a non-litigious court proceeding – as in Section 336/A (2) of the Code on civil procedure) if the given country qualifies as a safe third country, while it will be an obligation for the ***applicant*** to support with evidence (at the level of ***substantiation***) pursuant to Section 51 (4) of the Act on Asylum that the given country is not a safe third country for him. In a non-litigious proceeding, it can be disputed, as appropriate, that a third country qualified by the authority as a safe third country in fact is not safe or it is not safe only in respect of the applicant. The burden of proof by the applicant is preceded, however, by the obligation of the authority to clarify with regard to the third country concerned whether it is in compliance with the requirement of 'being safe'. Due to its international legal obligation to obtain information from different sources, the court is obliged to consider all information individually and in their totality that it officially becomes knowledgeable about and not only the information from the party to whom the application was submitted and the information eventually obtained from the applicant.

Ad II. Whether a given country ratified the relevant international conventions is in itself irrelevant when answering the question about a country 'if it is safe' as the practical application of these conventions must also be investigated.
Pursuant to Section 51 (3) a) of the Act on Asylum, it is of outstanding importance if there is ***effective*** protection in the given state. In that respect, a number of circumstances must be investigated and must be considered with respect to their weight (e.g., if submission of application is subject to conditions, and if it is so, to what extent is it impossible to fulfil this condition within a rational time frame, if thorough examination of the application is assured and if guarantees for legal remedy and proceedings are adequate, etc.). If, due to any reason, a given state is not in a position to comply with the provisions of the European Union directives and fulfil other international obligations undertaken in its treatment of the asylum seekers and in the assessment of asylum applications, the risk exists that the fundamental rights of the asylum seekers are not guaranteed in that state. The overloading of the refugee system may result in a real risk of infringing the fundamental rights asylum applicants are entitled to, for which reason this state cannot be considered as a safe country from refugee points of view.

Ad III. Provision of evidence concerning individual risk cannot be rationally expected in respect of a chain re-foulement as it is typically a consequence which is independent of the will of the person concerned and often it is not influenced by the personal characteristics. If in the given country, the risk of chain refoulement exists in general, it is almost impossible for the individual applicant to provide evidence to support the fact beyond the statements thereof (on the basis of country information).

When considering whether the applicant used the protection system of the third country, it must be considered that the asylum system of the different countries function in extremely different ways and they are countries where the operation of the asylum system is under-designed or expressedly overloaded (due to the changes that have occurred since the time of its establishment), has insufficient sources, etc., therefore, the fact in itself that the applicant for asylum did not attempt to submit an application for asylum cannot result in the statement, without the examination of any other circumstances, that's the given country is safe from the point of view of that person.

2012.E1.II.F. 1/9/4-28-1

Joint interim report of the jurisprudence analysing group in the area of refugee law and alien policy:

Issues of interpretation of a safe third country in non-litigious asylum procedures

1. During the review of rulings based on Section 51 (2) e) of Act LXXX of year 2007 on asylum (hereinafter: Act on Asylum), the country information on the third country concerned with the case that the judge became knowledgeable about in any of its court proceedings as exact and authentic information available at the point of time of decision by the court must be considered ex officio. In this context, the country information of the United Nations High Commissioner for Refugees must be considered in every case.

In case of any doubt pursuant to Section 70 sub-section (3) of Government Decree No. 301/2007.(XI.9.) Korm. on the implementation of the Act on Asylum (hereinafter: Act on Asylum) information can also be requested from the Office of Immigration and Nationality as country information centre as well as from other sources that can be controlled. When sending a request to the country information centre, the duration of the request is not included in the 8 days available for a procedure.

2. The overloading of the refugee system of any third country may result in the consequence that in this country it becomes impossible to ensure the rights the asylum seekers are entitled to. Such third countries cannot be considered safe from refugee law aspect.

3. The fact in itself that the applicant did not attempt to submit an asylum application in the given third country does not substantiate the statement that this third country should be considered as safe third country with respect to the applicant.

Reasons

Point 1:

I. IF the conditions of the application of the Dublin Regulations do not exist, the refugee authority shall decide, in a preliminary assessment procedure, on the admissibility of the asylum application and will decide on whether the conditions to establishing that the application is apparently unfounded are available (Section 51 (1) of the Act on Asylum). Pursuant to Section 102 (2) of Act CXXXV of 2010, in its preliminary assessment procedures conducted on the basis of Section 51 (2) e) of the Act on Asylum in effect since 24 December 2010, the refugee authority has made a number of resolutions on refusal of applicants arriving to our country across Serbia because the refugee authority considered Serbia as a safe third country for the applicant and came to the conclusion that non-refoulement does not exist in respect of Serbia.

In the course of review of these rulings in year 2011 and in the second half of the year 2012 a contradictory practice evolved among the proceeding courts with regard to the issue whether it is possible to request appropriate effective protection in Serbia, and if, in the absence thereof, Serbia's classification as a safe third country can be doubted.

Decisions No. 6.Kpk.45.499/2011/3. and No. 15.Kpk.45.234/2011/2. of the Metropolitan Court, Decisions No. 9.Kpk.30.793/2011/3. and No. 9.Kpk.30.791/2011/4. of the Debrecen Regional Court, the Decision No. 9.Kpk.30.757/2011/3. of the Hajdú-Bihar County Court, the Decision No. 5.Kpk.20.678/2012/2. of the Szeged Regional Court and the Decision No. 3.Kpk.22.091/2011/4. of the Csongrád County Court have been examined by the jurisprudence analysing group.

On the basis of the analysis of these decisions, it can be ascertained – as explained below – that the difference between the decisions by the proceeding courts was fundamentally due to the fact that the rules applicable to the provision of evidence in the procedure by the authority and in the procedure by the court were not fully coherent and as a result, the burden of proof, the possibility to collect evidence ex officio and the utilisation of information obtained in some other procedure by the proceeding court (of the report of the United Nations High Commissioner for Refugees in particular) have been considered differently.

1. According to Ruling No. 5.Kpk.20.678/2012/2 of the Szeged Regional Court, pursuant to Section 51 (4) of the Act on Asylum, the burden of proof lies with the applicant to collect evidence as to the fact that in Serbia he did not have a possibility for effective protection

and in case he is unable to provide evidence then it is not possible to ascertain that Serbia is not a safe third country. Other courts, without provision of any specific evidence by the applicant, use and reference ex officio the country information on the refugee situation in Serbia, primarily the country report of the United Nations High Commissioner for Refugees on the asylum system in Serbia. And on the basis of these, they state that Serbia is a non-safe third country, therefore the non-refoulement is applicable.

It can also be established that when exact and relevant country information were submitted in the given non-litigious proceedings by the applicant, the Regional Court of Szeged decided, with attention to these, on repealing the resolution of the refugee authority and obliged it in the repeated procedure to examine with attention to the position of the United Nations High Commissioner for Refugees if Serbia is a safe third country and if the applicant had the opportunity to request effective protection (Csongrád County Court 3.Kpk.22.091/2011/4.).

2. It is not known what conclusions the Szeged Regional Court draws on the basis of the precise and up-to-date country information concerning the issue whether Serbia is a safe third country. The decisions of the other courts in that respect are straightforward: they do not consider Serbia as a safe third country. Data has also been found underlying that the Szeged Regional Court neglected the position of the United Nations High Commissioner for Refugees (page 3 of the Hungarian language summary made on the basis of the fact-finding visit of the Helsinki Committee in September 2011).

3. What can be considered as general practice of the Szeged Regional Court has also occurred in the early practice of the Budapest Metropolitan Court (15Kpk.45.234/2011/2.) that is, if, and in case the applicant did not attempt to submit an asylum application in Serbia (typically because the applicant was aware of the fact that he cannot expect effective protection in Serbia), then it considered it as an element of the fact suitable for individualisation out of which it follows that it cannot be established with regard to the specific applicant that Serbia would not be a safe third country. (This line of thought may be based on Section 51 (4) of the Act on Asylum which provides that the burden of proof lies with the applicant).

It may be ascertained that the practice of the Metropolitan Regional Court (former Metropolitan Court) shifted from the application of Section 51 (4) of the Act on Asylum

towards using ex officio up-to-date country information and not considering Serbia as a safe third country on the basis of that which practice has also been followed by the Debrecen Regional Court. The Szeged Regional Court (formerly: Csongrád County Court) initially did not contemplate it to the detriment of the applicant – if and in case relevant country information was available – that it did not attempt in Serbia to submit an asylum application but later it followed the practice that it required and still requires the applicants to attempt to obtain - effective protection – in Serbia. In the absence thereof it does not consider Serbia as a non-safe third country for the specific applicant.

II. In order to find an answer for the problem related to the provision of evidence and the evaluation of evidence we need to make a short review of the relevant European Union and national rules of law.

Before that, however, the necessary standard of proof is also worth mentioning. In the Anglo-Saxon legal system, refugee law decision-making requires low level standard of proof e.g., real risk, rational possibility, etc. (according to the precedent ruling by the Supreme Court of the United States 10% risk is sufficient because of the extremely severe consequences and the limited possibilities for the provision of evidences). The Hungarian asylum law indicates this lower standard of proof by the application of the term 'substantiates' (which was taken over from the handbook for refugees of the United Nations High Commissioner for Refugees into the Hungarian Act on Asylum but it is also use by the Qualification Directive – Directive No. 2004/83/EC of the Council). The European Court of Human Rights (hereinafter: Strasbourg Court) practice relating to Article 3 in removal/ extradition cases also uses the same lower standard of proof for the same reasons. In the application of the safe third country concept the 'mirrored' picture of this is the burden of proof lying on the authorities and the high standard of proof: Section 2. i) of the Act on Asylum uses the term the 'refugee authority became convinced of' (that is the term used is not 'substantiate' or 'substantively possible' etc.) (the same terms are used in the Qualification Directive (see below)).

At the meeting of the European Council on 15-16 October 1999 in Tampere, an agreement was reached on the necessity to establish a Common European Asylum System based on the full-scale and comprehensive application of the Geneva Convention of 28 July 1951 on the situation of the refugees (Geneva Convention) supplemented with the New York Protocol of 31 January 1967, maintaining that way the principle of refoulement and ensuring that in case of persecution no-one should be returned to where he was exposed to persecution.

The rules related to the international protection of refugees are contained in a number of Directives (the so-called Procedure Directive-2005/85/Ec of the Council, the so-called Qualification Directive-2004/83/Ec of the Council, the so-called Admission Directive-2003/9/EC of the Council, the so-called Temporary Protection Directive-2001/55/EC of the Council, the so-called Return Directive-2008/115/EC of the Council, the so-called Blue Card Directive-2009/50/EC of the Council) and Regulations (the so-called Dublin II. Regulation 343/2003/EC, Eurodac Regulation-2725/2000/EC). National rules are contained in the Act on Asylum and in the Government Decree on the implementation of the Act on Asylum with the exception that the rules applicable to court review are contained in Act III of year 1952 on the Code of Civil Procedures on the basis of Section 4 of Act XVII of 2005 and with consideration to the specific features of the procedure.

Article 8 (2) of Council Directive No. 2005/85/EC (Procedures Directive) stipulates that the Member States (including Hungary as well) shall ensure that decisions by the determining authority on applications for asylum are taken after an appropriate examination. To that end, Member States shall ensure that applications are examined and decisions are taken individually, objectively and impartially; precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR), which publish information on the countries of origin and on countries through which applicants transited. In that circle the requirement against the precise (relevant) information is that it must be taken from a source indicated and it must be accessible as it is indispensable for the applicant (and its legal representative) to enjoy access to such information in the applicant's file and to enjoy its right to legal remedy (Article 16 (1) of Procedures Directive).

Based on Section 47. (1) of the Act on Asylum, the refugee authority shall carry out the preliminary assessment of the application submitted for recognition of refugee status or beneficiary of subsidiary protection following its submission.

Pursuant to Section 49. (1) of the Act on Asylum, during the preliminary assessment, the refugee authority shall examine if the conditions are available for the application of Commission Regulation No. 1560/2003/EC of 2 September 2003 laying down detailed rules

for the application of Council Regulation (EC) No. 343/2003/EC establishing the criteria and mechanism for determining the Member State responsible for examining an asylum application launched in one of the Member States by a third country national, and Council Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application launched in one of the Member States by any third country national (hereinafter together: Dublin Regulations).

Based on Section 51. (1) of the Act on Asylum, in case the provisions of the Dublin Regulations do not apply, the refugee authority shall decide about the admissibility of the application and will also decide about whether the application is apparently unfounded.

Pursuant to Section 51. (2) of the Act on Asylum, the application for refugee status is inadmissible if the applicant is the national of one of the Member States of the European Union [a)]; the applicant was recognised by another Member State as a refugee [b)]; the applicant was recognised by a third country as a refugee provided that this protection exists at the time of the assessment of the application and the third country in question is prepared to admit the applicant [c)]; following a final and absolute decision of refusal, the same person submits an application on the same factual grounds [d)]; with respect to the applicant, there is a country available which qualifies as a safe third country for him [e)].
Based on Section 51. (3) and (2) e) of the Act on Asylum, the application can only be declared inadmissible if the applicant stayed in a safe third country and would have had opportunity to request effective protection as laid down in Section 2. i) in that country [a)]; travelled across the territory of that country and would have had an opportunity to request effective protection in accordance with the provisions in section 2. i) in that country [b)]; has relatives in that country and can enter the territory of that country [c)] or; the safe third country requests the extradition of the applicant requesting recognition [d)].
Based on Section 51. (4), in the event of those contained in sub-section (3) a)-b, it is the applicant requesting recognition that is obliged to provide evidence that in respect of the provisions in Section 2. i) he did not have an opportunity for effective protection in that country.

[According to Section 2. i) of the Act on Asylum the safe third country: is the country concerning which the refugee authority has ascertained that the applicant receives treatment in line with the following principles:

ia) the applicant's life and freedom are not jeopardised for racial or religious reasons or on account of his/her ethnicity, membership of a social group or political conviction and the applicant is not exposed to the risk of serious harm;

ib) the principle of non-refoulement is observed in accordance with the Geneva Convention;

ic) the rule of international law according to which the applicant cannot be removed to the territory of a country, where he would be exposed to attitudes determined in Article XIV (2) of the Fundamental Law is recognised and applied; and

id) submission of application for recognition as refugee is available and in case of receiving recognition as refugee, protection is available in accordance with the Geneva Convention.]

Article 33 of Act 15 of 1989 on the promulgation of the Convention relating to the status of refugees adopted on 28 July 1951 and the protocol relating to the status of refugees established on 31 January 1967 stipulates the prohibition of removal and return (principle of non-refoulement). Article 3 1. of Act 3 of 1988 on the promulgation of the international convention against torture and other cruel inhuman or degrading treatment or punishment also provides that no party to the convention can remove, expel or extradite anyone to another state where there is well-founded reason for the risk that the person would be tortured.

The two conventions however contain certain limitations with regard to applicability, the Geneva Convention allows for deviation from the principle of non-refoulement [Article 33, Sub-section 2 of the Geneva Convention].

At the same time the prohibition of torture, inhuman and degrading treatment are regulated as absolute human right not allowing for deviation both in the Internal Covenant of the Civil and Political Rights [Article 4 sub-section 2] and the European Convention on Human Rights [Article 3, Article 15, sub-section 2], which is also confirmed by the consistent jurisprudence of the Strasbourg Court [Tomasi vs. France, 12850/87, 27.08.1992, Chahal vs. United Kingdom 70/1995/576/662, 11.11.1996; Selcuk and Asker vs. Turkey, 12/1997/796/998-999, 24.04.1998; Saadi vs. Italy 37201/06, 28.02.2008].

Relating to the interpretation of Article 3 of the European Convention of Human Rights, the European Human Rights Committee functioning besides the Strasbourg Court and acting until 1998 as a kind of pre-screener and as a first instance decision-making body in certain

cases declared the application of the principle of non-refoulement – the extra territorial scope of Article 3 – as early as in the 80s [X vs. United Kingdom, 8581/79, 06.03.1980], which was later confirmed also by the Strasbourg Court, extending the principle also to the case of the so-called chain-refoulement [first it was declared by the German Constitutional Court in 1996, Judgement 2 BvR 1938/93 and 2 BvR 2315/93; Salah Sheekh vs. the Netherlands, 1948/04 11.01.2007]. Hence it follows that on the basis of guiding jurisprudence of the Strasbourg Court in relation with Article 3, the principle on non-refoulement is to be applied without deviation.

In harmony with that the Fundamental Law, in the Chapter on 'Freedom and responsibility' in Article XIV (2) declares that no-one can be removed into a state and cannot be extradited to a state where he is exposed to the threat of being sentenced to death, tortured or to other degrading treatment or punishment.

Considering the fact that pursuant to Article I sub-section 3, phrase two of the Chapter on 'Freedom and responsibility' of the Fundamental Law, a fundamental right can only be limited for the purpose of the validation of some other fundamental right or in the interest of protection of some constitutional asset and only to the absolutely necessary extent and in proportion to the objective intended to be obtained by respecting the essential content of the fundamental right, therefore, Article XIV, Sub-section (2) can be considered as a rule not allowing for deviation. Hardly is there any other fundamental right whose validation could compete with Article XIV, Sub-section (2) with attention to the fact that this Article is related to human life and dignity and may be derived from matriarchy being at the peak of the 'hierarchy' among fundamental rights and following the right to human life and dignity as laid down in Article II, it is closely related to the prohibition of torture, inhuman degrading treatment regulated in Article III and it is a supplement there to.

Therefore it can be ascertained that in accordance with the Fundamental Law and the European Convention on Human Rights, and the Strasbourg case law – but it can also be derived from Section 2. i) of the Act on Asylum – it is mandatory to examine whether the given country qualifies as safe third country or not, in respect of the applicant concerned.

Due to the absolute nature of prohibition, when deciding on whether it is a safe third country or not, both the authority and the court must consider the standard state of facts at the moment of passing its decision on the basis of the jurisprudence of the Strasbourg Court

[Chahal vs. United Kingdom, 70/1995/576/662. 11.11.1996; Salah Sheekh vs. the Netherlands, 1948/04 11.01.2007].

The European Union regulated the refugee issues in conformity with the above international conventions and the jurisprudence of the Strasbourg Court (EUB C-493/10 point 2) and accordingly Article 8, Sub-section (2) a) and b) of Directive No. 2005/85/EC establishes clear and unconditional obligations [applications are to be examined and decisions are to be taken individually, objectively and impartially; precise and up-to-date information is to be obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR) in the country of origin of the applicants for asylum and where necessary, information on the general situation prevailing in countries through which they transited until they reached the state where the application was submitted; furthermore, such information is to be made available to the personnel responsible for examining applications and taking decisions].

As the Act on Asylum is a rule of law harmonised – among others – with this European Union Directive provision [Section 95 (1) k) of Act on Asylum], it includes among its provisions that in the course of the refugee procedure, in the interest of verifying or substantiating that the conditions of recognition of the applicant as a refugee, a beneficiary of subsidiary of temporary protection exist, as means of providing evidence – among others – all relevant and up-to-date information on the country of origin of the applicant requesting recognition including the legislative and other mandatory provisions applicable to the subject of law as well as the way of application of the country of origin can be used [Section 41 (1) c] of the Act on Asylum]. It is quite conspicuous that this provision of the Act on Asylum – in contrast with the provision of the Procedures Directive – is not applied to countries across which the applicants transited until they reached the state of submission of the application (e.g., until they reached Hungary). At the same time, according to Section 71 b) of the Decree on the implementation of the Act on Asylum the relevant information in the application of Section 41 (1) c) of the Act on Asylum is – among others – the information describing and analysing the current real situation not only in the country of origin but also in the third country having significance from the aspect of recognition or withdrawal of recognition. Both Section 72 (1) and (2) a) of the Decree on the implementation of the Act on Asylum give rise to the conclusion that collection of country information cannot be neglected by the authority not even in a base case [Section 72 (1) the refugee authority if

necessary may repeatedly request information from the organ responsible for the provision of country information. Section 72. (2) a): The refugee authority may not neglect the collection of report from this organ in the preliminary assessment procedure – that is the prime rule is that the report must be considered.].

The provision of the Act on Asylum on the use of country information is deficient in the light of European Union legislation but the provisions of the Decree on the implementation of the Act on Asylum is not in contradiction with the prescriptions of the European Union. The application of the safe third country concept is an integral part of decision-making on refugee issues; it is a kind of 'preliminary question' of recognition. The investigation on a preliminary investigation procedure of whether a third country is 'safe' provides information on the real situation in a 'third country having significance from the aspect of recognition' and as such, it should be examined in accordance with the foregoing. Section 71 (1) c) of the Act on Asylum makes it even more straight forward when it implicitly refers to the fact that the relevant country information may also imply the investigation of the safe third country.

Provision supporting this concept can also be found in the Act on Asylum: Section 47 (1) makes it clear that the preliminary assessment (of which the investigation of the issue of safe third country is a part of) is an integral part of 'the assessment of an application for recognition as a refugee or as a beneficiary of subsidiary protection' (Section 71 (1) b) of the Act on Asylum).

Collection of up-to-date country information by the court is not assisted by the regulation pursuant to which in Section 53. (4) of the Act on Asylum the court shall decide in a non-litigious procedure on the basis of the available documents within 8 days. The legislator considered it important to highlight that in case of need the court may hold a personal hearing. Having this regulation in place, it is very difficult to explain why it does not indicate the opportunity for request.
At the same time it can also be stated that based on its national practice, the deadline of 8 days does not necessarily have to be interpreted as an obstacle. International examples in court practice show that the public administration organ responsible for giving country information is obliged to respond to the court sending a request within a short deadline. In addition, it is also important to highlight that the investigation of the safe third country in case of Hungary (where in practice only a few third countries can be relevant from that

aspect) is less complex and requires less meticulous Internet-based research and in a number of cases the relevant and accessible country report is available anyhow (even sometimes in Hungarian translation). Therefore, the 8 days deadline for the procedure – although it is undoubtedly very tight – cannot be considered a condition excluding the possibility for quality country information. The country information thus obtained is the 'document available' at the moment of passing decision; therefore, it cannot be excluded from use in the process of decision-making.

The Office of Immigration and Nationality (BÁH) as the organ responsible for the provision of country information responds to the request of the Court within 15 days pursuant to Section 70 (7) of the Decree on the implementation of the Act on Asylum, which term of procedure is not in harmony with the 8 days deadline available for the court procedure. Because of the obligation to obtain information from a number of sources, it is justified to conclude that the 15 days deadline available for the procedure – which is falling outside the scope of operation of the court – cannot be included in the deadline for the non-litigious procedure.

The report of the United Nations High Commissioner for Refugees has outstanding importance from the point of view of the control of information received from the organ responsible for the supply of country information especially because this source is implicitly indicated in Council Directive 2005/85/EC (Article 8 (2)).

Pursuant to Article 21 c) of the Procedures Directive, the United Nations High Commissioner for Refugees can otherwise present its views in any stage of the procedure.

For this reason it is of outstanding importance that during the statutory review of the procedure by the authority the Court may use and assess as evidence the report of the United Nations High Commissioner for Refugees based on Section 206 (1) of the Code on Civil Procedure. If it obtained information of the report through some other cases, the court must handle the information contained therein as information that it has official knowledge of.

Official knowledge is in fact knowledge and information <u>obtained</u> about facts by the judge that he obtained not as a private person but in the course of acting in his official capacity.

Such facts can be accepted by the court as true facts.
The most frequent case of officially obtaining information is when the court obtains information in litigious and non-litigious procedures that had been conducted at previous points of time. The parties are not required to refer to such facts, the court is obliged ex officio to consider such information in all phases of the procedure (Supreme Court Pfv. IV. 20 529/1994. - BH1996. 304 sz. II.). The court however must indicate the source of the official knowledge in its reasons for the resolution (Supreme Court Civil Code I. 20 871/1968.).

It follows from the foregoing that the report of the United Nations High Commissioner for Refugees must be assessed in all cases, which also means that both in the reasons for the resolution on the application for refugee status as well as in the reasons for the resolution by the court, explanation must be given if no such report is available with respect to the given country or it is so old that the information contained therein are no longer up-to-date (the information contained therein no longer correspond to the facts). Detailed reasons must be given for the latter circumstance.

Pursuant to Section 51 (3) of the Act on Asylum, the refusal of the application for asylum without the assessment of its substance and the absence of the existence of non-refoulement can only be ascertained based on this argument – among others – if the refugee authority has become convinced – among others – of the fact that in the given country the principle of non-refoulement is respected in accordance with the Geneva Convention; furthermore, the possibility for submission of application for recognition as refugee is ensured and in case of recognition as refugee, protection in accordance with the Geneva Convention is ensured (safe third country); and the applicant would had have an opportunity for requesting appropriate effective protection [Section 2. ib) and id) of the Act on Asylum, Section 51. (3) a) or b) of the Act on Asylum]. According to Section 51. (4) of the Act on Asylum, in the event of the provisions contained in sub-section (3) a)-b), the applicant requesting recognition must provide evidence that in the given country he did not have a possibility for effective protection although this given country is a safe third country.

Based on the provisions above, in respect of the burden of proof in a refugee procedure, the refugee authority shall assess [and if necessary provide evidence in a judicial non-litigious

procedure – Code on Civil Procedure Section 336/A. (2)], if the given country qualifies as a safe third country, while pursuant to Section 51. (4) of the Act on Asylum, it is an obligation of the applicant to provide evidence that the given country is not a safe third country for him. In a non-litigious procedure it may be disputed, as appropriate, that the country qualified by the authority as a safe third country is in fact not safe or it is not safe only in respect of the applicant. The requirement to provide evidence by the applicant is preceded, however, by the obligation of the authority to clarify with respect to the third country concerned whether it meets the requirement of 'being safe'. As due to the nature of legal regulation, the base case is that no country is a safe third country, unless proof thereof has been provided by the refugee authority. Failure to provide proof and the absence of related reasons make the resolution by the authority unfounded. Owing to its international legal obligation to obtain information from various sources, however, the court is obliged to assess, individually and in their totality, all information it obtained officially and not only the information it gathered from the applicants.

At the same time, all this means that in respect of the interpretation of the safe third country, the regulation of refugee matters contains statutory provisions that are different from the principle tied to application contained in Section 3. (2) of the Code on Civil Procedure and the rules on provision of evidence in sub-section 3), for which deviation authorisation is provided in Section 3 (2) and (3) of the Code on Civil Procedure. It follows from this that Section 164. (1) of the Code on Civil Procedure is not applied here, but the court must examine this issue ex officio irrespective of the content of the application.

Point 2

As referred to the above, in possession of the country information obtained the court shall establish on the basis of its own conviction and on the basis of the assessment of evidences individually and in their totality whether the given country is safe or nor from the aspect of refugee issues.

It is important to highlight however that the fact that the given country ratified the relevant international conventions is irrelevant in itself when answering the issue about whether a country is 'safe', as the practical application of these conventions must also be assessed in light of the Qualification Directive, the Hungarian rules of law and the jurisprudence of the Strasbourg Court (see 42502/06 11.12.2008 - Muminov vs. Russia: '[...] the availability of rules of law guarantying in principle the respect of fundamental rights and the fact of

having ratified international conventions are not sufficient in themselves to provide adequate protection against the risk of inhuman treatment, where [...] according to the reports of reliable sources a practice apparently contradictory to the principles of the Convention is pursued or tolerated.').
The fact that a country has an EU candidate status is also an irrelevant circumstance as in itself it has no correlation with the provision of the opportunity for real international protection.

According to Section 51. (3) a) of the Act on Asylum, it is of outstanding importance if in a given state, effective protection is available. In this circle a number of circumstances must be investigated and assessed according to their weight (e.g., if the submission of an application is tied to conditions, and if it is so, to what extent is the fulfilment of this condition impossible within rational time, is thorough assessment of the application ensured and are the legal remedy and procedure guarantees appropriate, etc.). If a given state, for any reason, is not in a situation that it is able to abide by the provisions of the European Union Directives in the treatment of the applicants for asylum and in the assessment of their applications for asylum and to fulfil its international obligations that it has undertaken, there is the risk of not providing the fundamental rights of the applicants for the asylum in that state. The overloading of the refugee system may lead to the point that there is a real risk of infringing the fundamental rights that the applicants for asylum are entitled to, for which reason such a state cannot be considered safe from the aspect of refugee issues.

Point 3:

It is important to highlight that during the assessment, the investigation of the individual situation of the applicant cannot be neglected which, apparently, cannot be separated from the system level analysis and assessment.

If and in case a given state is considered safe on the basis of information available, pursuant to the provisions in Section 51. (4) of the Act on Asylum, the applicant shall bear the burden to provide evidence in respect of not having access to effective protection (it is in that case that individual circumstances have an outstanding role). The provision of evidence must reach a sufficient standard of substantiation (e.g., verification of being a minor, realistic story, consistent declarations, etc.).

[Note: Prior to 24 December 2010, the preliminary assessment procedure contained the investigation of simple technical questions (if the applicant is an EU citizen, if he has been granted refugee status in some other country, etc.). To perform this, a non-litigious review and a tight deadline (8 days) were found sufficient by the legislator for well-founded reasons. The amendment of the legislation in 2010 extended the circle of facts to be investigated to include issues requiring investigation in substance (like the issue of the safe third country for example), in respect of which, however – incorrectly – it failed to assign a longer deadline and other necessary 'accessories' (e.g., obligation of mandatory hearing and obtaining explicit country information, etc.).]

The use of country information and individualisation are general requirements of procedure both in the Qualification as well as in the Procedures Directive, which must be applied to all components and phases of procedure of all procedures on refugee issues, and the preliminary assessment, accelerated, airport, etc. procedures are not exceptions from under the scope thereof either.
Provision of evidence of individual risk cannot be rationally expected in a chain-refoulement (when the domestic authority infringes the prohibition of removal and the principle of non-refoulement by making the applicant continue to travel to the country of the party to the agreement on the basis of the agreement on the transfer and reception of persons illegally entering the country and without carrying out the assessment of the substance of international protection, and the authority of that other country further transfers the applicant to another party to the agreement that may expose the applicant to the country of origin, infringing thereby the human rights obligations related to protection). The reason is that it is typically a consequence which is irrespective of the will of the person concerned and often not even individual characteristics can influence it. If the risk of chain-refoulement exists in general in a given country, beyond the statement of such fact (on the basis of country information) it is almost impossible to provide evidence of by the individual applicant.

According to the judicial practice described in point 1, the interpretation of whether the applicant for refugee status took advantage of the refugee system of this third country, if he used the opportunity to submit an application or not was also varied. There was a judicial interpretation of the law which interpreted the absence thereof by stating that in respect of such applicant, there is no way to establish that this country is not safe for him.

When interpreting this issue however, it must be noted that the operation of the refugee systems of countries is very must different. There are countries where the refugee system is under-designed or expressedly overloaded (as a result of changes occurring since the establishment of the system), has no sufficient sources, etc., therefore, without further assessment of the circumstances, merely on the basis of the fact that the applicant for asylum did not attempt to submit an application for asylum does but not follow logically that this country is safe from his aspect. As it was described in point 1., the fact that the country is safe can only be assessed on the basis of broad scale examination involving a number of aspects.

Budapest, 26 November 2012

Dr. András Kovács

Head of the Alien Policing and Refugee Jurisprudence Analysing Group, Judge, Acting Head of Chamber of the Curia of Hungary (Supreme Court)

Members of the Alien Policing and Refugee Jurisprudence Analysing Group:

Dr. András Béri, Judge of the Szeged Regional Court

Dr. Ildikó Fekete, Judge of the Curia

Dr. Ildikó Figula, Judge of the Debrecen Regional Court

Dr. Zoltán Hautzinger, Head of Department, University Associate Professor (NKE RK Department of Immigration and Nationality)

Dr. Ibolya Horváth, retired Supreme Court Judge, advisor, Penal Division

Dr. Gizella Márton, Judge of the Curia

Dr. Anita Nagy, Judge of the Metropolitan Regional Court

Dr. Zoltán Pál, Judge of the Debrecen Regional Court

Dr. József Surányi, Judge of the Metropolitan Regional Court

Dr. Szalayné Dr. Erzsébet Sándor, University Associate Professor (PTE ÁJK, Department of International and European Law)

Dr. Kincső Tóth, Acting Head of Chamber Judge of the Curia

Dr. Judit Tóth, University Associate Professor (SZTE ÁJK Department on Constitutional Law)

EURÓPAI VISSZATÉRÉSI ALAP

WORKSHOP 18-19 SEPTEMBER 2012 – 21-22 March 2013.
CASE STUDIES

THE INTERRELATIONSHIP BETWEEN THE 1951 CONVENTION, THE EU QUALIFICATION DIRECTIVE AND THE ECHR. ALSO ISSUES OF COUNTRY OF ORIGIN INFORMATION

(prepared by Anna Bengtsson, Laurent Dufour, dr Anita Nagy and dr Ildikó Figula)

THE CASE OF A - IRAN

A is a national of Iran. He fled Iran 2007 after it was discovered by his wife's family that he had committed adultery. The adultery was witnessed by four policemen who had visited his office after a complaint about drinking of alcohol on the premises. The wife's family had gone to the authorities to bring him to justice. He managed to leave the country just before the authorities issued a summons against him saying that he was charged with adultery. In his application for asylum he claims that he faces punishment and that according to article 83 B of the Islamic Criminal Code it will be death by stoning.

At first instance, the administrative authority, they find that A´s claim for asylum, including oral hearing and written submissions, is found to have credibility flaws. His asylum application is therefore rejected and the decision is taken that he must leave the country.

During the appeal you learn through written submissions that A has been prosecuted in Iran for excessive drinking and ambiguous behaviour with young women in the neighbourhood, and so has an unfavourable record with the Iranian courts.

You find that A is credible and that, even though there can be some issues of lack of credibility in his story, overall you decide that his asylum story must be accepted.

You note that A was not found guilty of any crime prior to leaving the country.

His lawyer ask now argues that

(i) you find that A is in need of international protection and eligible for asylum, i.e. refugee status according to the 1951 convention. Or, if he does not qualify for that,

(ii) (ii) you find that he is eligible for subsidiary protection under your national law equivalent of Article 15 of the Qualification Directive (QD). The argument is that he qualifies either under Article 15 a, because he faces the death penalty or under Article 15b.

You have before you Country of Origin Information (COI) confirming that the punishment under the Islamic Criminal Code is death by stoning, but that execution by stoning for the crime adultery has seldom happened since 1997, especially not in Teheran. The only two recorded cases of stoning there, both from 2001, concerned one case where the sentence was for adultery as well as for murder. The other adultery had been combined with acting in a movie deemed pornographic.

Questions

1. Do you consider that A qualifies for refugee status according to the 1951 convention?
2. If he does not, does he or can he qualify for subsidiary protection under QD Article 15?
3. If he does qualify under QD Article 15, should that be under 15 a or 15 b or both?

THE CASE OF B - IRAQ

B is a national of Iraq. Young man, living in central Baghdad, married with wife and two children. Shares house with brothers. B has worked for two years as an interpreter for the American troops in Baghdad. His colleague was killed two months ago and he himself received two death threats upon leaving work recently. His father used to be member of Baathist Party during the regime of Saddam Hussein, now unknown men and neighbours threaten the father and sometimes brothers because of this. B left Iraq and went to Hungary via Greece where was detained for entering the country illegally. After one week he was released and managed to find a smuggler who for 5000 US dollars took him in the boot of the car to Hungary. B is very concerned about the safety for his wife and children, as well as the safety of his father and brothers and asks you to take a quick decision.

Questions

1. Do you consider that B qualifies for refugee status according to the 1951 convention?
2. If he does not, can he qualify for subsidiary protection under QD Article 15?
3. If he does qualify under QD Article 15, should that be under 15 a, b or c?
4. Would an internal flight alternative be possible? If so, please outline under what conditions.

CASE OF C - MAROCKO

C is a teenage girl of 15 years and a national of Morocco. She is unmarried, her father deceased five years ago. Mother had to remarry the brother of her deceased husband. C lives with her mother, her uncle (fathers brother), who is head of household, and three younger sisters. Claims to have been humiliated and harassed by uncle for several years. Also has been very badly beaten and sexually abused. Has twice gone to local police office in order to file a complaint about beatings and abuse by uncle. The police have declared themselves unwilling to let her file any complaint.

Questions

1. Do you consider that C qualifies for asylum/refugee status?
2. If she does not, can she qualify for subsidiary protection under Article 15 QD?
3. Would an internal flight alternative be possible? If so, please outline under what conditions.

CASE OF D - GUATEMALA

A young man seeks asylum at the airport of Budapest, Hungary. From Guatemala, no ID-papers or passport. Shopkeeper. The local gangs have paid him visits to offer protection for a small fee. He agreed to pay for some six months. Then the fee was raised and he refused to pay anymore. Claims to have been seriously beaten by the mafia. Afraid of risking more beatings upon return.

Questions

1) Do you consider that D qualifies for asylum/refugee protection?
2) If he does not, does he or can he qualify for subsidiary protection under Article 15 QD?

CASE OF E – CUBA

E is a national of Cuba. She was asked to join the youth organisation of the Communist party which she declined to do. Reason for his being that she was not in agreement with how the country was governed. This is when her trouble with the Cuban regime started; she was recognized as a person with political issues. She studied literature at university and also came into contact with foreign tourists. From one tourist she was given a book written by a Cuban exile, that contained criticisms of the Cuban regime. She lent the book to a fellow literature student and then the book was lent to other students as well. Word got round about students reading this book and it was found out, by "spies", whose book it was. "Spies" are everywhere, for example in the organisation of CDR. CDR stands for *Comités de Defensa de la Revolución (Committees for the Defence of the Revolution).* CDR committees exist in every neighbourhood and their function is to channel information to the government of who is acting "against the Cuban Revolution". When it was found out that the book was hers she was expelled from university. She was then three months from finishing her university degree. She was not able to have any documents showing that she has studied at university. She cannot apply for work since it in her personal file, dossier, was registered that she was expelled and the reason being she is opposing the regime. After this she encountered problems with her five year old son. At the school he attended the staff saw him as as being a mirror of his mother and he was therefore kept away from the other children, which gave him problems in that he felt rejected. He seeked treatment for this and was given medication. He now has no place in a school; this was taken from him when his mother had been gone from Cuba for 11 months, in accordance with the principle that a person that has been away for 11 months from the country loose their rights. E was actively under surveillance from the local CDR committee. A tourist came back for a visit and contacted E when he found out that E had been expelled from university. When Es mother was about to serve them coffee the Migration police suddenly entered the apartment. E was fined 1 200 US dollars for illegally receiving a tourist in her home. After this incident she was regularly stopped by the police on the street and asked to show identification documents. A number of times she was taken to the police station and kept there, sometimes over night or over the weekend. At a few occasions she was approached by the police when she was in the grocery shop together with her son and there were a few times in evenings when she was in discotheques. Her mother would a number of times call a lawyer and with the lawyer's help she would be released from the police station after an number of hours or 1-2 days. She applied for a passport which she was issued after five months after paying extra money. When she applied for an exit visa she was told that she could only get one if she fist paid for her university studies even though she had not been allowed to finish them. She believes that she will continue to face numerous ID checks and short time arrests if she would return and that she will not be able to study or find work.

Questions

1. Do you consider that E qualifies for asylum/refugee protection?

2. If she does not, does she or can she qualify for subsidiary protection under Article 15 QD?
3. Discuss issue of who is agent of persecution/serious harm. Discuss if there is any difference in level of intensity of persecutory acts compared to the other cases above.

CASE OF F - SOMALIA

A is a national of Somalia. She applied for asylum in early June 2006. The basis of her claim was that she was a member of a minority clan in Mogadishu (Reer Hamar). During the past 15 years majority clan militia (Hawiye) made numerous attacks on her family house and on its occupants. She personally had been raped and beaten on three separate occasions. In 2003, she went to work in Kenya as a maid. Early in 2006 when she was making arrangements to return to Mogadishu, she learnt that her husband and some other members of her family had been killed by majority clan militia. Her employers in Kenya took steps to get her to an EU country on a fake passport. She arrived in Hungary country on 1 June 2006.

In a decision dated 10 October 2006, the first instance in Hungary decided to reject her application and to direct her removal to Somalia. He concluded her claim was for the most part not credible in view of various inconsistencies and implausibilities. The Board was prepared to accept she was a national of Somalia and that her family, including her husband may have suffered violence or death in Somalia over the past 15 years. But since she had not shown she was a member of a minority clan, it considered that such violence could not be considered to have been persecutory. It would have simply, it said, formed part of the normal incidents of civil war that had plagued Somalia over a long period. It accepted she would be returning on her own as a young adult female, but would have some remaining family who could look after her. Thus she would neither be at risk of persecution under the Refugee Convention nor of any serious harm or ill treatment contrary to Article 3 of the European Convention on Human Rights (ECHR). Even if it were accepted she would be at risk of serious harm, she would not face persecution/serious harm since she would be able to obtain effective protection against it through the support she would get from her family and from her majority clan.

She has appealed. In her grounds of appeal, she raises points under both the Refugee Convention and under the ECHR. She does not refer to the Qualifications Directive ("QD") or to the implementing legislation[1].

Her representatives maintain that (a) she is from a minority clan and has given a credible account of everything; and (b), even accepting she is not from a minority clan, she should still succeed in her appeal because:

(i) the past adverse experiences of her and her family should have been seen as amounting to persecution as well as to treatment contrary to Art 3;

(ii) she would be returning as a lone (widowed) young woman and so would be subject to further attacks, rape or kidnapping by militia gangs who controlled the roads in and around Mogadishu: these too should be seen as amounting to persecutory acts and/or treatment contrary to Art 3; and

(iii) even if it were accepted that her family could arrange for her escort in safety back to their home in Mogadishu, they would still face there an ongoing risk of attacks on them and it was wrong to consider that adequate protection could be afforded to them by majority clan organisations, which were not agents of any state and could not even be said to be de facto state actors. Protection could only be afforded by entities which met or sought to meet their obligations under international human rights and international humanitarian law. Militia gangs were known not for their observance, but for their systematic flouting, of international human rights norms.

Having heard the appeal and considered all the evidence you have decided you agree with the main findings of Board, in particular: you ACCEPT that she and her family have experienced acts of violence and rape over the past 15 years and that her husband and some other members of her family have been killed. However, you REJECT her claim to be a minority clan member and her claim not to have any surviving family members in Mogadishu who she would be able to turn to for support. Given these findings, you have to assess whether they qualify the claimant as a refugee or as a person eligible for subsidiary protection.

In the course of deciding her appeal you are asked:

1. to reach a conclusion on all of the three points raised in her grounds of appeal (including the protection point);
2. Do you consider that F qualifies for asylum/refugee protection?
3. If she does not, can she qualify for subsidiary protection under Article 15 QD?
4. If she does qualify under QD Article 15, should that be under 15 a, b or c?
5. to decide, irrespective of your decision on 1, 2 and 3, the question of whether you need to make any specific findings on her claim that the decision to remove her to Somalia breaches her rights under Article 3 of the ECHR.

Suggested issues to discuss:
Discuss all the cases – but please note that you may not have time to discuss all the below listed issues regarding every case

- What convention ground may be applicable (of the five listed in1951 Convention article 1 (A) 2 ?
- Refugee status (Convention of 1951) or Subsidiary protection (Qualification Directive)
- Who are the agents of persecution? Is there more than one?
- Intensity – level of persecution or harm
- Noting that refugee status determination is looking to possible persecution or harm when the asylum seeker may return – what relevance is there of past persecution? Note QD Article 4.4 in this respect.
- Can protection be awarded by the state? Is it effective protection?
- If you find there is a need for protection, is there a relevant and reasonable internal flight alternative?

Additional issues are:

Handling issues: Need to know more? Need for Asylum seeker to provide more information? Call for an oral hearing? (in countries where there procedure is primarily based on written submissions, as in for example Sweden). Need for more Country of Origin Information (COI)? Need for other investigation?

HENGAMEH'S STORY

Hengameh is a 44 year old woman from Iran. She was born in the 1960s to an educated Teheran family as their only child. Although her family was a supporter of the shah' regime they were not really active politically. She was a teenager when the 1979 Islamic revolution swept the shah from the country and markedly altered the legal and social status of women in previously quite western-style and secular Iran. Hengameh always found the overly strict unfamiliar Islamic dress code (such as wearing a chador or the ban on makeup) totally alien to her humiliating and depressing.

At the age of 20 she made a love marriage with Reza, who had also been raised in an educated and Western-minded family. Supported by her parents and husband, Hengameh finished law school with honours after spending an academic year at the law faculty of the University of Lyon on a French public scholarship. She planned to become a lawyer after graduation and although she obtained all the necessary qualifications, being a woman and coming from a royalist family her chances were rather slim. So she started working as a legal assistant in the office of a prestigious Teheran lawyer who highly esteemed the talented and hardworking young woman speaking English and French fluently.

In 1997 the reformist Khatami was elected as president and the strict social limitations concerning Iranian women were somewhat eased. By 1999 Hengameh managed to obtain admission to the bar and with the help of her former employer opened her own law office where she primarily handled family law cases. She had several divorce cases (the number of divorces is extremely high in Iranian cities) and, from time to time, she also gave legal advice to abused and battered women with more or less success. While Hengameh seemed to establish herself professionally, her personal life was unfortunately less successful during those years. She gradually estranged from Reza and the couple divorced in a few years (and not long afterwards Reza moved to Australia) while her parents died of disease within a year of each other.

Hengameh sought refuge in work. Although she was committed to women's equality and human rights, she always distanced herself from active political involvement and from openly criticising the regime. In 2005 the ultraconservative President Ahmadinejad came to power and the "reform era" was over: observation of strict dress code and rules of conduct for women were enforced again and the oppression of women and dissident thinkers increased. In 2006 Hengameh decided to support the One Million Signatures Campaign, which aimed to obtain one million signatures for demanding changes to laws discriminating against women (in many respects the Iranian rule of law based on the Islamic law, or Sharia, is extremely discriminatory against women and even considers them inferior). The campaign gained worldwide publicity and received several human rights awards. The state, however, did not delay with its response: the leaders and major activists of the campaign were arrested and some of them are still kept in prison. Hengameh (as she was not among the emblematic figures of the movement) was not detained but she was disbarred without justification and her law office was closed down. When she lodged a complaint and demanded official explanation she was told that she "should be glad to get away with it so easily".

From that time on Hengameh could not find employment as a legal professional, not even as a legal assistant. She received no alimony from her ex-husband and the modest inheritance left by her parents did not last long. She was even denied (without justification) the ridiculously small unemployment benefit. She made some money from teaching French occasionally and a

sympathetic cousin supported her from time to time. The once talented and agile women closed herself up in her tiny flat in North Teheran, becoming overwhelmed by loneliness and depression. She could less and less tolerate wearing a headscarf and long overcoat as she considered them the symbols of oppression and felt them really suffocating. She almost developed a phobia, which made her spend even more time within the walls of her flat (where she were not forced to wear them).

On a hot summer day in 2011 she went out for shopping when two women wearing chadors halted her at the entrance of the shopping mall and told her that her headscarf was way too loose and that decent women were not supposed to wear such vivid makeup and a white coat in the street. When Hengameh told them that she could hardly tolerate the heat and that they should mind their own business the two women started to adjust her scarf and remove her makeup. At that point Hengameh lost control and started to push the women trying to free herself from their "helping" hands. As they were pushing and pulling each other, two male members of the Basij Militia (an Islamic paramilitary group) came up to them and told Hengameh to follow the "guidance of the helpers". Hengameh got more and more upset and tore off her headscarf hysterically. The two men grabbed her and dragged her to the nearby police station. There they tied Hengameh, who was still crying and hysterical, to a chair and slapped her in the face to "cool her down". The first question of the interrogating officer to her was: "Where is your husband?" When Hengameh answered that she was divorced, her father had died and she had no brothers the officer told her that she would be held in the station until she "came to her senses". She was locked up in a small damp cell for the night and the next morning the officer interrogated her once more and told her that if she was stopped again wearing such "untidy and provocative clothes" she would be prosecuted for prostitution and that she "as a woman with legal education should be well aware of what it means". Finally, around noon, she was released and wearing a black chador given to her by the police she was seen home by a policeman.

By the time Hengameh arrived home she was totally worn out. She had a suffocation attack and felt that she was unable to live any longer under such circumstances. She even considered suicide but finally, urged by her cousin, she decided to leave Iran (her cousin's family provided the necessary money).

Finally, Hengameh applied for refugee status in a European country. At her hearings the way she told the above story was so convincing that no doubts were raised concerning her credibility. According to the psychiatric opinion Hengameh suffers from severe depression and panic disorder, the latter causing the stress-induced suffocation attacks. Behind these symptoms –the psychiatrist says – there are the unacceptable nature of her life situation in Iran and the series of failures and painful experiences of past years.

Do you think Hengameh is entitled to some form of international protection?

What major pro and con arguments do you think are to be considered?

How is all that influenced by the fact that Hengameh is a woman?

Legal case

The plaintiff comes from Anonymous Country, declares to be Islamic by religion and, according to his/her own account, he intends to convert to the Christian faith.

Anonymous Country is governed alternately by the Black People's Party and the White People's Party. For the last 8 years the rule of the Black People's Party has been uninterrupted.

According to country information, black people will not let the whites have a say in state or economic affairs and, as a result, the great dissatisfaction of the whites sometimes escalates into demonstrations.

According to the plaintiff he/she graduated from an Anonymous Country university run by white people but since his/her degree is considered a "white degree" in his/her country of origin where the blacks are ruling, he/she cannot have a career.

The plaintiff claims that he/she left his/her country of origin on account of being persecuted by the state authorities of Anonymous Country for the following two reasons:

- first, he/she participated in demonstrations held against the black leaders of the country,

- second, he/she wanted to convert to the Christian faith, which the black leaders of the fundamentally Islamic country did not approve of.

He/she claims that if he/she returns to his/her country of origin he/she will be imprisoned for a long period for reasons above.

During the procedure of his/her application for international protection he/she made fundamentally different declarations in front of the Authority with regard to the issues of attending demonstrations and whether or not it was possible to practice Christianity in Anonymous Country.

Hence the asylum authority found that the plaintiff lacked credibility and consequently rejected in its decision his/her application for international protection either as a refugee or as a protected person.

The Authority, however, established the applicability of non-refoulement with regard to Anonymous Country for the following reasons:

According to the findings of the decision, the security situation concerning the entire Anonymous Country is not bad enough to prompt international protection but the situation is unpredictable.

According to the justification of the Decision, although country information supports that there are instances when the fight between blacks and whites escalates into armed clashes, these are typically limited to certain parts of the country and do not last long. According to the justification as of the date of the decision by the asylum authority, there had been news reports of a few hundred fatalities and the victims were mostly participants of rallies.

According to the justification it is not possible to tell from the country information on Anonymous Country whether or not a person participating in anti-black rallies is subject to persecution and no

country information is available to determine whether or not a person intending to convert to Christianity is subject to, and if so what kind of, retaliation.

The plaintiff filed a claim against the decision of the asylum authority and motioned

- first, for the recognition of his/her refugee status; and

- second, for the recognition of his/her protected person status.

According to the plaintiff's position, as the asylum authority had established the applicability of non-refoulement with regard to Anonymous Country the correct decision would have been to grant the plaintiff subsidiary protection status.

The **defendant in its counter-claim on the merits of the case** requested the dismissal of the plaintiff's claim. According to the defendant's position, the plaintiff cannot be granted a refugee status due to the plaintiff's lack of credibility among other things.

According to the respondent's position, protection status cannot be granted either, as realistically – based on the country information – it is not likely that the plaintiff will be subject to indiscriminate violence in his/her living environment.

The defendant referred to the decision made by the European Court of Justice in the Elgafaji case where the Court ruled that for considering the existence of indiscriminate violence, the rate of such violence must reach such a high level that if an individual was returned to the relevant country, or in this case, to the relevant region, he/she would face a real risk of being subject to a serious and individual threat as mentioned in Article 15(c) of the Council Directive 2004/83/EC solely by residing in the given area.

What will be the court's decision concerning the claim?

Attachment: Range of potential applicable regulations

2 Ivory Coast nationals, Mr Thibaot Lopko and Mr Ousmane Touré filed a case against the Republic of Hungary with the Court of Human Rights on 18 February 2010, alleging that their detention between 9 April and 10 September 2009 had been unlawful and it was not remedied by judicial review.

The application was based on Article 5 (1) and (4) and 13 of the European Convention on Human Rights.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1990 and in 1984, respectively. At the time of case-filing they lived in Budapest and in Nyírbátor, respectively.

6. The applicants entered Hungary illegally thus they were captured and detained by the police on 10 March, 2009. On the next day their expulsion was ordered but suspended due to practical obstacles. Their detention was ordered until 20 March under immigration law in order to ensure their eventual expulsion. The applicants, however, applied for asylum on 18 March claiming that they were subject to persecution in their country of origin for being homosexual.

7. The asylum procedure started on 25 March, and on 9 April the applicants were interviewed by the asylum authority, an agency under the supervision of the Office of Immigration and Nationality. On the same day, the case was referred to proceeding on the merits of the case. Under section 55(3) of the Asylum Act (see Chapter II below), once a case reaches this phase, the alien policing authority (another agency of the Office of Immigration and Nationality) shall, upon request by the asylum authority, terminate the detention of the asylum seeker. Nevertheless, the detention of the applicants continued. Following another interview on 28 May, the Office of Immigration and Nationality dismissed the application of the asylum seekers on 19 June. The applicant's petition for judicial review was also unsuccessful.

8. Relying on section 55(3), the applicants' lawyer then requested their release. However, since the asylum authority had not initiated their release, the request was denied by the alien policing authority. On 20July 2009 the applicants' lawyer requested the judicial review of their detention. This motion was rejected by the Nyírbátor City Court in its decision dated 19 August 2009 with the formal reasoning that since the refugee authority had not initiated the applicant's release, the alien policing authority had no obligation to order their release and therefore their detention was lawful.

9. The applicants were released on 10 September 2009, after the maximum period of detention applicable to such cases had expired.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

1 Act No. CXL of 2004 on the General Rules of Administrative Proceedings and Services (Administrative Procedure Act)

Section 13

"(2) This Act applies to ... (c) proceedings related to the entry and stay of persons entitled to the right of free movement and entry, and third-country nationals, and also to asylum procedures; ... if the act pertaining to the type of case in question does not provide otherwise."

Section 20

"(2) If the authority is found in default, the supervisory organ shall set a new administrative time limit consistent with the type of case in question and in consideration of the degree of preparation in the decision-making process, and shall order the authority affected to conclude the proceedings within three days…

(6) [...if] in the case in question there is no supervisory organ or the supervisory organ fails to execute its vested authority, the county or capital city court as the court of jurisdiction for administrative actions shall, at the client's request, order the authority to conclude the procedure..."